Town of Southold v Go Green Sanitation, Inc.
2016 NY Slip Op 32132(U)
July 28, 2016
Supreme Court, Suffolk County
Docket Number: 20159/12
Judge: Paul J. Baisley, Jr.

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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TOWN OF SOUTHOLD,

Plaintiff,

-against-

GO GREEN SANITATION, INC. and FRANK FISHER, individually,

Defendants.

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GO GREEN SANITATION, INC., FRANK FISHER and JOSE PEREZ,

Counterclaim Plaintiffs,

-against-

TOWN OF SOUTHOLD,

Counterclaim Defendant.

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INDEX NO.: 20159/12
CALENDAR NO.: 201500765ot
MOTION DATE: 11/5/15
MOTION SEQ. NO.: 004 MD
005 CASEDISP

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Upon the following papers numbered 1 to 58 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-30 ; Notice of Cross Motion and supporting papers 31-48 ; Answering Affidavits and supporting papers__; Replying Affidavits and supporting papers 49-53; 54-58 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 004) of defendants/counterclaim plaintiffs Go Green Sanitation, Inc., Frank Fisher and Jose Perez for summary judgment on their counterclaims is denied; and it is further

ORDERED that the cross motion (motion sequence no. 005) of plaintiff/counterclaim defendant Town of Southold for summary judgment dismissing the first, second and sixth counterclaims asserted by the counterclaim plaintiffs is granted.

The Town of Southold (the "Town") commenced this action against Go Green, Inc., ("Go Green") and Frank Fisher ("Fisher") to enjoin them from :1) picking up refuse that was commingled with recyclables in violation of the Town Code and State Law; 2) picking up refuse that was not placed as required under the Town Code; and 3) operating without a license. Go Green and Fisher filed an answer with five counterclaims and later amended their answer to assert a sixth counterclaim on behalf of Jose Perez.

Go Green and Fisher now move for summary judgment on their counterclaims. In support of the motion, they submit, *inter alia*, the pleadings, the transcripts of the depositions of Scott

Russell and James Bunchuck, a copy of a stipulation between the parties dated July 23, 2012, a copy of a prior order of this Court dated March 25, 2014, a copy of a letter from the office of the Southold Town Clerk to Go Green and Frank Fisher dated February 8, 2012, and the affidavit of Jose Perez dated August 14, 2015. The Town opposes the motion and cross moves for summary judgment dismissing the first, second and sixth counterclaims. In support of the cross motion it submits, *inter alia*, the amended answer, Town of Southold Appearance Ticket 1456 dated February 11, 2011, Southold Town Justice Court Case Report No. 11030039, a portion of the deposition transcript of James Bunchuck, and a copy of an affidavit of James Bunchuck dated July 2, 2012. The Town also submits a copy of the transcript of the proceedings before the Hon. Arthur D. Spatt, U.S.D.J., on November 15, 2012 in the matter of *Town of Southold v Go Green Sanitation, Inc. and Frank Fisher* under Index No. CV12-3837 in the United States District Court for the Eastern District of New York.

On or about October 20, 2011, the Town of Southold issued a carter permit to Go Green, effective on January 1, 2012. By a letter dated February 8, 2012, the Town revoked the permit due to a number of violations by Go Green of the Town Code, including picking up refuse that was commingled with recyclables. By Order to Show Cause dated July 5, 2012, the Town commenced this action for injunctive and other relief. This Court granted the Town's request for a temporary restraining order on July 5, 2012. However, on July 23, 2012, the parties entered into a stipulation allowing Go Green to operate for four months without complying with the "yellow bag law," which requires that Town residents purchase garbage bags from the Town, and put out all non-recyclable waste in said Town garbage bags for pick up.

Go Green and Fisher then interposed an answer asserting five counterclaims, and thereafter removed the action to the Federal District Court, Eastern District of New York. As the four-month stipulation between the parties was about to expire, Go Green and Fisher moved on November 15, 2012 for a temporary restraining order and a preliminary injunction solely to enjoin the Town from enforcing the yellow bag law, which they alleged was an unlawful tax. The motions were argued that day before Judge Spatt, who denied both motions. District Judge Spatt also remanded the matter to this Court.

On October 1, 2013, Go Green and Fisher moved to amend their answer to add a sixth counterclaim, and to add Jose Perez as a counterclaim plaintiff. That motion was granted by an order of this Court dated March 24, 2014, and an amended answer was then served on the Town. The parties are in agreement that since November 15, 2012 Go Green has been in substantial compliance with the source separation requirements of state law that prohibit carters from picking up refuse that contains recyclables mixed with solid waste, and with the Town's yellow bag law. The Town concedes that its injunction action, at this point, is moot.

The first two counterclaims allege that the revocation of Go Green's carter permit, without a hearing, was a violation of its due process rights pursuant to 42 USC §1983. The third and fourth counterclaims asserted by Go Green and Fisher allege violations of federal and state antitrust laws. Both of these counterclaims have been withdrawn. The fifth counterclaim by Go Green and Fisher seeking a declaratory judgment that the Town's yellow bag law (also referred to as "Pay as You Throw") is null and void was dismissed by an order of this Court dated March 24, 2014. The sixth counterclaim, on behalf of Jose Perez, a resident of the Town of Southold, seeks

a declaratory judgment that the Town's yellow bag law, set forth in Section 233 of the Town Code (also referred to as "Pay as You Throw") is null and void, as it exceeds the Town's Authority under the Town Law, is *ultra vires* and in violation of the New York State and Federal Constitutions.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto, supra*; *O'Neill v Fishkill*, *supra*).

Where the alleged deprivation arises from an unauthorized act of a governmental employee, it will not support a due process claim if adequate post-deprivation remedies are available, such as a proceeding pursuant to article 78 (*Your Place, LLC v City of Troy*, 122 AD3d 1148, 997 NYS2d 529 [3d Dept 2014]; *Matter of Hamil Stratten Properties, LLC v New York State Department of Environmental Conservation*, 79 AD3d 747, 913 NYS2d 282 [2d Dept 2010]; *Pinder v City of New York*, 49 AD3d 280, 853 NYS2d 312 [1st Dept 2008]; *Perkins v. McGrain*, 112 A.D.3d 1018, 1019, 975 NYS2d 924 [3d 2013]; *Hughes Vil. Rest., Inc. v Village of Castleton–on–Hudson*, 46 AD3d at 1047, 848 NYS2d 384 [3d Dept 2007]). "In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case" (*Brady v Colchester*, 863 F2d 205, 211 [2d Cir198]). However, where a plaintiff "was free to bring an Article 78 mandamus proceeding in New York State court" but did not, the plaintiff "cannot now be heard to complain of a denial of procedural due process" (*Nenninger v Village of Port Jefferson*, 509 App'x. 36, 39 fn.2 [2d Cir 2013]; *see also Orange Lake Assocs. v Kirkpatrick*, 825 FSupp 1169, 1179 [SDNY1993] ("Since Plaintiff's claim in this case is procedural, an article 78 hearing was available in state court and there can be no procedural due process violation."). Go Green and Fisher's reliance on *N.Y. State NOW v Pataki*, 261 F3d 156 [2d Cir 2001], is misplaced, as a close reading of the case reveals that the decision, in fact, supports the Town's arguments.

Therefore, to be timely, the first and second counterclaims had to be commenced within the four-month statute of limitations applicable to CPLR article 78 proceedings (*see* CPLR 217[1]; *Solnick v Whalen*, 49 NY2d 224, 425 NYS2d 68 [1980]; *Cloverleaf Realty of N.Y., Inc. v Town of Wawayanda*, 43 AD3d 419, 843 NYS2d 335 [2d Dept 2011]; *P & N Tiffany Props., Inc. v Village of Tuckahoe*, 33 AD3d 61, 817 NYS2d 345 [2d Dept 2006]). Merely because Go Green and Fisher couched their claims as denial of constitutional due process, it does not follow that their compliance with the statute of limitations applicable to CPLR article 78 proceedings is abrogated, since it is undisputed that the Go Green and Fisher received actual notice of the revocation of the carter license (see *Matter of ISCA Enters. v City of New York*, 77 NY2d 688, 569

NYS2d 927 [1991]; *Sheldon v Town of Highlands*, 73 NY2d 304, 539 NYS2d 722 [1989]; *Cloverleaf Realty of N.Y., Inc. v Town of Wawayanda, supra; P & N Tiffany Props., Inc. v Village of Tuckahoe*, supra). The causes of action alleging due process violations, therefore, are time barred and the Town is entitled to summary judgment dismissing the first and second counterclaims.

Counterclaim plaintiff Jose Perez has failed to establish his *prima facie* entitlement to summary judgment on the sixth counterclaim for a judgment determining that the yellow bag law, Southold Town Code Section 233-3.1A(2)(e)(2), is unconstitutional and unenforceable. Legislative enactments are entitled to an "exceedingly strong presumption of constitutionality" (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11, 390 NYS2d 827 [1976]; *see ATM One, LLC v Incorporated Vil. of Hempstead*, 91 AD3d 585, 936 NYS2d 263 [2d Dept 2012]; *American Ind. Paper Mills Supply Co., Inc. v County of Westchester*, 65 AD3d 1173, 886 NYS2d 178 [2d Dept 2009]). In the face of the strong presumption of validity, a plaintiff has a heavy burden of demonstrating, beyond a reasonable doubt, that the ordinance has no substantial relationship to public health, safety, or general welfare (*see Town of N. Hempstead v Exxon Corp.*, 53 NY2d 747, 439 NYS2d 342 [1981]; *Tilcon New York, Inc. v Town of Poughkeepsie*, 125 AD3d 782, 5 NYS3d 102 [2d Dept. 2015]; *Peconic Ave. Businessmens' Assn. v Town of Brookhaven*, 98 AD2d 772, 469 NYS2d 483 [2d Dept 1983]). While this heavy presumption is rebuttable, unconstitutionality on due process grounds "must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*Lighthouse Shores Inc. v Town of Islip*, 41 NY2d 7 at 11, 390 NYS2d 827, 830 [1976]).

The record establishes that the yellow bag law was designed and approved to bring the Town into compliance with State mandates to reduce the amount of solid waste being disposed of and to encourage increased reuse and recycling of a larger portion of the waste stream *(see* Environmental Conservation Law §27-0106; General Municipal Law §120-aa). The yellow bag law is a "pay as you throw" program designed to encourage Town residents to maximize recycling. This goal is accomplished by requiring residents to purchase Town-issued yellow bags, which must be used to dispose of their non-recyclable household waste. Under the law, commercial carters picking up garbage in the Town are required to pick up only household waste contained in the yellow bags. The cost of the bags ranges from 75 cents for a 13 gallon bag to $2.25 for a 44 gallon bag. Thus, Town residents are given an economic incentive to recycle more of their household waste stream, which will decrease the number of yellow bags they are required to purchase. The yellow bag law applies regardless of whether the residents or the commercial carters they hire use the Town's transfer station. Residents and carters can dispose of residential waste in yellow bags for free at the Town transfer station or at any other site authorized by law to accept municipal waste. The law thus treats all Town residents equally, whether they use the Town transfer station or not. The fees are also used to defray some of the cost of the Town's Solid Waste District, although it provides only 13% of the district's revenue.

In his brief affidavit, Mr. Perez states that he owns a residence in the Town of Southold, and that he pays Go Green $31.99 per month for garbage pick up. Mr. Perez also alleges that purchasing yellow bags from the Town will cost him $364.00 per year in increased waste disposal fees. However, as noted by the Town in its reply papers, his alleged costs represents an expenditure of $7.00 per week, which would require the purchase of more than three 44 gallon

bags a week, which leads to the conclusion that Mr. Perez produces 132 gallons of solid waste per week, more than seven times more than the amount produced by the average Southold residence. Based upon the numbers produced by counsel for the counterclaim plaintiffs, which are based upon Town records, the average household pays just under $50.00 per year in yellow bag fees per year. Mr. Perez provides no explanation as to why his household produces so much solid waste.

It is undisputed that a public authority cannot levy taxes, which "go to the support of government without any necessity to relate them to particular benefits received by the taxpayer" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 58, 412 NYS2d 821 [1978]). Indeed, " [t]o the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax" (*Matter of Torsoe Bros. Constr. Corp. v Board of Trustees of Inc. Vil. of Monroe*, 49 AD2d 461, 465, 375 NYS2d 612 [2d Dept 1975]; *see also Matter of Phillips v Town of Clifton Park Water Auth.*, 286 AD2d 834, 730 NYS2d 565 [3d Dept 2001]). The fees exacted pursuant to the yellow bag law are neither exacted for revenue purposes nor to offset the cost of general governmental functions. Furthermore, they are not fees for refuse and garbage collection service pursuant to Town Law §198(9)(c). In the same vein, the counterclaim plaintiffs' reliance on *Rauscher v Village of Boonville*, 131 Misc 2d 264, 499 NYS2d 832, 834–35 (Sup Ct Oneida Cty1986), is inappropriate. In that decision the Supreme Court found a village ordinance unconstitutional because it imposed a fee on carters in the village for the stated purpose of supporting the local transfer station. The Court found it to be a revenue measure, without any relationship to controlling solid waste. The yellow bag law has the opposite purpose, as it is designed to encourage Town residents to maximize recycling. As already noted, this is accomplished by requiring residents to purchase Town-issued yellow bags which must be used to dispose of their non-recyclable household waste. Town residents are given an economic incentive to recycle more of their household waste stream, which will decrease the number of yellow bags which they are required to purchase. The cost to the average Southold residence has been shown to be a minor expense, Mr. Perez's unsupported allegations to the contrary notwithstanding. The amount of revenue generated is an ancillary benefit, which the counterclaim plaintiffs allege is relatively small, and is used in the resource recovery effort. Thus, the yellow bag law is not enacted for revenue purposes or to offset the cost of general governmental functions, and is not invalid as an unauthorized tax (*see Matter of Torsoe Bros. Constr. Corp. v Board of Trustees of Inc. Vil. of Monroe*, *supra*).

Municipalities and administrative agencies engaged in regulatory activity can assess fees that need not be legislatively authorized as long as "the fees charged [are] reasonably necessary to the accomplishment of the regulatory program" (*Suffolk County Bldrs. Assn. v County of Suffolk*, 46 N.Y.2d 613, 619, 415 NYS2d 821 [1979]; *see Walton v New York State Dep't of Corr. Svcs.*, 13 N.Y.3d 475, 492 [2009]). As already noted, the primary reason for the fee on yellow bags is to encourage recycling. According to the Town's Solid Waste Coordinator, James Bunchuck, immediately after the law was implemented, overall waste decreased 29% and recyclables increased by 75%. Mr. Bunchuck further stated that since the implementation of the yellow bag program, the Town had realized savings of over $6 million in reduced waste disposal costs and increased recycling. Mr. Bunchuck also testified that the Town has the best recycling rate on Long Island.

"[I]n order to be upheld as constitutional, a law which places some restriction upon an individual's freedom of action in the name of the police power must bear some reasonable relation to the public good" (*Dobrzenski v Village of Hamburg*, 277 AD2d 1005, 1005–1006, 715 NYS2d 819 [4th Dept 2000], citing *People v Pagnotta*, 25 NY2d 333, 305 NYS2d 484 [1969]). The Town has established that the yellow bag law, which affects all of the residents of the Town, but which also benefits all of the residents of the Town, bears a reasonable relation to the public good.

Accordingly, the motion by Go Green Sanitation and Frank Fisher for summary judgment on the first and second counterclaims is denied, and the branch of the cross motion by the Town for summary judgment dismissing the first and second counterclaims asserted by Go Green Sanitation and Frank Fisher is granted. Furthermore, as Perez has failed to carry his burden of demonstrating beyond a reasonable doubt that the ordinance has no substantial relationship to public health, safety, or general welfare, the sixth counterclaim seeking a declaratory judgment is denied, and the branch of the Town's motion for summary judgment on the sixth counterclaim is granted. Finally, it is declared that Southold Town Code §233-3.1A(2)(e)(2) which is the subject of this action is a legal, constitutional and valid exercise of the police and legislative powers of the Town of Southold.

Dated: July 28, 2016

HON. PAUL J. BAISLEY, JR.

J.S.C.