Matter of Stephens v Isaman
2016 NY Slip Op 31412(U)
July 26, 2016
Supreme Court, Steuben County
Docket Number: 2015-1224CV
Judge: Marianne Furfure

State of New York **Supreme Court**
County of Steuben

In the Matter of the Application of
LARRY STEPHENS,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Laws and Rules

DECISION

Index No.: 2015-1224CV

v.

KENNETH ISAMAN,
TOWN OF HORNELLSVILLE,

Respondents.

Appearances: *Larry Stephens,* Canisteo, *Petitioner Pro Se*

Patrick F. McAllister, Wayland for Respondent Town of Hornellsville & *Kenneth Isaman*

This matter has come before the Court on petitioner's Article 78 application seeking an injunction directing respondent Kenneth Isaman (Isaman) and the Town of Hornellsville (Town) to cease all maintenance of Knoll Top Road and voiding any scheduled improvements on the road until the respondents comply with the road dedication requirements of Town Highway Law Section 171. Respondents oppose petitioner's request and contend that petitioner does not live in the Town and, thus, has no standing to bring this proceeding. Respondents further argue that the proceeding fails to state a cause of action, is time barred, cannot be brought against Isaman in his individual capacity, fails to join as

necessary parties landowners who own property on Knoll Top Road, and cannot provide injunctive relief.

Petitioner requested additional time in which to file a reply and the matter was adjourned. Petitioner did not file a reply, but instead filed a Notice of Motion and affidavit asking to amend his Article 78 petition to include a taxpayer cause of action under General Municipal Law (GML) Section 51, add Jason Emo, the current Town Highway Superintendent as a party, and update petitioner's residency information to establish that he maintains a residence and two business lots in the Town. Isaman filed a response in his individual capacity and also as supervisor of the Town. He objects to petitioner's request to add a GML Section 51 claim, argues that petitioner failed to include necessary parties, and requests that petitioner's original petition be dismissed and his motion to amend his petition be denied.

MOTION TO AMEND ARTICLE 78 PETITION

CPLR Section 3025(b) provides that "(a)ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." The statute states that the proposed amended pleading "shall" be included with the motion papers. However, the Court has discretion to decide whether or not to allow a motion to amend *(Chang v. First American Title Insurance Co. of New York*, 20 AD3d 502 [2nd Dept. 2005]). An application to amend a pleading should

be freely given, although a proposed amendment that is "palpably insufficient or patently devoid of merit" should be denied *(JFK Family Ltd. Partnership, v. Millbrae Natural Gas Development Fund*, 132 AD3d 729, 730 [2nd Dept. 2015]; *Matter of Clairol Development, LLC v. Village of Spencerport*, 100 AD3d 1546 [4th Dept. 2012]). Where a copy of the amended petition is not provided and the proposed amendment has no merit, the Court's decision to deny the motion is not an abuse of discretion (*Chang v. First American Title Insurance Co. of New York*, Id.). For the reasons set forth below, the Court finds that, even if the Court accepts petitioner's affidavit as the proposed amended pleading required by CPLR 3025(b), his motion to amend is denied because his GML Section 51 is devoid of merit.

Petitioner contends that the issue to be determined is whether the Town complied with the requirements of Highway Law Sections 171 and 210, when they voted to accept dedication of Knoll Top Road. Petitioner contends that Knoll Top Road was never properly dedicated and, therefore, any Town funds that were spent for maintenance and upkeep constitute an illegal waste of taxpayer funds.

Knoll Top Road, also referred to as Knoll Top Court, is located within both the Town of Hornellsville and the neighboring Town of Fremont. The road provides access from a residential development to County Route 58 in the Town of Hornellsville. In 2006, the Town Board was asked to accept dedication of Knoll Top Road. The Town agreed to do so, contingent on the landowners bringing the

road into compliance with the Town Highway Superintendent's specifications, which they did. Thereafter, the Town entered into an intermunicipal agreement with the Town of Fremont in which the Town of Hornellsville agreed to maintain all of Knoll Top Road, including that portion of the road located in the Town of Fremont, with the Town of Fremont retaining ownership of that portion of the road within its boundaries. The Town claims that, since 2007, Knoll Top Road has been regularly used by the public as a town roadway, is listed on the town highway inventory, and is maintained by the Town.

Petitioner does not deny the Town's claims, but argues that the road was never properly dedicated and, therefore, any funds spent on maintaining the road are an illegal waste of taxpayer money. Even assuming that petitioner is correct in claiming that the Town failed to follow statutory requirements governing dedication of the roadway, use of taxpayer funds to maintain an improperly dedicated road is not the sort of fraud or illegality necessary to support a claim under GML Section 51. A GML Section 51 claim "lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (*Godfrey v. Spano,* 13 NY3d 358, 373 [2009]; citing *Mesivta of Forest Hills Inst. v. City of New York,* 58 NY2d 1014, 1016 [1983]; *Western New York Water Company v. City of Buffalo,* 242 NY 202, 206-207 [1926]; *Klubenspies v. Town of Clarkstown,* 115 AD3d 817, 818 [2nd Dept. 2014]; Urbanski *v. City of Rochester,* 66 AD3d

1412, 1414 (4th Dept. 2009]). To state a GML Section 51 cause of action, "special allegations of waste tied to corruption have been required" (*Betters v. Knabel,* 288 AD2d 872, 873 [4th Dept. 2001] citing *Montecalvo v. City of Utica*, 170 Misc 2d 107, 111 [Oneida Co. 1996]). In this case, because petitioner does not allege that the Town committed any acts of fraud by maintaining Knoll Top Road, his claim can only succeed if he states an action for illegal dissipation of Town funds (Godfrey v. Spano, Id.; *Sevenson Hotel Associates, Inc. v. Stranges,* 262 AD2d 957 [4th Dept. 1999]).

Even assuming that petitioner's allegations are true - that the Town has used taxpayer funds to maintain Knoll Top Road without having followed the statutory process to accept dedication of the roadway - these allegations are insufficient to state a cause of action under General Municipal Law Section 51 (*Betters v. Knabel*, Id). "Failure to observe statutory provisions does not constitute the fraud or illegality necessary to support a taxpayer action pursuant to (GML) Section 51. To hold otherwise 'would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local administration' " (*Mesivta of Forest Hills Inst. v. City of New York,* Id. citing *Talcott v. City of Buffalo*, 125 NY 280, 288 [1891]). Therefore, petitioner's application to amend his petition to add a cause of action under General Municipal Section 51 is denied.

ARTICLE 78 PETITION

Respondents move to dismiss the petition on the grounds that petitioner, although a property owner is not a resident of the Town and, therefore, lacks standing to bring an Article 78 proceeding challenging the decisions and actions of the Town of Hornellsville.

Standing is a threshold determination which, if raised, must be considered at the outset of any litigation to determine whether a party " . . . should be allowed access to the courts to adjudicate the merits of a particular dispute. . . " (*Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 769 [1991]; *Matter of Dairylea Coop. v. Walkley*, 38 NY2d 6, 9 [1975]). To have standing, a party must show that it has suffered injury distinct from the public at large (*Society of Plastics Indus. v. County of Suffolk*, Id). "This is so since, under common law, a court is without power to right a wrong where civil, property or personal rights are not affected" (*Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1987]).

Petitioner cannot show that he is personally aggrieved, in a manner different in kind and degree from the community generally, by the Town's use of funds to maintain and upkeep Knoll Top Road. Any minimal increase in taxes suffered by petitioner as a result of these expenditures of Town funds is no injury distinct from that suffered by an other taxpayer and is insufficient to meet the

standing threshold (*Diederich v. St. Lawrence,* 78 AD3d 1290, 1291 [3rd Dept. 2010; *Quigley v. Town of Ulster*, 66 AD3d 1295, 1296 [3rd Dept. 2009]). As a result, petitioner cannot establish that he has common-law standing to challenge the Town's actions.

However, standing can also be established by taxpayers who challenge the legality of any state or local legislative action, even though they cannot demonstrate any injury-in-fact, when lack of standing would otherwise "erect an impenetrable barrier to any judicial scrutiny of legislative action" *(Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 NY2d 801, 814 [2003]; *Matter of Colella v. Board of Assessors of County of Nassau,* 95 NY2d 401, 410 [2000]; *Matter of Davidson v. Village of Penn Yan,* 107 AD3d 1423 [4th Dept. 2013]; *Ricket v. Mahan*, 97 AD3d 1062, 1064 (3rd Dept. 2012]). Petitioner has failed to demonstrate that there is an impenetrable barrier to judicial review, if his action is not allowed to proceed (*Davidson v. Village of Penn Yan,* Id.; *Seidel v. Prendergast*, 87 AD3d 545, 546 [2nd Dept. 2011]. Petitioner's interest in this expenditure is remote compared to other residents who live near or along the road and would more likely be affected by the Town's actions (*Colella v. Board of Assessors of County of Nassau*, Id.). Failure to grant petitioner standing would not foreclose judicial review of the issue he has raised by someone more directly impacted by the Town's actions. Petitioner's interest is insufficient to support

standing under the common law taxpayer doctrine. Therefore, this proceeding must be dismissed for lack of standing.

Respondents' attorney to submit order.

Dated: July 26, 2016.

ENTER:

Marianne Furfure

Hon. Marianne Furfure
Acting Supreme Court Justice