

Specialized Realty Serv., LLC v Town of Tuxedo
2008 NY Slip Op 33685(U)
June 20, 2008
Supreme Court, Orange County
Docket Number: 9364/07
Judge: Elaine Slobod
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

PRESENT: HON. ELAINE SLOBOD
SUPREME COURT JUSTICE

To commence the
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.

-----X
SPECIALIZED REALTY SERVICES, LLC,

Plaintiff,

SHORT FORM ORDER

-against-

Index # 9364/07

TOWN OF TUXEDO and DAVID MAIKISCH, as
Building Inspector of the Town of
Tuxedo,

Defendants.

-----X

The following papers numbered 1-11 submitted on motion by
defendant to dismiss were considered by the Court.

Notice of Motion/Affidavit/Affirmation/Exhs (A-C)	1-4
Opposing Affidavits (2)/Exhs (A-N)/Memo	5-7
Reply Affirmation/Exhs (A-C)	8-9
Sur-Reply letter and Response thereto	10-11

Upon reading the foregoing papers, the motion is disposed of
as follows:

The defendants have moved to dismiss plaintiff's declaratory
judgment action on the grounds (1) that the pleading under guise of
an action pursuant to the provisions of CPLR 3001 constitutes an
attempt to avoid dismissal pursuant to the four month statute of
limitations of CPLR 217 for a special proceeding under Article 78
of the CPLR, and (2) plaintiff's complaint is premature in any
event since it has not pursued formal administrative application(s)
and local reviews thereof.

Defendants in their moving and reply submissions in effect also seem to be requesting pre-answer reverse declaratory relief which is more in the nature of summary judgment.

BACKGROUND

The plaintiff, Specialized Realty Service, LLC (SRS), is the current owner of 3.1767 acres of real property situated in the Town of Tuxedo. Three separate contiguous tax parcels are combined in the above acreage to which the plaintiff took title in April 2002.

The parcels in question and three interconnected buildings situated on those parcels apparently are known as the Xicom Laboratory and Conference Center. Xicom, Inc., took title to the first tax parcel (1-1-29, 1.4A) in 1960. In late 1963 Xicom began to construct the first two of the aforementioned interconnected structures. In December 1964 Xicom allegedly completed those structures which are referred to as Buildings A and B. Xicom commenced operating its business in those buildings at about that time. Plaintiff's complaint described Xicom's business as:

"A profit oriented business operated by Millgate and Northrop [original and successor principals of Xicom] in the Xicom buildings consisting of offices, laboratories and conference facilities used in the conduct of a business of development and sale of communication techniques and products (audio, visual) and media enhancement for the private business community, and research and development activities in the communications field and the development of related products in a laboratory (audio and visual) setting, and services connected therewith including the conduct of business seminars and conferences

with respect to its techniques, products and services."

Xicom took title to its second tax parcel (1-1-28, .358A) in January 1965 and completed its acquisitions by taking title to the third parcel (1-1-35.1, 1.3617A) in May 1967. It is alleged that in October 1966 Xicom commenced construction of the third of these structures, Building C. The latter became an integral part of Xicom's business which thereafter allegedly continued to operate from this complex with about 25-30 employees until on or about 1998 when the Xicom business, but not the subject complex, was sold and Xicom vacated these three buildings. They have remained vacant to this date.

When the plaintiff SRS purchased the Xicom site from a third party in April 2002 it did so as an investment with the intent to market it to any interested buyer. In the fall of 2006 SRS began negotiations to sell this complex to BVZT, LLC which according to SRS's complaint

"...had expressed an interest in conducting a business, through its subsidiary Live Technology Holdings Inc. of market communications technology offering a diversity of business aids and technologies to help manage advertising and communications for the business sector including an audio visual laboratory and technical research business at the site."

Plaintiff contends that BVZT's proposed use was "virtually identical to that conducted by Xicom from 1966 to 1998."

However, when BVZT contacted the defendant David Maikisch, the

Building Inspector of the Town of Tuxedo, plaintiff contends that BVZT was verbally informed in late December 2006 or early January 2007 that its proposed business could not be conducted at the Xicom complex without first obtaining site plan approval from the Planning Board and a certificate of occupancy which confirmed that the Xicom buildings were in conformance with the current State Building and Fire Protection Codes. Allegedly because of this negative opinion, BVZT withdrew from negotiations with SRS. On October 2, 2007 SRS commenced the instant action in which it seeks declarations under CPLR 3001:

"...that the terms and provisions of the 1975 Zoning Law as amended to date do not apply to either the Xicom buildings or the Xicom site.

...that the future use of the Xicom buildings for office uses, including professional, business, research, product development and related conferencing and laboratory uses, are not subject to site plan approval by the Town Planning Board.

...that any owner or occupant of the Xicom buildings, current or future, is not required to install a sprinkler system by reason of the provisions of either Local Law No. 2 of 1991 or the State Building Code, the State Fire Prevention Code and the Existing Building Code.

...that notwithstanding the current vacancy in the Xicom buildings, any new occupant of the Xicom buildings and Xicom site will not need to secure either a certificate of occupancy or site plan approval by reason of the requirements of the State Building Code, or the 1975 Zoning Law or any other law in order to use and occupy said buildings to carry on a business which includes offices, research,

product development and the sale of related products, services and techniques with related conferencing and laboratory facilities in the Xicom buildings at the Xicom site open to the business public with sufficient employees to operate and conduct such a use and business."

The defendants, as indicated, have woven arguments into their papers which do not fall within the initial parameters of a CPLR 3211(a) motion to dismiss. However, at this juncture, the Court will only address those arguments which fall within the grounds for dismissal enumerated in that enactment.

STATUTE OF LIMITATIONS

The premise for defendants' argument that plaintiff's pleading is time barred is that some "determination" of the Building Inspector had become "final" and that it was "binding upon the plaintiff or the person whom he represents in law or in fact" (CPLR 217(1)).

The evidence presently before this Court does not establish, nor does it suggest, that the Building Inspector had provided anything more than an opinion to a third party which entity had no legal or factual authority to represent, let alone bind SRS. Therefore, even if for the sake of argument this apparently informal verbal opinion of the Building Inspector could be construed as a "determination" which was also "final," it cannot be argued that there was the requisite relationship between plaintiff and BVZT to satisfy the agency prerequisite of the enactment.

Therefore, since the prerequisites of CPLR 217(1) have not

been satisfied, the motion to dismiss on the basis of the Statute of Limitations is denied.

Ripeness/Exhaustion of Remedies

There has been no formal action taken by the defendant Building Inspector affecting plaintiff's rights with respect to use of the subject property. Nor has plaintiff filed any application which would cause a negative and final response from the Building Inspector or a municipal board. Also, it is not clear from the various submissions whether or not under the local code the plaintiff could petition the Town's Zoning Board of Appeals for interpretation of relevant provisions of that code which might help better frame any of the issues raised herein (see 3 Rathkopf's, The Law of Zoning and Planning §55.5). Therefore, at first blush it might appear that applying the standard elements for determining either "ripeness" or "exhaustion of remedies" (see Church of St. Paul and St. Andrew v Barwick 67 NY2d 510, 518-521), plaintiff's application is premature. However, the record before this Court leaves no doubt that the Town of Tuxedo, in the person of its Building Inspector and the Town's attorneys, has unequivocally and unalterably taken positions contrary to those of plaintiff by indicating that plaintiff and any purchaser or tenant of the subject property will be required to obtain a building permit, site plan approval from the Planning Board, and that they will be held subject to those local and state codes and regulations which

plaintiff seeks to avoid by this action.

In light of the defendants' stated positions, albeit they were rendered informally prior to the positions taken in the instant motion to dismiss, this Court finds that it would be futile for plaintiff to pursue administrative remedies under these circumstances (see Lehigh Portland Cement v DEC 87 NY2d 136, 141-143). This conclusion is buttressed due to the apparent personal interest which the Building Inspector may have in this matter and the adverse position taken by nearby residents to any proposal to recreate Xicom's use of the subject complex.


In any event, the Court finds that since it would be futile for plaintiff to pursue remedies before the Town, the normal preconditions of "ripeness" and "exhaustion" do not apply.

Therefore, the Court finds that there is no basis under CPLR 3211(a) to dismiss plaintiff's complaint at this juncture. Accordingly, defendants' motion is denied to the extent indicated.

However, before directing defendants to prepare an answer to the complaint, counsel are directed to appear for a conference at 9:15 a.m. on July 16, 2008 in the Orange County Courthouse, Courtroom 12, 285 Main Street, Goshen, New York at which time the Court will explore the possibility of treating this application as one for summary judgment pursuant to CPLR 3211(c), with or without prior discovery.

So ordered.

Dated: Goshen, New York
June 20, 2008



HON. ELAINE SLOBOD
SUPREME COURT JUSTICE

TO: James G. Sweeney, Esq.
Attorney for Plaintiff
One Harriman Square
P. O. Box 806
Goshen, New York 10924

Jacobowitz & Gubits, LLP
Attorneys for Defendants
158 Orange Avenue
P.O. Box 367
Walden, New York 12586