

Matter of Roehrig v Baranello
2010 NY Slip Op 31783(U)
July 8, 2010
Supreme Court, Nassau County
Docket Number: 20868/09
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

Application of CHRISTOPHER ROEHRIG,
BARRY GOLDSMITH, RONALD BARON,
KEVIN COSTELLO, ROBERT McNAMARA,
JOSEPH MERES, WILLIAM TYNAN,

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioners,

Index No.: 20868/09
Motion Seq. Nos.: 01 - 05
Motion Dates: 10/13/09
12/21/09
02/24/10
02/24/10
03/05/10

For a Judgment pursuant to CPLR Article 78

- against -

PATRICIA A. BARANELLO, JOSEPH BORDINO,
SUSAN CLONINGER, JOHN J. FANNING,
SCOTT F. GUARDINO, LOIS SCHMITT,
JACQUELINE A WATTERS, in their joint capacity as the
ZONING BOARD of APPEALS of the TOWN OF
OYSTER BAY,

XXX

Respondents.

The following papers have been read on these motions:

	Papers Numbered
Notice of Petition, Verified Petition and Exhibit	1
Notice of Motion, Affirmation and Exhibit	2
Notice of Motion to Dismiss Amended Petition, Affirmation and Exhibits	3
Affidavit in Opposition to Motion of Respondent Zoning Board	4
Notice of Motion, Affirmation, Affidavit and Exhibits	5
Affidavit in Opposition to Motion of Respondent Olesen	6
Reply Affirmation in Support of Motion to Dismiss	7
Notice of Cross-Motion, Affidavit and Exhibits	8
Affidavit in Opposition to Motion and in Support of Cross-Motion	9
Affidavit in Opposition to Cross-Motion and in Reply and Exhibit	10
Reply Affidavit in Support of Cross-Motion and Exhibits	11

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Christopher Roehrig, Barry Goldsmith, Ronald Baron, Kevin Costello, Robert McNamara, Joseph Meres and William Tyan (hereinafter collectively referred to as the "Petitioners") commenced the within proceeding pursuant to Article 78 of the CPLR seeking a judgment annulling and vacating the decision of the Zoning Board of Appeals of the Town of Oyster Bay dated April 30, 2009 (Motion Sequence No. 01) and for an order directing compulsory or discretionary joinder, as well as for an order, pursuant to CPLR §3212, granting summary judgment on the Petition (Motion Sequence No. 05).

Patricia A. Baranello, Joseph Bordino, Susan Cloninger, John J. Fanning, Scott F. Guardino, Lois Schmitt, Jacqueline A. Watters (hereinafter collectively referred to as the "Board"), move pursuant to CPLR §7804(f), CPLR §3211(a)(5),(10) and Article 10 of the CPLR for an order dismissing the Petition and the Amended Verified Petition (Motion Sequence Nos. 02 and 03).

Respondents, Arlene Olesen and Donald Olesen, move for an order dismissing the Amended Verified Petition as asserted against them on the basis that the within proceeding was not timely commenced within the applicable statute of limitations (Motion Sequence No. 04).

Factual and Procedural Background:

On April 30, 2009, respondent Board granted certain variances to respondents Arlene and Donald Olesen to erect additions to their property located at 64 Ships Point Lane, Oyster Bay New York. *See* Verified Petition at ¶¶6,7; Exh. A. *See also* Amended Verified Petition at ¶¶6,7. On September 15, 2009, respondent Board filed its decision with the Town Clerk. *See* Verified Petition at ¶1. *See also* Amended Verified Petition at ¶1.

On October 13, 2009, Petitioners commenced the within special proceeding to annul and vacate the determination of respondent Board. By Notice of Motion dated November 27, 2007, respondent Board moved for an order dismissing the petition on the grounds that Petitioners had failed to join Arlene and Donald Olesen, as necessary parties and that the time in which to commence a proceeding against the Olesens had since expired. *See* Hill Affidavit in Support of

Motion to Dismiss at ¶¶2,5,8. Subsequently, on November 30, 2009, an Amended Petition was verified by the Petitioners wherein Arlene and Donald Olesen were named as co-respondents, in response to which, both respondent Board and respondent Olesens, each respectively interposed applications seeking dismissal thereof on the basis that the proceeding asserted against the Olesens was not timely commenced. See Hill Affirmation in Support of Motion to Dismiss Amended Petition at Exh. at ¶¶9,10,14, Exh A; Olesen Affidavit in Support of Motion to Dismiss at ¶6. See also La Marca Affirmation in Support of Motion to Dismiss at ¶¶4,7,8.

The heretofore referenced applications were followed by the motion interposed by the Petitioners wherein they sought compulsory or discretionary joinder of the Olesens pursuant to CPLR §1001(b), as well as an order granting summary judgment on the Petition.¹

The Court initially addresses the issue raised by respondent Board that the Olesens are necessary parties without whom the original Petition dated October 13, 2009 must be dismissed.

“A party whose interest may be adversely affected by a potential judgment must be made a party in a CPLR Article 78 proceeding.” See *Cybul v. Village of Scarsdale*, 17 A.D.3d 462, 792 N.Y.S.2d 349 (2d Dept. 2005); *Lodge v. D’Aliso*, 2 A.D.3d 525, 767 N.Y.S.2d 909 (2d Dept. 2003); *Matter of Martin v. Ronan*, 47 N.Y.2d 486, 419 N.Y.S.2d 42 (1979). In the instant matter, inasmuch as Arlene and Donald Olesen are the individuals to whom the challenged variance was granted and, as a result, may be adversely effected by any judgment rendered relative thereto, they are quite clearly necessary parties to the within proceeding and should have been named in the original petition filed dated October 13, 2009. See *id.*

CPLR §1001(b) and the provisions therein embodied address the circumstances under which the failure to join a necessary party may be excused. The statute provides that “[w]hen a person who should be joined * * * has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed

¹ The Court notes that the time in which a party may interpose a motion for summary judgment is after issue has been joined via the service of a responsive pleading. See *Shaibani v. Soraya*, 71 A.D.3d 1121, 898 N.Y.S.2d 72 (2d Dept. 2010); *Chakir v. Dime Savings Bank of New York, FSB*, 234 A.D.2d 577, 651 N.Y.S.2d 622 (2d Dept. 1996); *Charter One Bank, FSB v. Houston*, 300 A.D.2d 429, 751 N.Y.S.2d 573 (2d Dept. 2002). However, the Respondents herein have not served an answer and rather have elected to move for dismissal of the within Petition. Thus, Petitioners’ application for summary judgment is inappropriate. See *id.*

without his being made a party. In determining whether to allow the action to proceed, the court shall consider: [1] whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; [2] the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; [3] whether and by whom prejudice might have been avoided or may in the future be avoided; [4] the feasibility of a protective provision by order of the court or in the judgment; [5] whether an effective judgment may be rendered in the absence of the person who is not joined.” See CPLR§1001(b).

In interpreting the statute and determining when a court is required to consider said factors, the Court of Appeals has held that “when a necessary party ‘is subject to the jurisdiction of the court’ * * * the statute directs that the court ‘order him summoned’” and “does not provide for consideration of the discretionary factors.” See *Windy Ridge Farm v. Assessor of the Town of Shandaken*, 11 N.Y.3d 725, 864 N.Y.S.2d 794 (2008). The Court noted that, in circumstances when the court indeed possessed jurisdiction over the necessary parties, it “would be required to join the necessary parties” and thereafter allow the action or proceeding to go forth. See *id.*

In the matter *sub judice*, both sides concede that respondents Arlene and Donald Olesen are subject to the jurisdiction of this Court. See Hill Affirmation in Support of Motion to Dismiss Amended Petition at ¶13; D’Errico Affidavit in Opposition to Motion and in Support of Cross Motion at ¶¶15,17. Thus, in accordance with the holding in *Windy Ridge Farm v. Assessor of the Town of Shandaken*, this Court is not required to consider the factors as enumerated in the statute and, in the absence of a valid defense, would be required to join the Olesens. See *id.* at 727; CPLR §1001(b). However, as noted above, after the service of the Amended Petition naming Arlene and Donald Olesen, respondents Olesens interposed a motion to dismiss said petition on the basis that same was not timely commenced. Accordingly, the Court now must determine the timeliness of the Amended Petition.

Town Law §267-c (1) provides the following, in relevant part: “Any person or persons, jointly or severally aggrieved by any decision of the Board of Appeals * * * may apply to the Supreme Court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision of the Board in the office of the town clerk.” In the instant matter, it is undisputed by the parties herein that the Board’s decision was filed with the town clerk on September 15, 2009. Thus, any

proceeding challenging the substance thereof would have to have been commenced no later than October 15, 2009. Here, while the *original* petition in which the Olesens were not named was timely commenced on October 13, 2009, the Amended Verified Petition in which the Olesens were actually named, was not filed until November 30, 2009 and was not served until December 1, 2009. Clearly this is beyond the thirty (30) days following the filing of the challenged decision.

Based upon the forgoing, it is

ORDERED, that the applications interposed by respondent Board and respondents Olesens for an order dismissing the Amended Verified Petition are hereby GRANTED (Motion Sequence Nos. 03 and 04); and it is further,

ORDERED, that in consideration of this Court's dismissal of the Amended Verified Petition, thereby effectively removing the Olesens from the within proceedings, respondent Board's application for an order dismissing the original Petition for failure to join necessary parties is hereby GRANTED (Motion Sequence No. 02) and the Petition (Motion Sequence Nos. 01) is dismissed; and it is further,

ORDERED, that Petitioners' application seeking compulsory joinder and an order granting summary judgment on the Petition is hereby DENIED as moot (Motion Sequence No. 05).

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

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Dated: Mineola, New York
July 8, 2010

ENTERED
JUL 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE