STATE OF NEW YORK
COUNTY OF CORTLAND SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

In the Matter of the Petition of

DECISION AND ORDER

Leach Properties, LLC, Leach's Custom Trash Service, Suit-Kote Corporation, Town of Cortlandville Zoning Board of Appeals, Town of Cortlandville Planning Board, and Town of Cortlandville Town Board,

Petitioners,

v. Index No. 2015-720

Pamela Jenkins, Cheri Sheridan and Olga Smith,

Respondents.

This matter comes before the Court upon the June 15, 2016, Notice of Motion and Petition of Gregory K. Leach (Leach), along with the June 14, 2016, Attorney's Affidavit in Support of Petition, seeking relief pursuant to Civil Practice Law and Rules §2221(d) and §2221(e) with respect to this Court's Decision and Order of May 23, 2016. In particular, Leach singularly seeks to reargue the issue of whether there existed a self-created hardship as that term is defined at Town Law §267-b(2)(b)(4) with respect to the issuance of a use variance by the Cortlandville Zoning Board of Appeals (ZBA). Respondents replied by Affirmation in Opposition to Motion to Reargue or Renew dated June 27, 2016, opposing the relief requested and also seeking attorney's fees.[1]

On July 25, 2016, the parties appeared in Cortland County Supreme Court and were heard.[2]

This Court incorporates by reference hereto it's prior Decisions and Orders in this matter dated March 18, 2016, and May 23, 2016, and the facts as found therein.

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[1]The initial Article 78 action identified the Respondents herein as the Petitioners, and the Petitioners herein the Respondents. The Index Number remained the same.

[2]Leach is the singular party pursuing the instant matter.

Leach specifically seeks relief pursuant to CPLR §2221(d), or alternatively, §2221(e), requesting that he be given an opportunity to renew or reargue whether it had created for itself the hardship by purchasing the subject property formerly owned by Suit-Kote. Leach, in requesting that this court revisit it's May 23, 2016, Decision and Order, asserts at Paragraph 8 of his Petition that "[i]t is respectfully submitted that Respondents herein and Petitioners in the Article 78 matter submitted no proof whatsoever that this was a self-created hardship, and those allegations were not properly before the Court." The supporting Affidavit of Attorney Lewis, at Paragraph 23, asserts that "..., the May 23, 2016 Decision contains findings that are inequitable and prejudicial to the Petition, and therefore, the Petitioner requires an order before allowing it to reargue or renew its position on hardship related to the purchase of the Property and subsequent judicial disapproval its land use variance."

CPLR §2221(d) and (e) provide for, as is relevant, the following:

> (d) A motion for leave to reargue:
>
> > 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion;
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> (e) A motion for leave to renew:
>
> > 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> >
> > 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

CPLR §2221(f) provides that: "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination."

The distinction between a motion to reargue and a motion to renew is succinctly described as follows: "the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind." (McKinney's Consolidated Laws of New York Annotated, Rule 2221, Practice Commentaries at C2221:7).

Leach seeks relief by asserting that "the Court overlooked or was unaware of a key fact when the Court made findings in the May 23, 2016, Decision." (Lewis Affidavit at ¶2). This "key fact" as alleged by Leach consisted of the existence of a contract purportedly entered into between Leach and Suit-Kote Corporation with respect to the subject property and, further, that the execution of this particular contract was dependent upon the issuance of the use variance by the ZBA. Thus, Leach's primary focus is upon the existence and relevance of a contract entered into between Leach and Suit Kote Corporation on or about September 3, 2015. (Petitioner's Exhibit 1 of the Petition). Leach's position is that the subject property would not have been purchased by Leach, and the hardship not created, if a use variance had not been granted in the first instance by the ZBA. Paragraphs 15 and 16 of the Petition state that:

> (15) The aforementioned Contact was wholly contingent upon Leach being able to obtain this variance for its intended use, as set for in ¶3(e) of the Contract.
>
> (16) In fact, Leach was not obligated to, and certainly would not have, purchased the Property if the variance had not been granted by ZBA.

Leach thereafter asserts that upon full reliance of the ZBA's grant of the use variance on or about October 27, 2015, Leach proceeded with the purchase of the subject property on December 1, 2015, as the contractual condition precedent to purchase had been satisfied as set forth in ¶3(e) of the contract.[3] Leach submits that absent such approval he would not have purchased the subject property. At Paragraph 22 of the Petition, Leach takes the position that "[i]ndeed, Leach would not have purchased the Property if the ZBA had denied its application for a variance or if it had known that the ZBA's approval of the variance would be made void *ab initio* by a later decision of the Court."

Leach further seeks to place some degree of responsibility upon the Respondents for having delayed commencement of the initial Article 78 proceeding as a basis to re-visit the matter of self-created hardship. At Paragraphs 27 and 28 of the Petition, Leach asserts that:

> (27) The Respondents herein had approximately five (5) weeks to challenge that determination [of the ZBA]; however, they waited until after Leach purchased the Property and began using the Property for its intended purpose to challenge the ZBA's approval of the variance.

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[3]Paragraph 3(e) of the purchase contract states as follows: "Buyer shall make an application for a lot line adjustment or subdivision approval as may be required by the Town of Cortlandville. Seller shall cooperate as reasonably required to purse (sic) said approvals. In addition, Buyer shall obtain confirmation that premises may be used as part of Buyer's trash hauling business." The language of this paragraph does not expressly provide that the grant of a use variance would be a condition precedent to the purchase of the property; rather, this provision placed the onus upon the Buyer (Leach) to insure that the property could be utilized for its intended purpose.

(28) This prolonged wait by the Respondents to challenge the approval of the variance is extremely prejudicial to Leach and **the sole reason** for Leach's hardship; if the Respondents had acted prior to Leach purchasing the Property, Leach would have known the approval of the variance might be voided *ab initio* and would not have purchased the Property at that time. (Emphasis added).

In effect, then, Leach asserts that the Respondents are responsible for the hardship created here by having delayed in the commencement of the Article 78 proceeding to his ultimate detriment.

Respondents, on the other hand, while asserting that the instant petition is without merit, take issue with the alleged "new facts" sought to be introduced by Leach and further assert that it was Leach's failure to satisfy the burden imposed upon him before the ZBA to demonstrate that this was not a self-created hardship which placed him in the position he finds himself in today, not any actions of the Respondents. In addition, the Respondents assert that they did not purposefully delay commencement of this action until after Leach had purchased the property. This position is supported by the fact that Suit-Kote had been an original party to the Article 78 action but such action was discontinued as against Suit-Kote once it was determined, well after commencement, that a transfer of the property had taken place such that Suit-Kote no longer had a legal interest in the property.

In reviewing this matter, which necessarily includes those matters which had been associated with the underlying Article 78 proceeding, this court finds that the basis upon which Leach seeks relief is more in the nature of a motion to renew rather than reargue. Specifically, Leach seeks to change this court's prior determination based upon the introduction of "new facts" which "[were] not offered at [the time of the original proceedings] and to show that the Court overlooked or was unaware of a key fact when the Court made findings in the May 23, 2016, Decision." (Lewis Affidavit at ¶2).

In order to consider these new facts pursuant to CPLR §2221(e), Leach would first have to satisfy the threshold question of whether there is presented a "reasonable justification for the failure to present such facts on the prior motion" by him. Here, Leach takes the position that the contract between Leach and Suit-Kote was not introduced setting forth the contingency pertaining to municipal approval in the first proceeding with respect to whether the hardship was self-created as it was the Respondents, by their timing of the initial Article 78 action, which was the sole or exclusive basis upon which the hardship was created. This court, upon a review of the proceedings heretofore had herein, does not find this posture to be supported in law or fact.

This court, upon a review of the record of this proceeding and the underlying Article 78 action, does not find that Leach has demonstrated that any of the information now proffered consists of "new facts." The existence of a purchase agreement between Leach and Suit-Kote was, at all times, evident in the underlying proceedings as was Leach's reliance upon the issuance of a use variance with respect to the purchase of the subject property. Therefore, as Leach has failed to demonstrate the existence of new facts upon which the prior determination may be modified or

changed, the instant petition must be denied, as compliance with CPLR §2221(e) has not been found.

Alternatively, if relief is unavailable pursuant to CPLR §2221(e), petitioner must seek redress by way of CPLR §2221(d), as the facts presently asserted by Leach to be new facts were, in substance, made known to the court and were alleged within the body of the pleadings previously submitted. For example, Paragraphs 59, 74 and 100 of the February 1, 2016, Affidavit of Gregory Leach, submitted with respect to the question of standing, which was determined by Decision and Order dated March 18, 2016, disclosed the following:

> 59. The adjacent property that has now been purchased in reliance upon the variance granted, was unusable by Suit-Kote Corporation, its owner at the time of the public hearing, and by doing minimal fill, a driveway could be created that would provide a secondary means of exist from the existing facility, without impact on the community or environment and improve maneuverability within the property.
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> 74. In support of the lack of viability of this vacant property, the applicant put in an offer to purchase that property, contingent upon a variance being granted in connection with the permitted use on the contiguous property that it owned. It is clear that this property would have no value absent being used in connection with the adjacent parcel.
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> 100. As a result of the granting of the variance, [Leach] purchased the property which would be otherwise useless if a driveway could not be installed.

Relief, then, would be based upon these known facts which would, to comport with the statute, have been "overlooked or misapprehended" by the court in its earlier decision.[4] This information, as known previously, was considered by the court in its prior decision. The actions of the ZBA did not, as previously found, satisfy the provisions of Town Law §267-b with respect to providing a competent evidentiary basis for its findings. The burden was upon the petitioner, while before the ZBA, to demonstrate that there existed an unnecessary hardship as a result of the then known zoning restrictions. The record was devoid of any showing by the petitioner to satisfy this burden.

Here, petitioner was well aware of the zoning regulations and thus the need for a use variance regarding a non-conforming use, especially where the use was ancillary to an otherwise non-conforming use for which a use variance was previously granted. Petitioner seeks to ameliorate the perceived hardship which he has now sustained, which was primarily financial in nature, as a result of his having moved forward with the purchase of the property prior to his having obtained

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[4]Petitioner's submission of the written contract between he and Suit-Kote does not serve to provide additional information to the court which was otherwise unknown previously.

all necessary approvals required for the expansion of the transfer station and having awaited the expiration of the appropriate period of limitations with respect to potential legal challenges to the actions of the Town of Cortlandville. The actions of petitioner here are not appreciably dissimilar to those of the purchaser of property and applicant for a variance in *Matter of Tharp v Zoning Board of Appeals of the City of Saratoga Springs*, 138 AD2d 906, 3rd Dpt. 1988, which suggested that the purchaser would have been prudent to have awaited judicial resolution of a pending action to address the propriety of the grant of a variance rather than to have proceeded with the purchase. Though Leach waited until various approvals were granted with respect to his proposed project before finalizing the purchase of the Suit-Kote property, it was evident that he was aware of the property restrictions and the contentious nature of the application given the comments by Respondent Jenkins at the October 27, 2015, ZBA hearing.

Upon the foregoing, this court finds no basis presently asserted upon which to change its prior determination as set forth in the Decision and Order of May 23, 2016. The present motion is therefore denied in its entirety.

Therefore, it is

ORDERED, that the relief seeking to change this court's prior Decision and Order is DENIED; and it is

ORDERED, that Respondents' application for attorney's fees is GRANTED and Petitioner is ordered to pay Five Hundred Dollars ($500.00) as attorney's fees to counsel for the Respondents within thirty days of this Decision and Order.

Enter.

DATED: August 4, 2016
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice
County of Cortland