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STATE OF NEW YORK
COUNTY OF OTSEGO SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

COOPERSTOWN HOLSTEIN CORPORATION,
Plaintiff,

v.

TOWN OF MIDDLEFIELD,
Defendant.

DECISION AND ORDER

Index No. 2011-0930

This matter comes on before the Court upon Plaintiff's Notice of Motion to Renew and Affirmation of Yvonne E. Hennessey in Support of Motion to Renew pursuant to Civil Practice Law and Rules §2221(e), dated March 29, 2012, seeking grant of summary judgment and a declaration of this court that Defendant Town of Middlefield's Zoning Law pertaining to Gas, Oil, or Solution Drilling or Mining and the ban on Gas, Oil or Solution Drilling or Mining within the Town of Middlefield is void as being preempted by New York State Environmental Conservation Law §23-0303. Defendant, Town of Middlefield, responded by an Attorney Affirmation in Opposition to Plaintiff's Motion to Renew dated May 4, 2012. *Amici* Town of Ulysses, by letter dated May 4, 2012, opposed the plaintiff's motion to renew. *Amici* EARTHJUSTICE did not submit responsive pleadings.

On June 1, 2012, in Madison County Supreme Court counsel for plaintiff and defendant appeared and were heard.

The following reflects the Decision and Order of this Court:

Brief History

The history of this matter is set forth in this court's Decision and Order of February 24, 2012, and is incorporated by reference herein.

Legal Analysis

Plaintiff seeks relief pursuant to Civil Practice Law and Rules §2221(e) asserting that "newly discovered facts not offered in support of [Cooperstown Holstein Corporation's] prior motion for summary judgment as well as [Cooperstown Holstein Corporation's] reasonable justification for not previously presenting them" satisfies the statutory burden imposed upon plaintiff under the present circumstances and that this court should therefore change its prior determination and grant the relief as requested by plaintiff. (Plaintiff's Affirmation dated March 29, 2012, at ¶4,

thereof). Defendant Middlefield asserts that such facts are not "new" and that plaintiff has not presented a "reasonable justification" for having failed to present such facts in the first instance, thereby opposing the relief sought.[1]

Civil Practice Law and Rules §2221(e), as it pertains to a motion to renew, requires that such motion be identified as such, as is the case here, and, as is relevant here,:

> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination...; and
>
> 3. shall contain a reasonable justification for the failure to present such facts on the prior motion.

Therefore, the movant must demonstrate that the proffered facts are "new" and that a reasonable justification exists for having failed to include such new facts in the prior motion. If the movant fails to satisfy one or both elements of this provision the motion to renew must fail.

Here, plaintiff has asserted that the "newly discovered facts" are found in Executive Chamber Memorandum, dated July 9, 1981 (Plaintiff's Exhibit E); Assembly Bill 6928, dated March 23, 1981 (Plaintiff's Exhibit F), and, primarily, the accompanying 1981 Memorandum supporting A6928 (Plaintiff's Exhibit G) and that previous efforts made to discover this information were unavailing. Defendant takes the position that plaintiff has not demonstrated a reasonable justification for omitting the above-referenced information from the original pleadings and that, in any event, no new facts may be gleaned from these additional records as submitted such that this court should change its prior determination.

Addressing the second element of the inquiry first as contained in CPLR §2221(e), plaintiff has failed to demonstrate a reasonable justification for not having originally submitted these purportedly new facts. While this court does not minimize the efforts made by plaintiff to locate this material within a relatively brief period of time after the issuance of the February 24, 2012, Decision and Order, it is clear from a review of the papers that plaintiff was initially aware of the existence of additional materials with respect to the 1981 legislation and voluntarily chose to discontinue efforts at that time to locate such in preparation for the filing of the original pleadings. In particular, plaintiff sets forth in the Hennessey Affirmation of March 29, 2012, that initial review of the Bill Jacket did not contain the "detailed memo explaining the Legislation" as referenced in the Department of Environmental Conservation Legislative Memorandum of July 6, 1981. (See ¶11, thereof). Though plaintiff then contacted current counsel for the Department of Environmental Conservation, Division of Mineral Resources, in an effort to locate this memorandum such proved fruitless. Despite the knowledge that such a document had existed at the time of the enactment of the 1981 legislation, and though having been unable to locate a copy of same, counsel for plaintiff concluded her efforts and proceeded to submit the original moving papers without this documentary legislative support. (See Hennessey Affirmation, ¶15, thereof).

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[1] *Amici* Town of Ulysses, by letter dated May 4, 2012, simply asserts it's opposition to plaintiff's motion.

Such choice as made by plaintiff's counsel was not, in this court's assessment, reasonable given the relevant circumstances present. (See Tibbits v. Verizon New York, Inc., 40 AD3d 1300, 3rd Dpt. 2007; Serbalik v. General Motors Corp., 252 AD2d 801, 3rd Dpt. 1998).

With respect to the first element of §2221(e), and assuming *arguendo* that plaintiff's present justification were reasonable, the submissions on behalf of plaintiff do not demonstrate new facts, upon a plain reading thereof, which would cause this court to change it's prior determination pertaining to the extent and implication of the supersession clause as contained within the 1981 legislation.

Plaintiff takes the position that the following passage contained in the 1981 Memorandum supporting A6928 (Plaintiff's Exhibit G) conclusively demonstrates the state's intention to displace or preempt entirely local municipal authority with respect to the regulation of the oil, gas and solution mining industry:

> The provision for supersedure by the Oil, Gas and Solution Mining Law of local laws and ordinances clarifies the legislative intent behind the enactment of the oil and gas law in 1963. The comprehensive scheme envisioned by this law and the technical expertise required to administer and enforce it, necessitates that this authority be reserved to the State. Local government's diverse attempts to regulate oil, gas and solution mining activities serve to hamper those who seek to develop these resources and threaten the efficient development of there resources, with statewide repercussions. With adequate staffing and funding, the State's oil, gas and solution mining regulatory program will be able to address the concerns of local governments and assure the efficient and safe development fo these energy resources. (1981 Memorandum; Emphasis added).

A reading of this provision clearly references the 1963 predecessor provisions which, themselves, specifically addressed the "how" of oil, gas and solution mining or drilling, rather than "where" such activity may occur. The memorandum, by its very terms, pertains to the matter of program funding and serves to confirm the state's interest in bringing to bear the "technical expertise" necessarily required by state oversight, rather than disparate local control, to effectuate effective state-wide uniformity with respect to the manner and method by which such drilling would occur. Supersession, as referenced within the memorandum, did not serve nor was intended to preempt local land use regulation with respect to this industry. To conclude from a reading of this passage that the legislative intent was to disenfranchise local authorities from implementing local land use regulation would seem a leap of constructive interpretation which this court cannot embrace.

Conclusion

Upon a review of the submissions of plaintiff such do not serve to support a basis upon which this court may change it's prior determination that local municipalities are vested with the authority to either permit or prohibit oil, gas and solution mining or drilling, within their geographical jurisdiction.

Therefore, upon the facts and circumstances of this matter, and upon the relevant statutory and decisional law of this state, plaintiff's motion to renew is **denied.**

Enter.

DATED: June 19, 2012
Wampsville, New York

Hon. Donald F. Cerio, Jr.
Acting Supreme Court Justice

TO: Yvonne E. Hennessey, Esq., Attorney for Plaintiff
Michael Wright, Esq., Attorney for Plaintiff
Cheryl A. Roberts, Esq., Attorney for Defendant
Deborah Goldberg, Esq., Attorney for *Amici* EARTHJUSTICE
John Henry, Esq., Attorney for *Amici* Town of Ulysses
Christy Bass, Chief Court Clerk Otsego County Supreme Court