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SHORT FORM ORDER

INDEX No. 15-15090
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-8-15
SUBMIT DATE 10-1-15
Mot. Seq. # 01 - MD
02 - MG
03 - MG

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CRAIG SCHLOSSBERG and ESTELLE SCHLOSSBERG; PETER KIERNAN and ROY VICKERY; and KAREN FREEDMAN,

Plaintiffs,

-against-

MICHAEL DeFALCO and WILLIAM J. MATTHEWS; and against the TOWN OF BROOKHAVEN, THE TOWN BOARD-TOWN OF BROOKHAVEN, and ARTHUR GERHAUSER, in his capacity as Chief Building Inspector of the Town of Brookhaven,

Defendants.

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Upon the following papers numbered 1 to 169 read on this motion for a preliminary injunction and to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 53 ; Notice of Cross Motion and supporting papers 54 - 74 (#02) & 75 - 111 (#03) ; Answering Affidavits and supporting papers 112 - 144; Replying Affidavits and supporting papers 145 - 147 & 148 - 152; Other 153 - 167 (Snead affirmation), 168 (letter from Town) & 169 (letter from Teresa Butler); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

In this proceeding the plaintiffs move for: (1) an order compelling the Town of Brookhaven, the Town of Brookhaven Town Board and Arthur Gerhauser, in his capacity as Chief Building Inspector of the Town of Brookhaven, hereinafter referred to as "Town Defendants", to vacate and revoke the building permit issued on September 19, 2013 for the residential structure located at 401 Ocean Walk, Fire Island Pines; (2) an order preliminarily enjoining and restraining the Town Defendants from issuing any further construction approvals, permits, certificates of occupancy or use (either temporary or permanent), on the subject premises pending the determination of this action; (3) an order preliminarily enjoining and restraining defendants Michael DeFalco and William Matthews from their continued use and occupancy of the subject premises, and from their continued acts of harassment against plaintiff Schlossberg; and (4) an order compelling defendants DeFalco and Matthews to remove the compost pile, berm spite fence and fish flag from the subject premises during the pendency of this action. The Town Defendants cross move pursuant to CPLR 3211(a) to dismiss the complaint in its entirety. Defendants DeFalco and Matthews similarly cross move pursuant to CPLR 3211(a) to dismiss the complaint in its entirety.

The defendants Michael DeFalco and William Matthew are the owners of a parcel of real property located at 401 Ocean Walk on Fire Island in the Town of Brookhaven, hereinafter referred to as "Town". The property is located within the Fire Island Freshwater Wetlands and a Coastal Erosion Hazard Area. The property, which they acquired in 2010, is located within the boundaries of the Fire Island National Seashore, hereinafter referred to as "the Seashore", and is nonconforming pursuant to the Federal Zoning Standards for Fire Island National Seashore, 36 CFR Part 28, and the Town of Brookhaven Zoning Code, Chapter 85, Article XVI, "Great South Beach in Fire Island National Seashore." The property was improved with a one-story residence, front, side and rear decking, and an above-ground swimming pool. All of the then existing structures together accounted for a lot occupancy of 42.6%. Michael DeFalco sought to construct a second story addition to the existing residence with a balcony, swimming pool, additional decking around the pool and an eight foot fence on both side yards. In 2009, Michael DeFalco applied to the Town for a wetlands permit. The Town Department of Planning, Environment and Land Management denied the application on the grounds that the proposed construction in a primary dune area was incompatible with the standards of Chapter 76 of the Town Code. Michael DeFalco appealed to the Board of Zoning Appeals of the Town of Brookhaven, hereinafter referred to as "the Board", which granted the permit subject to certain conditions on July 23, 2010. Thereafter, Michael DeFalco applied to the Board for area variances, including a front yard setback and side yard variances for the proposed second story balcony and residence addition. Michael DeFalco also sought permission for an eight foot fence instead of six feet and permission to exceed the 35 percent lot occupancy to 42.6 percent. After a public hearing held before the Board on May 12, 2011, at which Michael DeFalco's agent testified in support of the application, the Board issued a determination that granted the requested second-story addition, second-story balconies on the north and south, a 6-foot high fence and wall on both side yards, 37% lot occupancy, and the proposed deck addition approved at 6 feet with total side yards of 16 feet.

In its findings of fact, the Board states that the existing one-story dwelling measures 1,224 square feet and accounts for approximately 19% of the lot occupancy. In addition, the Board notes that the existing accessory amenities account for 23.6% of the lot occupancy for a total of 42.6% lot coverage. Thus, the accessory structures alone accounted for more than the 35% lot occupancy permitted by the zoning regulations. The Board further states that Michael DeFalco no longer enjoys the protection of the Certificates of Compliance, as he is seeking to significantly alter the existing dwelling, the non-conforming and existing setbacks and lot occupancy.

As to Michael DeFalco's request for a variance to build second-story balconies, the Board found that there was significant evidence of conformity and it would not have any undesirable change in the character of the community. Moreover, the Board indicated that the front yard and total side yard setbacks would not have a negative impact on the nature and character of the community or be a detriment to neighboring properties. In approving the request for a variance, the Board concluded that the proposed second-story balconies on the north side and south side of the structure would not create a detriment to the health safety or welfare of the community. With respect to Michael DeFalco's proposal for the second story addition, the Board found that the proposed structure would not have an undesirable change to the nature and character of the community. It states that while the request for a 15.4 foot front yard setback, 6.7 foot minimum side yard setback and 16.9 foot total side yard setback would result in a 23%, 44% and 44% relaxation, respectively, the impact of this would be significantly mitigated by the fact that these set backs are already established by the existing dwelling.

With respect to Michael DeFalco's request for permission to construct two additions to the existing deck on the south side of the existing dwelling, the Board found that the request to maintain 0.5 foot and 1.5 foot minimum side yards for a total of 2 feet would have an undesirable impact on the nature and character of the community. It stated that the 2 feet of total side yard where 30 feet is required would result in a 94% relaxation of the Codes requirements. It further stated that the proposed decking would essentially consume the entire width of the property, extending from the eastern to western property line for 58 consecutive feet on a lot that maintains 60 feet in width. The Board concluded that the size of this decking and its configuration would have a negative impact on the fragile environmental and physical conditions of the area.

As to Michael DeFalco's lot occupancy, the Board noted that Michael DeFalco proposed to remove decking on the east and west side of the dwelling and replace it with the proposed decking on the south side of the dwelling, therefore proposing to maintain 42.6% lot occupancy where 35% lot coverage is permitted. The Board found that as Michael DeFalco is seeking to significantly alter the existing dwelling, the lot occupancy that currently exists on the subject lot is no longer protected by the Town of Brookhaven certificates. The Board noted that while Michael DeFalco is seeking to maintain the same lot coverage as presently exists on the parcel, any hardship suffered by Michael DeFalco was self-created in nature since the proposed structural alterations to the dwelling did not return the parcel to the Code required lot coverage of 35%. The Board concluded that Michael DeFalco's request to maintain 42.6% lot coverage is not the minimum relief necessary and would have a negative effect on the health, safety and welfare of the community. In addition, the Board found that the detriment would be mitigated by the granting of 37% lot coverage as an alternative to Michael DeFalco's request.

With regard to Michael DeFalco's proposal to construct an 8-foot fence where a 6-foot fence is permitted, the Board found that while Michael DeFalco submitted four prior grants to prove conformity, only one case involved a grant for an 8-foot fence. The Board stated that one grant from 2009 provides insufficient precedent to prove conformity and that the 8-foot fence was situated along the road side of the parcel, whereas the subject request would run along the side property lines towards the ocean front. The Board concluded that this request would have a negative impact on the nature and character of the community and create a detriment to neighboring property owners. Michael DeFalco then filed an Article 78 proceeding, ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 17102/2011, seeking to set aside the determination of the respondent Zoning Board of Appeals to the extent that it required him to reduce his lot coverage and increase his side lot set back.

Craig Schlossberg is the owner of an adjoining parcel of property located at 402 Ocean Walk. He commenced a hybrid proceeding, ***In the Matter of Schlossberg v. Brookhaven, et. al.,*** under Index No. 19598/2011, pursuant to Article 78 to annul the Zoning Board's determination. Schlossberg contended that the Board failed to comply with the State Environmental Quality Review Act (SEQRA) because no environmental review was conducted in connection with Michael DeFalco's application. He also alleged that the Board failed to perform appropriate reviews under Chapter 76 and Chapter 81 of the Town Code and that the determination to grant the variances lacked a rational basis. This Court in ***In the Matter of Schlossberg v. Brookhaven, et. al.***, Index No. 19598/2011, by Order dated August 6, 2012, (LaSalle, J.), held, *inter alia*, that "while the Board claims that a SEQRA review was conducted, the record contains no evidence that any such determination was made... The Board may still properly find that the application is a Type II action but the record contains no evidence that the Board made any such finding... Accordingly,

the petition is granted, the determination is annulled and the matter is remitted to the Board for a new determination." Further, this Court in ***In the Matter of DeFalco v. DeChance, et. al.***, Index No. 17102/2011, (LaSalle, J.), held that "in view of this Court's determination in the Schlossberg proceeding, the instant petition is moot... Accordingly, the petition is denied and the proceeding is dismissed."

Subsequent to this Court's determinations, Michael DeFalco's matter was re-heard by the Board, and a decision was rendered on March 22, 2013 which included a SEQRA Type II determination, adopted the findings outlined in its original decision of May 12, 2011, and granted Michael DeFalco's application with the previous modifications. Michael DeFalco then commenced another Article 78 proceeding, ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 11268/2013, seeking to set aside the determination of the respondent Zoning Board of Appeals to the extent that it required him to reduce his lot coverage and increase his side lot set back. Schlossberg also commenced another hybrid proceeding, ***In the Matter of Schlossberg v. Brookhaven, et. al.,*** under Index No. 10041/2013, pursuant to Article 78 to annul the Board's determination. In the latter proceeding Schlossberg contends that the Board failed to comply with the State Environmental Quality Review Act (SEQRA) because the Board did not perform any additional environmental review in connection with Michael DeFalco's application and merely declared the project to be a Type II action. Schlossberg also raised these issues in his answer as intervenor in the matter of ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 11268/2013. Schlossberg was given intervenor status by decision dated April 15, 2014. That decision also denied a preliminary injunction and held that

> Schlossberg has failed to establish the likelihood of ultimate success on the merits. Significant to this conclusion the Court notes that after exhaustive and thorough proceedings the Zoning Board of Appeals granted the permits to DeFalco on two occasions. The Court is also satisfied that the Board satisfactorily addressed the SEQRA as directed by Justice LaSalle in his decision in the prior proceeding.

In ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 11268/2013, this Court held, in its decision dated November 5, 2014, that "the Board's determination was not arbitrary and capricious... In making its determination, the Board considered all of the statutory factors and used the requisite balancing test." This Court further held that "the Board's determination did not affect Michael DeFalco's right to continue to live on his property with the dwelling and structures thereon as is." Finally this Court held that "each determination made by the Zoning Board of Appeals for the Town of Brookhaven was not arbitrary or capricious... Accordingly, the petition is denied and the proceeding is dismissed." As part of that proceeding, the Court held a hearing on a requested temporary restraining order in an Order to Show Cause, filed by Schlossberg, to compel the chief building inspector of the Town of Brookhaven to revoke Building Permit No. 13B091790, dated September 19, 2013, because of his allegation that the pilings were not inserted to the appropriate depth. That temporary restraining order was denied after the hearing.

In ***In the Matter of Schlossberg v. Brookhaven, et. al.,*** under Index No. 10041/2013, this Court held, in its decision dated November 5, 2014, that "in view of this Court's determination in the DeFalco proceeding, the instant petition is moot... Accordingly, the petition is denied and the proceeding is dismissed."

Now, plaintiffs have filed this action again seeking to compel the chief building inspector of the Town of Brookhaven to revoke Building Permit No. 13B091790, dated September 19, 2013, based upon alleged violations related to the zoning variances that were granted to the subject premises, the building permit, the piling foundation requirements, the fire-safety sprinkler requirements, and Town Code violations related to defendants DeFalco and Williams use and occupancy of the subject premises without certificates of use and occupancy.

New York State Town Law Section 268(2) states

> In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is used, or any land is divided into lots, blocks, or sites in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, use or division of land, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use in or about such premises; and upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.

To maintain a private action to enjoin a zoning violation, a plaintiff must establish that he or she sustained special damages as a result of the defendant's activities. (***Santulli v Drybka***, 196 AD2d 862, 863 [2nd Dept 1993]; *see also* ***Zupa v Paradise Point Assn., Inc.***, 22 AD3d 843, 843, 803 N.Y.S.2d 179; ***Futerfas v Shultis***, 209 AD2d 761, 762, 618 N.Y.S.2d 127; ***Guzzardi v Perry's Boats***, 92 AD2d 250, 253, 460 N.Y.S.2d 78; see ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778; ***Little Joseph Realty v Town of Babylon***, 41 NY2d 738, 363 N.E.2d 1163, 395 N.Y.S.2d 428). To establish special damages, a plaintiff must show a depreciation in the value of the real property "arising from the conduct of the [defendant's] forbidden use" (***Wheeler v Del Duca***, 2014 NY Slip Op 31603[U] [Sup Ct, Suffolk County 2014] *citing* ***Cord Meyer Dev. Co. v Bell Bay Drugs***, 20 NY2d 211, 218, 229 N.E.2d 44, 282 N.Y.S.2d 259). The plaintiffs must establish that they sustained special damages through specific, detailed, evidence, that they actually suffered a diminution of the value of their home and property and that there was some depreciation in its value which arose from the defendants' conduct. (***Santulli v Drybka***, *supra*; see also, ***Cord Meyer Dev. Co. v Bell Bay Drugs***, 20 NY2d 211, 218, 282 N.Y.S.2d 259, 229 N.E.2d 44). The plaintiffs' unsupported assertions will not be sufficient to demonstrate the existence of special damages, and would therefore lack standing to bring an action. (***Santulli v Drybka***, *supra*.)

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (***Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Pres. Comm'n***, 2 NY3d 727, 728-729 [2004], *citing* ***Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach***, 98 N.Y.2d 165, 172, 774 N.E.2d 193, 746 N.Y.S.2d 429 [2002]). Where the change in circumstances involves a construction project, the Court must consider how far the work has progressed towards completion. (***Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Pres. Comm'n***, *supra*). Another consideration is "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation." (***Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Pres. Comm'n***, *supra*; *citing* ***Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach***, 98 N.Y.2d at 173). "Also significant are whether work was undertaken without authority or in bad faith, and whether substantially completed work is 'readily undone, without undue hardship'." (***Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Pres. Comm'n***, *supra*; *citing* ***Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach***, *supra*).

In this action, the plaintiffs have failed to allege through specific, detailed, evidence, that they actually suffered a diminution of the value of their home and property or that there was even some depreciation in their property's value which arose from the defendants' conduct. Additionally, the plaintiffs failed to allege with any specificity that they are resident taxpayers within the district where this violation is alleged to have occurred, who are jointly and severely aggrieved by any of the alleged violations. Therefore the plaintiffs lack standing to bring this action. The defendants' motion to dismiss is granted and the complaint is dismissed in its entirety.

Further, the Court notes that plaintiff Schlossberg filed an Order to Show Cause in ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 11268/2013, where he requested the same relief requested here, that being to compel the chief building inspector of the Town of Brookhaven to revoke Building Permit No. 13B091790, dated September 19, 2013, based upon the allegation that the pilings were not inserted to the appropriate depth. That proceeding was dismissed by decision dated November 5, 2014, and yet plaintiff Schlossberg waited until August 27, 2015, (over nine (9) months later), to commence this action. In that nine month period major construction work was done to the subject premises and upon an inspection done by the Town Defendants, after this current action was commenced, it was noted that "... the DeFalco house and accessory structures... are FEMA compliant." (Todd M. Lewis affirmation). The work on the DeFalco and Williams house was not undertaken without authority or in bad faith, and the construction has been substantially completed at this time. That work can not be readily undone, without undue hardship and this Court finds the doctrine of mootness would also require dismissal of the complaint.

The defendants' remaining contentions are denied as moot.

The plaintiffs' motion is in all respects denied as moot, this Court having granted the defendants motion to dismiss. Moreover the plaintiff's contentions are clearly devoid of merit.

The foregoing shall constitute the decision and Order of this Court.

Dated: October 27, 2015

HON. JOSEPH A. SANTORELLI
J.S.C.