Matter of 67 West Main St. LLC v Village Bd. of Inc. Vil. of Patchogue
2013 NY Slip Op 32710(U)
October 8, 2013
Supreme Court, Suffolk County
Docket Number: 15537/12
Judge: Paul J. Baisley
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of
67 WEST MAIN ST. LLC, HAVENS BREWERY LLC, STEPHEN FUOCO, ELISABETH MCGUIRE, FOUR CORNERS ENTERPRISES, REMEMBER YESTERYEARS, INC., THE COLONY SHOP, INC. and THE ROE REALTY CORP. on behalf of themselves and others similarly situate,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and/or declaratory action and/or otherwise

-against-

THE VILLAGE BOARD OF THE INCORPORATED VILLAGE OF PATCHOGUE, THE VILLAGE OF PATCHOGUE and DOWNTOWN PATCHOGUE REDEVELOPERS, LLC,

Respondents.

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INDEX NO.: 15537/12
MOTION DATE: 9/13/12
MOTION NO.: 001 CASEDISP;
002 MG; 003 MG; 004 MD

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Upon the following papers numbered 1 to 19 read on this Article 78 petition, motions to dismiss and motion to add a party : Notice of Motion/ Order to Show Cause and supporting papers 1; 2; 7; 17 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 3; 4; 6; 8; 10; 11; 12; 18; 19 ; Replying Affidavits and supporting papers 14; 15; 16 ; Other 5; 9; 13 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition (motion sequence no. 001) of petitioners for an order reversing, annulling, vacating and/or setting aside in whole and/or in part the resolutions and/or findings of fact and law at a purported meeting of the Village Board of the Incorporated Village of Patchogue on April 23, 2012 and filed with the Village Clerk on or about April 24, 2012 (Resolutions 93-2012, 94-2012 and 95-2012), that part being the portion that granted respondent Downtown Patchogue Redevelopers, LLC's application for a site plan application extension and road abandonment and otherwise, is denied and the proceeding is dismissed; and it is further

ORDERED that the motion (motion sequence no. 002) of respondent Downtown Patchogue Redevelopers, LLC for an order pursuant to CPLR §404(a), CPLR R. 3211(a)(1), (5), (7) and (10), CPLR §7804(f), CPLR §1003, CPLR R. 3212, CPLR §3001, and 22 NYCRR §130-1.1 dismissing the petition in its entirety, and, in the event the Court considers this to be a hybrid proceeding/action, granting summary judgment dismissing all claims in the petition and declaring that the amended site plan approval issued for respondent's proposed redevelopment project by respondent Village Board of the Incorporated Village of Patchogue on March 10, 2011 has been validly extended or renewed and remains in full force and effect; and the various properties

involved in the said redevelopment project that were reclassified in the Downtown Redevelopment District of the respondent Village pursuant to Village Board Resolution #100-2009, adopted May 12, 2009, remain classified in the Downtown Redevelopment District, awarding Downtown its costs in connection with this proceeding (in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees), and imposing sanctions on petitioners and their legal counsel in this proceeding in the full amount permitted by law is granted to the extent that the petition is dismissed and is otherwise denied; and it is further

ORDERED that the motion (motion sequence no. 003) of respondent Village Board of the Incorporated Village of Patchogue and the Village of Patchogue for an order pursuant to CPLR §7804(f), R. 3211(a)(7), (5) and (1), and CPLR R. 3212 granting summary judgment and dismissing the petition with prejudice, and awarding respondents their costs and disbursements is granted to the extent that the petition is dismissed; and it is further

ORDERED that the motion (motion sequence no. 004) of petitioners, brought on by order to show cause (REBOLINI, J.) dated July 19, 2012, for an order adding One West Main Street Apartment Investors, LLC as an additional named party is denied as academic.

The Court notes that this is the fourth action/proceeding commenced by petitioners in connection with the plan of respondent Downtown Patchogue Redevelopers, LLC ("Downtown") for the construction of a mixed-use development in the downtown area of the Incorporated Village of Patchogue ("the Village") on property then owned by Downtown. The prior actions/proceedings challenged, *inter alia*, the adoption by the respondent Village Board of the Incorporated Village of Patchogue ("the Board") of a law creating a new "Downtown Redevelopment District" ("DRD"), the Zoning Board of Appeal's grant of a variance reducing the length of parking spaces provided for in connection with the project, and the Board's approval of an amended site plan for the project comprising residential units, retail space, and an underground parking lot. All of the prior actions/proceedings were dismissed.

The instant proceeding, commenced on May 18, 2012, arises out of the Board's adoption on April 23, 2012 of three resolutions in connection with the proposed development: Resolution #93-2012 to discontinue and abandon a portion of a Village street to facilitate certain improvements in accordance with approvals previously granted; Resolution #94-2012 granting Downtown's May 8, 2012 request for an extension of its site plan approval; and Resolution #95-2012 determining the site plan approval extension to be "non-significant" and issuing a negative declaration under SEQRA. Petitioners thereupon commenced the instant proceeding – which they characterize as "an action and/or proceeding (hybrid) commenced pursuant to Article 78 of the New York Civil Practice Law and Rules and/or as an action for a declaratory judgment and/or otherwise" – to reverse, annul, vacate and/or set aside such resolutions. Issue was joined by the service by the Board and the Village (collectively, the "Village respondents") of a verified answer with objections in point of law dated June 21, 2012 and by the service by Downtown of a verified answer with objections in point of law dated June 22, 2012. The Village respondents also served a certified transcript of the record of the proceedings at issue herein. Both Downtown and the Village respondents now move for an order dismissing the petition and, to the extent the Court deems the proceeding to be a hybrid proceeding/action, granting respondents summary judgment dismissing petitioners' claims.

The verified petition alleges that the Board's action in adopting the three challenged resolutions was:

> "arbitrary, capricious, an abuse of discretion, contrary to the facts, irrational and/or contrary to law as well as unreasonable and/or in addition constituted an improper

> or illegal segmentation and/or otherwise was procedurally defective and/or without proper notice and/or improperly and/or illegally and/or otherwise excluded certain parcel and/or parcels from consideration including but not limited to 31 West Main Street, Patchogue, New York 11772 and otherwise but moreover, the application for extension was without authority because the Prior site plan approval had expired upon its own terms on March 12, 2012 when the non-municipal respondents failed to obtain a building permit from the Village building Inspector or a timely extension from the Village Board."

Although the petition is devoid of facts supporting the conclusory allegations therein, it appears that the gravamen of petitioners' claims is that, pursuant to Village of Patchogue Code (the "Code") §435-82(F), the amended site plan approval previously granted to Downtown on March 10, 2011 expired by operation of law on March 12, 2012 (the next business day after the expiration of the one-year period on March 10, 2012) when the Board failed to act immediately on Downtown's application to renew the site plan approval as authorized by Code§435-82(F).

Code §435-82(F) (as then in effect) provided that:

> "A site plan shall be void if construction is not started within one year and completed within two years of the date of the issuance of a building permit or a building permit is not obtained within one year from the date that said site plan is approved, except that such site plan approval may be renewed by the [Board], subject to any special conditions, new requirements and scheduling standards deemed necessary and caused by the delay."

The March 8, 2012 letter application of Downtown's attorney reflected that Downtown had been unable to obtain a building permit and commence construction pursuant to its site plan approval in substantial part because of the pendency of petitioners' prior actions/proceedings referred to above, and requested a one-year extension of its site plan approval to enable it to resolve the remaining litigation and other matters set forth in the letter. The letter was concededly received on March 9, 2012 (a Friday), and at its next scheduled meeting on Monday, March 12, 2012, the Board voted to table the application until its next meeting on March 26, 2012. The record reflects that in fact no action was taken by the Board in connection with respondent's application until April 23, 2012, when the subject resolutions were approved. Petitioners allege that, the Board having failed to affirmatively act on respondent's application on March 12th, the site plan approval expired automatically and is now void, and further, that the Board is without power to revive a void site plan approval.

Petitioners also allege that as a result of the "automatic" expiration of the site plan approval, the DRD zoning classification of the subject parcels reverted to the prior zoning classification(s) as a matter of law pursuant to Code §435-30(F)(5).

That ordinance provides that:

> "Approval of the establishment of a DRD shall expire three years after the effective date of such local law if the applicant has not, within such period, applied for and received site development plan approval and, if applicable, final subdivision plat approval for at least the first section of the subdivision plat. The Board of Trustees, upon request of the applicant, may extend the above time period for two additional periods of not more than one year each. In any case where a

> phased development plan is approved, the DRD shall expire five years after the effective date of such local law. Notwithstanding the foregoing, the Board of Trustees may extend any of said expiration periods upon application of any owner made prior to the expiration of such period for the property affected by the DRD. In the event of expiration of DRD approval, the DRD classification shall automatically be removed from the subject property, and such property shall revert to the zone classification(s) existing prior to the establishment of the DRD for such property. The Village Clerk shall amend the official copy of the Zoning Map accordingly."

Petitioners' rationale for the foregoing argument is that, upon the "automatic" expiration of the site plan approval, Downtown can no longer be said to have "received site development plan approval" within three years after the approval of DRD status and accordingly the DRD zoning for the subject property has automatically – and irrevocably – reverted to its prior classification(s).

Petitioners' arguments, however, are unsupported by the plain language of the Code provisions on which they rely and are otherwise without merit.

The Code provision authorizing the Board to renew a site plan approval does not by its terms require that the Board act upon a request for renewal within one year after the site plan approval was originally granted or the site plan approval will become void (Code §435-82(F)). Indeed, it does not even expressly require that a request for such renewal be made within one year of the site plan approval, although it is conceded by all parties that Downtown's application was "timely" made within one year of the amended site plan approval on March 10, 2011.[1] Petitioners have cited no authority for their assertion that the Board was acting in excess of its authority when it voted to table respondent's timely application and subsequently approved it, thus extending the site plan approval for an additional year. In light of the absence of express language in the Code provision so providing, petitioners' argument that the site plan approval expired automatically while respondent's application for an extension was under consideration by the Board is without merit.

Moreover, the record reflects, and petitioners concede, that Downtown "applied for and received site development plan approval" within three years of the adoption of the local law establishing the DRD zoning as required by Code §435-30(F)(5). Since respondent met the express requirements of the ordinance, there was no need for it to subsequently apply for any extension of time, and the automatic expiration provisions contained in the ordinance are inapplicable. There is no language within the ordinance and no cited authority that supports petitioners' tortured interpretation that the Board's claimed failure to timely renew the site plan approval caused a reversion of the zoning classification.

It is well established that "the words in a statute or ordinance are to be construed by giving them their natural and ordinary meaning" *(Matter of Briar Hill Lanes, Inc. v Town of Ossining Zoning Board of Appeals*, 142 AD2d 578 [2d Dept 1988]) and that "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons Laws

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[1] Notably, Code §435-30(F)(5) does expressly require that an application to extend the DRD be "made prior to the expiration of such period for the property affected by the DRD."

of NY, Book 1, Statutes § 94, at 190). Moreover, an "inference must be drawn that what is omitted or not included was intended to be omitted and excluded" *(id.,* § 240, at 412);*Chemical Specialties Mfrs. Ass'n v Jorling*, 85 NY2d 382 [1995]).

In light of the foregoing, petitioners' submissions fail to establish that the Board's action in adopting the three challenged resolutions was arbitrary and capricious, irrational, an abuse of discretion, ultra vires, or contrary to law.

Petitioners' other vague and unsubstantiated procedural challenges to the enactment of the April 23, 2012 resolutions are similarly without merit. Respondents' submissions establish that the resolutions were duly noticed and properly considered and acted upon by the Board.

All of petitioners' other claims with respect to, *e.g.*, spot-zoning, segmentation, improper use of a public street and unconstitutionality were raised and decided adversely to petitioners in the prior actions/proceedings and are barred by principles of collateral estoppel/res judicata, including those claims that were determined to be barred by the statute of limitations (*Smith v Russell Sage College*, 54 NY2d 185 [1981]; *Nostrom v County of Suffolk*, 100 AD3d 974 [2d Dept 2012]).

With respect to petitioners' motion for leave to add a party, the submissions reflect that prior to the commencement of this proceeding, Downtown transferred its interest in the subject property to non-party One West Main Apartments Investors, LLC ("One West Main") pursuant to a deed acknowledged on May 10, 2012 but not recorded until June 12, 2012. Accordingly, One West Main is a necessary party to this proceeding *(Red Hook/Gowanus Chamber of Commerce v N.Y. City Bd. of Stds. & Appeals*, 5 NY3d 452 [2005]). Although petitioners' practical inability to ascertain that the property had been transferred renders its failure to join One West Main excusable, and the expiration of the statute of limitations does not in itself bar the addition of a necessary party (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725 [2008]), nevertheless, in light of the lack of substantive merit of petitioners' claims and the consequent dismissal of those meritless claims herein, the Court is constrained to deny petitioners' motion as academic.

The Court notes that the only legal issues arguably presented by the petition are those subject to review solely pursuant to CPLR Article 78 (*i.e.*, whether the Board acted in excess of its jurisdiction, or whether its determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion; CPLR §7803). Petitioners' gratuitous inclusion of a demand for "a declaration" with regard to its claims does not state a cause of action for a declaratory judgment or convert the instant Article 78 proceeding into a "hybrid" Article 78 proceeding/declaratory judgment action *(Matter of Whitted v City of Newburgh*, 65 AD3d 1365 [2d Dept 2009]; *Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004 [2d Dept 2009]). Accordingly, respondents' respective motions for summary judgment addressed to the merits of the petition are not necessary as Article 78 proceedings are summary in nature (*id.*).

For all of the foregoing reasons, respondents' motions are granted to the extent that the petition is denied and the proceeding is dismissed. All other relief sought therein, including the imposition of sanctions for allegedly frivolous conduct, is denied.

Settle judgment.

Dated: October 8, 2013

PAUL J. BAISLEY, JR.

J.S.C.