

Liendo v City of New York

2020 NY Slip Op 30358(U)

February 7, 2020

Supreme Court, New York County

Docket Number: 161040/2019

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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INDEX NO. 161040/2019

MICHAEL LIENDO, DEBBIE KUEBER, ROBERT KUEBER,
KINGA KURZYNA, DANIEL KURZYNA, WALTER
CLAYTON, RICHARD HUBER, PATRICK SHANLEY,
DIANA SHANLEY, WILLIAM WENZEL, DOROTHY
WENZEL, MICHAEL PAPA, CHERYL YODICE, GLORIA
CATALANO, TRIUMPH GYMNASTICS, GLENDALE
PROPERTY OWNERS ASSOCIATION, GLENDALE CIVIC
ASSOCIATION OF QUEENS, JUNIPER PARK CIVIC
ASSOCIATION, LIBERTY PARK HOMEOWNERS
ASSOCIATION, MIDDLE VILLAGE PROPERTY
OWNERS/RESIDENTS ASSOCIATION

MOTION DATE 01/13/2020

MOTION SEQ. NO. 001

Plaintiff,

**DECISION + ORDER ON
MOTION**

- v -

CITY OF NEW YORK, BILL DI BLASIO, NEW YORK CITY
DEPARTMENT OF SOCIAL SERVICES, STEVEN BANKS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16,
17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the verified petition/complaint of Michael, Liendo, Debbie Kueber,
Robert Kueber, Kinga Kurzyrna, Daniel Kurzyrna, Walter E. Clayton, Jr., Richard Huber, Patrick
Shanley, Diana Shanley, William Wenzel, Dorothy Wenzel, Michael J. Papa, Cheryl Yodice,
Gloria Catalano, Triumph Gymnastics, Glendale Property Owners Association, Glendale Civic
Association of Queens, Juniper Park Civic Association, Liberty Park Homeowners Association,
and Middle Village Property Owners/Residents Association (motion sequence number 001) is
denied, and that petition/complaint is dismissed; and it is further

ORDERED that counsel for respondents/defendants to serve a copy of this decision,
along with notice of entry, on all parties within 10 days of entry.

FINAL DISPOSITION

In this hybrid real property special proceeding-action, petitioners/plaintiffs request certain injunctive, declaratory and ancillary relief (motion sequence number 001). For the following reasons, their petition/complaint is denied.

BACKGROUND

The dispute that gave rise to this matter concerns the proposed development of a former factory building (the building) located at 78-16 Cooper Avenue, in the County of Queens, City and State of New York. *See* notice of petition at 2. Petitioners/plaintiffs are a group of individuals, businesses and neighborhood associations that either reside or are located in the immediate vicinity of the building. *See* verified petition, ¶¶ 9-26. The respondent/defendant New York City Department of Social Services is an administrative agency of the co-respondent City of New York (the City), and is responsible for overseeing the operations of its constituent agency and co-respondent/defendant the New York City Department of Homeless Services (DHS; together, the City respondents). Briefly, the City respondents seek to develop the building as a homeless shelter, and the petitioners/plaintiffs seek to stop them from doing so.

The petition alleges that the City respondents have undertaken this development project pursuant to a Mayoral initiative called the “Turning the Tide on Homelessness in New York City” plan (the TTH plan). *See* verified petition, ¶ 1. It asserts that this is improper, however, because the TTH plan appears to permit the expedited approval of certain development projects while wrongly exempting those projects from complying with land-use review procedures that are required by law. *Id.*, ¶¶ 2-6. In particular, the petition alleges that the instant project must meet the requirements of the New York State Environmental Quality Review Act (SEQRA) and the New York City Fair Share Rules in order to be approved. *Id.*, ¶¶ 33-53. It concludes that the

City respondents' attempt to circumvent those requirements via the TTH plan is an improper act that entitles them to declaratory and injunctive relief. *Id.*, ¶¶ 54-77.

The City respondents' answer asserts that DHS uses an "open ended request for proposal" (RFP) process to consider prospective homeless shelters, and asserts that DHS's internal review of the applications which are submitted as part of the RFP process is sufficient to comply with both SEQRA and the New York City Fair Share Rules. *See* verified answer, Ali affirmation, ¶¶ 20-26. It also asserts that non-party Westhab, Inc. (Westhab), a New York not-for-profit corporation, submitted an RFP to DHS that identified the building as a site where Westhab could operate homeless services programs. *Id.*, ¶ 27. It states that, during the RFP process, DHS retained an environmental consulting firm called the CSA Group (CSA) to perform a SEQRA review, and the DHS performed its own "Fair Share Criteria" review of Westhab's application. *Id.*, ¶¶ 28-39. With respect to SEQRA, the answer asserts that CSA's report led DHS to issue an "environmental assessment statement" (EAS) on December 16, 2019 that found that the instant development project did not have the potential to result in adverse environmental impacts. *Id.*, ¶ 38-39; exhibit B. As a result, DHS issued a "negative declaration" on that same day that made that finding official. *Id.* As regards the New York City Fair Share Rules, the answer states that DHS issued a final "Fair Share Statement" (FSS) on December 16, 2019 that found that the plan to locate a homeless shelter at the building was consistent with "Fair Share Criteria." *Id.*, ¶¶ 31-35; exhibit A. The City respondents assert that neither of these documents constitutes a "final agency determination" that is subject to challenge pursuant to CPLR Article 78. *Id.*, ¶¶ 45-50. They also assert that the Mayor's TTH plan is not subject to the more stringent SEQRA rule that would require the promulgation of an "environmental impact

statement” (EIS). *Id.*, ¶¶ 40-44. They conclude that enjoining the instant development project would unduly burden DHS and harm its homeless clients. *Id.*, ¶¶ 51-55.

Petitioners/plaintiffs commenced this hybrid special proceeding/action on November 12, 2019 by filing a “verified petition and complaint” that requests both injunctive and declaratory relief. *See* verified petition & complaint. Respondents/defendants filed an answer on December 23, 2019. *See* verified answer. The matter is now fully briefed (motion sequence number 001).

DISCUSSION

As noted, the verified petition/complaint requests the court to issue two injunctions along with ancillary related relief; specifically:

- “1) a preliminary and permanent injunction to halt the City respondents’ plan to develop the building as a homeless shelter - or to provide other homeless services - “because a proper review under [SEQRA] was not completed prior to a decision to develop the premises;” [along with]
 - a) an order to vacate the City respondents’ notice that a homeless shelter will be opened at the premises; [and]
 - b) a declaratory judgment that the instant development project is one of a number of City-wide homeless shelter development plans, all of which require review under SEQRA; [as well as]
- 2) a preliminary and permanent injunction to halt the City respondents’ plan to develop the building as a homeless shelter because that plan causes “a violation of the New York City Fair Share Rules.”

See verified petition/complaint at 16. Requests for injunctive relief are governed by CPLR 6301, which provides that:

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or

continued during the pendency of the action, would produce injury to the plaintiff.
...

The Court of Appeals holds that “[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005). The court notes that neither party expressly mentioned any of these elements in their briefs. Instead, they devoted their respective memoranda almost entirely to arguments about the applicability of SEQRA. In the context of the instant claims for injunctive relief, the court construes those arguments as allegations by each party that they can demonstrate “a probability of success on the merits,” because the governing law supports their stated position on the issue of the applicability of SEQRA.

Interestingly, neither party expressly cites such governing law either. Instead, petitioners/plaintiffs broadly assert that, because “the [TTF] plan calls for the discontinuance of certain types of facilities, the building on ninety . . . new shelters and the expansion of thirty . . . new shelters . . . , [it] clearly triggers the relatively low threshold under SEQRA for requiring an EIS [i.e., environmental impact statement].” See petitioners/plaintiffs’ mem of law at 19-20. They then discuss a quantity of case law that analyzes the legislative intent behind SEQRA (and in particular, referred to the statute’s “non-segmentation” provision) to support their position. *Id.* For their part, the City respondents reply with the factual assertion that “the required SEQRA . . . review was appropriately completed,” and the legal argument that “the [TTF] plan is not subject to SEQRA.” See respondents/defendants’ mem of law at 12-20. They support the latter claim by discussing a quantity of general SEQRA case law, although they also cite one allegedly on-point, unpublished trial court decision (*Sandora v City of New York*, 2017 NY Misc LEXIS 3723 [Sup Ct, Queens County 2017]). *Id.* at 19-20. However, they do not present a copy of that decision,

and they assert that it is currently being appealed. This makes its precedential value uncertain, at best. In any event, the court finds that neither parties' arguments bears on the facts of this case with sufficient specificity.

The regulation that implements the governing portion of SEQRA (i.e., Environmental Conservation Law § 8-0103) provides, in part, that:

“(c) The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the *actions* they directly undertake, fund or approve may *have a significant impact on the environment.*”

6 NYCRR § 617.1 (c) (emphasis added).

The Appellate Division, Second Department, has squarely held that “a building’s change in use [to a homeless shelter], in and of itself, does *not* constitute an ‘action’ under SEQRA . . . *unless* the change has significant environmental impact.” *Matter of Plaza v City of New York*, 305 AD2d 604, 606 (2d Dept 2003) (emphasis added). In *Plaza v City*, the Second Department found that DHS’s issuance of an EAS and a negative declaration as to “significant environmental impact” was sufficient to satisfy SEQRA, and reasoned that “in view of the lack of significant environmental impact, an EIS is *not* required.” *Id.* Here, too, DHS has issued an EAS and a negative declaration that found that locating a homeless shelter in the subject building will *not* have a “significant environmental impact.” *See* verified answer, Pereira affirmation, exhibits A, B. Accordingly, and in reliance on the *Plaza* holding, the court finds that the City respondents have demonstrated that they have performed an adequate SEQRA review, and rejects petitioners/plaintiffs’ argument that SEQRA also requires DHS to generate an EIS in connection with the instant development project. As a result, the court concludes that the petitioners/plaintiffs cannot establish “a probability of success on the merits” on their first claim

for injunctive relief, and it therefore denies so much of their petition/complaint as seeks that relief.

Petitioners/plaintiffs' first claim for injunctive relief also seeks a declaration that "the instant development project is one of a number of City-wide homeless shelter development plans, all of which require review under SEQRA," and "an order to vacate the City respondents' notice that a homeless shelter will be opened at the premises." *See* verified petition/complaint at 16. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, petitioners/plaintiffs are not entitled to the declaration that they seek, since their proposed declaration is based on an incorrect interpretation of SEQRA. The court has rejected the contention that SEQRA requires DHS to generate an EIS in connection with the instant homeless shelter development project, since DHS has already generated an EAS that found that the project will not have a "significant environmental impact." It is conceivable that SEQRA would have required DHS to generate an EIS *if* such an impact had been demonstrated. However, that showing was not made, and there is no legal basis to hold that SEQRA requires DHS to generate an EIS in connection with *every* homeless shelter development project commenced under the Mayor's TTH plan, in the absence of a showing of "significant environmental impact." Therefore, petitioners/plaintiffs are not entitled to either their proposed declaratory judgment or to the ancillary proposed vacate order, and the court denies so much of their petition/complaint as seeks these items of relief.

Petitioners/plaintiffs second request for injunctive relief seeks an order to halt the instant homeless shelter development project on the ground that the City respondents have violated the

New York City Fair Share Rules. *See* verified petition/complaint at 16. Petitioners/plaintiffs claim that a violation exists because the City Planning Commission has not completed a city-wide “annually required ‘beds to population index’ . . . since 2003.” *See* petitioners/plaintiffs’ mem of law at 20-21. The City respondents reply that DHS did generate an FSS on December 16, 2019 that found that the subject development plan was consistent with “Fair Share Criteria,” and that it contained the requisite estimate of the number of beds necessary for the building’s proposed population. *See* respondents/defendants’ mem of law at 15-16; Pereira affirmation, exhibit A. The court notes that petitioners/plaintiffs appear to have abandoned their “Fair Share Rules” argument, since their reply papers contain no mention of that argument. *See* petitioners/plaintiffs’ reply mem at 3-7. The court also notes that petitioners/plaintiffs’ original argument appears to be misplaced, since the City Planning Commission is not a party to this litigation. In any case, their argument is unfounded, since petitioners/plaintiffs’ fail to identify any authority to support the proposition that a “city-wide” review is required before DHS may initiate *any* homeless shelter development projects. As a result, the court concludes that petitioners/plaintiffs cannot show “a probability of success on the merits” on their second claim for injunctive relief, and it therefore denies so much of their petition/complaint as seeks that relief. Accordingly, the court finds that the instant petition/complaint should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the verified petition/complaint of Michael, Liendo, Debbie Kueber, Robert Kueber, Kinga Kurzyna, Daniel Kurzyna, Walter E. Clayton, Jr., Richard Huber, Patrick Shanley, Diana Shanley, William Wenzel, Dorothy Wenzel, Michael J. Papa, Cheryl Yodice, Gloria Catalano, Triumph Gymnastics, Glendale Property Owners Association, Glendale Civic

Association of Queens, Juniper Park Civic Association, Liberty Park Homeowners Association, and Middle Village Property Owners/Residents Association (motion sequence number 001) is denied, and that petition/complaint is dismissed; and it is further

ORDERED that counsel for respondents/defendants to serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

[Handwritten Signature]
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2/7/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE