

**22-50 Jackson Ave. Assoc., L.P. v Suffolk County
Water Auth.**

2014 NY Slip Op 30302(U)

January 23, 2014

Sup Ct, Suffolk County

Docket Number: 09-40761

Judge: Joseph Farneti

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 37

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22-50 JACKSON AVENUE ASSOCIATES, L.P.,
and PILGRIM EAST, L.P.,

By: Farneti, A.J.S.C.
Dated: January 23, 2014

Petitioners/Plaintiffs,

- against -

Index No. 09-40761
Mot. Seq. # 001 - MD
002 - MD; CDISPSJ

SUFFOLK COUNTY WATER AUTHORITY,

Return Date: 11-25-09 (#001)
5-16-13 (#002)

Respondent/Defendant.

Adjourned: 11-21-13

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In this hybrid CPLR Article 78 proceeding and action for declaratory relief petitioners-plaintiffs (“petitioners”) seek a judgment pursuant to CPLR Article 78 reversing, annulling and setting aside resolution 221-06-2009 of the Suffolk County Water Authority (“SCWA”) adopted June 30, 2013, which allegedly imposed a “surcharge” on them regarding water service to certain property which they are attempting to develop, and pursuant to CPLR 3001, declaring that the SCWA has no power or authority to impose surcharges on them for the cost of improvements to the SCWA’s water distribution system occurring off that property.

In their petition/complaint, the petitioners allege that they are the “beneficial owners” of approximately 452 acres of real property located in the Hamlet of Brentwood, Town of Islip, County of Suffolk, New York (“subject property”), which was formerly included in the Pilgrim State Psychiatric Hospital complex. For several years, the petitioners have worked on a proposal to redevelop the subject property as a mixed-use community to be known as “Heartland Town Square” (“HTS” or “the project”). The petitioners further allege that, without notice to them, the SCWA purported to adopt resolution 221-06-2009 (“the resolution”) on June 30, 2009, which authorized “the apportionment of water main improvements and the imposition of surcharges on the developer of [HTS],” and to proceed with a certain water system improvement at a cost to be surcharged and “assessed to the developer at the time of tapping along with other customary fees.”

In their first cause of action pursuant to CPLR Article 78, the petitioners contend that the resolution, and the manner in which it was adopted, was not warranted, was not supported by the facts,

was and is arbitrary and capricious, and is violative of the Public Authorities Law. They further allege, among other things, that they have been harmed in fact by the adoption of the resolution because it interferes with their proposed use of the property, and it prevents them from obtaining water service to the project without first paying an arbitrary surcharge to the SCWA. In their second cause of action for declaratory judgment, the petitioners contend that the SCWA does not have the authority to impose surcharges upon them, and that said surcharge and resolution are “illegal, ultra vires, unconstitutional, invalid, void, and of no effect.”

In support of their petition and motion for summary judgment (the latter discussed below), the petitioners submit, among other things, the affidavit of Gerald Wolkoff (“Wolkoff”) dated April 8, 2013. In his affidavit, Wolkoff swears that he is the president of 22-50 Jackson Avenue Corp., which is the general partner of the petitioners, and that the petitioners “have, for several years, proposed to redevelop” the subject property. He indicates that the petitioners are the “beneficial owners” of the subject property.¹ He states that “the final numbers and locations, and ... various uses in the proposed [HTS] redevelopment, as well as the sizes, heights, and locations of the buildings and other structures ... will not be determined until: (a) environmental review of the impacts of the proposed redevelopment ...; (b) the scope and construction details ... have been fully determined; (c) the Town of Islip and other involved agencies ... have approved the zoning changes, site plans, and other permits ...” Wolkoff further swears that “to date, the lead agency Town of Islip Town Board has not issued a final generic environmental impact statement [‘FGEIS’] or SEQRA ‘findings statement’ for the proposed redevelopment ...” He states that “[b]ecause the proposed [HTS] redevelopment is not yet ready for implementation, the Petitioners have neither made formal application to the SCWA for the provision of water services for such proposed community nor have they entered into any construction contract with the SCWA for the provision of such service.” Wolkoff further swears that the petitioners nonetheless received a letter dated July 1, 2009, from Steven M. Jones, the chief executive officer of the SCWA with a copy of resolution 221-06-2009 and indicating, among other things, that “there will be additional fees and charges that will be due and owing when you apply for service for the individual components of Phase I.”

It is undisputed that the SCWA passed the following resolution on June 30, 2009:

RESOLVED, To authorize the apportionment of water main improvements and the imposition of surcharges on the developer of [HTS] to pay for certain improvements required to adequately serve the [project] to be built at the former Pilgrim State Hospital property in Brentwood, in accordance with the estimated costs of May 2009; and be it

FURTHER RESOLVED, To proceed with System Improvement No. 1 on Commack Road, estimated in the amount of Two Hundred Fifty-four

¹ The record reveals that the subject property is currently owned by the Town of Islip Industrial Development Agency.

Thousand Nine Hundred Ten Dollars (\$254,910), subject to cost escalations dependent upon execution of a contract; this surcharge will be assessed to the developer at the time of tapping along with other customary fees.

In opposition to the petition, the SCWA submits its answer and return, and affidavits from its general counsel, chief executive officer and a deputy chief executive officer. In his affidavit, Stephen M. Jones ("Jones") swears that he is the chief executive officer of the SCWA, that he mailed the letter dated July 1, 2009 to Wolkoff, and that on or about April 22, 2009, the SCWA received notice from the Town of Islip that it had adopted a notice of completion for the draft generic environmental impact statement [DGEIS] for HTS. He states that, based on the information in the DGEIS, he had asked SCWA's deputy chief executive officer for operations, Henry J. Miller ("Miller") to do an updated analysis of the water supply and distribution system of SCWA to determine what might be needed to ensure an adequate supply of water to the project. Jones further swears that Miller's analysis identified three improvements to SCWA's system that would be needed to supply adequate water to the project and would be of direct benefit to the petitioners, one being the extension of a water main along Commack Road. He states that the authorization for the improvement on Commack Road was done immediately because the SCWA received notice from the County of Suffolk ("County") that it was planning to re-pave Commack Road, and that, once a road is re-paved, the County will typically not permit road openings in the new pavement for several years.

In his affidavit, Timothy J. Hopkins ("Hopkins") swears that he is the general counsel for the SCWA, that SCWA regulations generally require customers to pay for the installation or extensions of water mains to their project sites, and that "[i]n most instances developers must pay the full cost of the water main extension prior to its installation." He states that because of the "unique situation" involving the petitioners' proposed project, and because the SCWA had received notice from the County regarding the re-paving of Commack Road, the SCWA authorized the Commack Road improvement before the re-paving was commenced or the developer paid for the work to be performed.

In his affidavit, Miller swears that he is the deputy chief executive officer for operations for the SCWA, and that he is licensed in New York State as a professional engineer. He states that he conducted the update to the preliminary analysis of HTS's water supply needs based on the information in the subject DGEIS at the request of Jones, and that he identified three water main extensions directly related to the water supply needed for the petitioners' project. Miller further swears that the SCWA proceeded with the installation of the Commack Road water main extension because it had received notice that the County was planning to re-pave Commack Road, and that, once a road is re-paved, the County will typically not permit road openings in the new pavement for several years.

Upon a review of the record herein, it is determined that the resolution adopted by the SCWA does not represent a final determination by the respondent. The letter dated July 1, 2009 containing a copy of the subject resolution provides, in pertinent part:

Please advise the SCWA of the Project's status and any modifications which might be made with respect to building density, location, height or any other matters that might affect the design of the water service to the Project. As additional phases are proposed, it is likely that the SCWA will need to install the mains on Euclid Avenue and Crooked Hill Road to meet the Project's expanded water requirements. Additional surcharges will be established as those mains are installed. Of course, if the Project as presently configured does not proceed and land uses in the area remain as is, there will be no surcharge assessment made.

Pursuant to CPLR 7801 (1), a proceeding challenging an agency's determination may not be brought until such determination is "final." Thus, for an Article 78 proceeding to be ripe, the administrative action sought to be reviewed must be final, and the anticipated harm caused by the action must be direct and immediate (*Weingarten v Town of Lewisboro*, 77 NY2d 926, 569 NYS2d 599 [1991]; *Matter of Staskowski v Fanelli*, 48 AD3d 579, 852 NYS2d 231 [2d Dept 2008]). Whether agency action is ripe for review depends upon several considerations (*Gordon v Rush*, 100 NY2d 236, 762 NYS2d 18 [2003]). First, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (*Essex County v Zagata*, 91 NY2d 447, 453, 672 NYS2d 281 [1998], quoting *Chicago & S. Air Lines v Waterman S.S. Corp.*, 333 US 103, 113, 68 S Ct 431 [1948]; see *Gordon v Rush*, 100 NY2d at 242). In other words, "a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury'" (*Essex County v Zagata*, 91 NY2d at 453 [citations omitted]; see *Gordon v Rush*, 100 NY2d at 242).

Here, it undisputed that the scope and details of the petitioners' redevelopment of the subject property have not been finalized, that the municipal agencies interested in the project have not issued even preliminary approvals for the redevelopment, and that the petitioners have not yet submitted an application to the SCWA invoking any power in that authority to make a final determination regarding the subject matter of this proceeding. In addition, the petitioners acknowledge that they are only the beneficial owners of the property, and they have failed to establish that they will ever take title to the subject property, that they will ever obtain the necessary municipal approvals for the project, or that they will ever undertake construction of the redevelopment project.

The Court now turns to the petitioners' motion for summary judgment on their second cause of action for an Order declaring that the SCWA has no power or authority to impose surcharges on them for the cost of improvements to the SCWA's water distribution system occurring off their property. Pursuant to CPLR 3001, the Court may render a declaratory judgment as to the rights of the parties when there is a justiciable controversy. "A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff" (*Ashley Bldrs. Corp. v Town of Brookhaven*, 39 AD3d 442, 833 NYS2d 230 [2d Dept 2007]; see also *Matter of Enlarged City School Dist. of Middletown v City of Middletown*, 96 AD3d 840, 946 NYS2d 208 [2d Dept 2012]; *Waterways Dev. Corp. v Lavalley*, 28 AD3d 539, 813 NYS2d 485 [2d Dept 2006]).

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Here, as set forth above, the record reveals that the petitioners have not been assessed a surcharge for the Commack Road extension. Rather they have been advised that they might be subject to some surcharge depending on the scope and details of their proposed redevelopment project, or that they might not be subject to any surcharge at all. The fact that the internal workings of the SCWA required a resolution to approve the appropriation of funds to undertake the Commack Road improvement does not render the determination final. The SCWA's business judgment to undertake such work prior to any commitment or obligation on the part of the petitioners will not be second-guessed herein. Accordingly, the petitioners' motion for summary judgment is denied.

However, the Court finds that its inquiry should not end there. A court is empowered to search the record and grant summary judgment in favor of a nonmoving party (CPLR 3212 [b]; *1133 Taconic, LLC v Lartrym Serv., Inc.*, 85 AD3d 992, 925 NYS2d 840 [2d Dept 2011]; *Shore Dev. Partners v Board of Assessors*, 82 AD3d 988, 918 NYS2d 566 [2d Dept 2011]; *Masi v Kir Munsey Park 020 LLC*, 76 AD3d 514, 906 NYS2d 88 [2d Dept 2010]). However, this power applies only with respect to a cause of action or issue that is the subject of the motions before the court (*Dunham v Hilco Const. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Masi v Kir Munsey Park 020 LLC, supra*; *Lee v City of Rochester*, 254 AD2d 790, 677 NYS2d 848 [4th Dept 1998]). Upon reviewing the entirety of the records submitted to this Court on the petitioners' motion for summary judgment it is determined that the cause of action for declaratory judgment is before the Court, and that the respondent is entitled to summary judgment dismissing the petitioners' second cause of action as a matter of law.

Accordingly, this Article 78 petition is denied and the proceeding is dismissed. In addition, the petitioners' request for declaratory relief is denied and the plenary cause of action is dismissed.

Submit judgment.


A.J.S.C.