

<b>Ball v Town of Ballston</b>
2018 NY Slip Op 33712(U)
August 29, 2018
Supreme Court, Saratoga County
Docket Number: Index No. 2017586
Judge: Thomas D. Buchanan
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

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RICHARD A. BALL, Commissioner of the Department  
of Agriculture and Markets of the State of New York,

Petitioner/Plaintiff,

vs.

TOWN OF BALLSTON and TIMOTHY SZCEPANIAK,  
as Town Supervisor;

Respondents/Defendants;

THOMAS J. BENUSCAK; KATZ CONSTRUCTION &  
EXCAVATION, LLC; and  
THE SPINNEY AT BALLSTON LAKE, LLC;

Intervenors/Respondents/Defendants.

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KATZ EXCAVATING AND CONSTRUCTION, LLC;

Petitioner/Plaintiff;

For a Judgment Pursuant to CPLR Article 78  
and CPLR §3001

vs.

THE TOWN OF BALLSTON; THE TOWN BOARD OF  
THE TOWN OF BALLSTON; RICHARD A. BALL AS  
COMMISSIONER OF THE DEPARTMENT OF  
AGRICULTURE AND MARKETS OF THE STATE OF  
NEW YORK and THE DEPARTMENT OF  
AGRICULTURE AND MARKETS OF THE STATE OF  
NEW YORK;

Respondents/Defendants.

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DECISION AND ORDER

Index No. 2017586  
[Saratoga County]

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

Index No. 4688-17  
[Albany County]

Buchanan, J.:

This matter comes before the Court on CPLR 2221 motions to reargue brought by Intervenors/Respondents/Defendants Thomas J. Benuscak and Katz Construction & Excavation, LLC. Petitioner/Plaintiff commenced this combined action and special proceeding seeking declaratory judgment, relief in the nature of mandamus to compel, and injunction against Respondents/Defendants Town of Ballston and Timothy Szcapaniak (collectively, the "Town"). Petitioner/Plaintiff had issued a Determination and Order against each of two actions taken by the Town to approve new connections to the public water supply for residential developments proposed by the movants here, based on their location within Saratoga County Agricultural District No. 2. By Decision, Order and Judgment issued on April 6, 2018, the Court dismissed the declaratory judgment action, denied mandamus to compel compliance with each Determination and Order, and ordered a review of both proposed developments pursuant to Agriculture and Markets Law §305(4).

This matter also comes before the Court pursuant to the Decision and Order of Hon. Kimberly A. O'Connor in a separate combined action and special proceeding in Albany County Supreme Court, entitled "*Katz Excavating and Construction, LLC v. The Town of Ballston, et al.*" which bears Albany County Index No. 4688-17. Judge O'Connor ordered that the Albany County case should be transferred to Saratoga County Supreme Court and joined for trial with the instant Saratoga County Supreme Court case. Judge O'Connor's Decision and Order specifically held in abeyance -- pending transfer of the Albany County case to Saratoga County -- a motion to dismiss the Albany County case that had been made by the Commissioner of the Department of Agriculture and Markets, a respondent in the Albany County case and the petitioner/plaintiff here.

**Reargument.** A motion for leave to reargue is to be based on matters of fact or law which were overlooked or misapprehended by the Court in determining a prior motion (CPLR 2221[d]). Both of the moving parties assert that the Court overlooked or perhaps misapprehended the import of resolutions passed by the Town Board in April of 2017, during the pendency of this action/proceeding, which gave approval for water service to their respective developments. They were mentioned by counsel for Katz and asserted by counsel for Benuscak as barring this action/proceeding pursuant to Town Law §195.

The Court did not overlook or misapprehend resolutions from April of 2017 asserted here by the movants. In the Decision, Order and Judgment, the Court specifically and intentionally referred to Resolution 16-107 and Resolution 16-108. These were the Town Board resolutions which prompted Petitioner/Plaintiff to issue each Determination and Order for which judicial enforcement was sought in this action/proceeding. Moreover, neither movant pled Town Law §195 as a defense. While the Court exercised its discretion to address the proffered defense, that portion of the Court's decision is effectively dictum, because the defense had been waived (CPLR §3018[b]; see *Fregoe v. Fregoe*, 33 AD3d 1183 [3d Dept 2006]; *Andersen v. Mazza*, 258 AD2d 726 [3d Dept 1999]).

**Dismissal.** As Judge O'Connor noted in her decision, these two cases involve the same lateral connection to the municipal water supply for the same development and were subject to the same Determination and Order issued by the Commissioner. Katz was allowed to intervene in this action/proceeding by Order issued on September 8, 2017, and this action/proceeding has proceeded to judgment. The action brought by Katz in Albany County is thus moot and should be dismissed.

Therefore, in consideration of the foregoing, it is hereby

ORDERED, that the brought motion by Intervenor/Respondent/Defendant Thomas J. Benuscak for leave to reargue is denied; and it is further

ORDERED, that the motion brought by Intervenor/Respondent/Defendant Katz Construction & Excavation, LLC, for leave to reargue is denied; and it is further

ORDERED, that the motion to dismiss made by Respondent/Defendant in the Albany County Supreme Court action/proceeding is granted and that proceeding is dismissed.

Dated: August 29, 2018

ENTER.

ENTERED  
Craig A. Hayner

*Craig A. Hayner*  
Saratoga County Clerk

*[Signature]*  
Thomas D. Buchanan  
Supreme Court Justice

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA  
NY

ENTERED

Papers considered:

Reargument: Notice of Motion [Benuscak]; Affidavit of William F. Ryan, Jr., Esq., with annexed exhibits; Notice of Motion [Ball as Comm'r]; Affidavit of Mary Elizabeth Slevin, Esq., with annexed exhibits; Affirmation of Danielle C. Cordier, Esq., with annexed exhibits; Memorandum of Law; Reply Affirmation of Mary Elizabeth Slevin, Esq.

Dismissal: Notice of Motion; Memorandum of Law In Support, with annexed exhibits; Affidavit in Opposition of Mary Elizabeth Slevin, Esq., with annexed exhibits; Affidavit in Opposition of Timothy Szczepaniak, with annexed exhibit; Affidavit in Opposition of Debra A. Kaelin, Esq.; Memorandum of Law In Opposition; Reply Remorandum of Law In Support