Haberman v Zoning Bd. of Appeals of the City of Long Beach
2010 NY Slip Op 32532(U)
September 13, 2010
Supreme Court, Nassau County
Docket Number: 001138/04
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

SINCLAIR HABERMAN and BELAIR BUILDING, LLC,

Petitioners-Plaintiffs,

-against-

Index No.: 001138/04
Motion Sequence...08
Motion Date...07/23/10

ZONING BOARD OF APPEALS OF THE CITY OF LONG BEACH, ROCCO MORELLI, LENNY TORRES, MARCEL WEBER, MICHAEL FINA, STUART BANSCHICK, LORRAINE DIVONE, MICHAEL LEONETTI, THE CITY OF LONG BEACH, SCOTT KEMINS, as Commissioner of the Department of Buildings of the City of Long Beach and XANDER CORP.,

Respondents-Defendants.

X

Papers Submitted:
Notice of Motion...x
Memorandum of Law...x
Affirmation in Opposition..................................x
Memorandum of Law...x
Reply Memorandum of Law...............................x

Upon the foregoing papers, the motion by the Respondents/Defendants, ZONING BOARD OF APPEALS OF THE CITY OF LONG BEACH, ROCCO MORELLI, LENNY TORRES, MARCEL WEBER, MICHAEL FINA, STUART BANSCHICK, LORRAINE DIVONE, MICHAEL LEONETTI, THE CITY OF LONG BEACH, SCOTT

KEMINS, as Commissioner of the Department of Buildings of the City of Long Beach (hereinafter "Long Beach Group") in this matter, seeking to dismiss the first, second, fifth and sixth causes of action of the third amended Petition/Complaint, pursuant to CPLR § 3211 (a) (1) and (a) (7) and CPLR § 7804 (f), is decided as provided herein.

In this hybrid Article 78/Declaratory Judgment proceeding the Petitioners/ Plaintiffs challenge the December 29, 2003 decision of the Zoning Board of Appeals of The City of Long Beach (hereinafter "Zoning Board") which revoked the building permit[1] issued on August 12, 2003 permitting the construction of a ten story residential co-operative/condominium building on Shore Road in Long Beach, New York. The building was to be the second of four towers in a beachfront apartment complex for which a variance had been obtained in 1985. After Tower 1, which is now owned by Xander Corp., was built, but before construction began on Tower 2, The City of Long Beach amended its zoning laws rendering the 1985 variance inoperative and prohibiting construction of the remaining towers as contemplated by the 1985 variance.

In this proceeding, the Petitioners/Plaintiffs seek reinstatement of the building permit, declaratory relief and monetary damages based on the Respondent/Defendant's, Long Beach Group's, alleged breach of contract, violation of procedural due process and deprivation of the Petitioners/Plaintiffs' alleged vested property interest.

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[1]Permit A-31936 was issued to the Petitioners/Plaintiffs' contractor, D. Domenico, Ltd. for the purpose of driving piles and installing footings for a ten (10) story apartment building. Cost of construction $276,300.

The gravamen of the Petition/Complaint is that, as a result of the arbitrary and capricious action of the Defendant/Respondent, Long Beach Group, the Plaintiffs/Petitioners were deprived of their vested property interest in the permit issued August 12, 2003, which violation of substantive due process evidenced an official City of Long Beach policy for which the municipality is liable in damages under 42 USC § 1983.

By this instant motion, the Defendant/Respondent, Long Beach Group, seeks dismissal[2] of the claims asserted in the first, second, fifth and sixth causes of action of the third amended Petition/Complaint alleging:

> violation of Petitioners'/Plaintiffs' right to procedural due process (first and second causes of action);
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> breach of contract (fifth cause of action); and
>
> violation of 42 USC § 1983[3] (sixth cause of action).

Insofar as pertinent, the Petitioners/Plaintiffs allege that the Defendant/Respondent, Long Beach Group's failure to give proper notice of the issues to be addressed at the hearing to Belair Building, LLC and Sinclair Haberman, and the purported conflict of interest of the Chairman of the Zoning Board, who was allegedly a rental tenant

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[2]Defendant/Respondent, Long Beach Group does not seek dismissal of the Article 78 claims asserted in the third cause of action.

[3]42 USC § 1983 provides in pertinent part that "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen or the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress."

in Tower 1 with an interest in seeing that the adjoining building was not erected, so tainted the public hearing held on October 23, 2003, that the Zoning Board's revocation of the building permit at issue was a nullity. They further contend that, in revoking the building permit, The City of Long Beach breached its obligations under the terms of a Stipulation of Settlement executed on March 8, 1989, as modified by an Extension Order dated June 19, 1992, which were executed in connection with the settlement of a proceeding brought by Sinclair Haberman against The City of Long Beach, et al, under Index Number 13391/87. That Petition sought to enjoin The City of Long Beach from enforcing amendments to its Zoning Ordinances, reducing the maximum permitted building height from ten (10) to seven (7) stories and increasing off-street parking requirements with respect to construction of the second, third and fourth towers of the condominium project. In so doing, the Petitioners/Plaintiffs contend the Defendant/Respondent, Long Beach Group, deprived them of a protectable property interest without substantive and procedural due process of law.

A detailed history of the facts surrounding the more than twenty year history of the controversial construction project is set forth in the Memorandum Decision/Short Form Order of the Hon. Kenneth A. Davis, in this matter, dated May 17, 2004 and will not be repeated here.

ANALYSIS

When considering a motion to dismiss pursuant to CPLR § 3211 (a) (7), the Court must afford the pleadings a liberal construction, accept the facts alleged as true, accord

the pleading the benefit of every possible inference and determine whether the facts alleged fall within any cognizable legal theory. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence, however, are not entitled to such consideration. *Dinerman v. Jewish Bd. of Family and Children's Services, Inc.*, 55 A.D.3d 530, 531 (2nd Dept. 2008).

Alternatively, to obtain dismissal pursuant to CPLR § 3211 (a) (1), movants are required to show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposed of the claims alleged. *First Keystone Consultants, Inc. v. DDR Const. Services*, 74 A.D.3d 1135 (2nd Dept. 2010).

Ordinarily, the due process clause requires that the state not deprive an individual of significant liberty or property interest without affording notice and some opportunity to be heard prior to the deprivation. Where a due process violation results from a random unauthorized act by state officials, as opposed to an established state procedure, the availability of a meaningful post-deprivation remedy defeats the claim. An Article 78 proceeding affords a perfectly adequate post-deprivation remedy wherein the petitioner may argue that a determination was made in violation of lawful procedure (i.e., lack of notice, lack of fair and impartial hearing), was affected by an error of law or was arbitrary or capricious or an abuse of discretion. *Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 156-157 (2nd Cir. (N.Y.) 2006).

The allegations that the Petitioners/Plaintiffs were denied due process of law, as asserted in the first and second causes of action, based on allegations, *inter alia*, that they did not receive notice of the hearing held on October 23, 2003, which resulted in the Zoning Board's decision to revoke the building permit at issue; that matters not specifically contained in the Xander petition were considered at the meeting; and/or that the meeting was conducted in a manner prejudicial to the Petitioners/Plaintiffs are insufficient to state a cognizable cause of action for violation of New York State Constitution, Article 1, § 6 which includes the right to due process, and Article 1, § 11, which concerns equal protection rights. All of the above claimed deficiencies could have been challenged in an Article 78 proceeding.

This is not a situation in which the subject building permit was summarily revoked without due notice to the Petitioners/Plaintiffs or an opportunity to be heard which would be incompatible with the most rudimentary motions of procedural due process.

With respect to the notice issue, the Hon. Kenneth A. Davis held, in his previously referenced decision in this matter, that Sinclair Haberman "received actual notice of the hearing (in the proceeding to revoke the building permit) and was represented by counsel thereat" notwithstanding "the purported infirmities in the distribution of the notice i.e., to Jacob Haberman, (Sinclair Haberman's father) instead of to Sinclair Haberman and Belair Building, LLC, to whom the property at issue had been transferred on September 4, 2003."

The first and second causes of action are not viable and must, therefore be **DISMISSED**.

For the reasons which follow, the allegations asserted in the fifth cause of action are insufficient to sustain a breach of contract claim against the Zoning Board or The City of Long Beach. The Stipulation of Settlement in the litigation brought by Sinclair Haberman against The City of Long Beach under index number 13391/87, specifically required that Sinclair Haberman apply to the Zoning Board for variances as required to permit the construction of buildings in accordance with the terms of the Stipulation of Settlement, subject to a series of conditions set forth in the Stipulation itself. It is clear from the language of the Stipulation that the parties anticipated that a public hearing would be held in the matter and that, should the variance(s) be approved, appeal(s) might be taken.

Approval of the required variances was in no way guaranteed by the Stipulation of Settlement. Nor can it be said, as alleged in the Petition/Complaint, that the 1985 variance obtained by Sinclair Haberman with respect to the project was either confirmed by the Stipulation of Settlement or approved and "so ordered" by the Supreme Court as alleged by the Petitioners/Plaintiffs.

The Petitioners/Plaintiffs have failed to satisfactorily plead the required elements of a cause of action for breach of contract i.e., the existence of a contract, the Plaintiff's performance under the contract, the Defendant's breach of the contract and damages. *JPMorgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2nd Dept.

2010).

The Stipulation of Settlement did not prevent the Respondent/Defendant, Long Beach Group, to wit: the Zoning Board/The City of Long Beach, from proceeding as it did with respect to the petition by Xander Corp. to revoke building permit A31936 issued on August 12, 2003 to builder D. Domenico, Ltd. to drive piles and install footings for a ten (10) story apartment building. The Stipulation of Settlement was conditioned upon the subsequent issuance of amended variances following a public hearing and recognizes the possibility of collateral attack on any decision reached by the Zoning Board on the Petitioners/Plaintiffs' application.

Neither the Stipulation of Settlement, nor the Extension Agreement, constitutes a contractual agreement by which either the Zoning Board or The City of Long Beach agreed that the building permit issued on August 12, 2003 would not be challenged and/or could not be revoked.

The fifth cause of action is not viable and must, therefore be **DISMISSED**.

With respect to the sixth cause of action, the Respondent/Defendant, Long Beach Group, maintains that the action of the Zoning Board as alleged i.e., revocation of a duly issued building permit, does not rise to the level necessary to sustain a claim predicated on a violation of 42 USC § 1983, or to support statutory liability thereunder. The Petitioners/ Plaintiffs counter that, once a permit has been duly issued, it constitutes a vested cognizable interest.

In the land use context, 42 USC § 1983 protects against municipal actions that violate a property owner's right to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution. 42 USC § 1983 does not simply provide an additional review of land use determinations. *Bower Associates v. Town of Pleasant Valley,* 2 N.Y.3d 617, 626-627 (2004); *Sonne v. Board of Trustees of Village of Suffern*, 63 A.D.3d 192, 200 (2nd Dept. 2009). The denial of a permit, even an arbitrary denial which can be redressed by an Article 78 or other state law proceeding, is not necessarily tantamount to a constitutional violation under the statute. Significantly more is required. *49 East Maple Avenue, Inc. v. Loniewski,* 50 A.D.3d 628, (2nd Dept. 2008) (quotation marks and citation omitted).

In order to establish a deprivation of a property right in violation of substantive due process in the context of 42 USC § 1983, the claimant must establish, (1) a cognizable or vested property interest, not the mere hope of one; and (2) that the municipality acted wholly without legal justification and was motivated entirely by political concerns. *Upstate Land and Properties, LLC v. Town of Bethel,* 74 A.D.3d 1450 (3rd Dept. 2010); *Nicolakis v. Rotella*, 24 A.D.3d 739, 740 (2nd Dept. 2005). Only the most egregious official conduct can be said to be arbitrary in the constitutional sense. *Sonne v. Board of Trustees of Village of Suffern, supra* at p. 201. A protectable property interest does not arise in benefits that are discretionary unless the discretion of the governmental agency is so narrowly circumscribed that approval of a proper application is virtually assured. *Huntington Yacht Club v.*

Incorporated Village of Huntington Bay, 1 A.D.3d 480, 481 (2nd Dept. 2003).

A property owner obtains a vested right when, "pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 43 (1996). Neither the issuance of a permit, however, nor the landowner's substantial improvements and expenditures, standing alone, will establish such a vested right. The landowner's actions, relying on a valid permit, must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless. *Id.* at 47-48 (citations omitted); *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 136 (2010); *A.B.C. Home Furnishings, Inc. v. Town of East Hampton*, 947 F. Supp. 635, 644 (E.D.N.Y. 1996).

There is no fixed formula to determine whether an owner has engaged in substantial construction and made substantial expenditures so as to have a vested right which survives a zoning amendment. As such, each case must be decided according to its own circumstances. *Estate of Kadin v. Bennett*, 163 A.D.2d 308 (2nd Dept. 1990). Whether expenditures made after issuance of a building permit, but before revocation, are substantial may depend on the monetary expenditure (*Reichenbach v. Windward at Southampton*, 80 Misc.2d 1031, 1034, [N.Y. Sup. 1975], *aff'd* 48 A.D.2d 909 [2nd Dept. 1975]), or the nature of the work performed. *Smith v. M. Spiegel & Sons, Inc.*, 31 A.D.2d 819, 820 (2nd Dept. 1969), *aff'd* 24 N.Y.2d 920 (1969).

Even taking the factual allegations of the complaint as true, the Petitioners/ Plaintiffs have failed to make out a Federal claim under 42 USC § 1983. The Respondent/Defendant, Long Beach Group's, conduct was not tantamount to a constitutional violation of the Petitioners/Plaintiffs' constitutional substantive/procedural due process rights *Bower Assoc. v. Town of Pleasant Valley, supra* at p. 627. Nor does the revocation of the building permit at issue, after a hearing at which the Petitioners/Plaintiffs were represented by counsel, submitted a memorandum of law and reply memorandum of law, constitute egregious official conduct sufficient to state a cause of action sounding in deprivation of property rights in violation of 42 USC § 1983.

The record establishes that, in connection with the two-pronged challenge to the issuance of the building permit brought by Xander Corp., various injunctive relief enjoining the Petitioners/Plaintiffs from proceeding with construction of Tower 2 was granted by the court. It does not appear, therefore, that in reliance on the building permit, issued and then revoked, that the Petitioners/Plaintiffs changed their position to their detriment and/or incurred substantial expense solely in furtherance of the construction of Tower 2 in reliance on said permit.

It bears noting that a landowner's reliance on the specific municipal action in question i.e., issuance of a certificate of occupancy or a building permit must be so substantial that it results in such a serious loss that the improvements made are rendered essentially valueless. *Genser v. Board of Zoning and Appeals of Town of North Hempstead,*

65 A.D.3d 1144, 1146 (2nd Dept. 2009); *RC Enterprises v. Town of Patterson*, 42 A.D.3d 542, 544 (2nd Dept. 2007). No such showing exists here. Nor does the record support a claim that revocation of the building permit was wholly without legal justification.

The Petitioners/Plaintiffs have not successfully stated a cause of action under 42 USC § 1983. Accordingly, the sixth cause of action must, therefore, be **DISMISSED**.

Inasmuch as the challenged actions of the individual members of the Zoning Board, in connection with the revocation of the subject building permit, were discretionary and quasi-judicial in nature, such individuals are immune from suit for monetary damages. *Alan and Allan Arts Ltd. v. Rosenblum*, 201 A.D.2d 136, 141 (2nd Dept. 1994), *leave to appeal denied* 85 N.Y.2d 921 (1995). To the extent that the Petition/Complaint purports to allege claims against said individuals, they are hereby **DISMISSED**.

There being two (2) causes of action remaining, the third and fourth causes of action in the Petitioner/Plaintiff's third amended Petition/Complaint, this matter shall appear on this Court's Compliance Conference calendar on **October 12, 2010 at 9:30 a.m**. at which time counsel for all remaining parties shall appear.

All matters not decided herein are hereby denied.

This constitutes the decision and order of this court.

DATED: Mineola, New York
September 13, 2010

Hon. Randy Sue Marber, J.S.C.

ENTERED
SEP 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE