Matter of Town of Hempstead v Board of Appeals of the Town of Hempstead
2010 NY Slip Op 32882(U)
July 29, 2010
Supreme Court, Nassau County
Docket Number: 12635/07
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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In the Matter of the Application of
THE TOWN OF HEMPSTEAD,

Petitioner(s),

For Judgment pursuant to CPLR Article 78

-against-

THE BOARD OF APPEALS OF THE TOWN OF HEMPSTEAD AND SCOTTY'S MARINA, INC.,

Defendant(s).

---x

Index No. 12635/07

Motion Submitted: 7/9/10
Motion Sequence: 001, 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XXX
Answering Papers..X
Reply...X
Briefs: Plaintiff's/Petitioner's......................................
Defendant's/Respondent's.................................

Respondent Board of Appeals of the Town of Hempstead moves this Court for an order dismissing the verified petition insofar as interposed as against it pursuant to CPLR §§ 3211[a][5], [7] and 7804[f].

Respondent Scotty's Marina, Inc. moves this Court for an order dismissing the verified petition insofar as interposed as against it pursuant to CPLR §7804[g] and CPLR §3211[a][5],[7] .

As set forth in this Court's prior decision dated February 8, 2007, the respondent Scotty's Marina, Inc. ["Scotty's] owns property located at 72 Bayside Drive, Point Lookout, New York, which is currently used as a fishing station and a bar and grill type restaurant (*see, **Town of Hempstead v. Board of Appeals of Town of Hempstead***, 15 Misc.3d 1116(A) 839 N.Y.S.2d 437, [Supreme Court, Nassau County 2007]).

Adjacent to the principal building and to the north, is a deck structure currently used for outdoor dining and drinking, which extends into Reynolds Channel and over submerged land owned by the petitioner, the Town of Hempstead ("the Town").

According to the Town, in 2005, Scotty's applied to the Town of Hempstead Department of Buildings for, *inter alia*, permission to legalize the outdoor deck, which application was allegedly denied by the Department on the ground that "under the zoning ordinance, a special exception from the Board was necessary to legalize 'outdoor dining' on the deck."

Scotty's appealed the Building Department's determination to the respondent Board of Appeals ("the Board") which, after a hearing, granted the application by determination dated November 30, 2005.

Among other things the Board concluded in substance that: (1) the use of the outdoor deck for dining is a riparian right enjoyed by Scotty's; (2) the mere consumption of food on the deck does not transform the deck into a restaurant, especially since there is no bar or waiter service thereon; and (3) based upon the foregoing facts – together with other relevant considerations – Scotty's was therefore entitled to a special exception legalizing the current use of the deck structure (November 30, 2005 decision, ¶¶ 15-19).

By verified petition dated January 24, 2006, the Town of Hempstead commenced the within proceeding pursuant to CPLR article 78, for stated declaratory relief and a judgment annulling the Board's determination.

The Town's petition alleges, *inter alia*, that the Board lacked the statutory authority to assess the issue of riparian rights; that, in any event, the Board's riparian rights analysis is legally incorrect; and that since the subject deck extends over Reynolds Channel, it lies within a "B" residence district as defined by Town Code § 314, where outdoor dining is not authorized absent issuance of a "use" variance.

Scotty's thereafter moved pre-answer, for an order dismissing the subject proceeding, arguing that the Town lacked legal capacity to maintain the proceeding since, *inter alia*, there was no pre-commencement, Town resolution formally approving and/or authorizing the

institution of the within matter. This Court agreed, and by order dated February 8, 2007, dismissed the proceeding.

In July of 2006, after the original, 2005 determination was rendered, the Board agreed upon its own resolution to rehear the matter so as to "review * * * [its] determination of November 30, 2005." A second, full hearing was conducted in mid-December, 2006 (*see*, ***Town Law § 267-a[12]***).

Although evidence was adduced and witnesses testified at the rehearing, the Board did not render a new, substantive assessment of its original determination or reconsider the merits of the parties' respective claims. Rather, upon polling its members after the hearing was complete, the first board member polled voted against any modification or reversal of the original determination, after which no further vote was taken, since the unanimity required by Town Law § 267-a[12] obviously could not be obtained. In light of the foregoing, the Board concluded that "any further vote would be moot" and that by law, the "original determination * * * must remain unchanged" (Board Exh., "G" *see also*, ***Town Law § 267-a[12]***).

In March of 2007, after this Court dismissed the Town's original proceeding the Town Board adopted a resolution authorizing the commencement of a new article 78 proceeding which was thereafter instituted in July of 2007. In its new petition, which relies upon the savings provisions of CPLR 205[a] – the Town again challenges the original, November 30, 2005 determination, as opposed to the above-referenced Board decision rendered upon rehearing, dated January 3, 2007.

The Board and Scotty's now move and cross move respectively to dismiss the petition, arguing that the January 3, 2007 decision, made upon rehearing definitively superseded the November, 30, 2005 determination and therefore constitutes the final and exclusive decision from which the four-month limitations period should be measured.

The movants further contend that since the Town's petition challenges only the allegedly superseded, non-final determination rendered in 2005 – and does not challenge the January, 2007 decision – the subject proceeding is time-barred and must be dismissed. The Court disagrees.

It is settled that "[a]n article 78 proceeding must be brought 'within four months after the determination to be reviewed becomes final and binding upon the petitioner'" (***Best Payphones, Inc. v. Department of Information Technology and Telecommunications***, 5 N.Y.3d 30, 34, 832 N.E.2d 38, 799 N.Y.S.2d 182 (2005); *see generally*, ***Walton v. New York State Dept. of Correctional Services***, 8 N.Y.3d 186, 863 N.E.2d 1001, 831 N.Y.S.2d 749

(2007); ***Eadie v. Town Bd. of Town of North Greenbush***, 7 N.Y.3d 306, 316, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006); ***In re City of New York***, 6 N.Y.3d 540, 547-548, 847 N.E.2d 1166, 814 N.Y.S.2d 5 [2006]).

In general, "this time period begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action" (***Matter of City of New York, supra***; ***Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y., supra***; *see,* ***Eadie v. Town Bd. of Town of North Greenbush, supra***; *see also,* ***Guido v. Town of Ulster Town Bd.***, 74 A.D.3d 1536, 902 N.Y.S.2d 710 [3d Dept., 2010]).

However, "[w]hen reconsideration of * * * [an administrative] determination is granted as a matter of discretion, 'the nature of the reconsideration determines whether the time to commence a review is extended'" (***Matter of Corbisiero v. New York State Tax Commn.***, 82 A.D.2d 990, 440 N.Y.S.2d 396 (3d Dept., 1981); ***Seidner v. Town of Colonie***, 79 A.D.2d 751, 434 N.Y.S.2d 800 (3d Dept., 1980); ***Custom Topsoil, Inc. v. City of Buffalo***, 63 A.D.3d 1511, 1512, 879 N.Y.S.2d 854 (4th Dept., 2009); ***Finger Lakes Racing Ass'n, Inc. v. State of New York Racing and Wagering Bd.***, 34 A.D.3d 895, 896-897, 823 N.Y.S.2d 586 (3d Dept., 2006) *cf.,* ***Apple's Deli, Inc. v. State***, 50 A.D.3d 1027, 1028, 854 N.Y.S.2d 909 [2d Dept., 2008]).

"Where there is a fresh and new redetermination", or "where new and additional evidence has been presented, petitioner's period within which to commence a review proceeding is renewed" (***Matter of Corbisiero v. New York State Tax Commn., supra***; *see,* ***Seidner v. Town of Colonie, supra***; ***Matter of Quantum Health Resources v. DeBuono***, 273 A.D.2d 730, 732, 710 N.Y.S.2d 422 (3d Dept., 2000); ***Matter of Corbisiero v. New York State Tax Commn., supra***; *see also,* ***Eldaghar v. New York City Housing Authority***, 34 A.D.3d 326, 327, 824 N.Y.S.2d 268 (4th Dept., 2006); ***Boston Culinary Group, Inc. v. New York State Olympic Regional Development Authority***, 18 A.D.3d 1103, 1104-1105, 796 N.Y.S.2d 188 (3d Dept., 2005); ***Chase v. Board of Educ. of Roxbury Cent. School Dist.***, 188 A.D.2d 192, 197, 593 N.Y.S.2d 603 (3d Dept., 1993) *cf.,* ***Young v. Board of Trustees of the Village of Blasdell***, 89 N.Y.2d 846, 849, 675 N.E.2d 464, 652 N.Y.S.2d 729 [1996]).

Of course, to succeed on a motion to dismiss based on limitations grounds the movant "bears the initial burden of establishing prima facie that the time in which to sue has expired" (***Savarese v. Shatz***, 273 A.D.2d 219, 220; *see generally,* ***Tsafatinos v. Wilson Elser Moskowitz Edelman & Dicker, LLP***, ___ N.Y.S.2d ___, 2010 WL 2757472, (2d Dept., 2010); ***Morris v. Gianelli***, 71 A.D.3d 965, 897 N.Y.S.2d 210 (2d Dept., 2010); ***Minskoff Grant Realty & Management Corp. v. 211 Manager Corp.***, 71 A.D.3d 843, 897 N.Y.S.2d 485 (2d Dept., 2010); ***Swift v. New York Med. Coll.***, 25 A.D.3d 686, 687, 808 N.Y.S.2d 731 (2d Dept., 20006); ***Matter of Quantum Health Resources v. DeBuono, supra***.

Preliminarily, the Court agrees with the petitioner's contention that the authorities relied upon by the movants are inapposite and/or distinguishable. In the typical case cited by the movants – and in others like them – the petitioners failed to timely commence proceedings challenging an agency's original determination (*see*, ***Matter of Corbisiero v. New York State Tax Commn., supra***; ***Seidner v. Town of Colonie, supra***; *see generally*, ***Young v. Board of Trustees of the Village of Blasdell, supra***; ***Boston Culinary Group, Inc. v. New York State Olympic Regional Development Authority, supra***; ***Mazzilli v. New York City Fire Dept.***, 224 A.D.2d 621, 622, 638 N.Y.S.2d 681 (2d Dept., 1996); ***Knorr v. Ross***, 208 A.D.2d 841, 208 A.D.2d 841, 618 N.Y.S.2d 66 (2d Dept., 1994); ***Camperlengo v. State Liquor Authority***, 16 A.D.2d 342, 228 N.Y.S.2d 115 [1st Dept., 1962]).

Thereafter, and in order to avoid dismissal on limitations grounds, these same petitioners commenced Article 78 proceedings challenging subsequently issued decisions rendered upon reconsideration and/or argued that the statute of limitations was "renewed" or tolled by virtue of a request for reconsideration and/or should run from the date of those subsequently issued determinations (***Pronti v. Albany Law School of Union University***, 301 A.D.2d 841, 842, 754 N.Y.S.2d 68 (3d Dept., 2003); ***Mazzilli v. New York City Fire Dept., supra; Delbello v. New York City Transit Authority***, 151 A.D.2d 479, 480, 542 N.Y.S.2d 270 (2d Dept., 1989); ***Camperlengo v. State Liquor Authority, supra***; ***Matter of Feller v. Wagner***, 7 A.D.2d 126, 180 N.Y.S.2d 748 [1st Dept., 1958]).

It is within this context that the cases cited by the Board hold, in substance, that neither a mere request for reconsideration (***Seidner v. Town of Colonie, supra; Matter of Quantum Health Resources v. DeBuono, supra***; ***Drake v. Reuter,*** 27 A.D.3d 736, 810 N.Y.S.2d 916 (2d Dept., 2006); ***Miller v. Ambach***, 124 A.D.2d 882, 883, 508 N.Y.S.2d 310 (3d Dept., 1986 *cf.*, ***Yarbough v. Franco***, 95 N.Y.2d 342, 347, 740 N.E.2d 224, 717 N.Y.S.2d 79 [2000]), nor a hearing which does not result in, *inter alia*, a "fresh and new redetermination," will suffice to extend the time within which to seek review of a previously issued, administrative determination (*see*, ***Matter of Corbisiero v. New York State Tax Commn., supra***; ***Finger Lakes Racing Ass'n, Inc. v. State of New York Racing and Wagering Bd., supra***; ***Eldaghar v. New York City Housing Authority***, 34 A.D.3d 326, 327, 824 N.Y.S.2d 268 (1st Dept., 2006); ***Stephens v. Strack***, 249 A.D.2d 637, 671 N.Y.S.2d 535 (3d Dept., 1998); ***Concourse Nursing Home v. Perales***, 219 A.D.2d 451, 453-454, 631 N.Y.S.2d 156 [1st Dept., 1995]).

Here, in contrast, the Town *did* timely commence an Article 78 proceeding challenging the Board's original determination. Although the Town did not commence a new proceeding and/or otherwise challenge the Board's subsequent determination, the cases cited by the movants do not hold that dismissal is required upon the facts presented here, or that the Town's petition is untimely (*cf.*, ***Davis v. Kingsbury***, 27 N.Y.2d 567, 569-570, 261 N.E.2d 393, 313 N.Y.S.2d 390 [1970] (Breitel, J., dissenting).

In any event, the movants have not sustained their burden of establishing that the January 3, 2007 decision made upon rehearing, constitutes a "fresh and new redetermination" for the purposes of applying the four month limitations period.

More specifically, a review of the Board's own decision upon rehearing confirms that there was "no new determination" in which the Board substantively reconsidered, reexamined, or revisited its prior ruling (***Eldaghar v. New York City Housing Authority, supra***). At best, the decision on rehearing merely referenced * * * [the] original denial ***(Eldaghar v. New York City Housing Authority, supra***), and decided nothing which could be characterized as "fresh" or as "new action" (***Matter of Corbisiero v. New York State Tax Commn., supra***; ***Feller v. Wagner, supra***). Nor does the statutory mechanism authorizing the rehearing process, mandate such a review upon reconsideration of a prior determination (*cf.*, ***Feller v. Wagner, supra***, *see,* ***Town Law § 267-a[12]***).

To the contrary, the Board's decision is bereft of substantive content and contains no factual analysis of either "the additional evidence submitted" (***Feller v. Wagner, supra***, or the claims made by the parties at the rehearing; indeed, the decision does not even mention the issues raised and is "not a redetermination on the merits" (***Stephens v. Strack, supra***). Instead – and based upon its inability to obtain unanimity under Town Law § 267-[12] – the Board's decision merely re-adopts – and thus leaves intact and undisturbed – its previously issued, original determination.

Upon these facts, the Board "certainly cannot be said to have engaged in a 'fresh and new redetermination' of" its prior decision (***Concourse Nursing Home v. Perales, supra***).

Significantly, in assessing the finality of administrative determinations, the "Court of Appeals has declined to adopt any bright-line rules designating particular actions as final, preferring instead to apply the foregoing test on a case-by-case basis in order to avoid inappropriate results in particular circumstances" (***Guido v. Town of Ulster Town Bd., supra***; see generally, **Walton v. New York State Dept. of Correctional Services,** ***supra***; ***In re City of New York***, 6 N.Y.3d 540, 847 N.E.2d 1166, 814 N.Y.S.2d 592 [2006]).

In sum, and with this governing principle in mind, the Court cannot say that the Board's January 3, 2007 decision superseded, as a matter of law, the Board's original determination for the purposes of applying the relevant, four month limitations period.

The Court has considered the movants' remaining contentions and concludes that they are lacking in merit.

[* 7]

Accordingly, it is,

ORDERED that the motions by the respondents Board of Appeals of the Town of Hempstead and Scotty's Marina, Inc., are denied.

The foregoing constitutes the Order of this Court.

Dated: July 29, 2010
Mineola, N.Y.

J. S. C.

ENTERED
OCT 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE