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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE

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ANNE DENISSE HIDALGO and ROSANNE F. OTT,

Plaintiff(s),

-against -

TOWN OF HIGHLANDS, THE TOWN BOARD OF THE TOWN OF HIGHLANDS, and THE TOWN OF HIGHLANDS BUILDING DEPARTMENT,

Defendant(s).

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DECISION/ORDER

Index No. 5611-2009

Motion Date: 3/05/10

LUBELL, J.

The following papers were considered in connection with this motion by Defendants for an order (1) pursuant to CPLR 3211(a)(7) dismissing the plaintiffs' complaint for failure to state a cause of action against the Defendants, (2) pursuant to CPLR 3212 granting the Defendants summary judgment, and (3) granting such other and further relief deemed just and proper:

PAPERS	**NUMBERED**
Motion/Affidavits/Affirmation/Exhibits	1
Affirmation in Opposition/Exhibits A-G	2
Reply Affirmation/Affidavits/Exhibits G-J	3

Plaintiffs, the owners of real property with the street address of 7 Hillcrest Road, Town of Highlands, County of Orange ("Lot 2"), commenced this action against Defendants Town of Highlands, the Town Board of the Town of Highlands, and The Town of Highlands Building Department (collectively, the "Town") for "damages flowing from the breach of duties assumed by Defendants in the 'special relationship' that was created between Plaintiffs and the Town" (Par. "5", Affirmation in Opposition of Mitchell Troyetsky dated February 5, 2010) in connection with the construction of a single-family home by non-party neighboring property owners, Robert Bryant and Karen Bryant, at adjoining 4 Hillcrest Road ("Lot 4"). Among other claims, Plaintiffs contend that they suffer a reduced view of the Hudson River and reduced

privacy and enjoyment of their home. Plaintiffs argue that they are neither challenging the validity of the underlying building permit nor asserting a failure of the Town to enforce a statute, regulation, or ordinance. The Court disagrees.

On or about December 28, 2007, a conditional building permit was issued to the Bryants. Upon review and examination of the building permit and on-going construction, Plaintiffs summoned the Building Inspector of the Town of Highlands who allegedly advised them

> . . . that the Building Permit was specifically written as it was, with the conditions contained therein, because of the fact that Lot #4 was a very precarious lot overlooking their Lot #2" (Complaint, par. "14").

Continuing, the complaint further alleges:

> 18. That, upon observing the ongoing construction of the dwelling on Lot [#4] in violation of the Building Permit, Plaintiffs had numerous and ongoing conversations with the Building Department building inspectors and/or code enforcement officers.
>
> 19. That in [those] conversations . . ., Plaintiffs advised the building inspectors and/or code enforcement officers of violations of the Building Permit as well as violations of the Code of the Town of Highlands . . .

Plaintiffs further allege that the building inspector then visited the site and on or about March 28, 2008 issued an Advisory Notice "that the construction was being performed without approval of the Building Department and that any further construction was at the risk of the applicant" (Complaint, par. "20"). In asserted furtherance of "conversations, information and requests from Plaintiffs", the building inspectors directed the Bryants to apply to the Planning Board of the Town of Highlands for site plan approval, as dictated by the Building Permit, and, thereupon, issued a Stop Work Order on or about April 29, 2008. Continuing, Plaintiffs assert that the Town was aware that the "failure to act and enforce the Building Permit and the applicable provisions of the Town Code could lead to harm to Plaintiffs (Complaint, par. "24") and that the Town was aware that Plaintiffs were relying upon them "to act upon and enforce the affirmative undertaking set forth in the Building Permit" (Complaint, par. "25") and Stop Work Order (Complaint, par. "26") and in compelling the Bryants to apply for site plan approval (Complaint, par. "27").

In paragraphs "34" through "35" of the complaint, Plaintiffs

assert that issues were raised during the April 17, 2008 Planning Board meeting about "dangerous boulders and an unsafe retaining wall being constructed on the borderline [of the properties]" and the proximity of same to Plaintiff's patio below. Despite this, Plaintiffs contend that the Town "took no action and failed to further address the issue until formal written complaint was filed by Plaintiffs in or about September 2008" (Complaint, par. "36"). Thereupon, the building inspector wrote to the Bryants advising them of the "unsafe and hazardous condition and requiring a report be provided by a licensed professional engineer indicating existing conditions and proposed plan to correct deficiencies" (Complaint, par. "37"). Notwithstanding this, Plaintiffs allege that the Town has "failed and refused to take further action to enforce the Town Code and/or to cause the unsafe and hazardous conditions to be remedied", and have failed to enforce the Building Permit, the plans upon which it was issued, and the applicable provisions of the Town Code (Complaint, pars. "40" through "42").

Later on and in that same vein, Plaintiffs allege that the Town "failed to enforce the Building Permit" (Complaint, par. "49") and "breached their duty to the Plaintiffs by failing to enforce the Building Permit" (Complaint, par. "50"), "by issuing a certificate of occupancy" to the Bryants (Complaint, par. "51"), by allowing the Bryants to withdraw their application with the Planning Board and avoid the requirements of the site plan (Complaint, par. "52"), "by failing to comply with applicable provisions of the Town Code" (Complaint, par. "53"), "by failing to enforce applicable provisions of the Town Code" (Complaint, par. "54"), and "by failing to supervise, inspect and control the development and construction of the [Bryant dwelling] . . . (Complaint, par. "55").

> Upon a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (see Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Dye v. Catholic Med. Ctr. of Brooklyn and Queens, 273 A.D.2d 193, 710 N.Y.S.2d 83).

(Pankin v. Cronin, 12 A.D.3d 492 [2d Dept., 2004]).

Here, upon doing so, and upon full and detailed consideration of the complaint and Plaintiff's opposition to the Town's motion, all causes of action are hereby dismissed.

"The salient distinction between discretionary or quasi-judicial acts and ministerial acts . . . is that the former 'involves the exercise of reasoned judgment which could typically

produce different acceptable results', while the latter envision 'direct adherence to a governing rule or standard with a compulsory result'" (Miller v. State, 125 A.D.2d 853, 854 [3d Dept., 1986], app denied 69 N.Y.2d 608, 507 [1987] quoting Tango v. Tulevech , 61 N.Y.2d 34, 41 [1983]).

Whether or not and to what extent a municipal code should be enforced by a municipality rests in the sound discretion of the public officials charged with its enforcement (McLean v. City of New York, 12 N.Y.3d 194, 201 [2009] citing Matter of Dyno v. Village of Johnson City , 261 A.D.2d 783, 784 [3d Dept., 1999], appeal dismissed 93 N.Y.2d 1033, [1999], lv. denied 94 N.Y.2d 818 [1999]; Manuli v. Hildenbrandt, 144 A.D.2d 789, 790 [1988]; Matter of Young v. Town of Huntington, 121 A.D.2d 641, 642 [2d Dept., 1986]; Church of Chosen v. City of Elmira, 18 A.D.3d 978, 979 [3d Dept., 2005]). "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general."

Here, regardless of how Plaintiffs characterize their pleadings, this action seeks relief based upon the manner in which discretionary acts were performed by the Town and/or the alleged failure of the Town to perform them in the first place. As such, there is no legal basis upon which to maintain this action.

Based upon the foregoing, it is hereby

ORDERED, that the motion to dismiss pursuant to CPLR §3211(a)(7) is hereby granted.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Goshen, New York
May 17, 2010

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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