Greens at Half Hollow LLC v Suffolk County Dept. of Pub. Works
2014 NY Slip Op 31692(U)
June 20, 2014
Supreme Court, Suffolk County
Docket Number: 003381-2013
Judge: Emily Pines

[* 1]

SHORT FORM ORDER INDEX NUMBER 003381-2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION- PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Dates: 01-17-2014 & 01-21-2014
Motion Submit Date: 03-18-2014
Motion Sequence Nos.: 007 MOTD; 008 MOTD; 009 MOTD; 010 MOTD; 011 MOTD & 013 MOTD

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GREENS AT HALF HOLLOW LLC,

Petitioner-Plaintiff,

-against-

SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, SUFFOLK COUNTY SEWER AGENCY, SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES, THE COUNTY OF SUFFOLK, and THE TOWN OF HUNTINGTON, THE GREENS AT HALF HOLLOW HOME OWNERS ASSOCIATION, INC., and THE BOARD OF MANAGERS OF GREENS AT HALF HOLLOW CONDOMINIUMS I - V ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF AND ON BEHALF OF THE RESIDENTS OF THE GREENS AT HALF HOLLOW,

Respondents-Defendants,

and

NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES f/k/a NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, NEW YORK STATE OFFICE OF MENTAL HEALTH, SAGAMORE CHILDREN'S PSYCHIATRIC CENTER, LONG ISLAND DEVELOPMENTAL DISABILITIES SERVICE OFFICE, HSC NO. 5 HOUSING DEVELOPMENT FUND COMPANY, INC., HSC NO. 6 HOUSING DEVELOPMENT FUND COMPANY, INC., AND COUNTRY POINTE AT DIX HILLS HOMEOWNERS ASSOCIATION, INC.,

Additional Respondent-Defendants added per Court Order dated November 8, 2013.

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In this hybrid proceeding/action, the Petitioner-Plaintiff, Greens at Half Hollow LLC ("GHH") seeks, among other things, (1) a judgment pursuant to CPLR article 78 annulling a

"Sewer Rate Determination" dated October 12, 2012, by the Suffolk County Department of Public Works ("SCDPW"), disapproving the rates charged by GHH to Respondent Greens at Half Hollow Homeowner's Association ("HOA") for its use of a sewage treatment plant ("STP") owned by GHH, (2) various declaratory judgments, and (3) compensatory damages and declaratory and injunctive relief pursuant to 42 USC § 1983 for purported violations of GHH's property rights.

By order dated November 8, 2013 ("November Order"), this Court (Pines, J.) granted in part and denied in part various motions to dismiss by the original Respondents-Defendants and Defendants. In deciding the prior motions the Court found, among other things, that GHH had failed to join all necessary parties to the proceeding/action, and the Court ordered all them summoned without prejudice to their rights to assert any defenses or affirmative defenses. GHH was directed to serve all entities connected to the STP within 30 days of November 8, 2013. The Court denied, with leave to renew after joinder of all necessary parties, those branches of the motions pursuant to CPLR 3211(a)(5) seeking dismissal of the claims asserted in the Combined Verified Petition and Complaint as barred by the statute of limitations.

In accordance with the November Order, GHH filed a Supplemental Summons and a Supplemental Notice of Petition adding the following entities as parties to the proceeding/action: New York State Office for People with Developmental Disabilities f/k/a New York State Office of Mental Retardation and Developmental Disabilities, New York State Office of Mental Health, Sagamore Children's Psychiatric Center, Long Island Developmental Disabilities Service Office, HSC No. 5 Housing Development Fund Company, Inc., HSC No. 6 Housing Development Fund Company, Inc., and Country Pointe at Dix Hills Homeowners Association, Inc. (collectively

"New Parties"). GHH also added the HOA and The Board of Managers of Greens at Half Hollow Condominiums I-V ("Boards") as Respondents to the article 78 claims and Defendants to the other claims not previously asserted against those entities. All of the Respondents-Defendants, including those joined since November 8, 2013, now move to dismiss to the Combined Verified Petition and Complaint, primarily on the ground that the claims asserted therein are barred by the statute of limitations.

Factual and Procedural Background

In 2002, in connection with the development of condominiums known as the Greens at Half Hollow ("The Greens"), GHH's predecessor in interest, S.B.J. Associates, LLC ("SBJ") and the Suffolk County Department of Public Works ("SCDPW"), Suffolk County Sewer Agency ("SCSA"), Suffolk County Department of Health Services ("SCDHS"), and the County of Suffolk ("County")(collectively "County") entered into an agreement entitled "Agreement for the Construction, Operation and Maintenance of a Sewer System" ("STP Agreement"). The STP Agreement recites, among other things, that SBJ is the owner of the premises on which the Greens was to be developed and that it had previously made an application to the County to construct a sewage collection, treatment and disposal facility for the Greens, which application was approved by the County. Article 19 of the STP Agreement, provides, in relevant part:

> C. In addition to any consideration paid to the OWNER for the connection of off-site additional facilities in accordance with paragraph (B) above, the OWNER shall be entitled to receive from any connecting entity a fair and reasonable charge for the entity's proportionate share of the operation and maintenance costs of the

> SYSTEM. This charge shall be subject to the approval of the COUNTY. The OWNER covenants, warrants and represents that any fees, excluding that part reasonably attributable to the value of sewer line easements, collected by the OWNER pursuant to this paragraph shall be applied for the benefit of all users of the SYSTEM.
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> E. In the event that the OWNER, at any time, desires an increase in the rate charged to any connecting entity for the operation and maintenance costs of the PLANT, the OWNER shall make application to the COUNTY for same. The OWNER shall, at the OWNER'S sole cost, expense and effort, provide written notice of its application to all of the entities connected to the PLANT. This notice . . . may be included with the invoices sent by the OWNER to the connected entities for operation and maintenance expenses. This notice shall advise the connected entities that the OWNER is seeking an increase in the rate charged to them for the operation and maintenance costs of the PLANT and that the OWNER has applied to the AGENCY for such an increase, and shall state the date of the AGENCY meeting at which the OWNER'S application will be considered. Such notice shall be mailed to each connected entity no less than three weeks prior to the date of the AGENCY meeting at which the OWNER'S application will be heard.

In 2011, the HOA asked SCDPW to review the sewer rates charged to it by GHH. On October 12, 2012, following a review of documentation provided by GHH relating to the operation and maintenance of the sewage treatment plant from 2004 through 2011, SCDPW issued its written determination ("Rate Determination"). SCDPW determined that the charges to the HOA were not fair and reasonable and, therefore, SCDPW did not approve the charges imposed at that time. SCDPW also determined that a rate of $270 per "Single Family Equivalent" annually for entities connected to the sewage treatment plant was fair and reasonable.

GHH commenced this proceeding/action on January 31, 2013, by filing a Summons and Combined Verified Petition and Complaint naming SCDPW, SCSA, SCDHS, the County of Suffolk and the Town of Huntington as Respondents-Defendants and the HOA and the Board of Managers of Greens At Half Hollow Condominiums I-V ("Boards") as Defendants.

The Combined Verified Petition and Complaint contains thirteen causes of action. The first through fifth causes of action are asserted pursuant to CPLR article 78 and seek to vacate and annul the Rate Determination issued by SCDPW. GHH alleges, among other things, that the Rate Determination was arbitrary and capricious, made in violation of lawful procedure, and an abuse of discretion. The sixth cause of action seeks a judgment declaring (1) that the STP Agreement between GHH and the County is void as a matter of law because the County had no legislative authority to enter into the STP Agreement and (2) that Transportation Corporations Law § 119 *et seq.* controls the parties' substantive rights and obligations. The seventh cause of action seeks a judgment declaring the STP Agreement void and *ultra vires* because the County was without authority to enter into an open-ended agreement or, alternatively, for a judgment declaring that pursuant to Transportation Corporations Law § 121, the STP Agreement terminated on May 15, 2012, or is terminable at will. The eighth cause of action seeks a judgment declaring that any change in rates charged by GHH will be implemented prospectively only, and not retroactively. The ninth cause of action was dismissed by the November Order. The tenth cause of action seeks a judgment declaring that the County Defendants wrongfully deprived and are depriving GHH of its right to substantive and procedural due process in violation of the Fifth and Fourteenth Amendments to the United States and New York State Constitutions, as well as damages of no less than $5,000,000. The eleventh cause of action

seeks, in the alternative to the declaratory relief sought in the sixth and seventh causes of action, a judgment declaring that Sections 18 and 29 of the STP Agreement are unconstitutional. The twelfth cause of action seeks a judgment declaring that Section 740-46 of the Suffolk County Code is void as preempted by State-wide general law. The thirteenth cause of action seeks a permanent injunction enjoining the HOA and the Boards, on their own behalf and on behalf of the residents of the Greens at Half Hollow, from refusing to pay for sewer services.

Discussion

> "A petitioner who seeks article 78 review of a determination must commence the proceeding 'within four months after the determination to be reviewed becomes final and binding upon the petitioner' (CPLR 217[1]). An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party'"

(*Walton v New York State Dept. of Corr. Servs.*, 8 NY3d 186, 194 [2007] quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). As recently held by the Appellate Division, Second Department:

> "[T]he statute of limitations is a defense which must be asserted by the party opposing the challenge, and the failure to interpose a cause of action within the applicable limitations period is not a jurisdictional defect (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 727). If the necessary party, once joined, correctly alleges that the statute of limitations bars the proceeding, the proceeding may be then dismissed as time-barred (*see id.* at 727)."

(*Jenkins v Astorino*, 110 AD3d 882 [2d Dept 2013]).

A proceeding pursuant to CPLR article 78 is properly dismissed for failure to timely join all necessary parties (*see, Matter of Long Is. Pine Barrens Socy., Inc. v Town of Islip*, 286 AD2d 683 [2d Dept 2001]; *Matter of Artrip v Incorporated Vill. of Piermont*, 267 AD2d 457 [2d Dept 1999]; *Matter of Cybul v Vill. of Scarsdale*, 17 AD3d 462, 463 [2d Dept 2005][petitioners' failure to explain why landowner not named as party in first instance despite awareness of landowner's identity precludes proceeding in landowner's absence]).

Statute of Limitations

Here, in the first, second, third, fourth and fifth causes of action, GHH explicitly seeks relief pursuant to CPLR article 78. Accordingly, it is clear that such causes of action are subject to the four-month statute of limitations set forth in CPLR 217(1). Contrary to GHH's contention, the Rate Determination became final and binding on GHH when it was issued on October 12, 2012. First, it is clear that in issuing the Rate Determination SCDPW reached a definitive position on the issue of the fairness and reasonableness of the charges imposed by GHH upon each connected entity for its proportionate share of the operation and maintenance costs of the STP. SCDPW stated its position that the charges "are not fair and reasonable." Its position could not have been stated more definitively. Second, GHH has failed to demonstrate the availability of administrative procedures to review the Rate Determination and that those procedures, if available, have not been exhausted. GHH's challenge to the lawfulness of the procedure followed by SCDPW in issuing the Rate Determination is, in fact, a challenge under

CPLR 7803(3), which, among other things, permits a petitioner in a proceeding commenced pursuant to CPLR article 78 to raise the question of whether the challenged determination was made in violation of lawful procedure. GHH's contention that SCDPW had no authority to approve, disapprove, set, or fix sewer rates because the controlling statute, Transportation Corporations Law § 121, does not give it such authority is undeniably a challenge to the lawfulness of the procedure followed in issuing the Rate Determination. Such a challenge is permitted under CPLR 7803(3) and is subject to the four-month limitations period set forth in CPLR 217(1). Thus, GHH's contention that the statute of limitations has not even begun to run because the Rate Determination is not a "final determination" is without merit.

Additionally, the Court finds that because the sixth and seventh causes of action, which seek judgments declaring that the STP Agreement is void because the County did not have authority to enter into such an agreement, are also subject to the four-month limitations period set forth in CPLR 217(1). Moreover, the twelfth cause of action is, in effect, a challenge to the lawfulness of the procedure followed by the County and, therefore, is also subject to the four-month statute of limitations.

> "In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' (*Solnick v Whalen*, 49 NY2d 224, 229). If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action (*Press v County of Monroe*, 50 NY2d 695; *Solnick v Whalen*, *supra* at 230; *see*, *Koerner v State of New York*, 62 NY2d 442, 446-447).

(*Matter of Save the Pine Bush, Inc. v City of Albany*, 70 NY2d 193, 202 [1987]; *see*

McComb v Town of Greenville, 163 AD2d 369 [2d Dept 1990]).

Here, the sixth, seventh, and twelfth causes of action are essentially duplicative of GHH's CPLR article 78 claims in that they indirectly challenge the Rate Determination by directly challenging the County's authority to enter into the STP Agreement in the first place (sixth and seventh causes of action) and the lawfulness of the section of the County Code pursuant to which the County entered into the STP Agreement (twelfth cause of action). If, as GHH contends, the STP Agreement is void then the Rate Determination is void because SCDPW lacked authority to issue it. If, as GHH contends, Suffolk County Code § 740-46 is void because it is preempted, then the STP Agreement is void and, as a result, the Rate Determination is void as well. Such claims are, in effect, challenges to the lawfulness of the procedures followed by SCDPW in issuing the Rate Determination, which, as discussed above, are already asserted by GHH in its claims pursuant to CPLR article 78, were available under CPLR 7803(3), and, therefore, should have been commenced within four months of the Rate Determination (*see Matter of Rochester Tel. Corp. v Public Serv. Comm. of the State of N.Y.*, 87 NY2d 17, 28 [1995][article 78 proceeding is proper avenue to obtain review of PSC ruling allegedly beyond its authority]).

Additionally, to the extent that GHH complains of statutory violations by the County in entering into the STP Agreement, as it does in the sixth and seventh causes of action by alleging that the County violated the Transportation Corporations Law ("TCL") in entering into the STP Agreement, the time for GHH to complain of such statutory violations in entering into the STP Agreement was within four months of the date the STP Agreement was entered into, i.e. May 2002 (*Id.*). In *Save the Pine Bush, Inc.*, the Court of Appeals held, among other things, that "regardless of the form in which plaintiffs-petitioners have chosen to couch their action, their

challenges to the three ordinances primarily involving the [City of Albany's] failure to follow SEQRA" in enacting the ordinances "were maintainable in an article 78 proceeding and should have been commenced within four months" (*Id.* at 203). Similarly, although couched as declaratory judgment claims, the sixth and seventh causes of action primarily allege that the County failed to follow the TCL in entering into the STP Agreement. Such claims were maintainable in an article 78 proceeding and should have been commenced with four months of May 2002.

Similarly, the tenth and eleventh causes of action, both of which challenge the Rate Determination and/or the STP Agreement on constitutional grounds, are also subject to the four-month statute of limitations applicable to article 78 proceedings (*Solnick v Whalen*, 49 NY2d 224, 230-231 [1980]["(t)he fact that the challenge mounted to defendants' determinations is stated in terms of a constitutional objection (denial of due process hearing rights) does not serve to make unavailable an article 78 proceeding – the customary procedural vehicle for review of administrative determinations"]). Here, it is undeniable that the object of GHH's attack is the Rate Determination, which is properly classified as administrative rather than legislative (*see International paper Co. v Sterling Forest Pollution Control Corp.*, 105 AD2d 278 [2d Dept 1984]). Therefore, the four-month statute of limitations set forth in CPLR 217(1) also applies to the tenth and eleventh causes of action as well.

However, Respondents-Defendants have not demonstrated that the eighth cause of action is subject to the four-month statute of limitations applicable to article 78 proceedings. The eighth cause of action seeks a judgment declaring that any change in rates charged by GHH will be implemented prospectively only, and not retroactively. The Rate Determination does not address

this issue. Because prospective or retroactive application has not been determined by SCDPW, the issue is not subject to review of the Rate Determination under article 78.

SCDPW issued the Rate Determination on October 12, 2012. The four-month statute of limitations for challenging the Rate Determination expired on February 12, 2013. GHH commenced this proceeding/action on January 31, 2013, prior to the expiration of the statute of limitations. However, as determined by this court in its November Order, GHH failed to join all necessary parties when it commenced this proceeding/action on January 31, 2013. By way of a Supplemental Summons and a Supplemental Notice of Petition, both of which are dated November 27, 2013, GHH added the New Parties to the proceeding/action. Thus, assuming that the New Parties were properly served, they were added more than eight months after the expiration of the four-month statute of limitations applicable to the first, second, third, fourth, fifth, sixth, seventh, tenth, eleventh, and twelfth causes of action on February 12, 2013. Said causes of action are therefore subject to dismissal pursuant to CPLR 3211(a)(5) as time-barred (*see Windy Ridge Farm v Assessor of the Town of Shandaken*, 11 NY3d 725, 727 [2008]).

Relation Back

GHH's contention that the claims subject to the four-month statute of limitations are not time-barred because of the relation back doctrine is without merit. "[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest' (CPLR 203[b]; *see also*, CPLR 203[e][relation back of new claims against same party])." (*Buran v Coupal*, 87 NY2d 173, 177 [1995]).

> "Under the relation-back doctrine, a plaintiff may interpose a cause of action against a person or entity after the statute of limitations has expired, provided that the plaintiff had timely commenced the action against another defendant, served process upon that other defendant within the applicable statutory period, and established that the defendant previously named and served was "united in interest" with the person or entity sought to be added as a defendant (CPLR 203[b])."

(*LeBlanc v Skinner*, 103 AD3d 202, 209 [2d Dept 2012]).

In order to determine whether two defendants are united in interest

> "A party seeking the benefit of the relation-back doctrine must establish that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against the new party (*see Buran v Coupal*, 87 NY2d 173, 178, 181). The mistake need not be excusable for the relation-back doctrine to apply (*see LeBlanc v Skinner*, 103 AD3d 202, 209, citing *Buran v Coupal*, 87 NY2d at 178-182).

(*Castagna v Almaghrabi*, — AD3d —, 2014 NY Slip Op 03223 [2d Dept 2014]).

Here, the New Parties are those entities added after November 8, 2013. The original parties are the County, Town, and HOA and Boards. Thus, the question is whether the claims asserted in the amended pleading against the New Parties relate back to those claims previously asserted against the originally named parties, i.e., the County, Town, HOA and Boards. The only claim previously asserted in the original pleading against the HOA and Boards was the thirteenth cause of action seeking an injunction prohibiting the HOA and Boards from refusing to pay for

sewer services. GHH concedes that it did not name the HOA and Boards as respondents in its original pleading. The article 78 and declaratory judgment claims in the original pleading were only asserted against the County and Town. Contrary to GHH's contention, the November Order did not simply correct a procedural irregularity by changing the designation of the HOA and Boards from "defendants" to "defendants-respondents." Rather, the November Order directed that they be served and joined as respondents. Therefore, only the thirteenth cause of action was previously asserted against the HOA and Boards and could possibly relate back. However, the thirteenth cause of action is not asserted against the New Parties and, therefore, application of the relation back doctrine to that cause of action is not necessary. Even if application of the relation back doctrine was needed to save the untimely interposition of the thirteenth cause of action against the New Parties, it would only operate to save that cause of action and the remaining claims would not be similarly saved because they were not previously asserted against the HOA and Boards. Accordingly, the issue of whether the New Parties are united in interest with the HOA and Boards is irrelevant and need not be reached. The court notes that GHH only contends that the New Parties are united in interest with the HOA and specifically states in its brief that it is not contending that the New Parties are united in interest with the County.

Similarly, even if the claims now asserted in the amended pleading against the HOA and Boards (the article 78 and declaratory judgment claims) are timely under CPLR 203(f), because they were not previously asserted against the HOA and Boards, they cannot be used to bootstrap relation back under CPLR 203(b) of the claims now asserted against the New Parties. The procedural posture of the New Parties and the HOA and Boards is different and, therefore, the analysis of the timeliness of the claims asserted against them in the amended pleading is

undertaken pursuant to different sections of the CPLR.

Moreover,"[w]hen a plaintiff intentionally decides not to assert a claim against a party. . ., there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired" (*Buran v Coupal*, 87 NY2d 173, 181 [1995]). GHH fails to satisfy the third prong of the relation-back test, i.e. that the failure to join all entities connected to the STP as parties was the result of a mistake as to the identities of such entities as proper parties. It must be emphasized that the mistake must be as to the *identity* of the proper parties, not simply the failure to name parties whose identities are known. GHH does not dispute that at the time this proceeding/action was commenced, it knew the identities of all entities connected to the STP. In fact, the allegations in the Combined Verified Petition and Complaint dated January 30, 2013, concede the existence of entities connected to the STP other than the Greens owners. Rather, GHH now contends that its failure to name all entities connected to the STP was an inadvertent mistake based on its good faith belief that the Rate Reduction only applied to the sewer rates charged to the HOA. However, even if deemed a mistake and not intentional, such a mistake was not as to the identity of the proper parties. Rather, GHH's mistake was one of law, which is not the type of mistake contemplated by the relation-back doctrine (*see Matter of Ferruggia v Zoning Bd. of Appeals of the Town of Warwick*, 5 AD3d 682 [2d Dept 2004]; *27th Street Block Assoc. v Dormitory Auth. of the State of N.Y.*, 302 AD2d 155, 165 [1st Dept. 2002][failure to join entity whose existence was known was mistake of law]; *Holster III v Ross*, 45 AD3d 640, 642 [2d Dept 2007][plaintiff not establish failure to sue entity was due to a mistake arising out of lack of knowledge that entity existed]).

The contentions of the Boards and Country Pointe HOA that GHH failed to properly

serve them are without merit. The remaining contentions raised by the parties have been considered and are either without merit or need not be addressed in light of the foregoing. Accordingly, it is

ORDERED that the motions by the Respondents/Defendants are granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, tenth, eleventh and twelfth causes of action are dismissed pursuant to CPLR 3211(a)(5) as time-barred; and it is further

ORDERED that the parties shall appear for a status conference before the court on June 30, 2014, at 9:30 to discuss discovery on the remaining causes of action.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: June 20, 2014
Riverhead, New York

Emily Pines
HON. EMILY PINES

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