

Hogue v Village of Dering Harbor
2019 NY Slip Op 34303(U)
April 8, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 610573-2018
Judge: David T. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 610573-2018

**TIMOTHY HOGUE and DERING POINT
ASSOCIATES, LLC,**

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Plaintiffs,

- against -

**O'Shea, Marcinuk & Bruyn, LLP
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Village of Dering Harbor & Board of
Trustees of the Village of Dering Harbor
250 North Sea Road
Southampton, NY 11968**

**VILLAGE OF DERING HARBOR and BOARD OF
TRUSTEES OF THE VILLAGE OF DERING
HARBOR, BRAD GOLDFARB and ALFREDO
PAREDES,**

Defendants.

**x Margolin Besunder LLP
Attorneys for Defendants
Brad Goldfarb & Alfredo Paredes
1050 Old Nichols Road, Suite 200
Islandia, NY 11749**

MOTION DATE: 07/25/18
SUBMITTED: 11/14/18
MOTION SEQ. NO.: 1 & 2
MOTION: 001. MD
002. MG

Upon the reading and filing of the following papers in this matter: (1) Plaintiff's Order to Show Cause (001) dated June 12, 2018 and supporting papers; (2) Defendants Goldfarb and Paredes' Affirmation in Opposition dated July 17, 2018 and supporting papers; (3) Defendants Village of Dering Harbor and Board of Trustees of the Village of Dering Harbor Affirmation in Opposition dated August 28, 2018; (4) Plaintiffs' Affirmation in Reply dated August 28, 2018 and supporting papers; (5) Defendants Goldfarb and Paredes' Notice of Motion to Dismiss (002) dated August 29, 2018 and supporting papers; (6) Plaintiffs' Affirmation in Opposition dated October 31, 2018 and supporting papers; and (7) Defendants Reply Affirmation dated November 14, 2018 and supporting papers (and after hearing counsel in support and opposed to the motions) it is,

ORDERED that plaintiffs' application for an Order granting it a preliminary injunction, pursuant to CPLR 6301, is denied; and it is

ORDERED that defendants Goldfarb and Paredes' application for an Order dismissing the complaint as against them, pursuant to CPLR 3211(a)(1) and 3211 (a)(7), is granted.

In this declaratory judgment action plaintiffs seek an Order declaring invalid, annulling and enjoining the local law adopted by resolution on April 14, 2018 (the Local Law) by the Board of

Trustees of the Village of Dering Harbor (the Trustees) which amended the Village Zoning Code (the Village Code) pertaining to the regulation of fences and hedges within village boundaries. According to the plaintiffs, the Trustees amended the Village Code “in a manner that signaled the abandonment by the trustees of the longstanding regulation of ‘living fences’” (see Plaintiff’s Amended Complaint, ¶1). Plaintiffs maintain that the Local Law is: (1) inconsistent with the purposes for which police power of the State of New York was delegated to village governments as prescribed in the Village Law; (2) not in accordance with the Village of Dering Harbor’s comprehensive plan; (3) adopted without any kind of study by the trustees of the consequences of enactment, including the safety of motorists, bicyclists and pedestrians; and (4) was not adopted in good faith and for a proper purpose. Plaintiffs have joined defendants Brad Goldfarb (Goldfarb) and Alfredo Paredes (Paredes), inasmuch as plaintiffs alleged that these defendants have used the Local Law to install hedges around their property which abuts a right of way enjoyed by plaintiff Dering Point Associates, LLC (see *Id.*, ¶¶ 2-3).

The Village of Dering Harbor and the Trustees have submitted an answer setting forth five affirmative defenses, including but not limited to, the assertion that plaintiffs do not have standing to challenge this legislative action, that plaintiffs seek an advisory opinion as to the application of the Local Law on other residents of the Village of Dering Harbor (Dering Harbor), the legislation is subject to a strong presumption of validity and that plaintiffs have failed to allege a cause of action for an injunction against Dering Harbor to prevent the performance of its statutory duties.

By way of procedural history, the plaintiffs moved by Order to Show Cause dated June 12, 2018 for an Order preliminarily enjoining Goldfarb and Paredes, during the pendency of this action, from installing or maintaining hedges of any kind on the east and west sides of a deeded right-of-way which runs through their land between property to the north owned by Dering Point Associates, LLC (Associates) and Shore Road to the south, which represents the Associates only means of ingress and egress from its premises. Plaintiffs were denied identical temporary relief during the pendency of the motion by Order of the Court [Hudson, J.]. On August 29, 2018, Goldfarb and Paredes moved for dismissal of the second cause of action in the amended complaint pursuant to CPLR 3211 (a)(1) and (7).

With respect to the amended complaint, plaintiffs maintain that in furtherance of Dering Harbor’s Zoning Code and the principles and policies of the village’s comprehensive plan, the Trustees adopted Village Code §4-420 (the statutory predicate to the Local Law), which provides in pertinent part,

Fences, other than those required in connection with swimming pools, whether structures, or living in the form of vegetation, may be permitted, subject to the issuance of a license by the board of trustees. The board of trustees finds and determines that fences should neither be permitted nor prohibited generally and that because of varying conditions adequate guidelines cannot be established for delegated administrative action by the board of appeals. Accordingly, action on applications for permission to erect, plant, or grow fences shall be legislative in nature.

However, on March 3, 2018 the Trustees adopted the Local Law which repealed that portion of the Village Code under §4-420 relating to “fences,” and adopted a new §4-420 entitled, “Fences,

walls and hedges.” That new legislation, seemingly for the first time, differentiated the definitions of fences, walls and hedges, as well as the laws pertaining thereto. With respect to hedges, the Local Law provides, at subsection (4) and in pertinent part,

Hedges. A hedge shall be defined as any number of woody plants, whether capable of growing into trees or not, which are planted so as to be in a general line and, when mature, to be so integrated together as to for a barrier or screen. Such hedge need not represent or constitute the precise line of a boundary and may be plantings in a general linear or staggered line or form. Such terms include hedgerows, windrows, and other forms of plantings running along the front lot line or street line. The following requirements shall apply to hedges in all districts:

(a) The stem or trunk of a hedge in a front yard or along a street line shall be setback a minimum of four (4) feet from the street right-of-way line. Where the boundary line for the property extends into the paved portion of the street, then such hedge shall be setback a minimum of four (4) feet from the paved edge, curb line or sidewalk, whichever is greatest.

(b) The landowner shall have a continuing obligation to maintain the hedge so the hedge does not encroach into the street or cause a safety hazard. Failure of a landowner to maintain a hedge installed after the effective date of this amendment at the required setback shall constitute a violation of this Zoning Law.

© A hedge on a corner lot shall be subject to the corner clearance requirements of §4-408 herein.

(d) A hedge in a side or rear yard (other than along a street line) and general landscaping beyond four (4) feet of the street line are not regulated hereunder.

The Local Law includes, as a portion thereof, a section entitled “Legislative Intent.” Within that section it references the prior law which required “landowners to make application and obtain the review and approval of the Board of Trustees and the Architectural Review Board for a fence, including ‘living fences’.” Noting that such an application for review and approval was “legislative in nature” the Local Law observed that “there are no expressed standards or criteria to guide the Board of Trustees action.” The stated intent of the Local Law is “to repeal §4-420 in its current form and replace it with a definition of structural fences, walls, and hedges, and standards therefor, and to eliminate review and approval of all fences, structural or living, by the Board of Trustees.” The Trustees further intended the Local Law to be amended to eliminate reference to living fences and delegate the authority to review application for structural walls and fences to the Architectural Review Board.

In commencing this action, the plaintiffs seek a judgment declaring the Local Law invalid and annulling and enjoining same. Plaintiffs argue that the adoption of the Local Law “signaled an abandonment by the Trustees of the longstanding regulation of ‘living fences’ in the Village and that, in practical effect, constituted an open invitation to Village homeowners, including Goldfarb/Paredes, to erect ‘living fences’ of any kind, quality, height and breadth, in virtually any location, regardless of their impact upon the health, safety and welfare of the community, the natural

beauty of the Village, its scenic vistas, and the provision of light and air to its residents.” The instant application is one for a preliminary injunction by the plaintiffs against Goldfarb and Paredes to prevent them from installing hedges on their property during the pendency of this action.

With respect to plaintiffs’ application, to demonstrate entitlement to a preliminary injunction, the movant must demonstrate a probability of success on the merits, danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction (*see* CPLR 6301; *see also Olabi v Mayfield*, 8 AD3d 459, 778 NYS2d 311 [2d Dept 2004], citing *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 1990]; *Doe v Axelrod*, 73 NY2d 748, 536 NYS2d 44 [1988]).

To that end, the New York Legislature has empowered the board of trustees of a village to enact zoning regulations (*see* NY Village Law §7-700). That power rested with the trustees is limited, however, to the extent that such regulations shall be made in accordance with a comprehensive plan (*see* NY Village Law §7-704). The requirement of NY Village Law §7-704 is met if implicit in the ordinance there is the element of planning which is both rational and consistent with the basic land use policies of the community (*see Taylor v Head of Harbor*, 104 AD2d 642, 480 NYS2d 21 [2d Dept 1984], citing *McBride v Town of Forestburgh*, 54 AD2d 396, 388 NYS2d 940 [3d Dept 1976]). The party challenging a zoning enactment on the ground that it is contrary to a comprehensive plan assumes a heavy burden to counter the strong presumption of validity accorded the enactment (*Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 351 NYS2d 129 [1973]). Where the validity of the ordinance or amendment is fairly debatable, it may not be set aside (*see Id.*).

While neither party has submitted what could be considered a full comprehensive plan adopted by the Village and the Trustees, the Court can glean from the exhibits attached to the plaintiffs’ amended complaint that the Trustees adopted the Village’s first Zoning Code in 1970. Zoning Code §1-104, as adopted, provides that the purpose of the specific Zoning Code provisions enacted were, “To guide the future growth and development of the village in accordance with a comprehensive plan”; “To provide adequate light, air and privacy; to secure safety from fire and other damage”; to “balance public and private interests”; to “encourage the wise use and sound management of natural resources throughout the village to preserve the beauty of the community and value of the land.”

When read against the Village’s original Zoning Code, the Court finds that the Local Law does not violate the spirit of the Village’s comprehensive plan. The Local Law addresses the absence of the regulatory guidelines with respect to “living fences” in the original Zoning Code §4-420 to the extent that it differentiates between fences and walls made of wood, stone or other building materials and hedges, which are comprised of “any number of woody plants.” The regulation of “living fences” are indeed part of the Local law and prohibit the location of any hedges within four feet of the street right-of-way line. In addition, the homeowner is placed on notice of their continuing obligation to maintain the hedge so that it does not “encroach into the street or cause a safety hazard.” (*Emphasis supplied*). To allow such an encroachment would result in a violation of the Zoning Law.

Based upon the sum of the foregoing, the Court finds that the Village’s adoption of the Local Law as an amendment to Zoning Code §4-420 is both rational and consistent with the basic land use

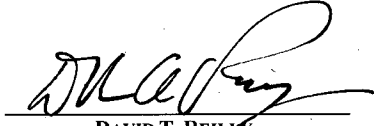
policies of the Village and does not violate the comprehensive plan. Therefore, the plaintiff's burden as to demonstrating a probability of success on the merits has not been met and the application for a preliminary injunction is denied.

With respect to defendants Goldfarb and Paredes motion to dismiss the complaint as against them, that application is granted. As the Court has determined that the plaintiffs are not entitled to injunctive relief, the cause of action asserted against Goldfarb and Paredes, to wit: for injunctive relief enjoining the defendants from installing and maintaining hedges on their property and along to the plaintiff Associates' right of way, must also be denied (*see Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 943 NYS2d 519 [1st Dept 2012]).

In denying the plaintiffs' application for a preliminary injunction based on their failure to demonstrate a likelihood of success on the merits, the Court has made certain determinations as to the Village's adoption of Local Law §4-420. That being said, the Court is without the mechanism to mark this matter "disposed." Accordingly, to the extent that the parties wish to pursue this action on the first cause of action asserted in the amended complaint, the parties are directed to make application for a preliminary conference so that any additional discovery, if any, can be exchanged by the parties. The Court will await such an application or a dispositive motion submitted by the Trustees and the Village.

This shall constitute the decision and Order of the Court.

Dated: April 8, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 FINAL DISPOSITION X NON-FINAL DISPOSITION