

<b>Djoganopoulos v Polkes</b>
2011 NY Slip Op 31444(U)
May 11, 2011
Sup Ct, Suffolk County
Docket Number: 44406/2008
Judge: Ralph T. Gazzillo
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**COPY**

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ. ✓ 005, Mot. D.; 006 Mot. D. ✓  
007 Mot. D.

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

-----X		
NEVIN DJOGANOPOULOS and	:	TWOMEY, LATHAM, SHEA
CHRIS DJOGANOPOULOS,	:	KELLEY, DUBIN,
	:	& QUARTARARO, LLP
Plaintiff(s),	:	Attorneys for Plaintiffs
- against -	:	33 West Second Street, PO Box 9398
	:	Riverhead, NY 11901
JONATHAN D. POLKES, ELLEN G. POLKES,	:	
and ELIZABETH HALE,	:	PINKS, ARBEIT & NEMETH
	:	Attorneys for Defendants
Defendant(s).	:	140 Fell Court
-----X		Hauppauge, NY 11788

Upon the following papers numbered 1 to 75 read on this hybrid proceeding/action brought pursuant to CPLR Article 78, RPAPL Article 15, and CPLR §3001; Notice of Petition and supporting papers numbered 1-9; Amended Verified Petition and supporting papers numbered 10-14; Notice of Motion to Dismiss (#005) and supporting papers numbered 15-37; Notice of Cross Motion for partial summary judgment (#006) and supporting papers numbered 38-51; Answering affidavits and supporting papers numbered 53-55; Replying Affidavits and supporting papers numbered 56- 63; Notice of Cross Motion to Dismiss (#007) and supporting papers numbered 64-72; Answering affidavits and supporting papers numbered 73-75; it is,

**ORDERED**, that the Village defendants'/respondents' motion to dismiss petitioners' claims for relief against Herbert Hoffman, as Village building Inspector is granted with leave to replead as set forth herein, and it is further

**ORDERED**, that the remaining portions of the Village respondents' motion to dismiss the petition are denied, and it is further

**ORDERED**, that respondents' Polkes and Hale's cross motion to dismiss the petition is denied, and it is further

**ORDERED**, that the petitioners' motion for partial summary judgment is granted, to the extent that the existence of the easement and their rights in it are upheld.

The instant proceeding seeks relief pursuant to CPLR Article 78 as well as declaratory relief pursuant to RPAPL Article 15 and/or CPLR §3001 in order to establish the petitioners'/plaintiffs' right to construct a dune walkover structure<sup>1</sup> which would allow access

<sup>1</sup>A "dune walkover" structure is a narrow, raised wooden "boardwalk" type walkway over the dunes with railings on either side that provides access over the dunes to the water.

from petitioner's property located on the north side of Dune Road in the Village of Westhampton Dunes (824 Dune Road) through two parcels of land located on the southerly side of Dune Road owned by defendants Jonathan Polkes and Ellen Polkes (843 Dune Road) and Elizabeth Hale (841 Dune Road). The dune walkover structure proposed to be constructed would provide petitioners access to the Atlantic Ocean upon an easement that runs along the common boundary of the Polkes and Hale properties. The subject easement, which is clearly described in a 1967 deed, is 4 feet in width and allows access to the ocean by "foot" only. The deed was recorded when the property now owned by the petitioners and respondents was in common ownership and was bounded on the north by Moriches Bay and on the south by the Atlantic Ocean. Although it was a single parcel at that time, it was bifurcated by Dune Road. The deed containing the easement split off two lots from the portion of the parcel lying north of Dune Road. In the same deed that created the subject easement, the grantors retained an identical easement allowing their retained oceanfront parcel access to Moriches Bay through the newly created lots to the north. The easements created in this deed were clearly described in terms of location, size and use. Later, the two lots created on the northerly side of Dune Road were re-subdivided and configured into three lots, one of which is now owned by petitioners.

The underlying conflict between the parties began in the Fall of 2004 when the Djoganopouloses began constructing a dune walkover structure within the disputed easement area. Shortly after the construction commenced the respondents (or their predecessors in title), had the structure removed. At the time the construction began, the Village of Westhampton Dunes (hereinafter "Village") had no local laws or ordinances in effect which would govern the construction of a dune walkover. However, shortly after the partially constructed dune walkover was removed, the Village enacted a local law (Local Law #3 of 2004) purportedly requiring a permit for the construction of such structures. Among other things, the new local law mandates that the applicant for a permit for a dune walkover on an easement area obtain "[e]ither written and notarized permission of the owner of the property or a Court order approving or granting permission or authority to construct the walkover." *Village of Westhampton Dunes, Local Law #3 of 2004*, §2,1,c(2)(c). It bears mentioning that the partially constructed dune walkover structure was allegedly removed by Robert Strecker. Mr. Strecker is the father of Megan Strecker, predecessor in interest to respondent Elizabeth Hale. At the time the structure was removed and at the time Local Law #3 of 2004 was adopted by the Village, Mr. Strecker was a Village trustee.

Shortly after the partially constructed dune walkover structure was removed, the petitioners and their neighbors to the north, the Feders, attempted to discuss with the respondents' predecessors in title the possibility of confirming and relocating the easement to Moriches Bay and to the Atlantic Ocean for their mutual benefit. When these discussions were not productive, litigation ensued. Specifically, petitioners and the Feders commenced an action

*Djoganopoulos v. Polkes, et al.*  
Index No.: 29937/2009  
Page 3 of 9

against the Polkes and Strecker. That action was dismissed by this Court (Pitts, J.) without prejudice to the petitioners bringing an Article 78 proceeding to compel the processing and issuance of the building permit for the dune walkover. *Joseph Feder, et al. v Jonathan D. Polkes, et al.*, Suffolk Co. Index No. 26191-2006.

In September 2007, the petitioners (without their neighbors the Feders), commenced an action pursuant to RPAPL Article 15 seeking a determination as to their right to utilize the subject easement. The action was thereafter dismissed by this Court (Pitts, J.) on the basis of *res judicata*. *Djoganopoulos v. Polkes and Strecker*, Suffolk Co. Index No. 29937-2007. Both the 2006 and 2007 decisions were appealed. In 2009, the 2006 decision was affirmed and the 2007 decision was reversed.

While the appeals were *sub judice*, the petitioners made application to the Village's building inspector for a building permit to construct the dune walkover structure on their easement. The building inspector rejected the petitioners' application in October 2008. Thereafter, in December 2008, the petitioners, commenced the instant proceeding/action pursuant to CPLR Article 78, RPAPL, Article 15 and CPLR §3001 against the Village, its building inspector, Polkes, and Hale.

Specifically, petitioners' amended verified petition seeks a determination as follows: 1) reversing, annulling and setting aside the October 18, 2008 determination of the building inspector that petitioners' application for a dune walkover structure was "incomplete"; 2) directing the building inspector to process and grant the building permit for the dune walkover structure; 3) declaring petitioners' rights in the easement; 4) declaring Local Law #3 §2.1.C (2) (c) unconstitutional; and 5) declaring that petitioners have vested rights in the walkover structure that they commenced constructing prior to the enactment of Local Law #3 of 2004.

In response, respondents Herbert Hoffman, building inspector of the Village of Westhampton Dunes and the Village of Westhampton Dunes (hereinafter "Village respondents") cross move to dismiss the petition arguing: 1) the decision of the building inspector in refusing to process the petitioners' building permit application is neither final nor binding; 2) the constitutional validity of Local Law #3 of 2004 cannot be determined within the context of an Article 78 proceeding; 3) *res judicata* and collateral estoppel preclude the proceeding; 4) that the applicable statute of limitations has expired; and 5) the petition fails to state a cause of action.

Respondents' motions also sought to dismiss petitioners' claims based upon the existence of the 2006 and 2007 matters relating to the subject easement. The dismissal of the 2006 action was affirmed on appeal. As such, respondents' motion regarding that matter is denied as moot.

The 2007 action, which was restored to the court's calendar following the appeal, was sufficiently different from the instant action so as not to warrant dismissal pursuant to CPLR §3211(a)(4).

Respondents Polkes and Hale support the Village respondents' motion to dismiss, cross move to dismiss the petition on identical grounds to the Village's motion and oppose the petitioners' motion for summary judgment claiming, through the affidavit of Rudolph de Winter, Esq., that the easement, although clearly created by deed in 1967, was thereafter abandoned. In his affidavit Mr. de Winter opines that the various real estate transactions involving the subject properties over the years ensuing the undisputed creation of the easement by deed in 1967 effectuated an abandonment of the deeded path to the Atlantic Ocean. Specifically, Mr. de Winter asserts that because the petitioners' property was once part of a larger parcel that was subdivided into 3 parcels, the sale of two of the three adjoining parcels to one party in 1973 created an abandonment of the deeded easement to the Atlantic Ocean. In support of his theory, Mr. de Winter offers the fact that the deeds exchanged between the seller and the purchasers in 1973 omitted a specific recitation of the easement to the Atlantic Ocean together with the fact that the parties made a separate agreement 1974 re-creating an easement for the two adjoining parcels to Moriches Bay over the third parcel. There were no affidavits of prior owners or other admissible evidence submitted to support the claim of abandonment.

#### The RPAPL Article 15 claim<sup>2</sup>

Article 15 of the Real Property Actions and Proceedings Law allows a party to commence and action to determine a claim to real property that is adverse to that of the plaintiff (See, *RPAPL*, §1501, et seq.; *Garcia v. Velazquez*, 228 AD2d 937.) Since the petitioners claim the easement exists while the respondents claim that it was abandoned, the claims are clearly adverse to one another. As such, the matter is the proper subject of an action pursuant to RPAPL Article 15.

As a matter of law, an easement is an appurtenance to the land benefitted by it (the dominant estate). "It is inseparable from the land and a grant of the land carries with it the grant of the easement". *Western Union Tel. Co. v. Shepard*, 169 N.Y. 170, 179. "Thus, an existing easement appurtenant will pass to the grantee of a dominant estate even if the deed does not expressly refer to the easement." *Tabor v. Bradley*, 18 N.Y. 109, 111. An easement acquired by grant remains as

---

<sup>2</sup>Although respondents complain that the proceeding must be dismissed since declaratory judgment claims are not the proper subject of Article 78 proceedings, the petitioners' election of the Article 78 proceeding is not fatal to its other claims since the court can treat the claims any way it determines is appropriate. (See, *CPLR 103(c)*; *Matter of Crown Communication NY, Inc. v. Department of Transp. of State of NY*, 4 NY3d 159 (2005).

*Djoganopoulos v. Polkes, et.al.*

*Index No.: 29937/2009*

*Page 5 of 9*

inviolable as the fee favored by the grant, unless ... conveyed, abandoned, condemned or lost through prescription.” *Will v. Gates*, 89 NY2d 778, 783 quoting *Gerbig v Zumpano*, 7 NY2d 327, 330. “In order to prove an abandonment it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement.” *Loening v. Red Spring Land Co.*, 198 Misc. 151, 159 *aff’d*. 277 App. Div. 1050. “Furthermore, acts evincing an intention to abandon must be unequivocal. They must clearly demonstrate the permanent relinquishment of all right to the easement. ... [t]he mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment.” *Gerbig v. Zumpano*, *supra* at 331.

The existence of the 1967 deed creating an easement from the northerly side of Dune Road to the Atlantic Ocean is undisputed. While respondents claim that the easement was “abandoned”, there are no unequivocal acts of the predecessors in title to the present owners showing that abandonment of the easement occurred. Although the configuration of the lots on the northerly side of Dune Road changed over the years and the deeds subsequent to the original grant lack of a specific description of the easement (all of the deeds contain the boiler plate language granting the grantors “appurtenances” to the property being transferred), the dominant estate (the northerly parcels) was never merged with the servient estate (the southerly parcels) so as to effectuate an abandonment. Mr. de Winter’s affidavit incorrectly suggests that the dominant and servient estates were all located on the northerly side of Dune Road and that the common ownership of two of those northern parcels created the abandonment of the easement. Rather, with respect to the easement to the Atlantic Ocean, all of the lots on the northerly side of the road were part of the original dominant estate while the parcels on the south side of Dune Road were the servient estate. As such, no merger occurred. The other “facts” cited by respondents allegedly pointing to abandonment are purely conjecture on the part of respondents’ expert and are unsupported by affidavits of fact witnesses. Conjecture is insufficient to defeat a motion for summary judgment. Indeed, “[r]ank speculation is no substitute for evidentiary proof inadmissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment” *Tungsupong by Tungsupong v. Bronx-Lebanon Hosp. Center*; 213 A.D.2d 236, 238; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, citing *Zuckerman v. City of New York*, 49 NY2d 557.

Without a clear demonstration of facts showing relinquishment of the easement, it cannot be shown to be abandoned. (*See, Gerbig v. Zumpano, supra; Will v. Gates, supra.*) Further, respondents do not claim that the easement was conveyed, condemned or adversely possessed. As

such, the petitioners' motion for partial summary judgment on the RPAPL Article 15 claim must be granted.

#### The Article 78 Proceeding

The petition herein seeks a determination from this Court that the actions of the Village building inspector in rejecting petitioners' building permit application as "incomplete" should be annulled. The Village respondents seek dismissal of this claim as premature claiming the building inspector's action was "non-final". Further, the respondents claim that the petition herein should be dismissed as untimely.

In order to be the proper subject of an Article 78 proceeding, the determination sought to be reviewed by the Court must be final. CPLR §7801 states that "... a proceeding under this Article shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer." *CPLR §7801(1)*. "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Brunjes v. Nocella*, 40 AD 3d 1088, 1089 citing *Watergate II Apts. V. Buffalo Sewer Auth.*, 46 NY2d 52 and *Matter of Podolsky v. Daniels*, 21 AD3d 559.

Pursuant to Village Law §7-712-c(1), an Article 78 proceeding challenging the determination of a Board of Zoning Appeals must be commenced within thirty days after the filing of the decision of the board in the office of the village clerk.

Additionally, Village Law §7-712-a(4) states that the Village Board of Appeals has jurisdiction to hear appeals "from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any local law adopted pursuant to this Article. Such appeal may be taken by any person aggrieved ...". (Village Law §7-712-a(4).)

In the matter at bar, it appears that shortly after the rejection of their application by the building inspector as "incomplete" petitioners correctly appealed the building inspector's determination to the Village Board of Appeals pursuant to Village Law 7-712-a (4). It further appears that the Village Board of Appeals has refused to act on the appeal. Therefore, since the building inspector's determination could have been reviewed by the Village Board of Appeals and since the Village Board of Appeals has apparently refused to do so, petitioners' relief lies in mandamus rather than certiorari. (CPLR §7803(1)).

*Djoganopoulos v. Polkes, et.al.*  
*Index No.: 29937/2009*  
*Page 7 of 9*

Moreover, the building inspector's determination was properly appealed to the Board of Zoning Appeals. As such, the petitioner's claim for relief pursuant to Article 78 as against the building inspector must be dismissed as moot. However, petitioner is hereby granted leave to replead to include the Village Board of Appeals as an additional respondent within 30 days of service of Notice of Entry herein.<sup>3</sup>

In so far as timeliness of the proceeding is concerned, the building inspector's determination was made (and presumably filed) on October 16, 2008. Pursuant to Village Law §7-712-a(5)(b), the time within which to appeal the building inspector's determination to the Board of Zoning Appeals was 60 days following the filing of the determination. Since the appeal to the Board of Zoning Appeals of the was made December 12, 2008, it was within the 60 day time period. Pursuant to Village Law §7-712-a(7)and (8), the Board of Zoning Appeals was required to schedule a hearing on the application and decide the matter within 62 days following the hearing. Had the Board acted, the petitioners would have had thirty days within which to commence a proceeding challenging the action. Since the Board has not acted, the statute of limitations has not begun running. Therefore, whether the challenge was to the building inspector's determination or the Board of Zoning appeals refusal to act, the proceeding commenced on December 12, 2008 was timely.

#### The Declaratory Judgment Claim

Petitioners have also alleged that Local Law #3-2004 adopted by the Village of Westhampton Dunes is "unduly burdensome and unconstitutional".

In pertinent part, Local Law #3 of 2004 requires that applicants for dune walkover structures within rights of way or easements provide as part of their application "[e]ither written and notarized permission of the owner of the property or a Court order approving or granting permission or authority to construct the walkover."

Respondents argue that this action is not the proper subject of an Article 78 proceeding and

---

<sup>3</sup> Given the fact that the Court has determined that the easement has not been abandoned, petitioners may elect to reapply for their permit to construct their dune walkover structure, which would moot the instant Article 78 proceeding.

*Djoganopoulos v. Polkes, et.al.*  
Index No.: 29937/2009  
Page 8 of 9

therefore should be dismissed. The respondents also assert that petitioners' claims should be dismissed pursuant to CPLR 3211(a)(10) because they allege that the State of New York and the County of Suffolk are necessary parties to the determination as to the constitutionality of Local Law #3 of 2004 pursuant to a consent decree made pursuant to *Rapf and Hansen v. County of Suffolk*, et.al, 84 Civ. 1478, (hereinafter "Rapf consent decree").

Initially, as previously set forth herein, provided all necessary parties are included in a proceeding, pursuant to CPLR §103( c ) the court, at its discretion may convert the proceeding to a plenary action. Neither the State of New York nor the County of Suffolk are necessary parties to the determination as to the constitutionality of Local Law #3 of 2004. While separate permits from those municipal entities having coterminous jurisdiction may be required for the construction of a dune walkover, and while the Rapf consent decree may ultimately impact where dune walkover structures are constructed, those municipal entities would not be necessary parties to the instant proceeding. In addition, no part of the petitioners' application seeks to build structures upon County of Suffolk or State of New York lands. As such, the determination as to the validity of Local Law #3 of 2004 would only require the Village board as a necessary party. Accordingly, the respondents' motion to dismiss petitioners' third claim for relief is denied<sup>4</sup>.

The Polkes and Hale respondents also assert that the mere existence of the Rapf consent decree, which apparently allows only one dune walkover structure per property, precludes the petitioners from constructing a dune walkover structure since both the Polkes and Hale properties already have such structures. This argument is without merit. While the Rapf consent decree may bind the parties, it does not in any way eliminate the deeded easement in favor of the petitioners and does not create any legal impediment which would prevent the respondents from reconfiguring or removing their walkways as necessary to allow the construction of a walkway on the easement area so that all structures are in compliance with the Rapf consent decree.

The respondents also seek dismissal of the claim stating that the constitutionality of a statute may not be reviewed in a proceeding under Article 78 of the CPLR and that the applicable 4 months statute of limitations pursuant to CPLR §217 has expired. Where jurisdiction is obtained over all necessary parties, courts have the power to convert a proceeding to an action for

---

<sup>4</sup> Should this Court ultimately find that petitioners had vested rights in the construction commenced prior to the adoption of Local Law #3 of 2004, a determination as to the constitutionality of the provision would be moot.

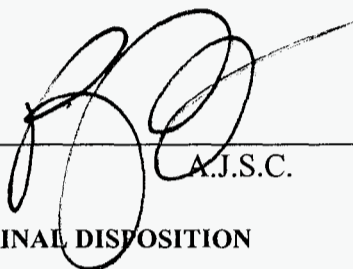
*Djoganopoulos v. Polkes, et.al.*  
 Index No.: 29937/2009  
 Page 9 of 9

declaratory judgment. (See, *Garden City Center Associates v. Incorporated Village of Garden City*, 193 AD2d 740.) Contrary to the respondents' assertions, the declaratory judgment action is also timely because the 4 months statute of limitations to challenge the adoption of a local law only applies where it is alleged that there were procedural defects in the adoption of the law. Challenges to the substance of the local law are subject to the six year statute of limitations set forth in CPLR §213. (See, *Matter of Frontier Ins. Co. v. Town Bd. of Town of Thompson*, 252 A.D.2d 928).<sup>5</sup> Therefore, since the proceeding was commenced within 4 years of the adoption of the local law, it is unquestionably timely.

Accordingly, the Village respondents' cross motion to dismiss is granted with respect to the claims against the building inspector only with leave to plead to include the Village Board of Zoning Appeals, the petitioners' motion for partial summary judgment is granted and motion to dismiss made by Polkes and Hale is denied in its entirety.

Dated: \_\_\_\_\_

5/11/11

  
 \_\_\_\_\_  
 A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     NON-FINAL DISPOSITION

<sup>5</sup>Moreover, challenges to the constitutionality of a law are not subject to any statute of limitations. (See, *Roebing Liquors Inc. v. Urbach*, 245 A.D.2d 829.)