

**Incorporated Vil. of Port Washington N. v Sandy
Hollow Assoc., LLC**

2011 NY Slip Op 32305(U)

August 19, 2011

Supreme Court, Nassau County

Docket Number: 024765-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**INCORPORATED VILLAGE OF PORT
WASHINGTON NORTH,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 024765-09
Motion Sequence No. 3
Submission Date: 6/27/11**

-against-

**SANDY HOLLOW ASSOCIATES, LLC,
PORT NORTH CONSTRUCTION LLC,
J.D. POSILICO, INC., XL SPECIALTY
INSURANCE COMPANY, DALLAS
REALTY, LLC, MILL POND ACRES
CONDOMINIUM, MICHAEL F. PUNTILLO,
MICHAEL S. PUNTILLO, ROBERT M.
PASCUCCI and MARIO POSILICO,**

Defendants.

-----X

The following papers having been read on this motion:

- Notice of Motion and Affirmation in Support.....X**
- Plaintiff's Exhibits A and B.....X**
- Plaintiff's Exhibits C through F.....X**
- Affirmation in Opposition.....X**
- Joint Memorandum of Law in Opposition.....X**
- Plaintiff's Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion for reargument filed by Plaintiff, the Incorporated Village of Port Washington North ("Village" or "Plaintiff") on March 24, 2011 and submitted on June 27, 2011. For the reasons set forth below, the Court grants reargument and, upon that reargument, denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

The Village moves for an Order, pursuant to CPLR § 2221, granting the Village leave to reargue this Court's Order dated February 1, 2011 ("Prior Decision") in which the Court, *inter alia*, granted the motions to dismiss the First Cause of Action in the Complaint interposed by all of the Defendants except Defendant Mill Pond Acres Condominium,¹ and upon that reargument, denying the motions to dismiss the First Cause of Action.

Defendants Sandy Hollow, Port North, Posillico and XL Specialty oppose Plaintiff's motion to reargue.

B. The Parties' History

The parties' history is set forth in detail in the Prior Decision, and the Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, this is an action by the Village to compel the Defendants to correct various defective and/or incomplete work on Public Improvements or, alternatively, to recover \$3,434,689.00, or such other amount as the Court determines appropriate, under a performance bond that was furnished to the Village, which bond insured the proper construction and installation of the Public Improvements. In the First Cause of Action, interposed against all Defendants, the Village seeks an injunction enjoining Defendants to construct the Public Improvements in accordance with the Approved Plans, and to correct the alleged Deficiencies.

In the Prior Decision, the Court held that, in light of Plaintiff's failure to allege, or even address, all of the required elements of injunctive relief, and the Court's conclusion that Plaintiff had not demonstrated that it would suffer irreparable harm without injunctive relief given that Plaintiff's claims appeared to be compensable by money damages, the Court dismissed the First Cause of Action against moving Defendants Posillico, XL Specialty, Sandy Hollow and Port North (Prior Decision at p. 8).

¹ With the Plaintiff's consent, the Court dismissed the claims against the Individual Defendants Mario Posillico, Michael F. Puntillo, Michael S. Puntillo and Robert M. Pascucci in the Prior Decision.

Counsel for Plaintiff has provided an Affirmation in Support of Plaintiff's motion to reargue in which he affirms that the allegedly defective work violated zoning resolutions and covenants, as well as the Village's building code.

C. The Parties' Positions

Plaintiff submits that the Court, in the Prior Decision, improperly held that Plaintiff was required to plead or show "irreparable harm" to enforce its zoning resolutions, zoning covenants and building code against the Defendants. Plaintiff submits that, pursuant to certain Village Laws and Codes as well as applicable case law, the Village is entitled to a permanent injunction to enjoin violations of its zoning and building regulations, and it not required to demonstrate "irreparable harm" in those proceedings.

Sandy Hollow and Port North oppose Plaintiff's motion, first on the grounds that

- 1) Plaintiff never raised its current argument in opposition to Defendants' original motion;
- 2) Plaintiff failed to cite, in its opposition to Defendants' original motion, two of the four cases now relied on; and
- 3) Plaintiff cited two of the cases in its original opposition for certain propositions, and now cites those cases for different propositions.

Sandy Hollow and Port North submit, further, that the cases cited by Plaintiff in support of its motion to reargue do not "remotely suggest[], much less hold[], that a Village can compel someone to cure alleged code violations on property it previously owned and no longer owns" (Clines Aff. in Opp. at p. 3) (emphasis in original). Sandy Hollow and Port North note that the cases cited by Plaintiff, including *Inc. Village of Freeport v. Jefferson Indoor Marina, Inc.*, 162 A.D.2d 434 (2d Dept. 199) and *Village of Chestnut Ridge v. Roffino*, 306 A.D.2d 522 (2d Dept. 2003), addressed a municipality's right to injunctive relief with respect to the current owner of the property in question.

Defendants Posillico and XL Specialty oppose Plaintiff's motion on the grounds that

- 1) Plaintiff failed to raise, in its initial opposition to Defendants' motion, the argument that it should not be required to demonstrate irreparable harm to obtain injunctive relief;
- 2) Plaintiff's First Cause of Action against Posillico and XL Specialty did not seek to enforce zoning laws, or the building code, but rather was a "straight-forward" (Posillico and XL Specialty Memorandum of Law in Opp. at p. 1) breach of contract claim regarding which Plaintiff was required to demonstrate irreparable harm;
- 3) under the express terms of the Bond, Plaintiff has no right to

[* 4]
injunctive relief as to Posillico or XL Specialty, and Plaintiff's sole remedy is a claim for money damages; and 4) as held by the Court in the Original Decision, Plaintiff failed to allege or address the required elements for injunctive relief.

In reply, Plaintiff submits that 1) contrary to Defendants' contentions, Plaintiff previously argued that it was not required to plead or demonstrate "irreparable harm" to sustain its First Cause of Action; and 2) the Court should reject Sandy Hollow's assertion that it cannot be compelled to enter the Property because it no longer owns the Property, in light of the fact that Sandy Hollow expressly reserve an easement for itself to reenter the Property for the purpose of completing the Project.

RULING OF THE COURT

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992). *Accord Matter of Carter*, 81 A.D.3d 819 (2d Dept. 2011), quoting *McGill*, *supra*.

The Court is mindful of the cases cited by Plaintiff, including *Town of Brookhaven v. Mascia*, 38 A.D.3d 758 (2d Dept. 2007) and *Incorporated Village of Freeport v. Jefferson Indoor Marina, Inc.*, 162 A.D.2d 434 (2d Dept. 1990), which address a municipality's right to injunctive relief to enjoin violations of their zoning and building regulations. The Court concludes, however, that those cases are distinguishable from the matter at bar, and do not warrant the granting of Plaintiff's instant motion, even assuming *arguendo* that Sandy Hollow could be compelled to perform work in light of its reservation of an easement to reenter the Property for the purpose of completing the Project.

Mascia involved an action by the Town of Brookhaven ("Town") to enjoin the defendants from using or occupying a structure on their premises, and to direct that the structure be demolished, following the individual defendant's conviction for constructing a residence without a permit as required by local law. 38 A.D.3d at 758-759. A permit had previously been

issued but was subsequently revoked, and defendants continued the construction without a permit. *Id.* at 759. The Second Department, in affirming the trial court's Order granting summary judgment to the Town, held that the Town had established its entitlement to judgment by demonstrating, on the basis of the defendant's criminal conviction and the affidavits of the Town's building officials, that the defendants had constructed the residence in question and were residing in it in violation of local law. *Id.*

In *Jefferson Indoor Marina*, the Village of Freeport ("Village") had issued defendants a permit to construct a marina on their property. Following a public hearing on the Village's request for modifications to the marina, the Village revoked the permit and issued a cease and desist order. Notwithstanding the revocation, the defendants continued construction at the site. The Village then commenced an action for a permanent injunction and moved for a preliminary injunction, pursuant to the Village Law, to bar the continued violation of its zoning ordinance. 162 A.D.2d at 435. The trial court initially denied the Village's motion for a preliminary injunction. Upon reargument, however, the trial court granted a preliminary injunction in favor of the Village. In affirming that determination, the Second Department held that a municipality has authority to obtain a temporary restraining order and preliminary injunction strictly enforcing its zoning ordinances without application of the three-pronged test for injunctive relief. *Id.* at 436.

The Court concludes that it would be inappropriate to apply the principles set forth in *Mascia* and *Jefferson Indoor Marina* to the matter *sub judice*. The gravamen of the matter before the Court is the parties' dispute regarding a performance bond that was furnished to the Village, which bond insured the proper construction and installation of the Public Improvements. As noted in the Prior Decision, the Complaint describes this lawsuit as "an action by the Village to compel the Defendants to correct various defective and/or incomplete work on Public Improvements...that the Defendants were required to construct and install in connection with the [Project]. Alternatively, this is an action to recover \$3,434,689.00, or such other amount as the Court determines appropriate, under a performance bond that was furnished to the Village, which bond insured the proper construction and installation of the Public Improvements." The cases cited by Plaintiff, on the other hand, arise in the context of the municipality, in a quasi-prosecutorial role, seeking to enforce its local laws. The Court concludes that the action before

it is essentially a contractual dispute, and not an enforcement action by the Village to cure alleged violations of zoning and building regulations. Accordingly, it would be inappropriate to apply the principles espoused in *Mascia* and *Jefferson Indoor Marina* to the matter before the Court. Thus, upon reargument, the Court denies Plaintiff's motion.

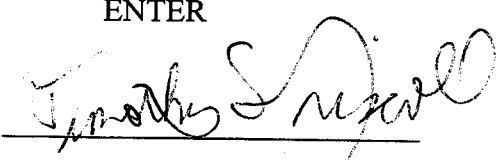
The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on January 26, 2012 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
August 19, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 24 2011
WESTCHESTER COUNTY
COUNTY CLERK'S OFFICE