

**Matter of Ho v Town of Riverhead Zoning Bd. of Appeals**

2018 NY Slip Op 30339(U)

February 1, 2018

Supreme Court, Suffolk County

Docket Number: 16-5238

Judge: Joseph Farneti

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In this proceeding, petitioner seek a judgment pursuant to CPLR article 78 reviewing and annulling a final determination dated April 28, 2016, by respondent Town of Riverhead Zoning Board of Appeals ("ZBA"), which granted an application by respondent Jason Esposito for a use variance permitting him to use certain property known as 1556 West Main Street, Riverhead, New York, as an auto parts wholesale distribution business. Petitioner also request an injunction enjoining the ZBA from issuing any permits or certificates of occupancy to Esposito, and restraining Esposito from performing any work in furtherance of the proposed use of the premises. Additionally, petitioner seeks a judgment directing the ZBA to deny Esposito's request for the proposed use variance on the basis he failed to meet the criteria set forth in Town Law § 267 (b).

Petitioner owns undeveloped property situated directly across from the subject premises, which is known as 1581-1595 West Main Street, Riverhead, New York. Both petitioner's property and the subject premises are located within the Riverfront Corridor Zoning Use District ("RFCDD"). As set forth in Riverhead Town Code § 301-164, the permitted uses within the RFCDD includes one-family dwellings, river-related retail uses, and non-motorized open space recreation uses. The RFCDD also sets forth special permit uses, including bed and breakfast establishments, country inns, and other uses which are customarily incidental to either the permitted uses or the special permit uses. Petitioner commenced this proceeding on May 25, 2016. Contemporaneously, petitioner moved, by order to show cause, for a preliminary injunction restraining the ZBA from issuing any permits or certificates of occupancy to Esposito, and preventing Esposito from performing any more work in furtherance of his proposed use of the premises as a wholesale auto parts business. According to petitioner's moving papers, Esposito allegedly began work renovating the subject premises for the purpose of opening an auto parts wholesale business in December 2015. Shortly thereafter, the Town of Riverhead Building Department ("RBD") issued a stop work order for the premises, as no building permit or certificate of occupancy was obtained for the proposed renovation. On December 15, 2015, the RBD also allegedly denied a building permit application submitted by Esposito for use of the premises as an auto parts wholesale business on the grounds the proposed use did not comply with the uses permitted within the RFCDD.

Esposito allegedly then submitted an appeal to the ZBA challenging the RBD's rejection of his application for the building permit and certificate of occupancy on the basis he was merely seeking permission to substitute a pre-existing nonconforming use of the premises as a tractor repair business with the newly proposed nonconforming use of the premises as a location to house a wholesale auto parts business. Esposito allegedly appeared for a hearing before the ZBA on February 25, 2016. However, the hearing was adjourned until March 10, 2016, when it appeared that the previous nonconforming use of the premises had been abandoned. At the March 10, 2016, Esposito allegedly requested an adjournment of the proceedings in order to amend his application to include an alternative request for approval of a use variance permitting the proposed use of the premises as a location to house a wholesale auto parts business. The amended application was submitted to the ZBA on March 14, 2016. Subsequently, at a hearing held on April 14, 2016, the ZBA indicated that it would permit the submission of additional evidence on the appeal, and that the matter would be adjourned until April 28, 2016.

The ZBA received additional testimony at the April 28, 2016 hearing, including testimony by petitioner's husband, Lawrence Simms, who allegedly was also acting as petitioner's attorney in the proceeding. Immediately thereafter, the ZBA allegedly issued a type-written decision granting Esposito's proposed use variance and recorded a vote approving the same. The decision provided, in pertinent part, as follows:

APPLICATION FOR A USE VARIANCE ALLOWING AN AUTO PARTS WHOLESALE USE IS GRANTED – FINDINGS AND CONCLUSIONS TO BE FILED SEPARATELY BUT NOT A CONDITION TO THE APPLICANT ESTABLISHING THE NEWLY PERMITTED USE. THE USE VARIANCE IS LIMITED IN DURATION PURSUANT TO THE SUNSET PROVISIONS OF CHAPTER 108, SECTION 108-51 OF THE RIVERHEAD TOWN CODE OR ANY SUCCESSOR SECTION OF THE TOWN CODE REGULATING THE DISCONTINUANCE OF LEGAL PRE-EXISTING NON-CONFORMING USES . . . The Board of Appeals shall have the power, by resolution, to extend its determination for a period of one year upon written notice from the applicant or his agent of the desire to do so. No more than three such extensions shall be allowed. This determination will expire on April 28, 2017.

Petitioner alleges that there was no discussion among the ZBA members on the record setting forth any findings, conclusions, or other basis to support its decision, and that the type written decision also was bereft of any such discussion, although it noted that such findings and conclusion would be filed separately.

Esposito opposes petitioner's motion and cross-moves, pursuant to CPLR 3211 (a) (10) and 1001 (a), for dismissal of the proceeding on the basis petitioner failed to name the owner of the subject premises, WR Gelateria, Inc. ("WRG"), a necessary party to the action. Esposito further argues that petitioner failed to appear in the proceeding, since her husband lacked the power of attorney to appear on her behalf at the time of the ZBA hearings; and that petitioner's request for a preliminary injunction should be rejected as this matter, which did not include a necessary party, was not properly brought before the court. In support of his cross motion, Esposito submits, *inter alia*, a copy of the deed to subject premises which names WRG as the owner of said premises, a copy of the April 28, 2016 determination by the ZBA, and a copy of a decision by the Court (Whelan, J.) which dismissed a petition to annul a ZBA determination based on the petitioner's failure to join and name necessary parties within the 30-day statute of limitation set forth in Town Law § 267-c (1). The ZBA joins Esposito's cross-motion to dismiss the petition, asserting, *inter alia*, that petitioner failed to name WRG as a necessary party to the action and cannot now cure that defect, as the statute of limitations to add another party has expired, and the relation-back doctrine is inapplicable under the circumstances of this case.

A party may move for dismissal on the ground that the court should not proceed in the absence of a person who should be a party (CPLR 3211 [a] [10]). CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The

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failure to join a necessary party under CPLR 1001 is a ground for dismissal of an action without prejudice pursuant to CPLR 1003 (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 766 NYS2d 654 [2003]). In determining whether to allow the action to proceed in the absence of the joinder of a necessary party, the court shall consider: (1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the non-joinder; (2) the prejudice which may accrue from the non-joinder to the defendant or to the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether an effective judgment may be rendered in the absence of the person who is not joined (CPLR 1001 [b]; *see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 805 NYS2d 525 [2005]).

A party whose interest may be inequitably or adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding (*see Matter of Ayres v New York State Commr. of Taxation & Fin.*, 252 AD2d 808, 810, 675 NYS2d 678 [3d Dept 1998]; *see also* CPLR 1001). Owners of real property subject to a variance challenge have been deemed necessary parties to such proceedings because their interests in the value and use of the property will be adversely impacted if the zoning board annuls the variance (*see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 805 NYS2d 525 [2005]; *Matter of Feder v Town of Islip Zoning Bd. of Appeals*, 114 AD3d 782, 980 NYS2d 537 [2d Dept 2014]). Therefore, it has been widely recognized that CPLR article 78 proceedings challenging land use determinations are subject to dismissal where the petitioner failed to timely join the landowner of the property at issue (*see Matter of Cybul v Village of Scarsdale*, 17 AD3d 462, 792 NYS2d 349 [2d Dept 2005]; *Matter of East Bayside Homeowners Assn. v Chin*, 12 AD3d 370, 783 NYS2d 305 [2d Dept 2004]). Furthermore, a landowner generally may not be joined as a party to the land use proceeding after the expiration of the applicable statute of limitations unless he or she shares a unity of interest in the outcome of the proceeding with the petitioner (*see Buran v Coupal*, 87 NY2d 173, 638 NYS2d 405 [1995]; *cf Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d 682, 774 NYS2d 760 [2d Dept 2004]). However, even where a unity of interest potentially exists between a petitioner and the non-joined party, the relation-back doctrine cannot be used to achieve joinder where the petitioner failed to adequately explain why he or she did not join the necessary party despite being aware of the party's identity at the time of the commencement of the proceeding (*see Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick, supra*; *Matter of East Bayside Homeowners Assn. v Chin, supra*).


The cross-motion by Esposito seeking dismissal of the petition is granted. Initially, the Court notes that Esposito has demonstrated that WRG is a necessary party under the circumstances of this case, as he established that WRG is the owner of the subject premises, and that its interests may be inequitably or adversely affected by a judgment in this proceeding (*see* CPLR 1001; *see also Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals, supra*; *Matter of Ayres v New York State Commr. of Taxation & Fin., supra*). The Court also notes that the factors set forth in CPLR 1001 (b) weigh heavily against allowing the action to proceed in the absence of joining WRG as a necessary party. Significantly, petitioner will have future opportunities to challenge the respondent's applications for renewal of the use variance, petitioner was in a much better position to

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avoid the possible prejudice in the first place, since her attorney/husband had knowledge of WRG's ownership interest in the premises before commencing the proceeding and, finally, any judgment rendered in the absence of joining WRG would likely lead to the commencement of another lawsuit. In any event, Esposito demonstrated that petitioner failed to join WRG prior to the expiration of the 30-day statute of limitation to challenge the ZBA's determination (*see Matter of Greens at Half Hollow, LLC v Suffolk County Dept. of Pub. Works*, 147 AD3d 942, 48 NYS3d 147 [2d Dept 2017]; *Matter of Feder v Town of Islip Zoning Bd. of Appeals*, *supra*; *Matter of Cybul v Village of Scarsdale*, *supra*; *Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 49 AD3d 749, 853 NYS2d 644 [2d Dept 2008]), and that the relation-back doctrine may not be used to now join WRG, as petitioner provided no explanation for her initial failure to join WRG, and she failed to substantiate her conclusory claim that WRG and Esposito's interests in the outcome of the proceeding were so equitably aligned that any "judgment against one will similarly affect the other" (*Karmel v White Plains Common Council*, 284 AD2d 464, 465, 726 NYS2d 692 [2d Dept 2001], quoting *Mondello v New York Blood Ctr.*, 80 NY2d 219, 590 NYS2d 19 [1992]).

In light of the foregoing, the branch of the motion by petitioner seeking the annulment of the ZBA's decision to grant Esposito a variance permitting him to use the subject premises as an auto parts wholesale distribution center is denied, as moot. The branch of petitioner's motion seeking the issuance of a preliminary injunction against the respondents also is denied, as it is well-established that unless there is an underlying action which confers statutory authority upon a court to grant a preliminary injunction, the court has no jurisdiction to award such relief (*see Hart Island Committee v Koch*, 150 AD2d 269, 541 NYS2d [1st Dept 1989]; *Golden v Metropolitan Transp. Authority*, 126 AD2d 128, 512 NYS2d 710 [2d Dept 1987]).

Dated: February 1, 2018

  
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 Hon. Joseph Farneti  
 Acting Justice Supreme Court

FINAL DISPOSITION     NON-FINAL DISPOSITION