

People v City of Watervliet Zoning Bd. of Appeals

2013 NY Slip Op 33896(U)

March 26, 2013

Supreme Court, Albany County

Docket Number: 1446-13

Judge: Kimberly A. O'Connor

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

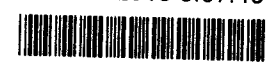
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

Albany County Clerk
Document Number 11364025
Rcvd 03/28/2013 3:37:43 PM

CITIZENS FOR ST. PATRICK'S, EILEEN ANDERSON,
CHRISTINE BULMER and ROSEMARY NICHOLS,



Petitioners,

-against-

DECISION AND ORDER

Index No.: 1446-13
RJI No.: 01-13-109563

CITY OF WATERVLIET ZONING BOARD OF APPEALS,
CITY OF WATERVLIET BUILDING INSPECTOR, and
PCP WATERVLIET, LLC,

Respondents.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

ROSEMARY NICHOLS, ESQ.
Attorney for Petitioners
1241 19th Street
Watervliet, New York 12189-1602

GOLDMAN ATTORNEYS, PLLC
Attorneys for the Municipal Respondents
(Paul J. Goldman, Esq., Of Counsel)
210 Washington Avenue Extension
Albany, New York 12203

WHITEMAN, OSTERMAN & HANNA, LLP
Attorneys for Respondent PCP Watervliet, LLC
(Robert L. Sweeney, Esq., Of Counsel)
One Commerce Plaza
Albany, New York 12260

O'CONNOR, J.:

Petitioner Citizens for St. Patrick's is an unincorporated association pursuant to General
Association Law § 12 and is represented in this proceeding by its co-chairs/co-presidents Eileen

Anderson and Christine Bulmer (see Verified Petition, ¶1). Eileen Anderson and Christine Bulmer are also individual petitioners in this proceeding, together with Rosemary Nichols, each of whom reside in the City of Watervliet, Albany County (see Verified Petition, ¶¶4-6). This proceeding constitutes the third litigation¹ before this Court concerning the future of the former St. Patrick's campus, which includes a church, school and rectory. The underlying facts are more fully set forth in the Court's Decision and Order, dated March 8, 2013.

On March 8, 2013, Citizens for St. Patrick's filed a "Notice of Appeal and Application to the Zoning Board of Appeals for Review of Demolition Permits Issued by the City's Building Inspector" (see Goldman Aff., Ex. B, p. 1). The notice requests that respondent City of Watervliet Zoning Board of Appeals determine that respondent City of Watervliet Building Inspector, Mark Gilchrist, issued the demolition permits in violation of various provisions of the City Code, the City's Comprehensive Plan and SEQRA (see Goldman Aff., Ex. B, p. 2). Less than one business day later, petitioners commenced the instant proceeding pursuant to CPLR Article 78 against the City of Watervliet Zoning Board of Appeals, City of Watervliet Building Inspector and PCP Watervliet, LLC, the owner of the former St. Patrick's Church property (hereinafter PCP) (see Sweeney Aff., ¶3). On March 12, 2013, petitioners presented an order to show cause to this Court seeking to suspend the demolition permits and stay the demolition of the buildings situated on the former St. Patrick's campus, pending final determination of this proceeding. The Court signed petitioners'

¹ The first action, filed on January 4, 2013 (Albany County Index No. 64-13), against the City of Watervliet City Council, Nigro Companies and PCP Watervliet was discontinued by plaintiffs. The second action, filed on January 11, 2013 (Albany County Index No. 190-13), against the City of Watervliet City Council is presently pending before this Court. Nigro Companies, Inc. and PCP Watervliet, LLC were granted leave to intervene as parties/defendants in the second action upon the consent of counsel for plaintiffs and the City of Watervliet City Council. By written Decision and Order, dated March 8, 2013, this Court denied plaintiffs' application for a preliminary injunction. On March 13, 2013, the Court issued an Amended Decision and Order solely for the purpose of correcting the inadvertent omission of the Attorneys for Plaintiffs' appearance.

order to show cause, but declined to issue a temporary restraining order. The order to show cause was made returnable on March 14, 2013. Respondents filed papers in opposition to petitioners' application and oral argument was held on March 14, 2013.²

At oral argument, petitioners' counsel withdrew her request for the first two items of relief sought in the petition. Thus, the only outstanding matter pending before the Court is petitioners' request for an order requiring the Building Inspector to notify PCP that the demolition permits are suspended pending determination of petitioners' appeal to the City of Watervliet Zoning Board of Appeals. This Decision and Order follows.

DISCUSSION

I. PRELIMINARY INJUNCTIVE RELIEF

"It is well settled that a preliminary injunction, the purpose of which is to preserve the status quo pending resolution of the underlying dispute, is a drastic remedy and imposes upon the party seeking such relief the burden of demonstrating a likelihood of success on the merits, irreparable harm absent the issuance of the requested injunction and a balancing of the equities in his or her favor" (Bonnieview Holdings v Allinger, 263 AD2d 933, 935 [3d Dep't 1999] [internal citations omitted]; see CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Troy Sand & Gravel Co., Inc. v Town of Nassau, 101 AD3d 1505, 1506-1507 [3d Dep't 2012]; Sync Realty Group, Inc. v Rotterdam Ventures, Inc., 63 AD3d 1429, 1430 [3d Dep't 2009]).

A. Likelihood of Success on the Merits

As an initial matter, PCP argues that petitioners failed to plead any legal theory constituting a CPLR Article 78 cause of action. For their part, petitioners claim that this proceeding is in the

² Petitioners were granted the opportunity to submit reply papers on or before March 18, 2013.

nature of mandamus to compel the Building Inspector to suspend the demolition permits pursuant to General City Law § 81-a(6). To this end, it is well established that “[m]andamus to compel is appropriate only where a clear legal right to the relief sought has been shown, the action sought to be compelled is one commanded to be performed by law and no administrative discretion is involved” (New York Civ. Liberties Union v State of New York, 3 AD3d 811, 813-814 [3d Dep’t 2004], affd 4 NY3d 175 [2005]; see CPLR 7803[1]). “In other words, ‘[t]he act sought to be compelled must be ministerial, nondiscretionary and nonjudgmental, and [must] be premised upon specific statutory authority mandating performance in a specific manner’” (New York Civ. Liberties Union v State of New York, 3 AD3d at 814, quoting Matter of Brown v New York State Dept. of Social Servs., 106 AD2d 740, 741 [1984], lv denied 65 NY2d 604 [1985]). At this juncture, however, the Court need not determine whether the petition would, in fact, survive a pre-answer motion to dismiss (see CPLR 3211[a][7]).

Turning to the underlying merits of petitioners’ claims, the Court concludes that they have not established a likelihood of ultimate success. It is undisputed that the City of Watervliet Zoning Board of Appeals’ jurisdiction is found in General City Law § 81-a(4), which states as follows:

Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article (emphasis supplied).

In turn, Watervliet City Code § 272-37(G) provides, in pertinent part:

The [Zoning] Board of Appeals shall . . . review any order or decision of [the Building Inspector] where such order or decision is based upon the requirements of this Chapter 272, Zoning, or the Uniform Fire Prevention and Building Code or Chapter 175, Housing Standards, where applicable.

Thus, based on the plain language of Watervliet City Code § 272-37(G), the Zoning Board of Appeals does not have jurisdiction to hear and decide petitioners' appeal because the demolition permits were not issued under the City's Zoning Code, the Uniform Fire Prevention and Building Code or the Housing Standards. Rather, the Building Inspector issued the demolition permits pursuant to an entirely separate, non-zoning related provision of the City Code entitled "Building demolition; fee; insurance" (see Watervliet City Code § 127-4[A]).³ Accordingly, the Court is not persuaded that there is any likelihood petitioners will successfully obtain an order compelling the Building Inspector to suspend the demolition permits.

Equally significantly, PCP presented binding appellate caselaw, which leads this Court to conclude that the automatic stay provision of General City Law § 81-a(6) governing appeals to a Zoning Board of Appeals does not apply to the filing of an appeal by third parties, such as the petitioners herein (see Matter of Mamroneck Beach & Yacht Club, Inc. v Fraioli, 24 AD3d 669, 670-671 [2d Dep't 2005]; Barnathan v Garden City Park Water Dist., 21 AD2d 832, 832 [2d Dep't 1964]; see also Bonded Concrete v Town of Saugerties, 282 AD2d 900, 903 [3d Dep't 2001], lv dismissed 97 NY2d 653 [2001]; Historic Hornell, Inc. v City of Hornell Planning Bd., 19 Misc3d 1108[A], *3 [Sup Ct, Steuben County 2008]). Given the foregoing, the Court finds that plaintiff's failed to satisfy the first prong of the test for preliminary injunctive relief.

B. Irreparable Harm

On the other hand, the Court is persuaded that petitioners have made a sufficient showing that

³ Pursuant to Watervliet City Code § 127-4(A), "[n]o existing building or any part thereof shall be demolished until a permit therefor has been obtained from the Inspector of Buildings. Where application is made for a permit for the demolition of a building or part thereof which building or part thereof abuts upon a public street, the permit shall not be issued unless the applicant furnishes the Inspector of Buildings with certain evidence that the applicant has obtained a policy of liability insurance . . . which said insurance coverage shall be maintained in full force and effect until the work covered by the permit has been fully completed to the satisfaction of the Inspector of Buildings."

they would suffer irreparable harm absent the grant of the preliminary injunction. To this end, PCP has already engaged in some demolition activities authorized under the terms of the permits. By all accounts, PCP intends to continue these activities, actions which could conceivably render moot any relief the Court may eventually grant petitioners in the underlying CPLR Article 78 proceeding. Accordingly, the Court finds that petitioners have satisfied the second prong of the test for preliminary injunctive relief.

C. Balancing of the Equities

Following a comprehensive review of the record and papers submitted in opposition to petitioners' application, the Court finds that the balancing of the equities decidedly tilts against petitioners. As respondents pointed out, petitioners' alleged harm appears to be, at least in part, self-created because they delayed seeking a hearing before the Zoning Board of Appeals, or commencing litigation pertaining to the demolition permits until two months after they were issued (see generally Sync Realty Group, Inc. v Rotterdam Ventures, Inc., 63 AD3d at 1431). During this time period, PCP has "expend[ed] substantial sums of money on asbestos abatement and demolition activities" (Sweeney Aff., ¶25). Moreover, even after petitioner Christine Bulmer received copies of the subject demolition permits in response to her FOIL request, petitioners delayed commencing the instant litigation an additional 25 days (see Goldman Aff., Ex. G).

For these reasons, the Court finds that the circumstances underlying this proceeding are strikingly similar to those presented in Matter of Miner v Town of Duanesburg Planning Bd., in which the Third Department affirmed the dismissal of a petition based upon the doctrine of laches after a three month delay (98 AD3d 812, 814 [3d Dep't 2012], lv denied 20 NY3d 853 [2012] [noting that respondent had expended over \$200,000 and construction of the facility was near completion]). Accordingly, the Court concludes that petitioners failed to satisfy two of the three

prongs of the test for preliminary injunctive relief and, thus, their application must be denied.

II. PCP'S REQUEST FOR LEAVE TO APPLY FOR SANCTIONS AND COSTS PURSUANT TO 22 NYCRR § 130.1-1

Finally, the Court, in its discretion, hereby grants PCP's request for leave to apply for sanctions and costs against petitioners and/or their counsel pursuant to 22 NYCRR §130-1.1.

Those arguments not specifically addressed herein were found to be unpersuasive, or were otherwise rendered academic.

Accordingly, it is hereby

ORDERED, that petitioners' application for a preliminary injunction is denied; and it is further

ORDERED, that respondent PCP Watervliet, LLC's request for leave to apply for sanctions and costs pursuant to 22 NYCRR § 130-1.1 is granted; and it is further

ORDERED, that respondent PCP Watervliet, LLC's application for sanctions and costs shall be filed, on notice, within 30 days of the date of this Decision and Order.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the attorney for the municipal respondents. A copy of this Decision and Order together with all other papers are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: March 26, 2013
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

PAW
3/28/2013 *James J. Cr...*

Papers Considered:

1. Order to Show Cause and Notice of Petition with annexes; Kimberly A. O'Connor on March 12, 2013; Verified Petition, dated March 11, 2013, re Bulmer, sworn to March 11, 2013;
2. Affidavit of Paul J. GOUGHAN, sworn to March 14, 2013, with annexed exhibits; Affidavit of Mark Gilchrist, sworn to March 14, 2013, with annexed exhibits;
3. Affidavit of Robert L. Sweeney, Esq., sworn to March 14, 2013, with annexed exhibits;
4. Reply Affirmation of Rosemary Nichols, Esq., dated March 18, 2013, with annexed exhibits; Affidavit of John G. Waite, sworn to March 18, 2013, with annexed exhibits; Affidavit of James F. Bulmer, sworn to March 18, 2013, with annexed exhibits; *and*
5. Correspondence from Robert L. Sweeney, Esq. Addressed to the Hon. Kimberly A. O'Connor, dated March 18, 2013.

Albany County Clerk
Document Number 11364025
Rcvd 03/28/2013 3:37:43 PM
