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Index No.: 5091-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

In the Matter of the Application of DANIEL RAPPAPORT and EVELYN RAPPAPORT,

Petitioners,

- against -

VILLAGE OF SALTAIRE, THE BOARD OF TRUSTEES OF THE VILLAGE OF SALTAIRE, ROBERT COX III, as MAYOR, and BRUCE RICH, HILLARY RICHARD, JOHN ZACCARO, JR., and ALEX CHEFETZ, as TRUSTEES, ARTHUR ORTENBERG, INDIVIDUALLY and ARTHUR ORTENBERG and ARTHUR SCHNECK, As CO-EXECUTORS OF THE ESTATE OF ELISABETH CLAIBORRNE ORTENBERG, DECEASED,

Respondents.

CASE DISPOSED: YES
MOTION R/D: 5/25/12
SUBMISSION DATE: 9/7/12
MOTION SEQUENCE NO.: 009 MG
010 MD
011 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated April 27, 2012; Affirmation in Support dated April 27, 2012; Exhibits A and B annexed thereto; Affidavit in Support dated April 25, 2012; Exhibits A through C annexed thereto; Verified Answer dated April 25, 2012; Petitioners' Reply dated May 17, 2012; Respondents' Memorandum of Law; Notice of Amended Verified Petition and Amended Verified Petition dated April 9, 2012; Exhibits A and B annexed thereto; Notice of Cross Motion dated May 17, 2012; Affirmation dated May 17, 2012; Exhibits A through C annexed thereto; Petitioners' Memorandum of Law; Respondents' Memorandum of Law; Petitioners' Reply Memorandum of Law; and upon due deliberation; it is

ORDERED, that the amended petition of Daniel Rappaport and Evelyn Rappaport,

RST

pursuant to CPLR Article 78, for a judgment reviewing and annulling the Respondents' November 15, 2010 Agreement for Removal of Restrictive Covenants from a parcel of vacant real property owned by Respondent Village of Saltaire, and reviewing and annulling Respondent Board of Trustees of the Village of Saltaire's December 5, 2010 issuance of a Negative Declaration under the State Environmental Quality Review Act for the removal of the restrictive covenants from the subject Property (009); is denied; and it is further

ORDERED, that the motion by respondents, pursuant to CPLR 3211(a)(1), (3), and (7), and CPLR 7804(f), for an Order dismissing the amended petition (008), is granted; and it is further

ORDERED, that the cross motion by petitioners, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor or petitioners and against the respondents (010), is denied.

The petitioners Daniel Rappaport and Evelyn Rappaport are the owners of the real property which has been improved with a residence and is known and located at 305 Pacific Walk, Saltaire, Fire Island, New York. The petitioners' property, which was acquired by deed dated October 14, 1999, is contiguous to the property which is the subject of this proceeding.

By deed dated February 26, 1985, the respondent Village of Saltaire (party of the second part) acquired the vacant real property that is located at the equivalent of 307 Pacific Walk, Saltaire, Fire Island, New York, from respondent Arthur Ortenberg and his wife Elisabeth Claiborne Ortenberg (now deceased). Said transfer was subject to a possibility of reverter to the Ortenbergs (party of the first part) as follows:

1. That the property shall be maintained and preserved forever by the party of the second part in its present natural state for public purposes.

2. That the party of the second part shall retain title to the property in perpetuity or as long as its existence as a municipal corporation shall continue.

3. That in the event that the property is not maintained by the party of the second part in its present natural state, or in the event that the existence of the party of the second part as a municipal corporation shall be terminated, then in either or both of such events, the property hereby conveyed shall revert to the party of the first part, their heirs and assigns.

Upon the death of Elisabeth Claiborne Ortenberg, Arthur Ortenberg, as the surviving tenant by the entirety, entered into a written agreement with the Village of Saltaire ("Village")

dated November 15, 2010, in which Ortenberg terminated the possibility of reverter and the related contingencies contained in the 1985 deed. At a December 5, 2010 meeting of the Village Board of Trustees, the Village Board approved the Agreement by issuing and adopting a SEQRA Resolution Regarding Adoption of a Resolution Releasing Covenants and Restrictions and a Resolution Approving and Authorizing Agreement for Removal of Restrictive Covenants. The petitioners then commenced the instant proceeding.

The petitioners allege that they relied upon the restrictive covenants on the subject property, specifically that the property would be maintained by the Village in its natural state for public use, when they purchased their property and subsequently attempted to improve such property. The petitioners further allege that removal of the restrictive covenants (1) adversely impacts and inhibits the use, occupancy, and value of their property; (2) was void since petitioners failed to obtain the necessary authorization from the New York State Legislature for removal of the restrictive covenants; (3) was issued without the environmental review required by SEQRA; and (4) the respondents Arthur Ortenberg, individually, and Arthur Ortenberg and Arthur Scheck, as co-executors, are without authority to remove the restrictive covenants.

Petitioners contend that the removal of the restrictions upon the subject property eliminates their "enjoyment" of the "open space and scenic resources" of such property. As noted, the 1985 deed from the Ortenbergs conveyed to the Village a fee simple subject to a possibility of reverter. The Court of Appeals has held:

> The long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed,' does not create a valid interest in favor of that third party. Plaintiff invites us to abandon this rule and adopt the minority view which would recognize an interest reserved or excepted in favor or a stranger to the deed, if such was the clearly discernible intent of the grantor . . .
>
> The overriding considerations of the public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership, which may engender litigation, persuade us to decline to depart from the settled rule.

Estate of Thomson v. Wade, 69 N.Y.2d 570, 573, 516 N.Y.S.2d 614. See also, Sacjar v. East 53 Realty, LLC, 63 A.D.3d 715, 880 N.Y.S.2d 331 ("A grantor cannot create an easement benefitting land not of the grantor at the time of the grant"). Accordingly, even if the Ortenbergs had intended to create the reverter for the benefit of their neighbors, such act would not vest enforceable rights in those neighbors since they are "strangers to the deed."

The petitioners also allege that they are entitled to the enjoyment of "open space and natural and scenic resources" because they reviewed and relied upon the 1985 deed at the time

they purchased and developed their parcel, essentially entitling them to a negative easement of light and air over the subject property. However, negative easements, unlike affirmative easements, only come into existence through written instruments. See, e.g., Cohan v. Fleuroma, 42 A.D.2d 741, 346 N.Y.S.2d 157; Eng v. Shimon, 12 Misc.3d 1174(A), 820 N.Y.S.2d 842. In addition petitioners contention that the 1985 deed vested in them, whether as part of the general public or as adjoining property owners, an interest which prevents the termination of the reverter, would be in contravention to the Rule Against the Suspension of the Power of Alienation, as codified in EPTL §9-1.1(a), as well as the Rule Against Unreasonable Restraint to the Power of Alienation (see, Metro. Transp. Auth. v. Bruken Rlty. Corp., 67 N.Y.2d 156, 167, 501 N.Y.S.2d 30, 312; see also, Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 542, 161 N.Y.S.2d 418.

During the course of this litigation, the petitioners amended the petition to assert that the parties to the to the restrictive covenant did not intend to create a possibility of reverter, which requires a positive demand, but rather, a right of reacquisition, which does not. While the distinction drawn by petitioners was correct from an historical perspective, such distinction has been supplanted by statute, and it is no longer the law and was not the law at the time of the initial 1985 transaction or the 2010 at issue in this matter.

RPAPL §1953(2) provides:

> No reverter shall occur and no possessory estate shall result by reason of such special limitation, and no right of entry shall accrue by reason of breach of such condition subsequent, but upon the happening of such a breach the person or persons who would have such possessory estate or right of entry except for this section, may maintain an action in the supreme court to compel a conveyance [. . .].

It is noted that the "right of entry" is the original name for "right of reacquisition." See, Turano, M.V., McKinney's Commentary to EPTL §6-4.6. The relevant case law does not distinguish between one and the other, but simply selects one under substantially the same facts. See, Grant v. Koenig, 67 Misc.2d 1028, 325 N.Y.S.2d 428, *aff'd* 39 A.D.2d 1000, 333 N.Y.S.2d 591 (right of reacquisition); Pike Rlty Co. LLC v. Cardinale, 21 Misc.3d 1139 (possibility of reverter); Kuzma v. City of Buffalo, 11 Misc.3d 1061, 816 N.Y.S.2d 696 ("reversionary interest"). The distinction between these terms is now invalid under the statute.

Petitioners maintain that the Village was required to obtain authorization from the New York State Legislature for removal of the restrictive covenants from the subject property. While as a general matter, a municipality may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private absent specific approval of the New York State Legislature (see, Matter of Lake George Steamboat Co. v. Blais, 30 N.Y.2d 48, 51, 300 N.Y.S.2d 336), such rule does not apply to property, such as the subject property, which has been conveyed to a municipality subject to a reversionary interest. See,

Landmark West! v.City of N.Y., 9 Misc.3d 563, 802 N.Y.S.2d 340, 350, wherein the Court observed that, "the rule is inapplicable to donated property subject to a possibility of reverter," explaining as follows:

> The rule is intended to protect the public's interest in the property by preventing local governments from diverting it from public use. When a donor retains possibility of reverter, that also restrains the donee local government; if the donee violates the terms of the gift, the donee loses the property completely. The property reverts to the donor, who can use it for any purpose, thereby depriving the donee of title and the public of any use. It would not protect the public's interest in the property to require the Legislature to consider a proposed use if the approval and conveyance only were to effectuate return of title to the private donor.

Since the subject property was conveyed to the Village subject to the Ortenberg's reversionary interest, it was not under the control of the State Legislature, and authorization for removal of the restrictive covenants is therefore not required from that entity. The amendment to the petition does not strengthen the petitioners' position inasmuch as regardless of whether the property is subject to a possibility of reverter or a right of reacquisition, it is not subject to the control and approval of the State Legislature.

The petitioners' contention that the Village failed to comply with SEQRA requirements in adopting a resolution issuing a negative declaration related to the removal of the restrictive covenants is without merit, inasmuch as the release of reverter rights from a piece of property, such as occurred here, is not an action that requires SEQRA review. See, Matter of Kuzma v. City of Buffalo, 11 Misc.3d 3 at 4, citing Briody v. Village of Lewiston, 188 A.D.2d 1017, 591 N.Y.S.2d 909, *lv. denied* 81 N.Y.2d 710, 600 N.Y.S.2d 197. It is also noted that the petitioners have failed to set forth in the petition a single significant adverse environmental impact that will occur to themselves or the subject property as a result of the challenged agreement. In fact, the subject residential parcel is completely surrounded by improved residential lots, has not been designated by the Village as open space, parkland or preserve, and has not been shown to have any recognized distinguishing attributes. The real crux of the petitioners' complaint with respect to the agreement between the respondents, is the allegation that it may have an economic impact upon the value of petitioners' properties. However, "with respect to SEQRA claims in particular, a challenger 'must demonstrate that it will suffer an injury that is environmental and not solely economic in nature." Matter of Village of Canajoharie v. Planning Bd. Of the Town of Florida, 63 A.D.3d 1498, 1501, 882 N.Y.S.2d 526, 529, *citing*, Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433, 559 N.Y.S.2d 947. For all of the above reasons, the transaction at issue here is not an event that would trigger SEQRA review, and the petition fails to identify any specific, direct, adverse environmental impact from the subject transaction.

The petitioners also maintain that the respondents Arthur Ortenberg and/or co-executors

of the Estate of Elisabeth Claiborne Ortenberg were without the power and authority to terminate the reverter. However, the facts of this action reveal this allegation to be without merit. The Ortenbergs acquired the subject property as husband and wife from the Village on October 7, 1984, conveying it back to the Village by the subject 1985 deed, which reserved the possibility of reverter. "A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common." EPTL §6-2.2(b).

In In re Kwesit's Estate, 32 Misc.2d 601, 223 N.Y.S.2d 595, 601, the Court held, "An interest in real property acquired by a husband and wife as purchasers under a contract of sale creates a tenancy by the entirety. Upon the death of either spouse, the survivor is entitled to a conveyance [from the seller]"). In the instant matter, upon the death of Elisabeth Claiborne Ortenberg, Arthur Ortenberg became the sole owner of the possibility of reverter by survivorship. See, In re Maguire's Estate, 251 A.D.337, 339, 296 N.Y.S.528. Accordingly, Arthur Ortenberg had complete independent, undivided authority to terminate the reverter interest.

Based on the foregoing, the petitioners have failed to demonstrate a basis to annul the respondents' November 15, 2010 Agreement For Removal of Restrictive Covenants for the subject property, or the respondent Board of Trustee's issuance of a Negative Declaration under SEQRA for the removal of the restrictive covenants from the subject property. The respondents however, have demonstrated their entitlement to a dismissal of the petition.

The foregoing constitutes the Order of this Court.

Dated: April 1, 2013

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.