

24 Franklin Ave. v Heaship

2011 NY Slip Op 3401 (U)

February 23, 2011

Supreme Court, Westchester County

Docket Number: 24531/07

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED
AND
ENTERED
ON 2-24 2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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24 FRANKLIN AVE. R.E. CORP. and
MARC CASTALDI,

Petitioners/Plaintiffs,

For Judgment Under Article 78 of the Civil Practice
Law and Rules,

DECISION & ORDER

-against-

Index No. 24531/07
Motion Date: Dec. 6, 2010

THOMAS HEASHIP, ALICE AURUTICK, ANTHONY SPANO; RAYMOND A. KRAUS, NONI REICH, MARSHALL DONAT, MARK RINALDI, as members of the Planning Board of the Town/Village of Harrison; STEPHEN MALFITANO, JOSEPH CANNELLA, ROBERT PALADINO, THOMAS SCAPPATICCI, PAT VETERE, as members of the Board of Trustees of the Town/Village of Harrison; STEPHEN MALFITANO, Individually and as Supervisor/Mayor of the Town/Village of Harrison; and ROBERT W. FITZSIMMONS as Building Official of the Town/Village of Harrison,

FILED
FEB 24 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Respondents.

-----x
LEFKOWITZ, J.

The following papers numbered 1 to 20 were read on this motion by petitioners/plaintiffs (hereinafter "petitioners") for an order striking certain discovery demands served by respondents as being improper and beyond the scope of the decision and order of remand by the Appellate Division, Second Department dated June 8, 2010.

Order to Show Cause - Affirmation - Exhibits 1-13
Answering Affirmation - Exhibits 14-20
Filed Papers (Appellate Briefs)

Upon the foregoing papers and the proceedings held on December 6, 2010, it is ORDERED that the motion is granted only to the extent that Demand 8 of respondents' Demand for a Verified Bill of Particulars dated August 27, 2010 is stricken; and it is further

ORDERED that petitioners shall provide responses to the remaining portions of respondents' Demand for a Verified Bill of Particulars within 20 days of entry of this order; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on March 22, 2011 at 9:30 A.M.

Petitioners commenced this hybrid Article 78 proceeding and declaratory judgment action seeking, *inter alia*, mandamus to compel issuance of building permits and a judgment declaring invalid Harrison Local Law No. 4. On September 20, 2007, the Harrison Board of Trustees enacted Local Law No. 4, which amended its zoning ordinance and rezoned Blocks 51 - 54 from B-Two Family and NB - Neighborhood Business Zoning Districts to R-50 One Family Residence Districts. Petitioners own three parcels which were rezoned. Prior to the enactment of Local Law No. 4, petitioners obtained subdivision approval for the three parcels and had submitted building permit applications seeking to build a two family residence on each parcel.

In their petition, petitioners' first three causes of action seek mandamus compelling the issuance of buildings permits. The next ten causes of action are labeled causes of action for a declaratory judgment and seek to annul and vacate Local Law No. 4. The grounds alleged in those ten causes of action include allegations that the amendment to the zoning ordinance violated substantive and procedural due process, was ultra vires, constituted unconstitutional spot zoning, violated the Town's comprehensive plan, and the Board of Trustees failed to comply with the procedural requirements of the State Environmental Quality Review Act (SEQRA), as well as the notice requirements of General Municipal Law § 239-m and Town Law § 264 (1). The final three causes of action state: (1) a cause of action pursuant to CPLR article 78 to set aside the recommendation of the Planning Board to rezone; (2) a cause of action against Supervisor Stephen Malfitano individually on the ground his actions were ultra vires; and (3) a cause of action for damages under 42 USC § 1983.

By decision, order and judgment entered September 16, 2008, the court (Zambelli, J.) declared Local Law No. 4 invalid on the grounds that it constituted impermissible spot zoning, was not adopted in accordance with the relevant comprehensive plan, and was not adopted in compliance with the statutory procedural requirements, including SEQRA, General Municipal Law § 239-m, and Town Law notice requirements. The court specifically determined that the violations of the procedural requirements constituted jurisdictional defects which rendered the enactment of Local Law No. 4 invalid. The court also dismissed petitioners' CPLR article 78 cause of action seeking mandamus compelling issuance of a building permit based upon their failure to exhaust their administrative remedies. The court dismissed the CPLR article 78 cause of action to set aside the recommendation of the Planning Board on the ground the recommendation was advisory and not subject to review under article 78. Finally, the court severed petitioners' causes of action pursuant to 42 USC § 1983 and against Supervisor/Mayor Malfitano in his individual capacity on

the ground that those causes of action could not be dealt with in the special proceeding.¹ Respondents appealed the decision, order and judgment.

Prior to a decision being rendered on the appeal, petitioners commenced a separate hybrid CPLR article 78 proceeding and action for declaratory relief (Index No. 4101/09) against the same respondents (hereinafter “related action”). In the related action, petitioners sought (1) an order of mandamus directing the issuance of building permits for petitioners’ three lots, (2) a declaration that petitioners acquired a statutory vested right by reason of the July 24, 2007 subdivision approval and that the zoning change three years later did not apply to them, and (3) a declaration that the subdivision is entitled to a preexisting non-conforming use as two family lots and petitioners have a vested right, and (4) a declaration that withholding the building permits until the passing of the zoning ordinance changing the permitted use of the lots was the result of municipal bad faith and, therefore, the “special facts exception” applies requiring the issuance of the permits.

By order entered August 11, 2009, the court (Zambelli, J.) dismissed the majority of the causes of action in the related action on the grounds they were procedurally improper, were raised in the prior action, or were without merit. The court, however, determined that petitioners were entitled to the issuance of the building permits as of right since the court’s prior order invalidated Local Law No. 4 and the property was, therefore, currently zoned as B-Two Family. Respondents also appealed the court’s order in the related action, and the appeals were consolidated and heard together.

By decision and order dated June 8, 2010, the Appellate Division, Second Department decided both appeals. In the appeal from the present action, the Appellate Division determined that respondents were appealing only from so much of the court’s order/judgment which “declared that Local Law No. 4 (2007) of the Town/Village of Harrison is invalid on the grounds that it constitutes impermissible spot zoning and was not adopted in accordance with the relevant comprehensive plan.” The Appellate Division reversed the court’s order/judgment insofar as appealed from, on the law, and remitted the matter back to this court for further proceedings on the causes of action for a declaratory judgment, which the Appellate Division held should be treated as if they had been asserted in a plenary action. The Appellate Division held that the court erred in using a summary procedure in awarding judgment on causes of action which sought a judgment declaring that the zoning ordinance was invalid, since the causes of action sought a declaratory action, rather than relief pursuant to CPLR article 78. The Appellate Division noted that separate procedural rules apply to CPLR article 78 proceedings and declaratory judgment actions, and that summary proceedings pertain only to CPLR article 78 proceedings.

In the related action, the Appellate Division, Second Department reversed the court’s order insofar as it granted mandamus and directed that the building permit be issued. The sole reason given by the Appellate Division for reversing that portion of the order in the related action was the reversal of the court’s order/judgment in the present action. The Appellate Division also held that

¹ The 42 U.S.C. § 1983 cause of action was subsequently removed to Federal Court.

the petition should have been denied, the proceeding dismissed, and the causes of action for declaratory relief severed.

Petitioners moved for amendment/clarification of the appeal from the related action only on the ground that it was issued based solely upon the Appellate Division's decision and order in the present action, and discounted the fact that the Appellate Division's decision and order in the present action did not reverse the Supreme Court's determination that the zoning ordinance was also invalid due to procedural deficiencies. The Appellate Division denied the motion without opinion in October, 2010.

While the motion for amendment/clarification was pending before the Appellate Division, petitioners made the present motion in the Compliance Part seeking an order striking certain discovery demands as, *inter alia*, beyond the scope of the Appellate Division's decision and order of remand. Petitioners contend that discovery should be limited to the issue of spot zoning and the failure to comply with the comprehensive plan since respondent's appeal of the prior order in this action was limited to those two causes of action. Accordingly, petitioners reason that the remand of the action is limited only to the issues which were appealed by the respondents.

Respondents oppose the present motion and assert that the Appellate Division remanded all declaratory judgment causes of action to this court. Therefore, respondents contend that they are entitled to discovery with respect to all causes of action seeking a declaratory judgment.

A party is entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). Initially, this court notes that although the Appellate Division held that the appeal in the present action was limited to so much of the order/judgment which "declared that Local Law No. 4 (2007) of the Town/Village of Harrison is invalid on the grounds that it constitutes impermissible spot zoning and was not adopted in accordance with the relevant comprehensive plan," the Appellate Division, nevertheless, remitted the matter back to this court for further proceedings on "the causes of action for a declaratory judgment, in which those causes of action shall be treated as if they had been asserted in a plenary action." Accordingly, based upon the unambiguous language of the Appellate Division, this court can only conclude that, contrary to petitioners' contention, the Appellate Division remitted all of petitioners' causes of action seeking a declaratory judgment back to this court for further proceedings. The Appellate Division, however, did not examine the petitioners' remaining causes of action labeled by petitioners as "declaratory judgment cause of action" and did not determine whether those causes of action were properly brought as declaratory judgment causes of action or actually sought relief pursuant to CPLR article 78.

Upon an examination of the petitioners' remaining causes of action labeled "declaratory judgment cause of action," this court finds that all of the causes of action, except petitioners' seventh cause of action, were properly labeled and assert a cause of action for a declaratory judgment. When a cause of action alleges the violation of vested property rights and not the denial of a particular application, as alleged by petitioners in their first two causes of action for

declaratory judgment, the proper vehicle to seek such relief is a declaratory judgment action, not a proceeding pursuant to CPLR article 78 (*Sonne v Board of Trustees of Village of Suffern*, 67 AD3d 192, 202-203). Similarly, petitioners' challenges to the constitutionality of the enactment of Local Law No. 4, as distinct from the constitutionality of its application, assert causes of action for declaratory judgment (*Board of Ed. of Belmont Cent. School Dist. v Gootnick*, 49 NY2d 683, 687). Petitioners' causes of action challenging Local Law No. 4 based upon respondents' failure to comply with General Municipal Law § 239-m² and the other notice requirements were properly labeled as declaratory judgment causes of action since those causes of action allege a jurisdictional defect involving the validity of a legislative action, not a mere procedural irregularity (*Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336 [2d Dept] [cause of action alleging failure to comply with General Municipal Law § 239-m alleged a cause of action reviewable in a declaratory judgment action]; *Matter of Burchetta v Town Bd. of Town of Carmel*, 167 AD2d 339 [2d Dept] [affirmed order which converted proceeding pursuant to CPLR article 78 to a declaratory judgment action where petitioners alleged a failure to comply with General Municipal Law § 239-m]). However, the petitioners' seventh cause of action for declaratory judgment, which alleges a failure to comply with the procedural requirements of SEQRA, is properly maintained in a CPLR article 78 proceeding since it challenges the procedures followed in the enactment of Local Law No. 4 and not the substance of the ordinance (*Save Pine Bush v City of Albany*, 70 NY2d 193, 202).

Initially, this court notes that petitioners did not appeal that branch of the prior order/judgment of the court (Zambelli, J.) dated September 16, 2008, which determined that Local Law No. 4 was invalid on the ground that it was not adopted in compliance with the procedural requirements set forth in SEQRA, nor did the Appellate Division reverse that branch of the prior order/judgment. Accordingly, there appears to be an inconsistency in the Appellate Division's decision and order dated June 8, 2010, to the extent that it remitted the matter for further proceedings with respect to the declaratory judgment causes of actions despite the Supreme Court's prior determination that Local Law No. 4 was invalid on the basis of petitioners' failure to comply with SEQRA, which presumably is still a valid determination. Nevertheless, in view of the Appellate Division's directive remitting the present action back to this court for further proceedings as to petitioners' declaratory judgment causes of action, this court is constrained to continue to supervise discovery with respect to those causes of action.

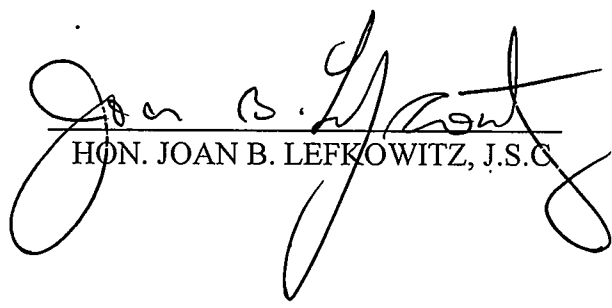
In view of the foregoing, respondents are only entitled to discovery with respect to petitioners' causes of action seeking a declaratory judgment. Respondents are, therefore, not entitled to discovery regarding petitioners' SEQRA cause of action. Therefore, since Demand 8 of respondents' Demand for a Verified Bill of Particulars seeks discovery regarding petitioners' cause

² General Municipal Law § 239-m requires a city, town or village to refer a proposed adoption or amendment of a zoning ordinance or local law to the county planning agency or regional planning agency for a recommendation prior to final action, if it applies to real property within 500 feet of, *inter alia*, the boundary of any city, village or town; or the boundary of a county or state park; or county or state parkway or thruway (General Municipal Law § 239-m [2]; [3] [ii]).

of action alleging a violation of SEQRA, that demand must be stricken. The remaining demands challenged by petitioners seek discovery with respect to petitioners' declaratory judgment causes of action and are, therefore, proper. Accordingly, petitioners' motion is granted only to the extent that Demand 8 of respondents' Demand for a Verified Bill of Particulars is stricken.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
February 23, 2011


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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cc: Compliance Part Clerk