Matter of Sweetwater Estates, Ltd. v Carpenter
2015 NY Slip Op 32319(U)
December 2, 2015
Supreme Court, Suffolk County
Docket Number: 15-3843
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX No. 15-3843

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4/15/15
ADJ. DATE 6/11/15
Mot. Seq. #001 - CDISPSUBJ
Mot. Seq. #002 - MG

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In the Matter of the Application of

SWEETWATER ESTATES, LTD.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

ANGIE M. CARPENTER, Supervisor of the Town of Islip, STEVEN J. FLOTTERON, TRISH BERGIN WEICHBRODT, JOHN C. COCHRANE, JR., ANTHONY S. SENFT, JR., OLGA MURRAY and ALEXIS WEIK, constituting the TOWN BOARD OF THE TOWN OF ISLIP, and the TOWN BOARD OF THE TOWN OF ISLIP, and JOHN SCHETTINO, Chairman, KEVIN BROWN, Vice-Chairman, DONALD J. FIORE, JOSEPH DeVINCENT, ANTHONY MUSUMECI, DANIEL DeLUCA, MICHAEL KENNEDY and VINCENT PULEO, constituting the PLANNING BOARD OF THE TOWN OF ISLIP, and the PLANNING BOARD OF THE TOWN OF ISLIP, the TOWN OF ISLIP DEPARTMENT OF ENVIRONMENTAL CONTROL, and the TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT, JOSEPH MONTUORI and BRETT ROBINSON,

Respondents.

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Upon the following papers numbered 1 to 15 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-12; Replying Affidavits and supporting papers 13-15; Other amended notice of petition and amended petition, dated March 9, 2015, and supporting papers; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by respondents Angie M. Carpenter, Supervisor of the Town of Islip, Steven J. Flotteron, Trish Bergin Weichbrodt, John C. Cochrane, Jr., Anthony S. Senft, Jr., Olga Murray, and Alexis Weik, constituting the Town Board of the Town of Islip, and the Town Board of the Town of Islip, John Schettino, Chairman, Kevin Brown, Vice-Chairman, Donald J. Fiore, Joseph DeVincent, Anthony Musumeci, Daniel DeLuca, Michael Kennedy, and Vincent Puleo, constituting the Planning Board of the Town of Islip, and the Planning Board of the Town of Islip, the Town of Islip Department of Environmental Control, and the Town of Islip Department of Planning and Development (collectively "the Town respondents") for an Order, pursuant to CPLR 7804 (f), dismissing the amended petition in its entirety, is granted.

By way of this proceeding, the petitioner seeks, *inter alia*, to abate a nuisance created by the alleged illegal dumping of construction debris and contaminated fill at its property and to compel the Town respondents to remediate the hazardous conditions resulting from the contamination of the property.

The petitioner alleges in its amended petition that it is the owner of property located at 367 Lincoln Boulevard, Hauppauge, New York; that in or about December 2012, certain individuals (including Joseph Montuori, former Town of Islip parks commissioner, and Brett Robinson, his assistant, who were subsequently indicted for their roles in the dumping of 32,000 tons of contaminated construction debris at various sites in the Town of Islip) excavated a large hole at the property, removed and sold the clean fill for profit, and began filling the hole with construction debris and contaminated fill; that this was done with the knowledge and consent of Town officials but without the knowledge and consent of the petitioner; that the Town was aware of the illegal dumping at the property through November 2013; that in November 2013, the Town directed the petitioner to excavate a pit on the property, as a result of which the petitioner discovered large amounts of construction debris and contaminated fill; that the petitioner arranged to have all the illegally-dumped material removed from its property at a cost in excess of $50,000.00; that the petitioner was further directed by the Town to conduct a second analysis of the soil from the bottom of the pit; that this second analysis revealed a significant presence of toxic pollutants, including PCBs, varium, chromium, copper, lead, manganese, nickel, zinc, hexavalent chromium, and mercury, all well above allowable levels; that there are three well sites within a five-mile radius of the property which could potentially become contaminated by the toxic and hazardous conditions at the property; and that remediation of the hazardous conditions at the property could cost in excess of $3 million.

On March 4, 2015, the petitioner commenced this proceeding by filing of a petition dated March 4, 2015. In addition to the Town respondents, the petitioner named as a respondent the Town of Islip Department of Parks, Recreation and Cultural Affairs. On March 13, 2015, the petitioner served an amended petition dated March 9, 2015, removing the Town of Islip Department of Parks, Recreation and

Cultural Affairs as a respondent (*see* CPLR 1003) and purporting to add Joseph Montuori and Brett Robinson as respondents. Service of the amended petition was without leave of court.

In its amended petition, the petitioner seeks relief both under federal statute (the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* [CERCLA], which governs the cleanup of toxic waste sites, and the Resource Conservation and Recovery Act, 42 USC § 6901 *et seq.* [RCRA], which addresses the proper treatment, storage, and disposal of such waste), and under state statute (titles 9 and 13 of ECL article 27 regulating, respectively, hazardous waste management and inactive hazardous waste disposal areas, and RPAPL 841, governing nuisance claims), and pleads three causes of action, identified as "Points." As Point I, the petitioner alleges that the Town respondents, having arranged for the disposal of hazardous substances at the property without authorization from any state or federal agency in violation of ECL 27-0914 (2), which has resulted or may imminently result in the contamination of soil and of the public water supply, are strictly liable under CERCLA for all necessary costs in responding to the release of hazardous substances into the environment and should be required to remediate the toxic and hazardous conditions at the property. As Point II, the petitioner alleges that the Town respondents are strictly liable under RCRA and should be required to remediate the toxic and hazardous conditions at the property. As Point III, the petitioner alleges that the actions of the Town respondents amount to a private nuisance, materially impairing its use and enjoyment of the property, and that they should be compelled to permanently abate the nuisance at the property and its environs caused by the presence, migration, and threat of migration of hazardous substances.

The Town respondents now move, pre-answer, to dismiss the amended petition, claiming: (i) that mandamus does not lie; (ii) that the amended petition fails to state a cause of action upon which relief can be granted; (iii) that the petitioner lacks standing and presents unripe, nonjusticiable claims; and (iv) that personal and subject matter jurisdiction are lacking.

CPLR 7804 (f) provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an "objection in point of law," which is akin to an affirmative defense (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7). On a pre-answer motion to dismiss an article 78 petition, only the petition is to be considered and all of its allegations are deemed to be true (***Matter of East End Resources v Town of Southold Planning Bd.***, 81 AD3d 947, 917 NYS2d 315 [2011]; ***Matter of Long Is. Contractors' Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2005]).

Addressing first the Town respondents' threshold objections based on lack of personal jurisdiction, the Court finds that they are without merit. It appears, and the Town respondents do not contest, that the proceeding was properly commenced by the filing of a petition with the Clerk of the Court (*see* CPLR 304). Nor do the Town respondents contest the timing or method of service employed. Instead, they claim, without more, that the service copy of notice of petition and petition did not indicate the index number assigned or the date of filing (*see* CPLR 305 [a]), that a request for judicial intervention was not served with the petition (*see* Uniform Rules for Trial Cts [22 NYCRR] §§ 202.8 [b]; 202.9), and that the amended notice of petition misidentified the dates of the papers on which the

proceeding is based. Absent a showing of actual prejudice, however, a failure to inscribe the index number and filing date as required under CPLR 305 (a), as here, is a mere irregularity that does not warrant dismissal (*see* ***Cruz v New York City Hous. Auth.***, 269 AD2d 108, 702 NYS2d 284 [2000]; ***Matter of City of Amsterdam v Board of Assessors of Town of Providence***, 237 AD2d 63, 667 NYS2d 493 [1998]; ***Cellular Tel. Co. v Village of Tarrytown***, 209 AD2d 57, 624 NYS2d 170, *lv denied* 86 NY2d 701, 631 NYS2d 605 [1995]); as to the remaining objections, they amount to little more than technical errors which do not serve to deprive a court of jurisdiction.

Nor are the Town respondents entitled to dismissal based on their assertion--correct as it is--that mandamus does not lie. "Mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought" (***Matter of Legal Aid Socy. of Sullivan County v Scheinman***, 53 NY2d 12, 16, 439 NYS2d 882, 884 [1981]). Pursuant to CPLR 103 (b), all civil judicial proceedings shall be prosecuted in the form of an action "except where prosecution in the form of a special proceeding is authorized." Here, although the petitioner has instituted a special proceeding under CPLR article 78, the relief sought is not in the nature of mandamus; the petitioner seeks to impose financial responsibility for remediation on the Town respondents under the citizen suit provisions of CERCLA (42 USC § 9607) and RCRA (42 USC § 6972), as well as to abate a nuisance under RPAPL 841, all of which relief may only be sought in the context of a plenary action (*see* CPLR 7803). That a proceeding is brought in an improper form does not, however, mandate its dismissal since CPLR 103 (c) authorizes a court to "make whatever order is required for its proper prosecution" (*accord* ***Matter of National Amusements v County of Nassau***, 156 AD2d 566, 549 NYS2d 73 [1989]). "[D]ismissal of an action or special proceeding simply because it is brought in the wrong form is forbidden. Rather, once jurisdiction is acquired, the court will retain it and direct that the action or proceeding continue in its appropriate form" (***Matter of Greenberg [Ryder Truck Rental]***, 110 AD2d 585, 586, 487 NYS2d 797, 799 [1985] [internal quotation marks omitted]).

Nevertheless, as the Court is constrained to find that it lacks subject matter jurisdiction with respect to the causes of action set forth in Points I and II and that the cause of action set forth in Point III is legally insufficient, dismissal is warranted. As to CERCLA (Point I), 42 USC § 9613 (b) specifically provides, with limited exceptions not applicable here, that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter." Though the matter of exclusive jurisdiction is not quite so well-defined under RCRA (Point II)–subdivision (b) of 42 USC § 6972 provides that any citizen suit against an alleged polluter "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur"–the "overwhelming majority" of courts "have read this provision to confer exclusive jurisdiction on federal courts" as well (***Litgo New Jersey v Commissioner New Jersey Dept. of Envtl. Protection***, 725 F3d 369, 394 [3d Cir 2013]). This Court concurs in the Third Circuit's assessment, while noting that at least one federal circuit court is in the minority (*see* ***Davis v Sun Oil Co.***, 148 F3d 606 [6th Cir], *cert denied* 525 US 1018, 119 S Ct 543 [1998]), and finds persuasive the Third Circuit's reasoning that the relevant statutory language is "most naturally read as a mandate" requiring that the suit be brought in federal district court, sufficient to overcome the presumption of concurrent state court jurisdiction and to oust the state courts of jurisdiction (***Litgo New Jersey v Commissioner New Jersey Dept. of Envtl. Protection***, *supra* at 395; *see also* ***Flanagan v Prudential-Bache Sec.***, 67 NY2d 500, 506, 504 NYS2d

82, 85, *cert denied* 479 US 931, 107 S Ct 402 [1986] [absent pertinent Supreme Court precedent or uniformity among the lower federal courts, a state court required to interpret a federal statute "is not precluded from exercising its own judgment"]). To the extent the petitioner may claim to have pleaded a cause of action under ECL article 27, it suffices to note that no private cause of action exists to enforce the provisions of that article (***Town of Wilson v Town of Newfane***, 181 AD2d 1045, 581 NYS2d 962 [1992]). And as to RPAPL 841 (Point III), because "the duty to abate a private nuisance existing on real property arises from the power to possess the property and control the activities that occur on it" (***Taggart v Costabile***, 131 AD3d 243, 247, 14 NYS3d 388, 392 [2015]), the Court finds the mere allegations that the Town respondents were aware of and consented to the illegal dumping insufficient to sustain the cause of action.

Finally, it is evident that the amended petition is a nullity to the extent it is asserted against Joseph Montuori and Brett Robinson, as the petitioner failed to obtain leave to join them as parties (*see* CPLR 401; ***Matter of Barrett v Dutchess County Legislature***, 38 AD3d 651, 831 NYS2d 540 [2007]; ***Matter of Board of Educ. of Fla. Union Free School Dist. v DePace***, 301 AD2d 521, 753 NYS2d 381, *lv denied* 99 NY2d 511, 760 NYS2d 102 [2003]; ***Matter of Aries Striping v Hurley***, 202 AD2d 578, 610 NYS2d 821 [1994]). Since there are no surviving causes of action, it is unnecessary to convert this proceeding into a plenary action (*see* CPLR 103 [c]; ***Matter of Cramer v New York State Racing Assn.***, 136 AD2d 104, 525 NYS2d 938 [1988]).

Accordingly, the motion is granted, the amended petition is denied, and the proceeding is dismissed.

Submit judgment.

Dated: December 2, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION