To commence the 30 day 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 PUTNAM

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GEORGE HERTZEL, VALLEY CORNERS REALTY, INC. and KAPPEL'S GARAGE, INC. d/b/a GEORGE'S SUPER SERVICE,

Plaintiffs,

-against -

TOWN OF PUTNAM VALLEY,

Defendant.

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DECISION & ORDER

Index No. 2533-2009

Sequence No. 1

LUBELL, J.

The following papers were considered in connection with this motion by defendant for an Order pursuant to CPLR §3212 granting the defendant summary judgment and dismissing plaintiffs' complaint:

PAPERS	**NUMBERED**
Motion	1
Affidavits/Exhibits A-C	2A
Exhibits D-K	2B
Affidavits in Support/Exhibits	3
Affirmation in Opposition/Affidavit/Exhibit 1	4
Affidavit in Opposition/Exhibit 1	5
Affidavit in Further Support/Exhibit A	6
Plaintiffs' Memorandum of Law in Opposition	7
Reply Affidavit in Support	8
Reply Memorandum of Law	9

Upon the August 27, 2009 filing of the summons and verified complaint with the Putnam County Clerk, plaintiffs George Hertzel, Valley Corners Realty, Inc. and Kappel's Garage, Inc., d/b/a George's Super Service, commenced this action against the Town of Putnam Valley (the "Town") for, among other relief, monetary damages in connection with the commercial property situated at 2 Peekskill Hollow Road, Putnam Valley, New York (the "Premises").

Plaintiff Valley Corners Realty, Inc. ("Valley Corners") sues as the owner in fee of the Premises; Kappel's Garage, Inc., d/b/a George's Super Service ("Kappel's Garage"), as the lessee of the Premises and operator of a vehicle maintenance and service center thereat; and, George Hertzel ("Hertzel") as the owner of both corporations and as the operator of Kappel's Garage. The Premises is improved by, among other things, a commercial building with workstation bays and a retaining wall (the "Retaining Wall") bordering the Peekskill Hollow Brook (the "Brook").

In April of 2007, a severe storm with attendant flooding caused substantial damage to the Retaining Wall which also serves as a sea wall for the contiguous Brook. Following the flooding and in the presence of Hertzel, the Premises was inspected by The Town's Consulting Engineer, Todd Atkinson, and the Town Code Enforcement Officer, Irv Sevelovitz. Engineer Atkinson found that the rear portion of the building's foundation had been damaged and that 25% of the rear slab had been undermined. Correspondingly, he advised Code Enforcement Officer Sevelovitz to direct the owner to obtain a structural assessment and to present plans as to how repairs were going to be made. By letter dated April 17, 2008, Code Enforcement Officer Sevelovitz advised Hertzel that "the rear corner of the building and the retaining wall [were] in danger of collapse."

By memorandum dated April 10, 2008, Code Enforcement Officer Sevelovitz advised the Town Supervisor and Town Board that the building and retaining wall were unsafe and dangerous. This position was consistent with his earlier advise to Hertzel and of the need for its repair.

In April 2008, Engineer Atkinson re-inspected the Premises at the request of Code Enforcement Officer Sevelovitz. Upon re-inspection, Engineer Atkinson was not satisfied that sufficient effort had been made to repair or remediate the structural deficiencies of the Retaining Wall aside from what was viewed as temporary measures that had been put in place in April 2007. Engineer Atkinson concluded that the Retaining Wall leaned further, the concrete floor had been further undermined, the cavity under the concrete floor had increased, the concrete floor, wall and roof supports had rocked and twisted and a large crack in the floor had developed.

Upon these observations, Engineer Atkinson concluded that the damage was beyond repair and in imminent danger of collapse. He advised the Town Supervisor, Robert Tendy, of his findings and conclusion by letter dated April 13, 2008. More specifically, he

stated that the rear building's concrete slab was "now approximately 50% undermined, the roof beams have twisted and come off their base plates on the columns, the block walls now exhibit severe movement cracks in multiple locations and the crack in the rear slab has grown". Furthermore,

> [t]he rear portion of the Hertzel building is severely undermined and showing multiple signs of future failure. With its proximity to the Peekskill Hollow Brook, and the bridge on Oscawana Lake Road, I am fearful that during a future flooding event on the Peekskill Hollow Brook, a failure of the building could lead to a catastrophic event in which the Peekskill Hollow Brook (Peekskill Watershed Supply) could be contaminated with painting and repair materials and or the bridge on Oscawana Lake Road along with the sewer line constructed under the bridge could be damaged by debris swept down stream from the failed building structure.
>
> Our office highly recommends the removal of the rear portion of the garage in a timely manner followed by an engineered plan to stabilize the banks of the Peekskill Hollow Brook in the [proximity] of the front portion of the garage.

The Town Board of Putnam Valley (the "Town Board") held a meeting on May 21, 2008 to consider passing an unsafe building resolution pursuant to Section 66-11 of the Town of Putnam Valley Code, whereupon the following resolution issued:

> WHEREAS, Chapter 66-1 1 of the Putnam Valley Town Code (the "Code") empowers the Putnam Valley Town Board (the "Town Board") to order the repair or demolition and removal of a building found by it to be unsafe and dangerous; and
>
> WHEREAS, Section 66.1 1 of the Code empowers the Town Board, by Resolution, to authorize the Code Enforcement Office to immediately cause the repair, securing or demolition of an unsafe building where it reasonably appears that such building presents

a clear and imminent danger to life, safety or the health of any person or property; and

WHEREAS, the Town Board is in receipt of written reports from Code Enforcement Officer, Irv Sevelowitz and Town Engineer, Todd Atkinson P.E., dated April 10, 2008 and April 13, 2008, respectively, advising the Town Board that the retaining wall and rear portion of the building at 2 Peekskill Hollow Road has been severely undermined and are in danger of collapse; and

WHEREAS, the subject building contains an auto body and paint shop and is directly adjacent to the Peekskill Hollow Brook; and

WHEREAS, the Peekskill Hollow Brook is a DEC classified Trout Stream and serves as the principal water supply for the City of Peekskill; and

WHEREAS, a failure of the already-compromised and structurally unsound retaining wall and building could contaminate the Peekskill Hollow Brook and/or damage or destroy the bridge immediately downstream from the subject site which, in addition to serving as a principal access route to Putnam Valley, carries a sanitary sewer line serving the Oregon Corners Sanitary Sewer District, including the Putnam Valley Middle and High Schools; and

WHEREAS, despite numerous requests and posting of the property as a dangerous building, the owner has failed to repair or remove same; and

WHEREAS, it is the finding of the Town Board that the structural condition of the retaining wall and auto body and paint shop building at 2 Peekskill Hollow Road presents a clear and imminent danger to life, safety and health of the residents of Putnam Valley and the residents and property of landowners downstream from the site, including residents of the City of Peekskill.

NOW, THEREFORE be it

> RESOLVED that the Code Enforcement Office shall immediately cause the repair, securing or demolition of the unsafe building and retaining wall at 2 Peekskill Hollow Road, and be it further;
>
> RESOLVED that pursuant to section 66-9 of the Code, the Code Enforcement Officer shall not be subject to competitive bidding in the awarding of contract(s) for the repair, securing or demolition of the subject structures; and be it further
>
> RESOLVED that, pursuant to Section 66-1 1 of the Code, the expenses of repair, demolition and removal of all the subject structures shall be a charge against the land on which same are located and shall be assessed, levied and collected as provided in Section 66-10 of the Code.

Notwithstanding the resolution, the Town Board allowed plaintiffs "one last chance" to properly address the situation.

Towards that end, plaintiffs engaged an attorney and engineer, all of whom attended meetings with Town representatives at the site and/or otherwise. Since by July 2008 plaintiff had not yet proceeded with any work and had not yet obtained a Department of Environmental Conservation permit, the Town convened a meeting on July 22, 2008, and set a July 29, 2008 deadline for plaintiffs' submission of plans and an August 4, 2008 deadline for the commencement of work. Among the attendees at this meeting were Hertzel and plaintiffs' counsel. Upon allowing plaintiffs time to take corrective action and, thereafter, upon setting the aforementioned deadlines, Town representatives were sensitive and responsive to the fact that the Brook is a Class I trout stream, and that work impacting the Brook could only take place between May 1st and October 1st and only with an appropriate New York State Department of Environmental Conservation permit.

Preliminary draft engineering plans submitted by plaintiffs' engineer to Engineer Atkinson on July 29 were deemed incomplete. Upon the expiration of the August 4, 2008 deadline, the Town set out to secure a bond and put the work out for bid. The Town also applied for a Department of Environmental Conservation permit.

On August 13, 2008, the Town Board adopted a resolution approving a $300,000.00 bond. A DEC permit was obtained on August 20, 2008. Thereafter, the Town sent a letter to plaintiff on or about August 26, 2008 advising that contractors and consultants

employed by the Town had authority to enter upon the Premises in accordance with the Unsafe Building Resolution and the New York Eminent Domain Procedure Law.

Quotes were obtained and, in the end, Aphrodite Construction was awarded the contract. Work commenced on September 17, 2008 and was completed by September 30, 2008. Among other things, the rear portion of plaintiff's building was demolished and the retaining wall was torn down and rebuilt. In or about October 2008, the Town added forty linear feet of three rail fencing and four arborvitae nigre trees to prevent parking near the Retaining Wall in an effort to protect the new construction.

Thereafter, the Town levied a special tax assessment in the amount of $253,456.29 for the work performed pursuant to the Unsafe Building Resolution and Town Code 66-1 1. In or about January 2009, plaintiff Valley Corners received a tax bill for $271,000.75, of which $253,456.29 was for an "unsafe building" charge.

The Town contends that demolition of a portion of the building and reconstruction of the retaining wall were necessary as they were beyond repair. The Town notes that there was a very narrow time period during which work could be performed as October 1 drew near due to the Brook's designation as a trout stream.

In contrast to the Town's position, plaintiffs claim that there is a "stone and masonry" retaining wall that underlies the part of the building foundation and not, as the Town asserts, a "rock retaining wall." Further, the "poured concrete retaining wall" that was breached and damaged by the April 2007 storm, plaintiffs continue, abutted but did not underlie any portion of the building. Nonetheless, plaintiffs note, the Town's contractors demolished that "poured concrete retaining wall" and erected an entirely new one. This, plaintiffs argue, was not only outside of the scope of the May 21, 2008, "Unsafe Building" resolution, it is not permitted under any section of the Town's Unsafe Building Code.

Plaintiff Hertzel further contends that he took appropriate action in April 2007 to address the damage caused to the rock and masonry retaining wall, which admittedly underlies one corner of the building, by "jacking up" the building and "securing" it, rendering it "safe and stable". More work followed in the Spring of 2008, Hertzel contends. In short, the plaintiffs take the position that neither the building nor any part of it were ever in "imminent danger of collapse."

In any event, Hertzel's deposition testimony is replete with admissions that, over the course of the year and a half as measured from the date of the flood to the time that work was actually commenced by the Town's contractor, Hertzel was aware that the Town

was demanding that certain repairs be made, that extensions were given for the commencement and completion of same, and, ultimately, that the final deadlines had passed. In fact, admittedly, as early as May 2008, Hertzel knew that the Town was planning on removing the rear portion of the building and, after May 2008, he continued to communicate with the Town regarding the circumstances of the Premises, the Town's concerns and plans regarding same, and with respect to his own plans and efforts to address the situation. Notwithstanding the complaints now advanced in this action, plaintiffs did not see fit to timely challenge any administrative determinations about which they now complain, be it by way of mandamus to review, compel, restrain or otherwise.

By way of their first and second causes of action ("Condemnation of Building" and "Condemnation of Land", respectively), plaintiffs seeks damages for the alleged "*de facto* taking" of the demolished section of the building portion of the Premises and for the alleged construction of a fence and the planting of trees on the land portion of the Premises, respectively. As and for their third cause of action ("Challenge to Reimbursement - Building Not Unsafe"), plaintiffs allege, among other things, that the Town failed to give them proper notice specifying the "particulars" and the "[m]anner in which [the Building] could be made safe and secure or demolished and removed", as is allegedly required by section 66-6 of the Town Code of the Town of Putnam Valley, nor was Valley Corners given the opportunity to "repair [the Building]" if same could have been safely repaired.

"Challenge to Reimbursement - Building Repair Not Emergency" is the caption attributed to plaintiffs' fourth cause of action wherein they allege that "the Building did nor present an emergency situation that required immediate action." Thus, Valley Corners seeks a declaration that it had no obligation to reimburse the Town for the costs of demolition and that said amount should be stricken from the tax rolls. The fifth cause of action, "Challenge to Reimbursement - Town Board Decision was Arbitrary and Capricious", challenges the Unsafe Building Determination as "arbitrary, capricious, unreasonable, unsupported by substantial evidence, and contrary to law." Thereupon, plaintiffs also seek a declaration that Valley Corners had no duty to reimburse the Town for unnecessary repairs and requests that said amount be stricken from the tax rolls. Through their sixth cause of action, "Challenge to Reimbursement - No Duty to Rebuild Retaining Wall", plaintiffs seek a declaration that Putnam Valley "has no obligation to build the New Retaining Wall and the amount charged for same be stricken from its tax roll." The seventh cause of action, "Challenge to Reimbursement -Tax Bill", is a direct challenge to the tax levy on various procedural grounds. Finally, "trespass", is alleged as the eighth cause of action.

By Decision and Judgment dated June 28, 2011, the Court (Nicolai, J.) in Matter of the Foreclosure of Tax Liens by Proceeding *In Rem* Pursuant to Article Eleven of Real Property Tax Law by the County of Putnam affecting a Parcel Located in the Town of Putnam Valley (Index No. 2696-2010) granted summary judgment awarding the Premises to the County of Putnam.

At the outset, the Court dismisses the first, second, third, fourth, sixth and seventh causes of action as advanced by all plaintiffs against the Town, except with respect to the owner of the Premises, Valley Corners. The Town correctly notes that the demanded relief with respect thereto relates only to Valley Corners and to no other plaintiff.

Notwithstanding the language of the complaint or form of this action including the headings attributed to the various causes of action, upon a proper reading of the complaint or, as to the fifth cause of action, upon a plane reading thereof ("Challenge to Reimbursement" as "arbitrary, capricious, unreasonable, unsupported by substantial evidence, and contrary to law"), the Court finds that this action is, in essence, a challenge to the administrative determination or determinations of the defendant Town and/or its agents or employees which should have been brought within the context of a CPLR Article 78 proceeding. An examination of the relief demanded does not compel a different result because it is necessarily incidental to the primary relief which could have and should have been sought through a timely commenced CPLR Article 78 proceeding (see, CPLR §7806). Having failed to avail themselves of this remedy, plaintiffs cannot now seek judgment in the guise of a plenary action (see, Noroian v. City of Port Jervis, 16 AD3d 392, 393 [2d Dept 2005][plaintiffs could and should have commenced a CPLR Article 78 proceeding challenging Common Council's "dangerous building" determination with respect to their property; failure to do so bars action declaring underlying code provision as unconstitutional as applied])

Even when measured from the latest possible point in time, the July 22, 2008 determination setting a July 29, 2008 deadline for the submission of plans and an August 4, 2008 deadline for the commencement of work by plaintiffs, this action is untimely, having not been commenced until August 27, 2009, more than eleven months later.

The Court has considered and finds no merit to plaintiffs' lack of notice claim. Any defect in notice of the May 21, 2008 Town Board meeting at which the Unsafe Building resolution was passed, or otherwise, did not deprive the Town of jurisdiction such as would extend the statute of limitations. This is especially so give plaintiffs actual notice of and participation in the various administrative processes and determinations that took place at that

time and thereafter, including the extension of time afforded to plaintiffs to take matters into their own hands and the setting of a final deadline and the conditions regarding same (see, Baer v. Town of Waterford, 186 AD2d 850, 851 [3d Dept 1992] citing Fairris v. Town of Washington Planning Bd., 167 AD2d 368, lv. denied, 77 NY2d 805; Matter of Ahearn v. Zoning Bd. of Appeals of Town of Shawangunk, 158 AD2d 801, lv. denied 76 NY2d 706; Matter of Gaona v. Town of Huntington Zoning Bd. of Appeals, 106 AD2d 638 [2d Dept 1984]; compare Jones v. Zoning Bd. of Appeals of Town of Oneonta, 61 AD3d 1299, 1302 [3d Dept 2009][petitioner learned of application just two hours before, appeared at hearing, raised the issue of notice and voiced objections to the application]). The record reflects how involved and informed plaintiffs were during the entire process, from the initiation of the inspection of the Premises soon after the flood through the setting of final and firm dates for the commencement of reparation work by plaintiffs.

Nor has the plaintiff met its burden of establishing that the statue of limitations is tolled because the Town acted ultra vires. Mere allegations of same are not enough. In any event, issues such as whether the Town misinterpreted or misapplied its own code by, for example, directing the demolition and reconstruction of a retaining wall as part of an Unsafe Building proceeding are issues that could have properly been addressed within the context of a timely CPLR Article 78 proceeding.

Any direct challenge to the merits or procedures surrounding the tax levy, such as appears in the seventh cause of action, "Challenge to Reimbursement -Tax Bill", should have been raised in Matter of the Foreclosure of Tax Liens by Proceeding In Rem Pursuant to Article Eleven of Real Property Tax Law by the County of Putnam affecting a Parcel Located in the Town of Putnam Valley (Index No. 2696-2010) and either was not or, if raised, was found to be without merit.

Plaintiffs' 42 USC §1983 arguments are rejected. The Town correctly notes that this is not a 1983 action.

Based upon the foregoing and there being no merit to any other argument advanced in opposition thereto, it is hereby

ORDERED, that defendant's motion to dismiss this action in its entirely be and is hereby granted in all respects.

The foregoing constitutes the Opinion, Decision, and Order of

the Court.

Dated: Carmel, New York
July 26, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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