

Riverhead PGC LLC v Town of Riverhead

2011 NY Slip Op 30493(U)

February 18, 2011

Supreme Court, Suffolk County

Docket Number: 17068/10

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 17068-10

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-27-10
SUBMITTED: 11-18-10
MOTION NO.: 004-MOT D
005-MG
006-MG; CASE DISP

_____ x
RIVERHEAD PGC LLC,

Plaintiff,

-against-

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
Attorneys for Plaintiff
225 Old Country Road
Melville, New York 11747

THE TOWN OF RIVERHEAD, TOWN OF
RIVERHEAD TOWN BOARD, HEADRIVER
LLC and LOCAL 25 OF THE
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,

Defendants.

LAW OFFICE OF RICHARD S. BROOK
Attorney for Defendant Local 25 of the
International Brotherhood of Electrical Workers
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Mineola, New York 11501

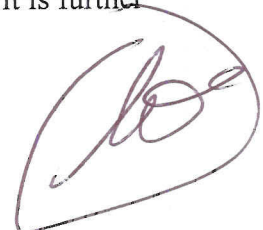
_____ x

DAWN C. THOMAS, ESQ.
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Town of Riverhead Town Board
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Upon the following papers numbered 1-35 read on these motions to dismiss; Notice of Motion and supporting papers 1-6; 7-11; 12-17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18-24; Replying Affidavits and supporting papers 25; 26-27; 28; Other 29-35 it is,

ORDERED that the branch of the motion by the defendant Local 25 of the International Brotherhood of Electrical Workers which is for an order dismissing the complaint insofar as asserted against it is granted, and the motion is otherwise denied; and it is further



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ORDERED that the motion by the defendants Town of Riverhead and Town of Riverhead Town Board for an order dismissing the complaint insofar as asserted against them is granted; and it is further

ORDERED that the motion by the defendant Headriver LLC for an order dismissing the complaint insofar as asserted against it is granted; and it is further

ORDERED that the application by the plaintiff for leave to serve and file an amended complaint is denied.

The plaintiff, Riverhead PGC LLC (“Riverhead PGC”), owns a shopping center known as “Riverhead Plaza” on Route 58 in the defendant Town of Riverhead. Wal-Mart is the anchor tenant at Riverhead Plaza. The defendant Headriver LLC (“Headriver”) owns a 22-acre parcel, also on Route 58 in the Town of Riverhead, more than two miles west of Riverhead Plaza. On June 5, 2007, the defendant Riverhead Town Board (“Town Board”) approved a site plan and several variances for the construction of, inter alia, a Wal-Mart Supercenter on the parcel owned by Headriver (“Resolution 557”). Wal-Mart intends to vacate its store in Riverhead Plaza and move to the Headriver property upon completion of the new Wal-Mart Supercenter.

Riverhead PGC commenced a hybrid CPLR article 78 proceeding/declaratory judgment action challenging the Town Board’s adoption of Resolution 557 and certain local laws and provisions of the Riverhead Town Code pursuant to which the resolution was made. By an order and judgment dated October 6, 2008, the Supreme Court, Suffolk County (Whelan, J.), inter alia, annulled the determination adopting Resolution 557 and declared null and void the challenged local laws and provisions of the Riverhead Town Code. On appeal, the Town of Riverhead and the Town Board argued that Riverhead PGC lacked standing to challenge Resolution 557. Riverhead PGC argued that its property would be devalued by the proposed development due to increased traffic congestion to the west of Riverhead Plaza on Route 58, which would cause motorists to avoid Route 58 and Riverhead Plaza and which would adversely impact its ability to maintain its present customer level. Riverhead PGC also argued that it would be damaged if it were unable to acquire a suitable replacement tenant for Riverhead Plaza. The Appellate Division reversed the Supreme Court’s order and judgment dated October 6, 2008, and dismissed the hybrid CPLR article 78 proceeding/declaratory judgment action by a decision and order dated May 11, 2010. The Appellate Division agreed with the Town of Riverhead and the Town Board that Riverhead PGC lacked standing to challenge Resolution 557 pursuant to CPLR article 78. The Appellate Division also found that Riverhead PGC lacked standing to assert its declaratory judgment causes of action to invalidate certain local laws and provisions of the Riverhead Town Code (**Matter of Riverhead PGC, LLC v Town of Riverhead**, 73 AD3d 931).

Riverhead PGC subsequently commenced this action against the Town of

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Riverhead, the Town Board, Headriver, and Local 25 of the International Brotherhood of Electrical Workers (“IBEW”). The complaint alleges, inter alia, that Resolution 557 was passed without a proper SEQRA review or traffic impact study, that it does not comply with the overall zoning plan contained in the Riverhead Town Code, that it violates certain provisions thereof, that its passage was procedurally improper, and that it will have a detrimental effect on traffic east of the traffic circle on Route 58 where Riverhead Plaza is located, which will result in a diminution in the value of Riverhead PGC’s property. The complaint alleges that, by adopting Resolution 557, the Town of Riverhead and the Town Board affected a taking of its property without due process, without compensation, and in violation of the Eminent Domain Procedure Law. The complaint also alleges causes of action against Headriver for nuisance and prima facie tort and causes of action against IBEW for prima facie tort and tortious interference with contractual relations. The Town of Riverhead and the Town Board, Headriver, and IBEW separately move to dismiss the complaint insofar as it is asserted against them.

Turning first to the causes of action against IBEW, the plaintiff alleges that IBEW’s business manager, Donald Fiore, was a member of the Suffolk County Planning Commission (the “Planning Commission”) on November 1, 2006, when it met to hear an application to construct the Wal-Mart Supercenter on Route 58. During the hearing, the report of the Planning Commission was strongly against the application. The plaintiff alleges that, after the hearing was closed and a vote was called, Mr. Fiore abstained from voting because of his role as IBEW’s business manager. The plaintiff alleges that, due to Mr. Fiore’s abstention, a quorum was not present and the Planning Commission was prevented from passing a motion disapproving the Wal-Mart application, which facilitated passage of Resolution 557 by the Town Board. The plaintiff further alleges that, the intended and expected result of Mr. Fiore’s abstention was to increase jobs for IBEW during construction of the Wal-Mart Supercenter.

The seventh cause of action alleges that IBEW tortiously interfered with the plaintiff’s lease with Wal-Mart by manipulating the Planning Commission meeting in order to facilitate passage of Resolution 557 and that, as a result, the plaintiff stands to lose Wal-Mart as a tenant. A plaintiff may recover damages for tortious interference with contractual relations when there is an existing, enforceable contract between the plaintiff and a third-party and a defendant’s deliberate interference results in a breach of that contract (**Lama Holding v Smith Barney**, 88 NY2d 413, 424; **NBT Bankcorp v Fleet/Norstar Financial Group**, 87 NY2d 614, 621). The availability of the remedy is linked with a breach of contract *Id.* at 620). Indeed, breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations (*Id.* at 621 [and cases cited therein]; *see also*, **Lama Holding v Smith Barney**, *supra* at 424; **Beecher v Feldstein**, 8 AD3d 597, 598). The plaintiff does not allege that Wal-Mart has breached its lease with the plaintiff. In the absence of such an allegation, the complaint fails to state a cause of action against IBEW for tortious interference with contractual relations. Accordingly, the seventh cause of action is dismissed.

The sixth cause of action for prima facie tort alleges that, by intentionally preventing the Planning Commission from passing a motion recommending denial of the Wal-

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Mart application, Mr. Fiore acted in a calculated, unethical, and improper manner in conscious disregard of his duties as a member of the Planning Commission and the plaintiff's property rights. The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts that are otherwise legal (**Del Vecchio v Nelson**, 300 AD2d 277, 278). There is no recovery in prima facie tort unless malevolence is the sole motive for the defendant's otherwise lawful act. "Disinterested malevolence" means the genesis that makes a lawful act unlawful must be a malicious one, unmixed with any other motive, and exclusively directed to the injury and damage of another (**Burns Jackson Miller Summit & Spitzer v Jackson, Lewis, Schnitzler & Krupman**, 59 NY2d 314, 333). The plaintiff does not allege that IBEW's motivation was malevolent. Rather, the plaintiff alleges that IBEW sought to benefit its members by increasing jobs for them during construction of the Wal-Mart Supercenter. The plaintiff has also failed to allege that it suffered special damages as a result of IBEW's conduct (*see*, **Freihofer v Hearst Corp.**, 65 NY2d 135, 143; **Curiano v Suozzi**, 63 NY2d 113, 117; **Del Vecchio v Nelson**, *supra* at 278). Accordingly, the sixth cause of action is dismissed for failure to state a cause of action against IBEW for prima facie tort.

The fifth cause of action against Headriver for prima facie tort fails for the same reasons that the sixth cause of action fails. While the plaintiff alleges that Headriver's construction of the Wal-Mart Supercenter will cause the plaintiff to lose its anchor tenant, which may result in other tenants terminating their leases at Riverhead Plaza, the plaintiff does not allege that Headriver's sole motive for constructing the Wal-Mart Supercenter is to cause the plaintiff harm. Moreover, the plaintiff has failed to allege special damages. Accordingly, the fifth cause of action is dismissed for failure to state a cause of action against Headriver for prima facie tort.

The fourth cause of action seeks to permanently enjoin Headriver from building the Wal-Mart Supercenter. The plaintiff alleges that Headriver negligently and recklessly developed the Supercenter, creating a nuisance in terms of the debilitating effect it will have on traffic patterns and unspecified environmental damage to the area. The plaintiff alleges that it is uniquely affected by such nuisance due to its proximity to the Supercenter. Although the fourth cause of action sounds in nuisance, it seeks to enjoin a purported zoning violation, i.e., the Wal-Mart Supercenter.

Whether in the form of an article 78 proceeding for review of an administrative determination or a private action at common law to enjoin a zoning violation, challenges to zoning determinations may only be made by aggrieved persons (**Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead**, 69 NY2d 406, 412; **Zupa v Paradise Point Assn.**, 22 AD3d 843). Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of the defendants (or respondents) or, put another way, that it has sustained special damage, different in kind and degree from the community generally (**Matter of Sun-Brite Car Wash**, *supra* at 413). An allegation of close proximity alone may give rise to an inference of damage or injury that enables

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a nearby owner to challenge a zoning board's decision without proof of actual injury (*Id.* at 414). The status of neighbor does not, however, automatically provide the entitlement to judicial review in every instance (*Id.*) Petitioner, for example, may be so far from the subject property that the effect of the proposed change is no different from that suffered by the public generally (*Id.*). Moreover, petitioner must also satisfy the other half of the test for standing to seek judicial review of administrative action: that the interest asserted is arguably within the zone of interest to be protected by the statute (*Id.*). Zoning ordinances are enacted to protect the health, safety and welfare of the community (*Zupa v Paradise Point Assn.*, *supra* at 844).

The plaintiff does not have standing to maintain the fourth cause of action for injunctive relief. The Appellate Division has already determined that the plaintiff's property does not lie in sufficiently close proximity to the proposed Wal-Mart Supercenter to avail itself of any presumption of injury-in-fact and that, in any event, the plaintiff's claim of increased traffic congestion to the west of its property is speculative. The Appellate Division has also determined that the economic harm asserted by the plaintiff does not implicate an interest protected by the local laws and town code provisions at issue (*Matter of Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d at 933). The plaintiff is collaterally estopped from relitigating the issue of standing, an issue that it had a full and fair opportunity to contest in the prior CPLR article 78 proceeding (*see, Kaufman v Lily & Co.*, 65 NY2d 449, 455). Accordingly, the fourth cause of action is dismissed.

The first, second, and third causes of action allege that, by adopting Resolution 557, the Town of Riverhead and the Town Board violated the plaintiff's substantive and procedural due process rights, resulting in a regulatory taking or inverse condemnation of the plaintiff's property. These three causes of action constitute an impermissible collateral attack on the Town Board's passage of Resolution 557 (*see e.g., Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 322; *Brawer v Johnson*, 231 AD2d 664; *State of New York v Khan*, 206 AD2d 732, 733). The appropriate vehicle for the plaintiff's claims that the Town Board's approval of Resolution 557 was arbitrary, capricious, and in violation of the plaintiff's substantive and procedural due process rights was the proceeding pursuant to CPLR article 78 that was dismissed by the Appellate Division (*see generally*, CPLR 7803; *Fiala v Metropolitan Life Ins. Co.*, *supra* at 321). In any event, the court finds that the allegations in the complaint do not set forth a cognizable cause of action for either a regulatory taking or an inverse condemnation.

Inverse condemnation is based on a showing that an entity possessing the power of condemnation has intruded onto a landowner's property and interfered with his or her property rights to such a degree that the conduct amounts to a constitutional taking, requiring the entity to purchase the property from the owner (*Corsello v Verizon, N.Y., Inc.*, 77 AD3d 344, 356). The sine qua non for such a cause of action is that the defendant's conduct must constitute a permanent physical occupation of the plaintiff's property amounting to the exercise of dominion and control thereof (*Id.* at 357). Liberally construing the allegations of the complaint in the plaintiff's favor, accepting the alleged facts as true, and according the plaintiff the benefit of

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every possible favorable inference (*see, Leon v Martinez*, 84 NY2d 83, 87-88), the court finds that they are insufficient to describe a permanent physical occupation of the plaintiff's property. Accordingly, the third cause of action is dismissed.

A reasonable land-use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property's value to be substantially reduced or because it deprives the property of its most beneficial use (**Putnam County National Bank v City of New York**, 37 AD3d 575, 577). To set forth a cognizable cause of action for a regulatory taking, the property owner bears a heavy burden of demonstrating by dollars-and-cents evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return upon enforcement of the challenged regulation (**Id.**). Liberally construing the allegations of the complaint in the plaintiff's favor, accepting the alleged facts as true, and according the plaintiff the benefit of every possible favorable inference (*see, Leon v Martinez*, 84 NY2d 83, 87-88), the court finds that the plaintiff has made no such showing. Accordingly, the first and second causes of action are dismissed.

While the defendants' motions to dismiss were pending, Headriver's site-plan approval expired. On December 21, 2010, the Town Board approved Resolution 932, which declared Headriver's expired site-plan approval effective. The plaintiff subsequently served and filed an amended complaint, which seeks to add to the original complaint facts and claims regarding Resolution 932. The defendants objected to the amended complaint on the ground that it is actually a supplemental complaint, which requires leave of court (*see, CPLR 3025 [b]*). By a letter dated February 4, 2011, the plaintiff, in effect, sought leave to supplement the complaint. The court agrees with the defendants that the amended complaint is, in fact, a supplemental complaint because it seeks to add facts and claims that only came into being after the original complaint was served (*see, Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:9*). Moreover, the court finds that it does not cure any of the deficiencies found in the original complaint or revive any of the dismissed causes of action. It is, therefore, palpably insufficient (*see, Lucido v Mancuso*, 49 AD3d 220, 229). Accordingly, leave is denied. To the extent that the plaintiff seeks judicial review of Resolution 932, the appropriate vehicle is a proceeding pursuant to CPLR article 78 (*see generally, CPLR 7803; Fiala v Metropolitan Life Ins. Co.*, 6 AD3d at 321).

Finally, the question of whether sanctions should be imposed against a party or an attorney is addressed to the sound discretion of the court (*see, Kamen v Diaz-Kamen*, 40 AD3d 937; *Wagner v Goldberg*, 293 AD2d 527). In the exercise of its discretion, the court declines to impose sanctions on the plaintiff or its counsel.

Dated: February 18, 2011

HON. ELIZABETH HAZLITT EMERSON

J.S.C.