| **Masluf Realty Corp. v City of New York** |
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| 2005 NY Slip Op 30548(U) |
| September 30, 2005 |
| Supreme Court, New York County |
| Docket Number: 105023/05 |
| Judge: Paul G. Feinman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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MASLUF REALTY CORP.,

Plaintiff,

-against-

Action No. 1
Index No.105023/05

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Defendants.

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NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and CITY OF NEW YORK,

Petitioners,

-against-

Action No. 2
Index No. 402366/05

MASLUF REALTY CORP.,

Respondent.

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**PAUL G. FEINMAN, J.:**

The plaintiff in action number one above, Masluf Realty Corp. (Masluf), moves for an order preliminarily enjoining the defendants The City of New York and New York City Department of Design and Construction (collectively, the City): from continuing construction work on the roadbed of Manhattan Avenue between Ash Street and Newtown Creek in Brooklyn, NY; from spending any more money on the project; and from trespassing upon Masluf's real property.

The City moves for an order dismissing the first and the third causes of action as barred by the statute of limitations; and for an order pursuant to CPLR 3211 (a) (7) dismissing the entire complaint for failure to state a cause of action; or, in the alternative, for an order pursuant to

CPLR 3212 granting summary judgment dismissing the complaint.

The petitioners in action number two above, the New York City Department of Design and Construction and the City of New York (collectively the City) move, pursuant to Real Property Actions and Proceedings Law § 881 for a license to enter the respondent Masluf's real property for the purpose of making repairs to the bulkhead abutting the end of Manhattan Avenue, which is adjacent to Masluf's real property located at 1166 Manhattan Avenue, Brooklyn, NY.

*Factual and Procedural Background*

The City and Masluf own abutting pieces of real property on the waterfront in Brooklyn. The City has undertaken a construction project on Manhattan Avenue, consisting of the rehabilitation of the public street, the replacement of existing street lights and sewers, the repair of the bulkhead abutting Newtown Creek, and enhancement of pedestrian access to the waterfront. Masluf has served a complaint alleging that, although the City describes the project as the re-construction of the roadway, the project is actually the construction of a park. It is alleged that the close proximity of the park will prevent Masluf from receiving a waste transfer station permit.

Masluf's complaint in action number one sets forth a total of three causes of action. The first is a General Municipal Law § 51 taxpayer's claim for a permanent injunction, and alleges that the project violates numerous regulations including: Zoning Resolutions 62-416 and 62-71, the City Environmental Review Act, 43 RCNY § 6-01 and 62 RCNY § 5-01, and New York City Charter § 197-c.

The second cause of action alleges that the City's actions constitute an unconstitutional

taking.

The third cause of action seeks a judgment declaring that the City cannot proceed with the project until it completes an environmental assessment pursuant to the State Environmental Quality Review Act (SEQRA), the New York City Environmental Quality Review (CEQR), the New York City Charter § 197-c Uniform Land Use Review Procedure (ULURP), and complies with all applicable Zoning Resolutions. The third cause of action also seeks a judgment declaring that the project restricts Masluf's legal right to use its property, and directing the City to cooperate with Masluf's effort to secure a change in the lawful use of Masluf's property to allow for future, more profitable residential development, which would be consistent with a public park.

The City has not served an answer to the complaint.

Under a separate index number, the City has filed a special proceeding pursuant to RPAPL § 881, seeking access to Masluf's property in order to re-build the bulkhead at the foot of Manhattan Avenue. It is alleged that in order to build the new bulkhead precisely on the border of the two properties, it is necessary that some earth be moved onto Masluf's side of the property.

*Contentions*

In support of its motion for a preliminary injunction, and in opposition to the City's motions to dismiss and for a license to enter, Masluf makes the following arguments. This court, in its role in a motion to dismiss, must find that the complaint contains claims upon which the plaintiff may prevail. The court, on the alternative motion for summary judgment, must identify material facts in dispute necessitating a trial. The taxpayer's action (General Municipal Law § 51) is neither time-barred nor without merit. The City failed to comply with environmental and

land use requirements. Masluf has standing to challenge the City's failure to perform an environmental review. The City's activities did not comply with land use planning. The City's project constitutes an unconstitutional taking of Masluf's property. This was a regulatory taking. Masluf's loss of access to its property is a fact question, so the alternative motion for summary judgment must be dismissed. Masluff is entitled to a preliminary injunction to stop the work on the park, Manhattan Avenue, and the bulkhead. If the court finds the complaint deficient, Masluf should be granted permission to amend.

In support of its motions to dismiss, and for a license to enter, and in opposition to Masluf's motion for a preliminary injunction, the City makes the following arguments. Masluf's claims under General Municipal Law § 51, and its SEQRA/CEQR and ULURP claims are barred by the four-month statute of limitations applicable to Article 78 proceedings. Masluf's taxpayer cause of action under General Municipal Law § 51 fails as a matter of law, as Masluf cannot demonstrate that the City committed fraud resulting in a waste of public money. Masluf's request for declaratory relief under SEQRA/CEQR and ULURP fails as a matter of law, as the project is exempt from environmental review and is not a "site selection" project under ULURP. The pedestrian esplanade does not impinge upon any existing right of ingress and egress from Masluf's property.

*Discussion*

The court will first address Masluf's motion to enjoin the project, before turning to the City's motion to dismiss the complaint, or in the alternative for summary judgment. Finally, the court will dispose of the City's request for access to Masluf's property.

1. Preliminary Injunction

In order to be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and a balance of the equities in favor of injunctive relief (W.T. Grant Co. v Srogi, 52 NY2d 496 [1981]). Here, Masluf can succeed on the merits of its claim only if it can show that the City committed a fraud on the public by secretly disguising a project to build a park as a project to re-build a road. On these papers, Masluf has not demonstrated that it can make such a showing. Contrary to Masluf's assertion, the City never misrepresented the nature of the project. Indeed, at one point Masluf wrote a letter to the City, stating that Masluf does not oppose a park (Exhibit "L" to the City's motion to dismiss). Thus, the first prong of the test for preliminary injunctive relief, likelihood of success on the merits, is not met.

Although the traditional concepts of irreparable harm, which apply to private parties seeking injunctive relief, do not apply in the public-interest field (Gerges v Koch, 62 NY2d 84 [1984]), there is a failure to submit sufficient proof to show that anyone would suffer injury absent the granting of a preliminary injunction. The bare conclusory allegations made by Masluf, concerning its plans to obtain a waste transfer station permit, and the loss of access to its property because of a change to the parking pattern on Manhattan Avenue, are insufficient to satisfy its burden.

Finally, the balance of the equities favors the City and its plan to enhance pedestrian access to the waterfront. As a result, Masluf's motion for a preliminary injunction must be denied.

2. Motion to Dismiss

Turning to the City's motion to dismiss because of the statute of limitations, the first

(General Municipal Law § 51 taxpayer action), and third (declaratory judgment), causes of action, are both based on the City's alleged violations of zoning and environmental regulations (SEQRA/CEQR and ULURP). However, such claims must be raised in a timely Article 78 special proceeding, and not, as here, in a taxpayer action (Uhlfelder v Weinshall, __Misc3d__, 2005 WL 2036985 [Sup Ct NY County]). A four-month statute of limitations applies to challenges to SEQRA/CEQR and ULURP claims (Matter of Save the Pine Bush v City of Albany, 70 NY2d 193 [1987]). The only purpose served by the first and second causes of action is to improperly circumvent the four-month statute of limitations applicable to an Article 78 proceedings.

At the latest, Masluf's claim accrued on July 30, 2004, the date of a letter from the City to Masluf rejecting Masluf's claims, and informing Masluf that the City was going forward with the project. Thus, Masluf was aggrieved by the City's decision on July 30, 2004, and had, at the most, until December of 2004 to file an Article 78 petition (Stop-the-Barge v Cahill, 1 NY3d 218 [2003]). The plaintiffs did not file the complaint in this matter until April of 2005. Thus, Masluf's first and third causes of action are time-barred and should therefore be dismissed.

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference (Goshen v Mutual Life Ins. Co., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83, 87 [1994]). The credibility of the parties is not under consideration (S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

A review of the City's decision to rehabilitate the road and bulkhead may not be undertaken within the parameters of General Municipal Law § 51, which governs taxpayer actions, as it is "well established that a taxpayer action pursuant to section 51 of the General Municipal Law lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (Mesivta of Forest Hills Inst., Inc. v City of New York, 58 NY2d 1014, 1016 [1983]). In the instant case, Masluf does not point to any fraudulent or illegal activities undertaken by the City. Thus, its effort to base its environmental claim on General Municipal Law § 51 is unavailing.

Furthermore, a taxpayer cause of action, under General Municipal Law § 51, is not a vehicle for correcting purely procedural irregularities by governmental bodies, such as those here asserted (Council of City of New York v Giuliani, 5 AD3d 330, 331 [1st Dept 2004], lv to appeal denied 4 NY3d 707 [2005]). To establish standing to contest administrative action, a petitioner must show, inter alia, an injury "different in kind and degree from the community generally" (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 413 [1987]). In environmental challenges, as here, the injury cannot be solely economic, but must be environmental (Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency, 76 NY2d 428, 433 [1990]). In this case, Masluf has not identified any non-economic, environmental damage resulting from the project affecting only it, rather than the general population.

The project is exempt from the procedures required by the land use review process as it is not a "site selection" project under the City Environmental Quality Review procedures (CEQR),

the Uniform Land Use Review Procedure (ULURP) and the State Environmental Quality Review Act, ECL 8-0101 et seq. (SEQRA). The applicable regulation (6 NYCRR 617.5 [c]) specifically exempts from the environmental review process the following actions: (1) maintenance or repair involving no substantial changes in an existing structure or facility;*** (4) repaving of existing highways not involving the addition of new travel lanes; (5) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities; ***(16) installation of traffic control devices on existing streets, roads and highways; and (17) mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns. Contrary to Masluf's assertion, the re-building of an existing street and bulkhead, and the creation of a pedestrian esplanade, is precisely the type of maintenance or repair work requiring no full environmental review.

As to the bulkhead, the Army Corps of Engineers has informed the City that an individual permit is not required for the planned bulkhead work.

In addition, there is no taking of Masluf's property. Masluf alleges that because of a change to the parking pattern on Manhattan Avenue, Masluf will lose 130 feet of frontage on Manhattan Avenue. In Bopp v State of New York, (19 NY2d 368 [1967]), the claimants owned and operated a motel-lodge and restaurant which was located on a State highway in a resort area. A new highway was built for which a small piece of claimants' property was appropriated by the State, and a new access route was constructed connecting the old route with the new highway. The claimants were unable to continue their operation at a profit, and sought compensation for damages incurred. The Court found that the damage resulting from circuity of access, decreased traffic, and loss of visibility to travelers was not compensable, and that property owners have no

right to be located directly on a State highway, or to have traffic pass in front of their property. The inability of the claimants to use their property as a motel and restaurant was not a factor for which the law requires compensation. Moreover, the State's obligation to the claimants was fulfilled by providing a reasonably adequate means of access to and from the new highway, enabling the operation of the property as a residence and as a motel in the winter for skiers. The new access road was adequate to service the property for such purpose.

Similarly, in this matter, the facts, as pleaded by Masluf, demonstrate that Masluf will be provided reasonably adequate means of access to and from Manhattan Avenue.

Therefore, the City's motion to dismiss the complaint for legal insufficiency must be granted.

Leave to re-plead is denied because Masluf does not submit a proposed new pleading supported by evidence that could properly be considered on a motion for summary judgment (Colleran v Rockman, 232 AD2d 322 [1st Dept 1996]; Hickey v National League of Professional Baseball Clubs, 169 AD2d 685 [1st Dept.1990]).

In light of the foregoing, the City's motion pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint is rendered academic. However, the court notes had it not granted the branch of the motion which seeks dismissal pursuant to CPLR 3211, that the alternative motion would be denied as premature since issue has not been joined (CPLR 3212 [a]; City of Rochester v Chiarella, 65 NY2d 92 [1985]).

3. RPAPL § 881 Proceeding

RPAPL § 881 provides:

When an owner or lessee seeks to make improvements or repairs to real property

> so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

In determining the issue of whether or not to grant the City a license pursuant to RPAPL § 881, the standard to be applied is "reasonableness" (Mindel v Phoenix Owners Corp., 210 AD2d 167 [1st Dept 1994]). The court must balance the competing interests of the parties and should grant the issuance of a license, under reasonable conditions, where the inconvenience to the adjacent property owners is outweighed by the hardship of their neighbors if the license is refused (Chase Manhattan Bank [Nat Assn.] v Broadway, Whitney Co., 57 Misc2d 1091 [Sup Ct Queens County 1968], affd 24 NY2d 927 [1969]). The court finds that the City has met its statutory burden of showing the necessity for the work, and that scope of the proposed work on the bulkhead appears reasonable.

Finally, contrary to Masluf's assertion, venue in New York County rather than Kings County is proper since Masluf itself chose New York County for the related action seeking injunctive relief as the venue for litigating this dispute (Agostino Antiques Lt. v CGU-American Ins Co., 6 AD3d 469 [2d Dept 2004]).

Accordingly, it is

ORDERED that the defendant Masluf Realty Corp'.s motion filed under Index Number 105023/05 for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order previously issued is dissolved effective upon service of a copy of this order on Masluf with notice of entry; and it is further

ORDERED that the City's motions are granted to the extent that the complaint filed in Action 1 bearing Index Number 105023/05 and the Clerk of the Court shall enter judgment in defendants' favor dismissing that action in its entirety with costs and disbursements; and it is further

ORDERED, ADJUDGED AND DECREED that the Petitioners in Action 2 bearing Index Number 402363/05 are hereby granted a license to enter upon a portion of Respondent Masluf Realty Corp.'s land upon such terms and conditions that the Petitioners and the Respondent may agree upon within a twenty days after the entry of this Judgment, and it is further

ORDERED, ADJUDGED AND DECREED that failing agreement between the parties as to the terms and conditions of the license granted herein, this court will, upon request on notice, impose the terms and conditions of such license.

This constitutes the decision and order of the court on motion sequence 001 in Action 1 bearing Index Number 105023/05. This further constitutes the decision, order and judgment of the court in Action 2 bearing Index Number 402363/05.

Dated: September 30, 2005
New York, New York



ENTER:

J.S.C.