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Status conf: July 29, 2010 (LJL/AAF)

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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SHERI TORAH, INC.,

Plaintiff,

-against -

VILLAGE OF SOUTH BLOOMING GROVE,

Defendant.

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DECISION/ORDER

Index No. 13428-2009

Motion Date: 5-28-10

LUBELL, J.

The following papers were considered in connection with **(I)** this motion by plaintiff for (1) an Order pursuant to CPLR §3212 granting summary judgment on plaintiff's First Cause of Action and (2) an Order pursuant to CPLR §603 severing defendant's counterclaim, and for such other, further and different relief as the Court deems just and proper, and **(II)** the cross-motion by defendant for an Order (1) dismissing the complaint for failure to comply with the provisions of GML §50-e and 50-i, (2) granting summary judgment to the defendant on the First Counterclaim to determine whether a purported judicial subdivision of the land herein located in Orange County by a Kings County Supreme Court Order based upon a Rabbinical Arbitration is valid, and (3) for an Order granting summary judgment to the defendant to declare that the Taxpayers protection Act enacted by the defendant is valid and otherwise enforceable in some or all of its provisions, together with such other and further relief as this Court may deem just and equitable:

PAPERS	**NUMBERED**
Motion/Affidavit/Exhibits A-G	1
Memorandum of Law (Plaintiff)	2
Cross-Motion/Affirmation/Exhibits A-L	3
Memorandum of Law (Defendant)	4
Memorandum of Law (Plaintiff)	5
Reply Memorandum of Law (Plaintiff)	6

Plaintiff Sheri Torah, Inc. ("Sheri Torah"), a religious corporation formed under the laws of the State of New York, brings this action for declaratory relief and for the return of certain counsel fees assessed against Sheri Torah and paid to the Village of South Blooming Grove (the "Village") pursuant to the Taxpayers Protection Act (Chapter 240 of the Village Code of the Village of South Blooming Grove; hereafter, the "Taxpayers Protection Act" or "Chapter 240")) in connection with its joint application to the Village Board of Trustees of the Village of South Blooming Grove (the "Village Board") and the Planning Board of the Village of South Blooming Grove (the "Planning Board") for a special permit to construct and maintain a religious school for boys adhering to the Hasidic Jewish faith on lands assertedly owned by Blue Rose Estates LLC.

More specifically and to the extent properly and fully submitted to the Court for determination, Sheri Torah challenges that aspect of section 240-3 of the Taxpayers Protection Act upon which the Village relies in assessing against Sheri Torah "any and all costs and expenses incurred by the Village" in connection with its special permit application as were or will be billed by special legal counsel to the Village.

At the outset, the Court rejects the procedural objections raised by the Village.

Upon doing so, the Court concludes that Sheri Torah has standing to maintain this action. It is challenging the very act upon which the Village relies in imposing the costs of counsel fees upon Sheri Torah.

The Court also rejects the Village's argument that the complaint must be dismissed for want of service of a notice of claim pursuant to sections 50-e and 50-i of the General Municipal Law. The money sought to be recovered by plaintiff is incidental to the equitable declaratory relief sought with respect to the validity of the local ordinance upon which the Village relied in assessing legal fees (see, Greaney v. Springer, 266 A.D.2d 707 [3d Dept., 1999][notice of claim not required in action against municipality where money damages are demanded incidental to the equitable relief sought, here to set aside a tax sale]; Kendall v. Evans, 100 A.D.2d 508 [2d Dept., 1984][ancillary relief in the form of a money judgment may be granted in declaratory judgment actions]).

Finally, there is no merit to the Village's exhaustion of remedy defense. Sheri Torah need not first seek administrative review of the propriety or legality of any of the counsel fees

assessed against it.

Without regard to the accuracy of special counsel's billing records and whether or not the hourly rate charged by special counsel to applicants under Chapter 240 exceeds those charged by special counsel directly to the Village for similar services (see, Home Builders Ass'n of Cent. New York, Inc. v. Town of Onondaga , 267 A.D.2d 973 [4th Dept., 1999][resolution providing for higher hourly rates for legal fees reimbursed than for legal fees incurred in connection with other Town matters is not a deprivation of equal protection of the law]), the Court finds that Sheri Torah has come forward in the first instance establishing "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; see Wolff v New York City Tr. Auth., 21 AD3d 956 [2005]) as to the illegality of Chapter 240 to the extent herein challenged, and, in response, the Village has failed to show that there are any material questions of fact regarding same.

Such an open-ended and potentially unlimited assessment (Kencar Associates, LLC v. Town of Kent, 27 A.D.3d 423 [2d Dept., 2006] citing Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 163 [1976] reargument denied 40 N.Y.2d 836) cannot withstand judicial scrutiny.

> For when the State's jealously guarded police power is delegated to a local government or to its agencies, it must be accompanied by standards which guide and contain its use . . . As a consequence, when the power to enact fees is to be implied, the limitation that the fees charged must be reasonably necessary to the accomplishment of the statutory command must also be implied . . . [citations omitted].

(Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d at p 163).

Nor is Chapter 240 insulated from attack merely because an applicant, like Sheri Torah, is pursing a "benefit", as opposed to a "right" to which "special significance" attaches (id). The legal fees herein challenged "do not represent necessary expenditures but rather conveniences to the board[s] for fulfillment of what in the end [is] its own decision-making responsibility" which cannot be passed along to an applicant such as Sheri Torah (id. at 165; see also Wright v. Town of LaGrange, 181 Misc.2d 625 [Dutchess Cty Sup, 1999]).

The Court is not persuaded that a different result is warranted under Coates v. Planning Bd. of Inc. Village of Bayville, 58 N.Y.2d 800 [1983][petitioner's failure to have offered any evidence establishing that a required $500 legal fee was either unnecessary or disproportionate to the village's projected costs does not constitute arbitrary or capricious conduct on the part of the planning board for imposing said fee]) or under any other authority cited by the Village. The Court's determination in Coats, supra, is readily distinguishable from the situation where, as here, there is an open ended and potentially unlimited obligation on the part of an applicant to pay counsel fees.

Having granted plaintiff summary judgment on its First Cause of Action, the only cause of action in its complaint, plaintiff's motion pursuant to CPLR §603 for an Order severing defendant's counterclaim and that aspect of defendant's cross-motion seeking summary judgment declaring the Taxpayers Protection Act valid and otherwise enforceable have been rendered moot to the extent properly and fully litigated herein.

Accordingly, the Court will proceed to address the remaining aspect of defendant's cross-motion.

Even though not opposed on the merits, the Court denies the Village's motion for summary judgment on its counterclaim "to determine whether a purported judicial subdivision of the land herein located in Orange County by a Kings County Supreme Court Order based upon a Rabbinical Arbitration is valid."

The Village has not come forward with sufficient evidence in the first instance to establish entitlement to judgment on this issue, one way or the other. In fact, given the dearth of factual background, documentary evidence and legal argument submitted to the Court on this issue coupled with the unusual manner in which the requested declaratory relief is couched, i.e., as a query rather than an affirmative statement on the issue one way or the other, the Court is without any guidance as to how summary judgment on this issue should be decided, even if unopposed.

The Court notes in passing that, whether or not any conflicting or unresolved issues before the two Boards warrant further submissions to the Boards and/or further public hearings on said issues, followed by an affirmative administrative determinations on those issues, one way or the other, is something that should be explored by the parties.

Based upon the foregoing, and there being no merit to any of

the other contentions or arguments herein raised, it is hereby

ORDERED, that plaintiff's motion for a severance is denied; and, it is further

ORDERED, that defendant's motion for an order dismissing the complaint is denied; and, it is further

ORDERED, ADJUDGED, and DECLARED that the portion of the Taxpayers Protection Act (Chapter 240 of the Village Code of the Village of South Blooming Grove) which permits the Village to pass along to the various applicants therein described costs incurred by the Village for counsel fees incurred by the Village in connection with underlying applications is hereby annulled; and, it is further

ORDERED, that any such counsel fees assessed in this case against the escrow funded by Sheri Torah shall be credited back to said escrow fund; and, it is further

ORDERED, that, to any further extent, the motion and cross-motion are denied; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:00 A.M. on July 29, 2010 for a Status Conference.

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

Dated: Goshen, New York
July 1, 2010

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

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