

**The Trustees of the Freeholders & Commonality of
the Town of E. Hampton v Zoning Bd. of Appeals of
the Town of E. Hampton**

2015 NY Slip Op 30229(U)

January 29, 2015

Supreme Court, Suffolk County

Docket Number: 38647/2012

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

The Trustees of the Freeholders and
Commonality of the Town of East Hampton,

Plaintiff,

-against-

The Zoning Board of Appeals of
the Town of East Hampton,
Joshua Young and Christine Lemieux,

Defendants.

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Motion Sequence No.: 005; MD

Motion Date: 6/25/14

Submitted: 11/5/14

Motion Sequence No.: 006; XMG

Motion Date: 7/25/14

Submitted: 11/5/14

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Clerk of the Court

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Upon the following papers numbered 1 to 24 read upon this motion to strike late answer and portions of Memorandum of Law, and Cross Motion to Compel Acceptance of Late Answer: Notice of Motion and supporting papers, 1 - 10; Notice of Cross Motion and supporting papers, 13 - 24; Answering Affidavits and supporting papers, 11 - 12; it is

ORDERED that this motion (005) by petitioner, the Trustees of the Freeholders and Commonality of the Town of East Hampton, for an order striking the verified answer filed by the respondents Joshua Young and Christine Lemieux served over 5 months late without leave of court and striking portions of their May 20, 2014 Memorandum of Law asserting conflict of interest is denied; and it is further

ORDERED that this cross motion (006) by respondents Joshua Young and Christine Lemieux pursuant to CPLR 3012 (d) to compel petitioner, the Trustees of the Freeholders and Commonality of the Town of East Hampton, to accept their late answer is granted.

In this proceeding, petitioner, the Trustees of the Freeholders and Commonality of the Town of East Hampton (“the Trustees”), seeks a judgment pursuant to CPLR article 78 vacating and annulling a final determination dated November 30, 2012 by respondent Zoning Board of Appeals of the Town of East Hampton which granted variances and a Natural Resources Special Permit to respondents Joshua Young and Christine Lemieux for the construction of a 147-linear foot stone armor revetment backed by a 32-foot vinyl seawall.

Respondents Joshua Young and Christine Lemieux (“respondents Young and Lemieux”) are the owners of a parcel of real property located at 157 Mulford Lane, Amagansett, New York. The parcel is located in the Hamlet of Amagansett, Town of East Hampton, New York and has a Suffolk County Tax map number of 0300-084.00-02.00-006.000. The subject property has a lot size of 15,960 square feet, is bordered on the north by Gardiner’s Bay, and contains tidal and freshwater wetlands, barrier dunes, surface waters, and beach vegetation. The property is located in the A Residence zoning district and in the Coastal Erosion Overlay District Zone 2 and the Flood Hazard Overlay District. Respondents Young and Lemieux purchased the property in late 2009, at which time the property was improved with a one-story, approximately 1,200-square-foot single family residence with 964-square-foot of decking.

Respondents Young and Lemieux filed an application in the fall of 2011 with the respondent Zoning Board of Appeals of the Town of East Hampton (“ZBA”) seeking a Natural Resources Special Permit (“NRSP”) pursuant to Town of East Hampton Zoning Code (“Town Code”) § 255-4-20 and a variance from Town Code § 255-3-85 to demolish the existing residence and construct a new 1,719-square-foot residence on pilings in a more landward location and to construct a rock revetment coastal erosion control structure along the northern, seaward, and western portions of the subject property. Town Code § 255-3-85 prohibits the construction, placement or installation of new erosion control structures in Coastal Erosion Overlay District Zone 2. By determination dated April 9, 2012, the ZBA denied that portion of the application for the proposed coastal erosion structure,

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and granted that portion of the application to demolish the existing house and construct a new 1,719-square-foot residence on pilings in a more landward location. Respondents Young and Lemieux subsequently filed a new application with the ZBA in June 2012 for variances and an NRSP for the subject 147-foot stone armor revetment. The Trustees submitted a letter dated September 27, 2012 to the ZBA with respect to this second application advising, among other things, that the proposed stone armor revetment would extend approximately 14 feet below the mean high water mark thus requiring the Trustees' approval and requested that any ZBA approval of the second application be conditioned upon receipt of a Trustee Permit. The ZBA granted the second application by determination dated November 30, 2012. Notably, said determination indicated in its New York State Environmental Quality Review Act ("SEQRA") determination that the lead agency was the ZBA, that the SEQRA classification was unlisted, and that there was a negative declaration finding.

The Trustees subsequently commenced the instant CPLR article 78 proceeding challenging the ZBA's November 30, 2012 determination as arbitrary and capricious, contrary to law, and an abuse of discretion. In their petition, the Trustees claim that they represent the original government of East Hampton, created by King James II through the Dongan Patent dated December 9, 1686, that they govern the Commonlands between the western border of the Town of East Hampton and the eastern edge of Napeague, that "the Commonlands include the Bottomlands, Beaches and Intertidal zones" as well as "the Commonlands between the high water line and low water line along Gardiner's Bay (Napeague Bay)." In addition, the Trustees assert that their "ownership and governance of the Commonlands between the high water and low water marks along Gardiner's Bay is one of the reasons Petitioner has the requisite legal standing to commence and maintain this Special Proceeding." The Trustees also assert that the deed history for the respondents Young and Lemieux's property confirms that the northernmost boundary has at all times been delineated by "the high water line of Gardiner's Bay."

The Trustees challenge the November 30, 2012 determination on grounds including that 1) the subject 147-foot stone armor revetment is substantially similar to the coastal erosion structure that was denied by the ZBA in its prior determination; 2) the ZBA acted ultra vires by illegally permitting respondents Young and Lemieux to erect a substantial portion of the subject 147-foot rock revetment seaward of the "high water line" of Gardiner's Bay (Napeague Bay) and therefore seaward of the northern boundary of the Young property on property that is not part of their lot as defined in the Town Code; 3) the determination granted a variance and an NRSP based in whole or in part on the ZBA's erroneous findings that the existing residence on the respondents Young and Lemieux's property was in "imminent danger" and that the threatened loss, destruction or severe damage to the existing residence cannot reasonably be prevented by some "alternative means" to permitting the construction of a coastal erosion structure when in fact the ZBA had previously granted them the necessary relief to demolish the existing residence and construct a new 1,719-square foot residence on pilings in a more landward location; 4) the ZBA failed to identify the relevant areas of environmental concern associated with the 147-foot rock revetment, take a "hard look" at them, and make a "reasoned elaboration" of the basis for its negative declaration in violation of SEQRA; and 5) the ZBA failed to set forth any change in law or in circumstances that warranted

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a departure from its denial of the prior application for a nearly identical rock revetment seven months earlier.

A motion to dismiss the petition by the ZBA was denied by order of this Court dated October 2, 2013. Said order directed the respondents to serve their answers to the petition within five days after service upon them of a copy of the order with notice of entry. Then, the parties entered into a stipulation dated December 11, 2013 by which the time to serve and file answers and answering affidavits was extended until January 15, 2014. The ZBA served its answer on January 13, 2014. Respondents Young and Lemieux served their answer on or about May 20, 2014 together with their Memorandum of Law in Opposition to the Petition dated May 20, 2014.

The Trustees now move to strike respondents Young and Lemieux's late answer, served over five months after the stipulation date, noting that said respondents never moved for an extension of time to serve an answer and compel the Trustees to accept a late answer and that said respondents have failed to demonstrate a reasonable excuse for their delay. In addition, the Trustees seek to strike the portion of the Memorandum of Law in Opposition to the Petition dated May 20, 2014 asserting conflict of interest of their counsel as inflammatory, irrelevant and false.

The ZBA opposes the Trustees' motion noting that respondents Young and Lemieux, as the property owners who received the NRSP and variances which are being challenged by the Trustees, have a direct personal stake in the outcome of this proceeding and have participated through counsel, quite amicably, during the entire pendency of the proceeding. The ZBA adds that the Trustees cannot show any prejudice from the late filing and have served a Reply Memorandum of Law addressing the affirmative defenses in the late answer and the contents of respondents Young and Lemieux's Memorandum Law in Opposition to the Petition.

Respondents Young and Lemieux cross-move to compel the Trustees to accept their late answer. Their counsel explains that originally they joined the Town in its answer but then decided to serve their own answer based on a Suffolk County Supreme Court decision¹ in late January 2014 in another Trustee-related matter which indicated the viability of a defense of lack of capacity to sue. Counsel notes that until April 2014 respective counsel had been very genial in the late exchange of documents. He also asserts lack of prejudice inasmuch as the Young and Lemieux answer is identical to the ZBA's answer except for the affirmative defenses of unclean hands and lack of capacity to sue. Counsel adds that there is no legal basis to strike portions of the Memorandum of Law in Opposition to the Petition relating to conflict of interest.

Here, respondents Young and Lemieux demonstrated a reasonable excuse for their late answer as well as a lack of prejudice to the Trustees. Therefore, their cross motion pursuant to CPLR 3012 (d) to compel the Trustees to accept service of said answer is granted (*see* CPLR 3012 [d];

¹ *Gessin v Throne-Holst*, 43 Misc3d 517, 979 NYS2d 776 (Sup Ct, Suffolk County 2014)

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Fried v Jacob Holding, Inc., 110 AD3d 56, 60-62, 970 NYS2d 260 [2d Dept 2013]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 705-706, 941 NYS2d 663 [2d Dept 2012]; *Harcztark v Drive Variety*, 21 AD3d 876, 800 NYS2d 613 [2d Dept 2005]; *see also Schwartz v Reisman*, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]). That portion of the motion of the Trustees for an order striking the answer of respondents Young and Lemieux is denied.

Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading or bill of particulars (*see* CPLR 3024 [b]; *Irving v Four Seasons Nursing and Rehabilitation Ctr.*, 121 AD3d 1046, 995 NYS2d 184 [2d Dept 2014]; *Kinzer v Bederman*, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]; *Aronis v TLC Vision Centers, Inc.*, 49 AD3d 576, 853 NYS2d 621 [2d Dept 2008]). Here, the conflict of interest allegations are not contained in a pleading or bill of particulars but rather in a memorandum of law and in any event, a review of said allegations reveals that they do not rise to the level of being scandalous or prejudicial to warrant striking them from the record. Based on the foregoing, that portion of the motion of the Trustees for an order striking portions of the Memorandum of Law in Opposition to the Petition dated May 20, 2014 asserting conflict of interest is denied.

Accordingly, the motion is denied and the cross motion is granted.

Dated:

1/29/2015


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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION