deZafra v Town of Brookhaven Planning Bd.
2013 NY Slip Op 31709(U)
July 3, 2013
Sup Ct, Suffolk County
Docket Number: 34733/2012
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Robert deZafra, Katherine Downs, Cynthia Barnes, Luci Betti Nash and Stephen Nash as Taxpayers and Members of the Coalition for the Future of Stony Brook Village, and The Coalition for the Future of Stony Brook Village,

Petitioners,

-against-

The Town of Brookhaven Planning Board, The Town of Brookhaven, Eagle Realty Holdings Inc. and Ward Melville Heritage Organization, Ltd.,

Respondents.

Index No.: 34733/2012

Attorneys [See Rider Annexed]

Motion Sequence No.: 001; MD
Motion Date: 12/6/12
Submitted: 3/20/13

Motion Sequence No.: 002; MD
Motion Date: 12/28/12
Submitted: 3/20/13

Motion Sequence No.: 003; MG
Motion Date: 2/6/13
Submitted: 3/20/13

Motion Sequence No.: 004; MG; CDSUBJ
Motion Date: 2/6/13
Submitted: 3/20/13

Upon the following papers numbered 1 to 62 read upon these motions to dismiss: Notice of Motion and supporting papers, 1 - 3; 4 - 26; Notice of Cross Motion and supporting papers, 27 - 35, 36 - 45; Answering Affidavits and supporting papers, 46 - 50; Replying Affidavits and supporting papers, 51 - 57, 58 - 59, 60 - 62; it is

ORDERED that the motion (#003) by respondents/defendants Town of Brookhaven ("Planning Board") and Town of Brookhaven ("Town"), for an order, pursuant to CPLR 3211, dismissing the petition/complaint is granted; and it is further

ORDERED that the motion (#004) by the respondents/defendants Eagle Realty Holdings, Inc. ("Eagle Holdings"), and Ward Melville Heritage Organization Ltd ("Ward Melville") for an order pursuant to CPLR 3211 and 7804(f), dismissing the petition/complaint is granted.

Petitioners/plaintiffs, consisting of individuals who are residents and taxpayers of the County of Suffolk and the Coalition for the Future of Stony Brook ("Coalition"), an unincorporated not-for-profit community group, commenced this amended proceeding (#002) pursuant to CPLR Articles 78 and 30, General Municipal Law § 51, and Town Law §65 for an order/judgment declaring unlawful, illegal, arbitrary and capricious, null and void, and ultra vires, the approval by the Planning Board, on October 15, 2012, of the amended site plan application for the Stony Brook Post Office Expansion; declaring unlawful, illegal, arbitrary and capricious, null and void, and ultra vires, the so-ordered stipulation of settlement, dated November 16, 2011, entered into by the respondents/defendants Eagle Holdings, and Ward Melville with the respondent/defendant Planning Board; declaring the actions of the respondent/defendant Planning Board unlawful, and in violation of the Open Meetings Law. The Planning Board and Town now move (#003) to dismiss the proceeding/action pursuant to CPLR 3211 (a) (3), (5), (7) and (10). In support of the motion, the Planning Board and Town submit, *inter alia*, their attorney's affirmation, Planning Board findings, dated October 15, 2012, Planning Board State Environmental Quality Review Act ("SEQRA") findings statement, dated May 5, 2012, the so-ordered stipulation of settlement dated November 16, 2011, Town Board Resolution 2011-01, approved January 6, 2011 and Certificate of Occupancy #265936, issued to Ward Melville. Eagle Holdings and Ward Melville also move (#004) to dismiss the proceeding/action pursuant to CPLR 3211 (a) (1), (2), (7) and (10), and 7804(f). In support of the motion they submit, *inter alia*, their attorney's affirmation, a copy of the amended petition/complaint, a letter from the attorney for the United States Postal Service, dated August 17, 2011; Certificate of Occupancy #265936, issued to Ward Melville, and the so-ordered stipulation of settlement dated November 16, 2011. In opposition to these motions, petitioners/plaintiffs submit, *inter alia*, their attorney's affirmations, copies of correspondence, Planning Board SEQRA findings statement, dated May 5, 2012; so-ordered stipulation of settlement, dated November 16, 2011, and the affidavit of Louise W. Harrison, sworn to November 29, 2012.

The subject property is a 7.871 acre parcel, and the application which is the subject of this litigation involves the expansion of the existing United States Post Office in Stony Brook, New York, the addition of a cultural center and 893 square feet of additional retail space. The site plan was initially submitted in 2000 and was approved at that time. Litigation followed, ultimately resulting in a decision from the Appellate Division, Second Department (***Matter of Coalition For the Future of Stony Brook, et al v Reilly, et al.,*** 299 AD2d 481, 750 NYS2d 126 [2002]) which remitted the matter to the Planning Board for the preparation of an Environmental Impact Statement and other proceedings consistent with SEQRA as it deemed appropriate. In 2005, a Final Environmental Impact Statement ("FEIS") was submitted to the Planning Board. Construction having been almost completed, the document focused on the impacts of the project. The Planning Board deemed the FEIS inadequate. A new FEIS was prepared between 2008 and 2011 and submitted to the Planning Board. In May of 2011, the Planning Board adopted the FEIS and findings and approved the site plan. Eagle Holdings and Ward Melville took issue with some of the findings made by the Planning Board, and filed an Article 78 proceeding challenging the findings and seeking to clarify certain mitigation measures set forth in the FEIS. Petitioners/plaintiffs moved to intervene in that proceeding, but thereafter withdrew their motion. The Article 78 proceeding was settled by a so-ordered stipulation of settlement, dated November 16, 2011.

The stipulation of settlement provided that:

> a. Regarding FEIS mitigation measures 1 and 4, since the project was complete, including the landscaping, it was shown that removal of all vegetation from the slope would have a negative effect on its stability. The stipulation requires that only non-native species be replaced.
>
> b. Regarding FEIS mitigation measure 6, lighting was to be modified on the Post Office site if permitted. The request by the respondent/defendant Eagle Holdings to the Post Office was denied, as the Post Office invoked the supremacy clause which makes it immune from local regulation. Changes in lighting would be required only for the cultural center portion of the property.
>
> c. Regarding FEIS mitigation measure 5, it was recommended but not required that pedestrians be allowed to access the adjacent County Park. Access was not granted and the stipulation confirms that fact.

On May 21, 2012, June 18, 2012 and July 17, 2012 public hearings were held, and the public had the opportunity to testify with regard to the amended site plan application. On October 23, 2012, the respondent/defendant Planning Board approved the amended site plan application. Thereafter, petitioners/ plaintiffs filed this proceeding (#001) on November 14, 2012. On January 13, 2013, the final certificate of occupancy for the site, that for the Educational and Cultural Center, was issued under #265936.

On a motion to dismiss pursuant to CPLR 3211 and 7804 (f), the petition/complaint alone must be considered, and all of its allegations are deemed true and afforded the benefit of every favorable inference (***Bloodgood v Town of Huntington***, 58 AD3d 619, 871 NYS2d 644 [2d Dept 2009]; *see* ***1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City***, 62 AD3d 1004, 880 NYS2d 133 [2d Dept 2009]). Moreover, on a motion to dismiss a declaratory judgment action for legal insufficiency, "the test is not whether a party will succeed in getting a declaration of rights in accordance with a theory or contention advanced, but whether '[t]he allegations of the complaint ... when considered as true, demonstrate the existence of a bona fide justiciable controversy which should be settled'" (***Schulz v New York State Legislature***, 230 AD2d 578, 582, 660 NYS2d 155 [3d Dept 1997], *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000], *quoting* ***Sysco Corp. v Town of Hempstead***, 133 AD2d 751, 751, 520 NYS2d 40 [2d Dept 1987]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (*see* ***Wohlgemuth v Lang Const., LLC***, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]).

The power of a court to declare law arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before a tribunal (***Hearst Corporation v Clyne***, 50 NY2d 707, 431 NYS2d 400 [1980]; ***Cisse v Graham***, 87 AD3d 1008, 929 NYS2d 628 [2d Dept 2011]). When an event that gives rise to a controversy has occurred and is completed, the rights of the parties would not be affected by the court's determination, and the

interest of the parties is no longer an immediate consequence of the action, the action will be dismissed as moot (***Funderburke v New York State Department of Civil Service***, 49 AD3d 809, 854 NYS2d 466 [2d Dept 2008]; ***Daniel v Coughlin***, 119 AD2d 922, 500 NYS2d 870 [3d Dept 1986]; ***Weaver v Ambach***, 107 AD2d 926, 483 NYS2d 864 [3d Dept 1985]). Courts are prohibited from rendering purely advisory opinions absent an exception to the mootness doctrine (***People ex rel Crow v Warden, Anna M. Kross Detention Center***, 76 AD3d 646, 905 NYS2d 913 [2d Dept 2010]; ***Cisse v Graham***, *supra).* Moreover, the issue of mootness may be raised at any time, for when a matter becomes moot, a court is deprived of an actual controversy, "an essential wherewithal of a court's jurisdiction" (***Cerniglia v Ambach***, 145 AD2d 893, 894, 536 NYS2d 227 [3d Dept 1988], *lv denied* 74 NY2d 603, 543 NYS2d 396 [1989]).

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (***Dreikausen v Zoning Bd. of Appeals of City of Long Beach***, 98 NY2d 165, 172, 746 NYS2d 429 [2002]). "Recognizing that a race to completion cannot be determinative, and cannot frustrate appropriate administrative review, courts have found several factors significant in evaluating claims of mootness. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo...during the pendency of the litigation" (*id.* at 172-173). A party seeking to halt construction must move for injunctive relief at each stage of the proceeding (***Weeks Woodlands Ass'n, Inc. v Dormitory Authority of State***, 95 AD3d 747, 945 NYS2d 363 [1st Dept 2012], aff'd 20 NY3d 919, 956 NYS2d 483 [2012]). The Court of Appeals has stated: "the exception to the doctrine of mootness has been subject over the years to a variety of formulations. However, an examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of important or significant questions not previously passed on, i.e., substantial or novel issue" (***Hearst Corporation v Clyne***, *supra*, 50 NY2d at 714-15, 431 NYS2d at 402). Petitioners/plaintiffs have failed to establish that this proceeding fits within any of the exceptions to the mootness doctrine. Real property is unique and, therefore, there will be no repetition with regard to the subject property. Petitioners/plaintiffs have not shown that the questions herein are novel or that they are phenomenon that have evaded review. Most devastating to petitioners/plaintiff's claim is their failure to seek an injunction to prevent the completion of the project over a period of a decade. The construction project herein is complete and a certificate of occupancy has been issued. Thus, they have failed to preserve their rights pending judicial review and their claims have been rendered moot (*see* e.g., ***Gorman v Town Board of the Town of East Hampton***, 273 AD2d 235, 709 NYS2d 433 [2d Dept 2000]).

Although the foregoing is sufficient to dispose of the matter, the court will review the issues raised by the causes of action herein.

Turning to the defense of lack of standing, the petitioners must demonstrate that they have suffered an injury in fact and must demonstrate that the injury falls withing the zone of interests protected by the legal authority being invoked (*see* ***Society of Plastics Indus. v County of Suffolk***,

77 NY2d 761, 570 NYS2d 778 [1991]). In land use cases, the petitioners "must show that [they] would suffer direct harm, injury that is in some way different from that of the public at large" (***Matter of Save the Pine Bush Inc. v Common Council of City of Albany***, 13 NY3d 297, 304, 890 NYS2d 405 [2009] *quoting* ***Society of Plastics Indus. v County of Suffolk***, *supra* at 774). While "an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury," the neighbor must nevertheless demonstrate that it "is close enough to suffer some harm other than that experienced by the public generally" (***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead***, 69 NY2d 406, 414, 518 NYS2d 418 [1987]; *see* ***Matter of Ziemba v City of Troy***, 37 AD3d 68, 71, 827 NYS2d 322 [3d Dept 2006])

Here, none of the individual petitioners/plaintiffs, who are members of the petitioner Coalition, allege that they reside in close proximity to the subject property. Therefore, the petitioners have failed to show that they are in sufficiently close proximity to be entitled to an inference of harm (*see* ***Matter of Barrett v Dutchess County Legislature***, 38 AD3d 651, 653-654, 831 NYS2d 540 [2d Dept 2007]; ***Matter of Oates v Village of Watkins Glen***, 290 AD2d 758, 736 NYS2d 478 [3d Dept 2002]). As a result, the petitioners/plaintiffs must demonstrate that they will suffer direct harm. The petitioners/plaintiffs have failed to allege any facts which are sufficient to establish an injury different from the public at large (*see* ***Matter of Barrett v Dutchess County Legislature***, *supra*; ***Matter of Oates v Village of Watkins Glen***, *supra*; ***Matter of Harris v Town Board of Town of Riverhead***, 73 AD3d 922, 905 NYS2d 598 [2d Dept 2010]; ***Matter of Shelter Island Assn. v Zoning Board of Appeals of Town of Shelter Island***, 57 AD3d 907, 869 NYS2d 615 [2d Dept 2008]; ***Matter of Buerger v Town of Grafton***, 235 AD2d 984, 652 NYS2d 880 [3d Dept 1997]). Furthermore, there are no allegations that any of the individual plaintiffs use the nature preserve next to the subject property more than most members of the public. In fact, they do not allege that they use it at all (*see* ***Matter of Save the Pine Bush Inc v Common Council of City of Albany***, *supra*). Thus, none of the individual petitioners/plaintiffs have established that they have standing to bring this hybrid proceeding.

Under the applicable three-part test for associational or organizational standing, the petitioner must demonstrate or show (1) that one or more of its members has standing to sue, (2) that the interests it asserts are sufficiently germane to its purpose to satisfy the court that it is an appropriate representative of those interests, and (3) that the participation of the individual members is not required to assert the claim or to afford complete relief to it (*see* ***Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens***, 95 AD3d 1420, 1421, 944 NYS2d 336 [3d Dept 2012], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; ***Matter of Patrolman's Benevolent Assn. of Southampton Town, Inc. v Town of Southampton***, 79 AD3d 891, 892, 913 NYS2d 715 [2d Dept 2010]; *see also* ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 775, 570 NYS2d 778 [1991]). At issue here is the first part of the Coalition's burden, i.e., to demonstrate, in the context of a land use matter, that one of its members has or will suffer direct harm, injury that is in some way different from that of the public at large (***Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens***, 95 AD3d 1420, 1421, 944 NYS2d 336 [3d Dept 2013]; ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 774, 570 NYS2d 778 [1991]).

Nor can the Coalition rely on the fact that they were found to have standing in the prior litigation in this proceeding (***Matter of Coalition For the Future of Stony Brook, et al v Reilly, et al***). In the prior appeal the Appellate Division found that two members of the Coalition had standing to bring the proceeding and since they were members of the Coalition, their standing was attributable to the Coalition. Circumstances have changed in the interim. Inasmuch as neither the petition nor the supporting affidavits specifically identify at least one Coalition member who allegedly has been or will be harmed or injured differently than the public at large, the Coalition has failed to establish that it has standing (*see* ***Matter of Hudson Property Owners' Coalition, Inc. v Slocum***, 92 AD3d 1198, 939 NYS2d 177 [3d Dept 2012]; *see also* ***Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens***, *supra*; ***Matter of Patrolman's Benevolent Assn. of Southampton Town, Inc. v Town of Southampton***, *supra*). Also, as noted above, there are no factual allegations that any of the individual petitioners/plaintiffs use the nature preserve next to the subject property and, thus, they have failed to establish that they have standing (*see* ***Matter of Save the Pine Bush Inc v Common Council of City of Albany***, *supra; see also* ***Citizens Emergency Committee to Preserve Preservation***, 70 AD3d 576, 896 NYS2d 41 [1st Dept 2010] [Advocacy group's members dedication to landmark preservation was insufficient to confer standing absent injury to a member that was distinct from injury to the public]).

Pursuant to General Municipal Law § 51, a taxpayer may maintain an action against "[a]ll officers . . . and other persons acting, or who have acted for and on behalf of any county . . . to prevent any illegal official act on the part of any such officers . . . or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estates or such county." A taxpayer action pursuant to General Municipal Law § 51, however, "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. v City of New York***, 58 NY2d 1014, 1016, 462 NYS2d 433 [1983], *quoting* ***Kaskel v Impellitteri***, 306 NY 73, 79, 115 NE2d 659 [1953]; *see* ***Godfrey v Spano***, 13 NY3d 358, 892 NYS2d 272 [2009]; *see also* ***Matter of Sanitation Garage Brooklyn Dists. 3 & 3A***, 32 AD3d 1031, 822 NYS2d 97 [2d Dept 2006]). Significantly, the mere failure to observe statutory provisions does not constitute the fraud or illegality necessary to maintain a taxpayer action under General Municipal Law § 51, as the law is intended to combat fraud and corruption committed by public officers or bodies (*see* ***Mesivta of Forest Hills Inst. v City of New York***, 58 NY2d 1014, 462 NYS2d 433; ***Kaskel v Impellitteri***, 306 NY 73, 115 NE2d 659; ***Matter of Resnick v Town of Canaan***, 38 AD3d 949, 832 NYS2d 102 [2d Dept 2007]; ***Beresford Apts. v City of New York***, 238 AD2d 218, 656 NYS2d 607 [1st Dept 1997]). "Any other construction would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local government" (***Talcott v City of Buffalo***, 125 NY 280, 288, 26 NE 263 [1891]). "General Municipal Law § 51 is not a vehicle for correcting purely procedural irregularities by governmental bodies" (***Council of the City of New York v Giuliani***, 5 AD3d 330, 331 773 NYS2d 557 [1st Dept 2004]). Petitioners/plaintiff's have failed to allege any facts sufficient to state a cause of action under General Municipal Law § 51. There are no allegations of fraudulent acts or the use of public property or funds for illegal purposes by the

respondents/defendants Town or Planning Board. Thus, the cause of action interposed pursuant to General Municipal Law § 51 must be dismissed.

Petitioners/plaintiffs have failed to state a cause of action under the Open Meetings Law (Public Officers Law, Article 7). It is alleged that on some unspecified date in the spring of 2012, the Planning Board went into executive session and excluded the public. The Planning Board had numerous public hearings thereafter with regard to the site plan, and the vote to approve the site plan was approved at a public hearing (*see e.g.*, ***Exmoor House, LLC v Village of Millbrook Planning Board***, 82 AD2d 763, 917 NYS2d 905 [2d Dept 2011). Petitioners/plaintiffs' single, vague, factual allegation is insufficient to state a cause of action.

Petitioners/plaintiffs have also failed to state a cause of action with regard to their claim that the stipulation of settlement is null and void, because it lacked Town Board approval. Even if one were to assume that the Town Board Resolution 2011-01, approved January 6, 2011, which granted the Town Attorney power to settle cases against the Town was insufficient, this claim, based upon the documentation submitted, fails to state a cause of action. A settlement of a claim against a municipality, which is not approved by the relevant municipal body, may be ratified by the municipality or governmental body by subsequent conduct (***JRP Old Riverhead LTD v Town of Southampton***, 44 AD3d 905, 844 NYS2d 132 [2d Dept 2007]; ***East Hampton Union Free School District v Sandpebble Builders***, 90 AD3d 815, 935 NYS2d 139 [2d Dept 2011]). In this matter, subsequent to and in accord with the stipulation of settlement, the Planning Board approved the subject site plan and Town thereafter issued a permanent certificate of occupancy for the final phase of the site plan. Thus, by their actions the Town or Planning Board ratified the stipulation of settlement. In addition to this, and as has already been established above, each of the alleged causes of action has been rendered moot, due to petitioners/plaintiffs failure to seek relief from the Court prior to the completion of all the requirements of the site plan, as approved and the issuance of a certificate of occupancy.

In light of the foregoing, the respective motions by the respondents/defendants to dismiss the petition/complaint are granted in all respects. Defendants/respondents Planning Board and Town are directed to submit judgment herein.

Dated: 7/3/2013

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION ______ NON-FINAL DISPOSITION

[* 8]

RIDER

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