STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED – MARCH 16, 2012)

JOHN J. DISANDRO	:	
	:	
v.	:	**C.A. No. N.C. 08-0036**
	:	
W. MICHAEL SULLIVAN, IN HIS CAPACITY AS DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	

DECISION

MCGUIRL, J. Before the Court is John J. DiSandro's (DiSandro) Declaratory Judgment action seeking the Court to declare that he may appeal a decision of the Rhode Island Department of Environmental Management ("DEM"). DEM objects to this action. Jurisdiction is pursuant to G.L. 1956 § 9-30-1.

I

FACTS AND TRAVEL

This case arises out of a DEM decision regarding DiSandro's application for permission to install a septic system that does not meet the requirements of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems. (Letter from Russell J. Chateauneuf, P.E., Chief, Groundwater and Wetland Protection, to John DiSandro, Feb. 15, 2007 ("DEM First Letter").) Therein, DEM notified DiSandro that it determined that his proposed project was not in the best public interest as stated within the DEM regulations. Id. at 2. The letter summarized DiSandro's proposed variances

and described the process to request a hearing on the issue, noting the thirty day time-limit to file the request. Id. at 2-3.

In response to this letter, on February 21, 2007, DiSandro's counsel, Attorney David Fox requested a more detailed, written response identifying the rationale supporting the denial of DiSandro's application. (Letter from David F. Fox to Russell J. Chateauneuf, P.E., Feb. 21, 2007 ("February 21st Letter").) In this letter, DiSandro's counsel explained that DiSandro was unable to make an informed decision regarding whether to pursue a formal hearing without an explanation as to the reasons his application for a variance had been denied. Id. He concluded that due process requires the tolling of the thirty day limitation for a formal hearing until DEM provides the supplemental information. Id.

Attorney Fox testified that shortly after he sent the February 21st Letter, he "was assured by Attorney Schultz that DEM would issue a revised decision that would state the basis for its decision." (Fox Aff., May 25, 2010, at 2.) According to Attorney Fox's records, this first conversation occurred on March 2, 2007. (Pl's Ex. E, "Chargeable Time Control Journal".) Attorney Fox further testified that he was contacted by DEM Attorney Gregory Schultz regarding DiSandro on March 16, 2007. (Fox Aff., June 2, 2010, at 1.)

There was no further contact from DEM until May 24, 2007, when it indicated that a revised decision would be sent to DiSandro. (Ex. 7, Note from Gregory Schultz to David Fox, May 24, 2007.) No revised decision was sent, and on October 15, 2007, Plaintiff's counsel sent another letter to DEM, requesting to know the status of the

revised decision. (Ex. 9, Letter from David F. Fox to Gregory Schultz, Oct. 15, 2007 ("Oct. 15th Letter").)

DiSandro filed suit with this Court, requesting an order requiring DEM to issue a revised decision on January 28, 2008. Thereafter, on May 1, 2008, DEM provided DiSandro with a supplemental letter. (Letter from Russell J. Chateauneuf, P.E. to John DiSandro, May 1, 2008 ("Supplemental Letter").) The Supplemental Letter did not provide for DiSandro's right to appeal DEM's decision. Attorney Fox testified that had he known DEM would insist that the Supplemental Letter was not appealable, he would have filed an appeal of the DEM First Letter within the thirty days following the decision. (Fox Aff. at 2.)

Attorney Fox testified to a prior case he had been involved in for another client, for which he had interacted with Attorney Schultz, as counsel for DEM in that case as well.[1] (Fox Aff., May 25, 2010, at 1.) The plaintiffs in Sandy Point Farms Inc. v. W. Michael Sullivan ("Sandy Point case"), the abutters brought suit with the Superior Court seeking the Court to require DEM to issue a new decision that explained DEM's reasoning. Id. In the Sandy Point case, this Court ultimately ordered DEM to revise its initial decision and "issue a [new] decision in compliance with the requirements of the Administrative Procedures Act and applicable [DEM] regulations." Sandy Point Farms, Inc. v. Michael Sullivan, in his capacity as Director of the RI DEM, Sandy Point Farms Condominium, LLC., No. PC-06-4086, September 21, 2006, Fortunato, Jr, J. (Order). Attorney Fox further testified as to how the experience with the Sandy Point case made

[1] The prior case, Sandy Point Farms Inc. v. W. Michael Sullivan ("Sandy Point case"), involved an objection by abutters to the property at issue's Individual Sewage Disposal System application to the DEM.

both him and Attorney Schultz "well aware of the costs and time involved in litigating the adequacy of DEM's decisions." (Fox Aff., May 25, 2010, at 1.)

DiSandro filed the instant declaratory judgment action seeking the Court to declare that he may appeal the Supplemental Letter. DiSandro contends that Gregory Schultz, a former DEM attorney, made representations to DiSandro's counsel indicating that DiSandro need not file his appeal with the DEM's Administrative Adjudication Division until after the revised decision had been received. DiSandro further contends that Attorney Schultz's representations induced DiSandro not to file an appeal within the thirty day limit and that this inducement should operate as an equitable estoppel against DEM, enabling DiSandro to now avail himself of the administrative appeals process. DEM objects to DiSandro's contention arguing that there is no evidence that Attorney Schultz actually made affirmative representations to DiSandro's counsel and, even if Attorney Schultz had, his actions were ultra vires and therefore do not warrant equitable estoppel against the agency.

II

STANDARD OF REVIEW

The Uniform Declaratory Judgments Act ("UDJA") gives the Superior Court broad discretion to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. The UDJA provides that any person

> "whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder." Section 9-30-2.

Section 9-30-2 further provides that the Uniform Declaratory Judgments Act should be "liberally construed and administered." Sec. 9-30-2. The Administrative Procedures Act ("APA") also addresses declaratory judgment actions in the context of administrative law by providing that

> "The validity or applicability of any rule may be determined in an action for declaratory judgment in the superior court of Providence County, when it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the plaintiff. . . . A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question." G.L. 1956 § 42-35-7.

The decision to grant or deny declaratory relief is "addressed to the sound discretion of the trial justice." Imperial Cas. and Indem. Co. v. Bellini, 888 A.2d 957 (R.I. 2005).

III

ANALYSIS

A

The Declaratory Judgment Action

As a preliminary matter, the Court will address the issue of the exhaustion of administrative remedies. DEM, relying on M.B.T. Construction Corp. v. Edwards, argues that a declaratory judgment is not appropriate here because DiSandro has not exhausted his administrative remedies. 528 A.2d 336 (R.I. 1987). DEM's reliance on M.B.T. Construction Corp. is misplaced. In M.B.T. Construction Corp., the plaintiff was seeking a declaratory judgment that certain sections of the zoning code of the city of Newport were invalid. Id. at 337. There, the Rhode Island Supreme Court held that the exhaustion of administrative remedies rule did not apply because in that case the plaintiff was not seeking the reversal of a ruling by a building inspector, but a ruling about the

validity and enforceability of the zoning ordinance, which is a question for the courts. Id. at 337-38.

Similarly, in the instant case, DiSandro is not seeking a reversal of the denial of his application but a ruling on the applicability of an agency ruling—that his administrative appeal of the denial must have been filed within thirty days of the mailing of the DEM First Letter in 2007. DEM correctly notes that in M.B.T. Construction Corp., the zoning board did not have the authority to rule on the validity of the zoning ordinance while DEM, as an agency, does have the authority to rule on the applicability of its own rules. Sec. 42-35-8. DEM's argument is unavailing, however, as the APA specifically notes that "[a] declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity of applicability of the rule in question." Sec. 42-35-7. The statute itself makes it clear that, in a declaratory judgment action on the question of the applicability of an agency rule, exhaustion of administrative remedies is not required.

B

Findings of Fact

DiSandro contends that neither the DEM First Letter nor the Supplemental Letter satisfied the requirements set forth in DEM's Regulations for a final determination. DEM, in contrast, argues that the DEM First Letter was final and therefore, DiSandro's right to appeal ended with the thirty day appeal deadline.

It is well-settled that an agency must follow its own regulations. 2 AM. JUR. 2d Administrative Law § 236 (2011). The APA requires that "[a]ny final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in

statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Sec. 42-35-12. DEM's own regulations state that in rendering a final decision approving or denying a requested variance, the Director may "[r]eject the recommendation and render his/her own decision; in which case the Director or his/her designee shall render a written decision specifying the bases for the rejection." (Ex. Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems, SD 20.01(d) (2002) ("DEM Regulations").)

The Rhode Island Supreme Court has repeatedly noted the importance of having findings of fact clearly stated in administrative decisions, stating that "the parties, as well as the court, are entitled to know and should not be required to speculate on the basis for a board's decision." Hooper v. Goldstein, 104 R.I. 32, 241 A.2d 809, 816 (1968) (comparing the requirement for factual findings in administrative decisions to the similar requirement in zoning cases); Sakonnet Rogers, Inc. v. Coastal Resources Management Council, 536 A.2d 893 (R.I. 1988) ("An administrative decision that fails to include findings of fact required by statute cannot be upheld."). The Supreme Court recently reiterated that "administrative bodies should be meticulous about documenting the fact-finding process that underlies their decision." State v. Germane, 971 A.2d 555, 588 (R.I. 2009). The reasons for requiring such findings include, inter alia, "assuring more careful administrative consideration [and] helping parties plan their cases for rehearings and judicial review." Id. (quoting 2 Davis, Administrative Law Treatise, § 16.05).

The DEM First Letter contained a summary of the variances requested, a restatement of the factors considered by the DEM in reviewing the application taken from

the DEM Regulations, as well as a notice of the appeal process. The DEM First Letter did not, however, contain any specific findings of fact regarding the proposed variance, nor did it specify the reasons for the DEM's denial. See Zammarelli v. Beattie, 459 A.2d 951 (R.I. 1983) (reversing and remanding the decision of a zoning board for being a "terse denial of petitioners' application, without findings of fact [or] application of legal principles"). Thus, the DEM First Letter did not meet either the requirements of the APA or DEM Regulations for a final, appealable decision. See Cranston Print Works Co. v. City of Cranston, 684 A.2d 689 (R.I. 1996) (remanding a case to the City Council, requiring the Council to make the required findings of fact and state the reasons for its denial of the petitioners' application).

DiSandro argues that the Supplemental Letter also fails to meet the requirements of the APA and the DEM Regulations because of its omission of an explanation of the appeals process. The Supplemental Letter set forth five specific findings to support the DEM's denial of DiSandro's application. The Supplemental Letter does not include any mention of the administrative appeals process.

DiSandro contends that this failure to mention the appeal process disqualifies the Supplemental Letter from being considered a final decision. The statutory language of the APA implicitly allows for a final order that omits the notice of appeal to remain valid, in that it provides that "[i]f the agency fails to provide such notice, the time for taking an appeal shall be extended for an additional thirty (30) days beyond the time otherwise authorized by law." Sec. 42-35-12. Because a decision without the requisite mention of the appeal process affords the petitioner an additional thirty days within which to appeal, this implies a fortiori that the omission of the appeal process does not foreclose the

petitioner's appeal. Accordingly, this Court declares that the Supplemental Letter constituted the final decision of the DEM, from the issuance of which the petitioner should have had thirty days to appeal.

IV

EQUITABLE ESTOPPEL

DiSandro further contends that DEM should be equitably estopped from enforcing the thirty day time limit. Specifically, DiSandro argues that Attorney Schultz made affirmative representations to DiSandro's counsel that the thirty day time limit to appeal would be tolled until after DEM had provided the reasons on which the DEM based its denial of DiSandro's application, as requested in the February 21st Letter. DEM counters that Attorney Schultz did not make affirmative representations and, even if he had, equitable estoppel would not apply in this case because Attorney Schultz's actions were ultra vires.

The elements of equitable estoppel are first, an affirmative representation or equivalent conduct on the part of the party against whom the estoppel is claimed for the purpose of inducing the other party to rely on the representation, and secondly, that the other party did, in fact, rely on the representation to his detriment. See Lichtenstein v. Parness, 81 R.I. 135, 99 A.2d 3, 5 (1953). The burden of proving estoppel rests with the party raising estoppel as a claim. Id. It is well-settled in Rhode Island that equitable estoppel may be applied against a governmental agency "when appropriate circumstances, justice and right so require." Schiavulli v. School Comm. of the Town of North Providence, 114 R.I. 443, 334 A.2d 416, 419 (1975). Equitable estoppel will not be applied against the government where the alleged representations are ultra vires or in

conflict with state law. Romano v. Ret. Bd. of the Employees' Ret. Sys., 767 A.2d 35, 38 (R.I. 2001). In general, for equitable estoppel to apply, there must have been an affirmative representation. However, the Rhode Island Supreme Court has also stated that in certain circumstances, "silence . . . can be the basis for estoppel . . . where the circumstances require one to speak lest such silence would reasonably mislead another to rely thereon to his detriment." Schiavulli, 114 R.I. at 449-50, 334 A.2d at 419.

A

Affirmative Actions by DEM

In the instant case, it is unclear from the record whether Attorney Schultz made affirmative representations to DiSandro's counsel that the thirty day appeal period would be tolled until after DEM issued a Supplemental Letter to the DEM First Letter. The alleged representations made by Attorney Schultz occurred in telephone calls between Attorney Schultz and DiSandro's counsel. DEM denies that any such affirmative representations were made, but contends that even if they had been made, such representations would have been clearly ultra vires and therefore cannot equitably estop DEM.

This Court has found that the DEM First Letter was not a final decision in compliance with the requirements of the APA and the DEM Regulations. As such, the time period for appeals would not have begun to run when the DEM First Letter was issued. Therefore, if Attorney Schultz did indeed make affirmative representations, they were not ultra vires as the DEM First Letter was not a final decision. This Court notes that Attorney Schultz and Attorney Fox had previously been involved in the Sandy Point case in which this Court remanded a decision to DEM to "issue a decision in compliance

with the requirements of the [APA] and applicable [DEM] regulations." Sandy Point Farms, Inc. v. Michael Sullivan, No. PC-06-4086, September 21, 2006, Fortunato, Jr, J. (Order). The evidence indicates that Attorney Schultz was familiar with the requirements for a final decision under the APA or DEM Regulations and, thus, would have been aware that the DEM First Letter did not comply with the requirements. Furthermore, the Court notes that DEM issued a supplemental letter in the Sandy Point case, in response to this Court's order to comply with the statutory and regulatory requirements.

Silence can be the basis for estoppel where one party's silence might reasonably mislead another party to rely on it to their detriment. See Schiavulli v. School Comm. of the Town of North Providence, 114 R.I. 443, 334 A.2d 416, 419 (1975). In the instant case, DEM's silence serves as the basis for estoppel. It is, therefore, irrelevant whether there is evidence that Attorney Schultz made affirmative representations to DiSandro's counsel about the tolling of the appeal period and indeed that Attorney Schultz denies making any such representations. See Schultz Aff. at 1-2. The evidence shows that Attorney Schultz and DiSandro's counsel spoke on the phone several times after the February 21st Letter was sent, all conversations taking place within the thirty days following the DEM First Letter's issuance. Attorney Schultz testified that he never made any affirmative representations that the appeal period would be tolled until the DEM had issued a new decision. However, the Court is satisfied that under the circumstances, it was reasonable for DiSandro's counsel to interpret Attorney Schultz's silence on the issue of tolling to be an affirmative representation that the appeals period would be tolled. Attorney Schultz's actions with regard to the instant case have previously been characterized by this Court as the DEM having "abused its discretion in this case because

they, in fact, strung [DiSandro] along." (Transcript of Hearing at 10, DiSandro v. Michael Sullivan, No. NC-2008-0036 (May 5, 2008).) Attorney Schultz's apparent failure to correct the statement made in the February 21st Letter about tolling the appeal period in any of the telephone conversations between Attorney Schultz and Attorney Fox amounts to an affirmation of the statement by silence. See generally, Shea v. Gamco, Inc., 81 R.I. 12, 98 A.2d 864 (1953) (finding that estoppel by silence applied where, in spite of having repeated conversations with the petitioner, an insurer failed to inform the petitioner that her claim for worker's compensation would not be permitted because of a failure to formally report her accident until after the statute of limitations for filing the petition had expired). From the phrasing employed in the February 21st Letter and their previous interactions due to the Sandy Point case, Attorney Schultz and the DEM should have been aware that its lack of response to the February 21st Letter may have led DiSandro's counsel to believe that the appeal period would be tolled. See generally G.L. 1956 § 45-23-40(f) (providing, with respect to a planning board's failure to act within a "prescribed period," that such inaction constitutes approval of an applicant's plan).

In deciding that equitable estoppel applies to the DEM, this Court wants to be clear and emphasize that it is not finding that Attorney Schultz or the DEM intentionally misled DiSandro as to the tolling of the appeal period. It is this Court's belief that Attorney Schultz acted professionally and appropriately as an attorney for the State in explaining and discussing this matter with opposing counsel. This Court is simply determining that under all these circumstances, the ongoing communications between Attorney Fox and Attorney Schultz regarding other cases could be and were misleading.

B

DiSandro's Detrimental Reliance

The Supreme Court has stated that "[t]he facts and circumstances of each case must be closely scrutinized to determine whether justice requires the imposition of estoppel." Lerner v. Gill, 463 A.2d 1352, 1363 (R.I. 1983). The circumstances must be such "where great injustice or loss would result" if estoppel were not applied. Ferrelli v. Dep't of Employment Security, 106 R.I. 588, 261 A.2d 906, 909 (1970).

In the present case, the evidence indicates that DiSandro relied on DEM's representations, made through Attorney Schultz's silence on the matter, in foregoing his ability to appeal the DEM First Letter within the thirty days following the decision. DiSandro's counsel testified he would have filed an appeal of the DEM First Letter within the thirty days following the decision, had he known the Supplemental Letter would not be appealable. (Fox Aff. at 2.) The Court, in particular, notes that in the February 21st Letter, DiSandro's counsel specifically stated that "[his] client cannot make an informed decision on whether he should pursue a formal hearing, without some clear explanation on where DEM purports the application is lacking." The statement shows that DiSandro certainly considered the possibility of an appeal, but was unable to make a decision without some way to evaluate the probability of success of such an appeal. See, e.g. Gorham v. Androscoggin County, 21 A.3d 115 (Me. 2011) (reasoning that an agency decision could not be final until the agency had issued a written decision articulating its findings and rationale because "[a] decision to take an appeal should be informed" and, otherwise, it would require parties to appeal "before it becomes clear whether an appeal is warranted"). Had DEM responded to the February 21st Letter with a clarification of its

view of the appeal process, DiSandro's counsel stated he would have filed an appeal within the thirty day time-limit. DiSandro's reliance on DEM's representations—whether silent or affirmative—was detrimental to DiSandro's interests as DiSandro's reliance meant that DiSandro, as DEM contends, lost his right to appeal DEM's denial of his application.

The Court is mindful that the doctrine of equitable estoppel should not be applied against a governmental entity lightly. Equitable estoppel against a public entity has been deemed an "extraordinary" remedy that "will not be applied unless the equities clearly must be balanced in favor of the parties seeking relief under this doctrine." Greenwich Bay Yacht Basin Ass'n v. Brown, 537 A.2d 988, 991 (R.I. 1988). In the instant case, the Court is satisfied that the equities weigh in favor of DiSandro. DiSandro and his counsel relied on the assurances of Attorney Schultz that DEM would be issuing a Supplemental Letter detailing the reasons for DEM's denial of DiSandro's application. Even if Attorney Schultz did not make affirmative representations that DiSandro would then be able to appeal the Supplemental Letter, it must be noted that without the ability to appeal, the Supplemental Letter would be moot.

DEM Regulations SD 21.01, which details the Appeal Procedure, requires each appeal to give, inter alia, "[a] detailed basis upon which the appeal is taken" and the payment of $1500. (DEM Regulations, SD 21.01.) The Court notes that anyone wishing to appeal a DEM decision, therefore, would need to know the specific reasons for DEM's decision in order to satisfy this first requirement.

V

CONCLUSION

For the foregoing reasons, the Court grants DiSandro's Motion for Declaratory Judgment and declares that the Supplemental Letter constituted the final decision from DEM and, thus, marked the start of the appeal period. Thus, DEM is estopped from using the time of the First Letter as the commencement of the appeal period. DiSandro shall further be given the original appeal period of thirty (30) days, though now from entry of this Decision in order to file his appeal with DEM.

Counsel shall submit the appropriate Order for entry.