Tomasino v Incoporated Vil. of Islandia
2018 NY Slip Op 30958(U)
May 14, 2018
Supreme Court, Suffolk County
Docket Number: 602780/2018
Judge: William G. Ford
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO.: 602780/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 04/12/18
Motion Seq 001 MG

PUBLISH

JENNIFER TOMASINO, KEVIN MONTANO, RICHARD MEYER, APRYL L. MEYER,

Plaintiffs,

-against-

INCOPORATED VILLAGE OF ISLANDIA, BOARD OF TRUSTEES OF THE VILLAGE OF ISLANDIA, GERALD PETERS, in his capacity as Incorporated Village of Islandia Building Inspector & DELAWARE NORTH ISLANDIA PROPERTIES, LLC. a/k/a DELAWARE NORTH,

Defendants,

-and-

SUFFOLK REGIONAL OFF-TRACK BETTING CORPORATION,

Proposed Intervenor- Defendant.

PLAINTIFF'S COUNSEL:
Anton J. Borovina, Esq.
425 Broad Hollow Road Suite 303
Melville, New York 11747

Paul Sabatino, II., Esq.
1617 New York Avenue
Huntington Station, New York 11746

DEFENDANT'S COUNSEL:
Sinnreich Kosakoff Messina, LLP
267 Carleton Avenue, Suite 301
Central Islip, New York 11722

PROPOSED INTERVENOR'S COUNSEL:
Eckert Seamans Cherin Mellott, LLC
10 Bank Street, Suite 700
White Plains, New York 10606

On the motion pursuant to CPLR 1012 & 1013 by interested non-party seeking to intervene, this Court considered the following:

1. Order to Show Cause dated March 9, 2018, Affirmation in Support dated March 8, 2018, Affidavit in Support dated March 8, 2018 and other supporting papers;
2. Affirmation in Opposition dated April 5, 2018, Memorandum of Law in Opposition dated April 5, 2018, Affidavits in Opposition dated March 29, 2018 & April 5, 2018 and other opposing papers;
3. Reply Affidavit in Further Support dated April 11, 2018 & Reply Memorandum of Law dated April 11, 2018; it is

ORDERED that upon due deliberation and full consideration of the motion for

mandatory or permissive intervention pursuant to CPLR 1012 or 1013 by non-party and proposed intervenor Suffolk Regional Off-track Betting Corporation is **granted** as follows; and it is further

ORDERED that intervenor is further hereby directed to serve a copy of this decision with notice of entry on all parties by counsel by certified first class mail, return receipt requested forthwith; and it is further

This action represents the latest chapter in opposition to the operation of a video lotter terminal (VLT) facility located at 3635 Expressway Service Drive North, Islandia, New York owned and operated by defendant Delaware North Properties, LLC (hereinafter "Delaware North."), more commonly called Jake's 58 Casino. The facility contains VLT simulcast betting feeds in agreement with the Suffolk County Regional Off-track Betting Corporation ("Suffolk OTB).

Plaintiffs are Village of Islandia residents who claim to reside near or in close proximity to the casino. In a summons and complaint electronically filed with the Suffolk County Clerk on February 12, 2018, plaintiffs seek permanent injunction and rescission of a Village building permit issued to Delaware North to permanently enjoin and cease operation of the casino. In furtherance of these efforts, plaintiffs generally challenge the Village's actions in approving the siting and operation of the casino as illegal or *ultra vires* zoning by agreement or spot zoning.

The Court notes that this is not the first litigation to arise out of the opening and operation of the casino. This Court presided over a previous matter brought by many of the same plaintiffs present in this action, who by CPLR Article 78 petition successfully challenged Village Board approval of the zoning for the casino. By their petition in that prior matter, plaintiffs successfully argued that the use of the VLT facility, previously a hotel, approved by special exception to Village Code § 177 within the Village's Office/Industrial District, as a gaming facility was expressly a non-permitted use as a matter of local zoning. As a result, this Court by Short-Form Decision & Order granted the Article 78 petition, which set aside, vacated or annulled the Village's special use permit. The Court further stayed enforcement of that decision pending appeal, and the parties advise that while notices of appeal have been filed, those appeals have not yet been perfected before the Appellate Division, Second Department.

Since then, the Village undertook efforts to mitigate the effects of the Article 78 determination, having amended by Local Law 3 of 2017 the Village's zoning code to define a hotel or gaming facility as an express permissive use within its code.1

Prior to the time for defendants to join issue, interested non-party Suffolk OTB made this application seeking leave of court to intervene in this action and participate directly as a party defendant in this action. The application is premised in part on OTB's stated intent to remove this action to the jurisdiction of the United States Bankruptcy Court for the Eastern District of New York in Central Islip as arising under their jurisdiction pursuant to 28 US.C. § 1452 and Fed. R. Bankr. P. 907. OTB made this desire clear having served a Notice of Removal dated March 14, 2018.

---

1 Plaintiffs note that they had brought a prior action to the instant matter on February 12, 2018, but that it was discontinued shortly thereafter in part because of this development.

Movant bases its request on arguments that it has a clear and substantial interest in the outcome of this matter. OTB states that on May 11, 2012 it filed for Chapter 9 bankruptcy. On September 11, 2014, it filed a second amended plan for the adjustment of its debts with its creditors. OTB further states that its plan was confirmed by the federal Bankruptcy Court on October 31, 2014. Movant emphasizes that part and parcel of that plan was the understanding that in furtherance of its efforts to emerge from bankruptcy, pay off its creditors and remain in business, OTB would enter into an arrangement with Delaware North for the siting and operation of a VLT facility or casino. The culmination of those efforts is the casino which has been the subject of plaintiffs' challenges.

In support of its motion to intervene, OTB essentially argues that should plaintiff's claims prove successful, the casino's doors would shutter and cease operation, thwarting or frustrating the essential core of OTB's plan of adjusting or settling its debts with its creditors, as anticipated by the Bankruptcy Court. Thus, OTB states it has a real and substantial interest in the outcome of plaintiff's case.

Further, OTB argues that its interests are not presently or adequately represented by defendants. Delaware North as the owner of the property and operator of the VLT facility, was not a party to the bankruptcy proceedings. Unlike OTB, none of the other parties herein are debtors or creditors in OTB's concluded bankruptcy. Further, movant stresses that its interests are uniquely or distinctly different from the other parties. Delaware North is clearly owner and operator of the casino. Plaintiffs are interested residents. The Village officials and entities are the recipients of payments and contributions from the casino's operation. OTB contends that while all parties draw interest in the casino, only they can argue that their very survival relies on its operation and plaintiff's defeat in this matter.

In further support of their motion, OTB submits the affidavit of its president Philip C. Nolan dated March 8, 2018. Nolan testifies the casino presently contains 1,000 machines which have resulted in the creation of 250 jobs. He further states that in December 2017 the facility derived $241.9 million in revenue, and $242.7 million in January 2018, of which $56 million has been contributed to the New York State Education Fund. Another $1.7 million has been repaid by OTB to its creditors in accordance with the approved bankruptcy plan. The balance of OTB's testimony through Nolan makes clear that Delaware North obtained all necessary municipal approvals for the operation of the casino and that it is essential to the continued financial viability and health of OTB in accord with the federal bankruptcy plan.

For their part, plaintiffs oppose the instant motion in its entirety making several different arguments. They first note that they do not seriously dispute that the OTB has some interest in the outcome of this matter to the extent that its bankruptcy plan hinges on the casino's continued success. However, plaintiffs do question why OTB has sought to intervene now, after the special use permit was vacated previously and the Village amended its zoning code, when it could have just the same sought the same or similar relief at the outset of the Article 78 proceeding. Plaintiffs then dispute that OTB has a real stake in the outcome of this litigation since it is neither the titled property owner or operator of the casino. Thus, they reason that an adverse judgment would not affect any concrete property rights or direct pecuniary interest presently before the Court. Finally, plaintiffs argue that granting OTB its requested relief would substantially frustrate their substantive rights in this case. Plaintiffs argue that intervention is

just a passthrough step to permitting OTB to remove this matter from Supreme Court's jurisdiction and transfer to the federal bankruptcy court's domain. Thus, plaintiffs contend that their choice in forum and resolution of their local zoning claims by a New York court of original and general jurisdiction would be usurped by OTB with relegation over to a federal statutory court more concerned with resolution of the duties, rights, and responsibilities by, between and among debtors and creditors under the federal Bankruptcy Code. Plaintiffs further fear that intervention and possible removal will unjustifiably delay resolution of their claims, thus further prejudicing their substantial rights.

Upon a timely motion, a person is permitted to intervene in an action as of right, "1. when a statute of the state confers an absolute right to intervene; or 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or 3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" (CPLR 1012[a]). Additionally, upon a timely motion, the court, in its discretion, may permit a person to intervene, "when a statute of the state confers a right to intervene ... or when the person's claim or defense and the main action have a common question of law or fact" (CPLR 1013; *see also* ***Wells Fargo Bank, N.A. v Mazzara***, 124 AD3d 875, 875–76, 2 NYS3d 553, 554 [2d Dept 2015]).

Intervention under CPLR 1012 and 1013 requires a timely motion (***Castle Peak 2012-1 Loan Tr. v Sattar***, 140 AD3d 1107, 1108, 35 NYS3d 368, 369 [2d Dept 2016]), although our courts also allow that "intervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties" (***Halstead v Dolphy***, 70 AD3d 639, 640, 892 NYS2d 897, 898 [2d Dept 2010]). A court may in the exercise of its inherent discretion "permit a person to intervene, inter alia, "when the person's claim or defense and the main action have a common question of law or fact" (***Trent v Jackson***, 129 AD3d 1062, 1062, 11 NYS3d 682, 683 [2d Dept 2015]). Further, parties have been permitted to intervene in an action as of right when, among other things, "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (***Spota v County of Suffolk***, 110 AD3d 785, 786, 973 NYS2d 657, 659 [2d Dept 2013]).

The labels "as of right" and "permissive" are not necessarily controlling as it has been held that "[w]hether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted "where the intervenor has a real and substantial interest in the outcome of the proceedings" (***Glob. Team Vernon, LLC v Vernon Realty Holding, LLC***, 93 AD3d 819, 820, 941 NYS2d 631, 633 [2d Dept 2012]; ***Berkoski v Bd. of Trustees of Inc. Vil. of Southampton***, 67 AD3d 840, 843, 889 NYS2d 623, 626 [2d Dept 2009]). However, motion courts remained cautioned that it should always consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party (***Wells Fargo Bank, Nat. Ass'n v McLean***, 70 AD3d 676, 677, 894 NYS2d 487, 489 [2d Dept 2010]).

Here, the Court finds particularly persuasive the relationship between defendant Delaware North and proposed intervenor Suffolk OTB. The motion record presently before the Court alludes to a relationship between the two suggesting that they exist in privity with each other. The casino benefits from its use of simulcast betting feeds from the OTB. OTB in turn, derives an as of yet undetermined on this record portion of the casino's profits which it uses to

repay debts owed to its creditors.

Plaintiffs seem to rely on the notion that because Suffolk OTB does not own the casino or operate it, they cannot conclusively show a real or substantial interest sufficient to warrant intervention since they cannot be bound over by an adverse judgment. This however does not square with precedent. Our courts have determined that as regards privity and substantial interest, that "a judgment in a prior action is binding not only on the parties to that action, but on those in privity with them," and thus in order to "establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." (***Green v Santa Fe Indus., Inc.***, 70 NY2d 244, 253, 514 NE2d 105, 108 [1987]; *see* ***also Blue Sky, LLC v Jerry's Self Stor., LLC***, 145 AD3d 945, 946, 44 NYS3d 173, 175 [2d Dept 2016][arriving at the same conclusion utilizing a *res judicata* analysis]). Thus, the Second Department has oft held that that a nonparty establishes privity where its interests were represented by a party in a prior proceeding, but additionally "[whose] own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party [in] the prior litigation." (***Bayer v City of New York***, 115 AD3d 897, 898, 983 NYS2d 61, 63 [2d Dept 2014]).

The Court is cognizant of plaintiff's rights to forum selection and selection of their particular theory of recovery or causes of action. However, plaintiffs do not present a particularly compelling case of why their choice in forum trumps the articulation of a real, concrete and substantial interest in the outcome of this matter by Suffolk OTB. Nor have plaintiffs disputed the claim of this interest in a persuasive manner. Plaintiffs' concern of substantial prejudice or unjustified delay therefore appears somewhat speculative when weighed on balance on the particular risk of harm to the OTB, given that the federal bankruptcy court approved a debt adjustment plan in part on the reliance of the operation of the casino *sub judice*. While the plaintiffs are correct that this Court, a court of general and original jurisdiction, weighs and determines matters of local zoning on a routine basis, this Court also is confident that plaintiff's claims and interest will not be given short shrift in an alternative forum such as the federal bankruptcy court. Lastly, plaintiffs have conflated the separate and distinct concepts of intervention and removal. While OTB may have clearly indicated a preference to move this dispute to bankruptcy court, that application is not presently before this Court and thus while looming over the relevant analysis, is not by itself outcome determinative.

More importantly, this Court does not agree that OTB unreasonably delayed in making this application. Contrary to plaintiffs' claims, albeit it is true that intervention in special proceedings may be more liberal than the standard of CPLR 1012 & 1013 (*see* ***Greater New York Health Care Facilities Ass'n v DeBuono***, 91 NY2d 716, 720, 697 NE2d 589, 591–92 [1998][the standard for permissive intervention under CPLR 7802(d) is more liberal than that provided in CPLR 1013]), the Court is not persuaded that this was such a *fait accompli*. Rather, plaintiff's Article 78 challenge involved the Village's routine municipal operation of government insofar as delving into application of zoning code and issuance of permits. To the extent plaintiffs have emphasized that Suffolk OTB was neither the government or a the interested property owner, they only cast a stronger light on the inadequacy of those parties' representation of OTB's unique status and interest in this case's outcome.

It bears some mention that OTB has relied upon a federal statute which in this Court's estimation supports intervention as of right. The Second Circuit Court of Appeals has ruled that

federal bankruptcy courts, which clearly have jurisdiction over core bankruptcy matters and proceedings, additionally have the authority to "hear a proceeding that is not a core proceeding but that is otherwise related to a case under [the Bankrupcty Code]," the standard for such a determination of "related to jurisdiction [being] "whether the outcome of the proceeding could conceivably have any effect upon the [debtors'] estate being administered" (***In re Robert Plan Corp.***, 777 F3d 594, 597 [2d Cir 2015][applying 28 U.S.C. § 157(c)(1)]; ***In re Cavalry Const., Inc.***, 496 BR 106, 111 [SDNY 2013][civil proceedings are "related to cases under title 11" if the outcome of those proceedings " 'in any way impacts upon the handling and administration of the bankrupt estate]). Given this relatively broad standard, this Court does not believe that it strains credulity or objective reason that plaintiff's local zoning claims seeking injunction and rescission of certificates of occupancy or permits with the end result of permanently shuttering the VLT facility/casino could be found to impact upon OTB's bankruptcy plan under the federal bankruptcy court's jurisdiction. Accordingly, this Court finds that Suffolk OTB has presented a compelling case for intervention as of right under CPLR 1012 premised upon presentation of real and substantial interest in the outcome of plaintiff's matter before the Court.

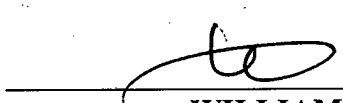
Therefore, for all of the reasons presented above, this Court **grants** Suffolk OTB's motion and they shall be permitted to intervene in this action as a direct party defendant.

Thus, it is

ORDERED that the proposed answer filed by Suffolk OTB pursuant to CPLR 1014 shall be deemed its answer in this matter and the same shall be filed with the Clerk of the Court and served on all parties within 21 days of the entry of this decision and or

The foregoing constitutes the decision and order of this Court.

Dated: May 14, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**