Springs Fire Dist. v Town of E. Hampton Zoning Bd. of Appeals
2018 NY Slip Op 30337(U)
February 21, 2018
Supreme Court, Suffolk County
Docket Number: 16-240
Judge: Joseph Farneti
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FILED

SHORT FORM ORDER

INDEX No. 16-240

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-16-16 (001)
MOTION DATE 3-16-16 (002)
MOTION DATE 4-21-16 (003)
ADJ. DATE 4-21-16
Mot. Seq. # 001 - Continued
002 - MD
003 - MG

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SPRINGS FIRE DISTRICT and ELITE TOWERS, L.P.,

Petitioners/Plaintiffs,

For a Judgment under Articles 78 and 30 of the Civil Practice Law and Rules and for Declaratory Judgment,

- against -

THE TOWN OF EAST HAMPTON ZONING BOARD OF APPEALS, THE TOWN CLERK OF THE TOWN OF EAST HAMPTON, AND THE TOWN OF EAST HAMPTON BUILDING DEPARTMENT,

Respondents/Defendants.

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Upon the following papers numbered 1 to 36 read on this motion to dismiss and motion to intervene; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9, 10 - 15, 20 - 27 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 19, 28 - 32 ; Replying Affidavits and supporting papers 34 - 36 ; Other memorandum of law 33; it is,

ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by the respondents/defendants for an Order dismissing the petition, pursuant to CPLR 3211(a) (2), (3), and (7), is denied; and it is further

ORDERED that the motion by the nonparty Headin East, Bub, LLC for an Order, pursuant to CPLR 1012, CPLR 1013 and CPLR 7802 (d), granting leave to intervene in this special proceeding is granted; and it is further

ORDERED that counsel for Headin East, Bub, LLC is directed to serve a copy of this Order with notice of entry upon all parties and the Clerk of the Court; and it is further

ORDERED that, upon receipt of a copy of this Order with notice of entry, the Clerk of the Court shall amend the caption to reflect "Headin East, Bub, LLC" as Intervenor-Respondent; and it is further

ORDERED that the respondents are directed to serve and file their answer to the petition, and to file any additional documents pursuant to CPLR 7804 (e), within twenty (20) days of service of a copy of this Order with notice of entry; and it is further

ORDERED that pursuant to CPLR 7804 (f), any party may re-notice this matter for hearing upon appropriate notice.

The petitioner Springs Fire District (the "Fire District") operates the Springs Fire Department out of its principal place of business located at 179 Fort Pond Boulevard, Springs, New York (the "premises"). It appears that the Fire District entered into a lease agreement with the petitioner Elite Towers, L.P. ("Elite") whereby the parties agreed to construct a communications facility at the premises to improve the communications system of the fire department. On October 28, 2014, the petitioners submitted an application to the respondent Town of East Hampton, Building Department (the "Building Department") for the construction of a new communications pole with antennas and an equipment area. The Building Department issued the subject building permit on November 5, 2014. On January 30, 2015, the Building Department issued a building permit to the petitioners' wireless service provider to install antennas on the new communications pole pursuant to an application filed on November 24, 2014. On or about April 16, 2015, the petitioners commenced construction pursuant to the subject building permits.

On or about May 22, 2015, the owner of property "in close proximity" to the premises, Headin East, Bub, LLC ("Headin East"), submitted an application to the Town of East Hampton Zoning Board of Appeals (the "ZBA") seeking to revoke the subject building permits. Afer a pubic hearing, the ZBA voted to grant Headin East's application on December 1, 2015. On December 8, 2015, the ZBA issued its written determination revoking the subject building permits (the "determination").

In this hybrid CPLR article 78 proceeding, the petitioners seek, among other things, an Order vacating, annulling and reversing the determination, reinstating the subject building permits, and issuing a declaratory judgment that the communications facility is not subject to further review by any agency of the Town of East Hampton (the "Town"). In their petition, the petitioners allege, among other things, that the Fire District does not provide "personal wireless services" or "commercial wireless telecommunications services" as those terms are defied in the Town Code, that the Town previously determined that two similar projects were not to subject to local zoning regulations, and that the determination is illegal, arbitrary and capricious, and "an abuse of discretion that must be set aside."

The respondents now move to dismiss the petition pursuant to CPLR 3211 (a) (2), (3), and (7). However, the sole grounds for the motion is that the petitioners have failed to name Headin East as a necessary party pursuant to CPLR 1001 (a). CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The failure to join a necessary party under CPLR 1001 is a ground for dismissal of an action without prejudice pursuant to CPLR 1003 (*see* CPLR 1003). However, when a person who should have been joined in an action was not made a party, but is subject to the jurisdiction of the court, dismissal is not the proper remedy; rather, the court "shall order him [or her] summoned" (CPLR 1001 [b]; *see* ***Windy Ridge Farm v Assessor of Town of Shandaken***, 11 NY3d 725, 864 NYS2d 794 [2008]; ***Matter of Mega Sound & Light, LLC v Commissioner of Labor***, 99 AD3d 800, 952 NYS2d 210 [2d Dept 2012]). The respondents' request for dismissal based on the petitioners' alleged failure to join a necessary party is denied, as the respondents have not shown, or even alleged, that Headin East is not subject to the jurisdiction of this Court or that joinder is not possible (*see* ***Schwimmer v Welz***, 56 AD3d 541, 868 NYS2d 671 [2d Dept 2008]; ***Matter of Long Is. Contractors' Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]). In fact, Headin East is subject to the jurisdiction of this Court and it has specifically requested to intervene as a party in this hybrid special proceeding. Accordingly, the respondents' motion to dismiss the complaint is denied.

Headin East now moves for leave to intervene in this proceeding citing, among other things, its interest in the resolution of this dispute as the owner of a parcel of property in proximity to the premises. A matter commenced pursuant to CPLR article 78 is a special proceeding and intervention will not be allowed except with leave of court (CPLR 401). In addition, where a specific provision of the CPLR authorizes intervention, it preempts the general provisions set forth in CPLR 1012 and 1013 (*see* ***Vanderbilt Credit Corp. v Chase Manhattan Bank***, 100 AD2d 544, 473 NYS2d 242 [2d Dept 1984]). It is well-settled that CPLR 7802 (d) is the specific provision governing intervention in CPLR article 78 proceedings (*see* ***Bernstein v Feiner***, 43 AD3d 1161, 842 NYS2d 556 [2d Dept 2007]; ***Matter of Elinor Homes Co. v St. Lawrence***, 113 AD2d 25, 494 NYS2d 889 [2d Dept 1985]). Thus, those branches of Headin East's motion to intervene pursuant to CPLR 1012 and 1013 are denied.

CPLR 7802 (d) states that a court "may allow other interested parties to intervene" in the proceeding (*see also* ***Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono***, 91 NY2d 716, 674 NYS2d 634 [1998]; ***Matter of Stockdale v Hughes***, 189 AD2d 1065, 592 N.Y.S.2d 897 (3d Dept 1993); ***Matter of Elinor Homes Co. v St. Lawrence***, *supra*). This subdivision grants the court broader

power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action (***Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono***, *supra*; ***Matter of Elinor Homes Co. v St. Lawrence***, *supra*; ***Kruger v Bloomberg***, 1 Misc 3d 192, 768 NYS2d 76 [Sup Ct, New York County 2003]). However, to be an interested party, one must have more than just a general interest in the result of the proceeding (*see* ***Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono***, *supra*; ***Ferguson v Barrios-Paoli***, 279 AD2d 396, 720 NYS2d 43 [1st Dept 2001]; ***Kruger v Bloomberg***, *supra*).

The petitioners contend that Headin East's motion is procedurally defective as it fails to include a copy of its proposed answer to the petition/complaint, and that Headin East has failed to demonstrate that it has suffered "special or unique damage" or it will be impacted by a decision herein. Here, Headin East is the applicant which sought to revoke the subject building permits and, according to the petition, played an active and substantial role in the hearing held to review said application. The petition also directly seeks to counter the arguments made by counsel for Headin East at said hearing.

In addition, the determination indicates that the ZBA's decision rests, in part, on the allegation that the petitioners did not comply with the New York State Environmental Quality Review Act (SEQRA). In the context of a SEQRA challenge, a party must demonstrate that they will suffer an environmental injury in fact (*see* ***Society of Plastics Industry, Inc. v County of Suffolk***, *supra*). If the challenging party is in close proximity to the premises that is the subject of the challenged zoning determination, they do not need to show actual injury or special damage to establish the first prong of the standing test (***Cremosa Food Co., LLC v Petrone***, 304 AD2d 606, 758 NYS2d 146 [2d Dept 2003]; ***Long Island Pine Barrens Soc., Inc. v Planning Bd. of Town of Brookhaven***, 213 AD2d 484, 623 NYS2d 613 [2d Dept 1995]). However, the challenger must still satisfy the second prong of the standing test by demonstrating that their alleged concerns fall within the "zone of interests" covered by the zoning laws or SEQRA (***Cremosa Food Co., LLC v Petrone***, *supra* at 607; ***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals***, 69 NY2d 406, 515 NYS2d 418 [1987]). Under the specific circumstances herein, it is determined that Headin East has more than just a general interest in the result of this proceeding.

Finally, Headin East's failure to submit its answer herein does not mandate a denial of its motion to intervene. These motions have been made prior to the time an answer is required under the CPLR, and Headin East provides a proposed answer in its reply. CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced." Thus, it has been held that where the record is sufficiently complete, and there is no proof that a substantial right of a party has been impaired by the failure of a movant to submit copies of pleadings, a court may address the merits of the motion (***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996 NYS2d 162 [2d Dept 2014]; *see also* ***Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello***, 97AD3d 611, 948 NYS2d 377 [2d Dept 2012]). Here, Headin East's proposed answer does not assert any affirmative defenses, and no substantial right of the petitioners is prejudiced.

Whether to permit a party to intervene in a special proceeding under CPLR article 78 lies within the court's discretion (***Matter of Pace-O-Matic, Inc. v New York State Liq. Auth.***, 72 AD3d 1144, 898 NYS2d 295 [3d Dept 2010]; ***Matter of Pirrotti v Town of Greenburgh***, 25 Misc 3d 1226[A], 906 NYS2d 775 [Sup Ct, Westchester County 2009], citing ***Matter of White v Incorporated Vil. of Plandome Manor***, 190 AD2d 854, 593 NYS2d 881 [2d Dept 1993]). It is determined that Headin East is an "interested party" pursuant to CPLR 7802 (d). Therefore, the motion to intervene in this proceeding is granted. Additionally, the proposed verified answer attached as an exhibit to Headin East's motion is deemed served and petitioner is directed to serve its response, if any, within twenty (20) days of the receipt of a copy of this Order with notice of entry. Furthermore, the caption of this proceeding is hereby amended to reflect "Headin East, Bub, LLC" as Intervenor-Respondent.

Dated: February 21, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION