

Matter of Gruskoff v County of Suffolk
2015 NY Slip Op 31595(U)
August 6, 2015
Supreme Court, Suffolk County
Docket Number: 15-6680
Judge: Peter H. Mayer
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ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by the petitioners for a preliminary injunction enjoining various respondents from taking action regarding a certain proposed permissive referendum pending a hearing and the determination of this special proceeding, and requiring the Suffolk County Legislature to notify the petitioners when the text of said referendum is certified and transmitted to the Suffolk County Board of Elections, is denied; and it is further

ORDERED that the motion by the respondent Town of Huntington for an order pursuant to CPLR 3211(a)(5) dismissing the petition is denied; and it is further

ORDERED that the motion by the nonparties Greens at Half Hollow Home Owners Association, Inc., Herbert Schoenfeld, Joseph Perry, Fred Werfel, and Steven Swersky for an order pursuant to CPLR 1012(a)(2) and CPLR 1013 granting leave to intervene in the subject special proceeding, and to amend the caption accordingly, deemed also to be a motion to dismiss the petition as to the petitioner Greens at Half Hollow, LLC, is granted; and it is further

ORDERED that counsel for said nonparties is directed to serve a copy of this order with notice of entry upon all parties and the Clerk of the Court; and it is further

ORDERED that, upon receipt of a copy of this order with notice of entry, the Clerk of the Court shall amend the caption to reflect the removal of the petitioner Greens at Half Hollow, LLC as a party hereto, and the addition of "Greens at Half Hollow Home Owners Association, Inc., Herbert Schoenfeld, Joseph Perry, Fred Werfel, and Steven Swersky" as Intervenors-Respondents; and it is further

ORDERED that the respondents and the intervenors-respondents are directed to serve and file their answers to the petition, and to file any additional documents pursuant to CPLR 408, within five days of service of a copy of this order with notice of entry; and it is further

ORDERED that pursuant to CPLR 404(a), any party may re-notice this matter for hearing upon appropriate notice.

The petitioner Greens at Half Hollow, LLC (GHH) is the successor in interest to the owner and sponsor of a development of condominiums known as The Greens at Half Hollow (The Greens). GHH operates the sewage treatment plant servicing The Greens pursuant to a Sewage Treatment Plant Agreement ("STP Agreement") dated May 12, 2002 between GHH and the respondent County of Suffolk (the County). Pursuant to the STP Agreement, GHH is obligated "to irrevocably offer for dedication to the County" the sewage treatment plant at the Greens, and is responsible for the operation, maintenance, repair and replacement of said plant "until such time, if any, that [GHH's] offer of dedication" is accepted by the County. It appears that in November 2012, GHH requested that the County form and maintain a new County sewer district and take ownership of the sewage treatment plant pursuant to the STP Agreement. In a report dated September 15, 2014, the Suffolk County Department of Public Works (DPW) and the Suffolk County Sewer Agency (SCSA) duly recommended pursuant to the New York State County Law that the County form Sewer District No. 26 encompassing the properties serviced by the sewage treatment plant. On November 18, 2014, the Suffolk

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County Legislature held a public hearing on the establishment of Sewer District No. 26, and adopted Resolution 1191-2014 (the Resolution) authorizing the formation of said water district subject to “the affirmative vote of a majority of the qualified electors who are resident within the proposed sewer district” in the event that a petition for a permissive referendum were to be properly filed protesting the Resolution.

It is undisputed that, by letter dated January 8, 2015, Herbert Schoenfeld, the president of the proposed intervenor-respondent Greens at Half Hollow Homeowners Association, Inc. (HOA), circulated an open letter to residents of The Greens encouraging said residents to sign the petition seeking a referendum regarding the adoption of the Resolution by the Suffolk County Legislature, and pointing out that the costs to the residents would increase should the vote affirm said adoption. Said petition was timely filed, and the respondent, Tim Laube, Clerk of the Suffolk County Legislature (the Clerk), duly examined the petition, as well as the signatures thereto. By letter dated February 11, 2015, the Clerk certified to the presiding officer of the Suffolk County Legislature that the petition “complies with all the requirements of law.” As a result, pursuant to Election Law 4-108, the Clerk is obligated to “transmit to each board of elections a certified copy of the text of such ... referendum and a statement of the form in which it is to be submitted” at least 36 days before the election at which the referendum is to be submitted to a vote. In this instance, the election is to be held on November 3, 2015, and last day for the Clerk to transmit said information is September 28, 2015.

On April 16, 2015, the petitioners commenced this special proceeding seeking a judgment declaring that the proposed text of the referendum question is null and void as misleading and inconsistent with GHH’s contractual and vested property rights, enjoining the Clerk from certifying and transmitting a certified copy of the “text and form ... [and] a brief abstract and an abbreviated title” of the proposed permissive referendum to the Suffolk County Board of Elections, enjoining the Board of Elections from printing, publishing or disseminating any ballots or abstracts pertaining to the proposed permissive referendum or conducting said referendum, and requiring the County to notify them when said text is certified and transmitted to the Board of Elections.

The petitioners now move by order to show cause for a preliminary injunction pending a hearing on the relief set forth in their petition, as well as additional relief. The petitioners contend that they should succeed in this special proceeding because, pursuant to all of the relevant agreements and documents regarding the properties serviced by the sewage treatment plant and the construction and development of The Greens, GHH has given its irrevocable consent to the dedication of the sewage treatment plant, that all of the eligible voters in the proposed sewage district, including the residents of The Greens, took title through GHH’s predecessor and are bound to consent to the formation of said district, and that the Clerk cannot formulate or propose any language regarding the proposed referendum that is not “misleading and inconsistent” with GHH’s vested property and contractual rights to dedicate the sewage treatment plant to the County. Thus, the petitioners contend that this special proceeding is brought pursuant to Election Law 16-104 which provides in pertinent part that “[t]he wording of the abstract or form of submission of any proposed amendment, proposition or question may be contested in a proceeding instituted by any person eligible to vote on such amendment, proposition or question.”

In opposition to the motion, the respondent Town of Huntington (Town) cross-moves pursuant to CPLR 3211(a)(5) to dismiss the petition as time-barred. In addition, HOA, Herbert Schoenfeld, Joseph Perry, Fred Werfel, and Steven Swersky (the Intervenors) move pursuant to CPLR 1012(a)(2) and CPLR 1013 for leave to

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intervene in this special proceeding. For reasons that will become obvious, the Court will address the aforesaid motion to intervene (#003) before it reviews the remaining motions.

A party is permitted to intervene in an action as of right when, inter alia, “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment” (CPLR 1012[a]; see *Berkoski v Board of Trustees of Inc. Village of Southampton*, 67 AD3d 840, 889 NYS2d 623 [2d Dept 2009]). Additionally, a court, in its discretion, may permit a person to intervene “when the person’s claim or defense and the main action have a common question of law or fact” (CPLR 1013; *Berkoski v Board of Trustees of Inc. Village of Southampton*, *id.*). “However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings” (*Berkoski v Board of Trustees of Inc. Village of Southampton*, *id.* at 843 quoting *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 533 NYS2d 147 [2d Dept 1988]; see *Wells Fargo Bank v McLean*, 70 AD3d 676, 894 NYS2d 487 [2d Dept 2010]).

Here, the petitioners explicitly consent to the intervention of the proposed intervenors. More importantly, it is determined that the HOA and the individuals seeking intervention have a real and substantial interest in whether the proposed permissive referendum appears on the ballot for the election scheduled for November 3, 2015. In addition, the proposed intervenors have submitted papers in direct opposition to the petitioners’ motion, and they point out that no other party has done so. Accordingly, the proposed intervenors’ motion is granted.

Turning to the petitioners motion (#001), it is well settled that to be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (see CPLR 6301; *Aetna Insurance. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Dixon v Malouf*, *supra*; *Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (see *Dixon v Malouf*, *supra*; *Ruiz v Meloney*, *supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (see *Gagnon Bus Company, Inc. v Vallo Transportation, Ltd.*, 13 AD3d 334, 786 NYS2d 107 [2d Dept. 2004]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2003]). Factors militating against the granting of preliminary injunctive relief include that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action or effect an alteration, rather than a preservation of the *status quo* (see *McIntyre v Metropolitan Life Insurance Company*, 221 AD2d 602, 634 NYS2d 180 [2d Dept. 1995]; *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 631 NYS2d 167 [2d Dept. 1995]).

In their verified petition, the petitioners allege that the petitioner Paul Gruskoff (Gruskoff) is a resident of The Greens eligible to vote in the proposed permissive referendum, and they set forth the history and the documents regarding the acquisition of the properties in the proposed sewage district, the history and the

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documents regarding the development of said properties, and the relationships of the properties and the residents to the question raised in this proceeding.

In opposition to the motion for a preliminary injunction, the Intervenor contends that GHH lacks standing to bring this special proceeding. With respect to standing, it is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (*see Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778 [1991]). To establish standing, a petitioner must show that 1) it has suffered an injury in fact; 2) that the alleged injury falls within the zone of interest that the statute covers; and 3) that the injury asserted is different from that suffered by the public at large (*Society of Plastics Industry, Inc. v County of Suffolk*, *id.* at 773). Moreover, the injury must be more than mere speculation or conjecture (*see New York State Assn of Nurse Anesthetists v Novello*, 2 NY3d 207, 211, 778 NYS2d 123, 125 [2004]; *see also Schaivoni v Village of Sag Harbor*, 201 AD2d 716, 608 NYS2d 322 [1994]).

Notwithstanding their consent to the proposed intervention herein, the petitioners submit their affirmation in opposition and a memorandum of law addressing the issues raised in the motion to intervene, including the issue of GHH's standing. Thus, the undersigned deems the motion to intervene to include a demand for relief dismissing the petition as to GHH, and it is determined that there is no prejudice to GHH in determining that demand for relief herein.

It is determined that GHH does not meet the justiciability criteria set forth within the Election Law which would enable it to maintain this proceeding. The petitioners zealously argue that this special proceeding is "a challenge under Election Law 16-104." As set forth above, Election Law 16-104(2) provides that "[t]he wording of the abstract or form of submission of any proposed amendment, proposition or question may be contested in a proceeding instituted by any person eligible to vote on such amendment, proposition or question." It is beyond cavil that GHH, a corporation, is not "a person eligible to vote" on the proposed permissive referendum herein. In reply to the Intervenor's contention that it lacks standing, GHH states that "the Court should disregard this argument and permit GHH to remain a party to this proceeding based upon ... the unique nature of the challenge. GHH's property and contract rights are integral to the central issue in this action of whether a Referendum question can be crafted which is not misleading or inconsistent with existing law ..."

GHH does not cite any authority that the undersigned has discretion to expand on the explicit language of the very statute that the petitioners so strongly contend is the only challenge currently available to the petitioners to challenge the proposed permissive referendum. Thus, it is determined that GHH does not have standing to maintain this proceeding. Moreover, the petitioners do not allege, in their petition or in their submissions relative to the motions and the cross motion before the Court, that Gruskoff has any contractual or vested property rights which bear upon the issues raised in this motion for a preliminary injunction.¹ Accordingly, the petitioners' motion for a preliminary injunction is denied.

¹ By letter dated June 22, 2015 addressed to the Court, with copies to the parties to this proceeding, the County advises that the Suffolk County Legislature has adopted a resolution approving the language and the text of the proposed permissive referendum, and directing the Clerk to transmit the text (and the necessary abstract) to the Board of Elections. Accordingly, that branch of the petitioners' motion seeking a mandatory injunction requiring the County to deliver notice of same to the petitioners is deemed academic.

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As discussed above, the parties have had the opportunity to fully address and brief the issue of GHH's standing herein. Moreover, since the relief granted is an essential component of the relief demanded, the petitioners may not be said to have been prejudiced by the Intervenor's failure to demand the relief specifically (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:5). Accordingly, that branch of the Intervenor's motion which is deemed to be a motion to dismiss the petition as to GHH is granted.

In its cross motion (#002), the Town contends that the petitioners' sole argument is that none of the residents of the proposed sewage district have the right to oppose the County's establishment of the district, and that this special proceeding is actually a challenge to the petition for a permissive referendum filed by said residents. The Town cites to County Law 101, entitled "Permissive referendum," which provides in subsection (3) that "[p]roceedings may be instituted and maintained to contest the sufficiency and validity of any petition provided for in this article, in the manner provided by the election law." Thus, the Town contends that this special proceeding is barred by the statute of limitations pursuant to Election Law 16-102(2). Said statute provides that "[a] proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition."

It is undisputed that the Resolution was adopted by the Suffolk County Legislature on December 15, 2014, and that it provided for a 45-day period in which petitions for a permissive referendum might be filed. The Town notes that the last day to file the petition for a permissive referendum herein was January 29, 2015. That is, 45 days from December 15, 2014. Because 14 days from January 29, 2015 is February 12, 2015, a holiday, the Town contends that the last day to commence this proceeding was February 13, 2015, and that this proceeding "is untimely by more than two months."

A movant seeking to dismiss a petition/complaint insofar as asserted against it as time-barred pursuant to CPLR 3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 AD3d 546, 903 NYS2d 907 [2d Dept 2010]; *Morris v Gianelli*, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (*Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; *Lessoff v 26 Ct. St. Assoc., LLC, supra*).

In opposition to the cross motion, the petitioners contend that the Town mischaracterizes the challenge before the Court, and that the Town's interpretation of the applicable law is erroneous. The petitioners assert that they could not have challenged the "sufficiency and validity" of the subject petition as to the qualifications and signatures of the residents based on GHH's contract or property rights, and that this special proceeding is necessitated by the unique issues herein. The petitioners point out that the County Law and Election Law sections applicable to this matter indicate that the Resolution was properly adopted, and that the petition for a permissive referendum was properly certified by the Clerk.

The statutes cited by the petitioners reveal that the Town has not met this burden in proving that this proceeding was untimely commenced and that, in any event, there is an issue of fact whether this proceeding was timely commenced. County Law 256 provides that, after a public hearing, "[i]f the board of supervisors shall determine that it is in the public interest to establish the district ... the board may adopt a resolution

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approving the establishment of the district ... subject to permissive referendum as hereinafter provided” County Law 257(1) provides that “[t]he provisions of sections one hundred one and one hundred two of this chapter and the applicable provisions of the election law as to conduct of elections and qualifications of voters shall apply to permissive referenda conducted hereunder, except that only those electors shall be qualified to sign a petition and to vote who are resident within an area included in the proposed county district, and provided further that the number of signatures required on the petition shall be one hundred or five per centum of the owners of taxable real property situated within the proposed district, whichever shall be less.”

County Law 101(2) provides that a permissive referendum shall be held “if within forty-five days after [the adoption of the subject resolution] there be filed with the clerk of the board of supervisors a petition signed by qualified electors ... ” In summary, Election Law 5-100 to 5-106 provide that a person shall be entitled to vote in any election if he or she is registered to vote, is a citizen over 18 years of age, is a resident for voting purposes, and has not been adjudged incompetent or convicted of a felony.

It is undisputed that the Suffolk County Legislature properly adopted the Resolution, and that the Clerk certified the petition for permissive referendum under the aforesaid criteria. The Town does not allege any error or misapprehension of the facts by the Clerk. In their submissions, the Intervenors essentially adopt and reiterate the contentions of the Town regarding the assertion that this proceeding is time-barred. Thus, there is an issue of fact whether the petitioners, or at least Gruskoff, could have challenged the petition seeking a referendum pursuant to Election Law 16-102 based merely on the assertion that GHH’s contract and property rights require the residents of the proposed sewage district to consent to the dedication of the sewage treatment plant to the County. That is, there is an issue whether Gruskoff’s cause of action accrued at the time the petition seeking a referendum was certified by the Clerk.

In addition, Election Law 16-104, which provides in subsection (2) for challenges to the text of a proposed permissive referendum, further provides in subsection (3) that “[a] proceeding pursuant to subdivision two of this section must be instituted within fourteen days after the last day to certify the wording of any such abstract or form of submission.” As set forth above, the last date for the Clerk to certify the text of the proposed permissive referendum is September 28, 2015, which date has not yet arrived. It has been held that a court may review a claim that the text of a proposed referendum is misleading or inconsistent with existing law prior to the certification of a clerk or transmittal to the Board of Elections (*Matter of Mavromatis v Town of W. Seneca*, 55 AD3d 1455, 869 NYS2d 709 [2d Dept 2008]). Accordingly, the Town’s cross motion to dismiss the petition is denied.

Dated: August 6, 2015



PETER H. MAYER, J.S.C.