

Gale Rd. Residents v Town of Bethel
2016 NY Slip Op 33050(U)
August 2, 2016
Supreme Court, Sullivan County
Docket Number: 0608-2016
Judge: Michael F. McGuire
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

GALE ROAD RESIDENTS, an unincorporated
association consisting of MICHAEL NASTRO,
STANLEY SPRINGSTEAD, and BRIDGET STOKER,

Petitioners,

Decision and Judgment
RJI No.: 52-38003-2016
Index No.: 0608-2016

- against -

THE TOWN OF BETHEL, a New York Municipal
Corporation, the TOWN BOARD OF THE TOWN
OF BETHEL, and DAVID [sic] STURM, its Mayor,
VICKY SIMPSON, BERNARD COHEN, DAWN RYDER
and LILLIAN HENDRICKSON, its Town Board
Chairpersons, and B.J. GETTEL, as Town Code
Enforcement Officer,

Respondents,

- and -

ERCOLE E. ALLEVA and 7-X MOTORS, INC.,

Additional Respondents.

X

Motion Return Date: July 18, 2016 (Adjourned from May 18, 2016)

Appearances: Orseck Law Offices PLLC
Attorneys for Petitioners
1924 State Route 52 - P.O. Box 469
Liberty, New York 12754
By: Gerald Orseck, Esq.

Ricclani & Jose, LLP
Attorneys for the Town of Bethel and Town of Bethel Respondents
17 St. John Street
Monticello, New York 12701
By: Jacqueline Ricclani, Esq.

MCGUIRE, J., Acting J.S.C.:

In this proceeding brought pursuant to CPLR article 78 seeking to compel respondents Town of Bethel and its Town Board, through its Code Enforcement Officer, to enforce the statutes, rules and regulations pertaining to the operation of additional respondent 7-X's junkyard, as well as certain provisions of the New York State Environmental Conservation Law, the Town respondents move to dismiss the proceeding for failing to state a cause of action. The Town respondents further seek an order of this Court awarding costs and attorney's fees for frivolous conduct pursuant to section 130-1.1. of the New York Court rules.

Petitioners oppose the motion only to the extent that respondents seek attorney's fees and costs.

Initially, to the extent that the petition seeks to compel the Town of Bethel Code Enforcement Officer to enforce the Town of Bethel's applicable rules and statutes pertaining to the operation of an automobile junkyard, it is, in essence, a request for relief in the form of mandamus (*see* CPLR 7803 [1]), "which does not lie to compel the performance of such a discretionary function" (*see Mayes v Cooper*, 283 AD2d 760, 761 [3rd Dept 2011]).

The Court also finds without merit petitioner's argument that respondents cannot assert an entitlement to legal fees. Here, petitioners rely on CPLR § 8303-a which is limited to actions for "damages for personal injury, injury to property or wrongful death" (CPLR 8303-a [3]). Although petitioners are correct that CPLR 8303-a awards costs (expenses and attorneys' fees reasonably incurred as a result of frivolous conduct) in only those actions enumerated in the statute, they are misguided in their reliance. Here, the Town respondents seek costs and reasonable attorney's fees under 22 NYCRR part 130 which is more flexible in its application. 22 NYCRR § 130-1.1. applies to all civil actions, such as here, and gives the courts the

authority to award "costs" and to impose "sanctions" against a party or attorney or both. Conduct is considered frivolous when the action taken was commenced or continued in bad faith without a reasonable basis in fact or law or unsupported by a good faith argument to extend, modify or reverse existing law or solely to delay or prolong the litigation or to harass or maliciously injure another (*see Retina Assocs. of Long Island, P.C. v Rosberger*, 299 AD2d 533 [2nd Dept 2002], *leave denied* 99 NY2d 624 [2003]).

Although petitioners' arguments in support of mandamus must fail, there is no evidence, nor does counsel for the Town respondents suggest, that the petition contained materially false statements or deliberate misrepresentations. Indeed, the very fact that counsel for petitioners conceded the lack of merit to the arguments set forth in their CPLR article 78 petition indicates a lack of bad faith or malevolence in pursuing the instant litigation. In light of this, the Town respondents have failed to demonstrate that this action is "frivolous" so as to be entitled to costs and fees (22 NYCRR § 130-1.1).

Accordingly, the petition is dismissed without costs and attorney's fees. This shall constitute the Decision and Judgment of this Court. All papers, including the original copy of this Decision and Judgment, are being filed with the office of the Sullivan County Clerk. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: Monticello, New York
August 2, 2016

ENTER


HON. MICHAEL F. MCGUIRE, AJSC

Papers considered:

Notice of petition and petition, dated April 15, 2016; notice of motion to dismiss and affirmation of Jacqueline Ricciani, Esq., dated May 9, 2016, with memorandum of law; affirmation of Gerald Orseck, Esq., dated July 18, 2016.