Westhampton Beach Assoc., LLC v Incorporated Vil. of Westhampton Beach
2015 NY Slip Op 30152(U)
January 26, 2015
Supreme Court, Suffolk County
Docket Number: 14-10493
Judge: James C. Hudson

[* 1]

SHORT FORM ORDER

INDEX No. 14-10493

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 7/28/14 (#001)
MOTION DATE 8/11/14 (#002)
MOTION DATE 9/17/14 (#003)
MOTION DATE 10/8/14 (#004)
ADJ. DATE 10/8/14
Mot. Seq. #001 - MG
Mot. Seq. #002 - XMD
Mot. Seq. #003 - MG; CASEDISP
Mot. Seq. #004 - XMD

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WESTHAMPTON BEACH ASSOCIATES, LLC,

Plaintiff,

- against -

INCORPORATED VILLAGE OF WESTHAMPTON BEACH, THE INCORPORATED VILLAGE OF WESTHAMPTON BEACH BOARD OF TRUSTEES, HAMPTONS APPRAISAL SERVICE CORP., JAMES R. McLAUCHLEN and JOHN B. CARSON,

Defendants.

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Upon the following papers numbered 1 to 72 read on these motions to dismiss; cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; 28-31; Notice of Cross Motion and supporting papers 11-27; 32-43; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 44-53; 54-66; 67-68; 69-70; 71-72; Other defendants' memorandum of law (#001); defendants' memorandum of law (#003); defendants' reply memorandum of law (#003); letter dated Oct. 13, 2014 from Robert L. Garfinkle, Esq. of Murphy, Bartol & O'Brien, LLP to the court, w/enc.; letter dated Oct. 13, 2014 from Daniel M. Maunz, Esq. of L'Abbate, Balkan, Colavita & Contini, L.L.P. to the court; letter dated Oct. 16, 2014 from Richard T. Haefeli, Esq. to the court; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Incorporated Village of Westhampton Beach and The Incorporated Village of Westhampton Beach Board of Trustees for an order dismissing the complaint pursuant to CPLR 3211, is granted; and it is further

ORDERED that the cross motion by the plaintiff for an order directing the entry of judgment in its favor and against the defendants for the relief demanded in the complaint, is denied; and it is further

ORDERED that the motion by defendants Hamptons Appraisal Service Corp., James R. McLauchlen, and John B. Carson for an order dismissing the complaint as against them pursuant to CPLR 3211 (a) (1), (5), and (7), is granted; and it is further

ORDERED that the cross motion by the plaintiff for an order directing the entry of judgment in its favor and against defendants Hamptons Appraisal Service Corp., James R. McLauchlen, and John B. Carson for the relief demanded in the complaint, is denied.

This is an action for judgment declaring the invalidity of a legislative act and to recover a park fee in the amount of $776,307.00 required to be paid as a condition of site plan approval.

The plaintiff is the former owner of real property located at 63-77 Old Riverhead Road in the Village of Westhampton Beach. The property has an area of 6.5928 acres and is situated in the Village's "hotel" zoning district. On or about October 12, 2006, the plaintiff, as owner of the property, applied to the Village of Westhampton Beach Planning Board for site plan review in connection with the proposed construction of 39 condominium units. On August 14, 2008, the Planning Board adopted a resolution granting the application on condition, *inter alia*, that the plaintiff pay a park fee to the Village, "based on the fair market value of a park area of 63,684 square feet with the amount to be set by the Board of Trustees of the Village of Westhampton Beach." It appears that the Planning Board subsequently authorized Hamptons Appraisal to prepare the required appraisal, and that an appraisal, signed by James R. McLauchlen and John B. Carson, was submitted to the Village Attorney on April 22, 2010. Based on the appraisal, which determined the fair market value of the property to be $3.5 million, the Board of Trustees issued a resolution on February 3, 2011 establishing the amount of the park fee to be $776,307.00.

Meanwhile, on or about September 9, 2011, the plaintiff, as seller, entered into a contract for the sale of the property with The EPH Group, LLC, as purchaser. Paragraph 11 of the rider to the contact, which provides that the purchaser was to "assume the responsibility for paying the entire park fee," also states in relevant part that

> If any or all of this park fee is waived by the Village of Westhampton Beach–or ceases to be in effect–for any reason at all, the Purchaser, its assigns, affiliates, successors, and/or principals shall pay to the Seller within 45 days an amount equal to the amount waived (or the amount not in effect anymore). This paragraph shall survive the closing.

On or about May 1. 2012, The EPH Group, LLC, as purchaser, assigned the contract to Timber Ridge at Westhampton Beach V, LLC ("Timber Ridge"), as assignee, and a deed was executed transferring title of the property from the plaintiff to Timber Ridge. It appears that Timber Ridge has since made installment payments of the park fee totaling $576,000.00.

The plaintiff commenced this action on May 23, 2014. At the heart of the action is the plaintiff's claim that section 197-63 (Q) of the Village Code, which requires in connection with the site plan application procedure either a reserved area for park and recreation purposes or payment of a fee to the Village in lieu thereof, sets forth conflicting methods for calculating the fee. Paragraph (2) of section 197-63 (Q) provides, in relevant part, as follows:

> In cases where the Planning Board determines that a reserved area cannot be properly located within the locus of the site plan, the applicant shall be required to pay a recreation area or park fee to the Village equal in amount to the fair market value at the time of the application procedure of the land area shown on the site plan that would otherwise be required for a reserved site. * * * The formula for the fee shall be the appraisal amount at the time of the application of the land area on the application as vacant land divided by the total area shown on the plan in square feet times 2,178 square feet of reserved area per dwelling times the number of dwelling units proposed on the plan.

The plaintiff alleges two causes of action in its complaint. The first, pleaded against the Village and its Board of Trustees only, is for judgment declaring that section 197-63 (Q) of the Village Code is "unconstitutionally" vague and, as such, is void, invalid, and unenforceable against the plaintiff, as well as for a refund of the full amount of the fee.[1] The second, pleaded against all of the defendants, ostensibly seeks damages for breach of contract on the theory that the plaintiff is a third-party beneficiary of the contract between and among the defendants to obtain and prepare the appraisal.

The defendants now move, pre-answer, to dismiss the complaint, and the plaintiff cross-moves, prematurely,[2] for relief in the nature of summary judgment.

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[1] Although the plaintiff alleges at paragraph 18 of the complaint that $776,307.00 was paid to the Village and that it retains the right to recoup that amount, it appears to have since acknowledged that only a portion of the fee has been paid and, in its attorney's affirmation, requests leave to amend its complaint to allege that it is entitled to recoup the fee "to the full extent of any payments made." The court notes that such relief is not explicitly requested in its notices of cross motion (*see* CPLR 2215; Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [a]; ***Matter of Briger***, 95 AD2d 887, 464 NYS2d 31 [1983]), nor has the plaintiff submitted a proposed amended complaint showing the changes and additions it seeks to make (*see* CPLR 3025 [b]). Nevertheless, for purposes of this determination, the court will treat the complaint as if it were so amended.

[2] "Any party may move for summary judgment in any action, *after* issue has been joined" (CPLR 3212 [a] [emphasis added]). "It is well settled that a motion for summary judgment may not be granted before issue is joined, and there is strict adherence to that requirement" (***Matter of Rine v Higgins***, 244 AD2d 963, 964, 665 NYS2d 165, 166 [1997]; *accord* ***City of Rochester v Chiarella***, 65 NY2d 92, 490 NYS2d 174 [1985]).

In support of their motion, the Village and the Board of Trustees (collectively, "the village defendants") contend that the plaintiff lacks standing and capacity to sue, that the complaint fails to state a cause of action, and the plaintiff's claims are barred by the applicable statute of limitations. Hamptons Appraisal Service Corp., McLauchlen, and Carson (collectively, "the appraiser defendants") move for dismissal on the grounds that the action is barred by the statute of limitations, that the plaintiff's alleged status as third-party beneficiary is contradicted by documentary evidence, and that the complaint otherwise fails to state a valid cause of action against them.

For the reasons discussed below, the court finds that dismissal is appropriate.

As to the first cause of action, it is apparent that the plaintiff lacks standing to challenge the validity of section 197-63 (Q). "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 769, 570 NYS2d 778, 782 [1991]). In order to establish standing, a plaintiff must demonstrate an "injury in fact" in that it will actually suffer harm from the challenged action (***New York State Assn. of Nurse Anesthetists v Novello***, 2 NY3d 207, 211, 778 NYS2d 123, 125 [2004])–in this case, the misapplication of section 197-63 (Q). Here, the crux of the plaintiff's claim for declaratory relief is that paragraph (2) of section 197-63 (Q) contemplates two conflicting methods of appraising property shown on a site plan for purposes of computing a park fee, and that the defendants employed and adopted the method assured of generating the greater fee.[3] It does not appear, however, how the plaintiff has been injured thereby. It is undisputed that the plaintiff did not have any responsibility for payment of the fee and did not, in fact, pay any portion of the fee; it is not alleged, moreover, that the plaintiff is the assignee of a claim by Timber Ridge to such recovery. Rather, it appears that the plaintiff's sole right to such recovery derives from paragraph 11 of the rider to the September 9, 2011 contract. But under paragraph 11, the plaintiff only stands to gain from the very misapplication of the law it challenges (*i.e.*, if and to the extent any portion of the fee ceases to be in effect), and then only from Timber Ridge. Under the circumstances, the court fails to perceive how the vagueness of the law, if any, harms or aggrieves the plaintiff, or how the plaintiff may be said to have "something truly at stake in a genuine controversy" with the village defendants (***Saratoga County Chamber of Commerce v Pataki***, 100 NY2d 801, 812, 766 NYS2d 654, 659, *cert denied* 540 US 1017, 124 S Ct 570 [2003]). The plaintiff's lack of standing likewise bars its claim for a refund of any park fee paid. Even were the plaintiff entitled to assert this claim on behalf of Timber Ridge, the court would be compelled to dismiss it pursuant to CPLR 3211 (a) (7), as the plaintiff failed to allege that any fee installments were paid under protest (*see* ***Video Aid Corp. v Town of Wallkill***, 85 NY2d 663, 628 NYS2d 18 [1995]).

The plaintiff's second cause of action is barred by the statute of limitations. Notwithstanding the references in the complaint to the defendants' "contract" to obtain and prepare an appraisal relative to the property, it is evident on review of the complaint that the essence of the plaintiff's claim is not breach of contract but, rather, that the appraisal failed to meet applicable standards to accurately determine fair market

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[3] The plaintiff claims in this regard to have separately obtained a second appraisal which, using the alternative method allegedly contemplated by section 197-63 (Q) (2), arrived at a market value corresponding to a park fee of $50,000.00.

value, and that the defendants breached their respective duties to provide and adopt an accurate conclusion of market value. "In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance" (***Faiella v Tysens Park Apts.***, 110 AD3d 1028, 975 NYS2d 71, 72 [2013], quoting ***Rutzinger v Lewis***, 302 AD2d 653, 754 NYS2d 735 [2003]). To the extent it is pleaded against the appraiser defendants, it is governed by the three-year statute of limitations set forth in CPLR 214 (6), which applies to "an action to recover damages for [nonmedical] malpractice * * * regardless of whether the underlying theory is based in contract or tort" (*see also* ***Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co.]***, 3 NY3d 538, 788 NYS2d 648 [2004]) and, as such, is untimely because it was not brought within three years after April 22, 2010, the date on which the appraisal was submitted to the Village, or even within three years after February 3, 2011, the date on which the Board of Trustees issued a resolution establishing the amount of the park fee based on the appraisal. To the extent it is pleaded against the village defendants, it would seem more properly the subject of an article 78 proceeding, and untimely because it was not brought within four months after February 3, 2011 (*see* CPLR 217); even if it may be said to arise from contract–and the manner in which those defendants may be alleged to have breached the contract is obscure at best–it would be barred by the 18-month limitations period for filing a breach of contract action against a village (*see* CPLR 9802).

Accordingly, the defendants' respective motions are granted, and the plaintiff's cross motions, which are premature in any event (*see* n 2, *supra*), are correspondingly denied.

Dated: January 26, 2015

Hon. James Hudson, A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION