

Wb Kirby Hill LLC v Incorporated Vil. of Muttontown
2015 NY Slip Op 32946(U)
November 17, 2015
Supreme Court, Nassau County
Docket Number: 10774/2014
Judge: Karen V. Murphy
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**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 10 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

X

WB KIRBY HILL LLC,

Plaintiff,

Index No. 10774/2014

-against-

Motion Submitted: 09/11/15

Motion Sequence: 004, 005, 006

**INCORPORATED VILLAGE OF
MUTTONTOWN; BOARD OF TRUSTEES OF
THE INCORPORATED VILLAGE OF
MUTTONTOWN; and PLANNING BOARD OF
THE INCORPORATED VILLAGE OF
MUTTONTOWN,**

Defendants.

X

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XXX
Answering Papers.....	XX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Petitioner filed a Notice of Amended Petition and an Amended Verified Petition (collectively, the Amended Petition) with the Nassau County Clerk's Office on July 23, 2015, following a conference held before the Court on June 30, 2015 (Motion Sequence 4). The Amended Petition seeks to annul the respondents' July 2014 determination to retain security in the amount of \$1,911,557 as arbitrary and capricious, an abuse of the Board's discretion, and affected by an error of law. Petitioners also seek to have the Court direct the Planning Board to perform certain actions, and to declare that petitioner need not pay any further costs, fees, or administrative expenses to respondents.

Respondents move this Court to compel petitioner to correct the Amended Petition (Motion Sequence 5).

Petitioner opposes respondents' motion, and cross-moves for sanctions (Motion

Sequence 6).

The June 30, 2015 conference was necessitated as the result of petitioner's original petition dated November 7, 2014, filed on November 10, 2014, under the present Index Number (10774/2014). In response to petitioner's filing of the original petition, respondents moved for correction of the original petition, seeking to strike various alleged scandalous and prejudicial language, and to strike paragraphs referencing a prior proceeding outside the administrative record presently under review (July 9, 2014 Village Board of Trustees' determination). Petitioner also cross-moved for sanctions (Motion Sequences 2 and 3, respectively). By Decision and Order dated May 27, 2015 (Cozzens, J.), those motions were referred to this Court.

This Court promptly scheduled the aforementioned conference, which took place on June 30, 2015. As a result of that conference, petitioner agreed to, and was given leave to re-file an Amended Petition. The Court did not issue any written directives as to the specific corrections to be made. The motion to correct and the cross-motion for sanctions were each withdrawn based upon petitioner's agreement to re-file an Amended Petition (Motion Sequences 2 and 3).

The Amended Petition was attempted to be filed on July 15, 2015; however, it was returned by the Supreme Court Clerk for various defects, including missing proof of filing and of service, as well as proof of payment of the \$210 filing fee and \$95 RJI fee. Petitioner also listed an incorrect Index Number on its Notice of Amended Petition (10774/15 instead of 10774/14). Although the Clerk returned the Amended Petition on July 15th, petitioner's affidavit of service of the Amended Petition states that the Amended Petition was served upon respondents' counsel the day before, July 14, 2015, via overnight delivery. Although this special proceeding was originally commenced on November 10, 2014, this Amended Petition was served upon respondents before it was properly filed, which did not occur until on or about July 21, 2014, when petitioner's counsel mailed the corrected Amended Petition to the Clerk, and provided proof of payment of all of the necessary fees. The time/date stamp on counsel's July 21, 2015 letter establishes that the corrected Amended Petition was received by the Supreme Court Clerk on July 22, 2015, at 1:03 p.m. The Amended Petition was not filed in the Nassau County Clerk's Office until July 23, 2015. There is no affidavit of service establishing that respondents were re-served on or about July 22 or 23, 2015. The return date noticed in the Amended Petition is August 28, 2015.

It is undisputed that respondents moved to correct the Amended Petition on August 21, 2015, prior to the return date. Petitioners now assert that respondents' motion to correct, made pursuant to CPLR §§ 3014 and 3024, is untimely because it was not made within twenty days of service.

While the time period in which to make a corrective motion under CPLR §§ 3014¹ and 3024 is twenty (20) days, “[i]t is not likely to be a matter of moment, since the court has the power to extend whatever time period is applicable under CPLR 2004” (*Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3014:4*). “Of course, if the corrective motion is made after the 20 days, there is still discretion to entertain it under the court’s general power to extend time. CPLR 2004.” (*Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3024:5*).

In view of the fact that petitioners did not properly file the Amended Petition until July 23, 2015, together with the fact that respondents filed their motion to correct seven days prior to the return date of the Amended Petition, the Court determines in its discretion to extend the time to file the motion to correct, thereby excusing respondents’ *de minimis* delay of, at most, seventeen (17) days.²

Turning now to respondents’ motion to correct, the Court determines that respondents’ motion should be granted only to the extent that petitioner is directed to re-plead in accordance with CPLR §§ 3014 and 3024.

It is clear to the Court that it is the July 9, 2014 decision of the Village Board of Trustees to reduce the security requirement to \$1,911,557, based upon the May 12, 2014 hearing before the Planning Board, which is at issue in this proceeding, and whether that determination should be annulled pursuant to Article 78 of the CPLR.

While some of the scandalous and prejudicial matter has been removed from the original petition, there remains unnecessarily prejudicial and improper language in the Amended Petition. For example, on the first page thereof, in the section entitled “Nature of the Action,” petitioners aver that “[r]espondents’ insistence on retaining security for admitted complete improvements is a *direct and flagrant violation . . .*” (emphasis added). Paragraph 5 of the Amended Petition contains the statement relative to the Village engineer that, “his reasoning as to each maintenance item is as good as anyone’s guess...” Paragraphs 3-9, 55, 71, and 84 are further examples of improper argument utilizing inflammatory language. The foregoing examples are by no means exhaustive, but only illustrative of the

¹“A party wishing to make a motion to separately state and number had best assume that the 20-day period [of CPLR 3024] applies, just as if this motion were one of those specifically authorized by CPLR 3024 and thus governed by the time periods in 3024 (c)” (*Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3014:4*).

²If respondents received the Amended Petition on July 15, 2015, the twentieth day to make the motion to correct would have been August 4, 2015. There is no Federal Express tracking number provided by petitioners, or a receipt indicating the date of actual delivery to respondents’ counsel.

need for correction. Analysis and argument relative to the alleged facts should be confined to a memorandum in support of the Amended Petition.

The Court also finds that petitioner's references to respondents' answer interposed in the previous Article 78 proceeding commenced in 2013 is improper in this Article 78 proceeding, and should not be included in a further corrected and amended petition.³ When this Court addresses the merits of this action pending under Index No. 10774/2014, it will review the determination at issue based upon the facts and record adduced before the Planning Board and Board of Trustees (*see Yarbough v. Franco*, 95 NY2d 342 [2000]).

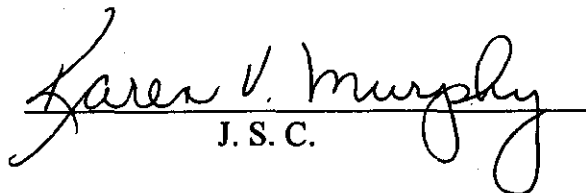
As to those portions of the petition seeking that this Court direct respondents to engage in specific actions upon remittur to the Planning Board (undertake an inspection of the landscape plantings, specify an amount for completion of driveway aprons, specify whether the equestrian trail has been constructed as required or requires additional work), and declare that petitioner need not pay any further fees or costs to respondents, the Court declines to strike those specific requests for relief from the amended petition at this juncture. The Court will not presently determine the propriety of the requested relief because the petition must be re-pled in accordance with this Decision and Order, and in accordance with CPLR §§ 3014 and 3024, before the Court can reach the merits of the application.

Respondents' motion to correct the amended petition is granted as determined above. Petitioner shall file and serve a second amended petition on or before December 21, 2015. Respondents' alternative requests to dismiss the amended petition in its entirety, and for costs and disbursements, are denied.

Petitioner's motion for sanctions is denied in light of the foregoing.

The foregoing constitutes the Order of this Court.

Dated: November 17, 2015
Mineola, N.Y.


J. S. C.

ENTERED

NOV 18 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE

³The Court notes, however, that both petitioner's and respondents' counsel referred to and/or read into the record at the May 12, 2014 Planning Board hearing portions of this Court's prior Decision and Order dated December 6, 2013.