

Matter of Kleinknecht v Siino
2017 NY Slip Op 33080(U)
January 6, 2017
Supreme Court, Nassau County
Docket Number: 5989-16
Judge: Daniel R. Palmieri
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SHORT FORM ORDER AND JUDGMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

-----X TRIAL/IAS PART 16
Index No.: 5989-16

In the Matter of the Application of,
RICHARE P. KLEINKNECHT and
SUZANNE W. KLEINKNECHT,

Petitioners,

Mot. Seq. 001, 002

- against -

Mot. Date: 9-27-16

Submit Date: 10-31-16

JAMES SIINO, Building Inspector for the
Incorporated Village of Lloyd Harbor,

Respondent.

-----X

The following papers have been read on this motion:

Notice of Petition, dated 8-18-16.....	1
Notice of Motion to Dismiss, dated 9-8-16.....	2
Affirmation of Joseph Covello (in opposition to motion to dismiss), dated 9-30-16.....	3
Memorandum of Law in Opposition to Motion to Dismiss, dated 9-30-16.....	4
Reply Affirmation In Support of Motion to Dismiss, dated 10-14-16.....	5

This matter was transferred to the undersigned by order of Justice Libert dated
October 24, 2016.

The petition for an order and judgment pursuant to CPLR Article 78 compelling the
respondent to issue a permit for construction of a dock on petitioners' property is granted.
The respondent's motion to dismiss is denied. Respondent James Siino, as Building
Inspector of the Incorporated Village of Lloyd Harbor, shall issue a permit to petitioners for
construction of a dock under the application previously filed with him within 10 days of
service upon him and his attorney of a copy of this Decision, Order and Judgment with notice

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of entry thereof, and upon his failure to do so the application shall be deemed approved as submitted and petitioners may commence construction.

This proceeding, sounding in mandamus to compel, is the third matter brought before the Court regarding the desire of petitioners to construct a dock into Lloyd Harbor, which abuts their residential property. The initial litigation (*Kleinknecht v Henoch, et al.*, Index No. 8945/12) resulted in an order of the Supreme Court (Adams, J.) dated September 18, 2013. Justice Adams annulled a determination of the Planning Board of the Village of Lloyd Harbor (Village) and directed the Village to issue a permit to petitioners for erection of a dock at their premises, 28 Plover Lane, upon the filing of a required application and payment of fees. No appeal was taken from that order, and thus this holding is now final.

The petitioners then submitted an application to construct a dock, but in order to do so certain variances were required. The Village's Zoning Board of Appeals ultimately denied them, resulting in the second proceeding. The undersigned upheld the denial by Decision and Order dated July 24, 2015 (*Kleinknecht v Brogan, et al.*, Index No. 2909/15). The Court is informed that an appeal from that Order is presently pending. Both Justice Adams's determination and this Court's are incorporated here by reference to avoid needless repetition.

At this juncture the Court notes that although no binding collateral estoppel effect on the respondent can be given to either Justice Adam's ruling or to this Court's as a technical matter, as the respondent/defendant parties in the prior cases were not the same as the respondent here (*cf.*, *Notrica v North Hills Holding Co., LLC*, 105 AD3d 826 [2d Dept. 2013]; *cf.*, *Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15 [4th Dept.

1996] [earlier related proceedings involving same parties binding]), the Court will not close its eyes to the clear resistance of the Village and its agencies to petitioners' repeated attempts to construct a dock, and the related view of the Village of the instruments that have stood at the core of that resistance. It strains credulity to assume that in a relatively small municipality such as the Village the respondents/defendants in the proceeding before Justice Adams, the respondents before the undersigned in the second case, and the respondent here were unaware of and unaffected by the positions taken by each. Accordingly, this Court will consider the prior rulings as highly persuasive, if not binding, authority. Indeed, respondent James Siino, as an employee of the Village, would be hard pressed to argue that a court's command to a Village entity to issue a permit is not also a command to him.

Notwithstanding the pending appeal of this Court's determination, petitioners have filed a revised application with the respondent Building Inspector to construct a floating dock, which they contend conforms fully with and does not require any variances under COD-1 zoning regulations. They further contend that pursuant to the Village's Zoning Code, at Article VII, §§ 205-33 and -34, respondent was required to issue a permit or to make a referral to the Site and Building Permit Review Board within 21 days of receipt of the application. If so referred to it, the Permit Review Board must "review and approve, with or without conditions, or it shall disapprove any building permit." Village Zoning Code, § 205-34. No permit was issued, and no referral was made. Rather, the application was sent to the Village Attorney, who issued what he later described as an opinion letter concluding that the Building Inspector was not authorized to issue the permit.

Respondent, although challenging petitioners' interpretation of the two prior

decisions, has not disputed the foregoing recitation of events. Rather, he claims in his motion to dismiss that petitioners have not exhausted their administrative remedies because an application first must be made to the Village's Board of Trustees (and the New York State Legislature). That in turn is based on his contention that a 1990 Indenture required petitioners to seek modification or removal of the restriction contained in the Indenture against the building of any such new dock, an issue that was not addressed by Justice Adams in his determination. He also seeks dismissal based on the pending appeal, because this renders that proceeding as another action pending for purposes of CPLR 3211(a)(4). Finally, he claims that the petition fails to state a cause of action. The Court finds these arguments to be without merit.

There is nothing in Justice Adams's decision that would require, in effect, a fresh look at the 1990 Indenture and its effect on the petitioners' right to construct a dock. As petitioners correctly state, the Court had all these factors before it and directed the issuance of a permit to do so notwithstanding. The undersigned in the later decision merely pointed out that there was no discussion of the Indenture by Justice Adams, that a separate entity was the one whose ruling was the subject of the later proceeding, and thus collateral estoppel did not bar the ZBA from ruling against the petitioners – on the variance application. That is very different from a statement that the issue of petitioners' right to "a" permit to construct a dock had not been established by Justice Adams. That was simply not before this Court. As was noted in the decision upholding denial of the variance, the initial Letter of Denial cited to the COD-1 provisions of the Village Code, and directed the petitioners to apply to the ZBA to seek relief from the same. In short, it was the issue of the variances that was

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decided by the undersigned, and nothing more.

Therefore, this Court's discussion of the petitioners' prior litigation in no way requires a reexamination of Justice Adams' decision, and his holding that a permit was to be issued remains in full force and effect and will not be overturned here. It will, rather, be followed. Indeed, and as explained in the preceding paragraph, the interpretation urged by respondent pitting the undersigned's alleged version of the Indenture against Justice Adams' decision is faulty and no conflict exists in the holdings. Accordingly, this Court finds that under Justice Adams' determination no further administrative review prior to the application to respondent herein was required of the petitioners, and the exhaustion of administrative remedies doctrine does not apply to the present petition because a final determination by the Court already had been made.

Nor does the Court agree that this matter is subject to dismissal on the ground of "another action pending between the same parties for the same cause of action." CPLR 3211(a)(4). The appeal is from an order upholding denial of variances to build a particular type of dock, which differs in kind from the issue that underlies this present matter. There is therefore no "same cause of action" for purposes of the statute. Further, just as the respondent here is not technically bound by the earlier determination by Justice Adams because he was not a party, there is no commonality of parties for purposes of CPLR 3211(a)(4) either. Accordingly, the Court rejects respondent's argument that the present proceeding should be dismissed on that ground.

The Court also cannot agree that the petition fails to state a cause of action. Mandamus to compel can be utilized to compel a governmental entity or officer to perform

a ministerial duty, although not to compel an act that involves an exercise of judgment or discretion. *Brusco v Braun*, 84 NY2d 674 (1994). The party seeking mandamus must show a "clear legal right" to that relief. *Id.*, quoting *County of Fulton v State of New York*, 76 NY2d 675, 678 (1990). Availability of the remedy depends on the nature of the duty to be commanded, *i.e.*, it must be a mandatory, nondiscretionary action. *Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 97 (1981). Here, such a claim is stated based on the expiration of the 21-day period and the mandatory nature of the Code's command either to issue a permit or to make the referral to the Site and Building Permit Review Board within that period. The fact that the respondent could choose to do either, and that such a decision calls on him to exercise judgment, does not alter the duty to do one or the other within the period provided. A cause of action for mandamus commanding him to do so therefore lies.

The Court rejects respondent's argument that Justice Adams' direction to issue a permit upon the filing of an "appropriate application" (not a "necessary application," as respondent states in reply) meant that further governmental approvals beyond the ken of the Building Department were required. Even a cursory reading of the discussion immediately preceding this decretal paragraph, and the language of the decretal paragraph itself, make it clear that this was to be the end of the matter. The "appropriate" application thus was simply one that was consistent with the Court's decision; the Court clearly did not direct and was not anticipating further applications to other executive bodies, beyond those which were being directed to carry out the Court's instruction to issue a permit.

Finally, respondent has not asserted that petitioners' application to build the proposed dock is out of compliance with any of the requirements set forth in the Villages' Zoning


Code for COD-1, and certainly has come forward with no evidence to that effect. Petitioners' claim that their application is in order, complies with the Code, and requires no variances is therefore unrefuted, and the Court will not allow the respondent to now make a referral to the Site and Building Permit Review Board. Given his silence on the stated compliance with all requirements necessary for issuance of the permit, such a referral would be frivolous, an obvious attempt to reset administrative review when no substantive reason to do so has been presented to the Court. Therefore, as the 21 day period has passed, there is no basis for respondent not to issue the permit. He thus will be ordered to issue it.

All contentions not discussed either are unnecessary to the result reached here or are without merit. All requests for relief not specifically addressed are denied.

This shall constitute the Decision, Order and Judgment of this Court.

ENTER:

DATED: January 6, 2017
Mineola, New York


HON. DANIEL PALMIERI
Supreme Court Justice

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