

From v St. Lawrence

2016 NY Slip Op 33055(U)

November 20, 2016

Supreme Court, Putnam County

Docket Number: 752/2016

Judge: Paul I. Marx

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Copy to Order

SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

For Briefly

-----X
PAULA A. FROM, GERALD FROM and EUGENE MARKOWITZ,

Petitioners,

Index No: 752/2016

For a Judgment under Article 78 of the CPLR,

DECISION AND ORDER

-against-

Motion Date: September 12, 2016
Motion Sequence Nos. 2 and 3

CHRISTOPHER P. ST. LAWRENCE, in his official capacity as Supervisor of the Town of Ramapo, New York, and ANTHONY MALLIA, in his official capacity as Chief Building Inspector of the Town of Ramapo, New York, and VIOLA GARDENS, LLC,

Respondents.

PUTNAM COUNTY
CLERK
2015 DEC - 1 PM 4: 32

The following papers numbered 1 through 9 were read on: (1) the motion of Respondents Christopher P. St. Lawrence and Anthony Mallia to change venue, for partial dismissal and to extend the time to file an answer; and (2) the cross-motion of Respondent Viola Garden, LLC to dismiss the proceeding:

Notice of Petition/Notice of Petition¹/Complaint and Verified Article 78 Petition/Petitioners' Verifications/Exhibits A-D 1-4

Motion to Change Venue & Partial Dismissal (Sequence No. 1)

Demand for Change of Place of Trial by Respondents Christopher P. St. Lawrence and Anthony Mallia in their official capacities 5

Notice of Motion to Change Venue and for Partial Dismissal/Affirmation of Janice Gittelman, Esq./Exhibits A-C 6-7

Respondents/Defendants' Memorandum of Law 8

CPLR §511(b) Attorney Affirmation of Kevin T. Conway, Esq.² 9

¹ The second Notice of Petition is actually a Summons. It reads: "YOU ARE HEREBY SUMMONED to answer the Complaint in this action ..." Presumably, Petitioners intended to bring a hybrid action, as seen by their "Complaint and Verified Article 78 Petition".

² On August 11, 2016, the Court granted Kevin T. Conway, Esq.'s motion, brought by Order to Show Cause, to be relieved as counsel for Petitioners and imposed a stay of the proceeding until

Cross-Motion to Dismiss

Notice of Cross-Motion to Dismiss by Respondent Viola Gardens, LLC/Affirmation of Joseph J. Haspel, Esq./Notice of Petition/Exhibits A-C	10-12
Affirmation of Janice Gittelman, Esq. In Support/Exhibits A-C	6-7

Upon reading the foregoing papers, it is ORDERED that (1) the branch of the motion of Respondents Christopher P. St. Lawrence and Anthony Mallia to change venue is granted. The remaining branches of the motion, which seek partial dismissal and an extension of time to answer the Petition/Complaint is deferred to the Rockland County Supreme Court Justice to whom the case is assigned for further disposition; and (2) the cross-motion of Respondent Viola Garden, LLC to dismiss the Petition is similarly deferred for disposition.

BACKGROUND

On June 3, 2016, Petitioners filed the instant Article 78 Petition/Summons and Complaint against Respondents Christopher P. St. Lawrence and Anthony Mallia, in their official capacities of Town Supervisor and Building Inspector, respectively. Petitioners seek a Judgment and Order “[c]ommanding the Town Respondents to issue stop work orders prohibiting the continued construction” by Respondent Viola Garden, LLC of a 44-unit condominium project in the Town of Ramapo, NY. Notice of Petition at 1. Petitioners allege that Viola Garden “has illegally and materially misrepresented both the size of the units and density of the project in violation of zoning, building and fire safety laws.” Complaint and Verified Article 78 Petition at ¶ 1. Petitioners further allege that they “have suffered and will continue to suffer immediate and irreparable damages if the construction if [sic] not stopped, evaluated independently, and made to conform to zoning and fire safety codes.” *Id.*

On June 21, 2016, Respondents Christopher P. St. Lawrence and Anthony Mallia moved to change venue of the proceeding from Putnam County to Rockland County, arguing that they are public officials of the Town of Ramapo, located in Rockland County; that Petitioners all reside in Rockland County and that the challenged condominium project is located in Rockland County. They further request that “upon transfer, the petition/complaint be dismissed as against Christopher P. St.

September 12, 2016. To date, there has been no notice of appearance filed by any incoming counsel. Therefore, as far as the Court is aware, Petitioners have opted to proceed without legal representation. Nonetheless, the affirmation submitted by their prior counsel will be considered.

Lawrence, that Respondents/Defendants time to answer the petition/complaint be extended until after decision on this motion ...". Affirmation of Janice Gittelman, Esq. Petitioners opposed only the request to change venue to Rockland County.

On July 1, 2016, Respondent Viola Gardens LLC moved to dismiss the Petition/Complaint, contending that mandamus is not available to compel a municipality to enforce its laws. Respondent also contends that Petitioners failed to exhaust their administrative remedies and are now time barred from doing so. Respondent contends further that the matter is not ripe for review because the subject units have not been utilized, nor sought to be utilized, in a manner that is inconsistent with local law. Respondent also argues that Petitioners never challenged the project as it proceeded through the municipal review process and the time to do so has passed. Finally, Respondent argues that Petitioners do not meet the requirements for a private right of action under Town Law § 268(2).

Respondents Christopher P. St. Lawrence and Anthony Mallia submitted an affirmation in support of Viola Garden's cross-motion, which purports to be a "me too" motion to dismiss the action in its entirety.³

Petitioners did not oppose or otherwise respond to Viola Garden's cross-motion.

DISCUSSION

Motion to Change Venue, Partial Dismissal and Extend Time to Answer

Respondents Christopher P. St. Lawrence and Anthony Mallia request a change of venue of the action to Rockland County, where they serve as public officials, Petitioners reside, the subject premises are located and the challenged actions were taken. They contend that the Appellate Division has expressed a preference for "Article 78 proceedings [to] be heard and determined in a county in the judicial district in which the matter sought to be restrained originated, or where the material events occurred." *Lefkowitz v Beame*, 52 AD2d 925, 925 [2nd Dept 1976] (citing CPLR 506; *Matter of Lacqua v O'Connell*, 280 AD 31, 32 [1st Dept 1952]). Moreover, they contend that the requirement of Town Law § 66 that the "place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated" trumps the more general provisions of CPLR § 506(b) and CPLR § 7804(b).

³ Respondents must make their own motion in order to obtain affirmative relief; a "me too" request does not suffice.

Petitioners oppose Respondents' request to change venue to Rockland County, contending that CPLR § 506(b) and CPLR § 7804(b) allow for venue "in *any* county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located ..." (emphasis added). They therefore claim that venue is proper in Putnam County, because it is within the Ninth Judicial District, the same judicial district where the Town of Ramapo is located.

While venue is indeed proper in Putnam County, the Court is constrained to follow the more specific mandate of Town Law § 66, which requires venue of the instant proceeding to be in Rockland County, the county in which the Town of Ramapo is located. *Northeast Land Dev. Corp. v Bertoli*, 43 Misc3d 1213(A) [Sup Ct, Nassau County 2013].

Accordingly, the branch of Respondents' motion to change venue from Putnam County to Rockland County is granted. The remaining branches of the motion, including dismissal of the proceedings as against Christopher P. St. Lawrence is deferred, as requested, to the Rockland County Supreme Court Justice to whom the case is assigned for further disposition. Respondents' request for an extension of time to answer is similarly deferred pending determination of the request for partial dismissal.

Cross-Motion to Dismiss

Respondent Viola Garden LLC's motion to dismiss is also deferred to the Rockland County Supreme Court Justice to whom the case is assigned for further disposition.

Movants are directed to serve a copy of this Decision and Order upon the Putnam County Clerk. The Putnam County Clerk is hereby directed to transfer the entirety of the file maintained by him in this matter to the Rockland County Clerk.

Dated: Carmel, New York
November 30, 2016

ENTER


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