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Index No: 19256/2011

SHORT FORM ORDER

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

MOT. SEQ: 001 MD
Amended

PRESENT:

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

Richard K. Korzenko,	:	Alicia O'Connor
	:	Islip Town Attorney
Plaintiff(s),	:	By: John R. DiCioccio, Esq.
- against -	:	655 Main Street
	:	Islip, N.Y. 11751
Town of Islip,	:	
	:	Friedman, Harfenist Kraut
Defendant(s).	:	& Perlstein, LLP
		2975 Westchester Avenue, Suite 415
		Purchase, N.Y. 10577

Upon the following papers numbered 1 to 18 read on this motion to dismiss pursuant to CPLR 3211; Notice of Motion and supporting papers numbered 1-12; Affirmation in Opposition and supporting papers numbered 13-16; Replying Affidavits and supporting papers numbered 17-18; it is,

ORDERED that the defendant's motion to dismiss the plaintiff's action is denied, and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In the instant action plaintiff seeks damages from the defendant Town of Islip (hereinafter "Town") for an alleged "taking" of its property without just compensation in violation of Article 1, Section 7 of the New York State Constitution. The relevant facts are as follows:

Plaintiff is the owner of a parcel of real property located on Richmond Avenue in the hamlet of Ronkonkoma. The property has a lot area of approximately 5000 square feet and has an irregular "T" shape. The property was improved by a single family dwelling which was constructed in or around 1925 and comprised approximately 727 square feet. The property was purchased by the plaintiff in July 2004 for 200,000.00. The property is located in the Town's Residence "B" Zoning use district. In the Residence "B" district, lots are required to be a minimum of 7500 square feet in

size and have a minimum lot width of 75 feet. Following the purchase of the property, because the lot size was substandard, and because the house was constructed prior to the adoption of the Islip Tow Code, the plaintiff obtained a certificate of zoning compliance from the Town in April of 2005 which established the residence as a legal, pre-existing, non-conforming structure. Thereafter, the plaintiff applied to the Town's Zoning Board of Appeals (hereinafter ZBA) for an area variance which would allow him to construct a small addition to the residence and to add a second story. The ZBA granted the requested relief on October 3, 2006.

Plaintiff obtained a building permit in accordance with the ZBA approval for the project and commenced construction. At that point, it appears that rather than constructing the additions in accordance with the approved plans, plaintiff demolished the existing residence and commenced excavation for a new basement foundation. Due to the plaintiff's failure to construct the additions in accordance with the approved plans, the Town issued a Stop Work Order. Plaintiff was not permitted to continue reconstruction the residence because §65-15(c) of the Islip Town Code[1] requires that the reconstruction of a non-conforming structure be in conformance with the Town code. Petitioner acknowledges that he removed the structure, but alleges that he had no choice but to do so because when he began to construct the additions and discovered that the underlying structure was unsound and could not be salvaged. He additionally claims that he was advised by the Building Department not to apply for a demolition permit, but rather, to re-apply to the ZBA to reconstruct the existing residence[2].

In an attempt to rectify the situation, plaintiff reapplied to the ZBA for the area variances he required to build an entirely new residence. Public hearings were held on the new application which sought the following relief from the development standards set forth in the Town's Residence "B" zoning use district: permission to erect a dwelling (35 x 27 irrg) on a lot 1) not having required width of 75 feet throughout, 2) on a lot area of 5064 square feet instead of the required 7500 square feet, 3) having a front yard set back of 17.8 feet instead of the required 25 feet, side yard set backs of 4.6 feet and 9.8 feet instead of the required 14 feet, and total side yards of 14.4 instead of the required 28 feet. In a unanimous determination dated June 17, 2008, the ZBA denied the plaintiff's application in its entirety.

Plaintiff thereafter commenced an Article 78 proceeding to challenge the determination of the ZBA which proceeding was dismissed by Short Form Order of this Court dated January 14, 2009 (Pitts, J.). That determination was affirmed on appeal pursuant to an Decision and Order dated November 3, 2010. Plaintiff's application for leave to appeal to the Court of Appeals was thereafter denied. The instant action ensued.

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[1] Islip Town Code §65-15(c) was in effect in 2003 prior to the plaintiff's purchase of the property.

[2] Plaintiff's claim that he was told by the Building Department that he did not require a demolition permit and that he should go ahead with reconstruction was never substantiated and were determined to be lacking credibility by the ZBA.

Plaintiff's complaint alleges, inter alia, that as a result of the application of the Town code to his property the defendant has violated Article I, Section 7 of the New York State Constitution. Said another way, the defendant claims that the Town's regulations have had a confiscatory effect on his property so as to have deprived it of all economic value. Accordingly, plaintiff seeks damages for his claimed loss.

The Town now moves to dismiss the plaintiff's complaint based upon the following grounds: 1) failure to join a necessary party (the Zoning Board of Appeals) and 2) that the Plaintiff fails to state a cause of action since, according to the Town, plaintiff's hardship is self created and he never had a vested right in the property interest he claims was "taken".

"When a party moves to dismiss a complaint pursuant to CPLR §3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see ***Guggenheimer v Ginzburg***, 43 NY2d 268, 275; ***Foley v D'Agostino***, 21 AD2d 60, 64-65). In considering such a motion, the court must " 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (***Nonnon v City of New York***, 9 NY3d 825, 827, quoting ***Leon v Martinez***, 84 NY2d 83, 87-88). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19 quoting ***Sokol v Leader***, 74 A.D.3d 1180 at 1180,1181).

In the instant matter, however, the defendant Town has submitted evidentiary material in support of its motion. In such an instance, the question presented to the Court changes from whether the complaint states a viable cause of action to "whether the proponent of the pleading *has* a cause of action ..." (see, ***Guggenheimer v Ginzburg***, 43 NY2d at 275)(emphasis added). Accordingly, plaintiff's motion pursuant to CPLR 3211(a)(7) is determined using the foregoing standard.

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." The Takings Clause of the Fifth Amendment applies to State action through the Fourteenth Amendment ***(Dolan v City of Tigard***, 512 US 374, 383-384 [citing ***Chicago, Burlington & Quincy R. R. Co. v Chicago***, 166 US 226]). Article I, § 7 of the New York State Constitution provides in part that "[p]rivate property shall not be taken for public use without just compensation."

Case law has developed a great deal in this area such that not only is the physical taking of property compensable, but a regulatory taking, e.g., one involving the deprivation of use of ones property by the application of governmental regulation, is compensable as well (see, ***Penn Central Transportation Co. v. City of New York***, 438 US 104). Because of the nature of the regulatory taking and the development of the case law, the determination as to whether a taking has occurred is complex (see, ***Matter of Friedenberg v. New York State Department of Environmental Conservation***, 3 AD3d 36). Our nation's highest Court has characterized the evaluation of

regulatory takings as "essentially, ad hoc, factual inquiries" (***Tahoe-Sierra Preserv. Council v. Tahoe Regional Planning Agency***, 535 US 302, citing ***Penn Central Transportation Co. v. City of New York***, 438 US 104). The high Court has advised that it is "inappropriate to treat cases involving physical takings as controlling precedents of the evaluation of a claim that there as been a regulatory taking, and vice versa." (***Tahoe-Sierra*** at 323).

With respect to regulatory takings, the law in New York has been clear in that an owner is not entitled to compensation when the regulation that precludes the use of the land as proposed by the owner pre-existed the owner's ownership of the land. Said another way, if the owner buys land subject to a municipal restriction that precludes him from realizing his or her desired development, the owner cannot claim a taking (see, ***Gazza v. NYS DEC***, 89 NY2d 603; Matter of ***Annello v. Zoning Board of Appeals of the Village of Dobbs Ferry***, 89 NY2d 535).

This may even be the case where the subject property has been held in single and separate ownership prior to the adoption of the offending regulation (see, ***Matter of Khan v. Zoning Board of Appeals of the Village of Irvington***, 87 NY2d 344). For a period of time, some courts in New York State recognized a common-law rule which granted an automatic exemption from new dimensional regulations which were imposed on pre-existing, non-conforming lots which had been held in a non-conforming configuration prior to the adoption of the offending regulation (see, ***Siciliano v. Scheyer,*** 150 AD2d 460). In other words, an owner was "vested" with the right to develop the lot subject only to the dimensional regulations in place at the time of purchase. Otherwise, those courts held, the owner would be the victim of a regulatory taking. In ***Matter of Khan v. Zoning Board of Appeals of the Village of Irvington***, 87 NY2d 344, however, the Court of Appeals abandoned that common law rule determining that since the owner's constitutional rights were amply protected by the availability of variances or, in the instance where no variance could be obtained, through an action for an unconstitutional taking or a challenge to the denial of the requested variance.

Since the plaintiff was not entitled to an automatic exemption from the regulations that restrict the development of his property, his remaining options were to seek a variance from the applicable dimensional restrictions. The plaintiff in the instant case did seek the necessary variances, but was denied the relief requested. Since the property owner has exhausted all of his available remedies the only remaining claim that could be asserted is a claim for compensation due to a regulatory taking. To prove this claim, he must establish "that the property cannot yield an economically reasonable return as zoned." (see, ***Kransteuber v. Scheyer***, 176 AD2d 724, aff'd ***Kransteuber v. Scheyer***, 80 N.Y.2d 783).

Defendant argues that the plaintiff had no expectation of a reasonable return since he purchased a non-conforming property (as evidenced by the Certificate of Compliance), i.e., one that was subject to a statute which prevented the reconstruction of a non-conforming structure following its destruction for any reason (see, ***Islip Town Code*** §65-15(c)). Citing ***Gazza v. NYS DEC***, 89 NY2d 603 as support for this position, defendant asserts that the plaintiff has failed to state a cause of action and that his complaint is subject to dismissal as a matter of law. This Court disagrees with

the defendant's analysis of the relevant cases.

Initially, while it is true that the property owner in ***Gazza*** bought property subject to the regulations which ultimately precluded the construction of a dwelling and his claim of regulatory taking, the determination to dismiss his claim was made after a hearing on the taking issues. Moreover, the ***Gazza*** property was completely vacant land at the time of the purchase by the plaintiff. It was only after a trial that the Court declined to grant the taking claim in part because due to the specific facts that existed at the time of plaintiff's purchase, i.e. that the plaintiff purchase the property at a significant discount due to the regulations that restricted its development. Based upon the severity of the restrictions imposed on that property by the wetlands regulation and the plaintiff's knowledge of the possibility that the regulations might preclude development (as evidenced in the purchase price), the ***Gazza*** plaintiff failed to establish that he had any "investment backed expectation" of development.

The plaintiff in the instant case is situated differently factually that the plaintiff in ***Gazza***. Specifically, the plaintiff has not been afforded a trial of the takings issue. As set forth in ***Fred F. French Investing Co. v. City of New York***, 39 N.Y.2d 587, 597, "[i]t is recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put.". Furthermore, "[w]hen the onwer contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self evident an the analysis is more complex" (see, ***Friedenburg v. NYSDEC,*** 3 A.D.3d 86). Here, although the plaintiff was aware of the restrictions that burdened the property, he parcel he purchased was already improved with a single family residence which the plaintiff purchased at fair market value. Accordingly, the Court finds that these factual nuances preclude dismissal of the action on the pleadings. Rather, these factual nuances require a determination on the merits as to whether the plaintiff had any investment backed expectation at the time of his purchase and/or whether the applicable regulations deprived him of all economic return on the property (see, ***Tahoe-Sierra Preserv. Council v. Tahoe Regional Planning Agency***, 535 US 302).

A reading of the complaint, the documentary evidence and the case law, supports this Court's approach. The plaintiff's complaint alleges the cost of the acquisition of the property and that subsequent denial of his ability to construct a residence thereon caused a taking. Further the complaint alleges that there has been a reduction of property value due to the Zoning Board's failure to grant the variances to the Town Code of the subject property. In evaluating the plaintiff's complaint to determine whether he has a cause of action, it is clear that he has adequately plead his claim for an unconstitutional taking. The case law makes it clear that he now needs to establish the claim after a trial or upon summary judgment. None of the evidentiary submissions made by the defendant eliminate the possibility of the plaintiff proving, after an *ad hoc* factual inquiry, that he had some investment backed expectation of development when he purchased the property (see, ***Tahoe-Sierra Preserv. Council v. Tahoe Regional Planning Agency***, 535 US 302).

Since the summons and complaint clearly set forth a claim for a regulatory taking, and since defendant`s motion papers do not eliminate the possibility of the plaintiff proving a compensable "investment backed expectation" at the time of his purchase after a trial, the defendant's motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7) must be denied (see, ***Guggenheimer v Ginzburg***, 43 NY2d at 275).

Defendant also contends that the complaint should be dismissed due to the plaintiff's failure to name the Islip Zoning Board of Appeals as a party to the action. Defendant claims that the ZBA is the "body that issued the decision which forms the basis of Plaintiff's claims." The Court disagrees with this contention as well.

It is well settled that a determination that a particular party is a necessary party does not necessarily require dismissal. "[T]he court must consider whether the action can proceed without that party. A party who must be joined lest the action be dismissed is termed an "indispensable party." There are two significant reasons which would require the dismissal of a complaint due to the lack of an indispensable party. "First, mandatory joinder prevents multiple and inconsistent judgments relating to the same controversy. Second, joinder protects the absent party who would be 'embarrassed by judgments purporting to bind their rights or interests where had no opportunity to be heard'" (see, ***Stanley v. Amalithone Realty, Inc.***, 31 Misc.3d 995 quoting ***Saratoga County Chamber of Commerce, Inc. v. Pataki***, 100 N.Y.2d 801, 820).

The Court finds that the ZBA is neither a necessary party, nor an indispensable party. While the denial of the variances sought from the ZBA is what caused plaintiff's cause of action to accrue, they were not the actions that precluded plaintiff from developing his property. Rather, it was the Town Board's adoption and enforcement of zoning restrictions that precluded the development of the property that deprived the owner of his right to develop, if any. Since the ZBA's determinations were challenged and upheld through the Appellate Division, its determination is no longer subject to review. Accordingly, the ZBA's presence as a party to the action would neither prevent multiple or inconsistent judgments not bind the ZBA without giving it the opportunity to be heard. Instead, the sole inquiry at trial is whether the strict application of the zoning law to the plaintiff's property operated to deprive the plaintiff of his investment backed expectations in the property at the time he purchased it. Clearly, the ZBA is not a necessary or indispensable party with regard to that inquiry.

Accordingly, the motion is decided as set forth herein.

Dated: 1/24/13
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION