Suffolk Asphalt Supply, Inc. v Board of Trustees of Vil. of Westhampton Beach
2011 NY Slip Op 34215(U)
March 30, 2011
Supreme Court, Suffolk County
Docket Number: 15115-00
Judge: Elizabeth H. Emerson

[* 1]

SHORT FORM ORDER

COPY

INDEX
NO.: 15115-00

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-3-10
SUBMITTED: 12-9-10
MOTION NO.: 008-MD
009-XMD

SUFFOLK ASPHALT SUPPLY, INC.,

Plaintiff,

-against-

BOARD OF TRUSTEES OF THE VILLAGE OF WESTHAMPTON BEACH and FRED SHOWERS, BUILDING INSPECTOR OF THE VILLAGE OF WESTHAMPTON BEACH,

Defendants.

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Upon the following papers numbered 1-63 read on this motion and cross-motion for summary judgment; Notice of Motion and supporting papers 1-40; Notice of Cross Motion and supporting papers 41-55; Answering Affidavits and supporting papers 56-61; Replying Affidavits and supporting papers 62-63; it is,

ORDERED that the motion by the defendants and the cross motion by the plaintiff for summary judgment are denied.

The plaintiff owns a parcel of real property located within the Village of Westhampton Beach (the "Village") that has been improved with an asphalt plant since 1945. In 1985, the Board of Trustees of the Village ("the Board of Trustees") amended the Village zoning code so that the use of the property as an asphalt plant became nonconforming. The plaintiff acquired the property in 1994 and continues to operate the nonconforming asphalt plant thereon. The plant is the only asphalt plant in the Village.

In June 2000, the Board of Trustees adopted Local Law No. 10. It provided that the plaintiff's right to operate and maintain the nonconforming asphalt plant would terminate within one year unless the plaintiff applied to the Village Zoning Board of Appeals (the "ZBA")

for an extension of the termination date, which was not to exceed five years from the date the law was adopted. The plaintiff applied for and obtained such an extension. In a determination dated May 19, 2005, the ZBA granted the maximum extension permitted by Local Law No. 10 and directed the plaintiff to terminate its asphalt operation effective July 2, 2005.

Meanwhile, the plaintiff commenced this action, inter alia, for a judgment declaring that Local Law No. 10 is invalid and unconstitutional. By an order dated June 11, 2007, this court denied the plaintiff's motion and the defendants' cross motion for summary judgment, finding that there was a question of fact as to whether the amortization period provided in Local Law No. 10 was reasonable. The denial of the plaintiff's motion for summary judgment was affirmed on appeal (59 AD3d 429). The Appellate Division found that, because the plaintiff failed to submit any evidence as to the amount that it had actually invested in the business, there remained a question of fact regarding whether the amortization period provided in Local Law No. 10 was reasonable and, thus, constitutional as applied to the plaintiff. In the absence of a finding that the law was unconstitutional as applied to the plaintiff, the Appellate Division did not reach the question of whether the brevity of the amortization period rendered Local Law No. 10 unconstitutional on its face. The plaintiff subsequently supplied evidence as to the amount that it had actually invested in the business, and both sides again move for summary judgment.

Preliminarily, the court notes that the defendants' motion does not violate the general proscription against successive motion for summary judgment since it is based on evidence that was elicited after the prior motions were denied (*see*, **North Fork Preserve, Inc. v Kaplan**, 68 AD3d 732, 733). The plaintiff's cross motion, on the other hand, is based on grounds and factual assertions that were raised or could have been raised in support of its prior motion for summary judgment (*see*, **Mendez v Queens Plumbing Supply, Inc.**, 12 Misc 3d 1064, 1066 [and cases cited therein]). In any event, neither party has established its entitlement to judgment as a matter of law.

An "amortiztion period" simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. It is, in effect, a grace period, putting owners on fair notice of the law and giving them a fair opportunity to recoup their investment (**Village of Valatie v Smith**, 83 NY2d 396, 400). Amortization periods are presumptively valid, and the owner carries a heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power (**Id**. at 401). Determining the reasonableness of an amortization period is an inherently factual inquiry with a balance to be struck between an individual's interest in maintaining the present use of his or her property and the general welfare of the community sought to be advanced by the zoning ordinance (**Lodge Hotel v Town of Erwin Zoning Board of Appeals**, Sup Ct, Steuben County, April 25, 2005, Bradstreet, J. [2005 WL 6214563], *citing* **Modjeska Sign Studies, v Berle**, 43 NY2d 468). An amortization period is designed to provide the owner with an opportunity to

recoup his or her investment and avoid substantial financial loss (**Id.**). If the owner can show that the loss suffered as a result of the removal of a nonconforming use at the expiration of the amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period must be held unreasonable (**Modjeska Sign Studies, v Berle**, *supra* at 480). Thus, the relevant inquiry is whether the plaintiff has sufficiently demonstrated that the loss suffered due to Local Law No. 10 is so substantial that it outweighs the public benefit gained thereby and whether the amortization period provides the plaintiff with an opportunity to recoup its investment and avoid substantial loss (*see*, **Lodge Hotel v Town of Erwin Zoning Board of Appeals**, *supra*).

The defendants' contention that the plaintiff has substantially recovered its investment in the nonconforming asphalt plant is based on depreciation taken by the plaintiff for income tax purposes. According to the defendants, the plaintiff invested a total of $1,265,296 in fixed assets and equipment used in the production of asphalt. Based on an analysis of the plaintiff's income tax returns and other records, the defendants contend that, as of December 2009, all but $39,963 was fully depreciated for income tax purposes and that the plaintiff's investment will be entirely depreciated before the end of 2011.

The defendants rely on **Matter of Suffolk Outdoor Adv. Co. v Town of Southampton** (60 NY2d 70) and **Philanz Oldsmobile v Keating** (51 AD2d 437) for the proposition that depreciation for income tax purposes equals recoupment of one's investment. **Matter of Suffolk Outdoor Adv. Co.**, however, is distinguishable. The petitioner in that case conceded that its investment had been fully recovered, that it had made a substantial profit, and that the offending billboards had been substantially depreciated for tax purposes. Such is not the case here. In **Philanz Oldsmobile**, the fact that the petitioner had received the full income tax depreciation was not the only factor considered by the court. In making its determination, the court also considered, inter alia, the nature of the area surrounding the subject premises; the lengthy period of time between enactment, enforcement, and implementation of the ordinance; that such ordinance was regulatory rather than prohibitory, and the minimal cost of removing the outdoor advertising signs in question.

While courts have considered whether the property in question has been fully depreciated for income tax purposes in reviewing the reasonableness of an amortization period, this factor alone has not been held to be determinative (*see*, **AVR, Inc. v City of St. Louis Park**, 585 NW2d 411, 415 [Ct App Minn], *citing* **Philanz Oldsmobile v Keating**, *supra* [and other cases cited therein]). Other factors to be considered include the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the plaintiff may relocate, the cost of such relocation, as well as any other reasonable costs which bear on the kind and amount of damages that the plaintiff may sustain (*see*, **Harbinson v City of Buffalo**, 4 NY2d 553, 563-564). The defendants have not addressed any of these other factors in support of their motion for summary judgment, relying entirely on the argument that the plaintiff's asphalt plant has been fully depreciated for income tax purposes. The court finds

that, under these circumstances, the defendants have failed to establish, prima facie, their entitlement to judgment as a matter of law. The failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853). Accordingly, the motion is denied.

The plaintiff argues in support of its cross motion that Local Law No. 10 is unconstitutional on its face because it serves no public purpose and because the amortization period is unreasonably short. As this court noted in its June 11, 2007, order denying the prior motion and cross motion for summary judgment, it is doubtful that any meaningful distinction exists between a facial and as-applied challenge under the facts of this case since it does not appear that there are any circumstances under which the Village may enforce Local Law No. 10 against someone other than the plaintiff. In any event, a litigant cannot sustain a facial challenge to a law when that law is constitutional in its application to that litigant (**Village of Valatie v Smith**, 83 NY2d at 403). Thus, any facial challenge to Local Law No. 10 must await a determination on the issue of whether the law is constitutional as applied to the plaintiff.

The plaintiff has failed to establish as a matter of law that Local Law No. 10 is unconstitutional as applied to it. Contrary to the plaintiff's contentions, the purpose of an amortization period is to provide the owner of a nonconforming use with an opportunity to recoup his or her investment (*see*, **Village of Valatie v Smith**, *supra* at 400; **Suffolk Outdoor Adv. Co. v Hulse**, 43 NY2d 483, 490), not the value of the property with improvements or even the entire investment (**Id.**). Thus, the assessed value of the plaintiff's property with improvements for property-tax purposes is of no moment. The plaintiff attempts to demonstrate that, due to the fact that the asphalt plant operated at a loss for six of the ten years between 1996 and 2005, Suffolk Asphalt was unable to recoup its investment. The plaintiff's analysis, however, fails to take into account the years from 2005 to the present, which had the effect of doubling the amortization period from five years to more than ten years (*see*, **Philanz Oldsmobile v Keating**, 51 AD2d at 441). The court finds that, under these circumstances, the plaintiff has failed to establish as a matter of law that it has not had a sufficient opportunity to recoup its investment in the nonconforming asphalt plant and avoid substantial financial loss (*see*, **Modjeska Sign Studies, v Berle**, 43 NY2d at 479). Accordingly, the cross motion is denied.

HON. ELIZABETH HAZLITT EMERSON

Dated: March 30, 2011

J.S.C.