Dish Realty, LLC v Town of Huntington
2015 NY Slip Op 30352(U)
March 10, 2015
Supreme Court, Suffolk County
Docket Number: 04-9966
Judge: Arthur G. Pitts

SHORT FORM ORDER

INDEX No. 04-9966

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 5/22/14
ADJ. DATE 6/19/14
Mot. Seq. #010 - MotD

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DISH REALTY, LLC,

Plaintiff,

- against -

THE TOWN OF HUNTINGTON and HUNTINGTON TOWN BOARD,

Defendants.

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Upon the following papers numbered 1 to 172 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-92; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 93-130; Replying Affidavits and supporting papers 131-172; Other defendants' memorandum of law; plaintiff's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for judgment in their favor and against the plaintiff pursuant to CPLR 3212 and CPLR 3211 (a) (1), (7), and (10), is granted to the extent of (i) dismissing the plaintiff's first cause of action and (ii) granting summary judgment dismissing the plaintiff's fourth cause of action except to the extent that it is premised on an equal protection violation under 42 USC § 1983, and is otherwise denied; and it is further

ORDERED, on the court's own motion, that the caption of this action be and hereby is amended by deleting the Huntington Town Board as a party defendant.

In this declaratory judgment action, the plaintiff challenges the enactment of Local Law 7-2004, which amended chapter 198 of the Code of the Town of Huntington by creating a C-6 Huntington Station Overlay Zoning District and effectively prohibiting the plaintiff from operating a self-service laundromat on property located within the new district.

At the heart of this action is the defendant's continuing effort to revitalize a select portion of Huntington Station designated as the Huntington Station Revitalization Area, located in the vicinity of the

Long Island Railroad station. The defendant claims that the rezoning of the plaintiff's property, along with 147 other properties, was an integral part of the revitalization process, which is intended to promote economic stability by bringing businesses into the area and strengthening its economic base.

When the plaintiff commenced this action on May 14, 2004, it was the owner of property located at 1000 New York Avenue, Huntington Station, New York, within the revitalization area. The plaintiff's property was improved with an approximately 4,000-square-foot structure that had previously been used as an automobile repair shop. The plaintiff acquired the property on May 8, 2002. At that time, the property was situated in the Town's C-6 General Business District, in which a (self-service) laundromat was a permitted use.

It appears that on or about June 1, 2002, the plaintiff applied to the Town's Department of Building and Housing for permission to operate a laundromat on the property. That request was denied on or about June 18, 2002, apparently for failure to meet applicable parking requirements. On or about June 21, 2002, the plaintiff filed an appeal with the Zoning Board of Appeals of the Town of Huntington ("ZBA"), seeking a parking variance or a special exception permitting its use of a nearby Town-owned parking lot, and a hearing was scheduled for September 26, 2002. The ZBA, however, adjourned the hearing until November 21, 2002. In the interim, on November 19, 2002, the Town Board adopted a local law imposing a six-month moratorium on the issuance of all permits and other approvals for the development of commercial and industrial properties in the revitalization area, the stated purpose of which was to allow it to revise and adopt a new comprehensive plan and to research and draft amendments to the zoning code in furtherance of the goals of the comprehensive plan. As a result, the ZBA did not consider the plaintiff's appeal on November 21. On December 20, 2002, the Town Board denied the plaintiff's request for relief from the moratorium. When the moratorium expired on May 15, 2003, the ZBA deferred the hearing on the plaintiff's appeal until October 16, 2003. On October 22, 2003, following the hearing of the appeal and upon a tie vote taken at the hearing, the ZBA issued a "default denial" pursuant to Town Law § 267-a (13) (b). By order dated June 17, 2004, this court (Mullen, J.) denied the plaintiff's request for article 78 relief from the ZBA's October 22, 2003 determination (*Dish Realty v Modelewski*, Sup Ct, Suffolk County, Index No. 03-28141).

At or about the same time, the plaintiff separately began to pursue site plan approval for the construction of a (smaller) self-service laundromat on the property which did not require the granting of a parking variance. On September 12, 2003, the plaintiff filed a site plan application with the Planning Board of the Town of Huntington; on September 16, 2003, the Planning Board refused to process the plaintiff's application. On November 2, 2003, the plaintiff re-submitted a site plan for operation of a laundromat with on-premises washing, drying, cleaning, and laundering on the property. The plaintiff claims that the Planning Board, despite having scheduled a meeting to take place on March 3, 2004 to consider the plaintiff's application, refused to consider the application on that date, ostensibly on the ground that Local Law 7-2004 had become effective earlier that day (*see infra*). On May 5, 2004, the Planning Board voted to deny the site plan application. By order dated November 23, 2004, this court (Henry, J.) annulled the Planning Board's May 5, 2004 determination and remitted the matter to the Planning Board for approval of the site plan.

On March 2, 2004, the Town Board enacted Local Law 7-2004, simultaneously applying the new overlay district to certain properties, including the plaintiff's. Section 198-27.1 (A) of the Code of the Town of Huntington, added by Local Law 7-2004, provides, in relevant part, as follows:

> A. Use regulations. Unless otherwise specifically prohibited, the as-of-right uses provided in the C-6 General Business District shall be permitted in the C-6 Huntington Station Overlay District, subject to any restrictions and limitations contained in this section. * * * In addition to such permitted uses, a building, structure or premises in the C-6 Huntington Station Overlay District may be used for the following purposes:
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> * * *
>
> (8) Neighborhood service shops to include photographic studios; bookstores; stores for the sale of stationery and newspapers; video rental shops; retail bakery; confectioneries: gift shops; *laundry or dry cleaning drop-off/pick-up stations (excluding on-premises cleaning or laundering)*; liquor stores; shoe and clothing stores including the rental of formal wear; print shops; bookbinding; pharmacies; hardware stores; and pet stores [emphasis added].

This action followed, with the Town of Huntington named as the sole defendant. The plaintiff claims, in part, that the "sudden" and "inexplicable" prohibition of on-site laundering at any laundromat in the overlay district–a permitted use "as of right" prior to the enactment of Local Law 7-2004 and a conditionally permitted use in all prior draft versions of the law–was specifically and impermissibly targeted at the plaintiff.

Certain related matters bear mention at this juncture. On or about August 3, 2010, the Town Board authorized the condemnation of the plaintiff's property and the plaintiff agreed to accept an advance payment of $535,000.00 in connection with the Town's acquisition of the property by eminent domain. In a subsequent eminent domain proceeding (*Matter of Dish Realty v Town of Huntington*, Sup Ct, Suffolk County, Index No. 11-30504), the court (Bivona, J.), in a July 28, 2014 decision after trial, fixed just compensation for the taking of the property at $712,208.00, and directed the entry of judgment in favor of the plaintiff in the principal amount of $177,208.00. Also in this court, still pending, is a related action entitled *Dish Realty v Planning Bd. of Town of Huntington* (Sup Ct, Suffolk County, Index No. 11-36857), in which the plaintiff alleges constitutional violations and seeks damages arising from the Planning Board's refusal to issue site plan approval relative to the plaintiff's application to open a laundromat with on-premises washing, drying, cleaning, and laundering on the property. Although the parties stipulated, on or about February 19, 2012, to consolidate the two pending actions and their stipulation was "so ordered" by the court, it is apparent the court files have never been consolidated and that the parties have continued to treat the actions as separate, as evidenced by the recent filing of papers in connection both with this motion and with the Planning Board's motion for summary judgment in the related action. Accordingly, the parties' so-ordered stipulation shall be deemed abandoned.

Following joinder of issue in this action, the Town moved for summary judgment and the plaintiff cross-moved, *inter alia*, for leave to amend the complaint. By order dated November 29, 2012, the court denied the parties' respective applications without prejudice to renewal upon joinder of the Town Board as a necessary party. The plaintiff has since served and filed a supplemental summons and amended complaint naming the Town Board as a defendant, and the defendants have answered the amended complaint.

The plaintiff pleads four causes of action in its amended complaint, the third of which, alleging confiscation of its property, has been withdrawn. The first is for judgment declaring that the plaintiff should be permitted under the "special facts" doctrine to develop the property under the law as it existed prior to the enactment of Local Law 7-2004 because the defendant's actions delayed and illegally blocked the various permits and approvals to which it was entitled. The second is for judgment declaring that Local Law 7-2004 is invalid and illegal on the ground that it is not general legislation but is in the nature of a bill of attainder. The fourth is for judgment declaring that Local Law 7-2004 is unconstitutional, void, and of no force and effect as applied to the plaintiff's property in that it is not in accordance either with the Town's comprehensive plan or with the requirements of Town Law, as well as for damages and attorney's fees under 42 USC §§ 1983 and 1988.

The defendants now move for summary judgment, *inter alia*, declaring the validity of Local Law 7-2004, and to dismiss the complaint based on certain procedural irregularities. The defendants contend that the law is rationally related to the Town Board's intended purpose of revitalizing the targeted area and that it is in harmony with the Town's comprehensive plan; that the exclusion of self-service laundromats from the list of permitted uses in the newly-created overlay district was not violative of the plaintiff's due process or equal protection rights because the Town Board relied on studies and other proof demonstrating that dry cleaners, auto wash establishments, auto body and fender shops, and other commercial uses were likewise prohibited because they were determined to be either incompatible with the village-type setting that the new district was designed to create or discharged a large amount of wastewater into the sewage treatment plant and, ultimately, into Huntington Harbor; that there is a reasonable connection between the Town Board's expressed goals and the means sought to achieve them; that the plaintiff has no vested rights in retaining the prior zoning classification as a matter of law; that the plaintiff has produced no proof of substantial construction or expenditures prior to the effective date of Local Law 7-2004; that subsequent to the enactment of the legislation, the plaintiff failed to protect or preserve the property, or to take advantage of new business opportunities, including a $1.07 million grant that the defendants were willing to pass on to the plaintiff to renovate the property; and that the record is devoid of proof that the defendants were politically motivated or acted with malicious intent to injure the plaintiff or to single the plaintiff out for differential treatment. The defendants further contend, as bases for dismissal, that the action is untimely as against the Town Board, that the plaintiff failed to join the ZBA and the Planning Board as necessary parties, and that the action is moot because the plaintiff is no longer the owner of the property.

As a procedural matter, it is noted that after the defendants' motion was fully submitted, this court's November 29, 2012 order–in which the Town Board was named a necessary party–was reversed on appeal. In a decision and order (one paper) dated November 12, 2014, the Appellate Division found that because the Town was already a party defendant in the action, it was "unnecessary for the court to have directed the

joinder of the Town Board" (122 AD3d 665, 996 NYS2d 335, 337 [2014]). In light of that finding, and to obviate any prejudice to the plaintiff which may arise as a result of the Town Board's joinder (as by assertion of a statute of limitations defense), the court, on its own motion, hereby drops the Town Board as a defendant (*see* CPLR 1003), leaving the Town, again, as the only party defendant.

As to the plaintiff's first cause of action, the court finds that dismissal is appropriate. Under the "special facts" doctrine, if a municipal zoning board or official acts in bad faith by delaying a property owner's application for a requested approval and the municipality then changes the applicable zoning law, and the owner establishes that it would have been entitled to the approval as a matter of right before the law changed, a court may apply the zoning law in effect at the time that the application was submitted (***Rocky Point Drive-In v Town of Brookhaven***, 21 NY3d 729, 977 NYS2d 719 [2013]; ***Figgie Intl. v Town of Huntington***, 203 AD2d 416, 610 NYS2d 563 [1994]). Here, since the plaintiff no longer owns the property and has no right to develop it in any way–much less in a way consistent with the zoning law in existence prior to the enactment of Local Law 7-2004–the first cause of action has been rendered academic (*see* ***Noghrey v Town of Brookhaven***, 21 AD3d 1016, 801 NYS2d 620 [2005], *lv dismissed* 7 NY3d 897, 826 NYS2d 603 [2006]). Accordingly, to the extent that the ZBA and the Planning Board are alleged to have conspired in the delay that underlies this cause of action, the court need not reach the issue of whether they are necessary parties.

The Town's acquisition of the property, however, does not otherwise affect the plaintiff's right to continue this action. Where, as here, an action involving real property is brought and the plaintiff conveys the property to another while the action is pending, the plaintiff may continue the action, as the original party, unless and until the court directs that the new owner be substituted (***Pritzakis v Sbarra***, 201 AD2d 797, 607 NYS2d 470 [1994]; ***Froehlich v Town of Huntington***, 159 AD2d 606, 552 NYS2d 660, *appeal dismissed* 76 NY2d 935, 563 NYS2d 63 [1990], *lv denied* 77 NY2d 803, 568 NYS2d 347 [1991]; *see* CPLR 1018). The plaintiff, therefore, did not lose standing to pursue this action by reason of the transfer of ownership, and its remaining claims for declaratory and monetary relief are not mooted but rather continue to present a live, justiciable controversy (*see* ***Matter of Cohen v Board of Appeals of Vil. of Saddle Rock***, 100 NY2d 395, 764 NYS2d 64 [2003]). Nor, contrary to the Town's assertions, does any failure on the part of the plaintiff to vigorously prosecute its case, to preserve the physical condition of the property, or to put the property to a conforming use serve to render this action academic.

The plaintiff's remaining causes of action–the second and fourth–are addressed to its constitutional and other substantive objections to the validity of Local Law 7-2004.

Local zoning laws are entitled to a "strong presumption of constitutionality" (***Bonnie Briar Syndicate v Town of Mamaroneck***, 242 AD2d 356, 357, 661 NYS2d 1005, *appeals dismissed* 91 NY2d 832, 666 NYS2d 564 [1997]). Generally, town land use regulations must be compliance with the town's comprehensive plan (Town Law § 263; ***Rocky Point Drive-In v Town of Brookhaven***, *supra*), with utmost consideration given to the general welfare of the community. "In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community" (***Udell v Haas***, 21 NY2d 463, 469, 288 NYS2d 888, 893 [1968]). "A

municipality may change its zoning ordinance, however, to promote the general welfare and to respond to changed conditions in the community * * *. The question is whether the change 'conflict[s] with the fundamental land use policies and development plans of the community'" (***Matter of Gernatt Asphalt Prods. v Town of Sardinia***, 87 NY2d 668, 685, 642 NYS2d 164, 174 [1996], quoting ***Udell v Haas***, *supra* at 472, 288 NYS2d at 896). Thus, to satisfy the requirement that zoning legislation be in accordance with a town's comprehensive plan, the town "need only show that the zoning amendment was adopted for 'a legitimate governmental purpose' and is unreasonable if 'arbitrary, that is, if there is no reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'" (***Matter of Rossi v Town Bd. of Town of Ballston***, 49 AD3d 1138, 1144, 854 NYS2d 573, 579 [2008], quoting ***Fred F. French Inv. Co. v City of New York***, 39 NY2d 587, 596, 385 NYS2d 5, 10, *cert denied* 429 US 990, 97 S Ct 515 [1976]).

As to the claimed constitutional violations, it is well established that "[i]n the land use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (***Bower Assoc. v Town of Pleasant Val.***, 2 NY3d 617, 626, 781 NYS2d 240, 245 [2004]). To prevail on a cause of action to recover damages pursuant to 42 USC § 1983 against a municipality, the plaintiff must specifically plead and prove that he or she was deprived of a constitutional right by someone acting under the color of state law pursuant to an official policy or custom, and that he or she was injured as a result of that conduct (***Monell v Department of Soc. Servs. of City of New York***, 436 US 658, 98 S Ct 2018 [1978]; ***Jackson v Police Dept. of City of N.Y.***, 192 AD2d 641, 596 NYS2d 457, *lv denied* 82 NY2d 658, 604 NYS2d 557 [1993], *cert denied* 511 US 1004, 114 S Ct 1370 [1994]).

Here, the plaintiff alleges violations of its rights to substantive and procedural due process and to equal protection. In order to establish a substantive due process violation in the land-use context, a plaintiff must establish deprivation of a "vested property interest" and that the challenged governmental action was "wholly without legal justification"; as to the second element, only the "most egregious official conduct" will support a claim under 42 USC § 1983 (***Bower Assoc. v Town of Pleasant Val.***, *supra* at 627, 628, 781 NYS2d at 245, 246). Likewise, "to succeed on a claim of procedural due process deprivation–that is, a lack of notice and opportunity to be heard–a plaintiff must establish that [the challenged] action deprived him of a protected property interest" (***Sanitation and Recycling Indus. v City of New York***, 107 F3d 985, 995 [2d Cir 1997]). An equal protection violation based, as here, on selective enforcement "arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as * * * intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (***Bower Assoc. v Town of Pleasant Val.***, *supra* at 631, 781 NYS2d at 248 [emphasis in original]).

With respect to the plaintiff's second cause of action, and notwithstanding the breadth of relief requested in the notice of motion, it is noted that the defendants failed in the moving papers to offer any argument addressing whether Local Law 7-2004 may constitute a bill of attainder. The court is constrained, therefore, to deny summary judgment as to the second cause of action, and proceeds to an analysis of the fourth cause of action.

Based on the affidavits of Town personnel familiar with the revitalization process and the resulting change in the zoning law, it is apparent that the Town has established prima facie that the rezoning of the plaintiff's property was consistent with the land use policies and development plans set forth in the its comprehensive plan, that the change was adopted for the legitimate governmental purpose of benefitting the Huntington Station area by enhancing the economic base of the community, and that there was a reasonable relation between the enacted legislation and the expressed goal (*see* ***Matter of Gernatt Asphalt Prods. v Town of Sardinia***, *supra*; ***Matter of Rossi v Town Bd. of Town of Ballston***, *supra*). The plaintiff, in response, has not raised a triable issue of fact, and does not seriously dispute the Town's showing except to question the legitimacy of the Town's expressed concern regarding land uses involving the handling of hazardous or noxious chemicals and the production of excessive wastewater as a basis for prohibiting self-service laundromats. The plaintiff contends that such concern is nothing more than an after-the-fact attempt to justify the delays in processing its various applications. Even if, as the plaintiff claims, this concern was not raised in the record prior to the rezoning of the property, this would not suffice to demonstrate any conflict or inconsistency between the zoning change and the comprehensive plan. Summary judgment is granted, therefore, dismissing the fourth cause of action to the extent it is predicated on the claim that Local Law 7-2004 is not in compliance with the Town's comprehensive plan or with the requirements of Town Law.

The plaintiff's claims under 42 USC § 1983, insofar as they are based on alleged deprivations of substantive and procedural due process, are dismissed as well. Even assuming, for purposes of this determination, that the plaintiff had a protectable property interest that was impaired by Local Law 7-2004, it cannot be said, given the legitimacy of the Town's overall goal to revitalize the economic base of the community (*see* Town Law § 261; ***Marcus Assoc. v Town of Huntington***, 45 NY2d 501, 410 NYS2d 546 [1978]), that the enactment of the law was "so outrageously arbitrary as to constitute a gross abuse of governmental authority" (***Matter of Loudon House v Town of Colonie***, 123 AD3d 1406, 1409, ___ NYS2d [2014], quoting ***Natale v Town of Ridgefield,*** 170 F3d 258, 263 [2d Cir 1999]). The plaintiff cannot establish, therefore, an abuse of power so egregious as to be arbitrary in the constitutional sense, as required to show a violation of substantive due process (*see* ***Bower Assoc. v Town of Pleasant Val.***, *supra*); its claim of a denial of procedural due process also fails because it was afforded a hearing and the opportunity for further review by way of a CPLR article 78 proceeding (*see* ***Fike v Town of Webster***, 11 AD3d 888, 782 NYS2d 491 [2004]). Whether, as the plaintiff contends, it may have actionable due process claims based on subsequent failures on the part of the Planning Board to timely process and grant the plaintiff's site plan application is a matter beyond the scope of this action.

As to the alleged equal protection violation, however, there remain issues of fact, sufficient to defeat summary judgment, whether in the course of enacting Local Law 7-2004, the plaintiff was treated differently from similarly situated entities due to any malicious or bad faith intent to injure on the part of the Town, and whether such illegal action stemmed from any official policy or custom. The court notes in this regard the plaintiff's claim that it has not yet received numerous documents responsive to its document demands and that depositions have not yet taken place. Upon completion of discovery, the Town may, if it be so advised, renew its motion for summary judgment as it pertains to the plaintiff's § 1983 equal protection claim.

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: March 10, 2015

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION