

Holihan v Town of Orangetown
2015 NY Slip Op 32616(U)
June 4, 2015
Supreme Court, Rockland County
Docket Number: 035704/2014
Judge: Margaret Garvey
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NYSCEF DOC. NO. 31

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
RICHARD HOLIHAN and REGINA HOLIHAN,

Plaintiffs,

DECISION AND ORDER

Index No. 035704/2014

(Motion # 1)

-against-

TOWN OF ORANGETOWN,

Defendant.

-----X
Margaret Garvey, J.

The following papers, numbered 1 to 3, were considered in connection with Defendant's Notice of Motion for an Order pursuant to Civil Practice Law and Rules § 3211(a)(5) dismissing the complaint as time-barred, and for such other, different and further relief as the Court deems just, equitable or proper, together with statutory costs and disbursements of this action:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF DENNIS D. MICHAELS, ESQ. DATED JANUARY 26, 2015 IN SUPPORT OF MOTION TO DISMISS/EXHIBITS (1-9)	1
AFFIRMATION OF DWIGHT D. JOYCE, ESQ. DATED FEBRUARY 23, 2015 IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS/AFFIDAVIT OF RICHARD HOLIHAN AND REGINA HOLIHAN DATED FEBRUARY 25, 2015 IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS/EXHIBIT (A)	2
REPLY AFFIRMATION OF DENNIS D. MICHAELS, ESQ. DATED FEBRUARY 26, 2015 IN SUPPORT OF MOTION TO DISMISS	3

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on December 17, 2014 with the filing of the Summons, Verified Complaint, and Exhibits (A-G) through the NYSCEF system.

The following facts are not disputed:

The action stems from an April 16, 1986 use and area variance granted on a parcel commonly known as 19 Lowe Lane, Orangeburg, New York (owned by Plaintiffs). The variance allowed for the construction of a second dwelling above a detached garage on Plaintiff's property (a single lot), despite the R-15 zoning, which limited the lot to one dwelling per lot. The reason cited by the Plaintiffs in their request for the zoning variance was to allow Plaintiff RICHARD HOLIHAN's recently-widowed mother to remain local by having her move into the second dwelling over the detached garage, as she could not afford to remain local otherwise. In the April 16, 1986 Zoning Board of Appeals Decision approving the use variance, under the heading "Findings of Fact," the Zoning Board of Appeals stated that "the applicant had presented sufficient evidence to warrant the granting of the use variance in that there is no other way that the applicant's mother could afford to remain local." The subsequent September 23, 1987 Certificate of Occupancy limited the permitted use to "garage with dwelling for immediate family (mother)".

In September of 2011, Plaintiffs were notified of an alleged violation of the Code of Orangetown because the dwelling above the garage was being rented out to a tenant (not immediate family - Plaintiff's mother).

In October of 2013, Plaintiffs submitted an application to the Town of Orangetown for a corrected Certificate of Occupancy removing the limiting condition that only Plaintiff's mother can reside in the second dwelling. On November 27, 2013, that application was denied, and Plaintiffs appealed the denial to the Zoning Board of Appeals. On May 21, 2014, Plaintiffs Zoning Board of Appeals appeal/application was also denied.

Plaintiffs' Verified Complaint alleges that "By failing to correct the certificate of occupancy the Town has required the Property to remain vacant and therefore deprived the Plaintiffs of any use and enjoyment of the Property and any monetary value, including but not limited to rental incomes."

Specifically, the Verified Complaint alleges the following causes of action:

1. Violations of 42 U.S.C. § 1983 by depriving the Plaintiffs of their interest in the property without adhering to the requirements and protections of due process of law
2. Violations of Plaintiffs' 4th Amendment rights by effectively seizing the property and requiring that it remain vacant
3. Violations of Plaintiffs' 5th Amendment rights by unlawfully taking Plaintiffs' property

without payment of compensation

4. Plaintiffs are the victims of a de facto taking without just compensation as a result of Defendant's failure to issue a proper Certificate of Occupancy legalizing the second dwelling for residential use
5. Plaintiffs are entitled to a declaratory judgment to enforce their rights under the 1986 use and area variance and Plaintiffs are also entitled to a declaratory judgment requiring the Town to issue a proper Certificate of Occupancy for the property allowing the second dwelling unit to be used for residential purposes

The Verified Complaint demands the following relief:

- A. Plaintiffs be awarded compensatory damages, including but not limited to lost rental incomes, in a sum to be determined, and reimburse Plaintiffs for the full value of all legal fees incurred in connection with the prosecution of this action, pursuant to 42 U.S.C. § 1983 and § 1988
- B. Enjoining the Defendant from seizing the Property in violation fo Plaintiffs' Fourth Amendment rights
- C. Enjoining the Defendant from taking Plaintiffs' Property in violation of the Plaintiffs' Fifth Amendment rights
- D. For inverse condemnation directing Defendants to pay just compensation to Plaintiffs for Defendant's illegal and de fact taking of Plaintiffs' property and awarding Plaintiffs damages for its loss of use and enjoyment of their Property in an amount to be determined at trial of this action
- E. Awarding Plaintiffs all reasonable attorneys fees pursuant to section 702(c) of the New York State Eminent Domain Procedure Law and the costs and disbursements of this action and such other and further relief as the Court deems just and proper
- F. For a declaratory judgment issuing a certificate of occupancy for the second dwelling unit on one lot and therefore enforcing the Plaintiffs' rights under the 1986 use and area variance
- G. For a declaratory judgment requiring the Town to issue a proper certificate of occupancy for the Property allowing the second dwelling unit to be used for residential purposes
- H. For such other and further relief, or both, as shall be equitable, just and proper

Counsel for Defendant filed the instant pre-Answer motion to dismiss through the NYSCEF system on January 26, 2015. Defendant argues that Plaintiffs' claims stemming from the restriction placed on the Certificate of Occupancy are time-barred because the 3 year statute of limitations expired over twenty-four years ago. The Certificate of Occupancy was

issued on September 23, 1987, and the action was not commenced until December 17, 2014.

Defendant argues that Plaintiffs were aware of the restrictive condition at the time the Certificate of Occupancy was issued. However, Defendant alternatively states that even if Plaintiffs were to argue that they were not aware at that time, at the absolute latest, they were aware as of December 14, 2011, the date of a letter written to the Town on behalf of Plaintiffs by an architect. If the 3 years should run from that date, the action would still be time-barred.

Additionally, Defendants argue that if Plaintiffs were aggrieved by the Zoning Board of Appeals decision of May 21, 2014, which denied Plaintiffs' application to amend the Certificate of Occupancy and remove the limiting condition, Plaintiffs were required to commence an Article 78 proceeding, and pursuant to *Town Law* § 267-c, such proceeding should have been commenced within thirty days of the May 21, 2014 Decision of the Zoning Board of Appeals.

Further, Defendants argue that if Plaintiffs wished to challenge the inclusion of the restrictive condition in the September 23, 1987 Certificate of Occupancy, Plaintiffs were required to follow the Board of Appeals procedure laid out in *Town Law* § 267-a, which requires that an administrative appeal be taken within sixty days after the filing of an order, requirement, decision, interpretation or determination of an administrative official.

Plaintiffs oppose the instant motion to dismiss, arguing that a variance can only affect the use of a property, and cannot limit or restrict the people who occupy such property. Plaintiffs argue that the restrictive language added to the Certificate of Occupancy improperly limits the occupancy of the property, and Plaintiffs are aggrieved by Defendant's continuing failure to issue a corrected Certificate of Occupancy. Plaintiffs therefore argue that the continuing wrong is not subject to any statute of limitations or the doctrine of laches. Plaintiffs' counsel states that Plaintiffs chose to file the instant declaratory action because the 1986 variance directs the issuance of a Certificate of Occupancy.

Regardless of how a pleading is styled, the Court has the responsibility in the first instance to ascertain the true nature of a case in order to determine the applicable statute of limitations that governs the actions. [*Solnick v. Whalen*, 49 N.Y.2d 224 (1980); *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83 (2d Dept. 2011)]. In making that determination, the Court must examine the substance of the action and identify the relationship out of which the claim arises, as well as the relief sought. [*Solnick v. Whalen*, 49 N.Y.2d 224 (1980); *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83 (2d Dept. 2011)]. If the Court determines that the dispute could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, then that

limitation period governs. [*Solnick v. Whalen*, 49 N.Y.2d 224 (1980); *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83 (2d Dept. 2011)].

In this case, regardless of how Plaintiffs' claims are pled and/or analyzed, the result is the same: the action is time-barred.

Defendant correctly notes that Plaintiffs were first aggrieved by the issuance of the Certificate of Occupancy in 1987 with the limiting condition. Any cause of action based on improper issuance of the 1987 Certificate of Occupancy is clearly time-barred.

Further, even if Plaintiffs could revive the cause of action by arguing that the 2014 denial of their application for a corrected Certificate of Occupancy was the point they were aggrieved, that decision should have been challenged in an Article 78 proceeding. Whether the 4 month statute of limitations for Article 78 proceedings applies, or the thirty day statute of limitations from *Town Law* § 267-c applies, the instant action is time-barred.

Plaintiffs' styling of the Verified Complaint alleging violations of various constitutional provisions and 42 U.S.C. § 1983, and demanding declaratory judgment, do not change the applicable statute of limitations.

As an aside, part of Defendant's motion includes an argument that Plaintiffs must be charged with notice of the limiting condition as a result of correspondence received from an architect on Plaintiffs' behalf. Specifically, Defendant's counsel points to the September 20, 2011 letter from Paul Witte, notifying Plaintiffs that the Town was aware that Plaintiffs were renting out the apartment above the garage in violation of the 1987 Certificate of Occupancy and Zoning Board Decision #86-10 that limits use to "immediate family (mother)." Defendant's counsel also points to a September 21, 2011 letter from the architect requesting access to records for 19 Lowe Lane, presumably on behalf of Plaintiffs. Defendant's counsel then points to a September 23, 2011 letter to Plaintiffs, informing them that the records were reviewed, and reiterating that they are using the property in violation of the 1987 Certificate of Occupancy and 1986 Zoning Board Decision. Finally, Defendant's counsel points to a December 14, 2011 letter from the architect that referenced the September 23, 2011 letter from the Town.

In the opposition papers, presumably in an attempt to argue that Plaintiffs were not on notice of the limiting condition in September 2011, or December 14, 2011, Plaintiffs' counsel argues that the letters from the architect were not written or sent at the behest of the Plaintiffs. Further, Plaintiffs both submitted an affidavit, signed by both individually, that states that the architects request for access was not done at Plaintiffs' request, and was not done with Plaintiffs' knowledge or consent. Plaintiffs state that any letter sent by the architect requesting any material was done in her individual capacity, and not as a representative of Plaintiffs. Plaintiffs state that the architect was never retained by them, and was never authorized to

represent them in any manner on any of the issues. Plaintiffs state that the architect sent the December 14, 2011 letter without their knowledge or approval (despite the fact that the December 14, 2011 letter references the September 23, 2011 letter sent only to Plaintiffs). Plaintiffs claim that they were unaware of any results or information obtained by the architect.

However, the Verified Complaint, verified by Richard Holihan, states that Plaintiffs were charged with violations of the Town Code of Orangetown "in or about September 2011." Therefore, regardless of whether the architect was officially representing Plaintiffs' interests, Plaintiffs' own pleading concedes that they were notified of the limiting conditions in the Certificate of Occupancy as early as September 20, 2011. Even if the Court were to accept that date as a "date of discovery of the alleged wrong" (which it does not), the action would still be time-barred, because it was commenced more than three years later.

Plaintiffs' arguments that the Town's continued failure to issue a corrected Certificate of Occupancy is a "continuing wrong" is without merit.

Defendant's request for costs and disbursements is denied.

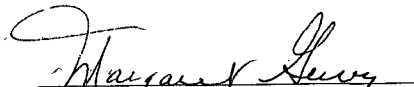
Accordingly, it is hereby

ORDERED that Defendant's Notice of Motion is granted; and it is further

ORDERED that the Summons and Verified Complaint filed December 17, 2014 by Plaintiffs is dismissed as time barred.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
June 4, 2015


HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

by e-filing -

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