Dagro Assoc. LLC v City of Yonkers
2023 NY Slip Op 35037(U)
November 3, 2023
Supreme Court, Westchester County
Docket Number: Index No. 59406/2020
Judge: Nancy Quinn Koba
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------x
DAGRO ASSOCIATES LLC,

Plaintiff,

-against-

CITY OF YONKERS,

Defendant.
----------x

DECISION, ORDER & JUDGMENT

Index # 59406/2020

Mot. Seq. No. 2

QUINN KOBA, J.

The following papers were considered in determining the motion by defendant CITY OF YONKERS ("City") seeking an order under CPLR 3212 granting summary judgment and dismissing plaintiff's complaint, and granting such other and further relief as the court deems just and proper:

Papers	NYSCEF DOC. No.
Notice of motion, Affirmation in support, Statement of material facts, Memorandum of law, Exhibits 1-13	97-113
Affirmation in opposition, Exhibits 1-37, Milio affidavit in opposition, Exhibits A – E, Balog affidavit in opposition, Exhibits A – B, Miano affidavit, Smith affidavit in opposition, Memorandum of law, Response to statement of material facts	120-171
Reply affirmation, Response to counter statement of material facts	172, 174-175

NYSCEF file

Upon the foregoing papers, this motion is determined as follows:

FACTUAL AND PROCEDURAL BACKGROUND

This action involves a zoning change impacting the property at 30 Mile Square Road in Yonkers (the "Property"), a nearly two-acre parcel of land owned by plaintiff, a limited liability company formed by its members Antonio Milio ("A Milio") and Guiseppe Milio (collectively the "Milios"). When the Milios purchased the Property in 1994 for $250,000, the land was zoned for commercial use. In 2011, the Milios formed the plaintiff LLC and transferred their ownership interests in the Property to plaintiff for $10. In February 2013, plaintiff entered into a contract to sell the Property to MJM Travel Group ("MJM"), contingent upon MJM acquiring approval from the City to build a transportation service business on the site, a permissible use under the parcel's commercial zoning classification.

In March 2013, MJM submitted its site plan application to the City's Planning Board ("Planning Board"). Over the course of eight meetings from April through December 2013, the Planning Board reviewed MJM's site plan application, which was met with opposition from the community, including residents who lived near the Property. On December 11, 2013, the Planning Board voted down a resolution to approve MJM's site plan application without explaining the reasons for its denial. MJM then filed an Article 78 proceeding contending the Planning Board's denial of its site plan application was arbitrary and capricious.

In January 2014, while the Article 78 proceeding was pending, the City Council made a motion to rezone the Property for residential use, which passed in June 2014 before the Article 78 proceeding had been decided. In the October 3, 2014 Decision & Order issued in the Article 78 proceeding, the court noted that the Planning Board had not stated on the record why the application had been denied. Accordingly, the court remanded the matter to the Planning Board to act on MJM's site plan application and make specific factual findings in proper form (Article 78 Decision & Order [NYSCEF Doc. No. 105]. MJM decided not to pursue the project and terminated its contract with plaintiff.

On August 31, 2020, plaintiff commenced this action alleging the denial of MJM's site plan application and subsequent rezoning of the Property amounted to a taking under both the state and federal constitutions. In its verified complaint, plaintiff

asserted that under the new S-50 zoning classification, which allows for detached single-family residential dwellings on 50-foot lots, the Property was worth "no more than $300,000," and it would not see a reasonable return on its investment in the Property (Verified Complaint at ¶ 85 [NYSCEF Doc. No. 99). Plaintiff also alleged the City denied the site plan application and rezoned the Property in retaliation for its member's[1], specifically, A. Milio's testimony during a public corruption trial. In its complaint, plaintiff asserts the following causes of action: federal takings claim under 42 USC § 1983 based on substantive due process; state takings claim under New York Constitution Art. I, § 7; inverse condemnation claim under New York Eminent Domain Law; a federal takings claim under 42 USC § 1983 based on procedural due process; and 42 USC § 1983 claim based on first amendment retaliation (Verified Complaint [NYSCEF Doc. No. 99]).

Defendant maintains the plaintiff does not have standing to raise its claims because MJM, not plaintiff, filed the site plan application that was denied. Defendant also contends plaintiff's state and federal takings claims fail, as absent proof of substantial construction or expenditures on the Property, plaintiff cannot demonstrate that it had a vested interest in the commercial zoning classification; plaintiff cannot demonstrate that its right to the commercial zoning designation vested through equitable estoppel; and plaintiff cannot demonstrate a sufficient diminution in the value of the property to constitute a taking. With respect to plaintiff's procedural due process claim, defendant contends plaintiff has not exhausted its administrative remedies regarding the change in the zoning classification, such as by filing an Article 78 special proceeding or seeking a variance for commercial development on the property now zoned for residential development. With respect to the retaliation claim, defendant contends it is entitled to summary judgment because plaintiff's principals, rather than plaintiff, testified at the corruption trial; defendant also contends plaintiff cannot demonstrate a connection between that testimony and the City's rezoning of the Property.

In opposition, plaintiff argues the defendant waived its affirmative defense based on standing because it was not pleaded in its answer. Based on expenditures it made regarding the Property prior to its contract of sale with MJM -- such as money spent between 1994 and 1996 to conduct an environmental assessment, demolish a house damaged by fire, and unsuccessfully apply for a

[1]Apparently, A. Milio and Giuseppe Milio were the only members of plaintiff during the 2013-2014 time period. Franco Milio ("F. Milio") was the property manager (Milio Affidavit at ¶¶ 1, 6, 8-9 [NYSCEF Doc. No. 158]).

variance to operate a day care facility as well as architectural and engineering expenses from 2005 and 2006 for residential development plans -- Plaintiff contends it had a vested interest in the commercial zoning classification.

Alternatively, plaintiff argues its right to the commercial zoning classification vested through equitable estoppel because the City delayed the site plan application for the permissible commercial use while corralling public support to have the Property rezoned from commercial to residential. Plaintiff emphasizes that after eight months of consideration by the Planning Board, the site plan application was denied without explanation, and weeks later, the City began the process of rezoning the Property. Relying on correspondence and deposition testimony of some of the plan's most vocal opponents - Howard Huth Deposition [NSYCEF Doc. No. 122]; Judith Ramos Meier Deposition [NSYCEF Doc. No. 123]; Thomas Meier Deposition [NSYCEF Doc. No. 124]; Transcript Items [NYSCEF Doc. No. 129]; Huth Deposition Exhibit D [NYSCEF Doc. No. 142), plaintiff alleges City officials prevented plaintiff's interest in the commercial zoning classification from vesting by delaying the site plan application and colluding with the project's opponents to rezone the Property.

In support of its substantive due process claim, plaintiff contends the Planning Board's denial of the site plan application for a permissible use without explanation was arbitrary and capricious. In support of its procedural due process claim, plaintiff disputes defendant's contention that it was required to exhaust all administrative remedies before bringing this action. Plaintiff also alleges it was denied procedural due process because the City did not abide by the process of a zoning amendment, such as failing to provide proper notices for the amendment and failing to refer the matter to the Planning Board, which the City was required to do because MJM's pending site plan application would have been affected by such an amendment.

Plaintiff also contends that based on the zoning amendment it cannot make a reasonable return on its investment or find a buyer for the Property. In support of this claim, plaintiff submits the affidavit of Robert W. Balog ("Balog"), a real estate appraiser who affirms that in October 2018, the value of the property was $42,000, based on its S-50 zoning classification (Balog Affidavit at ¶ 17 [NYSCEF Doc. No. 164]). Plaintiff also submits the affidavit of its real estate broker, Dominick Miano ("Miano"), who attests that because the cost to build houses and supporting infrastructure on the Property is so high, the potential benefit is "so low" that "local developers do not have a[n] interest in purchasing the Property" (Miano Affidavit [NSYCEF Doc. No. 167 at

¶ 12]).

With respect to the retaliation claim, plaintiff contends there is an issue of fact whether the testimony of its member and his son at a 2012 federal corruption trial involving a former Yonkers City Councilperson and former Yonkers Republican Party chairman motivated City officials to deny MJM's site plan application and rezone plaintiff's Property to prevent commercial development.

In reply, defendant asserts plaintiff cannot rely on the expenses incurred by its members individually before plaintiff's existence to claim a vested interest in the commercial zoning classification; defendant also notes the Milios abandoned their efforts to construct a day care facility on the Property decades ago, and residential development, a use previously sought by the Milios, is a permitted use under current zoning. Defendant further maintains the plaintiff is not entitled to assert a claim of equitable estoppel because MJM submitted the site plan application, not plaintiff, and plaintiff cannot demonstrate the zoning amendment was due to egregious misconduct by the defendant involving corruption or bad faith. Defendant also emphasizes that contrary to plaintiff's claims, the proper standard for diminution in value of the property to constitute a taking is not a reasonable return on investment; rather, the proper measure is whether the zoning regulation prohibits all reasonable use of a property.

Lastly, defendant contends the plaintiff's retaliation claim is undermined by plaintiff's allegations that the City denied the site plan application and rezoned the Property out of pressure from outspoken community members who lived near the Property. Defendant further contends that given the length of time between A. Milio's and his son's testimony at the corruption trial and the zoning law change, plaintiff cannot demonstrate this was retaliatory conduct.

ANALYSIS

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). The court views the

evidence in the light most favorable to the non-movant (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

As an initial matter, by failing to assert plaintiff's lack of standing in its answer, defendant has waived this affirmative defense (*see Dougherty v City of Rye*, 63 NY2d 989, 991-92 [1984]). In any event, based on its allegations of financial losses due to the unsuccessful sale of the property to MJM, as well as its allegations of the diminution of value to the property due to the zoning change, plaintiff has sufficiently alleged an "injury in fact" to qualify for standing for its federal claims (*see Cunney v Board of Trustees of Village of Grand View*, 56 FSupp3d 470, 491 [SDNY 2014]). Based on its ownership of the property, plaintiff has a "legally cognizable interest that [has been] affected by the zoning determination" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY32d 406, 413 [1987]), thus it also has standing to bring its state takings claims.

Also, contrary to defendant's claims, plaintiff was not required to bring either an Article 78 proceeding or apply for a variance to assert its challenge to the rezoning of its Property (*see D&S Realty Dev., L.P. v Town of Huntington*, 295 AD2d 306, 307 [2d Dept 2002], citing *Town of Orangetown v Magee*, 88 NY2d 41 [1996]; *Paltrow v Town of Lewisboro*, 199 AD2d 372 [2d Dept 1993]; *Browne v Town of Hamptonburgh*, 76 AD2d 848 [2d Dept 1980]).

1. State and Federal Takings Claims

To prevail on its constitutional state and federal takings claims, plaintiff must first demonstrate that it had a vested right in the zoning classification for commercial development (*see e.g., Bower Assocs. v Town of Pleasant Valley*, 2 NY3d 617, 626-27 [2004]; *Town of Orangetown v Magee*, 88 NY2d 41, 47-48 [1996]; *C&B Realty #3, LLC v Van Loan*, 208 AD3d 778, 779-80 [2d Dept 2022]; *DLC Mgmt. Corp. v Town of Hyde Park*, 163 F3d 124, 130-31 [2d Cir. 1998]). Where a more restrictive zoning ordinance is enacted, a property owner acquires vested rights in the prior zoning classification when "the owner has undertaken substantial construction **and** made substantial expenditures prior to the effective date of the amendment" (*see Ellington Const. Corp. v Zoning Bd. of Appeals of Inc. Vill. of New Hempstead*, 77 NY2d 114, 122 [1990] [internal citations omitted] [emphasis added]; *see also Town of Orangetown v Magee*, 88 NY2d at 47-48; *Exeter Bldg. Corp. v Town of Newburgh*, 114 AD3d 774, 779 [2d Dept 2014], aff'd 26 NY3d 1129 [2016]; *RC Enterprises v Town of Patterson*, 42 AD3d 542, 544 [2d Dept 2007]; *DLC Mgmt. Corp. v Town of Hyde Park*, 163 F3d at 130). "In instances in which construction has been improperly delayed by town officials

in an attempt to prevent vesting, the existing zoning status may also vest by equitable estoppel" (*DLC Mgmt. Corp. v Town of Hyde Park*, 163 F3d at 130-31).

Plaintiff must also demonstrate a diminution in the value of the property significant enough to constitute a taking. The "property owner does not prove a taking solely by evidence that the value has been reduced by the regulation, even if it has been substantially reduced" (*de St. Aubin v Flacke*, 68 NY2d 66, 77 [1986], citing *McGowan v Cohalan*, 41 NY2d 434, 436 [1977] [79% diminution in value insufficient]; *Euclid v Ambler Realty*, 272 US 365 [75% diminution in value insufficient; *Hadacheck v Sebastian*, 239 US 395 [1926] [87% diminution in value insufficient]; *Matter of Grimpel Assoc. v Cohalan*, 41 NY2d 431 [dimunition in value not dispositive]). Nor does plaintiff demonstrate a taking by showing that it has allegedly been denied a reasonable return on its investment (*see Park Ave. Tower Assocs of City of New York*, 746 F2d 135, 139-40 [2d Cir 1984; *335-7 LLC v City of New York*, 524 FSupp3d 316, 333 [SDNY 2021]). "To be successful he must establish that the regulation attacked so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted" (*de St. Aubin v Flacke*, 68 NY2d at 77; *McGowan v Cohalan*, 41 NY2d at 436).

"The extent of monetary diminution necessary to support a conclusion that there was a taking requires a loss in value 'one step short of complete' (*Adrian v Town of Yorktown*, 83 AD3d 746, 747 [2d Dept 2011], citing *Noghrey v Town of Brookhaven*, 48 AD3d 529, 532 [2d Dept 2008]; *see also Lucas v South Carolina Coastal Counci*, 505 US 1003, 1019 n 8 [1992]). Put another way, "the economic value, or all but a bare residue of the economic value, of the parcel must have been destroyed by the regulations at issue" (*see de St. Aubin v Flacke*, 68 NY2d at 77; *Greenport Grp., LLC v Town Bd. of Town of Southold*, 167 AD3d 575, 578-79 [2d Dept 2018]; *Adrian v Town of Yorktown*, 83 AD3d at 767).

Here, defendant met its *prima facie* burden of showing entitlement to judgment as a matter of law regarding plaintiff's takings claims. Defendant demonstrated plaintiff did not have a vested interest in the zoning classification for commercial development. It is undisputed plaintiff did not perform any construction on the Property – an essential element to acquire vested rights in the zoning classification. Nor was there any evidence that plaintiff made substantial expenditures regarding the Property before the effective date of the zoning change (*see McGowan v Cohalan*, 41 NY2d at 438; *Greenport Grp., LLC v Town of Southold*, 167 AD3d at 578; *DLC Mgmt. Corp v Town of Hyde Park*, 163 F3d at 131; *RC Enterprises v Town of Patterson*, 42 AD3d at 544;

compare with Waterways Dev. Corp. v Town of Brookhaven Zoning Bd. Of Appeals, 126 AD3d 708, 711-12 [2d Dept 2015]). In its verified complaint, plaintiff maintains the Property has a value of no more than $300,000,[2] which is significantly more than the sum paid to transfer the Property to Plaintiff and more than the $250,000 paid by the Milios to purchase the Property in 1994. Thus, defendant demonstrated there was not a diminution in the value of the Property sufficient to constitute a taking under either the U.S. or New York State Constitutions (*see McGowan v Cohalan*, 41 NY2d at 436; *Greenport Grp., LLC v Town Bd. of Town of Southold*, 167 AD3d at 578-79).

Having demonstrated that plaintiff did not have a vested interest in the Property and that there was not a diminution in the value of the Property significant enough to constitute a taking, defendant met its *prima facie* entitlement to summary judgment on the state and federal takings claims pleaded in plaintiff's first, second, third, and fourth causes of action (*see Bower Assocs v Town of Pleasant Valley*, 2 NY3d at 626-27; *McGowan v Cohalan*, 41 NY2d at 436; *Greenport Grp., LLC v Town Bd. of Town of Southold*, 167 AD3d at 578-79; *Noghrey v Town of Brookhaven*, 92 AD3d at 853).

The burden then shifted to plaintiff to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557). Plaintiff failed to meet its burden regarding its takings causes of action. Although plaintiff may have raised a triable issue of fact as to whether it has vested rights in the commercial zoning regulation due to equitable estoppel, plaintiff failed to raise a triable issue of fact as to whether the loss in value of the Property allegedly attributable to the zoning change was 'one step short of complete' (*Adrian v Town of Yorktown*, 83 AD3d 746, 747 [2d Dept 2011]), an essential element of a takings claim.

In its complaint, plaintiff affirms the Property "is worth no more than $300,000" (Ex. 1 at ¶ 1 [NYSCEF Doc. No. 2]). In its opposition, plaintiff relies on the report of Balog, who was retained by the plaintiff in or around November 2018 to inspect the property and provide his opinion regarding the Property's fair and reasonable market value through October 15, 2018 in connection with certain tax certiorari proceedings plaintiff wished to commence to reduce its tax obligations (Balog Affidavit at ¶ 6 [NYSCEF Doc. No. 164]). According to that analysis, Balog

[2]Plaintiff does not provide an appraisal date for this valuation, but the complaint was verified on October 19, 2020.

concluded the estimated market value of the Property was $42,000 and that continues to be his opinion of the value of the Property in 2018 (*id.* at ¶ 17). Balog did not provide a market analysis of the Property value as of the date of his affidavit, sworn to approximately five years after his 2018 analysis, and did not provide any information regarding the valuation reached following any tax certiorari proceeding allegedly commenced by the plaintiff at that time. Thus, plaintiff failed to raise any question that there was a diminution in the value of the property due to the rezoning to constitute a taking (*see Greenport Grp., LLC v Town Bd. of Town of Southold*, 167 AD3d at 578-79; *Monroe Equities, LLC v State*, 145 AD3d 680, 683 [2d Dept 2016]; *Adrian v Town of Yorktown*, 83 AD3d at 747; *Noghrey v Town of Brookhaven*, 48 AD3d at 532-33). Moreover, as there is no dispute the parcel's current zoning classification allows for residential development, including planned cluster development, plaintiff cannot demonstrate that it is precluded from using the Property for another purpose for which it can be reasonably adapted (*see McGowan v Cohalan*, 41 NY2d at 437-48; *Greenport Grp., LLC v Town Bd. of Town of Southold*, 167 AD3d at 577).

Absent a showing of a diminution in value that is "one step short of complete" or that residential zoning classification "destroyed" the economic value of the parcel, plaintiff failed to raise a triable issue of fact precluding the defendant's entitlement to summary judgment on the state and federal takings claims pleaded in the first through fourth causes of action (*see de St. Aubin v Flacke*, 68 NY2d at 77; *Adrian v Town of Yorktown*, 83 AD3d at 747; *Noghrey v Town of Brookhaven*, 92 AD3d 851, 853 [2d Dept 2012]).

2. Plaintiff's Retaliation Claim

"When a private citizen alleges retaliation by a government actor for speech, he must show: '(1) he has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by his exercise of that right; and (3) defendants' actions effectively chilled the exercise of his First Amendment right (*Curley v. Village of Suffern*, 268 F.3d 65, 73 [2d Cir. 2001])'" (*Searle v Red Creek Central School District*, 2023 WL 3398137 at *2 [Not Reported in Fed. Rptr.]). Although a plaintiff must show that their First Amendment rights were actually chilled, "in limited contexts, other forms of harm have been accepted in place of this 'actual chilling' requirement" (*Zherka v Amicone*, 634 F.3d 642, 645 [2d Cir 2011]; *see also Gagliardi v Village of Pawling*, 18 F.3d 188 [2d Cir 1994][plaintiffs alleged retaliation of the municipality by failing to enforce local zoning laws]; *Schubert v City of Rye*, 775 F.Supp.2d 689 [SDNY 2011]). Plaintiff

must demonstrate a causal connection between the alleged retaliatory action and the protected speech, i.e. the "protected activity [is] closely followed in time by the adverse action [internal citation omitted]" (*Hampshire Recreation, LLC v The Village of Mamaroneck*, 664 Fed.Appx. 98, 100 [2d Cir 2016]).

Here, plaintiff failed to establish that it engaged in speech protected by the First Amendment. Rather, according to F. Milio from 2008 through 2012, he and his father cooperated with federal investigators and provided them information regarding corruption "of certain government officials in the City of Yonkers, including former Democratic Majority Leader of the City Council, Sandy Annabi ("Annabi"), and former head of the Yonkers Republican party, Zehy Jereis ("Jereis")" (Complaint at ¶ 36 [NYSCEF Doc. No. 158]). He contends they testified at the federal trial on behalf of the prosecution against Annabi and Jereis regarding Annabi taking bribes for favorable treatment in connection with certain real estate projects in the City (*id.*) and states a jury found Annabi and Jereis guilty on March 29, 2012. They were allegedly sentenced in or around November 2012 (*id.* at ¶¶ 37-38). F. Milio and his father apparently testified during that criminal trial in 2011 and 2012 pursuant to a plea deal arising out of conduct and activities they allegedly committed long before plaintiff was formed (Complaint at ¶¶ 116-118 [NYSCEF Doc. No. 158]). According to an article published by The New York Times on December 12, 2013, which facts therein were not refuted by plaintiff, F. Milio and his father testified at the federal trial pursuant to a cooperation agreement, dated January 31, 2012, which required their testimony in exchange for the plea agreement (Article titled "*New Issue of Corruption for Witness in Yonkers,* Welser, B., https://nytimes.com/2013/12/19 [Ex. 13 [NYSCEF Doc. No. 215] (CPLR 4532).

Moreover, plaintiff failed to establish the existence of genuine issues of material fact requiring a trial regarding the causal connection between the Milios' allegedly protected speech and the actions of the City in re-zoning the Property. A. Milio testified during the federal trial on some unspecified time in 2012. Since the verdict was issued on March 29, 2012, the testimony had to have been given before that date. The contract with MJM was entered into on February 20, 2013 and MJM filed its initial site plan application approximately thirty days later. The application was denied in December 2013. The passage of more than one year between the date of the allegedly protected speech and the filing of MJM's site plan application precludes an inference of causation between the allegedly protected speech and the City's alleged delay in deciding the site plan application and the

rezoning in 2014, which requires the dismissal of the fifth cause of action contained in the complaint.

All other arguments raised in the motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the Motion is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of the defendant dismissing the complaint.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 3, 2023

ENTER:

HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF

November 13 th 2023