

Eugene Racanelli, Inc. v Incorporated Vil. of Babylon
2010 NY Slip Op 32210(U)
August 8, 2010
Supreme Court, Suffolk County
Docket Number: 07-14164
Judge: Denise F. Molia
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 1-11-10
ADJ. DATE 3-26-10
Mot. Seq. # 002 - MG
003 - XMD

-----X		
EUGENE RACANELLI, INC., EUGENE	:	BARRY V. PITTMAN, ESQ.
RACANELLI and 62 E. MAIN REALTY, LLC,	:	Attorney for Plaintiffs
	:	26 Saxon Avenue, P.O. Box 5647
	:	Bay Shore, New York 11706-0455
Plaintiffs,	:	
- against -	:	
	:	MIRANDA SAMBURSKY SLONE
INCORPORATED VILLAGE OF BABYLON,	:	SKLARIN VERVENIOTIS, LLP
STEPHEN FELLMAN, ZONING BOARD OF	:	Attorneys for Defendants
APPEALS FOR THE INCORPORATED	:	The Esposito Building
VILLAGE OF BABYLON, PLANNING BOARD	:	240 Mineola Boulevard
FOR THE INCORPORATED VILLAGE OF	:	Mineola, New York 11501
BABYLON, TRUSTEES OF THE	:	
INCORPORATED VILLAGE OF BABYLON and	:	
RALPH SCORDINO,	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 57 read on this motion for summary judgment and this motion to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 44; Notice of Cross Motion and supporting papers 45 - 51; Answering Affidavits and supporting papers 52 - 53; Replying Affidavits and supporting papers 54; 57; Other 55 - 56; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants, the Incorporated Village of Babylon, Stephen Fellman, the Zoning Board of Appeals for the Incorporated Village of Babylon, the Planning Board for the Incorporated Village of Babylon, the Trustees of the Incorporated Village of Babylon and Ralph Scordino, is granted; and it is further

ORDERED that the cross-motion by plaintiffs Eugene Racanelli, Inc., Eugene Racanelli and 62 E. Main Realty, LLC, is denied.

Defendants the Incorporated Village of Babylon (the “Village”), Stephen Fellman (“Fellman”), the Zoning Board of Appeals for the Incorporated Village of Babylon (“ZBA”), the Planning Board for the Incorporated Village of Babylon (“Planning Board”), the Trustees of the Incorporated Village of Babylon (“Trustees”) and Ralph Scordino (“Scordino”) (and, collectively, “defendants”), move for an order dismissing plaintiffs’ Eugene Racanelli, Inc. (“the corporation”), Eugene Racanelli and 62 E. Main Realty, Inc. (“Racanelli” and, collectively, “plaintiffs”) complaint. Defendants have supplied copies of the pleadings, deposition transcripts, a copy of a “Village of Babylon Application to the Zoning Board of Appeals,” copies of correspondence, copies of various building permits, minutes of a Zoning Board of Appeals meeting, a copy of a deed, a copy of a “Declaration of Covenants,” a copy of an easement, “renewal” building permits, and a copy of a lease agreement. Plaintiffs cross-move for leave to file a “corrected/amended” verified complaint *nunc pro tunc* pursuant to CPLR 9802, and for leave to serve an amended complaint. Plaintiffs’ submissions include an affidavit in opposition to defendants’ motion for summary judgment and in support of the cross motion, various correspondence and a copy of a proposed amended verified complaint. Defendants have submitted an affirmation in opposition to plaintiffs’ cross-motion and have supplied an excerpt from a deposition transcript and an affidavit by Patricia C. Carley (“Carley”), the Village Clerk for the Village of Babylon. Defendants and plaintiffs have, respectively, replied. Defendants have also supplied memoranda in support, respectively, of the summary judgment motion, the opposition to the cross-motion and the reply.

Plaintiffs’ complaint asserts causes of action for breach of contract for issuing a stop work order and failing to renew a building permit; unjust enrichment by the Village in acquiring an easement from plaintiffs; enjoining defendants from any further use of the easement; and for intentional and/or negligent misconduct by defendants Fellman, the Village building inspector, and Scordino, the Village Mayor, in revoking the permit. By their motion, defendants contend that plaintiffs filed to file a notice of claim and that “[s]ubsequently, the Village cannot be estopped into contractual liability simply because it agreed to give plaintiffs a building permit subject to plaintiffs’ compliance with all Village Code requirements.”

Racanelli is the president and sole officer of Racanelli, Inc. In February 2001, the corporation purchased property located at 62 East Main Street, Babylon, New York. In June 2001, the corporation submitted a variance application to the ZBA regarding proposed construction. By letter dated October 24, 2001, the variance application was approved by the ZBA. A “superseding” letter of approval was issued on December 7, 2001. On March 4, 2002, Racanelli applied for a building permit. On March 19 the permit was issued with the proviso that it expired on September 15, 2002. The permit permitted development of the site using, in part, an existing structure as a professional office building subject to certain restrictions. Upon demolition and commencement of construction, it became apparent that structural damage precluded use of the existing structure. The Village “concurred” with Racanelli’s assessment that a complete demolition was required to proceed with the project. The Planning Board determined that inasmuch as the existing building was to be demolished, existing set backs would “automatically” be cancelled “and any new site plan would have to be submitted in accordance with the Village Code which would require a new permit.” By letter dated July 25, 2003, Fellman advised Racanelli that there was no extant valid building permit and “any construction on [the] site would leave [Racanelli] open to the appropriate enforcement from the Village of Babylon.” Discussions apparently ensued concerning an extension of the permit. Ultimately, by letter dated September 24, 2003, the ZBA

agreed to the issuance of a permit subject to the grant and recording of an easement allowing access to public parking areas located adjacent to the property. The permit allowed construction of a new building. A permit was issued on January 30, 2004 and renewed on July 27, 2004 and again on January 19, 2005. By letter dated January 12, 2006, Fellman advised Racanelli that the Village was in receipt of the latter's request for a further extension of the building permit and noted that "[y]ou were granted two earlier extensions and failed to ever commence, let alone complete the work. Village Code precludes any further extensions." Fellman further advised that "we are advised that it is your intention to construct the building as an office condominium," and that the permit was "issued predicated upon certain representations of intended use which did not include or contemplate a plan for office condominiums." Fellman, in closing, advised that "pending investigation and further inquiry, the permit #10039/10484 is hereby revoked pursuant to Village Code § 365-29c." Further efforts by Racanelli to renew the permit were unavailing. This litigation ensued.

Defendants, by their motion, contend, as a threshold matter, that plaintiffs have failed to comply with the statutory requisites articulated by CPLR 9802, which mandate timely filing of a notice of claim prior to commencing a law suit against a municipal defendant. Similarly, defendants contend that the tort cause of action against the Village and the individual officials must be dismissed inasmuch as a notice of claim was not filed pursuant to New York General Municipal Law § 50-e[1]. Defendants also claim that the claims against the Trustees, the Planning Board and the ZBA must be dismissed because they are not proper defendants inasmuch as they are not distinct legal entities separate and apart from the Village. It is further asserted, as to those claims, that no factual allegations have been made against those defendants.

Beyond the alleged procedural bars, defendants argue substantive grounds for dismissal. As to the breach of contract claim, defendants assert that the Village performed all that was required of it with respect to its agreement with plaintiffs by granting the construction permits, variances and renewals. They contend plaintiff failed to commence construction until the third permit was about to expire and that it was impossible to complete the project within a scant two days of the expiration of the final permit justifying its revocation and the issuance of the stop work order. Specifically it is noted that the terms of the contract, as evidenced by a September 24, 2003 letter "set[] out the Village's obligation" but according to defendants "did not provide any guarantees that the Village would renew the building permit in perpetuity." Defendants note that Village Code § 365-27 provides for only two building permit extensions and that no revocation occurred until shortly before the expiration of the third permit. It is noted that plaintiffs did not challenge the revocation of the last permit by timely commencing a CPLR Article 78 proceeding.

It is further claimed that an estoppel claim which seeks to bar the Village from using the easement must be dismissed because such actions cannot be maintained against a municipal party. Defendants point to the "well-established" principle "that a municipality cannot be estopped from enforcing its zoning laws, whether it be with respect to a building permit or by laches" and contend that plaintiffs seek to do exactly that "by asserting that the Village was contractually obligated to continue issuing building permits." Defendants argue that plaintiffs have produced no evidence that construction work had commenced other than the work which was "performed two days before the permit was set to expire."

As to the unjust enrichment claim, defendants assert that the parties had a valid and enforceable contract concerning the property and the plaintiffs did not perform their part of the agreement.

Finally, defendants claim entitlement to governmental immunity warranting dismissal of plaintiffs' claims noting that "[m]unicipalities are shielded from suit for damages resulting from their performance of official functions that involve the exercise of discretion" citing *Haddock v City of New York*, 75 NY2d 478 [1990].

By their cross motion plaintiffs ask that permission be granted to file a "corrected notice of claim and to serve the proposed amended complaint with the additional allegation that a notice of claim has been filed in accordance with the requirements of CPLR 9802." Plaintiffs chronicle the efforts undertaken to develop the property including demolition of the existing structure. Racanelli, by his affidavit, states that upon receiving the stop work order, he telephoned the building inspector who informed him that "he had heard rumors that I was going to turn the project into condominiums" and that he was "issued a stop work order not for what I had filed to do but rather for 'what I was attempting to do.'"

By his affidavit, plaintiffs' counsel argues that "the verified Notice of Claim pursuant to Section 50 of the General Municipal Law delivered to the Village by Racanelli on December 11, 2007 should be deemed a Notice of Claim under CPLR 9802." He further contends that such relief would not prejudice Babylon "in any way . It had been made aware within ten (10) months of it issuing the stop work order that Racanelli intended to bring a law suit." That notice was purportedly a letter penned by Racanelli to the "Incorporated Village of Babylon," dated December 11, 2006, "formally notify[ing] the Village and all parties that I and all affiliated companies intend to sue the village and all parties involved, namely the Zoning Board of Appeals, Planning Board, the Building Department, Mr. Steven Fellman, AIA and May Ralph Scordino." Counsel also argues that "CPLR 9802, unlike General Municipal Law 50-e, does not include language setting forth a procedure for permission to file a late or corrected notice" and that inasmuch as "[t]his is clearly an action sounding in contract" the rationale for a timely filing of the notice does not apply. He also contends that the pro se filing by Racanelli was merely technically defective, and that the court is "empowered to extend the time to file in accordance with CPLR 2004."

As to the assertion that the Village did not breach the contract by issuing a work stop order, plaintiffs contend that although the Village law admittedly articulated a time frame within which the project was to be completed, the agreement did not. Plaintiffs also argue, as to the unjust enrichment claim, that "the conditioning of the building permit on the granting of an easement constitutes an unconstitutional taking in view of the revocation of the building permit on allegations of bad faith. In granting the easement as requested, Racanelli gained vested rights in the building permit entitling him to equitable relief." As to the claim for estoppel, plaintiffs acknowledge the general rule that such claims generally do not lie against municipalities but nonetheless applies in those instances as alleged here "where the municipality acts in bad faith resulting in an exaction or taking of a plaintiff's property rights." Plaintiffs concede that the Village and its officials are entitled to governmental immunity.

By their reply defendants contend that the failure to file a timely notice of claim mandates summary dismissal of plaintiffs' tort claims and that the concession with respect to its assertion of

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governmental immunity requires dismissal of the claims against Village officials. It is also noted that plaintiff did not dispute the argument that the ZBA, the Planning Board and the Trustees are not distinct legal entities separate and apart from the Village capable of being sued. It is further contended that the due process cause of action must be dismissed, because there is no vested property right in the permit nor have plaintiffs established that a municipality may be estopped. Finally, as to the breach of contract claim, defendants assert that Racanelli's claim that he filed a notice of claim is a "fabrication" which should not be addressed by the court. Defendants point to Carely's affidavit attesting to the fact that plaintiffs never filed a notice of claim with the Village and that the document alleged to have been filed does not bear the Village stamp indicating receipt. Further, a log maintained by the Village and submitted to the court by defendants reveals that no such document was received or filed with the Village for the period of July 26, 2006 through July 6, 2007. In addition, as noted by defendants' counsel, the alleged notice was not disclosed during the discovery period. Most compelling, according to defendants, is the contradictory testimony by Racanelli at his deposition during which he answered in the negative the question "did you file an Notice of Claim in any lawsuit?"

Plaintiff, Eugene Racanelli by his "reply affidavit" contends, among other things, that he brought the notice of claim to the Village during the Christmas season and while at the Village Clerk's Office was "ignored" by Town employees while standing at the counter. Ultimately he "slammed the Notice and several other documents down on the counter, and said 'Merry Christmas' and left. I did not wait for any response. I wasn't aware of official stamps, signatures, logs, etc. It is also corroborative that the Notice was notarized by an attorney on the same date I served it at the Village Clerk's Office."

Denial of plaintiffs' application to renew his building work permit is properly the subject of a CPLR Article 78 proceeding. Such proceeding was not timely commenced and, therefore, the instant motion must be granted on that basis alone (CPLR 217[1]). Further, plaintiffs failed to file a timely notice of claim as to the tort claims (New York General Municipal Law § 50-e[1][a]). In addition, assuming, as the parties do, the existence of a contract between defendants and plaintiffs, plaintiffs failed to file a timely notice of claim as to the breach of contract claims (CPLR 9802). Any assertion that such notice was timely filed is belied by the record. Plaintiffs' due process claims must be dismissed inasmuch as there has been no showing that a property right in the building permit inasmuch as there has been no showing that substantial work was completed on the property (*see Town of Orangetown v Magee*, 88 NY2d 41 [1996]). Further, plaintiffs have failed to establish that the Village acted in bad faith thus permitting invocation of an exception to the general rule that estoppel will not lie against a municipality and that a municipality cannot be estopped from enforcing its zoning laws (*see Galvez v Srinivasan*, 71 AD3d 1019 [2010]). Nor have plaintiffs established entitlement to unjust enrichment inasmuch as it is not disputed that a valid contract existed between the parties (*see Clark v Fitzpatrick, Inc. v Long Island Railroad*, 70 NY2d 382 [1987]).

Plaintiffs' cross motion to file a notice of claim *nunc pro tunc* is denied (CPLR § 9802). The claim that a previous notice of claim was filed by Racanelli is contradicted by the record.

Dated: 8-8-2010

Hon. Denise F. Molia

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION