

**Long Is. Pine Barrens Socy., Inc. v Town of
Brookhaven Town Bd.**

2011 NY Slip Op 30177(U)

January 13, 2011

Supreme Court, Suffolk County

Docket Number: 18932/09

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/31/09
ADJ. DATES 11/20/09
Mot. Seq. # 013 - Adj. to 1/21/11
Mot. Seq. # 017 - MD
Mot. Seq. # 018 - X MotD

-----X
LONG ISLAND PINE BARRENS SOCIETY, :
INC., RICHARD AMPER as Executive Director, :
OPEN SPACE COUNCIL, INC., MARILYN :
ENGLAND, as President, MARY ANN :
JOHNSTON, PAUL McCOY, EDWARD :
KACHERSKI, LORENZ AND BRENDA VOGEL, :
as citizens, residents, taxpayers and property :
owners, :
Petitioners, :
-against- :
TOWN OF BROOKHAVEN TOWN BOARD and :
SANDY HILLS, LLC, :
Respondents. :
-----X

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Upon the following papers numbered 1 to 11 read on this motion (#017) by the petitioner for leave to serve an amended/supplemental petition and cross motion (#018) by respondent Sandy Hills to dismiss or consolidate ; Notice of Motion/Order to Show Cause and supporting papers 1-4 ; Notice of Cross Motion and supporting papers 5-7 ; Answering Affidavits and supporting papers 8-9 ; Replying Affidavits and supporting papers 10-11 ; Other _____ ; (and after hearing counsel in support of and in opposition to the motion) it is,

ORDERED that the petitioners' motion (#017) for an order granting them leave to serve an "amended/supplemental" petition, is denied; and it is further

ORDERED that the cross motion (#018) by respondent, Sandy Hills, LLC, to dismiss the original petition or for leave to consolidate a later commenced hybrid proceeding/action by the petitioners under Index No, 33842/2010 is considered under CPLR Article 63 and is denied in part and granted to the limited extent set forth below; and it is further

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ORDERED that the petition filed herein (#013), is adjourned to **January 21, 2011**, for the reasons set forth below; and it is further.

ORDERED that the related action commenced by the petitioners entitled, *Long Island Pine Barrens Society v Town of Brookhaven*, bearing Index No. 33842/2010, is consolidated with this action and the petition and responsive papers served and filed therein are adjourned to **January 21, 2011**, for submission as a supplemental petition in this proceeding.

In May of 2009, the petitioners commenced this Article 78 proceeding against the Town Board of the Town of Brookhaven and Sandy Hills, LLC, for a judgment annulling and reversing the April 16, 2009 resolutions of the respondent Town Board which granted portions of an application by respondent, Sandy Hills, LLC to re-zone a 39 acre parcel of real property situated in Middle Island, from Residence 1 and J Business 2 to Mf Residence and J Business 6. The petitioners are neighboring landowners and environmentalists who oppose the multifamily residence and mixed use development of the subject premises proposed by Sandy Hills, LLC.

This proceeding languished without judicial attention due to delays engendered by repeated administrative re-assignments of this proceeding for five months after its inception that ended in its last assignment to the undersigned in November of 2009. Prior motion practice, the commencement of a separate suit by respondent, Sandy Hills, LLC, against the Town of Brookhaven and its Town Board in February of 2010, the settlement thereof and the adoption of two "clarifying" resolutions by the Town Board on August 17, 2010 aimed at the three, separate April 16, 2009 resolutions at issue herein, resulted in further delays of the submission of the petition to this court for determination. The actions of the Town respondents on August 17, 2010, also led to the petitioners' commencement of a separate proceeding, in September of 2010, in which the petitioners seek the annulment of the two "clarifying" resolutions.

Now before the court is a motion (#017) by the petitioners for leave to serve an "amended/supplemental" petition in the form of the one attached to the moving papers. Review of the proposed amended/supplemental petition reveals that the same amends and enlarges some of the petitioners' originally pleaded claims for annulment of the April 16, 2009 resolutions due to their purported inconsistency with and violations of the rules and recommendations of the Suffolk County Planning Commission (*see* ¶¶ 43-53 of the proposed amended/supplemental petition). It also amends and enlarges the petitioners' claims that the April 16, 2009 resolutions were inconsistent with, and violative of, SEQRA (State Environmental Quality Review Act [ECL Article 8]) and other environmental statutes and local laws (*see* ¶¶ 54-65 of the proposed amended/supplemental petition). All other statements, claims and/or causes of action are supplemental in nature, rather than amendatory, in as much as they solely relate and challenge the "clarifying" resolutions adopted by the Town respondents on August 17, 2010, more than one year after the commencement of this action. While the proposed amended/supplemental petition incorporates, by reference, the original petition, its wherefore clause relates solely to the supplemental claims set forth therein, as all demands for relief set forth therein are limited to annulment of the August 17, 2010 resolutions.

The respondents oppose the petitioners' motion for leave to amend and/or supplement their original petition on several grounds, most of which are aimed at preventing them from enlarging their originally pleaded claims with new and/or additional allegations and demands for annulment of the April 16, 2009 resolutions. Additionally, respondent, Sandy Hills, LLC (hereinafter Sandy Hills), cross moves (#018) to dismiss this proceeding as academic due to the adoption of the August 17, 2010 "clarifying" resolutions. Alternatively, Sandy Hills demands, concomitantly with its requests for a denial of the petitioners' motion for leave to amend, an order consolidating this proceeding with the petitioners' recently commenced, separate proceeding challenging the August 17, 2010 resolutions.

There are distinctions between amended and supplemental pleadings. Supplemental pleadings seek to add to the pleading some claim or matter that only came into being, or into the pleader's knowledge, after the original pleading was served (*see Nissenbaum v Ferazzoli*, 171 AD2d 654, 567 NYS2d 135 [2d Dept 1991]). Supplemental pleadings thus seek relief upon transactions and occurrences that transpired after the service of the original pleadings were filed. In contrast, an amendment is one which makes any change at all in an existing pleading, including the addition of facts and/or claims that were in existence at the time of the original pleading (*see CPLR 3025[b]*; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3025:9).

An amended complaint supplants the original complaint and renders the original complaint without legal effect. A supplemental complaint does not supersede the original complaint, but is "in addition to it" (*see Mendrzycki v Cricchio*, 58 AD3d 171, 868 NYS2d 107 [2nd Dept 2008]).

The standards for granting leave to serve an amended or a supplemental pleading are, by statutory fiat, the same and are skewed in favor of a liberal granting of both (*see CPLR 3025[b]*; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). Case authorities provide the court's initial inquiry is determining whether the proposed amendment or supplement is palpably improper or patently insufficient as a matter of law and no evidentiary showing of either its merits or legal sufficiency is required (*see Koenig v Action Target, Inc.*, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). The motion should be granted absent a showing by one or more adverse parties that the proposed amendment or supplement would prejudice or surprise such parties (*see Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*).

A proposed amendment that is unquestionably barred by an applicable statute of limitations will be considered improper and/or legally insufficient law unless it qualifies for the relation back doctrine set forth in CPLR 203(f) (*see 39 College Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 810 NYS2d 520; *Clark v Ferzli*, 284 AD2d 425, 726 NYS2d 565 [2d Dept 2001]). This doctrine "permits a plaintiff to interpose a claim or cause of action which would ordinarily be time barred, where the allegations of the original complaint give notice of the transactions or occurrence to be proven and the cause of action would have been timely interposed if asserted in the original complaint" (*Pendleton v City of New York*, 44 AD3d 733, 843 NYS2d 648 [2d Dept 2007]). The new claim relates back only to the allegations in the original complaint not to any of the causes of action (*see Id.*) The relation back doctrine has no application to claims based upon events that occurred after the filing of the initial complaint rather than upon transactions giving rise to the claims advanced therein (*see New York*

Foundling Hosp., Inc. v Novello, 47 AD3d 1004, 849 NYS2d 694 [2d Dept 2008]). If a proposed supplemental pleading is time barred because its interposition is beyond the time limitations period applicable to the claims advanced therein, the relation back doctrine can not be employed to save it (see *Clark v Ferzli*, 284 AD2d 425, *supra*).

Where proposed pleading amendments or supplements are neither palpably improper or legally insufficient, leave to amend should be granted unless any one or more of such adverse parties demonstrates that surprise or prejudice will directly result therefrom (see *Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Yemini v Goldberg*, 46 AD3d 806, 848 NYS2d 676 [2d Dept 2007]). In determining whether surprise or prejudice exist, courts have long recognized that the mere fact that an amended pleading may defeat an adverse party's cause of action or a defense, such as the statute of limitations, or subject such party to liability where none exists without the amendment, is not a sufficient basis for denying the motion to amend (see *Loomis v Civetta Corinno Const. Corp.* 54 NY2d 18, 444 NYS2d 571 [1981]; *Trans-World Trading, Ltd. v North Shore Univ. Hosp. at Plainview*, 64 AD3d 698, 882 NYS2d 685 [2d Dept 2009]; *Ozen v. Yilmaz*, 181 AD2d 666, 580 NYS2d 468 [2d Dept 1992]; *De Gradi v Coney Is. Med. Group, P.C.*, 172 AD2d 582, 568 NYS2d 412 [2d Dept 1991]).

Nevertheless, proposed amendments that arise out of materially different, rather than the same facts as those underlying the action, prejudice or surprise may be found to have inured to adverse parties (see *Koenig v Action Target, Inc.*, 76 AD3d 997, *supra*; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). Thus, a motion for leave to amend is subject to denial where the movant seeks to add new theories of liability that are not readily discernible from the allegations in the original pleading (see *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 854 NYS2d 222 [2d Dept 2008]). Prejudice may also be found where an opposing party demonstrates that a material change in position or a hindrance in the preparation of his or her case has been sustained which could have been avoided had the original pleading contained the proposed amendment (see *RCLA, LLC v 50-09 Realty, LLC*, 48 AD3d 538, 852 NYS2d 211 [2d Dept 2008]; *Yemini v Goldberg*, 46 AD3d 806, *supra*). Where the action or proceeding is ready for trial or summary determination “the court should consider how long the party seeking an amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom” (*American Cleaners, Inc. v American Intern. Specialty Lines Ins. Co.*, 68 AD3d 792, 891 NYS2d 127 [2d Dept 2009]; quoting *Cohen v Ho*, 38 AD3d 705, 833 NYS2d 542 [2d Dept 2007]).

Review of the record adduced on the instant applications reveals few challenges to the petitioners' entitlement to supplement their original petition with factual statements and demands for relief that are based upon the subsequent transactions and occurrences engaged in or brought about by the respondents which led to the Town's adoption of the August 17, 2010 “clarifying” resolutions that are the subject of the “supplemental” allegations and demands for relief in the proposed amended/supplemental petition. Rather, the respondents' objections to the petitioners' motion are principally aimed at preventing them from enlarging their originally pleaded claims with new and/or additional factual allegations and new theories for the annulment of the April 16, 2009 resolutions on the following grounds: 1) that such claims are time barred under the four month statute of limitations applicable to the petitioners' demands for annulment of the April 16, 2009 re-zoning and SEQRA

resolutions; 2) that the amendments are palpably improper, totally devoid of merit and lack evidentiary support; 3) that the amendments, if permitted, would surprise and/or prejudice the respondents.

Clearly, the petitioners' supplemental allegations of fact and demands for relief, all of which are aimed solely at the actions of the respondents undertaken after the service and filing of the original petition that culminated in the Town's adoption of the August 17, 2010 "clarifying" resolutions, were timely interposed on this motion in this action and in the separate action commenced by the petitioners under Index No. 33842/2010. The respondents can show neither prejudice nor surprise with respect to these new allegations and claims, in light of their separate interposition in the petitioners' other pending action, with respect to which, consolidation with this action has been requested by Sandy Hills in its cross motion. The existence of the separate action, in which these supplemental claims are advanced and answered by the respondents, obviates the need for the court to determine whether any of these supplemental claims are patently devoid of merit or insufficient as a matter of law. These circumstances, coupled with the unduly protracted nature of this proceeding and its already confused record, which is largely attributable to prior, unsuccessful attempts by the petitioners to amend their petition, warrant a denial of the petitioners' motion for leave to supplement their existing petition.

With respect to the amendments proposed by the petitioners, the court finds that the respondents have demonstrated that they would be surprised and/or prejudiced if the court were to allow the petitioners to advance new claims based upon new allegations of facts which challenge the propriety of the April 16, 2009 resolutions. The newly asserted factual allegations, upon which the petitioners predicate their new challenges to the April 16, 2009 resolutions, were known or should have been known to the petitioners at the time of the interposition of their original pleading and the petitioners offer no explanation for the omission of these facts in their original pleading. In addition, the new allegations of fact upon which the petitioners predicate new theories for annulment of the April 16, 2009 resolutions, are not readily discernible from the allegations of fact set forth in the original petition. Accordingly, the petitioners' motion for leave to amend their petition is denied.

The court next considers the cross motion (#018) by Sandy Hills for dismissal of the petition served in this hybrid, Article 78/declaratory judgment action¹ or for consolidation of the separate action commenced by the petitioners under Index No. 33842/2010. The demand for dismissal is singularly predicated upon claims that this proceeding has been rendered moot by the actions of the respondents undertaken subsequent to its commencement which culminated in the adoption of the "clarifying" resolutions by the Town respondents on August 17, 2010. Reduced to its essence, this argument distills into a claim that all substantive and procedural omissions and/or errors committed during the environmental review process and other proceedings undertaken by the respondents in connection with the adoption of the April 16, 2009 resolutions were ameliorated by the respondents' adoption of the August 17, 2010 "clarifying" resolutions. To sustain this claim, the court would necessarily have to

¹ The court notes that this proceeding has none of the characteristics of a plenary action as the only process and pleading served in a jurisdictionally proficient manner was the notice of petition and petition in which the parties are styled solely as petitioners and respondents. Nevertheless, all parties characterize this proceeding as a hybrid Article 78/ declaratory action which is correct in light of the petitioners' challenges to legislative action, namely, the re-zoning resolutions of April 16, 2009. Under these circumstances and pursuant to CPLR 103(c), the court converts those portions of the petition filed herein, which challenge the re-zoning amendments, into a complaint for declaratory relief.

reject the petitioners' claims that such resolutions were new resolutions that substantively determined SEQRA matters and effected a further re-zonings or modifications of existing zoning classifications assigned to the subject premises and concur in the respondents' characterization of the August 17, 2010 resolutions as resolutions which merely "clarified" the prior adopted, April 16, 2009 resolutions.

The court, however, rejects the arguments advanced in support of the motion to dismiss. Whatever the true nature of the August 17, 2010 resolutions are found to be, neither the movant nor the Town respondents have demonstrated that the claims interposed in this action have been rendered moot by a change in circumstances due to the actions undertaken by the respondents after the filing and service of the petition. For the subsequent actions of the respondents, including the adoption of the August 17, 2010 resolutions, remain under siege as they are challenged as improper, erroneous, illegal, *ultra vires* and the like in the separate action commenced by the petitioners. In light of these challenges, which have yet to be judicially determined, the respondents' claims that the petitioners' claims in this proceeding are academic and unmeritorious. Those portions of Sandy Hills' cross motion for dismissal of the petition in this action are thus denied.

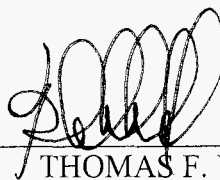
However, the court grants the remaining portions of Sandy Hills' cross motion for consolidation of the related action commenced by the petitioner under Index No. 33842/2010 to the extent that said action shall be consolidated and merged into this action for purposes of determination by this court. The petition in that action is hereby deemed a supplemental petition to the original petition served in this action and the answer return and other papers served by the parties shall be read and considered by the court to be responsive to the "supplemental" petition which is hereby converted pursuant to CPLR 103(c) as a hybrid supplemental petition/complaint in this proceeding.

In view of the foregoing, the petition/complaint filed in this proceeding, which is now consolidated with the petition, answers, return and other answering papers served in the action bearing Index No. 33842/2010, is adjourned to Friday, **January 21, 2011** for submission. The petition served in the related action and herein deemed "supplemental" to the instant petition and all responsive papers, is likewise adjourned to that date. The parties are invited, but not compelled, to appear on the adjourned date of January 21, 2011, to review the record to be considered by the court in determining the petition, supplemental petition and responsive papers in this consolidated, hybrid, Article 78/declaratory action.

Upon receipt of a copy of this order, the Clerk of the Calendar Department shall mark and re-number the petition (#001) and answering papers served and filed in the related action entitled ***Long Island Pine Barrens Society v Town of Brookhaven***, bearing Index No. 33842/2010, as motion sequence #019 in this action and shall calendar same in this action for the date of **January 21, 2011**. The Clerk is further directed to mark that action, bearing Index No. 33842/2010, *disposed* by consolidation under the terms of this order.

DATED: _____

1/13/11



THOMAS F. WHELAN, J.S.C.