

**De Lisi v Incorporated Vil. of Huntington Bay  
Planning Bd.**

2010 NY Slip Op 32065(U)

July 29, 2010

Sup Ct, Suffolk County

Docket Number: 09-40286

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

**PRESENT:**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 12/11/09  
ADJ. DATE 7/7/10  
Mot. Seq. # 001 - MD; CASEDISP  
# 002 - XMG

-----X  
SUZANNE DE LISI and LOUIS PARR, :  
 :  
 :  
 Petitioners, :  
 :  
 - against - :  
 :  
 INCORPORATED VILLAGE OF HUNTINGTON :  
 BAY PLANNING BOARD, MAYOR HERB :  
 MORROW, DEPUTY MAYOR DENNIS GAI, :  
 TRUSTEES JOHN McCUSKER, JAY MEYER, :  
 DONALD T. RAVE, JR., VILLAGE ENGINEER :  
 JEFFREY VOLLMUTH, VILLAGE :  
 ATTORNEYS RICHARD CAHN, JAMES :  
 GESUALDI AND MARA MANIN, :  
 :  
 Respondents. :  
-----X

SUZANNE DE LISI  
Petitioner *pro se*  
50 Bay Crest  
Huntington Bay, New York 11743  
  
LOUIS PAAR  
Petitioner *pro se*  
42 Bay Crest  
Huntington Bay, New York 11743  
  
FARRELL FRITZ, P.C.  
Attorneys for Respondents  
1320 RXR Plaza  
Uniondale, New York 11556

Upon the following papers numbered 1 to 31 read on this motion for preliminary injunctive relief and cross motion to dismiss the petition; Order to Show Cause, Petition and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 20; Answering Affidavits and supporting papers 21 - 22; Replying Affidavits and supporting papers 23 - 24; 25 - 26; Other petitioners' application for recusal 27; respondents' opposition 28 - 29; petitioners' reply 30 - 31; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the petitioners *pro se* for an order "directing respondents to cease and desist issuing permits for demolition and construction in Bay Crest, specifically 40 Bay Crest, until they have complied w/ Environmental Law, article 8, SEQRA review & until a final resolution has been decided in Bay Crest Ass v. Paar & Delisi, Index No. 07-31111 Supreme Court Appellate Div. 2<sup>nd</sup> Dept Docket No: 2008-10866" is deemed to be a request for a preliminary injunction and is denied; and it is further

**ORDERED** that this cross motion by the respondents for an order pursuant to CPLR 3211[a][5][7][8] and [10] dismissing the petition, dated November 4, 2009, in this CPLR article 78 proceeding on the basis that [1] the petitioners' claims are time-barred by the applicable

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statute of limitations; [2] the petition fails to state a cause of action; [3] the Court does not have personal jurisdiction over the respondents; and [4] the petitioners failed to join several necessary parties to this proceeding and the Court should not proceed in the absence of such necessary parties, is granted.

By their petition, dated November 4, 2009, the petitioners *pro se* seek a judgment annulling and reversing certain permits, site plan approvals and SEQRA determinations made by the respondents with respect to various parcels of real property located within the Bay Crest section of the Village of Huntington Bay, New York. The petitioners also seek a judgment mandating that the Village of Huntington Bay impose a moratorium on demolition and building within the Bay Crest section during which time the Village should enact an Historic Preservation ordinance. The petitioners further seek a judgment “[d]irecting Respondents to cease and desist from any direct or indirect actions which run counter to federal and state statutes and acts and until there is a final resolution to the action now in Supreme Court Appellate Division, Second Department, Docket No: 2008-10866; the administrative petition to be acted upon by the NYSDEC; and a resolution of the actual boundaries of the Bay Crest Historic District by the NYSOPRHP.” In addition, the petitioners seek a judgment “[h]olding all Respondents individually and collectively liable for any damage to the Bay Crest community pending the final determination of the abovementioned Supreme Court action and, in the instant case, the Applicant’s carriage house and property status as a potential historic structure in the Bay Crest Historic Distric [sic] and in Freshwater Wetlands, including liability for the cost to replace and restore any damaged portions of the community.” The petitioners request “...preliminary injunctive relief to enjoin the Respondents and Applicants from any further action pending the Respondent Village’s enforcement of Village Code, particularly regarding the Association, and to revoke any relevant permits issued by the Village.” Finally, the petitioners seek a judgment awarding them “...compensatory damages of not less than \$1 million dollars each together with punitive damages in the amount of \$10,000,000 (to be used to support the incorporation of the Bay Crest Historical Society and its preservation activities) against all Respondents, together with cases and *pro se* costs and attorney’s fees.”

Initially, the Court must address an application made by the petitioners *pro se* to have this Court recuse itself based on the petitioners’ claims of prejudice, bias and conflict of interest. The petitioners, Louis Paar and Suzanne De Lisi, contend that this Court, in presiding over an action<sup>1</sup> commenced by the Bay Crest Association, Inc. [the Association] to collect unpaid annual assessments from them, granted summary judgment to the Association and in the process demonstrated a clear disregard for the applicable law and the evidence and unfairly ruled against Mr. Paar and Ms. De Lisi. They argue that this establishes that the Court has a bias against them. The petitioners also argue that the Court has an interest in protecting its determination in that

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<sup>1</sup> The action entitled, *Bay Crest Association, Inc. v Paar* was filed under Suffolk County Index No. 07-31111.

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case which places it in conflict with its obligation to render an impartial determination in the instant case. They further argue that they will be prejudiced if the Court does not recuse itself.

Judiciary Law § 14 prohibits a judge from presiding over a case “to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.” Where, as here, no basis for disqualification pursuant to Judiciary Law §14 is presented, the question of recusal is committed to the discretion and personal conscience of the court (*Matter of O’Donnell v Goldenberg*, 68 AD3d 1000, 890 NYS2d 331 [2009]; *Matter of Imre v Johnson*, 54 AD3d 427, 863 NYS2d 473 [2008]; see also, *People v Moreno*, 70 NY2d 403, 521 NYS2d 663 [1987]; *Kupersmith v Winged Foot Golf Club, Inc.*, 38 AD3d 847, 832 NYS2d 675 [2007]; *Ficalora v Town Bd. Gov’t*, 276 AD2d 666, 714 NYS2d 353 [2000]). To justify recusal under these circumstances, the petitioners must demonstrate actual bias against them, rather than a mere speculative possibility of bias (see, *Kelley v Zavalidroga*, 55 AD3d 1391, 864 NYS2d 819 [2008] quoting *Rumsey v Niebel*, 286 AD2d 564, 565, 730 NYS2d 591 [2001]). Moreover, a judge has an obligation not to recuse himself or herself, even if sued in connection with his or her duties, unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance (*Robert Marini Builder Inc. v Rao*, 263 AD2d 846, 694 NYS2d 208 [1999]). Thus, a party’s mere “dissatisfaction” with the prior rulings of the court, absent more, is insufficient to meet that burden (see, *Ficalora v Town Bd. Gov’t*, *supra*).

Parenthetically, the Court notes that since the making of the application for recusal, its decision in *Bay Crest Association, Inc. v Paar* has been affirmed by the Appellate Division, Second Department, (72 AD3d 713, 898 NYS2d 857 [2010]), thereby lending credence to the Court’s belief that it applied the correct standard of law to the facts in that matter. In any event, the Court is satisfied that it harbors no ill will or bias to either of the petitioners and is able to preside over the instant Article 78 proceeding with complete impartiality. Under these circumstances, the Court should not recuse itself and, in good conscience, declines to do so.

With regard to the respondents’ cross motion for a dismissal of the petition pursuant to CPLR 3211[a][5][7][8] and [10], the Court first considers whether the necessary personal jurisdiction has been obtained with respect to the respondents herein. The instant proceeding was commenced on October 14, 2009, by the filing of the original Notice of Petition and Petition, dated October 14, 2009, naming the Incorporated Village of Huntington Bay Planning Board as the sole respondent. On November 2, 2009, the petitioners filed an amended Notice of Petition, dated November 4, 2009, adding additional respondents, Mayor Herb Morrow, Deputy Mayor Dennis Gai, Trustees John McCusker, Jay Meyer, Donald T. Rave, Jr., Village Engineer Jeffrey P. Vollmuth and Village Attorneys Richard Cahn, James Gesualdi and Mara Manin. On November 6, 2009, the petitioners served a second amended Notice of Petition and Petition containing additional allegations against the previously-named respondents.

The incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, the petitioners have the burden of proving satisfaction of statutory and due process prerequisites (*Matter of CACV of Colo., LLC v Nowak*, 67 AD3d 1423, 887 NYS2d 897 [2009] citing *Matter of Country Side Sand & Gravel, Inc. v Town of Pomfret Zoning Bd. of Appeals & Town of Pomfret*, 57 AD3d 1501, 870 NYS2d 654 [2008]). The notice of petition in a special proceeding must comply with strict statutory mandates for obtaining personal jurisdiction when served (*National Gypsum Co. v Assessor of Tonawanda*, 4 NY3d 680, 797 NYS2d 809 [2005]). Pursuant to CPLR 403[c] a notice of petition must be served in the same manner as a summons.

Pursuant to CPLR 311[a][6] personal service upon a village may be made by delivering the summons to the mayor, the clerk or any trustee. CPLR 312 provides that personal service upon a board or commission having a chairman or other presiding officer, secretary or clerk, by whatever official title he is called, may be made by delivering the summons to him. Personal service upon a board or commission of a town or village may also be made by delivering the summons to the clerk of the town or village. Petitioners do not provide an affidavit of service of the original petition upon the sole respondent at that time, the Village Planning Board; nor do the petitioners provide an affidavit of service of the amended petitions, dated November 4, 2009<sup>2</sup> filed by them with the County Clerk on November 2, 2009 and November 6, 2009, respectively. Petitioners do state in their papers opposing the motion to dismiss that “[t]he Petition was filed pursuant to CPLR § 304 [a][c] and all parties were served pursuant to CPLR RULE 2103[a][b][6] and an affidavit verifying that all parties, including the Attorney serving the Village, was properly served is filed with the Suffolk County Clerk.” The Court could not locate such an affidavit in the County Clerk’s file, and the Court assumes that the petitioners’ reference to the petition served is that of the one filed on November 6, 2009 since petitioner Suzanne DeLisi, on behalf of both petitioners, by letter, dated November 6, 2009, requested that the Court “ignore the first two briefs [sic] filed on October 14, 2009 and November 2, 2009.” She further stated that “[t]he brief filed at the County Clerk on November 6, 2009 is the brief served upon the Respondents pursuant to CPLR 403[b].” Counsel for the respondents confirms that the petition was served upon him by “overnight mail.”

The Court thus concludes that after its filing, the petitioners failed to serve the original petition upon the respondent Village of Huntington Bay Planning Board in the manner required by CPLR 312. The two amended petitions filed by the petitioners, without leave, are nullities. An amended petition adding parties to an Article 78 proceeding is a nullity where the petitioners failed to join those parties with leave of court as required by the rule governing the addition of parties in special proceedings (CPLR 401; *Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 831 NYS2d 540 [2007]; see also, *Matter of Bd. of Educ. of Florida UFSD v DePace*, 301 AD2d 521, 753 NYS2d 381 [2003]; *Aries Striping, Inc. v Hurley*, 202 AD2d 578,

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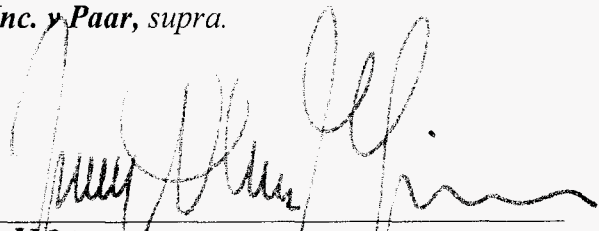
<sup>2</sup> Although both amended petitions are dated November 4, 2009, their content differs.

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610 NYS2d 821 [1994]). In any event, personal jurisdiction may not be attained by the service of process by the means set forth in CPLR 2103[a][b][6] as that section applies only to the service of papers in a pending action or proceeding. The petitioners contend that the Court, in signing the order to show cause, dated November 16, 2009 (Gazillo, J.) bringing on their motion for preliminary injunctive relief also "provided the petitioners the opportunity to re-submit and serve the petition upon the respondents and the Village Clerk with a return date of November 20, 2009," and thus, effectively granted them leave to amend the petition and extended the petitioners' time to serve the petition. The petitioners' contention is not borne out by the record before the Court as the order to show cause issued by the Court on November 16, 2009 contains no provision for such relief.

In view of the foregoing, the Court concludes that the petitioners have not met their burden of proving compliance with the mandates of the applicable service statutes, and thus, personal jurisdiction has not been acquired over any of the respondents. The proceeding must therefore be dismissed. The preliminary injunctive relief requested by the petitioners has been rendered academic by the dismissal of the within petition and the Appellate Division, Second Department's decision in *Bay Crest Association, Inc. v Paar, supra*.

Dated: JUL 29 2010

  
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HON. JEFFREY ARLEN SPINNER  
J.S.C.  
NON-FINAL DISPOSITION

X  FINAL DISPOSITION