

Hansen v Macedon

2013 NY Slip Op 30137(U)

January 24, 2013

Supreme Court, Wayne County

Docket Number: 74582/2012

Judge: Daniel G. Barrett

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At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 22nd day of August, 2012.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT STATE OF NEW YORK
COUNTY OF WAYNE

PAUL T. HANSEN,

Petitioner

DECISION
Index No. 74582

-vs-

2012

TOWN OF MACEDON,
William Hammond, Town Supervisor of the Town of Macedon
Scott Allen, Building Inspector and Zoning Officer for the Town of Macedon
Town of Macedon Planning Board:
Doug Allen, Chairman
Suzanne Airy, Planning Board Member
Merton Bartels, Planning Board Member
Tom Morrison, Planning Board Member
Greg Whitney, Planning Board Member
Town of Macedon Zoning Board of Appeals:
Warren Jeffries, Zoning Board of Appeals Chairman
Aaron Cook, Zoning Board of Appeals member
Carl Eligh, Zoning Board of Appeals member
Jon Gravino, Zoning Board of Appeals member
Ronald Santovito, Zoning Board of Appeals member
Town of Macedon Town Board:
Paul Kenyon, Town Board member
David Maul, Town Board member
David McEwen, Town Board member
Sandy Pagano, Town Board member
and John Doe 1-50,

Respondents

The Petitioner has filed this Article 78 proceeding to set aside and vacate building permits which were issued by the Macedon Town Building

Inspector for a house and a “barn/garage” and a Certificate of Occupancy on property owned by the Marvin’s located at 1005 Victor Road, Macedon, New York. Petitioner also seeks to have the Macedon Town Planning Board’s decisions dated December 8, 2003 and June 11, 2012 which recommended approval for the subdivision of the building lot at 1013 Victor Road forming 1005 Victor Road vacated and rescinded. Petitioner seeks to have the Macedon Zoning Board of Appeals Decisions rendered March 21, 2012 and June 20, 2012 denying Petitioner’s appeals reversed.

The Petitioner resides at 983 Victor Road, Macedon, New York. Mr. and Mrs. Marvin were his neighbors when he purchased this property over thirteen years ago.

The Petitioner has provided a very extensive record for this application. This Court appreciates the hard work the Petitioner devoted to this application. The following abbreviated time line is helpful in the analysis of this case:

1. October 22, 2003 - Marvin’s were issued a building permit to build an accessory building or a “barn/garage”;
2. December 8, 2003 - Planning Board approved the subdivision of 1013 Victor Road which formed 1005 Victor Road;
3. December 16, 2003 - The Marvin’s sell the house at 1013 Victor Road and the “barn/garage” under construction is located at 1005 Victor Road;
4. September 28, 2004 - An unsigned building permit is issued for the house construction at 1005 Victor Road;
5. August 14, 2007 - A reissued and unsigned building permit is issued for the construction of the house at 1005 Victor Road;

6. November 17, 2011 - A building permit is issued for the "barn/garage";
7. November 18, 2011 - A Certificate of Occupancy is issued for the "barn/garage";
8. January 18, 2012 - Petitioner filed an appeal with the Zoning Board of Appeals relative to the "barn/garage";
9. March 21, 2012 - Zoning Board of Appeals renders a Decision regarding the appeal;
10. March 22, 2012 - The Town and Building Inspector reissues a building permit for the house to be built at 1005 Victor Road;
11. March 23, 2012 - The Decision of the Zoning Board of Appeals is filed relative to the "barn/garage";
12. May 27, 2012 - Petitioner files an appeal regarding the issuance of the building permit for the house;
13. June 20, 2012 - Zoning Board of Appeals denies the Petitioner's appeal regarding the house building permit;
14. June 26, 2012 - The Decision of the Zoning Board of Appeals is filed regarding the house building permit;
15. July 18, 2012 - The Petitioner files this Article 78 proceeding.

STATUTE OF LIMITATIONS

A proceeding under Article 78 of the CPLR, to review a Decision of a Board

of Zoning Appeals must be initiated within thirty (30) days after the Decision is filed. Town Law Section 267-c. From the records the first Decision of the Zoning Board of Appeals was filed March 22, 2012 and a second Decision was filed June 26, 2012. Since this proceeding was initiated on July 18, 2012, the Decision of the Zoning Board of Appeals filed on March 22, 2012 is untimely. Petitioner argues that his application is timely because he filed a Notice of Claim pursuant to the General Municipal Law and that the Macedon Town did not adopt the thirty (30) provision of the Town Law. These arguments are unavailing. The time limit imposed by specific enabling statutes, rather than the time limits prescribed in Article 78 of the CPLR, govern proceedings to review the Decisions of Zoning Boards of Appeals. (CPLR Section 217, Fammler v. Board of Zoning Appeals of the Town of Hempstead, 254 A.D. 777, 4 N.Y.S. 2d 760). This thirty day period cannot even be extended by a Court. Sengstacken v. Zoning Board of Appeals of the Town of Ramapo, 87 A.D. 2d 651, 448 N.Y.S. 2d 521.

The Planning Board approved the subdivision of the Marvin property in 2003. Simply because the Planning Board opined in June of 2012 that the original site plan is valid provides no basis to appeal the 2003 Planning Board Decision.

NECESSARY PARTY

For a number of years, the courts have insisted that an applicant or owner of property who has obtained a permit must be made a party to a proceeding challenging the approval. See, e.g., Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock, 16 A.D. 3d 991, 792 N.Y.S. 2d 661; Manupella v. Troy City Board of Standards and Appeals, 272 A.D. 2d 761, 707 N.Y.S. 2d 707.

In Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals, 5 N.Y. 3d 452, 805 N.Y.S. 2d 525, 839 N.E. 2d 878, the Court of Appeals determined that before rendering a determination on a motion to dismiss a proceeding as a consequence of the failure to name an indispensable

party, a Court must consider all of the five factors set forth in CPLR Section 1001 (b).

The Red Hook decision indicated that a Court need not set forth its analysis with respect to each factor but the Decision must indicate that all were considered. This Court has considered these five factors and finds that the Marvin's are indispensable parties to this proceeding. See also Caltagirone v. Zoning Board of Appeals, 49 A.D. 3d 729, 852 N.Y.S. 2d 850.

Petitioner in his Notice of Motion dated August 17, 2012 indicates if Respondents wish to join the Marvin's in this action, Respondents can make a motion under CPLR Section 1001 to join them. It is the obligation of the Petitioner to name the Marvin's as a party in this action. The time to bring the Marvin's in as a party expired thirty (30) days after the Decision was filed on June 26, 2012.

JURISDICTION

The Petitioner contends he properly served all the named parties in this action by serving the Macedon Town Clerk. The Petitioner failed to comply with the mandatory prerequisites of the CPLR as to the service required on the Zoning Board of the Appeals in order to properly commence this proceeding against the Zoning Board of Appeals (see Beck v. Goodday, 24 A.D. 2d 1016, 265 N.Y.S. 2d 916, Sengstacken (supra), County Side Sand and Gravel, Inc. v. Town of Pomfret Zoning Board of Appeals, 57 A.D. 3d 1501, 87 N.Y.S. 2d 654.)

The Petitioner submitted an Affidavit of Service wherein the process server made a notation in his Affidavit that:

"Sharleen Fleck, at the Town of Macedon Clerk's
Office, 32 Main Street, Macedon, New York, 14502.

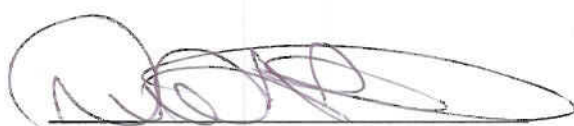
She stated 'I will accept service of process for the Town of Macedon and individuals named in the Petition.' Then therefore the serving of papers on Sharleen Fleck satisfies the service of process to the Town of Macedon as well as all listed Respondents."

The Respondents have raised an objection to this service on the Zoning Board of Appeals.

In a case pursuant to Article 78 of the CPLR to annul a determination of the Board of Zoning Appeals of the Town of Smithtown, the Appellate Division Second Department held that the Town Clerk's oral representation to petitioner's attorney that service could be made on him does not estop respondent's from asserting their right to rely on proper service (Lara v. Kern, 35 A.D. 2d 958, 318 N.Y.S. 2d 273). The Court held the Petition must be dismissed for failure to serve the process in accordance with the statutory mandate.

Based on the foregoing, this Court does not have jurisdiction to review the determination of the Zoning Board of Appeals and must dismiss this Petition. Attorneys for Respondents to prepare an Order consistent with this Decision.

Dated: January 24, 2013
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

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