

Matter of Belsky v Laga
2017 NY Slip Op 33134(U)
June 30, 2017
Supreme Court, Putnam County
Docket Number: 175/16
Judge: Robert M. DiBella
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PUTNAM COUNTY
CLERK

2017 JUL -7 PM 2: 33

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

-----X
In the Matter of the Application of

**ALAN BELSKY, ROBIN BELSKY, ALAN P. RAINES,
NORMAN SAS, MINIA SAS, CHARLES MINTZ,
KIRK LAKE VIEW, LLC, CYNTHIA HERTZ, JUDITH
GORDON, HOWARD PEARLE, GUY VOLOZINSKY,
GAL VOLOZINSKY, DROR YEHUDA, LEONA YEHUDA,
SUSAN WILLIAMS, JANE KARTSCH, WAYNE
BOTTRELL, BARBARA BERGER, ELIA OFEK, RONALD
ALLSTADT, MICHAEL LEVITAN, KENETH DESANCTIS,
LESLIE GELLER, ELIOT GELLER, SYLVIA PEARL, ERIC
BIRNBAUM, PAMELA STANLEY, RICHARD STANLEY,
MARILYN BIRNBAUM, MARGARET FIOR, MARSHA
WALDMAN, ROBERT ROSIT, HARVEY KATZEFF and
BARBARA KATZEFF,**

Index No.: 175/16
Motion Seq. 001

Petitioners/Plaintiffs,

**For Judgments Pursuant to Article 78 and Section 3001
of the Civil Practice Law and Rules,**

**DECISION,
ORDER AND
JUDGMENT**

-against-

**ROBERT LAGA, ANTHONY DUSAVIC, EDWARD
BARNETT, NICHOLAS FANNIN, MARC PEKOWSKY,
JOHN STARACE, VINCENT TURANO, Individually and
Collectively, as the TOWN OF CARMEL
ENVIRONMENTAL CONSERVATION BOARD, JAY
MOSKOWITZ and JANET SILVERSTEIN,**

Respondents/Defendants.

-----X
DIBELLA, J.

The following documents numbered 1 to 62 were read on this petition, complaint and counterclaim:

Order To Show Cause - Verified Complaint and

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Petition - Affirmation - Affidavit - Exhibits - Memorandum of Law - Affidavits of Service	1-26
Verified Answer (Town Respondents) ¹ - Affidavit - Exhibit - Memorandum of Law - Return of Record - Affidavits of Service	27-45
Verified Answer (Moskowitz/Silverstein) - Exhibits - Affidavit of Service	46-57
Verified Reply To Counterclaim - Reply Affirmation - Reply Affidavits - Exhibit	58-62

Upon consideration of all of the foregoing,² and for the following reasons, the Petition is denied in its entirety and the special proceeding is dismissed, and the Complaint is dismissed as to the Town Respondents.

Factual and Procedural Background

According to the Verified Complaint And Petition (collectively hereafter, "the Complaint/Petition"), Petitioners/Plaintiffs include owners of real property located "along and nearby Kirk Lake [in the Town of Carmel], who are subject to real covenants and restrictions, codes, ordinances, and rules and/or regulations restricting disturbances within a one-hundred (100) foot wetland conservation buffer along the shores of Kirk Lake" (Complaint/Petition at ¶11). Petitioners/Plaintiffs plead that "Moskowitz is the record owner in fee simple of an unimproved lot known as 47 Tyler Court [hereafter, "the Moskowitz

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Hereafter, Respondents/Defendants, Robert Laga, Anthony Dusavic, Edward Barnett, Nicholas Fannin, Marc Pekowsky, John Starace, Vincent Turano, Individually and Collectively, as the Town Of Carmel Environmental Conservation Board, shall be referred to collectively as "the Town Respondents." Hereafter, Respondents/Defendants, Jay Moskowitz (individually hereafter, "Moskowitz") and Janet Silverstein, shall be referred to collectively as "Moskowitz/Silverstein."

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A submission by Moskowitz/Silverstein entitled, Respondent's Sur Reply In Opposition To Complaint Counsel's Reply Affirmation Of Michael V Caruso In Further Support Of Order To Show Cause, as well as a submission by Petitioners/Plaintiffs entitled, Reply Affirmation Of Michael V. Caruso To The Sur-Reply Affidavit Of Jay Moskowitz And In Further Support Of Order To Show Cause, were not considered in the Court's determination.

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Property"]" (*id.* at ¶16), which was once part of a single piece of real property with frontage on Kirk Lake that was subdivided into "[a]pproximately twelve (12) lots" (*id.* at ¶18), which are commonly known as Lakeview at Hill Farm. Petitioners/Plaintiffs plead that "many, if not all, vesting deeds including that of the [Moskowitz Property] emanating from [said subdivision] recited a covenant and restriction burdening all successors in title to maintain an undisturbed one-hundred (100) foot minimum wetland conservation buffer from the shoreline of Kirk Lake" (*id.* at ¶25). And Petitioners/Plaintiffs plead that "[i]n approximately fall [sic], 2014, Moskowitz installed dock footings within the Wetland Buffer in violation of the covenants and restrictions encumbering the [Moskowitz Property] and the Code of the Town of Carmel" (*id.* at ¶34).

In January 2015 Moskowitz applied to Respondent, Town Of Carmel Environmental Conservation Board (hereafter, "the ECB"), for permission to construct a dock at the shoreline of Kirk Lake and the Moskowitz Property (hereafter, "the Wetlands Permit Application"). The Wetlands Permit Application first appeared on the ECB's agenda for consideration on January 22, 2015, and was adjourned to and considered during public meetings of the ECB on February 5, 2015, March 19, 2015, and May 13, 2015. The ECB granted the Wetlands Permit Application on January 21, 2016.

Petitioners/Plaintiffs commenced the above-captioned special proceeding and declaratory judgment action (hereafter, "the Proceeding/Action") on February 2, 2016, by filing a proposed Order To Show Cause (hereafter, "OTSC") and the Complaint/Petition and supporting papers, with the Putnam County Clerk, which OTSC this Court signed on February 2, 2016, and made returnable on March 7, 2016.

Petitioners/Plaintiffs seek a temporary restraining order and judgment (1) enjoining Moskowitz from performing any construction on the dock which was the subject of the Wetlands Permit Application, (2) judgment vacating, annulling and setting aside the ECB's determination granting the Wetlands Permit Application, and (3) judgment declaring that the construction of said dock is prohibited by a covenant in the deed by which Moskowitz acquired title to the Moskowitz Property. The Complaint/Petition pleads four separately

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stated and numbered causes of action. In the first cause of action Petitioners/Plaintiff's allege that ECB's conduct in granting the Wetlands Permit Application was "arbitrary, capricious, and illegal and unsupported by substantial evidence [and] has violated, and unless enjoined will continue to violate, CPLR Article 78" (Complaint/Petition at ¶¶64-65). In the second cause of action Petitioners/Plaintiffs allege that ECB's failure to require Moskowitz to make a second application, and its failure to give public notice, hold a public hearing and otherwise "observe all lawful procedures" (*id.* at ¶67) in its consideration and determination of the Wetlands Permit Application, violated their "right to procedural due process" (*id.*) under the United States Constitution and the New York State Constitution.³ In the third cause of action Petitioners/Plaintiffs allege that the ECB's action in granting the Wetlands Permit Application was "unauthorized by New York Law and the Code of the Town of Carmel" (*id.* at ¶69). And in the fourth cause of action Petitioners/Plaintiffs allege that pursuant to the covenant to the deed by which he acquired title to the Moskowitz Property, Moskowitz is prohibited from constructing the dock which was the subject of the Wetlands Permit Application. (*See id.* at ¶¶72-76).

The OTSC established the time and method of service, and directed that papers in opposition were to be served and filed by February 26, 2016, and that reply papers were to be served and filed by March 4, 2016. By letter to the Court, counsel for Petitioners/Plaintiffs and counsel for the Town Respondents dated February 16, 2016, Moskowitz requested an adjournment of the date set for submission of opposition papers. The Court granted the request and directed that opposition papers were to be served and filed by March 11, 2016, and reply papers were to be served and filed by March 21, 2016.

The Town Respondents filed their Verified Answer (hereafter, "the Town Answer") with supporting papers, certified record and Affidavit Of Service on March 11, 2016. The

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Petitioners/Plaintiffs also allege in the second cause of action that the ECB's actions "violate Pulte's equal protection rights" (Complaint/Petition at ¶67). However, noone identified as "Pulte" is named as a party in the Proceeding/Action or otherwise mentioned elsewhere in the Complaint/Petition or in any of the papers filed in support thereof.

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Town Answer pleads five separately stated and numbered affirmative defenses. In their first through fourth affirmative defenses the Town Respondents argue that the ECB's decision to grant the Wetlands Permit Application was not arbitrary, capricious, an abuse of discretion or otherwise unlawful, and that it was rational and supported by substantial evidence. (See Town Answer at ¶¶36-39). And in their fifth affirmative defense the Town Respondents argue that "Petitioner's [sic] lack standing to bring the within action" (*id.* at ¶40).

Moskowitz/Silverstein – who have appeared without counsel at every stage of the Proceeding/Action – filed their Verified Answer (hereafter, "the Moskowitz/Silverstein Answer") and papers in opposition, with Affidavit Of Service on March 11, 2016. So far as the Court is able to discern, the Moskowitz/Silverstein Answer pleads four separate but unnumbered affirmative defenses and a counterclaim. In their first affirmative defense Moskowitz/Silverstein argue that Petitioners/Plaintiffs' "request for a temporary restraining order must be denied as moot because[, inter alia,] the dock has been fully constructed since February 6, 2016 and was lawfully constructed in accordance with a certain approval issued by the New York State Office of General Service [sic], which is the municipal entity having sole jurisdiction over Kirk Lake" (Moskowitz/Silverstein Answer at ¶3). In their second affirmative defense Moskowitz/Silverstein argue that the Complaint/Petition must be denied "because the . . . ECB has no jurisdiction over the construction of docks in a navigable waterway of the State of New York" (*id.* at ¶4). In their third affirmative defense Moskowitz/Silverstein argue that the covenant on which Petitioners/Plaintiffs purportedly rely "must be read only to apply to the designated wetlands and not the navigable waterway that is Kirk Lake" (*id.* at ¶5). In their fourth affirmative defense Moskowitz/Silverstein argue that the Proceeding/Action "must be dismissed as service of process was not proper . . . as it was not by personal service at the Moskowitz residence address" (*id.* at ¶6). And in their counterclaim Moskowitz/Silverstein seek judgment declaring that the ECB "has no jurisdiction over the construction of a dock on a navigable waterway of the State and that the construction of the dock [which was the subject of the

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Wetlands Permit Application] is not in violation of [the covenant on which Petitioners/Plaintiffs purportedly rely]" (*id.* at ¶7).

Petitioners/Plaintiffs filed their Verified Reply To Counterclaim (hereafter, "Reply to Counterclaim") and reply papers in further support on March 18, 2016. The Reply to Counterclaim pleads four separately stated and numbered affirmative defenses: failure to state a cause of action, the counterclaim is barred in whole or part by documentary evidence, equitable estoppel, and unclean hands.

Although the relief sought by Moskowitz/Silverstein in their counterclaim arguably includes judgment against the ECB, the Moskowitz/Silverstein Answer does not denote any part of the pleading as a cross-claim and the Town Respondents did not respond to the counterclaim.

The Complaint/Petition was deemed fully submitted on March 21, 2016, the date to which the original return date for the OTSC had been adjourned.

Discussion

Procedural Rules for Determination

The standard for determining a fully submitted article 78 proceeding is the same as that for summary judgment in a plenary action (*see Matter of Bahar v Schwartzreich*, 204 AD2d 441, 443 [2d Dept 1994]), "requiring the court to decide the matter 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' (CPLR 409[b] [other internal citations omitted])" (*Matter of Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008]). However, "[i]n a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand" (*Matter of Rosenberg v New York State Off. of Parks, Recreation, and Historic Preserv.*, 94 AD3d 1006, 1008 [2d Dept 2012]). If no party has made a motion for accelerated judgment, the court must determine the fully submitted proceeding but may not summarily

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dispose of the causes of action for damages or declaratory relief. *See id.*; *Matter of East West Bank v L&L Assoc. Holding Corp.*, 144 AD3d 1030, 1033 (2d Dept 2016).

The issues addressed in the first, second and third causes of action in the Complaint/Petition are appropriately raised in a CPLR art. 78 proceeding. Regardless of the language used in a pleading to describe the relief sought in a particular claim or cause of action, the standard of judicial review depends upon the vehicle by which such claim or cause of action should have been brought. *See New York City Health and Hosps. Corp. v Mc Barnette*, 84 NY2d 194, 200-206 (1994). The questions that may be raised in an article 78 proceeding include: "whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[2] and [3]). In each of their first three causes of action Petitioners/Plaintiffs challenge the propriety and lawfulness of the procedures that resulted in ECB's granting of the Wetlands Permit Application, which challenge should have been brought by an article 78 proceeding. Therefore, those causes of action plead claims under CPLR art. 78, which claims – comprising the Petition portion of the Complaint/Petition – must now be determined on their merits.

The Petition is Denied and the Special Proceeding Portion of the Proceeding/Action is Dismissed.

Petitioners/Plaintiffs lack standing to maintain the special proceeding. In order to assert a claim that an administrative body or officer has failed to comply with or acted in contravention of law a petitioner must demonstrate that as a result of such action or non-compliance it has sustained or will sustain an injury-in-fact, which injury is within the zone of interests promoted or protected by the statutory provision under which the administrative body or officer has acted, and that the harm the petitioner suffered from such injury is different in some way from that suffered by the public at large. *See Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772-775 (1991). The harm suffered must

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be direct, not merely potential or general. See *Matter of Brunswick Smart Growth, Inc. v Town of Brunswick*, 73 AD3d 1267, 1268 (3d Dept 2010). And where the issue of standing is disputed, “perfunctory allegations of harm” are insufficient; petitioners “must prove (emphasis supplied) that their injury is real and different from the injury most members of the public face” (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]).

Petitioners/Plaintiffs’ pleadings and averments as to the ownership of real properties are not sufficient to prove that any of them has sustained or will sustain a special – i.e., non-public – injury. An owner of property that is located in close proximity to the site of the project to which the challenged administrative action relates is presumed to be adversely affected by the action and, accordingly, need not allege a specific, non-public harm. See *Matter of Vil. of Chestnut Ridge v Town of Ramapo* [“*Chestnut Ridge*”], 45 AD3d 74, 90 (2d Dept 2007) *lv dismissed* 12 NY3d 793 (2009) and 15 NY3d 817 (2010); *Matter of Long Island Pine Barrens Socy., Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 (2d Dept 1995). Thus, Petitioners/Plaintiffs plead: “[c]ollectively, Petitioners are record owners in fee simple of real property on or nearby Kirk Lake” (Complaint/Petition at ¶10) and “[m]any, if not all, of Petitioners are property owners along and nearby Kirk Lake” (*id.* at ¶11). And in an affidavit submitted in support of the OTSC, one of the Petitioners/Plaintiffs alleges that since 2003 she and her husband “have made our primary residence of [sic] 231 West Lake Boulevard, Mahopac, New York 10541, which has frontage along a Southeasterly portion of Kirk Lake” (Affidavit Of Robin Belsky In Support Of Order To Show Cause [hereafter, “Belsky Affidavit”] at ¶5).

However, there is no allegation in the Complaint/Petition or the Belsky Affidavit, nor any evidence submitted in support thereof, as to which of the Petitioners/Plaintiffs owns or resides in what real property, where such properties are located, or where they are situated relative to the Moskowitz Property. And there is no allegation in the Reply to Counterclaim or the affidavits annexed thereto – all of which were submitted after standing

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to maintain the special proceeding had been disputed in the Town Answer⁴ – nor any evidence submitted in support thereof, as to such matters. Indeed, it is alleged in the Belsky Affidavit that the Moskowitz Property has “frontage on the Western shore of Kirk Lake” (*id.* at ¶4), which would tend to show that it is located on a different part of the lake than, and not close to, the affiant's residence. Consequently, none of the Petitioners/Plaintiffs are entitled to the benefit of the close proximity presumption, so that in order to establish standing, they were required to prove by other means that at least one of them has sustained or will sustain a special injury-in-fact (*see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d at 306; *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d at 433).

Petitioners/Plaintiffs have failed to satisfy their burden. The Complaint/Petition pleads only that “each and every Petitioner is an interested party directly affected by Respondents' unlawful actions” (Complaint/Petition at ¶12). It does not identify which of the Petitioners/Plaintiffs were purportedly affected, or describe the specific nature of their interest or how such interest was affected, by the granting of the Wetlands Permit Application. Indeed, none of the individual Petitioners/Plaintiffs named in the caption are even mentioned by name in the pleading itself. Thus, without more, the pleading is not sufficient to prove that any of the Petitioners/Plaintiffs have standing. Moreover, the Belsky Affidavit does not provide any more information relevant to the standing of the other Petitioners/Plaintiffs, and is not sufficient to prove even the affiant's own standing.

Firstly, to constitute an injury-in-fact sufficient to confer standing, the injury complained of must at least be related to if not a direct consequence of the action being challenged. *See Socy. of Plastics Indus., Inc. v County of Suffolk, supra* ; *Matter of Open Space Council, Inc. v Town of Brookhaven*, 245 AD2d 378, 379-380 (2d Dept 1997). It is alleged in the Belsky Affidavit that the water quality of Kirk Lake “has considerably declined

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The Town Respondents – the only Respondents/Defendants whose actions are challenged in the article 78 claims – disputed Petitioners/Plaintiffs' standing in their fifth affirmative defense (*see* Town Answer at ¶40).

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in recent years (emphasis supplied) due to factors, including, but not limited to, eutrophication, pollutant and phosphorous loading, surface runoff, and the marked decline of native fish and wildlife species" (Belsky Affidavit at ¶25) and that "Kirk Lake was and remains (emphasis supplied) a very sensitive ecosystem with any disturbance yielding disproportionate environmental consequences" (*id.* at ¶27). Even assuming arguendo that the circumstances described in the Belsky Affidavit could constitute injuries sufficient to confer standing, none of them can have been related to or a consequence of the granting of the Wetlands Permit Application because they existed or occurred prior to that event. And there is no allegation in the Reply to Counterclaim or the affidavits annexed thereto, nor any evidence submitted in support thereof, that would indicate or tend to show otherwise. Thus, Petitioners/Plaintiffs have failed to prove that any of them has sustained an injury-in-fact that is related to or a consequence of the granting of the Wetlands Permit Application.

Secondly, allegations founded on mere speculation of a hypothetical harm are not sufficient to demonstrate an actual injury. *See Roberts v Health and Hospitals Corp.*, 87 AD3d 311, 318-319 (1st Dept 2011) *lv denied* 17 NY3d 717 (2011); *Matter of Niagara County v Power Auth. of State*, 82 AD3d 1597, 1598-1599 (4th Dept 2011) *lv dismissed in part and denied in part* 17 NY3d 838 (2011). The only allegations in the Belsky Affidavit even remotely relating the circumstances described therein to the granting of the Wetlands Permit Application are that "[a]llowing Moskowitz to proceed with dock construction . . . would generate detrimental physical and environmental conditions (e.g., increased runoff and impervious surface coverage)" (Belsky Affidavit at ¶45) and that "[i]rreversible environmental damage to Kirk Lake likely (emphasis supplied) has already occurred by these actions and continues to compound with each passing day Moskowitz performs dock construction" (*id.* at ¶46). However, those allegations are not based upon or supported by any competent evidence, research, study or expert analysis, or even personal experience or observation. Rather, they represent the affiant's apprehensions and conclusory opinions

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as to what might happen – in other words, mere speculation of a hypothetical harm.⁵ And Petitioners/Plaintiffs did not submit any such evidence, research, study or analysis in reply after standing had been disputed. Thus, Petitioners/Plaintiffs have failed to prove that any of them will sustain an injury-in-fact as a consequence of the granting of the Wetlands Permit Application.

Therefore, Petitioners/Plaintiffs have failed to prove that any of them have standing to maintain the special proceeding portion of the Proceeding/Action.

In sum, the pleadings, papers and admissions submitted herein – including the certified transcripts of the record of the proceedings under consideration (see CPLR 7804[d]) – fail to demonstrate the existence of a triable issue of fact and do establish that the Town Respondents are entitled to judgment as a matter of law. Therefore, the Town Respondents' fifth affirmative defense that Petitioners/Plaintiffs lack standing is granted, the Petition is denied and the special proceeding portion of the Proceeding/Action is dismissed. See CPLR 3212(b); *Matter of Izzo v Lynn*, 271 AD2d 801, 802 (3d Dept 2000); *Matter of Lupoli v Conservation Bd. of the Town of Southhampton*, 267 AD2d 387 (2d Dept 1999).

The Merits of the Complaint Portion of the Proceeding/Action are Not Determined

The Complaint consists entirely of the fourth cause of action, in which Petitioners/Plaintiffs seek declaratory relief against Moscowitz/Silverstein based upon the violation of a covenant in the deed to the Moscowitz Property. No such relief is sought against the Town Respondents and no challenge to the propriety or lawfulness of the ECB's actions are raised in either the fourth cause of action in the Complaint/Petition or the Moscowitz/Silverstein counterclaim. None of the parties has made a motion for accelerated judgment on the Complaint or the counterclaim. Thus, the Court may not

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Compare Matter of Sierra Club v Vil. of Painted Post, 26 NY3d 301 (2015), in which the Court of Appeals held that the petitioner's allegations that from his property he could see the increased activity and hear the increased noise from operations at the project at issue in the proceeding was sufficient to confer standing.

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summarily dispose of either. See; *Matter of East West Bank v L&L Assoc. Holding Corp.*, 144 AD3d at 1033; *Matter of Rosenberg v New York State Off. of Parks, Recreation, and Historic Preserv.*, 94 AD3d at 1008. Therefore, the merits of the Complaint and the counterclaim have not been determined in this Decision, Order And Judgment, which pleadings will be scheduled for a preliminary conference.

Accordingly, for the foregoing reasons, it is

ORDERED AND ADJUDGED that the fifth affirmative defense in the Verified Answer of the Town Respondents is granted, the Petition portion of the Petitioners/Plaintiffs' Verified Complaint And Petition – consisting of the first, second and third causes of action therein – is denied, and the special proceeding portion of the above-captioned special proceeding and declaratory judgment action is dismissed, and it is further

ORDERED that Respondent/Defendant, Jay Moscowitz, and Respondent/Defendant, Janet Silverstein, shall appear in person, and Petitioners/Plaintiffs shall appear by counsel, before this Court in courtroom 401, at the Putnam County Courthouse, at 9:30 a.m., on **July 31, 2017**, for a preliminary conference.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: Carmel, New York

June 30, 2017

ENTER:



HON. ROBERT M. DIBELLA
 Justice of the Supreme Court

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