SHORT FORM ORDER

INDEX NO.: 0035057/2011
SUBMIT DATE: 4-24-2013
MTN. SEQ.#: 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 3/26/2012
MOTION NO.: MD

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EWA LOSKOT-D'SOUZA, CORA OF L.I., INC., CENTER FOR ADDICTION RECOVERY AND EMPOWERMENT, LLC,

Plaintiffs,

-against-

TOWN OF BABYLON,

Defendant.

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Upon the following papers numbered 1 to 34 read on this application for an order dismissing the complaint; Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-34; Replying Affidavits and supporting papers ____; Other ____; it is

ORDERED that the application by the defendant, Town of Babylon, for an order dismissing the complaint is denied.

The following facts are taken from the Affirmation of plaintiffs' counsel in opposition to the motion to dismiss the Verified Complaint dated April 17, 2013, and from the Verified Complaint. According to counsel's affirmation, The Center for Addiction, Recovery, and Empowerment, LLC ["CARE"], is a state authorized and licensed facility providing essential care and counseling services to recovering drug users, alcohol users, and others. The subject of the lawsuit involves property located within the Town of Babylon ["the Town"], located at 400 Great Neck Road in Copiague ["the property" or "the premises"], that was purchased by the plaintiff Ewa Loskot-D'Souza in December of 2007 with the intended purpose of operating CARE from that location.

Plaintiffs' counsel admits that the property is located primarily in a residential setting. The plaintiffs' prior real estate and corporate counsel advised the plaintiffs, incorrectly, that the property

was zoned and/or could be used for the plaintiffs' intended use to provide care and counseling services to recovering drug and alcohol users. Plaintiffs' counsel states, upon information and belief, that before title closed on the property in late 2007 the Town led the plaintiffs to believe that any permits or approvals needed to conduct their business on the property would be granted.

The plaintiffs filed an application for a change of use with respect to the property on January 3, 2008. On January 9, 2008, the application was deemed incomplete as the applicant needed Planning Board Site Plan Review for a change of use. Plaintiffs' counsel contends that Town officials possessing decision and policy making authority indicated that the application would never be granted due to community opposition to the operation of CARE at the premises. As the plaintiffs attempted to comply with new and escalating requirements imposed by the Town to gain the necessary approvals, further requirements were imposed making compliance impossible and making further efforts to obtain a change of use futile. Plaintiffs claim that the escalating requirements were based on a select[ive] and discriminatory enforcement basis, without notice or opportunity to be heard, and in violation of the plaintiffs' substantive and procedural due process rights and right to equal protection under the laws.

The Verified Complaint makes the following additional factual allegations. In March of 2008, the plaintiff received a phone call from a representative of the Town Fire Marshall's Office who told her that "her kind of clients" were unwelcome in the Town and that there was opposition to permitting any use of the property for the intended purpose. The caller allegedly stated that the plaintiffs' application would never be granted. In or about October or November of 2008, the plaintiff alleges that she met with Ann Marie Jones, Town Commissioner of Planning and Development. Jones stated that the plaintiffs' applications "would likely never be approved" because of the nature of the proposed practice and clientele and informal community opposition. Jones is alleged to have stated that the purchase of the property should never have gone forward without conditions.

The plaintiffs also allege that the Town purported to bid on property located at 751 Broadhollow Road, Amityville within the Town for use as the Town's Drug and Alcohol Services Department with no intention of actually purchasing that property. Rather, the Town made overtures to purchase the Broadhollow Road property for the sole purpose of scuttling the plaintiffs' ability to purchase it as an alternate site for its counseling center. The Town's actions allegedly eliminated the plaintiffs from consideration for the property. Although not included in the Verified Complaint, counsel's affirmation states that the Town's previous Director of Alcohol and Substance Abuse told the plaintiffs that the Town tried to block the plaintiffs from purchasing the alternate site at 751 Broadhollow Road by out-bidding the plaintiffs. Once the alternate site was off the market the Town did not consummate the transaction.

Plaintiffs allege that these actions violated the plaintiffs' rights to due process and equal protection by impeding the plaintiff from utilizing the Copiague property and from purchasing an alternate site on account of selective, discriminatory, arbitrary and capricious policy. The Verified Complaint sues under 42 U.S.C. § 1983 for the alleged constitutional violations. Regarding the due process claims under the Fourteenth Amendment, the plaintiffs claim that they have a property interest in the Copiague property and in their right to a special use permit and/ or a change of use,

and to purchase alternate property in Babylon (*see generally* ***Bower Associates v. Town of Pleasant Valley,*** 2 N.Y.3d 617, 814 N.E.2d 410, 781 N.Y.S.2d 240 [2004] [holding that in order state a cognizable due process violation the plaintiff must have a property interest in the right sought to be vindicated]). The Verified Complaint alleges that the Town's conduct in barring, prohibiting, limiting, restricting, discouraging or denying access to the application process constituted de facto denial of such applications, and/or full objective access to the application process in violation of the state and federal constitutions.

The first basis for the Town's dismissal motion is that the controversy is not justiciable since the Town never arrived at a final decision on the plaintiffs' land use application that resulted in a concrete injury to the plaintiffs (*see* ***Town of Orangetown v. Magee***, 88 N.Y.2d 41, 50, 643 N.Y.S.2d 21,665 N.E.2d 1061 [1996]). Rather, the plaintiffs' single application dated January 3, 2008, was marked incomplete on January 9, 2008. Thus, argues the Town, the controversy is not ripe for review.

In order to meet the "real case or controversy" threshold, there must be a final determination on the application (***Waterways Dev. Corp. v. LaValle***, 28 A.D.3d 539, 813 N.Y.S.2d 485, 486 [2006] [holding that under New York law, a claim is not ripe if a governmental body has yet to render a "final determination as to the validity" of a proposed project]). The final decision requirement applies to land use disputes arising under New York law *(see* ***Church of St. Paul & St. Andrew v. Barwick***, 67 N.Y.2d 510, 505 N.Y.S.2d 24, 496 N.E.2d 183, 189–90 [1986] [finding that as-applied claims under the First Amendment of the New York State and Federal Constitutions unripe based on plaintiff's failure to obtain a final decision, where the plaintiff had yet to seek administrative approval of its "rebuilding program"]).

"A final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations." (***S & R Dev. Estates, LLC v. Bass***, 588 F.Supp.2d 452, 461 [S.D.N.Y.2008]; *see also* ***Goldfine v. Kelly***, 80 F.Supp.2d 153, 159 [S.D.N.Y. 2000] ["In order to have a final decision, a 'development plan must be submitted, considered, and rejected by the governmental entity.' "]; ***Waterways***, 28 A.D.3d at 540-41 [holding that case was not ripe, because "[t]he plaintiff ha[d] not applied for a building permit for the residential units involving the variance at issue" and "[t]herefore, there [had] been no final determination as to the validity thereof"]).

Based on the alleged representations made to the plaintiffs by the Director of Planning and Development, Ms. Jones, and an official from the Town Fire Marshall's office, the plaintiffs argue that they are excused from the final determination requirement since further efforts to obtain a change of use for the property would have been futile, triggering an exception to the final determination requirement (*see* ***Counties of Warren and Washington Indus. Development Agency v. Village of Hudson Falls Board of Health***, 168 A.D.2d 847, 565 N.Y.S.2d 236 [3d Dept.1990]; ***Southview Associates, Ltd. v. Bongartz,*** 980 F.2d 84 [2d Cir.1992] [discussing futility exception]; *see also* ***Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City***, 473 U.S. 172, 192–193, 105 S.Ct. 3108 [1985]). Notably, the Plaintiffs' Verified Complaint containing the allegations about the futility of plaintiffs proceeding further with the application was uncontradicted by the defendant Town.

Although demonstrating the futility of completing a land use application is not an easy hurdle to overcome (*see generally*, ***Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City***, *supra*), at this early stage, and in light of the uncontradicted assertions in the Verified Complaint to the effect that the Town continually imposed escalating requirements to deprive the plaintiffs of access to the permit process, dismissal of the Verified Complaint on the basis that the controversy is not justiciable is premature.

A motion to dismiss pursuant to **CPLR** 3211(a) (7) will not succeed if, taking all facts alleged as true and according them every possible inference favorable to the nonmoving party, the complaint or counterclaims state in some recognizable form any cause of action known to our law (*see* ***Leon v. Martinez***, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; ***Fisher v. DiPietro***, 54 A.D.3d 892, 894, 864 N.Y.S.2d 532; ***Clement v. Delaney Realty Corp.***, 45 A.D.3d 519, 521, 845 N.Y.S.2d 423; ***Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP***, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231).

To state a substantive due process claim, the plaintiffs must satisfy a two-part test. First, claimants must establish a cognizable property interest, meaning a vested property interest, or "more than a mere expectation or hope" to obtain a governmental benefit or privilege; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to the benefit sought (***Bower Associates v. Town of Pleasant Valley,*** 2 N.Y.3d 617, 814 N.E.2d 410, 781 N.Y.S.2d 240 [2004], *citing* ***Town of Orangetown v. Magee***, 88 N.Y.2d 41, 52, 643 N.Y.S.2d 21, 665 N.E.2d 1061 [1996] [internal quotation marks omitted]). Second, claimants must show that the governmental action was wholly without legal justification (*id.* at 53, 643 N.Y.S.2d 21, 665 N.E.2d 1061).

While it is highly doubtful, in view of the admittedly residential character of the neighborhood, that the plaintiffs had a property interest in a special use or change of use permit for the operation of the CARE endeavor on the property (***Bower Associates,*** *supra*; ***Medford Real Properties v. Town Bd. of Town of Brookhaven***, 23 Misc.3d 303, 871 N.Y.S.2d 864 [N.Y.Sup. 2008]), the plaintiffs do have a property interest in the Copiague property itself sufficient to withstand a dismissal motion on their due process claims, at least at this early, pre-discovery juncture.

Regarding the equal protection claim, a violation of equal protection sounding in selective enforcement arises where " first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (***Fields v. Village of Sag Harbor,*** 92 A.D.3d 718, 938 N.Y.S.2d 611 [2d Dept. 2012], *citing* ***Bower Assoc. v. Town of Pleasant Val.***, *supra* at 631; *see* ***Darby Group Cos., Inc., Distribs. v. Village of Rockville Ctr.***, 43 A.D.3d 979, 980–981, 842 N.Y.S.2d 75). "The person must be singled out for an impermissible motive not related to legitimate governmental objectives, which could include personal or political gain, or retaliation for the exercise of constitutional rights" (***Sonne v. Board of Trustees of Vil. of Suffern***, 67 A.D.3d 192, 203–204, 887 N.Y.S.2d 145 [citations omitted]).

While sparse on the facts concerning the "others similarly situated" component of their equal protection claim (*see* ***Fields v. Village of Sag Harbor***, *supra*) the Verified Complaint contains enough facts to withstand a challenge to the sufficiency of its equal protection claim by alleging that the Town used impermissible [discriminatory, arbitrary] considerations in refusing to entertain the plaintiffs' land use application (*see* ***Kreamer v. Town of Oxford,*** 96 A.D.3d 1130, 946 N.Y.S.2d 284 [3d Dept. 2012]).

Regarding the Town's argument that the action is barred by the three year period of limitations for civil rights actions commenced pursuant to § 1983, on the limited record here the motion is premature. A defendant who seeks dismissal of a complaint pursuant to **CPLR** 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (***see Benjamin v. Keyspan Corp*** ., 104 A.D.3d 891). The burden then shifts to the nonmoving party to raise a question of fact as to whether the action was actually commenced within the applicable limitations period (***see Williams v. New York City Health & Hosp. Corp.***, 84 AD3d 1358).

In support of this branch of its motion, the Town argues that the statute of limitations began to run when the plaintiffs knew or had reason to know the injury which is the basis of the action. In an attorney's affirmation the Town proffers, without reference to proof in admissible form, that such accrual date was more than three years before the action was commenced on November 10, 2011. The affirmation of the Town's attorney was insufficient to establish that the plaintiffs' action is time barred (***Warrington v. Ryder Truck Rental, Inc.,*** 35 A.D.3d 455, 826 N.Y.S.2d 152 [2d Dept. 2006]; *cf.* ***Davey v. Dolan***, 46 A.D.3d 854, 851 N.Y.S.2d 576 [2d Dept.2007)] [finding affirmation of moving defendant's attorney sufficient to support summary judgment since based upon attorney's personal knowledge of facts and where supported by documentary evidence]).

In any event, the Verified Complaint alleges, without contradiction from the Town, that from January 2008 through and including November 13, 2008, the plaintiffs continued to have direct dealings and communications with Town officials, Departments and Boards with regard to the plaintiffs' land use applications. This allegation may or may not be true. However, on a motion to dismiss a complaint, the court is obliged to take all facts alleged as true and accord them every possible inference favorable to the nonmoving party (***Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC,*** --- N.Y.S.2d ----, 2013 WL 2501738 [2d Dept.]). In doing so, the Town's motion to dismiss based on the expiration of the statute of limitations is likewise denied without prejudice to renew upon the completion of discovery.

DATED: 18 June 2013

HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION