

Korzenko v Town of Islip
2015 NY Slip Op 31749(U)
September 9, 2015
Supreme Court, Suffolk County
Docket Number: 19256/2011
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Index No: 19256/2011

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 002 MD

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X		
Richard K. Korzenko,	:	
	:	Islip Town Attorney
Plaintiff(s),	:	By: John R. DiCioccio, Esq.
- against -	:	655 Main Street
	:	Islip, N.Y. 11751
Town of Islip,	:	
	:	Friedman, Harfenist Kraut
Defendant(s).	:	& Perlstein, LLP
-----X		2975 Westchester Avenue, Suite 415
		Purchase, N.Y. 10577

Upon the following papers numbered 1 to 22 read on this motion for summary judgment pursuant to CPLR 3212(b); Notice of Motion and supporting papers numbered 1-14; Affirmation in Opposition and supporting papers numbered 15-21; Defendant's reply Memorandum of Law numbered 22; it is,

ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's complaint against it is denied, and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In the instant action, plaintiff seeks damages from the defendant Town of Islip (hereinafter "Town") for an alleged "taking" of its property without just compensation in violation of Article 1, Section 7 of the New York State Constitution. The relevant facts are as follows:

Plaintiff is the owner of a parcel of real property located on Richmond Avenue in the hamlet of Ronkonkoma. The property has a lot area of approximately 5000 square feet and has an irregular "T" shape. The property was improved by a single family dwelling which was constructed in or around 1925 and comprised approximately 727 square feet. The property was purchased by the plaintiff in July 2004 for 200,000.00. The property is located in the Town's Residence "B" Zoning use district. In the Residence "B" district, lots are required to be a minimum of 7500 square feet in size and have a minimum lot width of 75 feet. Following the purchase of the property, because the

lot size was substandard, and because the house was constructed prior to the adoption of the Islip Town Code, the plaintiff obtained a certificate of zoning compliance from the Town in April of 2005 which established the residence as a legal, pre-existing, non-conforming structure. Thereafter, the plaintiff applied to the Town's Zoning Board of Appeals (hereinafter ZBA) for an area variance which would allow him to construct a small addition to the residence and to add a second story. The ZBA granted the requested relief on October 3, 2006.

Plaintiff obtained a building permit in accordance with the ZBA approval for the project and commenced construction. At that point, it appears that rather than constructing the additions in accordance with the approved plans, plaintiff demolished the existing residence and commenced excavation for a new basement foundation. Due to the plaintiff's failure to construct the additions in accordance with the approved plans, the Town issued a Stop Work Order. Plaintiff was not permitted to continue reconstruction the residence because §65-15© of the Islip Town Code¹ requires that the reconstruction of a non-conforming structure be in conformance with the Town code. Petitioner acknowledges that he removed the structure, but alleges that he had no choice but to do so because when he began to construct the additions and discovered that the underlying structure was unsound and could not be salvaged. He additionally claims that he was advised by the Building Department not to apply for a demolition permit, but rather, to re-apply to the ZBA to reconstruct the existing residence².

In an attempt to rectify the situation, plaintiff reapplied to the ZBA for the area variances he required to build an entirely new residence. Public hearings were held on the new application which sought the following relief from the development standards set forth in the Town's Residence "B" zoning use district: permission to erect a dwelling (35 x 27 irrg) on a lot 1) not having required width of 75 feet throughout, 2) on a lot area of 5064 square feet instead of the required 7500 square feet, 3) having a front yard set back of 17.8 feet instead of the required 25 feet, side yard set backs of 4.6 feet and 9.8 feet instead of the required 14 feet, and total side yards of 14.4 instead of the required 28 feet. In a unanimous determination dated June 17, 2008, the ZBA denied the plaintiff's application in its entirety.

Plaintiff thereafter commenced an Article 78 proceeding to challenge the determination of the ZBA which proceeding was dismissed by Short Form Order of this Court dated January 14, 2009 (Pitts, J.). That determination was affirmed on appeal pursuant to an Decision and Order dated November 3, 2010. Plaintiff's application for leave to appeal to the Court of Appeals was thereafter denied. The instant action, which seeks damages pursuant to Article 1, Section 7 of the New York State Constitution for a taking of plaintiff's property without compensation ensued.

¹ Which was in effect in 2003 prior to the plaintiff's purchase of the property.

² Plaintiff's claim that he was told by the Building Department that he did not require a demolition permit and that he should go ahead with reconstruction was never substantiated and were determined to be lacking credibility by the ZBA.

Plaintiff's complaint alleges, inter alia, that as a result of the application of the Town code to his property the defendant has violated Article I, Section 7 of the New York State Constitution. Said another way, the defendant claims that the Town's regulations have had a confiscatory effect on his property so as to have deprived it of all economic value. Accordingly, plaintiff seeks damages for his claimed loss.

The Town now moves for summary judgment dismissing the plaintiff's complaint arguing that the essential facts are not in dispute and that the Court is now in a position to determine whether the plaintiff's cause of action should be dismissed. Specifically, the defendant argues that because it is undisputed that the regulations that preclude the construction of a residence on the property pre-existed the plaintiff's purchase of the property and that, as a matter of law, no taking occurred. Additionally, defendant argues that since the plaintiff has failed to seek re-hearing of his variance application he is barred from doing so and that applicable statute of limitation has expired. Finally, defendant asserts that the plaintiff should be equitably estopped from benefitting from his own wrongdoing, i.e. demolishing the pre-existing, non-conforming structure.

In opposition to the motion the plaintiff submits that the defendant's motion is effectively a "reargument" of its prior motion to dismiss the action and that procedure defects in defendant's moving papers preclude the Court from granting the motion. Further, the plaintiff argues that the law of the case prevents the Court from granting the motion as well. The Court agrees that the law of the case precludes summary judgment in this action.

With regard to the claim of regulatory taking, this Court's prior Short Form Order which found that:

Defendant argues that the plaintiff had no expectation of a reasonable return since he purchased a non-conforming property (as evidenced by the Certificate of Compliance), i.e., one that was subject to a statute which prevented the reconstruction of a non-conforming structure following its destruction for any reason (see, *Islip Town Code* §65-15(c)). Citing *Gazza v. NYS DEC*, 89 NY2d 603 as support for its claim, defendant therefore argues, that the plaintiff has failed to state a cause of action requiring the dismissal of the complaint as a matter of law. This Court disagrees with the defendant's analysis of the relevant cases.

While it is true that the property owner in *Gazza* bought property subject to the regulations which ultimately precluded the construction of a dwelling and his claim of regulatory taking, the *Gazza* property was completely vacant land at the time of the purchase by the plaintiff. In the *Gazza* case, after a full trial, the Court declined to grant the taking claim in part because due to the specific facts that existed at the time of plaintiff's purchase, i.e. that the plaintiff purchase the property at a significant

discount due to the regulations that restricted its development. Based upon the severity of the restrictions imposed on that property by the wetlands regulation and the plaintiff's knowledge of the possibility that the regulations might preclude development (as evidenced in the purchase price), the **Gazza** plaintiff failed to establish that he had any "investment backed expectation" of development.

The plaintiff in the instant case is situated differently factually. Specifically, although the plaintiff was aware of the restrictions that burdened the property, the parcel he purchased was already improved with a single family residence which the plaintiff purchased at fair market value. As set forth in **Fred F. French Investing Co. v. City of New York**, 39 N.Y.2d 587, 597, "[i]t is recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." Accordingly, the Court finds that these factual nuances require a determination on the merits as to whether the plaintiff had any investment backed expectation at the time of his purchase

A reading of the complaint, the documentary evidence and the case law, shows that the defendant's motion must be denied. The plaintiff's complaint alleges the cost of the acquisition subsequent denial of his ability to construct a residence thereon. Further the complaint alleges that there has been a reduction of property value due to the Zoning Board's failure to grant the variances to the Town Code of the subject property. In evaluating the plaintiff's complaint to determine whether he has a cause of action, it is clear that he has adequately plead his claim for an unconstitutional taking. The case law makes it clear that he now needs to establish the claim through trial or upon summary judgment. None of the evidentiary submissions made by the defendant eliminate the possibility of the plaintiff proving, after an *ad hoc* factual inquiry, that he had some investment backed expectation of development when he purchased the property.

Since the summons and complaint clearly set forth a claim for a regulatory taking, and since defendant's motion papers do not eliminate the possibility of the plaintiff proving a compensable "investment backed expectation" at the time of his purchase after a trial, the defendant's motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7) must be denied (see, **Guggenheimer v Ginzburg**, 43 NY2d at 275).

On a motion for summary judgment the moving party must prove as a matter of law the absence of a material issue of fact. Failure to do so requires denial of the motion regardless of the

sufficiency of the opposing papers (see, *Winegrad v. New York University Medical Center*, 64 NY2d 320). Once the movant has established its entitlement to summary judgment the burden shifts to the non moving party to show issues of fact that require a trial (*Greenberg v. Manlon Realty, Inc.*, 43 AD2d 968).

The Town has established the following facts:

1) that the regulations that limit the development of the plaintiff's real property existed at the time he purchased the property.

2) that the plaintiff demolished the pre-existing, non-conforming residence.

Accordingly, the defendant has established entitlement to summary judgment thereby shifting the burden to the defendant to show a material issue of fact that requires a trial.

In response to the motion the plaintiff argues that this Court's prior decision, which held that there was a potential that the plaintiff could possibly show that he had an "investment backed expectation" of development which was compensable, is the "law of the case" and that, as such, the Court cannot grant the defendant's motion for summary judgment. The Court agrees.

Law of the case requires that once a legal issue is decided, that decision remains in tact in the Courts of coterminous jurisdiction. Said another way: "law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment" (see, *People v. Evans*, 94 N.Y.2d 499).

Since this Court has already decided that there is the "possibility of the plaintiff proving a compensable investment backed expectation" (however slight it may be) at trial, it has effectively already determined that the facts presented at the time the motion to dismiss was made (which are the identical facts presented on this application) leave open the possibility of plaintiff proving at trial that it has a compensable investment backed expectation (see, *Guggenheimer v Ginzburg*, 43 NY2d at 275).

Defendant's remaining arguments are without merit. Specifically, defendant asserts that plaintiff's failure to seek a rehearing on the original variance application somehow operates as *res judicata* thereby precluding the plaintiff from bringing this action. While defendant could potentially seek a "rehearing" of the denial of its variance, there is no legal obligation for him to do so (see, *Matter of Schulz v State of New York*, 86 NY2d 225; *Timber Ridge Homes at Brookhaven, Inc. v. State*, 223 AD2d 635). Nor is the plaintiff under any obligation seek to purchase adjoining parcels or to modify his application before the Town of Islip prior to commencing this action. Moreover, *res judicata* is not applicable (see, *In re Hunter*, 4 NY3d 260). Lastly, the action is not barred by the statute of limitations or equitable estoppel (see, *Arbor Hill Partners ex rel F.D. Rich Housing Corp. v. New York State Commissioner of Housing and Community Renewal*; 267 A.D.2d 675).

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Based upon the foregoing, the motion is denied and the parties shall appear for a pre trial conference on October 20, 2015.

Dated: 9/9/15
Riverhead, N.Y.



Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION