Matter of Kogan v Zoning Bd. of Appeals of the Town of Southhampton
2015 NY Slip Op 32279(U)
November 6, 2015
Supreme Court, Suffolk County
Docket Number: 07049/2015
Judge: Thomas F. Whelan

MEMO DECISION & ORDER

INDEX No. 7049/15

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/27/15
SUBMIT DATE: 10/16/15
Mot. Seq. # 001- MD Settle Judgment
CDISP: YES

In the Matter of the Application of JEFFREY KOGAN and FAITH KOGAN Petitioners, For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules -against- ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHAMPTON, Respondent .	EILEEN A. POWERS, ESQ., PLLC Attys. For Petitioners 456 Griffing Ave Riverhead, NY 11901 TIFFANY S. SCARLATO, ESQ. Southampton Town Attorney Attorney for the Respondent 116 Hampton Rd. Southampton, NY 11968

Upon the following papers numbered 1 to 9 read on the petition served and filed in this Article 78 proceeding and the supporting papers, answering papers, return and other submissions of the parties, Notice of Petition and supporting papers 1-3; Notice of Cross Motion & Supporting papers ____; Opposing papers; 4-5; Reply papers ____; Other 6-7 (petitioner's memorandum); 8-9 (reply memorandum); ~~(and after hearing the parties in support of and in opposition to the motion)~~ it is,

ORDERED that the petition (#001) served and filed in this Article 78 proceeding in which the petitioners seek a judgment reversing and annulling the March 19, 2015 determination of the respondent to deny the petitioners' application certain area variances and/or a rehearing and modification of a prior application for such variances in necessary for the construction of a proposed tennis court, and for the issuance of such variances or direction, upon remand, that the respondent issue said variances, is considered under Town Law § 267-a and 267-b and is denied.

The petitioners are the owners of flag lot parcel of residential real property situated in the hamlet of Water Mill in the Town of Southampton, New York. In 2002, the petitioners applied for certain area variances in connection with their proposal, as amended, to construct a 50' x110' tennis court in the front

yard of their premises with heavy screening on the east side of the front yard. That application was denied by the respondent by determination dated April 4, 2002 due to the front yard configuration of the tennis court, the substantial size of the variances requested, the negative impacts upon the character and physical conditions of neighborhood, and that the hardship was self-created. At the public hearing held on that application, the issue of noise emanating from the use of the court was an issue of such great concern that one or more members of the respondent board suggested might be mitigated by sinking the court below grade. However, this suggestion was rejected by the petitioners due to the prohibitive costs associated with the sinking of the court below grade (*see* Exhibits, One, Two and Three of the respondent's certified return).

In or about May of 2013, the petitioners re-applied to the respondent board for variances in connection with their new proposal to construct a tennis court in the front yard of their home. This application featured a slightly smaller tennis court, the sinking of the court five feet below grade and the installation of nine feet of acoustical fencing around the perimeter of the court. At the public hearing held on this application, these features, along with the mature natural screening that had grown along the east side of the yard that affords shelter to neighbors, were characterized by the petitioner's counsel as those which ameliorated the adverse noise and visual impacts upon which the 2002 denial of the variances was based. In addition, the petitioners' counsel contended that the existence of these features sufficiently distinguished this new application from the prior one that was denied in 2002. The respondent board agreed, and granted the application upon condition that the proposed tennis court measuring 47 x 100 feet be sunken five feet, install a four foot fence around it and hang nine foot tall "Acoustifence" sound proofing material around the court that would effectively eliminate the noise on the court (*see* Decision dated September 5, 2013 attached as Exhibit 2 to the respondent's return).

In October of 2014, the petitioners filed a third application for front yard and other variances necessary for the construction of a tennis court in their front yard. In this application, the petitioners proposed to construct the tennis court at grade level with a nine foot high "Acoustifence" because the costs associated with sinking the court as proposed by them in 2013 and granted by the board were prohibitive. While this application was styled as a new application for variance relief in the petitioner's initial filings, references to the two prior applications were set forth therein. Thereafter, a notice of a the scheduling of a public hearing on such application was prepared and issued to surrounding landowners by the petitioners' counsel. Therein the instant application was described as follows: "The property was previously granted a variance to construct a court identical in size and location but required same to be sunk five (5) feet into the ground. This application requests the same relief without the 'sunk requirement'" (*see* Transcript of February 19, 2015 Public Hearing attached as Exhibit 12 to the respondent's return).

At the public hearing conducted on February 19, 2015, the petitioners' counsel repeatedly characterized it as one to modify and/or remove the condition that the tennis court be sunk below grade level that was imposed upon the granting of the variances in the respondent's September 5, 2013

determination because the costs of complying with such condition was prohibitive (*see* Transcript of February 19, 2015 Public Hearing attached as Exhibit 12 to the respondent's return). The petitioner's counsel produced an "expert" witness who testified to the noise reducing effectiveness of the nine foot Acoustifence now proposed to be installed from grade level and suggested that all adverse impacts would be ameliorated thereby because this new fence was better at noise reduction than the fencing previously approved. Counsel went on to note that the character of the neighborhood supported tennis courts and that there was little opposition to the application. Board members did, however, note their receipt of written opposition and they extensively questioned the petitioner's counsel regarding the history of the prior applications and the differences between them and this latest one. In a post-hearing e-mail submission which was invited by the respondent board, the petitioners' counsel again characterized the application as one seeking "only to swap out a condition, i.e. the acoustifence instead of the sinking" (*see* Exhibit 9 e-mail dated March 1, 2015).

In its March 19, 2015 decision to deny this third application, the board found, among other things, that the petitioners' previous proposal to sink the tennis court five feet below grade and to erect a nine foot acoustifencing material only four feet of which was above grade, was critical to distinguishing the 2013 variance application from the 2002 application and critical to the conditional grant of the 2013 variance application set forth in its September 5, 2013 determination thereof. The board then found that its 2013 decision should not be modified and that the granting of the instant application was barred by the doctrine of res judicata that arose upon the denial of the 2002 application.

This Article 78 proceeding then ensued. In their petition, the petitioners claim that the respondent ZBA's determination was arbitrary and capricious since at least two board members stated at the outset that they would not vote in favor of the application. In addition, the petitioners claim that the respondent board's failure to engage in the balancing test of the factors enumerated in Town Law § 267-b constitutes an error of law and/or arbitrary and capricious conduct warranting reversal of the respondent's March 19, 2015 determination. Finally, the petitioners' claim that the Board erred in applying res judicata because the subject application is not identical to the 2002 application.

For the reasons stated below, the petitioners' demands for relief are denied and their petition is dismissed.

It is well settled that "[t]he determination of a local zoning board is entitled to great deference, and will be set aside only if it is illegal, arbitrary and capricious, or irrational" (***Matter of Birch Tree Partners, LLC v Nature Conservancy***, 122 AD3d 841, 842, 996 NYS2d 693 [2d Dept 2014]; *see* CPLR 7803[3]; ***Matter of Pecoraro v Board of Appeals of Tn. of Hempstead***, 2 NY3d 608, 613, 781 NYS2d 234 [2004]). It is equally well settled that the doctrines of res judicata and collateral estoppel are applicable to administrative determinations as well as to decisions of courts (*see* ***Matter of Ryan v New York Tel. Co.***, 62 NY2d 494, 478 NYS2d 823 [1984]). Where applicable, these doctrines will preclude the re-litigation of issues previously litigated on the merits and those which could have been raised (*see* ***Calapi v ZBA of Vil. of Babylon***, 57 AD3d 987, 871 NYS2d 288 [2d Dept 2008]; ***Palm Mgt. Corp. v Goldsteind***, 29 AD3d 801, 815 NYS2d 670 [2d Dept 2006]).

The doctrines of res judicata and or collateral estoppel do not preclude a zoning board or agency from altering a prior determination where circumstances have changed and new evidence is offered (*see* ***Bianco v Blum***, 67 AD2d 947, 413 NYS2d 215 [2d Dept 1979]). The petitioner must, however, demonstrate that a change in a material fact has occurred, rather than a change in the quality of the petitioner's original proof in order for the zoning board to reconsider its earlier decision (*see* ***Jensen v Zoning Bd. Of Appeals of Vil. of Old Westbury***, 130 AD2d, 549, 515 NYS2d 283 [2d Dept 1987]). Thus, in the absence of changed facts or circumstances or a decision to grant a rehearing of a prior appeal pursuant to Town Law § 267-a(12), a property owner cannot cure deficiencies in proof in a subsequent application or again attempt to persuade a board to grant relief which previously has been denied.

Here, the court rejects as unmeritorious the petitioners' claim that the instant application is not identical to the 2002 application because that application did not include any proposal to limit noise and or to minimize adverse visual impacts other than by natural screening. The issue concerning mitigating adverse noise and other impacts arising from the front yard location of the proposed tennis court was the subject of the public hearing held thereon, at which, a respondent board member suggested that the tennis court be sunk below grade level to minimize these concerns. The petitioners rejected this suggestion due to the prohibitive costs associated with the sinking of the tennis court and the 2002 application was denied due to the substantial nature of the variances, the placement of the tennis court in the front yard and the failure to sufficiently mitigate the adverse visual and noise impacts arising therefrom. The board's finding to apply the preclusive effect of the 2002 application notwithstanding that it includes a nine foot, above grade level Acoustifence that was not proposed in 2002 was neither arbitrary and capricious nor irrational or erroneous, since the proposal to sink the tennis court five feet below grade level included a total of nine feet of acoustic fencing was the subject of the 2013 determination to grant the variances.

Nor was the determination not to modify the conditional grant of the 2013 variance application arbitrary and capricious, irrational or erroneous. The instant application, while styled by the petitioners in their initiatory filings, as a new one, was quickly transformed into one to modify the 2013 determination so as to remove the requirement for placing the tennis court five feet below grade level and to likewise position a portion of the acoustifencing material five feet below grade level. Such application was properly considered by the board as falling within the ambit of Town Law § 267-a(12) which permits a board or agency to consider an application as one for a re-hearing of a prior application (see March 19, 2015 written determination attached to respondent's certified return). In such cases, the second application for similar relief presents a situation in which the Zoning Board of Appeals has some discretion as to the type of hearing, if any, that will be granted (*see* Town Law § 267–a[12]). Where an application includes a request for a modification of a prior application, a zoning appeals board, on a motion made by one member and agreed to by all members, may deny the application after summary consideration or set it down for a public hearing pursuant to the procedure set forth in the Town Law §267-a(12).

Here, the respondent board chose to publicly hear the application upon due notice as permitted in Town Law §267-a(12). At the public hearing held on February 19, 2015, the petitioners' counsel

repeatedly characterized the application as one to modify the sinking of the tennis court condition that was imposed on the grant of the 2013 application for variances. This characterization of the instant application was also set forth as the sole basis for the public hearing in the notice of the public hearing counsel prepared and mailed to surrounding neighbors and in the post-hearing e-mail submission sent to the respondent board. The petitioners' counsel was advised at the public hearing that the board considered the application to be subject to principals of res judicata and it outlined the prior applications, the issues raised at the public hearings held thereon and the considerations underlying the board's separate determinations thereof. In its March 19, 2015 written determination to deny the instant application, the board found, upon consideration of the proofs presented, that instant application was essentially the same as the 2002 application as, no showing of changed circumstances or substantial changes to the plans to erect at tennis court on the front yard of the petitioners' lot requiring were shown. The respondent board thus found that the petitioners were not entitled to a modification of the 2013 determination or to the granting of the subject application, due to the preclusive effect of the respondent's 2002 determination.

As indicated above, a second application for substantially the same relief by the same person or a person in privity with the first applicant may be barred by res judicata or collateral estoppel (*see* ***Jensen v Zoning Bd. of Appeals of Vil. of Old Westbury***, 130 AD2d 549, *supra*). Where these doctrines are applicable, they will preclude the re-litigation of issues previously litigated on the merits and those which could have been raised (*see* ***Calapi v ZBA of Vil. of Babylon***, 57 AD3d 987, *supra*; ***Palm Mgt. Corp. v Goldsteind,*** 29 AD3d 801, *supra*). Under the circumstances of this case, the court finds no basis to disturb the findings of the respondent board which denied this third application by the petitioners for variances necessary for the construction of the tennis court in their front yard. The record supports the board's finding that the application was substantially the same as the one advanced in 2002 which was denied due to the adverse noise and visual impacts which a sunken court would have mitigated, which was thereafter proposed by the petitioners and conditionally granted in 2013, and that no entitlement to either a modification of these conditions on which the 2013 determination was premised or to the granting of variances previously denied was established by the petitioners.

The court has considered the petitioners' remaining contentions and finds them to be unavailing. The petitioners' demands for relief pursuant to Article 78 are thus denied and the petition is dismissed.

Settle judgment upon a copy of this order.

DATED: November 6, 2015

THOMAS F. WHELAN, J.S.C.