SHORT FORM ORDER

INDEX No. 10-692

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 9-18-12
ADJ. DATE 2-26-13
Mot. Seq. # 002 - MD
003 - MD

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NEW YORK & ATLANTIC RAILWAY COMPANY, THE LONG ISLAND RAIL ROAD COMPANY and COASTAL DISTRIBUTION, LLC,

Plaintiffs,

- against -

THE TOWN OF BABYLON,

Defendant.

- and -

THE TOWN OF BABYLON BOARD OF ZONING and PINELAWN CEMETERY,

Additional Defendants.

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Upon the following papers numbered 1 to 37 read on these motions to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8, 10 - 14; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 18, 21 - 22; Replying Affidavits and supporting papers 26 - 28, 31 - 37; Other memoranda of law 9, 15 - 16, 19 - 20, 23, 24 - 25, 29 - 30; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant Town of Babylon and additional defendant Town of Babylon Board of Zoning for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the first, second and third causes of action in the complaint is denied; and it is further

ORDERED that the motion by the additional defendant Pinelawn Cemetery for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the complaint is denied; and it is further

ORDERED that the plaintiff's fourth cause of action is hereby severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]); and it is further

ORDERED that the plaintiff's fourth cause of action is hereby converted into a CPLR article 78 proceeding, with the summons deemed the notice of petition and the complaint deemed the petition (*see* CPLR 103 [c]); and it is further

ORDERED that pursuant to CPLR 7804 (f), any party may notice this matter for hearing upon appropriate notice.

In this putative hybrid CPLR article 78 proceeding and action for declaratory relief, the plaintiffs seek a judgment 1) declaring that the defendant Town of Babylon (Town) has no zoning jurisdiction over a certain "transportation facility" pursuant to Public Authorities Law 1266 [8], 2) declaring that two sections of the Town of Babylon Code (Town Code) conflict with the Public Authorities Law (PAL) and are not applicable to said transportation facility, 3) declaring that the Town is equitably estopped from enforcing a stop work order issued against said facility, and 4) pursuant to CPLR article 78, reversing, vacating, and annulling the April 22, 2005 determination of the additional defendant Town of Babylon Board of Zoning Appeals sued herein as Town of Babylon Board of Zoning (BZA) denying the appeal from said stop work order.

The plaintiff The Long Island Rail Road Company (LIRR) is in possession of two parcels of property located within the Town (the property) pursuant to leases it entered into with the owner, the additional defendant Pinelawn Cemetery (Pinelawn), in 1904 and 1905. LIRR entered into a Transfer Agreement with the plaintiff New York & Atlantic Railway (NYAR) on or about November 1996. Said agreement transferred LIRR's freight operations to NYAR, including use of the property. On or about February 2002, NYAR entered into a contract with the plaintiff Coastal Distribution, LLC (Coastal) to operate a transloading facility on the property. Transloading is the practice of transferring a shipment from one mode of transportation to another, for example, from trucks to rail cars. Thereafter, Coastal commenced construction of a 22,000 square foot building (the transloading building) on the property. On March 29, 2004, the Town issued a stop work order directing that all work on the transloading building cease, as Coastal had not obtained a building permit for the construction. Coastal appealed the issuance of the stop work order to the BZA, which denied the appeal in a written decision on April 22, 2005.

Coastal and NYAR then commenced a timely action in the United States District Court, Eastern District of New York seeking to enjoin enforcement of the stop work order on the ground that the Town lacked authority to enforce its zoning laws based on federal law, which grants an exemption to rail roads and generally preempts local laws. Said action also included a pendant cause of action alleging that the BZA's denial of the appeal was arbitrary and capricious. After years of litigation, including a referral to the Surface Transportation Board (STB) for a determination whether Coastal was entitled to protection under federal law, the United States Court of Appeals for the Second Circuit affirmed the STB's finding that Coastal is not a rail carrier and that the Town's zoning jurisdiction was not preempted by federal regulations governing "transportation by a rail carrier." However, the Second Circuit held that "there is no question that the activity in issue constitutes 'transportation' within the meaning of the [federal] statute."

The Town now moves for an order dismissing the first, second and third causes of action pursuant to CPLR 3211 (a) (1) and (7). The Town contends, among other things, that the plaintiffs' first and second causes of action are barred by the doctrines of res judicata and collateral estoppel. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2009]; ***Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.***, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]; ***Francis v Vornado Realty Trust/Kings Plaza Mall***, 89 AD3d 680, 931 NYS2d 888 [2d Dept 2011]). In support of its motion, the Town submits, among other things, the complaint, the STB decision dated January 31, 2008, the decision of the Second Circuit, and the BZA decision dated April 21, 2005.

The doctrine of res judicata applies to quasi-judicial determinations of administrative agencies, including boards of zoning appeals, and precludes relitigation of claims which previously were litigated on the merits or might have been so litigated at the time (*see* ***Calapai v Zoning Bd. of Appeals of Vil. of Babylon***, 57 AD3d 987, 871 NYS2d 288 [2d Dept 2008]). Pursuant to the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (***O'Brien v City of Syracuse***, 54 NY2d 353, 357, 445 NYS2d 687 [1981]; *see* ***Incorporated Vil. of Laurel Hollow v Nichols***, 260 AD2d 439, 440, 688 NYS2d 581 [2d Dept 1999]; ***Schwartzreich v E.P.C. Carting Co.***, 246 AD2d 439, 668 NYS2d 370 [1st Dept 1998]; ***Cornwall Warehousing v Town of New Windsor***, 238 AD2d 370, 656 NYS2d 329 [2d Dept 1997]). A municipal agency's decision has not been brought to a final conclusion where a CPLR article 78 proceeding is commenced (*see generally* ***Parker v Blauvelt Vol. Fire Co.***, 93 NY2d 343, 690 NYS2d 478 [1999]; ***Matter of Carter v Walt Whitman N.Y. City Hous. Auth.***, 98 AD3d 1113, 951 NYS2d 210 [2d Dept 2012]).

Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). The two basic requirements of the

doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664, 563 NYS2d 24 [1990]; ***Matter of New York State Site Dev. Corp. v New York State Dept. of Envtl. Conservation,*** 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). Here, the documentary evidence does not conclusively resolve the question whether the issue before the BZA has been brought to a final conclusion considering the plaintiffs challenge to its decision on the ground that it is arbitrary and capricious. If the plaintiffs are in the process of litigating the issues, then they have not yet had a full and fair opportunity to contest the matter. Accordingly, that branch of the Town's motion which seeks to dismiss the first and second cause of action pursuant to CPLR 3211 (a) (1) is denied.

The second branch of the Town's motion seeks to dismiss the petition for failure to state a cause of action. Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Lucia v Goldman***, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

Here, the plaintiffs allege that they challenged the BZA's determination based upon CPLR article 78 standards in their federal court action. The Town does not dispute that allegation, and it does not contend in its submission that the instant hybrid action is untimely. Accepting the alleged facts as true, the Court finds that the plaintiffs have plead cognizable causes of action for declaratory judgment on the ground that the BZA's decision has not been brought to a final conclusion, and that first and second causes of action are not barred by the doctrines of res judicata or collateral estoppel. In addition, it appears that said causes of action seek relief which is logically included within the ambit of the CPLR article 78 proceeding, and may well be included in any relief afforded to the plaintiffs should they be successful in voiding the BZA determination. Accordingly, that branch of the Town's motion which seeks to dismiss the first and second cause of action pursuant to CPLR 3211 (a) (7) is denied.

The Town further contends that the third cause of action for equitable estoppel fails because the Town is immune from such a claim. Generally, a municipality cannot be estopped from asserting its

governmental power as to acts within its governmental capacity, or to prevent it from discharging its statutory duties or correcting an administrative error (***Matter of Daleview Nursing Home v Axelrod***, 62 NY2d 30, 475 NYS2d 826 [1984]; ***Matter of Palm Mgt. Corp. v Goldstein***, 29 AD3d 801, 815 NYS2d 670 [2d Dept 2006]; ***McGannon v Board of Trustees for the Vil. of Pomona***, 239 AD2d 392, 657 NYS2d 745 [2d Dept 1997]). Indeed, a municipality will not be estopped from enforcing its zoning code through the issuance of a stop work order after it erroneously issued a building permit (***Matter of Palm Mgt. Corp. v Goldstein***, *supra*; ***McGannon v Board of Trustees for the Vil. of Pomona***, *supra*). Moreover, it has been held that the doctrine of equitable estoppel does not apply to preclude municipal action where the applicant could have readily discovered that it had received erroneous advice from a municipal worker by reviewing the applicable zoning ordinance (***Matter of Twin Town Little League v Town of Poestenkill***, 249 AD2d 811, 671 NYS2d 831 [3d Dept 1998]). However, the Court of Appeals has held that the rule is not absolute. "We have held many times that estoppel is not available against a governmental agency in the exercise of its governmental functions [citations omitted]). The rare exception to this general rule requires an "'unusual factual situation' " (***Pless v Town of Royalton***, 81 NY2d 1047, 601 NYS2d 455 [1993] quoting ***Matter of Daleview Nursing Home v Axelrod***, 62 NY2d at 33, 475 NYS2d at 827; *see generally* ***Matter of Hamptons Hosp. & Med. Ctr. v Moore***, 52 NY2d 88, 436 NYS2d 239 [1981]).

In their complaint, the plaintiffs allege that the Town's Commissioner of Planning and Development issued a letter advising their architects that the Town did not have jurisdiction over the LIRR property, and that they commenced construction of the transloading building, and were near completion, when the Town issued its stop work order. In addition, the plaintiffs allege that Coastal invested "millions of dollars in making substantial improvements to the site," and that the transloading building "became and remains the property of the LIRR." Here, the complaint sets forth a cognizable cause of action for equitable estoppel, and the Town has not conclusively established that this is not an "unusual fact situation,' and that no such cause of action exists here. Accordingly, that branch of the Town's motion which seeks to dismiss the third cause of action is denied, and the motion is denied in its entirety.

Pinelawn now moves for relief identical to that requested by the Town in its motion, except that Pinelawn also seeks to dismiss the CPLR article 78 proceeding set forth in the plaintiff's fourth cause of action. In support of its motion, Pinelawn submits the affirmation of its attorney, the complaint, and the first amended and supplemental complaint served herein. In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a) (7) and 7804 (f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference (*see* ***Matter of Eastern Oaks Dev., LLC v Town of Clinton***, 76 AD3d 676, 906 NYS2d 611 [2d Dept 2010]; ***Matter of Bloodgood v Town of Huntington***, 58 AD3d 619, 871 NYS2d 644 [2d Dept 2009]). The motion must be determined solely on the allegations contained in the petition (*see* ***Matter of East End Resources, LLC v Town of Southold Planning Bd.***, 81 AD3d 947, 917 NYS2d 315 [2d Dept 2011]; ***Matter of McComb v Reasoner***, 29 AD3d 795, 815 NYS2d 665 [2d Dept 2006]; ***Matter of Long Is. Contrs. Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (*see* ***Wohlgemuth v Lang Constr., LLC***, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]).

In its submission, Pinelawn does not set forth any facts which would alter the findings of the Court in its discussion of the Town's motion regarding the allegations in the complaint, and the Court finds that the plaintiffs have pled a cognizable claim for CPLR article 78 relief. In addition, for the reasons set forth above, those branches of Pinelawn's motion which seek to dismiss the plaintiff's first, second and third causes of action are denied. Accordingly, Pinelawn's motion is denied in its entirety.

The Court's finding that the plaintiffs have pled a cognizable claim for CPLR article 78 relief does not obviate the fact that the plaintiffs failed to serve a pleading containing both a notice of petition and petition and a summons and complaint (*see also* CPLR 304 [a]). Thus, the fourth cause of action in the complaint was not noticed for a hearing and it was not issued a motion sequence number by the Clerk of the Court. However, the parties have treated said cause of action as one for CPLR article 78 relief, and the Town has served an answer and a certified return in this matter.[1] Therefore, the Court finds that the plaintiffs' fourth cause of action should be converted to a special proceeding pursuant to CPLR 103 (c), and that the parties should have the opportunity to notice the proceeding for a hearing pursuant to CPLR article 78.

Upon the service and filing of such notice, the party serving said notice shall also serve upon the Clerk a copy of this order, and the Clerk, upon receipt, shall assign this motion a motion sequence number.

Dated: AUGUST 2, 2013.

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

[1] The Town's answer is addressed to the plaintiff's fourth cause of action only, and Pinelawn has not yet served its answer to the complaint. Thus, both motions to dismiss the first three causes of action herein are deemed to be pre-answer motions pursuant to CPLR 3211 (e).