

Cuffaro v Village of Bellport
2024 NY Slip Op 35282(U)
March 6, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 611504/2022
Judge: Maureen T. Liccione
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Short Form Order

Index No. 611504/2022

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY**P R E S E N T:****Hon. Maureen T. Liccione**

Justice Supreme Court

-----x
FRANCESCO CUFFARO and ASHLEY
CUFFARO,

Plaintiffs,

-against-

VILLAGE OF BELLPORT; RAY FELL, in his
capacity as the Mayor of the Village of Bellport;
ZONING BOARD OF APPEALS OF THE
VILLAGE OF BELLPORT; JIM WOOD, JAMES
JANKOWSKI, MICHAEL COHEN and JUDY
HARVEY in their capacity as members of the Village
of Bellport Zoning Board of Appeals; and MARY
LOU BONO in her capacity as Building Inspector of
the Village of Bellport,Defendants.
-----xMot. Seq. No. 001 – MG/CaseDisp
Orig. Return Date: 01/18/2023
Mot. Submit Date: 01/03/2024**PLAINTIFFS' ATTORNEY**ACKERMAN PACHMAN
BROWN GOLDSTEIN &
MARGOLIN34 Pantigo Road
East Hampton, NY 11937**DEFENDANTS' ATTORNEY**

DEIRDRE MARIE CICCARI, PC

108 Terryville Road, Suite 6
Port Jefferson Station, NY 11776

Upon the reading and consideration of NYSCEF Doc Nos. 1 through 49, it is hereby:

ORDERED, that Defendants' motion to dismiss (motion seq. 001) is granted and the
complaint is dismissed.This is an action for money damages brought pursuant to 42 USC § 1983 et seq. by
plaintiffs Francesco and Ashley Cuffaro (Plaintiffs) against the Village of Bellport (Village), the
Village Mayor, Ray Fell, in his official capacity, the Village Zoning Board of Appeals (ZBA), the
individual members of the ZBA in their official capacities and the Village Building Inspector,
Mary Lou Bono, in her official capacity (Building Inspector) (collectively the Village or
Defendants).

The verified complaint (Complaint) seeks damages of five million dollars together with attorney's fees pursuant to 42 USC § 1988. It alleges that the Building Inspector's denial of Plaintiffs' application for a building permit to construct a single-family structure on a tax lot owned by them (Lot 7.2) and the ZBA's subsequent denial of their appeal of the Building Inspector's determination (ZBA Determination) were in violation of their procedural and substantive due process rights under the fifth and fourteenth amendments and their right to equal protection under the law as guaranteed by the fourteenth amendment.

The Village has made a pre-answer motion to dismiss under CPLR 3211 (a) (1) and (a) (7) asserting absolute defenses based upon documentary evidence and that the Complaint fails to state a cause of action. Plaintiffs have opposed the motion asserting that the records provided by the Defendants in support of the motion do not qualify as documentary evidence and that they have sufficiently stated causes of action.

Background

Plaintiffs' Lot 7.2¹ is a tax lot comprised of 31,593 square feet of vacant land, which is below the minimum 40,000 square feet required under the current Village zoning code for a buildable zoning lot. At the time of the deed conveyance the minimum buildable lot size was 30,000 square feet. The Complaint acknowledges that Lot 7.2 was created in 1978 by conveyance of a deed and without the requisite subdivision approval by the Village Planning Board. Until 1978 Lot 7.2 was part of a larger tax lot designated 7.0. In 1978 the then owner split off Lot 7.2 and retained the larger portion, Lot 7.1, upon which a single-family home and accessory structures already were located.

The Complaint alleges that the Building Inspector's reason for denying Plaintiffs' application for a building permit was because Lot 7.2 consisted of less than 40,000 square feet. The Plaintiffs appealed the Building Inspector's denial and a public hearing was held. The ZBA denied Plaintiffs' appeal after the hearing and in a written determination filed with the Village Clerk on October 5, 2021.

The ZBA Determination was challenged by Plaintiffs in a hybrid Article 78 proceeding/declaratory judgment action (*Matter of Cuffaro v Zoning Bd. of Appeals of the Village*

¹ A tax lot is not synonymous with a buildable lot under zoning regulations (see e.g. *Brown v Home Sales, Inc.*, 211 AD3d 675 [2d Dept 2023]; *Matter of Committee for Environmentally Sound Dev. v Amsterdam Ave. Redevelopment Assoc. LLC*, 194 AD3d 1 [1st Dept 2021]).

of Bellport, Suffolk County Index No. 620453/2021) (Hybrid). The Hybrid proceeding/action was finally determined in a decision and order dated May 16, 2023 (St. George, AJSC), which vacated the ZBA Determination and remanded the matter to the ZBA for a rehearing.² Thereafter, the instant action was transferred to this Part.

The Complaint alleges that since the 1978 deed conveyance, Lot 7.1 has “been granted multiple building permits to construct accessory structures and expand the house located thereon, and thereafter, certificates of occupancy or the equivalent for the constructed improvements” (Complaint ¶ 15, NYSCEF Doc No. 2). It further alleges that the issuance of building permits for Lot 7.1 ratified the subdivision by deed and requires the Village to consider Lot 7.2 as a buildable lot for purposes of zoning and estops it from denying a building permit for Lot 7.2. Plaintiffs further allege that in addition to the permits granted to Lot 7.1, the ZBA, over the years, has deemed additional tax lots buildable despite that there had been no Planning Board approval of their division from other tax lots.

These allegations give rise to Plaintiffs’ due process and equal protection claims. In response, Defendants have submitted Village documents which they claim establish that the circumstances surrounding the “subdivisions by deed” without Planning Board approval of other tax lots were dissimilar and that, as a consequence, Plaintiffs’ equal protection claim must be dismissed. Defendants further allege that Plaintiffs have failed to state a claim for due process and equal protection violations.

Motion to Dismiss Standards

When considering a motion to dismiss, a court is to afford liberal construction to a pleading (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87–88). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). Further, “allegations consisting of bare legal conclusions ... are not entitled to any such consideration” (*Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 810 [2d Dept 2023],

² Since this was a final determination of a hybrid Article 78 proceeding and action, the decision and order actually were a judgment and order.

quoting *Simkin v Blank*, 19 NY3d 46, 52 [2012]; see *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 109 [3d Dept 2023]).

On a motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7) “supported by evidence extrinsic to the petition/complaint, the inquiry becomes whether the [plaintiff] indeed has a cause of action, not simply whether he or she has stated one in the [complaint] ... and the [plaintiff] no longer can rely only on the unsupported factual allegations of the pleading, but must submit evidence demonstrating the existence of a cause of action” (*Matter of LaBarbera v Town Woodstock*, 29 AD3d 1054, 1055 [3d Dept 2006]), *lv to app dismissed* 7 NY3d 844 [2006] [internal citations omitted]). Furthermore, “factual claims either inherently incredible or flatly contradicted by documentary evidence” are not entitled to any presumption of truth (*Matter of Silverman v Town of Ramapo*, 222 AD3d 652, 653 [2d Dept 2023]).

On a motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7) “[c]ourts may consider extrinsic evidence outside of the pleading's four corners to help determine whether the pleading party has a cause of action, as distinguished from whether the pleading simply states a cause of action” (*Silverman*, 222 AD3d at 653 [internal quotations omitted]). In addition, on a motion to dismiss a court may consider documents which are referenced in the complaint. “In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor [sic] or incorporated by reference ... and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference” (*Dragonetti Bros. Landscaping Nursery & Florist, Inc. v Verizon New York, Inc.*, 71 Misc 3d 1214(A) [Sup Ct, New York County 2021], *aff'd* 208 AD3d 1125 [1st Dept 2022]).

A motion to dismiss pursuant to CPLR 3211 (a) (1) founded upon documentary evidence must present documents, which are “unambiguous and of undisputed authenticity” (*Fontanetta v Doe I*, 73 AD3d 78, 86 [2d Dept 2010]). Here, the Complaint alleges that certain properties comparable to Plaintiffs’ had received building permits. Subsequent to the filing of the Complaint, Plaintiffs received Village documents via their Freedom of Information Law (FOIL) requests. Defendants have attached these same FOILed Village documents as exhibits to their motion to dismiss in support of their contention that the properties relied upon by Plaintiffs bore no similarities sufficient to allege an equal protection claim. These FOIL documents include Village municipal board meeting minutes, including those of the ZBA, pre-1978 Planning Board

regulations, prior versions of the Village Code, amendment comparison tables published in the Village Code and certificates of occupancy and compliance.

Plaintiffs object to the consideration of these Village documents asserting that they do not constitute “documentary evidence” as required by CPLR 3211 (a) (1), but make no such argument with respect to the requirements of CPLR 3211 (a) (7). Furthermore, Plaintiffs have submitted Village documents as exhibits to their opposition papers while at the same time objecting to Defendant’s submission of similar documents (*see, e.g.* Plaintiff’s Exhibit 5, building permit denial, NYSCEF Doc No. 30; Plaintiff’s Exhibit 6, ZBA hearing transcript, NYSCEF Doc No. 31; Plaintiff’s Exhibit 7, letter from Village building inspector dated October 17, 1988, NYSCEF Doc No. 32; Plaintiff’s Exhibit 10, October 11, 1977 ZBA minutes, NYSCEF Doc No. 35). Accordingly, the objection to the consideration of the same sort of Village documents by Defendants is not sustainable.

These FOIEd Village documents suffice for purposes of CPLR 3211 (a) (1) and (7) (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47 [1st Dept 2015] [emails ruled sufficient as documentary evidence on CPLR 3211 (a) (1) motion to dismiss]; *Hiu Ian Cheng v Salguero*, 164 AD3d 768 [2d Dept 2018] [contract ruled sufficient documentary evidence for purposes of CPLR 3211 (a) (1) motion to dismiss]; *Kastin v GEICO Gen. Ins. Co.*, 190 AD3d 710 [2d Dept 2021] [letter ruled sufficient documentation to dismiss complaint under CPLR 3211 (a) (7)]).

Finally, the Court may take notice of the FOIEd Village documents. Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19 [2d Dept 2009]). Here, the affirmations of the Village attorney sufficiently authenticated the FOIEd Village documents (*see e.g., Calhoun v Midrox Ins Co.*, 165 AD3d 1450 [3d Dept 2018] [affidavit of insurance company’s president who reviewed company files established that insurance policy was sufficient documentary evidence to dismiss complaint pursuant to CPLR 3211 (a) (1)]).

Accordingly, the Village documents attached as exhibits to Defendants’ motion are considered.

Procedural Due Process

“In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of ‘an opportunity ... granted at a meaningful time and in a meaningful manner’ for [a] hearing appropriate to the nature of the case” (*Brady v Town of Colchester*, 863 F2d 205, 211 [1988] [quoting *Boddie v Connecticut*, 401 US 371, 378 [1971]]). The recourse afforded to a plaintiff by way of an Article 78 proceeding “as a matter of law, precludes finding that the defendants’ conduct violated plaintiffs’ rights to procedural due process under the fourteenth amendment” (*Brady*, 863 F2d at 211; *Riverhead Park Corp. v Cardinale*, 2013 WL 1335600 [EDNY, Mar. 28, 2013, No. 07-CV-4133 (ADS)(ARL)]; *G.I. Home Developing Corp. v Weis*, 2011 WL 4434223, at *7 [EDNY, Sept. 22, 2011, No. 07-CV-4115 (DRH)(ARL)], *aff’d* 499 Fed Appx 87 [2d Cir 2012], quoting *Parratt v Taylor* 451 US 527, 543-44 [1981] [“deprivations of property attributable to *unauthorized* conduct of state officials do not violate the Due Process Clause if state law provides an adequate post-deprivation remedy”] [emphasis in original]³; see *Dean v Town of Hempstead*, 527 F Supp 3d 347, 429 [EDNY 2021]).

Here, since Plaintiffs availed themselves of the Hybrid proceeding, the procedural due process claim does not state a cause of action and is dismissed.

Substantive Due Process

Courts will also uphold substantive due process challenges when plaintiffs can “prove that they were denied a permit and use of their property not because of a good faith mistake on the part of the [government entity] about the applicable law, but because of indefensible reasons such as impermissible political animus” (*Brady*, 863 F2d at 216). A determination in an Article 78 proceeding that the denial of an application for subdivision approval was arbitrary, capricious and without rational basis does not establish that plaintiff was denied a constitutionally protected property interest necessary to support a substantive due process claim in an action under § 1983 (*Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617 [2004]). Substantive due process “does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit.... [Substantive due process] standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority”

³ *Parratt* was overruled by the Supreme Court on other grounds in *Daniels v Williams* (474 US 327, 330-31 [1986]).

(*Harlen Assocs. v Inc. Village of Mineola*, 273 F3d 494, 503 [2d Cir 2001] [internal quotations omitted]). “In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience” (*Charles v Orange Cnty.*, 925 F3d 73, 85 [2d Cir 2019] [internal quotations omitted]).

Here, counsel for Plaintiffs and the Village attorney had a good faith difference of opinion as to the applicable law. For example, counsel for Plaintiffs argued that *Matter of Lund v Edwards* (118 AD2d 574 [2d Dept 1986]) was squarely on point because it involved a “subdivision by deed” of a vacant tax lot into two substandard sized vacant tax lots wherein one of the two substandard lots had been granted a building permit for a house, estopping the municipality from denying a building permit for construction of a house the second substandard vacant tax lot. Counsel for the Village believed the lots in *Lund* were distinguishable from Lots 7.1 and 7.2 herein because both *Lund* lots were vacant land. His position was that the instant subdivision by deed was distinguishable since Lot 7.1 had vested rights because it already was developed with a single-family home at the time of the 1978 deed conveyance creating lot 7.2. The Village’s counsel also believed that the permits granted to Lot 7.1 subsequent to 1978 were for minor improvements to a property which already had a vested right to residential improvements. The court in the Hybrid proceeding/action agreed with the Cuffaro’s and rejected the Village’s arguments.

A determination in an Article 78 proceeding agreeing with plaintiff’s view of the law and finding that the denial of an application for a permit was arbitrary and capricious and without rational basis does not establish a substantive due process violation (*see Bower Assoc.*, 2 NY3d at 629-30). There is no allegation in the Complaint that the Village’s actions were outrageous or the result of political animus. Accordingly, the substantive due process cause of action is dismissed for failure to state a claim.

Equal Protection

To state a claim for equal protection, a plaintiff can proceed on both a selective enforcement and a class-of-one theory (*Jordan v New York City Bd. of Elections*, 816 F Appx 559, 603–04 [2d Cir 2020]). Where a plaintiff is treated unequally compared with others similarly situated, and when such treatment is based on “impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person,” the facts give rise to a claim of selective enforcement (*LaTrieste Rest. & Cabaret Inc. v*

Village of Port Chester, 40 F3d 587, 590 [2d Cir 1994] [quoting *LeClair v Saunders*, 627 F2d 606, 608 [2d Cir 1980]]. Similarly, equal protection claims based on a so-called “class of one” theory involve claims “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment” (*Village of Willowbrook v Olech*, 528 US 562, 564 [2000] [per curiam] [internal citations omitted]). A plaintiff asserting a selective enforcement or class-of-one claim must present evidence of similarly situated comparators (*Church of Am. Knights of the Ku Klux Klan v Kerik*, 356 F3d 197, 210 [2d Cir 2004]). “Where a plaintiff challenges a zoning decision, that standard requires her to identify comparators who are similarly situated to her with regard to the zoning board's principal reasons for denying the application” (*Pappas v Town of Enfield*, 602 F Appx 35, 36 [2d Cir 2015] [quoting *Fortress Bible Church v Feiner*, 694 F3d 208, 223–24 [2d Cir 2012])). “To proceed under a class-of-one theory, [p]laintiffs ... must plausibly allege that there is no rational basis for the difference in treatment as well as an extremely high degree of similarity between themselves and the persons to whom they compare themselves (*Lilakos v New York City*, 808 F Appx 4, 8 [2d Cir 2020] [“Although [the plaintiffs] include dozens of allegations about the existence of other illegal hostels, [they] fail to explain how those residences are like theirs [t]hey share only one thing in common — the same alleged violation of law. That is insufficient to state an equal protection claim”])). It is not sufficient for the petitioner to demonstrate only that it was treated differently than similarly situated landowners. Instead, there must be proof that the applicant was singled out with an “evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances” (*Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 66, 693 [1979])).

Here, the documentary evidence establishes that two of the subdivisions relied on by Plaintiffs actually had Planning Board approval and were not, as Plaintiffs allege, tax lots subdivided by deed which were granted building permits. The three other subdivisions by deed were created prior to the Village code provisions requiring that subdivisions creating two lots obtain Planning Board approval. Moreover, the Complaint is devoid of any allegation that Plaintiffs were denied a building permit due to “impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person” (*LaTrieste Rest. & Cabaret Inc.*, 40 F3d at 590). Accordingly, the equal protection cause of action is dismissed for failure to state a claim.

Cuffaro v Village of Bellport

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The foregoing constitutes the decision and Order of the Court.

DATE: March 6, 2024
Riverhead, NY

ENTER


HON. MAUREEN T. LICCIONE, J.S.C.

X FINAL DISPOSITION

___ NON-FINAL DISPOSITION