

Matter of Margaret Cardy, LLC v Del Col
2013 NY Slip Op 32810(U)
October 23, 2013
Sup Ct, Suffolk County
Docket Number: 45527/10
Judge: Joseph C. Pastorella
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Index No. 45527/10

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNT

PRESENT:

HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Motion Seq: #001-MG

IN THE MATTER OF THE APPLICATION OF
MARGARET CARDY, LLC,

ATTYS FOR PETITIONER(S):
SCHEYER & JELLENIK, ESQ.
110 LAKE AVE. SO., STE. 46
NESCONSET, NY 11767

Petitioner(s),

ATTY FOR RESPONDENTS(S):
CINDY ELAN-MANGANO
TOWN ATTORNEY, TOWN OF
HUNTINGTON
BY: THELMA NEIRA, ESQ.
DEPUTY TOWN ATTORNEY
100 MAIN STREET
HUNTINGTON, NY 11743

-- against --

PAT DEL COL, AS DIRECTOR OF THE DEPARTMENT
OF THE ENGINEERING SERVICES, HUGH HAVENER
LOWERY, IN THE CAPACITY OF DEPUTY DIRECTOR
OF THE DEPARTMENT OF ENGINEERING SERVICES,
AND THE DEPARTMENT OF ENGINEERING SERVICES,
AND THE DEPARTMENT OF ENGINEERING SERVICES
OF THE TOWN OF HUNTINGTON, THE BUILDING
DEPARTMENT OF THE TOWN OF HUNTINGTON, AND
THE TOWN OF HUNTINGTON,

Respondent(s).
_____x

Pages Numbered
 Notice of Motion/Order to Show Cause/
 Petition/Cross Motion and Affidavits (Affirmations) Annexed 1
 Opposing Affidavits (Affirmations) 2, 3, 4
 Reply Affidavits (Affirmations) 6
 Affidavit (Affirmation)
 Other Papers 5 (Revised Affidavit), 7

Upon the foregoing papers, the petitioner moves for an order pursuant to CPLR Article 78 seeking the following relief: a writ of mandamus directing the respondent to issue a building permit for the construction of a one family home on Manchester Road in Greenlawn, New York; declare that Section 280-a of the Town Law does not apply in cases that have road frontage on a filed map; declare that the Town cannot enforce unwritten rules and conditions for an administrative act of issuing permits; that the respondent Town of Huntington violated 42 U.S.C. 1983, the Fourteenth Amendment to the United States Constitution Equal Protection clause, and the Fifth Amendment to the United States Constitution; award petitioner damages for actual loss and punitive damages; award petitioner costs and disbursements and granting petitioner such other and further relief as to the Court may seem just and proper.

The petitioner seeks to compel the issuance of a building permit to erect a two story dwelling with attached garage and front covered porch for the real property located on Manchester Road, Greenlawn, New York (hereinafter "subject property"). The petitioner's predecessor in interest obtained approval from the Town of Huntington Zoning Board of Appeals (hereinafter "ZBA") for various area variances in connection with the subject property dated September 25, 2008 and November 20, 2008 respectively. The petitioner upon obtaining variances for the subject property applied for a building permit; however, the Town of Huntington building department would not accept the application on the alleged basis that the road was not paved in front of the subject property.¹ The owner subsequently applied to the ZBA for an interpretation from the Board as to

¹ The petitioner previously filed an Article 78 proceeding against the respondent Town (index number 10-08089) and the respondent Town cross-moved to dismiss the proceeding which resulted in a stipulation dated June 11, 2010 withdrawing the action. In support of the cross-motion and in opposition to the instant proceeding the respondent Town submits an affidavit of (former) Deputy Director of the Department of Engineering Services, Hugh Havender Lowery, whereby he states the following: [p]etitioner has not been issued a building permit for the subject property because of its failure to make improvements to Manchester Road as a prerequisite to the issuance of a building permit as required by New York State Town Law Section 280-a."

whether or not this lot on an existing road on a filed map needs relief from Town Law 280-a.² The ZBA in a determination dated October 7, 2010 stated the following: “[a]fter hearing all the evidence and examining the exhibits, the Board has determined that no 280-a variance is needed and reaffirms the granting of this application as per ZBA #19540.” The petitioner sought to obtain a building permit following the ZBA’s interpretation dated October 7, 2010; however, the petitioner avers that the respondent Town would not issue the building permit on the basis that a prerequisite to the issuance of a building permit is a pre-construction meeting with the building department. In fact, the respondent in opposition to the instant action concedes that the sole basis for not issuing the building permit is that the petitioner has not arranged and conducted a pre-construction meeting with the respondent. The respondent in opposition submits the affidavit of Maria Jennosa employed by the respondent as a Building Permits Examiner in the Department of Engineering Services whereby she states the following: “[s]till outstanding is the pre-construction meeting for the project which would address road, street and lighting improvements as is necessary in accordance with town standards. It is important to point out, that while the Zoning Board approved a variance from the mandates of Town Law 280-a which requires road improvements to be made before a building permit is issued by our department, the applicant will still be required to improve the street in front of his property before a certificate of occupancy for the building will be released. The Zoning Board variance only relieves the applicant from improving the road at an earlier phase of construction, but does not release the developer from making road improvements. I told the expeditor for the applicant that no permit would be issued until a pre-construction meeting is held with the applicant.”

“A proceeding pursuant to CPLR article 78 is the proper vehicle by which to compel officials to perform a mandatory duty” (Bonanno v Town Bd. of Babylon, 148 AD2d 532,532). Mandamus to compel the performance of an official duty may only be granted where the act sought to be compelled is ministerial in nature and involves no exercise of discretion, and where the applicant has demonstrated a clear legal right thereto (see, Savastano v Prevost, 66 NY2d 47; Matter of Klostermann v Cuomo, 61 NY2d 525; Jordan’s Partners v Goehringer, 204 AD2d 453; Cohalan v Caputo, 94 AD2d 742). Conduct that requires adherence to a governing rule or standard with compulsory results is considered to be a ministerial act (Tango v Tulevich, 61 NY2d 34, 41; see, Garrett v Holiday Inns, 58 NY2d 253). Mandamus is not available to compel performance of an act which involves the exercise of judgment or discretion by an administrative agency or officer (see, Matter of Brusco v Braun, 84 NY2d 674; Matter of Klostermann v Cuomo, supra). Here, under the circumstances presented regarding the building permit for a proposed single family dwelling the court finds that the respondent does not have discretion to deny the building permit on the basis that the applicant is required to have a pre-construction meeting prior to the issuance of the building

² Town Law 280-a. 1. states: No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on a official map or plan, or if there be no official map or plan, unless such street or highway is (a) an existing state, county or town highway, or (b) a street shown upon a plat approved by the planning board as provided in sections two hundred seventy-six and two hundred seventy-seven of this article, as in effect at the time such plat was approved, or (c) a street on a plat duly filed and recorded in the office of the county clerk or registered prior to the appointment of such planning board and the grant to such board of the power to approve plats.”

permit (see, Charter Land Dev. Corp. v Hartmann, 170 AD2d 600; cf. Pius v Bletsch, 70 NY2d 920) and relief in the nature of mandamus is appropriate. The respondent Town fails to cite to any statutory authority in the Town Code or statutory scheme or promulgated regulations for the requirement that the applicant attend a pre-construction meeting before the issuance of a building permit other than that it is an unwritten policy of the building department (see, Rendely v Town of Huntington, 44 AD3d 864). The court notes that the building department has the authority to have a meeting with the applicable officials employed by the Town in connection with the subject building permit application absent the applicant and prior to the issuance of the building permit.³ Accordingly, the respondent Town is directed to issue the building permit sought by the petitioner.

The allegations in the petition are insufficient to state a claim against the respondent pursuant to 42 USC 1983. To state a claim pursuant to 42 USC 1983, a plaintiff must allege, at a minimum, conduct by a person acting under color of law which deprived the injured party of a right or interest secured by the Constitution or the law of the United States (DiPalma v Phelan, 81 NY2d 754). 42 USC 1983 protects against municipal actions that violate owners rights under the Fifth and Fourteenth Amendments of the United States Constitution to due process, equal protection of laws, and just compensation for the taking of property (Bower Assocs. v Town of Pleasant Val., 2 NY3d 617; Town of Orangetown v Magee, 88 NY2d 41, 49). “With respect to land use, 42 USC 1983 protects a landowner’s rights to (1) equal protection of the laws guaranteed by the Fourteenth Amendment, (2) just compensation for the taking of property guaranteed by the Fifth Amendment, and (3) due process of law guaranteed by both the Fifth and Fourteenth Amendments. A violation of equal protection arises if a person was selectively treated compared with others similarly situated and such selective treatment was based on impermissible considerations such as race, religion, an intent to inhibit or punish the exercise of constitutional rights, or a malicious or bad faith intent to injure a person” (Bower Assocs. v Town of Pleasant Valley, 2 NY3d at 631). A complaint alleging a violation of 42 USC 1983 must specify the substantive constitutional right upon which the claim is based and aver facts in support of the claimed constitutional deprivation (see, Incorporated Vil. Of Ocean Beach v Maker Water Taxi, 201 AD2d 704). Here, the court finds that the unsubstantiated and conclusory allegations in the petition are insufficient to state an equal protection claim (see, Gagliardi v Village of Pawling, 18 F3d 188; Huntington Yacht Club v Incorporated Vil. Of Huntington Bay, 1 AD3d 480; Bower Assocs. v Town of Pleasant Val., 304 AD2d 259; Matter of Sour Mountain Realty v New York State Dept. Of Env’tl. Conservation, 260 AD2d 920; Matter of Vito v Jorling, 197 AD2d 822). Moreover, the claim that the respondent Town violated petitioner’s federal constitutional right to just compensation is not ripe for review in light of the petitioner’s failure to show that it sought to obtain just compensation through State Procedures (see, Williamson County Regional Planning Commn. v Hamilton Bank of Johnson City, *supra*; Dougherty v Town of N. Hempstead Bd. Of Zoning Appeals, *supra*; Staatsburg Water Co. v Dutchess County, 291 AD2d 552). “[D]enial of a permit—even an arbitrary denial redressable by an article 78 or other state law proceeding—is not tantamount to a constitutional violation under 42 USC 1983; significantly more

³ Contrary to the respondent’s contention, the court is not bound to apply Local Law No.:9-2013 which codified in the Town Code the procedure of requiring a pre-construction meeting in light of the fact that Local Law 9-2013 did not show a clear expression that it should be applied retroactively (see, Matter of Mulligan v Murphy, 14 NY2d 223, 226).

is required” (Bower Assocs. v Town of Pleasant Val., supra at 627). Accordingly, the portion of the petition alleging violations of petitioner’s constitutional rights is denied. The portion of the petition seeking punitive damages, costs, and disbursements is denied as well as remainder of the petition.

This shall constitute the decision and judgment of the court.

DATED: October 23, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION _____