

Sullivan v Village of Southampton Bd. of Trustees
2015 NY Slip Op 32261(U)
November 23, 2015
Supreme Court, Suffolk County
Docket Number: 14-24031
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
L.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12/18/14 (#001 & #002)

MOTION DATE 2/19/15 (#003)

MOTION DATE 9/24/15 (#004)

ADJ. DATE 10/29/15

Mot. Seq. #001 - WDN

Mot. Seq. #002 - XMD

Mot. Seq. #003 - MID

Mot. Seq. #004 - MG; CDISPSUBJ

-----X
JOHN SULLIVAN, :

Petitioner.

For a Judgment Pursuant to CPLR 7801.

- against -

VILLAGE OF SOUTHAMPTON BOARD OF TRUSTEES, VILLAGE OF SOUTHAMPTON BOARD OF ARCHITECTURAL REVIEW AND HISTORIC PRESERVATION, VILLAGE OF SOUTHAMPTON BUILDING DEPARTMENT, 320 MURRAY PLACE, LLC, and MITCHELL JACOBSEN.

Respondents.

JORDAN & LeVERRIER

Attorney for Petitioner

257 Pantigo Road

East Hampton, New York 11937

ROBINSON & ROBINSON, P.C.

Attorney for Respondents Village of

Southampton Board of Trustees, Village of
Southampton Board of Architectural Review
and Historic Preservation, and Village of

Southampton Building Department

61 Main Street

Southampton, New York 11968

BENNETT & READ, LLP

Attorney for Respondents 320 Murray Place,
LLC & Mitchell Jacobsen

212 Windmill Lane

Southampton, New York 11968

Upon the following papers numbered 1 to 102 read on this motion for preliminary injunction; cross motion to dismiss; motion for preliminary injunction; motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-13; 36-44; 45-58 ; Notice of Cross Motion and supporting papers 14-35 ; Answering Affidavits and supporting papers 59-65; 66-72; 73-86; 87-90; 91-92 ; Replying Affidavits and supporting papers 93-94; 95-102 ; Other respondents' memorandum of law (#002); respondents' memorandum of law (#004); it is,

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

ORDERED that the motion by the petitioner for an Order, pursuant to CPLR 6301, preliminarily enjoining the respondents, their agents, servants, and employees, directly or indirectly, from taking any action in furtherance of the construction of a proposed residence at 320 Murray Place, Southampton, New York ("Property"), and from issuing any additional permits, including building permits and certificates of occupancy, pending the outcome of this proceeding, is denied; and it is further

ORDERED that the cross motion by respondents 320 Murray Place, LLC and Mitchell Jacobsen to dismiss the petition for, *inter alia*, lack of standing, is denied as academic; and it is further

ORDERED that the separate motion by respondents 320 Murray Place, LLC and Mitchell Jacobsen to dismiss the petition on the ground of mootness is granted.

By way of this article 78 proceeding, the petitioner seeks the entry of judgment: (i) annulling a November 25, 2014 determination by the Village of Southampton Board of Trustees approving a request by 320 Murray Place, LLC for an exemption from Local Law No. 4 of 2014, which established a moratorium on development of certain properties in the Village of Southampton, in order to construct a 44-foot-tall, 17,000-square-foot residence on the Property; (ii) annulling a December 8, 2014 resolution by the Village of Southampton Board of Architectural Review and Historic Preservation granting architectural review approval of the proposed construction; and (iii) staying all actions in furtherance of the proposed construction.

It appears that the Property is a 4.170-acre oceanfront parcel. The petitioner, who owns the property located at 317 Murray Place, immediately to the west of the Property, claims that his scenic views are directly impacted by the proposed construction.

According to the petitioner, Local Law No. 4 of 2014 was a response to a discovery in or about July 2014 that the Village's building inspector was interpreting the revised FEMA requirements incorporated in Chapter 62 of the Village Code in such a way as to require a significant increase in the elevation of new residences in FEMA flood zones and, consequently, in the height of those residences relative to natural grade. In or about August 2014, after hearing public comment and concern regarding the height of proposed new residences and their visual and aesthetic impact on the community, the Board of Trustees proposed a six-month moratorium on development of one-family dwellings subject to the revised flood damage prevention regulations, so as to allow the Village Planning Commission an opportunity to complete the work necessary for the Board of Trustees to enact amendments to the Village Code's maximum height regulations. On November 4, 2014, the Board of Trustees enacted Local Law No. 4, establishing the moratorium by temporarily suspending the authority of the building inspector and of the Board of Architectural Review and Historic Preservation (BARHP) "with respect to the issuance of permits and other approvals for one-family dwellings which exceed certain height limitations." In addition to establishing the moratorium, Local Law No. 4 set forth a series of procedural and substantive requirements for the granting of an exemption from the moratorium. On November 25, 2014, following a public hearing, the Board of Trustees resolved to grant 320 Murray Place, LLC's request for an exemption, and the matter was placed on the BARHP's agenda for its consideration. On December 8, 2014, following another public hearing, the BARHP approved the application. (According

to Village's attorney, approval by the BARHP is the last administrative approval required from the Village before issuance of a building permit.) This proceeding followed. The petitioner contends, in part, that the granting of an exemption was arbitrary and capricious in that the applicant failed to satisfy any of the substantive criteria necessary to obtain an exemption. The petitioner also contends that the Board of Trustees failed to comply with the requirements of SEQRA, in that a request for exemption from a moratorium is an "unlisted" action requiring SEQRA review.

Upon commencement of this proceeding and before the issuance of any building permit, the petitioner moved for preliminary injunctive relief, by order to show cause dated December 11, 2014 (mot. seq. #001). Following a hearing on the same date, the Court (Pastoressa, J.) denied the petitioner's request for a temporary restraining order.

On December 17, 2014, 320 Murray Place, LLC and its principal, Mitchell Jacobsen, cross-moved, pre-answer, to dismiss the petition (mot. seq. #002). In support of the cross motion, 320 Murray Place, LLC and Mitchell Jacobsen contend that the petitioner failed to make a *prima facie* showing of entitlement to any relief; that the construction of a single-family residence, as here, is a Type II action under SEQRA and not subject to any environmental review; and that the petitioner lacks the requisite standing to maintain this proceeding.

On or about December 22, 2014, 320 Murray Place, LLC obtained a building permit from the Village of Southampton Building Department and, according to the petitioner, subsequently began "clearing the land, in a race to completion, before any decision can be made" on the new rules for construction of single-family residences in FEMA flood zones. Citing this change of circumstances, the petitioner moved again for preliminary injunctive relief, by order to show cause dated January 22, 2015 (mot. seq. #003). In signing the order to show cause, the Court (Pitts, J.) again denied the petitioner's request for temporary injunctive relief.

While the aforementioned motions and cross motion were *sub judice*, the Board of Trustees enacted new legislation in response to the study by the Village Planning Commission. Local Law No. 4 of 2015, adopted on July 21, 2015, amended section 116-12 of the Village Code with respect to height regulations in residence districts, adding subsection (F) to provide, in part, that the maximum height of a residence on a lot having an area of 40,000 square feet or greater shall be 35 feet, and that if the residence has a roof pitch flatter than 7/12, the maximum height shall be seven feet less, or 28 feet. Local Law No. 5 of 2015, adopted on August 13, 2015, amended section 116-12 of the Village Code with respect to the height of elevated buildings, adding subsection (G) to provide, in part, that the height of an elevated building "shall be measured from the elevation two feet above the applicable base flood elevation (the base flood elevation applicable to such elevated building pursuant to Chapter 62)," and adding subsection (H) to provide front-yard and side-yard "sky plane" requirements.

In light of the new legislation, on September 1, 2015, 320 Murray Place, LLC and Mitchell Jacobsen moved again, pre-answer, to dismiss the petition on the ground of mootness (mot. seq. #004). In support of the motion, 320 Murray Place, LLC and Mitchell Jacobsen submit the affidavit of Timothy Haynes, the architect responsible for designing the residence. Based on his affidavit, it appears that the

base flood elevation of the Property is 15 feet; consequently, that the starting point for determination of height is 17 feet, pursuant to section 116-12 (G) (2); that a flat-roofed home, as here, on a lot having area greater than 40,000 square feet, may be 28 feet in height, pursuant to section 116-12 (F); and that the residence, which rises to a maximum height of 44 feet above sea level, is in fact one foot lower than is permitted under the Village Code as amended (the maximum being 45 feet, *i.e.* a 28-foot building measured from a starting point of 17 feet above sea level). Also annexed to his affidavit are diagrams depicting the front-yard and side-yard “sky planes” which, he asserts, fully comply with the requirements of section 116-12 (H). Claiming, therefore, that the residence can be built as of right under the Village Code as amended, 320 Murray Place, LLC and Mitchell Jacobsen contend that the question of whether the exemption was properly granted is now academic.

Before addressing the merits of the pending applications, the Court hereby deems the petitioner’s first motion for a preliminary injunction withdrawn, as it was effectively superseded by the petitioner’s second motion for a preliminary injunction. While the Court also notes, as a technical matter, that the CPLR authorizes the making of only one pre-answer motion to dismiss (CPLR 3211 [e]), it is generally recognized that a second such motion may be made, as here, based on additional defenses that could not have been raised at the time of the first motion (*see Held v Kaufman*, 91 NY2d 425, 671 NYS2d 429 [1998]; *Southbridge Towers v Frymer*, 4 Misc 3d 804, 781 NYS2d 207 [2004]). Moreover,

[w]hen a matter becomes moot a court is deprived of an actual controversy, the essential wherewithal of a court’s jurisdiction, and for that reason the issue of mootness may be raised at any time. In fact, it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot

(*Matter of Cerniglia v Ambach*, 145 AD2d 893, 894, 536 NYS2d 227, 229 [1988], *lv denied* 74 NY2d 603, 543 NYS2d 396 [1989] [citations omitted]).

Now, upon review, the Court is constrained to agree that the proceeding is moot and, therefore, to grant the second motion to dismiss. As a general rule, a case must be decided in accordance with the law as it exists at the time of the decision (*e.g. Matter of Alscot Inv. Corp. v Incorporated Vil. of Rockville Ctr.*, 64 NY2d 921, 488 NYS2d 629 [1985]). Based on the record provided, it is evident that the amendments to the Village Code, enacted subsequent to the administrative determinations which are the subject of this proceeding, obviated any need to obtain municipal approvals relative to the height of the proposed construction, thus superseding those determinations and rendering them irrelevant (*see Citizens for St. Patrick’s v City of Watervliet City Council*, 126 AD3d 1159, 5 NYS3d 582 [2015]). The petitioner, in opposition, has not alleged that any of its claims fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 431 NYS2d 400 [1980]), nor that the “special facts” doctrine is somehow applicable (*see generally Rocky Point Drive-In v Town of Brookhaven*, 21 NY3d 729, 977 NYS2d 719 [2013]). As to the alleged failure to comply with SEQRA, the Court notes that the petitioner’s argument is premised solely on the claim that the act of seeking an exemption from a local law constitutes an “unlisted” action; as such, that argument has likewise been rendered academic by the new enactments. The petitioner’s remaining arguments – including that the respondents may not seek a determination as to the applicability of the new legislation

Sullivan v. Village of Southampton Board of Trustees

Index No. 14-24031

Page 5

in the context of an article 78 proceeding, that the Village's building inspector is a necessary party to the proceeding, and that the affidavit of an engineer (rather than an architect) is required to offer competent testimony interpreting the subject amendments – are patently devoid of merit and warrant no further discussion.

Accordingly, the proceeding is dismissed, and the petitioner's request for preliminary injunctive relief is correspondingly denied.

Submit judgment.

Dated: November 23, 2015



Hon. Joseph Farneti
Acting Justice Supreme Court

 X FINAL DISPOSITION NON-FINAL DISPOSITION