

Matter of Brinkmann Hardware Corp. v Town of Southold

2020 NY Slip Op 31868(U)

May 11, 2020

Supreme Court, Suffolk County

Docket Number: 02790/2019

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 02790-2019

**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: 08/08/2019
Motion Seq 001 MD; CASE DISP**

**In the Matter of the Application of
BRINKMANN HARDWARE CORP. and
MATTITUCK 12500 LLC**

**PETITIONERS' COUNSEL:
SAHN WARD COSCHIGNANO, LLP
333 Earle Ovington Blvd.
Uniondale, NY 11553**

Petitioners,

**RESPONDENTS' COUNSEL:
ARNOLD & PORTER
250 West 55th Street
New York, NY 10019-8710**

- against -

**THE TOWN OF SOUTHOLD, SOUTHOLD TOWN
BOARD, and SOUTHOLD PLANNING BOARD,**

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Respondents.

Upon reading the Verified Petition/Complaint dated May 22, 2019, the affidavit of Ben A. Brinkmann dated May 22, 2019 in support of the petition, and the Pre-Answer Cross-Motion to Dismiss the Petition/Complaint by the Respondent dated July 26, 2019, the Affirmation of James M. Catterson Esq. in Support of the Cross-Motion, the Memorandum of Law in Support of the Cross-Motion, and the Affidavit of Ben A. Brinkmann in Opposition to the Cross-Motion, it is hereby

ORDERED that motion to dismiss the Petition/Complaint, is DENIED; and it is further

ORDERED that counsel for the Petitioners shall serve a copy of this order with Notice of Entry upon counsel for Respondent; and it is further

ORDERED that counsel for the Respondent shall serve an answer to the Petition/Complaint within 20 days after a copy of this order with Notice of Entry is served upon them.

ORDERED that, if applicable, within 30 days of the entry of this Decision and Order, that respondents' counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR §8019(c) with a copy of this Decision and Order and pay any fees should any be required.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Town of Southold Local Law 1 of 2019 which was renewed as Local Law 2 of 2020 provides in pertinent part:

(2) Until six months from the effective date of this Local Law, after which this Local Law shall lapse and be without further force and effect and subject to any other Local Law adopted by the Town Board during the six month period, no agency board, board officer or employee of the Town of Southold including but not limited to, The Town Board, the Zoning Board of Appeals, the Trustees, the Planning Board, or the Building Inspector(s) issuing any building permit pursuant to any provision of the Southold Town Code, shall issue, cause to be issued any approval, special exception, variance, site plan, building permit, subdivision, or permit for any property situated along State Route 25, bounded on the West by intersection of State Route 25 and Bay Avenue and bounded on the East by the intersection of State Route 25 and Pike Street.

The stated purpose of the law is to give the Town time to do a traffic study and analysis that they feel is necessary due to the recent increase of traffic in that area. The law was renewed for six additional months as the Town is in the midst of working with the State Department of Transportation and apparently intends to address the traffic concerns by making some infrastructure improvements as well as possible zoning changes, both of which would take into consideration their recently completed Comprehensive Plan.

Within the boundaries described in the law sits a parcel of land upon which the Petitioners wishes to build, then own and operate a 20,000 square foot hardware store, or alternatively a 12,000 square foot hardware store and an 8,000 square foot paint store.

Before proceeding with the applications to the Town of Southold to build the store, the Petitioners met with leaders of the Mattituck Laurel Civic Association on July 27, 2017 to involve the community in the proposed development and to request a meeting with them and the residents so they could address any concerns they may have. The meeting was held in September 2017 and joining the meeting were 50 residents of the community, leaders of the civic association and Richard Orłowski who owns a small nearby hardware store which would be adversely affected. Matters such as traffic were discussed. According to a news report by Patch from September 2018¹ which was attached to the Petitioners' affidavit, there was significant community concern about traffic and the need for such a large hardware store in

¹ The Court notes that the name of the publisher of the article "Patch" and the date of the article were handwritten at the top of the article.

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that area. Notwithstanding that, Petitioners asserts that they are confident the proposed store would not cause problems.

Also discussed was the fate of the Orłowski Hardware Store. Recognizing that the much larger store would be detrimental to the smaller store, the Petitioners had previously offered Richard Orłowski \$350,000 to close the store and the position of manager of Petitioners' store. In mid 2017 it appeared that there was an informal agreement between Mr. Orłowski and the Petitioners. However, Mr. Orłowski then engaged a different law firm and in July 2018 demanded \$700,000 to close his store. That was ultimately negotiated down on August 2, 2018 to \$450,000.00.

The Petitioners filed an application for a building permit on January 20, 2018 with the Town of Southold Building Department which was disapproved on March 12, 2018 because the proposed project required site plan approval by the Town of Southold Planning Board.

Thereafter, on May 18, 2018 the Petitioners filed an application for site plan approval with the Town of Southold Planning Board. On June 22, 2018 the Petitioners was notified that the project required a Special Exception Permit and fees in the amount of \$15.00 (balance of the fee for the site plan application), and a \$1,000 application fee for a Special Exception Permit which was also required. The Town also advised the Petitioners that a Market and Municipal Impact Study (Market Study) was required and that they would advise the Petitioners of the fee.

On July 31, 2018, the Planning Board notified the Petitioners that the fee for the Market Study would be \$30,000.00

Although they received no response from Petitioners, the Planning Board on August 13, 2018 notified the engineering firm of Nelson Pope and Voorhis that they were selected to perform the Market Study but that they should not start until they were advised that the fee was received from the Petitioners.

The same Patch article from September 2018 reported that the Town Supervisor and Suffolk County Legislator Al Krupski were working together to have the Town and County jointly purchase the subject parcel for use as parkland. That proposal was approved by the Southold Town Board in September 2018.

The Petitioners finally submitted the required \$30,000 fee to the Town on January 11, 2019 for them to perform the Market Study as prescribed by the Town Code.

However, while the various applications were pending the Town Board enacted Local Law 1 of 2019, which effectively ground the application to a halt. The Planning Board notified the Petitioners on February 28, 2019 that the application would not be processed because of the moratorium. By letter dated April 3, 2019 the Petitioners demanded that the applications

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be processed to the point where a building permit could be issued. No response was received by the Petitioners from the Town.

On July 30, 2019 the Petitioners submitted the two outstanding payments of \$15.00 and \$1,000 to the Planning Board.

The Petitioners contends that the law was passed specifically to stop him from building the hardware store. This is based on a conversation he alleges he previously had with the Town Supervisor at a political fundraiser on August 17, 2018 wherein Mr. Brinkmann asked the Supervisor about the application to build the hardware store. Mr. Brinkmann asserts that the Supervisor became agitated and told him that he did not belong on Main Road or anywhere else on the North Fork. Mr. Brinkmann then asserts that the Supervisor "stormed off, muttering angrily and inaudibly".

The Local Law also contains a "safety valve" which provides that any person suffering any unnecessary hardship because of the law may apply to the Town Board for a variance to allow the issuance of a permit in accordance with the town code. However, the Petitioners argues that they cannot apply for the variance from the Town Board because the variance only applies to the issuance of the permit. There are other approvals and processing necessary before the application is ready for the Town Board to allow the issuance of the permit. The Petitioners alleges that the town departments responsible for processing the application are reluctant to do so. For example, the Southold Planning Board has not had the market study performed nor has it conducted a public hearing on the application, hence the application for an order compelling the Town to process the application.

The Petitioners are seeking to have Local Law 1 (2019) declared null and void in addition to the petition for the order compelling the town to process its application. This application by extension would apply to and Local Law 2 (2020) the successor to Local Law 1 (2019) extending the moratorium. The Respondent argues that over the course of the application process the Petitioners had not paid various application fees including the market study fee and has not promptly responded to some requests from the Town. The Petitioners asserts they have since paid all fees and the application should proceed at least to the point where he could then apply to the Town Board for the variance from the moratorium.

The Respondent has moved to dismiss the Petition in lieu of answer asserting that the Petitioners have failed to exhaust its administrative remedy by failing to first apply to the Town Board for a variance. The Petitioners believe that it would be an exercise in futility because their application is incomplete and thus would be rejected out of hand by the Town Board, and that the application is incomplete because the Town is not processing the application.

The Petitioners is seeking various forms of relief in this proceeding. First, he is seeking a declaratory judgment that the local law establishing the moratorium is null and void. They are claiming that the true purpose for which it was enacted was to prevent them from building the hardware store and not to do traffic studies in that area. Petitioners is also seeking Article

78 review of the local law claiming that it was not referred to the Suffolk County Planning Commission pursuant to General Municipal Law §239-m. They are also seeking injunctive relief to prevent the Town from enforcing the moratorium against them again claiming that its true purpose was to frustrate and delay their efforts to develop the subject property. Lastly, they are seeking an order pursuant to Article 78 compelling the Town and the Town Planning Board to process their applications to build the hardware store.

The Respondent has submitted a pre-answer motion to dismiss. The thrust of the respondent's motion is that the petition should be dismissed because the Petitioners have failed to exhaust their administrative remedy by failing to apply to the Town Board for a variance to allow the issuance of the necessary permits, and that they have failed to state a cause of action because their application is incomplete in that they had failed to pay the outstanding fees of \$15.00 and \$1,000. The Petitioners have asserted in their reply papers that that they have subsequently paid those fees on July 30, 2019. The motion to dismiss is silent as to the Petitioners' cause of action relating to the Town's compliance with General Municipal Law §239m.

STANDARD OF REVIEW

Initially, the Court notes that Article 78 proceedings and declaratory judgment actions may be brought in a combined proceeding (*Matter of NY State Superfund Coalition, Inc. v NY State Dept. of Env'tl. Conservation*, 18 NY3d 289 [2011])

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept. 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept. 1985]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (see *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Bregman v E. Ramapo Cent. Sch. Dist.*, 122 AD3d 656, 657 [2d Dept. 2014]). Where a cause of

action is sufficient to invoke the court's power to render a declaratory judgment as to the rights and legal relations of the parties to a justiciable controversy, a motion to dismiss should be denied (see *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD2d 449 [2d Dept. 2013]). Where no questions of fact are presented by the controversy, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action (see *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148 [2d Dept. 2011]).

Article 78 of the CPLR provides a uniform procedure for judicial review of government action or inaction, previously provided under the common-law writs of certiorari, mandamus and prohibition (see *Harvey v Hynes*, 174 Misc2d 174, 176 [Sup Ct, Kings County 1997]; *Matter of Newbrand v Yonkers*, 285 NY 164, 174-75 [1941]). "Although Article 78 supersedes those common-law writs, it does so in procedure only. A party's right to relief still depends upon the substantive law of the former writs" (Harvey, 174 Misc2d at 177). Petitioners, in bringing an Article 78 proceeding in the nature of a mandamus to compel, "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 757 [1991]).

CPLR 7804 (f) provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an "objection in point of law," which is akin to an affirmative defense. On a pre-answer motion to dismiss an article 78 petition, only the petition is to be considered and all of its allegations are deemed to be true (*Matter of East End Resources v Town of Southold Planning Bd.*, 81 AD3d 947, 917 NYS2d 315 [201 I]; *Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2005]). No additional facts in support of the motion may be considered (*Matter of 1300 Franklin Ave. Members v Board of Trustees of Inc. Vil. Of Garden City*, 62 AD3d 1004, [2d Dept [2009]). If the motion is denied, "the court shall permit the respondent to answer" (CPLR 7804 [f]).

When challenging the validity of an ordinance, it has been held for example that a person can challenge the constitutionality of an ordinance on its face where there is an immediate and genuine economic interest (*Janas v Town Bd. & Zoning Bd. of Appeals*, 51 AD2d 473 [4th Dept 1976]). However, one cannot attack the validity of an ordinance where he has not exhausted his administrative remedies. (*Old Farm Rd., Inc. v New Castle*, 26 NY2d 462 [1970]) It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (e.g *YMCA v Rochester Pure Waters Dist.*, 37 NY2d 371 [1975]).

Notwithstanding the foregoing, "[I]t need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power (cf. *Matter of First Nat. City Bank v City of New York*, 36 NY2d 87, 92-93; or when resort to an administrative remedy would be futile (*Usen v Sipprell*, 41 AD2d 251 [4th Dept 1973]) or when its pursuit would cause irreparable injury (*Pierne v Valentine*, 291 NY 333 [1943]) (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).

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At this juncture, the Court is denying the Respondents' motion to dismiss the declaratory judgment action. "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Staver Co. v Skrobisch*, 144 AD2d 449, 450 [2d Dept 1988]). There are a number of issues of fact pertaining to the enactment of the moratorium, as to whether the moratorium was actually enacted to prevent the Petitioners from proceeding with building a hardware store, and not the Town's stated purpose of addressing traffic issues and furthering its Comprehensive Plan. Essentially it is argued that the Town has enacted a Local Law while legitimate and valid on its face, was a mere ruse and actually enacted to prevent or delay the applicant from proceeding with their application to build a hardware store. To that extent the Petitioners have stated a cause of action.

Alternatively, the Petitioners is seeking injunctive relief to prevent the Town from enforcing the moratorium against them. The injunction may be a remedy if it is found that the Town Board enacted the law to prevent the Petitioners from developing the subject parcel and not for the stated purposes.

The Respondent argues that the Town Board provided for an administrative remedy allowing an aggrieved party to apply to the Town Board for a variance to allow the issuance of a permit. However, to apply to the Town Board, the Petitioners must first proceed through the Planning Board, which requires the Market Study then a hearing. In their letter dated February 28, 2019 the Planning Board advised the Petitioners that the moratorium temporarily halts the Planning Board from processing the application. Accordingly, an application to the Town Board may very well be futile since the Planning Board will not process the application while the moratorium is in effect. This is an exception to the requirement that Petitioners should have exhausted its administrative remedies. (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]) (*Town of Oyster Bay v Kirkland*, 81 AD3d 812 [2d Dept 2011]).

Likewise, the motion to dismiss is also denied as to the petition for an order to compel the town to process the Petitioners application since the Planning Board process must first be completed before they can apply to the Town Board for the variance. Mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought" (*Legal Aid Socy. of Sullivan County, Inc. v Scheinman*, 53 NY2d 12 [1981]). Provided that the Petitioners have filed the required papers and paid the required fees, which they allege they now have, there should be no reason why the Town and its Planning Board could not process the application at least to the point where a complete application could be made to the Town Board for a variance from the moratorium.

Finally, it is also noted that the Petitioners are seeking an order compelling the Town and the Town Planning Board to process their application, not an order compelling the Town Board to entertain or grant the variance.

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Accordingly, the Respondents shall serve and file an answer to the Petition/Complaint within 20 days after service of a copy of this order with Notice of Entry by the Petitioners upon the Respondents, and it if further

ORDERED that Respondent shall settle judgment on notice consistent with the above decision.

The forgoing shall constitute the decision and order of the Court.

Dated: May 11, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION**

 X **NON-FINAL DISPOSITION**