

Incorporated Vil. of W. Hampton Dunes v Semlear

2012 NY Slip Op 30234(U)

January 12, 2012

Sup Ct, Suffolk County

Docket Number: 10-39304

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-15-10 (#005)
MOTION DATE 1-18-11 (#006)
MOTION DATE 1-20-11 (#007)
MOTION DATE 1-5-11 (#008)
ADJ. DATE 4-26-11
Mot. Seq. # 005 - MotD # 007 -MotD
006 - MotD # 008 - JT

-----X
INCORPORATED VILLAGE OF WEST
HAMPTON DUNES, Individually and *in parens*
patriae on behalf of its Residents,

Plaintiff,

- against -

JON S. SEMLEAR, FREDERICK K.
HAVEMEYER, ERIC SHULTZ, EDWARD J.
WARNER, JR., and WILLIAM PELL, as
Trustees of the Freeholders and Commonalty of
the Town of Southampton, and TOWN OF
SOUTHAMPTON, TOWN BOARD OF THE
TOWN OF SOUTHAMPTON,

Defendants.
-----X

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Upon the reading and filing of the following papers in this matter: (1) Plaintiffs' Notice of Petition dated November 16, 2010; (2) Notice of Motion/Order to Show Cause by the defendant Trustees, dated December 13, 2010, and supporting papers (including memorandum of law dated March 2, 2011); (3) Notice of Motion by the defendant Town, dated December 14, 2010, supporting papers; (4) Memorandum of Law in opposition dated January 24, 2011; (5) Sur- Reply Affirmation by the defendant Town, dated February 24, 2011, and supporting papers; (6) Notice of Motion/Order to Show Cause by the plaintiff, dated December 13, 2010, and supporting papers; (7) Other - Affidavits by the defendant Trustees, dated December 22, 2010, the defendant Town of Southampton, dated December 29, 2010, and the non-parties dated January 4, 2011 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion of the defendants/respondents Jon Semlear, Frederick K. Havemeyer, Eric Shultz, Edward J. Warner, Jr., and William Pell as Trustees of the Freeholders and Commonalty of the Town of Southampton, individually and as trustees, for an order pursuant to CPLR

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3211 and 404(a) dismissing the complaint of the plaintiffs is granted to the extent that those portions of the complaint which request a declaration that the Trustees may not retain, deposit, control, manage, or expend any moneys coming into the hands of the Trustees and that the Trustees may not retain or compensate private counsel, or otherwise cause the Town or the Trustees to become indebted to private counsel for legal services rendered, except by authority of the Town Board and Town Attorney, and a further declaration that the Trustees may not commence or prosecute litigation without the authorization of the Town Board and without being subject to the authority and control of the Town Attorney are dismissed; and it is further

ORDERED that the motion of the defendants/respondents Jon Semlear, Frederick K. Havemeyer, Eric Shultz, Edward J. Warner, Jr., and William Pell as Trustees of the Freeholders and Commonalty of the Town of Southampton, individually and as trustees, for an order pursuant to CPLR 3211 and 404(a) dismissing the petition brought pursuant to Article 78 of the CPLR is granted; and it is further

ORDERED that the motion of the defendants Town of Southampton and the Town Board of the Town of Southampton, for an order pursuant to CPLR 3211 and 404(a) dismissing the complaint of the plaintiffs is granted to the extent that those portions of the complaint which request a declaration that the Trustees may not retain, deposit, control, manage, or expend any moneys coming into the hands of the Trustees and that the Trustees may not retain or compensate private counsel, or otherwise cause the Town or the Trustees to become indebted to private counsel for legal services rendered, except by authority of the Town Board and Town Attorney, and a further declaration that the Trustees may not commence or prosecute litigation without the authorization of the Town Board and without being subject to the authority and control of the Town Attorney are dismissed; and it is further

ORDERED that the motion of the respondents Town of Southampton and the Town Board of the Town of Southampton, for an order pursuant to CPLR 3211 and 404(a) dismissing the Petition brought pursuant to Article 78 of the CPLR is granted; and, it is further

ORDERED that the motion of the plaintiffs/petitioners, the Incorporated Village of West Hampton Dunes, for an order pursuant to CPLR 602(a), granting joint pre-trial case administration and joint trial for the above captioned action with the matters known as Semlear, *et al* -v- Albert Marine Construction, Inc., *et al* (Index No. 10-11287) and Semlear, *et al* -v- Incorporated Village of Quogue (Index No. 10-30131) is granted to the extent that the matters shall be tried jointly but not consolidated; and, it is further

ORDERED that a separate note of issue and bill of costs shall be filed in each action and that separate court fees shall be paid for each of the actions.

Plaintiff/Petitioner, Incorporated Village of West Hampton Dunes, (“the Village”) individually and *in parens patriae* on behalf of its residents brings this hybrid action/proceeding for declaratory judgments and for relief under CPLR Article 78. The Village seeks an order declaring and adjudging that Jon Semlear, Frederick K. Havemeyer, Eric Shultz, Edward J. Warner, Jr., and William Pell as Trustees of the Freeholders and Commonalty of the Town of Southampton, (“the Trustees”) have no lawful governmental or regulatory power, duties or authority over the placement and grading of sand and

earth and the development, construction, maintenance and use of structures and lands located anywhere within the ocean beaches of the Village, including without limitation, management of any of the activities or uses reserved to the inhabitants of the Town under the Act of 1818, and that any attempt by the Trustees to exercise any such power, duties or authority within the boundaries of the Village, including, without limitation, enforcement of any provisions of the "Trustee Blue Book", is unlawful, unenforceable, null and void. The Village seeks a judgment declaring and adjudging that the Trustees may not retain, deposit, control, manage, or expend any moneys coming into the hands of the Trustees, regardless of the source, but rather must direct and relinquish all such monies to the Town to be deposited in duly designated Town accounts, under the authority and control of the Town and Town Board. Finally, the Village seeks a judgment declaring and adjudging that the Trustees may not retain or compensate private counsel, or otherwise cause the Town or the Trustees to become indebted to private counsel for legal services rendered, except by authority of the Town Board and Town Attorney, and further declaring that the Trustees may not commence or prosecute litigation without the authorization of the Town Board and without being subject to the authority and control of the Town Attorney.

Pursuant to Article 78 of the CPLR, the Village seeks to compel the Town of Southampton ("the Town") and the Town Board of the Town of Southampton ("the Board") to assume and exercise independent management, dominion and control over all monies that have, or in the future may, come into the hands of the Trustees, to subject all such monies to lawful controls, practices and procedures regarding the maintenance, accounting, budgeting, use, or expenditures of same in full compliance with the mandates of the Town Code and New York State law, to restrict and prohibit the Trustees from continuing the allegedly unlawful maintenance of independent accounts and to require the Trustees to identify, relinquish and deliver unto the Town all monies presently deposited or secured under their separate independent dominion or control. Additionally, pursuant to Article 78 of the CPLR, the Village seeks to compel the Town, the Board and Town Attorney to exercise exclusive control over the retention and compensation of private counsel in connection with the prosecution or defense of any action or lawsuit on behalf of the Town or the Trustees, to restrict and prohibit the Trustees from the allegedly unlawful and unauthorized retention of counsel, from the expenditure of public monies in compensating counsel, and to restrict and prohibit the Trustees from independently commencing or prosecuting litigation without the authority of the Board.

Defendant Trustees move to dismiss each and every cause of action in the complaint pursuant to CPLR 3211 and 404 (a) on the grounds that the Village lacks standing to make claims in its individual capacity regarding the manner in which the Trustees manage the public funds entrusted to them, and as *parens patriae* for its citizens. Moreover, the Trustees argue that petitioner cannot demonstrate a clear legal right to relief in its Article 78 *mandamus* action because the Village does not seek to compel the Board to perform a ministerial duty but to exercise their discretion in a way the Village desires them to act. Finally, the Trustees aver that the declaratory portions of the complaint must be dismissed on the merits, because the Trustees have the power to regulate ocean beaches, both within and without the boundaries of the incorporated villages located within the town.

The defendant Town and Town Board move to dismiss the complaint/petition pursuant to CPLR 3211 (a)(1) and (7) and 404 (a) on the grounds that documentary evidence exists which mandates the financial relationship and powers between the Town and the Trustees and that the rights of the Trustees

to an easement in favor of public access to the ocean beaches was recognized and agreed to by the Village.

On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; *Scoyni v Chabowski*, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; *Lucia v Goldman*, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]; *DaCosta v Trade-Winds Envtl. Restoration, Inc.*, 61 AD3d 627, 628, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Thomas v Lasalle Bank N. A.*, 79 AD3d at 1017; *Scoyni v Chabowski*, 72 AD3d at 793; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]).

“The town of Southampton, Suffolk county, N.Y., was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. The Dongan patent, after vesting all the undivided land within the town limits in twelve trustees, provides as follows: ‘and that they and their Successors by the name of Trustees of the freeholders and commonalty of the town of Southampton be and shall be forever in future times, persons able and Capable in law to have perceive receive and possess not only all and singular the premises but other messuages lands Tenements Privileges Jurisdictions franchises and hereditaments of whatsoever kind or species ... to plead and be impleaded answer and to be answered unto defend and be defended they are and may be Capable in whatsoever place and places and before whatsoever Judges and Justices or other persons or officials of his said Majesty his heirs and Successors in all & all manner of actions.’ ... The trustees named in the patent, and their successors in office, became, were and now are trustees of the town in the execution of the trust thus created, being vested by the patent with all the powers necessary for the proper discharge of their duties. ... The trustees have power under the charters to employ counsel when in the proper discharge of their duties the aid of counsel may be deemed to be necessary. ... The doctrine...to the effect that the town board alone can employ an attorney, has no application to this case where, as has been pointed out, the patent expressly empowers the trustees ‘to plead and be impleaded,’ etc.” (*People v Lister*, 106 AD 61, 62 - 65, 93 NYS 830 [2d Dept 1905]). “[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power” (*Knapp v Fasbender*, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees have the status of trustees and that of public officials, making them accountable and responsible and subject to the remedies of section 51 of the General Municipal Law with respect to all actions involving public interest; however, the exercise of their powers in relation to the making of contracts does not require a resolution or approval of the Town Board (*see id* at 234). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see People v Lagana*, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied*, 8 NY3d 882, 832 NYS2d 494 [2007]).

Although “[i]t is well established that a taxpayer action pursuant to section 51 of the General Municipal Law lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes” (*Mesivta of Forest Hills Inst., Inc. v City of New York*, 58 NY2d 1014 1016, 462 NYS2d 433 [1983] [citations omitted]), it is clear that the law should not be used as a tool to review or correct technical or procedural irregularities by governmental bodies (see *Council of the City of New York v Giuliani*, 5 AD3d 330, 773 NYS2d 557 [1st Dept 2004]; *Starburst Realty Corp. v City of New York* 125 AD2d 148, 512 NYS2d 60 [1st Dept 1987]). Unless such lawsuits are limited to those acts done without power or involving corruption, fraud or bad faith amounting to fraud, the discretionary acts of all local officials and municipal bodies would be subject to review by the courts at the suit of the taxpayers, “a result which would burden the courts with litigation, without increasing the efficiency of local administration” (*Talcott v The City of Buffalo*, 125 NY 280, 288, 1891 NY Lexis 1482 [1891]; see *Mesivta of Forest Hills Inst., Inc. v City of New York*, *supra*).

The Trustees are permitted to enter into contracts, take action necessary to preserve the interests of the public they serve, and hire counsel to defend or commence lawsuits in furtherance of preserving the interests of the public as a result of the patent and subsequent legislative action or “non-action”. The budgeting and disbursement procedures employed by the Town Board comply with the law as is indicated herein above. Plaintiffs/Petitioners have not sufficiently established that they have a legally cognizable cause of action against the Trustees, the Board, and the Town with regard to their claims in connection with the Trustees hiring of counsel, management, retention, control or expenditures of public funds, or the commencement or prosecution of litigation. Accordingly, those causes of action enumerated in the complaint and those brought pursuant to the Article 78 petition in connection therewith are dismissed.

The Trustees may retain, deposit, control, manage, or expend any moneys coming into their hands, regardless of the source, and are not required to direct and relinquish all such monies to the Town to be deposited in duly designated Town accounts, under the authority and control of the Town and Town Board; and the Trustees may retain or compensate private counsel, or otherwise cause the Town or the Trustees to become indebted to private counsel for legal services rendered, without the authority of the Town Board and Town Attorney, and the Trustees may commence or prosecute litigation without the authorization of the Town Board and without being subject to the authority and control of the Town Attorney.

Inasmuch as questions of fact exist as to the extent of the authority the Trustees may have over the beaches within the incorporated village and as to whether their powers are limited to narrowly defined activities, the motion to dismiss those portions of the complaint which seek a declaratory judgment in connection with the powers, authority and control of the Trustees over the placement and grading of sand and earth and the development, construction, maintenance and use of structures and lands located anywhere within the ocean beaches of the Village, including without limitation, management of any of the activities or uses reserved to the inhabitants of the Town under the Act of 1818, is denied.

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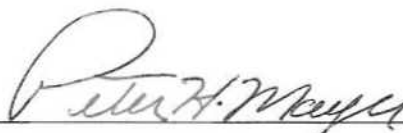
Finally, there are common questions involved in each of the three matters the Village seeks to join for trial¹, that is, the extent and scope of the Trustees' regulatory scope and authority with respect to the ocean beaches within the Town and whether the Trustees' regulatory powers exist or apply within the boundaries of an incorporated village. Accordingly, the motion of the plaintiff which seeks to join the three matters for pre-trial case administration and trial is granted to the extent that the matters are joined, but not consolidated, for trial.

Plaintiff/Petitioner is directed to serve a copy of this order upon each of the parties in the actions being joined as well as upon the Calendar Clerk of this court.

Submit Judgment.

Dated: _____

1/12/12



PETER H. MAYER, J.S.C.

¹Semlear, *et al -v-* Albert Marine Construction, Inc., *et al* [Index No. 10-11287]; Semlear, *et al -v-* Incorporated Village of Quogue [Index No. 10-30131]; and, the above captioned matter