Lewis Homes of N.Y., Inc. v Board of Site Plan Review of the Town of Smithtown
2019 NY Slip Op 31376(U)
May 10, 2019
Supreme Court, Suffolk County
Docket Number: 40966/2009
Judge: Sanford Neil Berland
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INDEX NO.: 40966/2009

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

LEWIS HOMES OF NEW YORK, INC. and, SMITHTOWN WAREHOUSE CONDOS, LLC.,

Petitioners/Plaintiffs,
-against-

BOARD OF SITE PLAN REVIEW OF THE TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, TOWN OF SMITHTOWN, and HOWARD BARTON 3rd,

Respondents/Defendants.

ORIG. RETURN DATE: December 10, 2009
FINAL RETURN DATE: April 24, 2018
MOT. SEQ #: 001 MD

ORIG. RETURN DATE: October 7, 2014
FINAL RETURN DATE: April 24, 2018
MOT. SEQ #: 002 MG; CASEDISP

PETITIONERS/PLTF'S ATTORNEY:
CERTILMAN, BALIN, ADLER & HYMAN, LLP.
100 Motor Parkway, Suite 156
Hauppauge, New York 11788

RESPONDENTS/DEFT'S ATTORNEY:
DEVITT, SPELLMAN, & BARRETT, LLP
50 Route 111, Suite 314
Smithtown, New York 11787

Upon the reading and filing of the following papers in this matter: (1) Notice of Petition, Summons, Verified Petition/Complaint made by Petitioners/Plaintiffs, dated November 5, 2009, and supporting papers; (2) Notice of Motion made by Respondents/Defendants, dated August 19, 2014 and supporting papers; (3) Verified Answer made by Respondents/Defendants dated August 19, 2014 and supporting papers; (4) Affidavit in Support of Petition/Complaint and In Opposition to Motion to Dismiss made by Petitioners/Plaintiffs dated March 20, 2017 and supporting papers; (6) Affidavit In Support of Petition/Complaint and In Opposition to Motion to Dismiss made by Theresa Elkowitz dated March 16, 2017 and supporting papers; (7) Affidavit In Support of Petition/Complaint and In Opposition to Motion to Dismiss made by Paul Lewis dated March 26, 2017 and supporting papers; (8) Affidavit In Support of Respondents/Defendants' Opposition made by Respondent/Defendant Howard Barton dated October 16, 2017 and supporting papers; (11) Sur-Reply Affidavit In Further Support of Petition/Complaint and In Opposition to Motion To Dismiss made by Theresa Elkowitz dated April 24, 2018; it is

ORDERED that respondents/defendants' motion (Seq. 002) seeking dismissal of petitioners/plaintiffs' Article 78 special proceeding and complaint is GRANTED to the extent indicated herein; and it is further

ORDERED that the petition (Seq. 001) is DENIED as premature.

This is a hybrid proceeding and action commenced on November 5, 2009 by petitioners/plaintiffs Lewis Homes of New York, Inc. and Smithtown Warehouse Condos, LLC against the Town of Smithtown and various municipal respondents/defendants ("Town") seeking relief pursuant to Article 78 of the CPLR in the nature of mandamus, a declaratory judgment and damages, costs, disbursements and attorney's fees for causes of action brought pursuant to 42 USC 1983.

This hybrid proceeding and action arises from a site plan application submitted by petitioners/plaintiffs for approval by the Board of Site Plan Review of the Town of Smithtown for a project known as the "Smithtown Warehouse Condominiums Project" ("the Project"). The Project entails the redevelopment of 4.298 acres of land in Nesconset, in the Town of Smithtown, including the construction and installation on the property of 47 warehousing condominium units contained in eleven four-unit buildings and one three-unit building. The Smithtown Town Code requires the Board of Site Plan Review to review proposed site plans in compliance with the New York State Environmental Quality Review Act ("SEQRA"), Article 8 of the New York State Environmental Conservation Law[1]. Petitioners/plaintiffs allege that respondents/defendants violated certain provisions of the implementation provisions of SEQRA as set forth in 6 NYCRR Part 617. They contend that the respondents/defendants did not properly conduct the environmental review of the Project; unduly and unjustifiably delayed the issuance of a SEQRA determination for the Project; and issued a so-called "positive" SEQRA declaration for the Project in retaliation for the petitioners/plaintiffs' commencement of a prior hybrid action seeking, *inter alia*, an order compelling respondents/defendants to immediately issue a negative SEQRA declaration.

Respondents/defendants maintain that they have been fully compliant with the provisions of SEQRA and correctly issued a positive SEQRA declaration as a result of a properly conducted and coordinated environmental review of the Project. Respondents/defendants now move to dismiss the combined petition and complaint on the grounds that the claims pursuant to Article 78 of the CPLR, 42 USC §1983 and for declaratory judgment are not ripe for determination; that the claim pursuant to CPLR 3001 for declaratory relief should be dismissed because there is another action pending between the parties in which all issues can be determined; and that the conspiracy cause of action asserted by petitioners/plaintiffs pursuant to 42 USC §1983 alleges a non-actionable intracorporate conspiracy and should be dismissed on that ground .

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[1]Local planning boards are required to consider the potential environmental impact of a proposed project before granting site plan approval. 6 NYCRR 617.1. If the planning board makes a positive declaration under SEQRA, i.e., that the Project has potential environmental impacts, the applicant is then required to conduct an environmental impact study and submit an environmental impact statement addressing any environmental concerns and anything necessary for eliminating or mitigating those concerns in greater detail. 6 NYCRR 617.7. A positive declaration is not a rejection of a site plan application; after submission of the environmental impact statement, the local planning board will then approve or reject the application. 6 NYCRR 617.1(c).

Background

Petitioners/plaintiffs submitted an application dated December 18, 2007 for approval of the site plan for the Project, together with an Environmental Assessment Form (EAF) and applicable fees, to respondent/defendant the Board of Site Plan Review. The site plan application identified Vincent J. Trimarco, Esq. as the contact person for the applicant. The site plan application and EAF were forwarded to the Supervisor of the Smithtown Department of Environment and Waterways ("DEW") for review for a determination of environmental significance. DEW received these documents on January 7, 2008. DEW staff prepared an Initial Disposition Form regarding the application on January 9, 2008, and classified the project as a SEQRA "Unlisted action". On January 11, 2008, DEW, on behalf of the Town Board, sent copies of the Initial Disposition Form, EAF and site plan to the Suffolk County Department of Health Services ("SCDHS"), along with a letter indicating that if comments were not received within 30 days of the date of the letter, it would be understood that SCDHS had no objection to the Town of Smithtown acting as the SEQRA lead agency for review of the Project. SCDHS responded in a letter dated January 16, 2008, stating that they 'ha[d] no objection to the Town of Smithtown Planning Board [sic] assuming lead agency status."

On March 11, 2008, petitioners/plaintiffs submitted to the Board of Zoning Appeals of the Town of Smithtown (the "BZA") an application for variances to reduce the minimum separation distance between the proposed buildings from 30 feet to 10 feet and to reduce the minimum number of truck loading spaces, from two as required by the Town Code, to one. On May 30, 2008, petitioners/plaintiffs submitted to the Town Planning Board an application for approval of a proposal for the Project to be subdivided into 47 warehouse units to be sold as condominiums. On April 8, 2008, a public hearing was held by BZA on the petitioners/plaintiffs' application for variances. The minutes of that hearing were provided to DEW. Respondents/defendants allege that by June, 2008, the Town had sufficient information to issue a positive SEQRA declaration, which would result in the requirement that an EIS be prepared by petitioners/plaintiffs. They allege that DEW personnel discussed the Town's environmental concerns and possible mitigating measures and/or design changes in the Project with Planning Department staff and Vincent J. Trimarco, Esq., petitioners/plaintiffs' representative. In August 2008, Howard Barton, newly appointed as Assistant Environmental Protection Director of DEW, reviewed the site plan, subdivision and variance applications for the Project. In an affidavit filed in opposition to the instant action, Barton, who is a named defendant/respondent, states that he concluded, in concurrence with DEW staff, that the Project posed a number of significant environmental issues. He noted that the petitioners/plaintiffs intended to sell each unit of the Project for any use allowable under the applicable Light Industry zoning, which encompasses not only warehousing, but also medical and non-medical offices, fitness centers, gymnasiums and restaurants. Barton contends that the nature and intensity of potential adverse environmental impacts vary significantly among the range of possible land uses of the site, especially with respect to wastewater, traffic, parking, and the use, storage, and handling of toxic and hazardous materials. Other significant concerns identified by Barton include fire safety and the precedent-setting nature of the project.

On August 8, 2008, Theresa Elkowitz, an environmental consultant retained by petitioners/plaintiffs, having learned that the Town had environmental concerns and was considering issuing a positive SEQRA declaration for the Project, sent a letter to DEW in which she analyzed certain potential environmental impacts of the Project and, based upon the criteria set forth in 6 NYCRR § 617.7(c)(1), concluded that a negative SEQRA declaration should be issued. DEW, however, determined that Elkowitz's

letter was not responsive to the Town's environmental concerns because it addressed only the potential environmental impacts of the use of the buildings solely for warehousing, a use less intensive than other potential uses of the buildings. DEW examined neighboring industrial developments to determine whether the Project was similar to those developments and concluded that the Project would impose substantially greater environmental impacts.

On November 20, 2008, DEW held a meeting with the Project's sponsors and their representatives, including George and Paul Lewis, Trimarco and Elkowitz. Also in attendance were respondent/defendant Barton and other members of the DEW staff. Among the issues discussed at the meeting were the Town's environmental concerns. Subsequent to the meeting, correspondence and discussions ensued between respondent/defendant Barton, on behalf of DEW, and Trimarco, on behalf of the petitioners/plaintiffs. At the same time, Elkowitz submitted letters to DEW ostensibly aimed at addressing DEW's environmental concerns. Respondents/defendants maintain that the petitioners/plaintiffs did not sufficiently alleviate the Town's environmental concerns, particularly as the petitioners/plaintiffs declined to agree to covenants and restrictions prohibiting certain non-warehousing uses on the Project site or to accept other project revisions and mitigation measures. Further, because the Elkowitz submissions were predicated upon the assumption that the Project would be used exclusively for warehousing, those submissions persistently failed to address respondents'/defendants' concerns stemming from the other potential uses of the buildings. Thus, in July 2009, Barton advised Trimarco that based upon the information and submissions received by the Town up to that time, DEW could not recommend a negative SEQRA declaration for the Project. In August 2009, Trimarco advised DEW that the petitioners/plaintiffs would not be submitting any additional information or proposed modifications to the Project in support of their application.

In September 2009, DEW began drafting a positive SEQRA recommendation, which consisted of a resolution request and supporting memorandum to the Smithtown Town Board. On September 18, 2009, petitioners/plaintiffs brought a hybrid proceeding and action under Index Number 35947/2009, seeking, among other things, a judgment declaring that the Town had violated the implementing provisions of SEQRA and compelling the Town to issue a negative SEQRA declaration forthwith. According to Barton, upon advice from the Smithtown Town Attorney, he continued to prepare the positive SEQRA recommendation, which he submitted to the Town Supervisor on September 29, 2009. On October 5, 2009, the Town Attorney faxed to petitioners/plaintiffs' attorney an excerpt of a proposed agenda for the Town Board's regular meeting of October 6, 2009, which included a proposed resolution issuing a positive SEQRA declaration for the Project's site plan. It is not disputed that on the morning of the Town Board meeting, petitioners/plaintiffs' attorney spoke with the Smithtown Town Attorney and explained the reasons his clients felt that a positive declaration would be unwarranted and improper and then had a letter hand-delivered to the Town Supervisor raising a number of issues in objection to the resolution, including (1) that petitioners/plaintiffs had conclusively demonstrated, in correspondence from their environmental consultants, that no significant adverse environmental impacts would result from the Project; (2) that the petitioners'/plaintiffs' proposed condominium form of ownership for their proposed warehousing units should have no bearing upon either the use or the environmental impacts of the Project; (3) that Barton's assertion that the Project entailed an over-intensification of development and use of the subject parcel was false; and (4) that the adoption by the Town Board of a SEQRA positive declaration for the Project could only be viewed as retaliation for the petitioners'/plaintiffs' filing of the hybrid Article 78 proceeding and action. Nonetheless, the Town Board adopted the resolution at its meeting, and a SEQRA Positive

Declaration Determination of Significance was issued for the Project, identifying and particularizing fourteen significant potential environmental impacts of the Project. By letter to petitioners'/plaintiffs' attorney dated October 7, 2009, Barton forwarded the declaration indicating that the preparation of an EIS would be required in connection with the application for site plan approval for the Project, along with a copy of the Town's "Standards for the Preparation of Draft and Final Environmental Impact Statements." Petitioners/plaintiffs did not take steps to prepare an EIS for the Project, and on November 5, 2009, the petitioners/plaintiffs filed the instant petition and complaint.

According to petitioners'/plaintiffs' submissions, petitioners/plaintiff Lewis Homes had entered into a contract to purchase the parcels for the proposed Project on September 18, 2007. The contract was subject to and conditioned upon the ability of Lewis Homes, one of the petitioners/plaintiffs, to obtain building permits from the Town of Smithtown for the Project within twelve months of the date of the contract. Because the issuance of building permits depended upon the issuance of site plan and variance approvals for the Project, Lewis Homes was unable to meet the twelve-month deadline. Also according to petitioners'/plaintiffs' submissions, on January 4, 2011, petitioner/plaintiff Lewis Homes entered into a further agreement with the seller of the property in which it agreed to pay $34,728.53 in real estate taxes on the property without any right to refund, in consideration for the right to purchase the property by December 31, 2011. Lewis Homes alleges that it lost all rights to purchase the property, which was ultimately sold to a third party.

CPLR 7801(1)

CPLR 7801(1) provides that a proceeding under Article 78 of the CPLR "shall not be used to challenge a determination which is not final." A positive SEQRA determination imposing a requirement that an EIS be prepared is not a final agency action and is instead an initial step in the SEQRA process (***Ranco Sand and Stone Corp. v Vecchio***, 27 NY3d 92, 29 NYS2d 873 [2016], *citing* ***Matter of Rochester Tel. Mobile Communications v Ober***, 251 AD2d 1053, 674 NYS2d 189 [4th Dept 1998]). An agency action is final when a decision-maker arrives at a definitive position on the issue that inflicts an actual concrete injury (*see* ***Matter of Essex County v Zagata***, 91 NY2d 447, 672 NYS2d 281 [1998], *see also* ***Matter of Gordon v Rush***, 100 NY2d 236, 762 NYS2d 18 [2003]). If a petitioner's application can be granted following the preparation of an EIS, notwithstanding the considerable expenses and time associated with its preparation, then the issuance of a positive SEQRA declaration does not constitute a definitive position on an issue that inflicts an actual, concrete, injury (*see* ***Matter of Sour Mtn. Realty v New York State Department of Environmental Conservation***, 260 AD2d 920, 688 NYS2d 842 [3d Dept 1999]; ***Matter of Essex County v Zapata***, *supra*, ***Church of St. Paul & St. Andrew v Barwick***, 67 NY2d 510, 520, 505 NYS2d 24 [1986]; ***Matter of Rochester Tel. Mobile Communications v Ober***, *supra* at 1053).

An agency's positive SEQRA declaration is ripe for judicial review when two requirements are satisfied: first, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process," and second, "there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." (***Ranco Sand and Stone Corp. v Vecchio***, *supra, quoting* ***Matter of Gordon v Rush***, 100 NY2d 236, 242, 762 NYS2d 18 [2003]).

Here, the petitioners have not satisfied either requirement for judicial review. The positive SEQRA declaration issued by respondents/defendants did not constitute a determination as to whether the site plan and variance applications for the Project would be approved. Petitioners/plaintiffs, had they availed themselves of the opportunity to prepare an EIS, may well have obtained approval of their applications to the Town and gone forward with the building of the Project. Their cause of action pursuant to Article 78 of the CPLR therefore fails on the ground that the action it challenged did not become ripe for judicial review.

CPLR 3001

In order for a claim for declaratory judgment pursuant to CPLR 3001 to be ripe for judicial review in the context of the instant action, there must first be a showing that the administrative action challenged is final so that only a purely legal question remains to be resolved, and, second, a showing that the administrative action will have a direct and immediate effect on the complaining party (***Petosa v City of New York***, 135 AD2d 800, 802, 522 NYS2d 904 [2d Dept 1987]). "'[I]f the claimed harm may be prevented or significantly ameliorated by future administrative action or by steps available to the complaining party' the controversy cannot be ripe."(***Petosa v City of New York***, 135 AD2d 800, 802, 522 NYS2d 904 [2d Dept 1987] *quoting* ***Church of St. Paul & St. Andrew v Barwick***, 67 NYS2d 510, 521, 505 NYS2d 24 [1986]; *see also* ***Matter of Staskowski v Fanelli***, 48 AD3d 579, 852 NYS2d 231 [2d Dept 2008]).

Here, the plaintiffs did not make a sufficient showing to entitle them to judicial review of their causes of action for declaratory judgment. As discussed *infra*, the issuance by defendants of a positive SEQRA determination requiring the preparation of an EIS was not a final action but merely an initial step in the SEQRA process. The final determination as to whether the site plan for the Project would be approved awaited the preparation and submission of an EIS by plaintiffs/respondents, and that final determination would have been impacted by the submission of an EIS by plaintiffs. /Pettioners'/plaintiffs' causes of action for declaratory relief therefore did not become ripe for judicial review.

42 USC §1983

A claimed violation of its First Amendment rights in the context of land use will be ripe for review only if the claimant can show "immediate injury" and that the state regulatory entity has rendered a final decision on the matter (***Roman Catholic Diocese of Rockville Centre, New York, v The Incorporated Village of Old Westbury***, 2011 WL 666252 [EDNY February 14, 2011], *citing* ***Dougherty v Town of North Hempstead Bd. Of Zoning Appeals***, 282 F3d 83 [2d Cir 2002]). Under a futility exception to the final decision requirement, certain procedures that a plaintiff normally would be required to pursue in order to receive a final determination may be excused if the plaintiff can demonstrate, by more than mere allegations, that they would be futile (*see* ***Westchester Day School v Village of Mamaroneck***, 236 F.Supp.2d 349 [SDNY 2002] (*citations omitted); see also* ***Leonard v Planning Board of the Town of Union Vale***, 659 Fed. Appx. 35 [2d Cir 2016]).

Petitioners/plaintiffs allege that defendants indefinitely and unjustifiably delayed taking action with regard to the Project and ultimately issued a positive SEQRA declaration with the intent to punish and retaliate against the plaintiffs for exercising their rights under the First Amendment of the United States Constitution, causing them to lose the benefit of their investments in the subject property and to suffer losses and expenses associated with the prosecution of their claims. Although these allegations are legally

sufficient to establish a *prima facie* showing that they have suffered an "immediate injury," petitioners/plaintiffs have failed to make the requisite showing that any efforts on their part to engage in the appropriate procedures in order to obtain a final determination by defendants on approval of the site plan application for the Project would have been futile. Plaintiffs' causes of action pursuant to 42 USC §1983 therefore fail on ripeness grounds.

For all of the above reasons, the petition and complaint must be dismissed. The court has considered the remaining contentions of the parties and finds that they do not alter the foregoing determination.

This constitutes the decision and order of the court.

Dated: 5/10/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

_X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**