STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

SHINE TIME, LLC, BRIAN C. HART and ERIC J. HART,

Plaintiff,

-against-

THE TOWN OF SCHODACK and THE COUNTY OF RENSSELAER,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0226-12 Index No. 238051

Appearances: Wilson, Elser, Moskowitz,
Edelman & Dicker LLP
Attorneys For Plaintiffs
677 Broadway
Albany, NY 12207-2996

Stephen A. Pechenik, Esq.
Attorney For Defendant
County of Rensselaer
1600 Seventh Avenue
Troy, NY 12180

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Plaintiffs Brian C. Hart and Eric J. Hart are owners of real property having a street address of 1515 Columbia Turnpike, in the Town of Schodack (the "Town"), Rensselaer County ("County"). Plaintiff Shine Time, LLC ("plaintiff") is a tenant of the premises and, since 2003, has operated a car wash at that location. The premises is located within Town of Schodack Sewer District No. 6. Sewer District No. 6 does not have a waste water treatment facility. Because, in the view of the Town Board, the financing of a waste water

treatment facility in a sewer district as small as Sewer District No. 6 would be prohibitive, the Town, in 1998, contracted with the Town of East Greenbush to connect with and utilize its waste water treatment facility.[1] In 2002 the plaintiff applied to the Town of Schodack for a permit to connect to the Town sewer system (Sewer District No. 6). The application was granted, and the plaintiff was required to pay a sewer connection fee of $5,000.00, which the plaintiff paid. In 2007, pursuant to the 2004 Sewer Connection Agreement with the Town of East Greenbush, the Town of Schodack issued invoices for an additional sewer connection fee denominated "East Greenbush Sewer Hookup Fees pursuant to Agreement dated the 24th day of July, 1998". The invoices were issued to at least eight commercial property owners[2]. The one issued to the plaintiff, dated March 22, 2007, was in the amount of $66,360.00[3]. Notwithstanding the issuance of these invoices, officials of both Towns continued to conduct further negotiations concerning the sewer connection fees in the ensuing two years. In 2009 they ultimately agreed that the sewer connection fee applicable to commercial properties within Sewer District No. 6 should be reduced. As a consequence, the sewer connection fee for the plaintiff was reduced from $66,360.00 to $35,000.00. It

---

[1]The original contract between the two Towns was entered into on July 24, 1998 ("1998 Sewer Connection Agreement"). A subsequent agreement was entered into on May 27, 2004 ("2004 Sewer Connection Agreement").

[2]It is indicated that there were only a "limited" number of single family residential units in the Sewer District, and that the sewer hookup fees for these property owners had already been paid.

[3]The total amount of the invoice was actually for $71,360.00, however Shine Time was credited with the $5,000.00 payment it made in 2002. Significantly, although plaintiff was issued an invoice for this amount, it was never levied on a Town and County real property tax bill.

is indicated by the Town Supervisor of the Town of Schodack that the $35,000.00 which was invoiced represented the actual amount paid (or as the Town Supervisor indicated, "passed through") to the Town of East Greenbush, without any additional "markup". As a result of the foregoing, a sewer connection fee of $35,000.00 was levied on plaintiff's 2010 Town and County real property tax bill. This amount was subsequently confirmed in a letter dated January 20, 2011 from the attorney of the Town of Schodack to the attorney for Shine Time.[4]

On October 13, 2011 the plaintiffs commenced the above-captioned action for injunctive and declaratory relief. Specifically, they seek a determination that the additional sewer connection fee (beyond the $5,000.00 paid in 2002) is unlawful under Town Law § 198 (1) (h), and violates NY Constitution Art IX §§ 1, 2, as well as the substantive and procedural due process clauses of the federal and state constitutions. In addition, they allege that the sewer connection fee constitutes a "taking" under the federal and state constitutions, and that the Town of Schodack should be estopped from charging and enforcing the fee. As

---

[4]The letter recited::

> "This will confirm that the 'invoice' sent to your client and dated March 22, 2007, is not the operative billing in this matter. Instead, the proper billing was the charge placed upon the property owned by the Harts, from whom your clients rent, in (sic) the sum of $35,000.00. That amount was imposed with the real property tax bill in January, 2009."

There is no evidence that the Town ever made any further attempt to collect this sum. In this respect, the Court finds that the Town abandoned the invoice in the amount of $66,360.00.

a final cause of action, they seek a permanent injunction from the collection of the sewer connection fee. Issue was joined, and the plaintiffs made a motion pursuant to CPLR 3212 for summary judgment and, pursuant to CPLR 3124 and 3126, to strike the answer of the defendant Town of Schodack. The defendants opposed plaintiff's motion.

In a decision-order dated April 1, 2013 the Court, citing Spinney At Pond View, LLC v Town Board of Town of Schodack (99 AD2d 1088 [3d Dept., 2012), granted the cross-motion of the Town for summary judgment and dismissed the action on grounds that the action was untimely commenced. The Court also denied plaintiffs' motion for summary judgment, and for relief under CPLR 3124 and 3126.

The plaintiffs have made a motion to reargue limited to grounds that the Court, in its April 1, 2013 decision-order, failed to address that portion of their motion which sought summary judgment against the County. The County has cross-moved for summary judgment. The plaintiffs argue that the statute of limitations defense was not raised by the County, and therefore their claims against the County are not time-barred.

A motion to reargue, directed to the sound discretion of the Court, must demonstrate that the Court overlooked, misapplied or misapprehended the relevant facts or law (see, CPLR 2221 [d] [2]; Loris v S & W Realty Corp., 16 AD3d 729, 730 [3rd Dept., 2005]; Matter of Smith v Town of Plattekill, 274 AD2d 900, 901-902 [3d Dept., 2000]; Spa Realty Associates v. Springs Associates, 213 AD2d 781, 783 [3rd Dept., 1995]; Grassel v Albany Medical Center, 223 AD2d 803, 803 [3rd Dept., 1996]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (see Foley v Roche 68 AD2d 558, 567 [1st Dept., 1979]), lv denied 56 NY2d 507).

The Court finds that the motion to reargue, as limited, should be granted by reason that the Court did not expressly address that portion of plaintiff's motion for relief against the County. The plaintiffs have submitted copies of all the papers submitted by the parties on the original motion, which will be considered.

In this instance, plaintiffs' second amended complaint recites as follows:

> "Defendant County of Rensselaer ('County') is a County situated in the State of New York, operated and governed as a County pursuant to the New York State County Law. Although Plaintiff does not allege that the County is guilty of any active wrongdoing in this case, the County is named herein as a 'necessary' defendant because the annulment and enjoinment of certain acts by Schodack (described below) will require an order modifying a property tax bill." (Plaintiff's Second Amended Complaint, paragraph 6).

Plaintiffs do not allege any wrongdoing on the part of the County. All of the causes of action are directed solely at the acts of the Town. Plaintiffs have failed on this motion, to demonstrate how or in what respect the County has taken any action in violation of plaintiffs' statutory or constitutional rights. There is no factual basis for a claim of estoppel against the County, or factual support for the issuance of a permanent injunction. In the Court's view, it would be improper for the Court to permit the plaintiffs to collaterally attack the County's tax lien, in a situation where the plaintiffs have been unsuccessful in their direct attempt to challenge the underlying assessment imposed by the Town. For this reason alone, the Court finds that the plaintiffs failed to carry their burden of proof on the motion as against the County.

Even if, however, the foregoing reasoning did not apply, the Court would still find

that the plaintiffs failed in their burden of proof on the motion.

Town Law § 198 (1) contains the following provisions:

> "Sewer districts. After a sewer district shall have been established, the town board may: []
>
> (f) enter into a contract or contracts with another sewer district or with any incorporated city or village or with one or more corporations or individuals for the joint disposal of sewage, and the expense of such joint disposal of sewage shall be apportioned between the contracting parties in proportion to the areas served, volumes of sewage disposed of or the benefits received by each contracting party; []
>
> (h) establish, from time to time, charges, fees or rates to be paid by the owners of real property within such district for the connection of house service lines or mains with such sewer system. Such connection charge may include any expense incurred for the purpose of providing service, whether such expense be incurred for construction within the property line or within the street lines. In addition, such connection charge may include a fee for the inspection of such connection, the expense of performing service in relation thereto *or for any other special benefit received*"[]. (emphasis supplied)

Town Law § 202 recites, in part, as follows:

> "1. *The expense of any public improvement made under authority of this article shall include the amount of all contracts*, the costs of all lands and interests therein necessarily acquired including the total payments of principal remaining on obligations assumed pursuant to paragraph (b) of subdivision twelve of section one hundred ninety-eight, the costs of erection of necessary buildings for operation or administration of the improvement, printing, publishing, interest on loans, legal and engineering services *and all other expenses incurred or occasioned by reason of the improvement or project.* [] (emphasis supplied)
>
> "2. The expense of the establishment of a sewer, sewage

> disposal, wastewater disposal, drainage or water quality treatment district and of constructing a trunk sewer or drainage system therein and of constructing lateral sewers, drains and water mains pursuant to paragraph (a) of subdivision one of section one hundred ninety-nine, and of constructing street improvements pursuant to section two hundred shall be borne by local assessment upon the several lots and parcels of lands which the town board shall determine and specify to be especially benefited by the improvement, and the town board shall apportion and assess upon and collect from the several lots and parcels of land so deemed benefited, so much upon and from each as shall be in just proportion to the amount of benefit which the improvement shall confer upon the same." (Town § 202, emphasis supplied)

In the Court's view paragraph 2 of Town Law § 202, which mentions "the expense of the establishment of a sewer, sewage disposal, wastewater disposal drainage or water quality treatment district", is referring to the expenses set forth in paragraph 1, which is broadly worded to include "the amount of all contracts" and "all other expenses incurred or occasioned by reason of the improvement or project" (id.). Of great significance here, the Town has the authority to enter into contracts with other municipalities for purposes of joint sewage disposal (Town Law § 198 [1] [f], supra). The authority to enter into such contracts implicitly carries with it the authority to fulfill the financial obligations which arise as a result of such municipal agreements. The plaintiff would construe Town Law § 198 (1) (h) narrowly, to authorize the Town only to recover costs for physical improvements to plaintiffs' property (or adjacent property) ignoring the last phrase of said section "or any other special benefit received". The Court does not agree.

Moreover, by entering into the Sewer Connection Agreements, the Town of Schodack conferred a special benefit, within the meaning of Town Law § 198 (1) (h), upon

the effected property by bringing waste water disposal service to Sewer District No. 6. The special benefit is of the kind and nature expressly mentioned in Town Law § 198 (1) (f) (supra). As pointed out by the Town, one hundred percent of the sewer connection fee charged to effected property owners is paid over to the Town of East Greenbush, as part of the compensation for use of the Town of East Greenbush waste water treatment facility.

The Court in New York State Dormitory Auth. v Board of Trustees (206 AD2d 483 [2d Dept., 1994]) stated the following:

> "It is well settled that special assessments are presumed to be valid, regular, and legal, and that the burden of rebutting the presumption falls upon the landowner (see, Matter of Pokoik v Incorporated Vil. of Ocean Beach, 143 AD2d 1021; Matter of Nolan v Bureau of Assessors, 31 NY2d 90). Moreover, a determination by a board with respect to the amount of benefit conferred on properties by improvements involves the exercise of the legislative power which will not be interfered with unless it is shown to be so arbitrary or palpably unjust as to amount to a confiscation of property (see, Baglivi v Town of Highlands, 147 AD2d 432; DWS N. Y. Holdings v County of Dutchess, 110 AD2d 837; Matter of Scarsdale Chateaux RTN v Steyer, 53 AD2d 672, affd 41 NY2d 1043)." (New York State Dormitory Auth. v Board of Trustees, supra, at 484, also citing Kermani v Town Bd., 40 NY2d 854)

The 1998 Sewer Connection Agreement between the Town of Schodack and the Town of East Greenbush, established a formula for a sewer connection fee based upon water usage. Under the formula the Town of East Greenbush would receive a one time sewer connection fee calculated by dividing the average annual water usage by 400 gallons per day[5], multiplied by $5,000.00. The 2004 Sewer Connection Agreement, as relevant here,

---

[5]400 gallons per day was deemed the equivalent of the average water usage for a single family residence, for which there was an assessment of $5,000.00.

contained essentially the same formula, even though it differentiated between residences and commercial property. The Town has the responsibility of apportioning the costs of the waste water disposal system "in just proportion to the amount of benefit which the improvement shall confer upon the same" (see Town Law § 202 [2]). Generally speaking, with regard to such apportionment "[t]he Town Board's determination 'is conclusive and not subject to review by the courts in the absence of a showing of fraudulent or arbitrarily discriminative action by the council'" (Matter of Brewster-Mill Park Realty v Town Bd., 17 AD2d 467, 468 [3d Dept 1962], quoting Matter of Amundson Ave. Sewer, 24 Misc 2d 618, 623-624). Significantly, it is the burden of the property owner to establish that the owner was not benefited or only received a comparatively insignificant benefit (id.). In Kermani v Town Board of Guilderland (40 NY2d 854, 855 [1976], supra), the Court rejected a taxpayer's argument that the sewer installation charge should bear a direct relation to the assessed value of the property. The Court there found that the petitioner did not sustain his burden of "demonstrating that the town [] failed to meet the statutory mandate that the financial burden of sewer system installation shall be apportioned among the parcels benefited 'in just proportion to the amount of benefit which the improvement shall confer upon the same'" (id., citing Town Law § 202 [2]). Here, plaintiffs have failed in their burden to demonstrate that the Town's action was either fraudulent or arbitrarily discriminative (see Matter of Brewster-Mill Park Realty v Town Bd., supra), or that the plaintiffs' property was only benefited in a comparatively insignificant manner (see id.). Nor have the plaintiffs carried their burden of demonstrating that the Town lacked jurisdiction, or that its action was so flagrantly baseless as to amount to a confiscation of

their property (see Scarsdale Chateaux RTN v Steyer, 53 AD2d 672, 673 [2d Dept., 1976], aff'd 41 NY2d 1043 [1977]).

In this instance, the record indicates that the Town of East Greenbush did not present a formal demand to the Town of Schodack for payment of the sewer connection fees due it until 2007. Thereafter the two Towns negotiated further, after which, in the Fall of 2009, they reached a final agreement with respect to the amount owed (which resulted in a further reduction of the fees to be charged). There is, in the Court's view, no showing of bad faith on the part of Town officials.

The Court finds that the plaintiffs failed to satisfy their burden of demonstrating that the Town's action violated NY Constitution Article IX (1) and/or (2) by acting beyond the scope of Town Law § 198 (1) (h). Accordingly, any argument directed against the County derived from, or arising out of the actions of Town officials has no merit.

Similarly, mindful of the broad discretion the Town possesses in imposing a special assessment, the Court finds that the plaintiffs have failed to carry their burden of demonstrating that the Town's action constituted a confiscation of its property and/or a taking under the substantive Due Process Clause of the United States or New York State Constitutions (see In re the Confirmation of the Report of the Comm'rs of Assessment for Grading, Paving & otherwise Improving Sackett & De Graw Sts., in the City of Brooklyn, 74 NY 95, 107 [1878]; In re Improvement of Constr. of Lateral Sewer, 24 Misc. 2d 618, 623-624 [Sup. Ct,. 1959]; Scarsdale Chateau RTN v Steyer, 53 AD2d 672, 673, supra).

Because an administrative mechanism was available to challenge the assessment both before it was final (see Town Law § 239), and after administrative review (see Town Law

§§ 239, 246), the Court finds that plaintiffs failed in their burden of proof to demonstrate a procedural due process violation (see Hughes Vil. Rest., Inc. v Village of Castleton-on-Hudson, 46 AD3d 1044, 1046 [3rd Dept., 2007).

The plaintiffs maintain that the Town should have been estopped from collecting any more than the $5,000.00 it initially charged for the sewer connection fee. As noted, the delay in imposing the proper assessment appears to be the result of protracted negotiations between the Town of Schodack and the Town of East Greenbush concerning the sewer connection fee owed to the Town of East Greenbush. In addition, the Court cannot ignore the fact that, as set forth above, the plaintiffs (as well as other tax payers in Sewer District No. 6) received a significant benefit through their ability to utilize the Town of East Greenbush water treatment facility. For the reasons set forth in its decision-order dated April 1, 2013, the Court finds that principles of estoppel do not apply to prevent the Town or County from carrying out their responsibilities under the Town Law or Real Property Tax Law to collect the special assessment (see Matter of Schorr v New York City Department of Housing Preservation, 10 NY3d 776, 779 [2008]; Matter of Pegasus Cleaning Corporation v Smith, 73 AD3d 1328, 1330 [3rd Dept., 2010]; Matter of Amsterdam Nursing Home Corporation (1992) v Daines, 68 AD3d 1591, 1592 [3rd Dept., 2009]). Lastly, based upon all of the foregoing, because the plaintiffs have failed to demonstrate that any of the actions of the Town or County are *ultra vires*, and/or a violation of plaintiffs' state or federal constitutional rights, the Court finds that the plaintiffs have failed to demonstrate, prima facie, their entitlement to a permanent injunction to prevent collection of the assessment and/or imposition of a lien.

Turning to the County's cross- motion for summary judgment, the plaintiffs assert that it is improper for the County to make such a cross-motion in response to the motion to reargue. In the Court's view, there is no restriction in CPLR 2215 with regard to the subject-matter of a cross-motion; and, indeed, the relief could have been sought by a separate motion. The Court finds that this is not a reason to deny the cross-motion.

The County argues that the complaint must be dismissed because the County, which in its view performs a ministerial function in collecting the tax, is only involved secondarily and derivatively as a tax collector, and has no culpability (or liability) for the actions of the Town. The County points out that all of the actions alleged to be wrongful in plaintiffs' second amended complaint are those of Town officials, not County officials. It maintains that because the action was dismissed as against the Town, the action may not now proceed forward in the absence of a necessary party. The Court agrees.

In this instance, the Town of Schodack, the only alleged wrongdoer here, is no longer a party to the action, having been granted summary judgment. In the Court's view, in order to defeat the County's tax lien, the plaintiffs first had to be successful in overturning the Town's assessment, which the plaintiffs have failed to do. As noted, there are no factual allegations in the complaint supportive of any wrongdoing on the part of the County. Nor do the plaintiffs advance arguments which would mandate judgment against the County as a matter of law. The Court finds that it may properly search the record (which includes the motion papers submitted by the plaintiffs and the Town on the original motion for summary judgment). Mindful of the presumptions set forth above with respect to lawfulness and regularity of special assessments (particularly with regard their apportionment), and mindful

that the County was not involved with any of the proceedings before the Town, the Court finds that the County met its burden of proof on the motion. Plaintiffs have not presented evidence to demonstrate the existence of a triable issue of fact. Under the circumstances, the Court finds that the cross-motion of the County must be granted.

Lastly, the Court is mindful of its obligation to make appropriate declarations in an action for a declaratory judgment (Matter of Gabrielli v Town of New Paltz, 93 AD3d 923, 925 [3d Dept., 2012]). The Court will proceed to do so.

Accordingly, it is

ORDERED, that the plaintiffs' limited motion for reargument of their prior motion is granted, and upon reargument, plaintiff's motion for summary judgment against the defendant County of Rensselaer is denied; and it is further

ORDERED, that the cross-motion of the defendant County of Rensselaer for summary judgment is granted; and it is

ORDERED, ADJUDGED and DECLARED, that the actions of the Town of Schodack in levying a $35,000.00 sewer connection fee as a special assessment on plaintiffs' 2010 Town and County real property tax bill was not an *ultra vires* act under Town Law § 198 (1) (h); and it is

ORDERED, ADJUDGED and DECLARED, that the actions of the Town of Schodack in levying a $35,000.00 sewer connection fee as a special assessment on plaintiffs' 2010 Town and County real property tax bill, and the actions of the County of Rensselaer under the provisions of the New York Real Property Tax Law in imposing and/or enforcing a tax lien upon plaintiffs' premises arising from the said $35,000.00 special

assessment do not constitute an *ultra vires* act in violation of New York Constitution Article IX; and it is further

ORDERED, ADJUDGED and DECLARED, that the actions of the Town of Schodack in levying a $35,000.00 sewer connection fee as a special assessment on plaintiffs' 2010 Town and County real property tax bill, and the actions of the County of Rensselaer under the provisions of the New York Real Property Tax Law in imposing and/or enforcing a tax lien upon plaintiffs' premises arising from the said $35,000.00 special assessment do not constitute a violation of plaintiffs' rights to substantive and/or procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution or New York Constitution Article I § 6, and do not constitute an unlawful taking thereunder; and it is

ORDERED, ADJUDGED and DECLARED, that the actions of the Town of Schodack in levying a $35,000.00 sewer connection fee as a special assessment on plaintiffs' 2010 Town and County real property tax bill, and the actions of the County of Rensselaer under the provisions of the New York Real Property Tax Law in imposing and/or enforcing a tax lien upon plaintiffs' premises arising from the said $35,000.00 special assessment are not barred under grounds of estoppel; and it is

ORDERED, ADJUDGED and DECLARED, that the $5,000.00 sewer connection fee paid by Shine Time in 2002 is not the only lawful sewer connection fee, but rather Shine Time is also liable for the $35,000.00 special assessment imposed in its 2010 Town of Schodack tax bill; and it is

ORDERED and ADJUDGED, that plaintiffs' cause of action for a permanent

injunction is dismissed; and it is

ORDERED and ADJUDGED, that plaintiffs' cause of action to strike the $35,000.00 special assessment from their 2010 Town of Schodack bill is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the County of Rensselaer. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: August 6, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated April 12, 2013, Supporting Papers and Exhibits
2. Notice of Cross-Motion dated May 13, 2013, Supporting Papers and Exhibits
3. Reply Affirmation of Benjamin F. Neidl, Esq., dated May 30, 2013

cc.:

David L. Gruenberg, Esq.
54 Second Street
Troy, NY 12180