

**Chord Assoc. LLC v Suffolk County Indus. Dev.
Agency**

2013 NY Slip Op 33618(U)

April 14, 2013

Supreme Court, Suffolk County

Docket Number: 11-39344

Judge: Peter H. Mayer

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

-----X
 CHORD ASSOCIATES LLC, JOPAL
 ENTERPRISES LLC and BARBARA M.
 SAEPIA,

Petitioners,

For a Judgment Pursuant to New York C.P.L.R.
 Article 78

- against -

SUFFOLK COUNTY INDUSTRIAL
 DEVELOPMENT AGENCY,

Respondent.
 -----X

By: PETER H. MAYER, J.S.C.

Dated: April 17, 2013

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Mot. Seq. # 007 - MD; CDISPSUBJ

Return Date: 12-21-12

Adjourned: 1-22-13

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In this CPLR article 78 proceeding, the petitioners seek judgment reversing and annulling the determination of the Suffolk County Industrial Development Agency (IDA), and its resolution dated December 22, 2011 (the Resolution), which authorized the assignment and assumption of the sale assets and related documents in connection with certain IDA bonds, and approved the form, substance and execution of related documents and the assignment of the bonds.

On or about April 25, 2003, the IDA approved the issuance of tax-exempt Industrial Development Revenue Bonds (bonds) for a project to develop affordable housing for low-income seniors (the Project). It appears that the petitioners claim an ownership interest in at least part of the real property to be developed, as well as the entity, Belmont Villas LLC (Belmont), which received the bonds in order to complete the Project. The petitioners allege that they had a falling out with their partner in the project, Capmark Affordable Equity Holdings, Inc. (Capmark), that their participation in the project and Belmont was wrongfully terminated by Capmark, and that Belmont and affiliates of Capmark are improperly attempting to transfer the bonds to a third party to further insulate themselves from the petitioners' claims.

The petitioners allege that, on December 15, 2011, the IDA held a meeting with Capmark and the putative assignee of the bonds, Hunt Capital Partners (Hunt), to discuss the approval of the transfer of

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Capmark's interest in the project to Hunt without giving the petitioners notice. In addition, the petitioners allege that the special meeting of the IDA held on December 22, 2011, which approved the assignment/transfer, was held without proper notice pursuant to law, and without a required quorum.

On December 29, 2011, the petitioners commenced this CPLR article 78 proceeding naming the IDA as respondent. By order dated August 8, 2012, the undersigned granted the petitioners motion to amend their petition to join Belmont and two other parties as necessary parties to the proceeding, and permitted any party to re-notice the matter for hearing. The petitioners, having served an amended petition and re-noticed the matter for hearing, request a stay of the implementation of the Resolution, an order annulling and voiding the actions of IDA on December 15, 2011 and December 22, 2011, whereby the IDA consented to the assignment, and an award of monetary damages. The Court notes that the request for a stay of the implementation of the Resolution is moot, as it is undisputed that the assignment and assumption of the subject sale assets has been completed. In addition, a review of the amended petition herein reveals that the petitioners have not set forth a claim for monetary damages, neither have they alleged any facts to support such a prayer for relief.

In addition, the Court notes that the respondents assert that the petitioners lack standing to challenge the IDA's decision. "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (*Hoston v New York State Dept. of Health*, 203 AD2d 826, 611 NYS2d 61 [3d Dept 1994], citing *Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778 [1991]; *New York State Nurses Assn. v Axelrod*, 152 AD2d 888, 544 NYS2d 236 [3d Dept 1989]). A party challenging an administrative action, for standing purposes, must show (1) that the party would suffer direct harm, injury that is in some way different from that of the public at large, and (2) that the in-fact injury of which the party complains (their aggrievement, or the adverse effect upon them) falls within the "zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted (see *Society of Plastics Indus., Inc. v County of Suffolk*, supra; see also *Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 687, 642 NYS2d 164, 176 [1996]; *Brown v County of Erie*, 60 AD3d 1442, 876 NYS2d 801 [4th Dept 2009]).

The respondents contend that the petitioners did not have an interest in Belmont at the time that the IDA was considering whether to permit Belmont to assign its rights to, and allow the assumption of its sale assets, by a third-party. It is undisputed that the petitioner Barbara M. Saepia withdrew as a member of Belmont on or about October 1, 2004, and that the petitioner Chord Associates, LLC (Chord) was removed as the managing member of Belmont on or about October 10, 2007. Whether Chord was properly and rightfully removed as the managing member of Belmont serves as the basis for the petitioners' demand for relief herein. That issue is currently being litigated in a breach of contract action by the petitioners against Capmark and its affiliates, as well as the respondent Protech Holdings, LLC (Protech), entitled *Chord Associates, LLC v Protech 2003-D*, # 07-CV-05138 [JFB] [EDNY] (Federal Action). The Court notes that said issue has been in litigation for approximately six years, and that the documents from that litigation which have been submitted by the parties herein reveals how contentious an issue it remains. Accordingly, the Court finds that it is appropriate to proceed with a determination herein and to hold that, for the purposes of this special proceeding only, the petitioners have standing to challenge the IDA's resolution dated December 22, 2011.

The petitioners' remaining contentions are that the IDA failed to provide proper notice of its meetings on December 15, 2011 and December 22, 2011, and that the IDA failed to have a quorum at its 9:00 a.m. meeting on December 22, 2011.¹ The Court notes that the petitioner has chosen to commence this proceeding pursuant to CPLR article 4. A special proceeding brought under CPLR article 4 is subject to the same standard of proof as a motion for summary judgment made in an action (*Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.]*, 18 NY2d 250, 273 NYS2d 337 [1966], *cert denied sub nom. McInnes v Port of N.Y. Auth.*, 385 US 1006, 87 S Ct 712 [1967]; *Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 805 NYS2d 175 [3d Dept 2005]; *Brusco v Braun*, 199 AD2d 27, 605 NYS2d 13 [1st Dept 1993]; *People v D.B.M. Intl. Photo Corp.*, 135 AD2d 353, 521 NYS2d 246 [1st Dept 1987]). To obtain summary judgment it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A review of the record, including the certified return submitted by IDA, reveals that the meeting held on December 15, 2011, was a working session held by IDA staff to explore the issues surrounding Belmont's request to permit the subject assignment and sale, and not a meeting of the Board of Directors of IDA. It is undisputed that there were no Board members at that meeting. The petitioners have failed to submit any evidence that such a "meeting" requires notice to the public, or anyone else in particular. Thus, the petitioners have failed to establish their entitlement to a judgment reversing and annulling the Resolution on the ground that IDA failed to give them notice of the December 15, 2011 meeting. This is true despite the petitioners' contention, which is undisputed by IDA, that the IDA knew of the petitioners' dispute with Capmark, and that the petitioners were making claims that they had continued rights regarding Belmont's activities.

The same is true for the 9:00 a.m. meeting held on December 22, 2011 (9:00 a.m. Meeting). While it is true that one Board member attended that meeting, a review of the record reveals that IDA intended the meeting to be a means for the IDA staff and others to explore the issues raised by the petitioners, and to afford the petitioners the opportunity to establish that they had the right to halt the proposed assignment and sale of Belmont's rights in the Project. It is undisputed that the petitioners' received notice of the 9:00 a.m. Meeting, that they participated in that meeting, and that they did not raise any objections to the date, time or scope of the meeting. The petitioners have failed to submit any evidence that the 9:00 a.m. Meeting required notice to the public or anyone else beside themselves, or that a quorum was required to hold the meeting. Thus, the petitioners have failed to establish their entitlement to a judgment reversing and annulling the Resolution on the ground that IDA failed to give them notice of the 9:00 a.m. Meeting, and that a quorum of the Board of Directors of IDA was not present.

The petitioners' sole remaining contention is that the IDA's decision was arbitrary and capricious because it failed to provide proper notice of its meeting held on December 22, 2011 at 10:30 a.m. It is

¹ The record reveals that the IDA intended to have two meetings on December 22, 2011; one at 9:00 a.m. and another later in the morning. The nature of those meetings, and the notice required for each, will be addressed below.

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undisputed that the IDA provided one week's notice of said meeting to the petitioners and interested local municipal entities, that notice was given to local media, and that a notice was posted at least 72 hours before said meeting. The petitioners assert that the IDA was required to provide ten days notice, as this was a scheduled public hearing. The gravamen of the petitioners argument is that the IDA failed to give proper notice of said meeting pursuant to 26 USC § 147 (f), General Municipal Law §§ 859-a (3) and 874 (7), and Public Officers Law § 104 (1). The Court will address each claim of a statutory violation seriatim. The Internal Revenue Code (IRC), Title 26, regulates the issuance of tax-exempt municipal bond such as those at issue herein. The cited section of the IRC, 26 USC § 147 (f), provides in pertinent part:

(f) Public approval required for private activity bonds.--

* * *

(2) Public approval requirement.--

(A) In general.--A bond shall satisfy the requirements of this paragraph if such bond is issued as a part of an issue which has been approved by--

(i) the governmental unit--

(I) which issued such bond, or

(II) on behalf of which such bond was issued, and

* * *

(B) Approval by a governmental unit.--For purposes of subparagraph (A), an issue shall be treated as having been approved by any governmental unit if such issue is approved--

(i) by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice ...

The petitioners do not submit, nor can the Court find, any authority for the petitioners' contention that the action taken at the December 22, 2011 meeting of the IDA involved any activity requiring a public hearing. Where the language is unambiguous, and the legislative history reveals nothing that would suggest an alternative interpretation, a statute must be construed with the presumption that no unjust or unreasonable result was intended that the legislature's intent should normally be ascertained from a careful reading of the statute itself (*Matter of Hyde*, 15 NY3d 179, 906 NYS2d 796 [2010]). Here, the statute governs only those instances where a bond issuance is involved (*see generally Matter of Steel Los III/Goya Foods, Inc. v Board of Assessors of County of Nassau*, 10 NY3d 445, 859 NYS2d 576 [2008]).

Similarly, and for the reason set forth immediately above, the petitioners contention that the IDA failed to give proper notice pursuant to General Municipal Law 859-a (3) is without merit. Said statute provides in pertinent part:

§ 859-a. Additional prerequisites to the provisions of financial assistance

Prior to providing any financial assistance of more than one hundred thousand dollars to any project, the agency must comply with the following prerequisites:

1. The agency must adopt a resolution describing the project and the financial assistance that the agency is contemplating with respect to such project ...
2. The agency must hold a public hearing with respect to the project and the proposed financial assistance being contemplated by the agency ...
3. The agency must give at least ten days published notice of said public hearing and shall, at the same time, provide notice of such hearing to the chief executive officer of each affected tax jurisdiction within which the project is located. The notice of hearing must state the time and place of the hearing, contain a general, functional description of the project, describe the prospective location of the project, identify the initial owner, operator or manager of the project and generally describe the financial assistance contemplated by the agency with respect to the project.

The same hold true for the requirements set forth in General Municipal Law § 874 (7), which requires a public hearing when there is a refinancing of a project. The Court next turns to the petitioners' final claim that the IDA violated Public Officers Law § 104 (1). Said statute reads:

§ 104. Public notice

1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.

A review of the record reveals that, on December 15, 2011, the IDA mailed public notice of the December 22, 2011 meeting to the petitioners and interested local municipal entities, that notice was sent to two local newspapers, and that notice of the meeting was sent to the pressroom at the Legislative Building in Hauppauge, New York for posting. The petitioners do not dispute that the IDA took these actions, and they do not deny that they were provided with notice of, and participated in, the December 22, 2011 meeting held at 10:30 a.m.

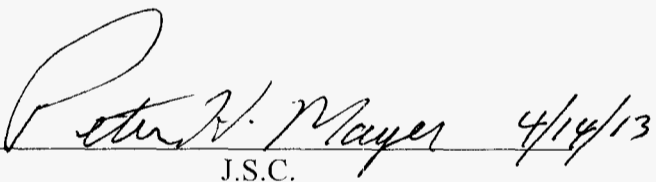
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Accordingly, the Court finds that the IDA provided public notice of its meeting on December 22, 2011 at 10:30 a.m., and that the petitioners claims that the Resolution should be declared void and annulled as arbitrary and capricious due to the IDA's failure to provide public notice is without merit. In addition, to the extent that the petitioners' claims can be read to include an assertion that the 10:30 a.m. meeting did not have a quorum, and that the actions of the IDA violated their due process rights, they are without merit.

The Court notes that the petitioners' have not asserted that the decision to permit the assignment and assumption of the sale assets of Belmont was itself arbitrary and capricious. A review of the record reveals that the IDA was faced with an unfortunate circumstance involving the potential loss of the requirement that the Project provide low-income housing for seniors. It is well settled that in a special proceeding seeking judicial review of administrative action, the Court must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 514 NYS2d 689 [1987]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]). In reviewing an administrative action a court may not substitute its judgment for that of the agency responsible for making the determination (*see Flacke v Onondaga Landfill Sys.*, *supra*; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, *supra*). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768 [2005], *appeals dismissed* 6 NY3d 890, *lv denied* 7 NY3d 708 [2006]). Here, the Court finds that the determination of the IDA to permit the subject assignment and assumption was not arbitrary and capricious.

Accordingly, the petition is dismissed.

Submit judgment.


J.S.C.