Matter of Brinkmann Hardware Corp. v The Town of Southold
2020 NY Slip Op 31961(U)
June 22, 2020
Supreme Court, Suffolk County
Docket Number: 02790/2019
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 02790-2019**

SUPREME COURT – STATE OF NEW YORK
I.A.S. PART 38 – SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 08/08/2019
Motion Seq: 001 - Adj'd to 07/30/2020
002 - MD

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In the Matter of the Application of
BRINKMANN HARDWARE CORP. and
MATTITUCK 12500 LLC

Petitioners,

- against -

THE TOWN OF SOUTHOLD, SOUTHOLD TOWN BOARD, and SOUTHOLD PLANNING BOARD,

Respondents.

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PETITIONERS' COUNSEL:
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RESPONDENTS' COUNSEL:
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Read upon the following papers: Petitioners' Notice of Petition and Verified Petition/ Complaint, and Affidavit in Support of Ben A. Brinkmann, each dated May 22, 2019, and supporting papers; Respondents' Pre-Answer Notice of Cross-Motion to Dismiss, with Affirmation of James M. Catterson, each dated July 26, 2019, with Memorandum of Law, and supporting papers; and Petitioners' Affidavit of Ben A. Brinkmann in Opposition to Cross-Motion, dated August 2, 2019, and supporting papers; and upon full consideration of the foregoing; it is

ORDERED that the prior Order of this Court, dated May 11, 2020 and entered May 18, 2020, is hereby vacated and superseded by this Order; and it is further

ORDERED that the Petition/Complaint ("Petition") **(001)** in this hybrid proceeding Article 78 special proceeding and declaratory judgment action is hereby **adjourned to July 30, 2020**, in anticipation of Respondents' service and filing of Respondents' Administrative Return/Answer and supporting papers pursuant to this Order; and it is further

ORDERED that the Respondents' Pre-Answer motion **(002)** to dismiss the Petition is hereby **DENIED**; and it is further

ORDERED that counsel for the Respondents shall serve and file an Administrative Return and Answer to the Petition promptly after receipt of a copy of this Order; and it is further

ORDERED that counsel for the Petitioners shall promptly serve a copy of this Order upon counsel for Respondents via facsimile transmission and certified mail (return receipt requested), and by First Class Mail upon the Calendar Clerk of the Court, and shall promptly thereafter file a copy of the affidavit(s) of such service with the Suffolk County Clerk; and it is further

ORDERED that, if applicable, within 30 days of the entry of this Order, Respondents' counsel shall give notice to the Suffolk County Clerk as required by CPLR §8019(c) with a copy of this Decision and Order and pay any fees should any be required.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

In this hybrid Article 78 special proceeding and declaratory judgment action, the Petitioners challenge Town of Southold ("Town") Local Law 1 of 2019, which was enacted on February 26, 2019 and thereafter renewed as Local Law 2 of 2020 ("Local Law"). In essence, the Local Law imposes a temporary Moratorium on the issuance of any approval, special exception, variance, site plan or building permit for property situated within the boundaries specified in the Local Law. Petitioners wish to build and operate a 20,000 square foot hardware store or, alternatively, a 12,000 square foot hardware store and an 8,000 square foot paint store in Mattituck within the boundaries affected by the Local Law Moratorium.

In pertinent part, the text of the Local Law provides as follows:

> Section 2. ENACTMENT OF A TEMPORARY MORATORIUM
>
> Until six (6) months from the effective date of this Local Law, after which this Local Law . . . no agency board, board officer or employee of the Town of Southold including but not limited to, The Town Board, the Zoning Board of Appeals, the Trustees, the Planning Board, or the Building Inspector(s) issuing any building permit pursuant to any provision of the Southold Town Code, shall issue, cause to be issued or allow to be issued any approval, special exception, variance, site plan, building permit, subdivision, or permit for any property situated along State Route 25, bounded on the West by intersection of State Route 25 and Bay Avenue and bounded on the East by the intersection of State Route 25 and Pike Street.
>
> Section 6. VARIANCE TO THIS MORATORIUM
>
> Any person or entity suffering unnecessary hardship as that term is used and construed in Town Law section 267-b(2)(b), by reason of the enactment and continuance of this moratorium may

> apply to the Town Board for a variance excepting the person's or entity's premises or portion thereof from the temporary moratorium and allowing issuance of a permit all in accordance with the provisions of this Southold Town Code applicable to such use or construction.

As set forth in Section 1 of the Local Law, the purpose of the Moratorium is, in essence, to provide time for completion of a traffic study and analysis of the effect that the drastic increase in traffic has had on the infrastructure, local businesses, residents and pedestrians in the stated area. The Board commissioned a traffic study of the area to identify specific issues and propose solutions and improvements to the infrastructure and traffic flow, which have the possibility of impacting other intersections in the area. In light of these potential impacts, the Town planned to meet with officials from the New York State Department of Transportation to determine what improvements would be acceptable to the State. The Town Board wishes to include any such recommended improvements in the update to the Town's Comprehensive Plan.

In their First Cause of Action, Petitioners allege that the true purpose for which the Local Law was enacted was to prevent them from building their hardware store. Therefore, according to the Petition, the Court should declare the Local Law unconstitutional, null and void. The Second Cause of Action alleges that the Town failed to refer the Local Law to the Suffolk County Planning Commission, as required by General Municipal Law §239-m. Petitioners, therefore, claim that, under Article 78 review, the Court should declare the Local Law jurisdictionally defective, unconstitutional, null and void. Petitioners' Third Cause of Action seeks injunctive relief to prevent the Town from enforcing the Local Law against them, since its true purpose was to frustrate and delay their efforts to develop the subject property. The Fourth Cause of Action seeks an Article 78 mandamus, compelling the Town and the Town Planning Board to process Petitioners' application for site plan approval pursuant to Town Code §280-131. The Respondents's pre-answer motion seeks dismissal of the Petition pursuant to CPLR §3211(a)(7) and CPLR §7804.

Ben E. Brinkmann is the President and CEO of Petitioner, Brinkmann Hardware Corp., and a Member of Petitioner, Mattituck 12500, LLC. Before proceeding with the application to the Town to build Petitioners' store, Mr. Brinkmann scheduled a meeting with leaders of the Mattituck Laurel Civic Association, which was held on July 27, 2017. The purpose of the meeting was to involve the community in the proposed development and to request a future public meeting with the Civic Association and the community residents, so Mr. Brinkmann could address any concerns the residents may have about Petitioners' project. Also in attendance was Richard Orlowski, owner of Orlowski Hardware Store, a small hardware store nearby, whose business would be affected by the Petitioners' much larger store. According to Mr. Brinkmann, Mr. Orlowski was in favor of the Petitioners' project because they offered to purchase Mr. Orlowski's business and employ him as their store manager. A public meeting was later held in September 2017 and was attended by 50 residents of the community, leaders of the Civic Association and Mr. Orlowski. At the meeting, discussions included the impact that the project would have on traffic and on Mr. Orlowski's business.

The Petitioners filed an application for a building permit with the Town of Southold Building Department on January 20, 2018. The permit was disapproved on March 12, 2018

because the proposed project first required site plan approval by the Town of Southold Planning Board. Thereafter, on May 18, 2018, the Petitioners filed an application for site plan approval with the Town Planning Board. On June 22, 2018 the Petitioners were notified that the project required a Special Exception Permit and payment of fees in the amount of $15.00 (balance of the fee for the site plan application), and a $1,000.00 application fee for a required Special Exception Permit. The Town also advised the Petitioners that a Market and Municipal Impact Study (Market Study) was required and that the Petitioners would be advised of the necessary fee the Study. On July 31, 2018, the Planning Board notified the Petitioners that the fee for the Market Study would be $30,000.00. Although the Planning Board had not yet received a response from Petitioners, on August 13, 2018 the Board engaged the engineering firm of Nelson Pope and Voorhis to perform the Market Study; however, the firm was instructed not to start the Study until the Town received the necessary fee from Petitioners.

While Petitioners' application was pending, the Town Board enacted the subject Local Law Moratorium on February 26, 2019. The Planning Board notified the Petitioners on February 28, 2019 that the application would not be processed because of the Moratorium. By letter dated April 3, 2019 the Petitioners demanded that the application be processed to the point where a building permit could be issued. When the Petitioners did not receive a favorable response, they filed the instant Petition. Respondents move to dismiss the Petition on the grounds that the Petitioners have failed to exhaust their administrative remedies and have failed to state a claim.

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed (*see* ***Nonnon v City of New York***, 9 NY3d 825, 842 NYS2d 756 [2007]; ***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1994]. The sole criterion for the court is whether, from the complaint's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law (*see* ***Guggenheimer v Ginzburg,*** 43 NY2d 268, 614 NYS2d 972 [1977]; ***Rochdale Village, Inc. v Zimmerman,*** 2 AD3d 827, 769 NYS2d 386 [2d Dept 2003]). In other words, the facts pleaded are presumed to be true and are to be accorded every favorable inference (*see* ***Kinnear v Cefoli***, ___ AD3d ___; 123 NYS3d 509 [2d Dept 2020]). Bare legal conclusions, as well as factual claims flatly contradicted by the record, however, are not entitled to any such consideration (*see* ***Santoro v Poughkeepsie Crossings, LLC***, 180 AD3d 12, 115 NYS3d 368 [2d Dept 2019]; ***Breytman v Olinville Realty, LLC***, 54 AD3d 703, 864 NYS2d 70 [2d Dept 2008]).

On a pre-answer motion to dismiss an Article 78 petition under CPLR §7804, only the petition is to be considered, all of its allegations are deemed to be true and the petitioner is to be accorded the benefit of every possible inference (*see* ***Tyson v Town of Ramapo***, 165 AD3d 805, 85 NYS3d 569 [2d Dept 2018]; ***East End Resources v Town of Southold Planning Bd.,*** 81 AD3d 947, 917 NYS2d 315 [2d Dept 2011]; ***Golden Horizon Terryville Corp. v Prusinowski***, 63 AD3d 930, 882 NYS2d 174 [2d Dept 2009] ***Long Is. Contractors' Assn. v Town of Riverhead,*** 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]). Pursuant to CPLR §7804(f), if the motion is denied, "the court shall permit the respondent to answer."

A motion to dismiss a claim for declaratory judgment relief prior to the service of an answer also presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not whether the plaintiff is entitled to a favorable declaration (*see* ***Bregman v E. Ramapo Cent. Sch. Dist.,*** 122 AD3d 656, 997 NYS2d 91 [2d Dept 2014]; ***DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC,*** 102 AD3d 725, 958 NYS2d 417 [2d Dept 2013]). Whether a pleading will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, plays no part in the court's determination of a motion to dismiss (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 799 AD2d 170 [2005]; ***Doe v Ascend Charter Schools***, 181 AD3d 648, 121 NYS3d 285 [2d Dept 2020; ***Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,*** 38 AD3d 34, 827 NYS2d 231 [2d Dept 2006]).

Generally, one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (***Watergate II Apts. v Buffalo Sewer Auth.,*** 46 NY2d 52, 412 NYS2d 821 [1978]; ***YMCA v Rochester Pure Waters Dist.,*** 37 NY2d 371, 372 NYS2d 633 [1975]; ***Old Farm Rd., Inc. v New Castle,*** 26 NY2d 462 [1970]). This exhaustion rule, however, is not an inflexible one and need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or cause irreparable injury (see ***Friedman v Rice***, 30 NY3d 461, 68 NYS3d 1 [2017]; ***Town of Oyster Bay v Kirkland***, 19 NY3d 1035, 954 NYS2d 769 [2012]; ***Watergate II Apts. v Buffalo Sewer Auth.,*** 46 NY2d 52, 412 NYS2d 821 [1978]; ***AAA Carting v Town of Stony Point***, 159 AD3d 1036, 74 NYS3d 276 [2d Dept 2018]).

Municipalities can be estopped from applying a moratorium against processing a petitioner's zoning application where the moratorium was enacted after the submission of the application and where there exists some form of misconduct or extraordinary delay on the part of the municipality (*see* ***Golden Horizon Terryville Corp. v Prusinowski***, 63 AD3d 930, 882 NYS2d 174 [2d Dept 2009]). On a motion pursuant to CPLR §7804(f) to dismiss a petition that alleges such misconduct or intentional delay by the municipality until it could enact the moratorium, only the petition is to be considered, all of its allegations are to be deemed true, and the petitioner is to be accorded the benefit of every possible inference (***id.***; ***10 E. Realty, LLC v Inc. Village of Valley Stream***, 17 AD3d 472, 792 NYS2d 606 [2d Dept 2005]; ***Zaidins v Hashmall***, 288 AD2d 316, 732 NYS2d 870 [2d Dept 2001]).

DISCUSSION

In support of dismissal, Respondents first argue that Petitioners have failed to exhaust their administrative remedies by not invoking their rights under the "carve out" provisions of Section 6 of the Local Law, which provides that "[a]ny . . . entity suffering unnecessary hardship as that term is used and construed in Town Law section 267-b(2)(b), by reason of the enactment and continuance of this moratorium may apply to the Town Board for a variance excepting the person's or entity's premises or portion thereof from the temporary moratorium . . ." According to Respondents, by merely demanding that the Planning Board process their application after the enactment of the Moratorium and not, instead, applying to the Town Board for a variance under Section 6 to allow the issuance of the necessary permits, Petitioners failed to exhaust their administrative remedies.

While exhaustion of administrative remedies is generally required before resorting to Article 78 litigation, the Petitioners here fit within the exception to that general rule (see ***Friedman v Rice***, 30 NY3d 461, 68 NYS3d 1 [2017]; ***Town of Oyster Bay v Kirkland***, 19 NY3d 1035, 954 NYS2d 769 [2012]). The Court agrees with the Petitioners, that to apply for hardship variance under the circumstances presented would be an exercise in futility. The hardship exception of Section 6 applies only to "issuance of a permit . . . in accordance with the provisions of [the] Southold Town Code applicable to . . . *construction*" (Local Law, Section 6) (emphasis added). Other approvals and processing are necessary before the Petitioners' application could be submitted to the Town Board to allow the issuance of a construction permit. For example, to apply to the Town Board, the Petitioners must first proceed through the Planning Board, which requires the Market Study and then a public hearing, neither of which has yet been completed. Furthermore, the Planning Board has already determined, as evidenced in its February 28, 2019 letter, that the processing of Petitioners' application was halted by the Moratorium. In addition, the Section 6 requirement of "unnecessary hardship" may also require separate litigation to determine if Petitioners satisfy the term's meaning "used and construed in Town Law section 267-b(2)(b)." These factors make evident that it would be futile for Petitioners to seek a hardship variance under Section 6 of the Local Law (see ***Friedman v Rice***, 30 NY3d 461, 68 NYS3d 1 [2017]; ***Town of Oyster Bay v Kirkland***, 19 NY3d 1035, 954 NYS2d 769 [2012]; ***Watergate II Apts. v Buffalo Sewer Auth.***, 46 NY2d 52, 412 NYS2d 821 [1978]; ***AAA Carting v Town of Stony Point***, 159 AD3d 1036, 74 NYS3d 276 [2d Dept 2018]). Accordingly, the Court rejects Respondents' arguments to the contrary regarding Petitioners' failure to exhaust their administrative remedies.

The Petitioners also allege in their Petition that although they submitted their application in May 2018, the February 26, 2019 Local Law Moratorium was enacted to target and thwart Petitioners' project, and stop them from building their hardware store. In this regard, Mr. Brinkmann alleges that he had a conversation with the Town Supervisor at a political fundraiser on August 17, 2018. According to Mr. Brinkmann, he inquired about any specific problems with the project, to which the Supervisor became agitated and told him, "you don't belong anywhere on Main Road. You don't belong on the North Fork." Mr. Brinkmann asserts that the Supervisor "then stormed off, muttering angrily and inaudibly."

This is consistent with the news report by Patch from September 2018,[1] which was attached to Mr. Brinkmann's affidavit in support of the Petition. According to the report, there was significant community concern about traffic and about having a large hardware store in that area. The same Patch article from September 2018 reported that the Town Supervisor and Suffolk County Legislator, Al Krupski, were working together to have the Town and County jointly purchase for parkland the very same property on which Petitioners' store would be built. That proposal was approved by the Southold Town Board in September 2018, notwithstanding the fact that Petitioners' application had already been submitted approximately 8 months earlier. The Moratorium on Petitioners' project was then enacted by the Town shortly thereafter, in February 2019.

[1] The Court notes that the name of the publisher of the article "Patch" and the date of the article were handwritten at the top of the article.

Mr. Brinkmann also avers that Mr. Orlowski was the first person to know of Petitioners' intention to build a hardware store in Mattituck, and that he and Petitioners' other principals had reached a handshake agreement with Mr. Orlowski to purchase his smaller store for $350,000.00. Under the agreement they would also employ him as their store manager. According to Mr. Brinkmann, however, Mr. Orlowski later changed counsel, retaining Martin Finnegan, Esq., the former Southold Town Attorney. Mr. Brinkmann states that suddenly thereafter, Mr. Orlowski raised his demand to $700,000.00. Ultimately, the offer was reduced to $450,000.00 via an August 2, 2018 email from Mr. Finnegan. In the email, Mr. Finnegan also states: "Brinkmann's business will undoubtedly benefit from [Orlowski's] good will . . . [I]n the context of the approval process you are engaged in, upgrading your status to the existing local hardware store should shed a favorable light on your application and eliminate some of the existing and insurmountable hurdles you are facing."

Based upon the allegations in the Petition, which are deemed to be true, the Petitioners have stated a cause of action for mandamus, and have, overall, demonstrated the existence of a bona fide justiciable controversy, warranting denial of the dismissal motion and requiring the Respondents to answer the Petition (*see* ***CPLR §7804[f]***; ***Golden Horizon Terryville Corp. v Prusinowski***, 63 AD3d 930, 882 NYS2d 174 [2d Dept 2009]; ***10 E. Realty, LLC v Inc. Village of Valley Stream***, 17 AD3d 472, 792 NYS2d 606 [2d Dept 2005]; ***Zaidins v Hashmall***, 288 AD2d 316, 732 NYS2d 870 [2d Dept 2001]).

Respondents' assertion that dismissal is warranted because the Petitioners' application is incomplete for nonpayment of certain fees is rejected, as moot, since such fees were paid by the Petitioners on January 11, 2019, before Respondents' dismissal motion was fully submitted.

CONCLUSION

Based upon the foregoing, the Respondents' Pre-Answer motion to dismiss the Petition **(002)** is **DENIED** and counsel for the Respondents shall serve and file an Administrative Return and Answer to the Petition promptly after receipt of a copy of this Order. Accordingly, the Petition **(001)** is adjourned to the date set forth above in anticipation of Respondents' service and filing of Respondents' Administrative Return/Answer and supporting papers.

Petitioners' counsel shall settle judgment on notice consistent with this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: June 22, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**