Matter of Willows Condominium Assoc. v Town of Greenburgh
2016 NY Slip Op 32761(U)
April 15, 2016
Supreme Court, Westchester County
Docket Number: 15-3403
Judge: Susan M. Cacace

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
WILLOWS CONDOMINIUM ASSOCIATION,
PETER EGER and DR. JEFFREY BALANCIO,

DECISION
ORDER & JUDGMENT

Petitioners,

Index No. 15-3403

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

- against -

TOWN OF GREENBURGH, ZONING BOARD
OF APPEALS OF TOWN OF GREENBURGH,
and JOHN LUCIDO as Building Inspector of
Town of Greenburgh,

Respondents.

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CACACE, J.

The following papers, numbered one (1) through seven (7) were read upon review of the instant amended verified petition for relief pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

Upon the foregoing papers, it is ordered and adjudged as follows:

Procedural and Factual Background

The petitioners bring this proceeding by verified petition submitted pursuant to article 78 of the CPLR, seeking (1) an order of this Court providing relief in the nature of *mandamus* to compel the respondents Town of Greenburgh (hereinafter, Greenburgh) and Greenburgh Building Inspector John Lucido (hereinafter, Lucido) to issue a formal determination upon petitioners' complaints regarding the Jackson Avenue Nursery (hereinafter, the Nursery), (2) an order of this Court providing relief in the nature of *mandamus* to compel the respondents Greenburgh and the Town of Greenburgh Zoning Board of Appeals (hereinafter, ZBA) to hear the petitioners' application before the respondent ZBA and hold a public hearing thereupon, and (3) an order of this Court providing relief in the nature of *mandamus* to compel the respondent ZBA to hear and determine the petitioners' application before the respondent ZBA based upon respondent Lucido's failure to respond to the petitioners' demands regarding the Nursery.

Petitioner Willows Condominium Association (hereinafter, the Willows) is an association of 81 condominium units located at both 125 Fort Hill Avenue, Yonkers, New York and 11 Jackson Avenue, Scarsdale, New York, which is adjacent to the Nursery located at 21 Jackson Avenue, Scarsdale, New York. Petitioners Peter Eger (hereinafter, Eger) and Jeffrey Balancio (hereinafter, Balancio) are the owners of distinct residential units at the Willows and are individual shareholders of the common elements of the Willows. In substance, the petitioners jointly oppose specific soil preparation operations being conducted at the Nursery and have undertaken various efforts to compel the owners of the Nursery to cease such operations on the Nursery property. Specifically, the owner(s) of the Nursery submitted an application to the

Planning Board of the Town of Greenburgh (hereinafter, the Planning Board) seeking site plan approval with regard to the Nursery. Upon initial consideration of the Nursery's site plan application, the Planning Board deferred a determination of same until an interpretation could be obtained from the respondent ZBA regarding whether or not "mixing soil and mulch to produce topsoil is a permitted use in a nursery" (hereinafter, the "interpretation"). Consequently, on behalf of the Planning Board, respondent Lucido submitted an application to the respondent ZBA seeking the "interpretation" under Case No. 14-20, which was the subject of hearings on three dates in the Fall of 2014, involved the comments of interested members of the community including the petitioners, and was resolved with the issuance of a written Certification of Decision (hereinafter, the ZBA Decision) on February 26, 2015.

In pertinent part, the ZBA Decision held that the mixing of soil and mulch to produce topsoil is not a legally nonconforming use of the Nursery property, but also held that such use may be permissible if it meets the definition of an "accessory use" which is incidental and subordinate to the principal use, in terms of both area and/or income, of the Nursery property for permitted nursery-related purposes. Although the ZBA Decision did not determine whether the mixing of soil and mulch to produce topsoil on the Nursery property meets the definition of an "accessory use", it suggested that such a determination was "for others to make in the first instance". Thereafter, respondent Lucido referred the "accessory use" question concerning the Nursery property to the Planning Board, which at present continues to have that matter under review in connection with the Nursery's pending site plan application.

Subsequent to the issuance of the ZBA Decision on February 26, 2015, and the filing of same with the Greenburgh Town Clerk on March 31, 2015, the petitioners sent a letter to

respondent Lucido on May 11, 2015 which formally complained about the continuing soil mixing operations being conducted on the Nursery property and "demand[ed] a determination from the appropriate administrative official of the Town with respect to zoning violations of the Town Code, illegality of the use and the illegal extension of a nonconforming use with respect to the subject premises", referring to the Nursery property. Although it appears that respondent Lucido did not directly respond to the petitioners' May 11, 2015 letter, respondent Lucido did subsequently write a letter to the owner(s) of the Nursery on June 17, 2015, wherein he directed them to follow the ZBA Decision with regard to soil mixing operations being conducted on the Nursery property within 14 days, or to otherwise cease all such activities.[1] The petitioners submit that respondent Lucido's letter of June 17, 2015 constituted a determination which failed to address the demands they made in their letter of May 11, 2015. The petitioners further submit that respondent Lucido failed to follow up on the subsequent failure of the owner(s) of the Nursery to comply with the demands he made in his letter of June 17, 2015, and they filed an appeal with the respondent ZBA on August 13, 2015 to challenge the alleged failure of respondent Lucido to address the demands made by the petitioners in their letter of May 11, 2015. Thereafter, a series of electronic mailings were exchanged between the petitioners' attorney, Matthew Calvi, Esq., and a Deputy Town Attorney for the Town of Greenburgh, Ed Lieberman, Esq., which culminated in his final electronic mailing to Mr. Calvi on September 28, 2015 wherein he indicated that the ZBA Chairperson "was not of the opinion that the appeal would be timely, or if it was, it would not be favorably decided". The petitioners commenced

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[1]Respondent Lucido copied the petitioners' attorney, Matthew Calvi, Esq., as well as the Planning Commissioner Garrett Duquesne, Town Attorney Timothy Lewis and Patrick V. DeIorio of the DeIorio Law Group, in his letter of June 17, 2015.

this proceeding upon the filing of the instant petition on October 27, 2015.

In opposition to the instant petition, the respondents filed a motion seeking the dismissal of same pursuant to CPLR 3211(a), alleging that (1) the petitioners lack standing because they are not residents of the Town of Greenburgh, (2) the petition is untimely because it was not filed within 30 days of the filing of the ZBA Decision with the Greenburgh Town Clerk on March 31, 2015, (3) the petition fails to state a cause of action because *mandamus* to compel the respondents to perform the actions sought through the instant petition does not lie, (4) the decision complained of is not final and therefore is not ripe for judicial review because the Planning Board has not yet issued site plan approval to the Nursery, (5) the petitioners have failed to exhaust their administrative remedies available under Town Law § 268(2), and (6) the petitioners have failed to join the Nursery as a necessary party to this proceeding. In opposition to the respondents' motion to dismiss, the petitioners argue that (1) they have standing because the Willows owns a .40 acre parcel of land located within the Town of Greenburgh for which property taxes are paid to the Town of Greenburgh, (2) the petition is timely because respondent Lucido's challenged determination is ongoing, (3) the petition states a cause of action because *mandamus* to compel respondent Lucido to review and investigate the petitioners' complaints does lie, (4) the failure of respondent Lucido to make a determination, and the respondent ZBA's rejection of the petitioners' appeal are final determinations which are ripe for judicial review at this time, (5) the petitioners' filing of an appeal with the respondent ZBA satisfied all available administrative remedies, and (6) the Nursery need not be joined as a necessary party to this proceeding.

In further opposition to the respondents' motion to dismiss this proceeding, the

petitioners also filed a notice of cross-motion for summary judgment, arguing that they have presented adequate proof of the existence of zoning illegalities at the Nursery, and the respondents have failed to take the actions they are legally bound to perform. The respondents oppose the petitioners' cross-motion as premature, arguing that same was impermissibly filed prior to the respondents' filing of an answer and record of proceedings pursuant to CPLR 7804(e) and (f).

Legal Analysis

Turning first to consider the respondents' challenge to the petitioners' standing to bring the instant proceeding, the petitioners bear the burden to show that they have suffered an "injury in fact, distinct from that of the general public" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 771-774; *see Matter of Clark v Town Board of Clarkstown*, 28 AD3d 553; *Matter of Rediker v Zoning Bd. of Appeals of Town of Phillipstown*, 280 AD2d 548, 549), and that the injury they allegedly suffered falls within the "zone of interest" that the relevant statute seeks to promote or protect (*see Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9-12; *see also Colella v Board of Assessors of County of Nassau*, 95 NY2d 401). Specifically, the respondents argue that the petitioners lack standing to challenge the actions which are the subject of the instant petition because their residential condominium units are physically located outside of the geographic boundaries of the Town of Greenburgh. Upon that claim, the respondents submit that the alleged status of the petitioners as non-residents of the Town of Greenburgh precludes them from having standing to challenge any determination reached, or decision rendered by any of the municipal

boards or agents of the Town of Greenburgh, as they cannot claim that they are aggrieved by any such determinations or decisions. In connection herewith, the Court has reviewed the case law cited by the respondents and must disagree with the application of the principles espoused in *Browning v Bryant* (178 Misc. 576) and *Wood v Freeman* (43 Misc. 616) to the facts presented in this case, as this Court finds that such a restrictive interpretation of standing concepts is inconsistent with more recently decided case law.

Here, the petitioners have asserted that their collectively owned property of the Willows abuts the Nursery property, and has been impacted by excessive noise, dust and noxious odors emanating from the Nursery property as a consequence of the soil preparation activities being conducted by the Nursery. Furthermore, although the record is unclear with regard to the residency status of the petitioners within or without the Town of Greenburgh, the petitioners make the uncontroverted claim that they are required to pay property taxes to the Town of Greenburgh for that portion of the Willows property which lies within the geographic boundaries of the Town of Greenburgh, and have adequately supported that claim with proof that the Willows paid property taxes to the Town of Greenburgh in 2015. Consequently, since the individual petitioners and the other members of the Willows live in such close physical proximity to the Nursery property, and as the petitioners' complaints concerning the asserted environmental impacts of the challenged soil preparation activities being conducted on the Nursery property fall within the zone of interests protected by the Greenburgh Town Code provisions which are within the jurisdiction of respondent Greenburgh's Building Department, this Court finds that "there should be no distinction between plaintiffs who reside in the town and those beyond its borders, since the environmental effects of the [soil preparation activities being conducted on the Nursery

property] are matters of more than local consequence that will affect residents and nonresidents" alike (*Glen Head-Glenwood Landing Civic Council, Inc. v Town of Oyster Bay*, 88 AD2d 484, 490). Accordingly, this Court finds that the petitioners have standing to bring this proceeding against the respondents, as the petitioners have adequately demonstrated that the respondents' actions with regard to the Nursery's soil preparation activities has had, and will continue to have a harmful effect upon the individual petitioners, as well as the associational petitioner, irrespective of their residency within or without the Town of Greenburgh.

However, although this Court finds that the petitioners do have standing to bring this proceeding, this Court also finds merit in the respondents' challenge to the petitioners' failure to name the Nursery as a necessary party to this proceeding. Specifically, the Court notes that a party whose interest may be adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding (*see* CPLR 1001[a]; *Matter of Martin v Ronan*, 47 NY2d 486; *Matter of Karmel v White Plains Common Council*, 284 AD2d 464, 465). In this regard, it is well-settled that CPLR article 78 proceedings challenging land use determinations are properly subject to dismissal where the petitioner(s) failed to timely join the landowner of the property at issue as necessary party thereto (*see Matter of East Bayside Homeowners Assn. v Chin*, 12 AD3d 370, *lv. denied* 4 NY3d 704; *see also Matter of Cybul v Village of Scarsdale*, 17 AD3d 462; *Matter of Long Is. Pine Barrens Socy. v Town of Islip*, 286 AD2d 683). Upon the record presented, the Court finds that the Nursery is a party whose interests would be adversely affected by a potential judgment in favor of the petitioners in this proceeding, as the Nursery's ability to continue conducting the significant soil preparation activities on the Nursery property, and consequently benefit from the business profits derived therefrom, compels the inclusion of the

Nursery as a necessary party to this CPLR article 78 proceeding (*see* CPLR 1001[a]; *see also Matter of Freed v New York State Racing & Wagering Bd.*, 9 AD3d 808, 809; *Matter of Haddad v City of Hudson*, 6 AD3d 1018, 1019; *Matter of Karmel v White Plains Common Council,* 284 AD2d at 465). Moreover, as the petitioners were undeniably aware of the identity of the owner(s) of the Nursery from their mutual presence and participation in the extensive hearings conducted before the respondent ZBA in the Fall of 2014 in connection with respondent Lucido's request for an interpretation regarding the soil preparation activities being conducted on the Nursery property, the petitioners' failure to adequately explain their failure to name the Nursery as a party to this proceeding in the first instance, precludes them from proceeding in the absence of the Nursery (*see* CPLR 1001[b]; *Matter of Bayside Homeowners Assn. v Chin*, 17 AD3d at 370; *Matter of Lodge v D'Aliso*, 2 AD3d 525). Accordingly, the respondent's motion to dismiss this proceeding is hereby granted upon the Court's determination that the petitioners have failed to name the Nursery, or any of its principals, as parties to this CPLR article 78 proceeding.

Independently, the instant proceeding must also be dismissed upon the respondents' claim that the instant petition fails to state a cause of action to compel the respondents to perform the actions sought through the instant petition, as *mandamus* is unavailable upon the record presented. CPLR 7803(1) requires that the petitioners establish that the respondents failed to perform a duty which was incumbent upon them as a matter of law. In this regard, an action brought in the nature of *mandamus* to compel has been defined as an "extraordinary remedy", available under only limited circumstances which do not involve the exercise of judgment or discretion (*see Klostermann v Cuomo*, 61 NY2d 525). Furthermore, it is well-settled that *mandamus* to compel will lie only to "compel the performance of a purely ministerial act where

there is clear legal right to the relief sought" (*Matter of Legal Aid Society of Sullivan County v Scheinman*, 53 NY2d 12, 16), which must stem from "a clear and unequivocal expression of intent from the Legislature" (*Harper v Angiolillo*, 89 NY2d 761, 767).

Here, this Court finds that *mandamus* does not lie to afford the petitioners the relief sought through the instant petition due to their failure to establish that (1) respondents Greenburgh and Lucido are duty-bound, without any exercise of discretion, to issue a formal determination upon the complaints against the Nursery raised by the petitioners in their letter addressed to respondent Lucido on May 11, 2015, or (2) that respondents Greenburgh and ZBA are duty-bound, without any exercise of discretion, to hold public hearings on the petitioners' appeal to challenge the alleged failure of respondent Lucido to address the demands they made in their letter of May 11, 2015, or to otherwise hear and determine that appeal in some other manner despite the respondent ZBA's determination to reject their appeal on timeliness grounds. Where, as here, the petition fails to establish that there exists any authority which compels the respondents to provide the petitioners with the specific relief that they seek through their petition, nor that the relief sought therein constitutes the performance of an act which is "ministerial, nondiscretionary and nonjudgmental, and . . . premised upon specific statutory authority mandating performance in a specific manner", *mandamus* relief is unavailable (*Matter of Brown v New York State Dep't of Social Servs.*, 106 AD2d 740, 741). Accordingly, the respondent's motion to dismiss this proceeding is hereby granted upon the Court's additional determination that the petitioners have failed to establish that *mandamus* relief is available upon the record presented.

Finally, to the extent that the petitioners seek relief pursuant to the cross-motion for

summary judgment that they filed contemporaneously with their affirmation in opposition to the respondents' motion to dismiss, this Court finds that the petitioners' cross-motion for summary judgment is premature and otherwise unavailable prior to the respondents being afforded an opportunity to file an answer and record of proceedings pursuant to CPLR 7804(e) and (f). Accordingly, the petitioners cross-motion for summary judgment is summarily denied.

Based upon the foregoing, the respondents' motion to dismiss the instant petition is granted; and therefore, this proceeding is hereby dismissed.

The foregoing constitutes the Decision, Order and Judgment of this Court.

Dated: White Plains, New York
April 15, 2016

Honorable Susan Cacace
Acting Justice of the Supreme Court

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