Matter of Affiliated Brookhaven Civic Orgs., Inc. v Suffolk Regional Off Track Betting Corp.
2016 NY Slip Op 30014(U)
January 7, 2016
Supreme Court, Suffolk County
Docket Number: 602867/2015
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 602867/2015

SUPREME COURT - STATE OF NEW YORK

I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

In the Matter of the Application of AFFILIATED BROOKHAVEN CIVIC ORGANIZATIONS, INC., MEDFORD TAXPAYERS CIVIC ASSOCIATION, INC., BROOKHAVEN TOWN CONSERVATIVE COMMITTEE, BRETT HOUDEK, DONALD SEUBERT, EDWARD SULLIVAN, GEORGINA BRENNAN,

Petitioners,

-against-

SUFFOLK REGIONAL OFF TRACK BETTING CORPORATION,

Respondent.

ORIG. RETURN DATE:
FINAL SUBMITTED DATE: 12/9/15
MOTION SEQ#004, 005, 006, 007
MOTION: 004 MD 005 MOTNDECD
006 MD 007 MD

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Petitioners, the Affiliated Brookhaven Civic Organizations, Inc., Medford Taxpayers Civic Association, Inc., Brookhaven Town Conservative Committee, Brett Houdek, Donald Seubert, Edward Sullivan and Georgina Brennan [hereinafter Petitioners] present a petition seeking an Order and judgment pursuant to Article 78 and CPLR § 3001. The Petitioners label their action a "hybrid proceeding" wherein they seek declaratory and injunctive relief pursuant to Article 78 and Civil Practice Law and Rule 3001. More particularly, Petitioners seek an injunction barring the Suffolk Regional Off-Track Betting Corporation [hereinafter SCROTBC] from attempting to construct a video lottery terminal [hereinafter VLT] casino on a parcel of land located at 440 Express Drive South, Medford, New York.

Petitioners seek further relief in the form of an Order declaring that SCROTBC lacks the power to place a video lottery casino anywhere in the Town of Brookhaven, without complying with Brookhaven zoning regulations and thereby obtaining its consent.

Lastly, Petitioners seek a declaration that the proposed use of 440 Express Drive

South, Medford, New York as a Suffolk Regional Off-Track Betting Corporation, video lottery terminal casino is unlawful and in derogation of the Town of Brookhaven zoning laws.

The respondent, SCROTBC, opposes the applications in all respect and petitions the Court to dismiss the action, claiming the Petitioners lack standing to proceed and, even if the Court were to acknowledge the standing of the Petitioners that SCROTBC is not required to obtain the consent of the Town of Brookhaven in order to develop a simulcast license branch office at the Medford site (citing RAC Pari-M section 1008[1], 1003). Respondent claims it is merely required to provide the Gaming Commission with "written confirmations from appropriate local officials that the location of such facility and the number of patrons expected to occupy such facility are in compliance with all applicable local ordinances" citing RAC Pari-M section 1003[2][f]. Lastly, Respondent presents arguments that the issues are not ripe. More particularly, that the planned development will be subject to future administrative review under SEQRA, noting that the Gaming Commission, Suffolk County Department of Health, New York State Department of Transportation and the Town of Brookhaven , "will be invited to participate in the SEQRA review process."

Upon receipt of the Respondent's Petition seeking dismissal, the Petitioners filed a Cross-Motion seeking an Order of summary judgment pursuant to CPLR § 3212 granting a permanent injunction prohibiting the SCROTBC from siting or constructing a video lottery terminal casino and/or an OTB betting facility at the site. The Respondent opposes the cross petition.

In making this determination, the Court has considered the following:

1. Seq. 004- Petition inclusive of Exhibits 1 through 13 and A through D;
2. Seq. 005 Respondent's Notice of Motion To Dismiss inclusive of Exhibits A through D, Affirmation In Further Support of Motion To Dismiss and Memorandum of Law In Support of Respondent's Motion To Dismiss;
3. Seq. 006- Petitioners' Notice of Cross Motion inclusive of Exhibits 1 through 10 and A through F, Affirmation In Further Support of Respondent's Motion To Dismiss and In Opposition To Petitioners' Motion For Summary Judgment and Reply In Support of Petitioners' Summary Judgment Motion; and
4. Seq. 007- Petitiners' Order To Show Cause For a Preliminary Injunction inclusive of Exhibits 1 through 24, Affidavits of Daniel Gulizio, Frank Profeta, Brett Peter Houdek, Mary Ann Johnston, Anne Ohlrogge and Georgina Brennan, Respondent's Affirmation In Opposition to Petitioners' Order To

Show Cause.

As concerns the issue of standing, counsel for Petitioners discontinued participation in the action by the Brookhaven Town Conservative Committee. At issue is the standing of the remaining Petitioners to bring these proceedings.

> It is the law's policy to allow only an aggrieved person to bring a lawsuit. One not affected by anything a would-be defendant has done or threatens to do, ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. New York Practice, 5th Edition, by David D. Siegel §136.

Professor Siegel dissects the evolution of standing from the springboard case of *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 377 N.Y.S.2d 451. The Dairylea court noted:

> Only where there is a clear legislative intent negating review... or lack of injury in fact will standing be denied. 38 N.Y.2d at 11. Therefore, the test today is a liberal one, according to Dairylea, and the right to challenge administrative action, articulated under the "standing" caption, is an expanding one. Siegel §136.

Professor Siegel notes:

> With the Court of Appeals having acknowledged that in general "standing" is to be measured generously, the occasion for closing the court's doors to a plaintiff by finding that his interest is not even sufficient to let him address the merits, which is what a "standing" dismissal means, should be infrequent. Ordinarily only the most officious interloper should be ousted for want of standing.

Therefore, the Respondent's application to deny Petitioners "standing" is denied and the Court confirms the standing of the Petitioners [excepting the Brookhaven Town Conservative Committee].

The Court must next determine whether or not the controversy is ripe and/or

justiciable. The Respondents suggest that the controversy placed before the Court is not ripe for review. In order for an administrative decision to be ripe for judicial review in a CPLR Article 78 proceeding, the challenged action must be final (see CPLR 7801[1]). An action is considered to be final when it represents a definitive position on an issue which imposes an obligation, denies a right or fixes some legal relationship, resulting in an actual concrete injury (*Matter of Gordon v. Rush*, 100 N.Y.2d 236, 243 [2003]. Quoting *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 [1998]). The harm suffered must not be amenable to further administrative review and corrective action (*Matter of Eadie v. Town Board of North Greenbush*, 7 N.Y.3d 306, 316 [2006] quoting *Matter of City of New York v. Grand Lafayette Properties, LLC.*, 6 N.Y.3d 540, 548[2006]).

Ripeness is easier stated than applied. The Court of Appeals has declined to adopt any bright-line rules designating particular actions as final, referring instead to apply the foregoing test on a case-by-case basis in order to avoid inappropriate results in particular circumstances (See *Matter of Eadie v. Town Board of North Greenbush*, 7 N.Y.3d at 317; *Matter of Gordon v. Rush*, 100 N.Y.2d at 243). Quoting *Matter of Guido v. Town of Ulster Town Board*, 74 A.D.3d 1536, 902 N.Y.S.2d 710).

In applying the applicable test, the Court must balance the goals of preventing "the piecemeal review of each determination made in the contents of the SEQRA process, which would subject it to unrestrained review resulting in significant delays in what is already a detailed and lengthy process (*Matter of Sour Mountain Realty v. New York State Department of Environmental Conservation*, 260 A.D.2d 920, 921 [1999] against the possibility of harm to the complaining parties. See *Matter of Gordon v. Rush*, 100 N.Y.2d at 243.

The matter is further complicated by the fact that the Honorable Carla E. Craig, United States Bankruptcy Judge, has ordered Suffolk County and the Town of Brookhaven to accept and review plans for the facility. In compliance, the Respondent is in the process of making revisions subject to Brookhaven Township's staff review and comments. Furthermore, after the Respondent completes an environmental review a final plan is to be submitted and forwarded to the Suffolk County Planning Commission. Thereafter, the site plan will be considered by the Brookhaven Planning Board for approval. The Petitioners in essence by seeking an Order of the Court enjoining Respondent's "attempt" at this juncture potentially and unnecessarily puts the Bankruptcy Court and the reporting Court at odds.

Section 7801(1) of the CPLR unequivocally states that no determination shall be challenged in an Article 78 proceeding "which is not final or can be adequately reviewed by appeal to a court or to some other body or officer..." A determination is deemed final and

binding and thereby ripe for review "when it has its impact upon the petitioner who is thereby aggrieved." *Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716, 499 N.Y.S.2d 934. The concept of impact requires certainty and immediacy of harm, and "a-fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 520, 505 N.Y.S.2d 24.

Therefore, on the face of Petitioners' argument there is no mistaking that the Petitioners are not challenging an action that with certainly and immediacy harm them, but are merely attempting to prevent a speculative harm from taking place. *See Parent Teacher Association of P.S. 124M v. Board of Education of the City School District of the City of New York*, 138 A.D.2d 108.

It is therefore the finding of this Court that the grievances suggested by Petitioners are not yet ripe for review. Accordingly, the petitions are determined as follows: mot seq. 004 **DENIED**; mot seq 005 **GRANTED** in part, **DENIED** in part (Standing); mot seq. 006 **DENIED**; mot seq. 007 **DENIED**.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: January 7, 2016

HON. JERRY GARGUILO, JSC