Matter of Joy Selter, LLC v Weeks
2017 NY Slip Op 31059(U)
April 27, 2017
Supreme Court, Suffolk County
Docket Number: 21464/2015
Judge: Martha L. Luft

[* 1]

SHORT FORM ORDER

INDEX No. 21464/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:
Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 01/28/2017
ADJ. DATE 01/10/2017
Mot. Seq. # 001 - **Mot D**

MOTION DATE 03-22-16
ADJ. DATE 01/10/2017
Mot. Seq # 002 - **MG**

x

In the Matter of the Application of

JOY SELTER, LLC.,

Petitioner,

For an Order Purusant to Article 78 of the Civil Practice Law and Rules

-against-

KENNETH WEEKS, Chief Building Inspector of the Building Department of the Town of Islip, CHRISTOPHER D'ANTONIO, Respresentative of the Planning Department of the Town of Islip, the PLANNING DEPARTMENT of the Town of Islip, and the Town of Islip,

Respondents.

x

PETITIONER'S ATTORNEY
Law Office of Richard I. Scheyer
110 Lake Avenue So., Suite 46
Nesconset, NY 11767

RESPONDENTS' ATTORNEY
Marie E. Knapp
Islip Town Attorney
655 Main Street
Islip, NY 11751
By: John R. DiCioccio, Esq.
Deputy Town Attorney

Upon the reading and filing of the following papers in this matter: (1) Article 78 dated December 4, 2015 and supporting papers by Petitioner; (2) Notice of Motion dated March 15, 2016 and supporting papers, including Respondents' Memorandum of Law In Opposition to Article 78 Proceeding, by Respondents; Reply to Respondents' Motion to Dismiss dated May 20, 2016 by Petitioner; the motion is determined as follows.

Petitioner, Joy Selter, LLC, is the owner of certain real property located within the Town of Islip. In this article 78 proceeding, petitioner seeks an order directing the Town of Islip Building Department to process its application and issue a building permit, and a declaration that Town Code §68-54A does not apply to petitioner's application. A variety of constitutional claims are also raised.

The Town respondents have moved to dismiss the petition pursuant to CPLR §7804 (f) and

3211 (a). They raise three bases for their motion - the proceeding is time barred, the petition fails to state a cause of action and the petitioner failed to exhaust administrative remedies.

The essential facts are not in dispute. A hearing was held before the Zoning Board of Appeals (ZBA) of the Town of Islip on October 28, 2014 on an application made by the petitioner seeking a variance in order to erect a dwelling on the subject property. Petitioner annexed the transcript of such hearing as Exhibit B to the petition (Transcript). The call of the application involved three issues: that the lot has a width varying between 71 feet and 125.82 feet rather than the code requirement of 150 feet throughout; that the proposed second front yard would be 35 feet instead of the required 50 feet, as well as an issue involving steep slope requirements. At the hearing, all parties agreed that the latter issue was not applicable. Petitioner's attorney noted that the ZBA had previously granted similar applications for this property on two occasions in 1984 and 1994, however the prior owner never followed through with construction. (Transcript, pp 3-6, 10). Copies of those earlier ZBA decisions are annexed to the petition as Exhibits F and G.

During the course of the hearing, an additional issue, not included in petitioner's application, was discussed. It had to do with whether the dwelling was required to be set back further on the property. The ZBA chairman, James Bowers, noted to petitioner's attorney, who was making the presentation to the ZBA , that this issue "is not before us." (Transcript, p. 13). Petitioner's attorney concurred that the issue "is not before you." (Transcript, p. 14).

Later in the hearing, Christopher D'Antonio from the Town Planning Department spoke, and noted that the earlier grants had not taken into account Section 68-54A of the Town Zoning Code, which requires deeper setbacks of the primary front yard under certain specified conditions. (Transcript, p. 18). Again Chairman Bowers noted that the issue was not part of the call, and Mr. D'Antonio agreed and stated that a variance would be needed to maintain the proposed setback of 50 feet. (Transcript, p. 19). Petitioner's attorney disagreed that there was such a need based upon his belief that the provision had never been relied upon previously. (Transcript, p. 22). A discussion ensued concerning the fact that the application would have to be re-advertised and the hearing adjourned in order for the issue to be properly addressed by the ZBA. (Transcript, pp. 21-24). The Secretary to the Board, Mary Passaro, noted that the matter could be included in the November 18th agenda. (Transcript, p. 24). However, petitioner's counsel stated he would prefer to "litigate it." (*Id.*).

By decision dated October 30, 2014, the ZBA granted the petitioner's application, as amended to delete the portion of the call having to do with steep slope requirements. A copy is annexed to the petition as Exhibit A. The decision does not mention the Section 68-54A issue.

On December 3, 2014 a filing fee for a permit was received by the Town concerning the subject property. By letter dated December 22, 2014, the Town of Islip Zoning Department notified petitioner that the front setback in its proposed plan did not conform with Section 68-54A of the Town Zoning Code. Petitioner was instructed to contact the Zoning Department. A copy of this letter appears as Exhibit E annexed to the petition.

Petitioner has characterized its request for relief as being in the nature of a mandamus to compel, however, the facts, as alleged in the petition, do not support such a characterization. Mandamus to compel is an extraordinary remedy that only lies to direct performance of a ministerial act involving no discretion, to which the petitioner has a clear legal right. ***New York Civil Liberties Union v State of New York,*** 4 NY3d 175, 791 NYS2d 507 [2005]; ***Harper v. Angiolillo***, 89 NY2d 761, 658 NYS2d 229 [1997]; CPLR 7801(1). The focus is on the nature of the duty sought to be compelled, not upon the substantive right of the petitioner to prevail. ***Brusco v. Braun,*** 84 NY2d 674, 621 NYS2d 291 [1994].

In the present matter, the petitioner was informed that there was an additional provision in the Town Code for which a variance would be required. That provision, a copy of which is annexed to the Town's motion papers as Exhibit B, requires a deeper front yard setback for new buildings when "25% of the block frontage on either side of the street is improved with buildings having a greater depth of front yard than is required by the ordinance[.]" On its face, this provision involves a calculation of setbacks of surrounding properties, information for which had not been included in the hearing on petitioner's application. Thus, the issuance of the building permit was not a purely ministerial action. While petitioner may disagree that such provision should be applied in its case, petitioner has not and cannot demonstrate that it has a clear legal right to the permit. As noted above, the chairman of the ZBA made clear that the hearing conducted on October 28, 2014 did not address the issue of the setback standards of §68-54A, and, in fact, the variance granted in the ZBA's decision did not mention it. Thus, petitioner has not shown that issuance of the permit is a purely ministerial act because the application presented does not unquestionably reflect compliance with all of the provisions of the Town's Zoning Code.

The essence of petitioner's argument is that the Town's Zoning Department was incorrect in stating that §68-54A applied to the proposed project, or, put another way, it lacked a rational basis for applying this provision. Indeed, annexed to the petition as Exhibit H are a large number of previous decisions by the ZBA in what is asserted were similar cases where this section was not considered. They were proffered to show the basis for petitioner's disagreement with the Zoning Department's "interpretation of the meaning of that Code Section," as noted in the cover letter thereto. Such a challenge is in the nature of a mandamus to review the determination by the Zoning Department that the proposed plan did not conform to this provision in the Code. As such, the proceeding must be dismissed for failure to exhaust administrative remedies.

Section 68-443 (A) (2) of the Town Code of the Town of Islip accords authority to the ZBA to "hear and decide appeals where it is alleged there is an error in any requirement, decision or determination made by the local administrator in the enforcement or administration of this article." As noted, petitioner's argument is that there was an error in the requirement that its plan must conform to §68-54A.

It is well established 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" ***Watergate II Apts. v Buffalo Sewer Auth.***, 46 NY2d 52, 57, 412 NYS2d 821 [1978]; *see* ***Matter of Perretta v Mulvey***, 77 AD3d 758, 908 NYS2d 601 [2d Dept 2010]; ***Matter of Mirenberg v***

Lynbrook Union Free School Dist. Bd. of Educ., 63 AD3d 943, 881 NYS2d 159 [2d Dept 2009]; ***Matter of Laureiro v New York City Dept. of Consumer Affairs***, 41 AD3d 717, 837 NYS2d 746 [2d Dept 2007]. "[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" ***Galin v Chassin***, 217 AD2d 446, 447, 629 NYS2d 247 [1st Dept 1995]; *see* ***Matter of Tahmisyan v Stony Brook Univ.***, 74 AD3d 829, 831, 902 NYS2d 617 [2d Dept 2010]. The doctrine of exhaustion of administrative remedies applies to actions for declaratory judgments *see* ***Slater v Gallman***, 38 NY2d 1, 377 NYS2d 448 [1975].

However, there are exceptions to the exhaustion doctrine that apply when the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to administrative remedies would be futile or would cause irreparable injury *see* ***Watergate II Apts. v Buffalo Sewer Auth.***, *supra*; ***Matter of Pitts v City of N.Y. Off. of Comptroller***, 76 AD3d 633, 906 NYS2d 337 [2d Dept 2010]; ***Matter of Laureiro v New York City Dept. of Consumer Affairs***, *supra*. It should be noted that this case clearly does not involve irreparable injury nor is there any basis to assert that resort to an administrative remedy would be futile.

Nevertheless, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established" ***Matter of Schulz v State of New York***, 86 NY2d 225, 232, 630 NYS2d 978 [1995], *cert. denied* 516 US 944, 116 SCt 382 [1995]; *see also* ***Town of Oyster Bay v Kirkland,***19 NY3d1035, 954 NYS2d 769 [2012]. In addition, "merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief." *Id.* At 1039, 954 NYS2d at 772 (*citing* ***Matter of Schulz,*** *supra).*

In the present matter, the petitioner failed to seek review by the ZBA as to whether conformance with §68-54A was required or not, or whether a variance would be granted. The applicability of this provision clearly requires, at a minimum, a factual record regarding the percentage of houses on the block with front yards that are deeper than required by the ordinance. Further proceedings of some sort on this topic were clearly contemplated by the ZBA, as indicated in the transcript of the October 28, 2014 hearing, when it was noted that petitioner's application could be re-advertised and placed on the following month's agenda to address the issue properly. (Transcript, p. 24). There is even an indication that the board would be favorably disposed to grant the variance. (Transcript, p. 20). However, petitioner's counsel declined to avail himself of this option.

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LUFT, J

Accordingly, it is hereby

ORDERED that the motion is granted and the proceeding is dismissed.

Submit judgment.

ENTER

Date: April 27, 2017
Riverhead, New York

Martha L. Cfe
HON. MARTHA L. LUFT, A.J.S.C.

✓ FINAL DISPOSITION

___ NON-FINAL DISPOSITION