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Schulz v Town Bd. of the Town of Queensbury
2018 NY Slip Op 51328(U) [61 Misc 3d 1202(A)]
Decided on September 19, 2018
Supreme Court, Warren County
Muller, J.
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Decided on September 19, 2018

Supreme Court, Warren County

Robert L. Schulz, Plaintiff-Petitioner,

against

Town Board of the Town of Queensbury, JOHN STROUGH, SUPERVISOR, Defendants-Respondents.

65512

Robert L. Schulz, Queensbury, plaintiff-petitioner pro se.

Miller, Mannix, Schachner & Hafner, LLC, Glens Falls (Jacqueline P. White of counsel), for defendants-respondents.

Robert J. Muller, J.

The City of Glens Falls (hereinafter the City) and Town of Queensbury (hereinafter the Town) entered into a Wastewater Treatment Agreement on April 1, 2002, which Agreement provides for the treatment of the Town's wastewater at the City's Wastewater Treatment Plant.[FN1] In March 2013, the Town began discussing the establishment of a Sanitary Sewer District in the vicinity of Carey Road. The Town then entered into the "Carey Road Sewer District Sewer Improvement Agreement" with the City in March 2016 to implement certain improvements to existing sewer mains so as to accommodate the flow increases expected from the Town's development of this new District. The Town thereafter proceeded with formation of the District.

In accordance with Town Law article 12-a, the Town commissioned engineering firm Chazen Companies (hereinafter Chazen) to prepare a Map, Plan and Report (MPR) relative to the project (*see* Town Law §§ 209-b, 209-c). The MPR was finalized in July 2016 and filed with the Town Clerk for public inspection on August 12, 2016 (*see* Town Law § 209-c). Defendant-respondent Town Board of the Town of Queensbury (hereinafter the Town Board) met on August 15, 2016 and scheduled a public hearing on the establishment of the District for September 12, 2016, thereafter publishing notice of the same (*see* Town Law § 209-d). The public hearing was then held as scheduled and the Town Board adopted a Resolution establishing the District, subject to a permissible referendum (*see* Town Law § 209-e). Notice of adoption of the [*2]Resolution was published and no petition for referendum was filed.

In accordance with the State Environmental Quality Review Act (*see* ECL art 8 [hereinafter SEQRA]), the Town Board deemed the project to be an Unlisted action and, on January 11, 2016, adopted a Resolution indicating that it planned to serve as Lead Agency for SEQRA review purposes (*see* 6 NYCRR 617.6 [a] [1]; [b] [2] [I]). Chazen then prepared part one of the short environmental assessment form (EAF) and it was provided — together with the Lead Agency Notice — to all potentially involved agencies, namely the Department of Environmental Conservation (hereinafter DEC), the Warren County Department of Public Works and the State Historic Preservation Office (*see* 6 NYCRR 617.6 [b] [3] [I]). The EAF included detailed information regarding the project, including the fact that the District would discharge all wastewater to the City's Wastewater Treatment Plant.

The DEC responded by letter dated April 12, 2016, consenting to the Town Board acting as Lead Agency and providing comments relative to, *inter alia*, the potential need for DEC permitting of construction activities on the project. Notably, the DEC did not express any concerns about the District discharging all wastewater to the City's Wastewater Treatment Plant. Neither the Warren County Department of Public Works nor the State Historic Preservation Office responded and, as such, were deemed to consent to the Town Board acting as Lead Agency.

At the conclusion of the public hearing on September 12, 2016, the Town Board — all of whom had heard a presentation by Chazen and been provided with a copy of part one of the EAF — completed its SEQRA review. Specifically, the Town Board addressed each question in part two of the EAF and then adopted a negative declaration determining that the project will not result in any significant adverse environmental impacts (*see* 6 NYCRR 617.7 [a] [2]). The Town Board further completed part three of the EAF, including a written explanation for the negative declaration. This SEQRA review was completed prior to the adoption of the Resolution establishing the District.

On December 22, 2016, the Town submitted its application for approval of the District to the State Comptroller (*see* Town Law § 209-f), which then granted approval on November 10, 2017. On November 20, 2017, the Town Board adopted the Final Order establishing the District. The Town Board then adopted a Resolution on January 22, 2018 authorizing the issuance of up to $1,919,949.00 in serial bonds and bond anticipation notes to pay the cost of acquisition, construction and installation of the District improvements. On March 1, 2018, the Town closed on $325,000.00 of the authorized financing and, on July 2, 2018, the Town Board approved a bid for construction of the project submitted by Turner Underground Installations (hereinafter Turner).

On July 2, 2018, plaintiff-petitioner (hereinafter petitioner) commenced this action for a declaratory judgment against the Town Board and defendant-respondent John Strough, the Town Supervisor. Petitioner claims that defendants-respondents (hereinafter respondents) violated SEQRA and, further, violated his rights under the First Amendment of the United States Constitution by failing to respond to two separate Petition for Redress of Grievances, one presented to the Town Board at its meetings on October 17, 2016 and another at its meeting on June 4, 2018. Presently before the Court is (1) petitioner's motion by Order to Show Cause for a preliminary injunction prohibiting respondents from

executing a contract with Turner relative to [*3]construction of the project and issuing any bonds or bond anticipation notes to fund the construction; and (2) respondents' pre-answer cross motion to dismiss the action.

Turning first to the cross motion, respondents contend that petitioner's claims relative to SEQRA must be dismissed as time-barred (*see* CPLR 3211 [5]).

It is by now well established that — regardless of the form in which a petitioner chooses to couch his or her claims — any claims that a municipality has failed to follow SEQRA are maintainable only in the context of a CPLR article 78 proceeding, which must be commenced within the applicable four-month statute of limitations (*see* CPLR 217 [1]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 203 [1987]; *Matter of Village of Woodbury v Seggos*, 154 AD3d 1256, 1260 [2017]). To that end, "an agency's action is final for statute of limitations purposes when the decisionmaker arrives at a definitive position on the issue that inflicts an actual, concrete injury" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 22 AD3d 1025, 1027 [2005], *affd* 7 NY3d 306 [2006] [internal quotation marks and citations omitted]).

Here, while petitioner commenced a declaratory judgment action, his claims relative to SEQRA should have been brought in the context of a CPLR article 78 proceeding (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d at 203; *Matter of Village of Woodbury v Seggos*, 154 AD3d at 1260). Insofar as the deadline for such proceeding is concerned, the Town Board completed its SEQRA review and adopted a Resolution establishing the District on September 12, 2016. The Court finds that the adoption of this Resolution constituted a definitive position on the issue inflicting an actual, concrete injury. The proceeding therefore had to be commenced on or before January 12, 2017. To the extent that the instant action was not commenced until July 2, 2018, the Court finds that petitioner's claims relative to SEQRA are time-barred (*see* CPLR 217 [1]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d at 203; *Matter of Village of Woodbury v Seggos*, 154 AD3d at 1260).

Briefly, it must also be noted that even if the Court chose to use November 20, 2017 — when the Final Order establishing the District was adopted — as the date upon which the Town Board's action became final for statute of limitations purposes, petitioner's claims relative to SEQRA still would be time-barred.

Respondents next contend that petitioner's remaining constitutional claims fail to state a cause of action (*see* CPLR 3211 [7]).

"On a motion to dismiss for failure to state a cause of action, [the Court] must 'afford the pleadings a liberal construction, accept the facts alleged therein as true, accord [petitioner] the benefit of every possible inference and determine whether the facts alleged fit within any cognizable legal theory'" (*Nelson v Capital Cardiology Assoc., P.C.*, 97 AD3d 1072, 1073 [2012], quoting *Matter of Upstate Land & Props., LLC v Town of Bethel*, 74 AD3d 1450, 1452 [2010]).

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." With that said, " [n]othing in the First Amendment or in [the] case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues" (*Minnesota State Bd. for Community Colls. v Knight*, 465 US [*4]271, 285 [1984]; *see Knight First Amendment Inst. at Columbia Univ. v Trump*, 302 F Supp 3d 541, 576 [SD NY 2018]). Indeed, "'[a] person's right to speak is not infringed when government simply ignores that person while listening to others,' or when the government 'amplifies' the voice of one speaker over those of others" (*Knight First Amendment Inst. at Columbia Univ. v Trump*, 302 F Supp 3d at 576, quoting *Minnesota State Bd. for Community Colls. v Knight*, 465 US at 285). It is "when the government goes beyond merely amplifying certain speakers' voices and not engaging with others, and actively restricts 'the right of an individual to speak freely [and] to advocate ideas,' [that] it treads into territory proscribed by the First Amendment" (*Knight First Amendment Inst. at Columbia Univ. v Trump*, 302 F Supp 3d at 576, quoting *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463, 464 [1979]; *see Minnesota State Bd. for Community Colls. v Knight*, 465 US at 286).

Here, petitioner provided written comments to the Town Board at its meetings on October 17, 2016 and June 4, 2018, respectively, which comments he labeled "Petition[s] for Redress of Grievances Regarding the Proposed Carey Road Sanitary Sewer District." While petitioner contends that his First Amendment rights were violated because the Town Board failed to respond to the comments in writing, the Court is not persuaded. The

comments were accepted by the Town Board and even read into the record at the meetings. Under these circumstances, it certainly cannot be said that the Town Board actively restricted petitioner's right to speak freely and to advocate his ideas. Even affording the pleadings a liberal construction and accepting the facts alleged as true, the Court nonetheless finds that petitioner has failed to state a claim for violation of his rights under the First Amendment of the United States Constitution.

Based upon the foregoing, respondents' cross motion is granted in its entirety and the action dismissed.

Petitioner's motion for a preliminary injunction is denied as moot.[FN2]

The parties' remaining contentions, to the extent not expressly addressed herein, have been considered and are either academic in light of this decision or without merit.

Therefore, having considered the Brief of Robert L. Schulz, dated July 3, 2018, submitted in support of the motion; Affidavit of Robert L. Schulz with exhibits attached thereto, sworn to July 3, 2018, submitted in support of the motion; Affirmation of Jacquelyn P. White, Esq. with exhibit attached thereto, sworn to July 16, 2018, submitted in support of the cross motion and in opposition to the motion; Affidavit of Christopher Harrington, Jr. with exhibits attached thereto, sworn to July 13, 2018, submitted in support of the cross motion and in opposition to the motion; Memorandum of Law of Jacquelyn P. White, Esq., dated July 16, 2018, submitted in support of the cross motion and in opposition to the motion; Affidavit of Robert L. Schulz with exhibits attached thereto, sworn to July 19, 2018, submitted in opposition to the cross motion and in [*5]further support of the motion; and Brief of Robert L. Schulz, dated July 19, 2018, submitted in opposition to the cross motion and in further support of the motion,[FN3] it is hereby

ORDERED AND ADJUDGED that respondents' cross motion is granted in its entirety and the action dismissed; and it is further

ORDERED AND ADJUDGED that petitioner's motion for a preliminary injunction is denied as moot.

The original of this Decision and Judgment has been filed by the Court together with the Notice of Cross Motion dated July 16, 2018 and the submissions enumerated above. Counsel for respondents is hereby directed to obtain a filed copy of the Decision and Judgment for service with notice of entry in accordance with CPLR 5513.

Dated:September 19, 2018
Lake George, New York

_____
ROBERT J. MULLER, J.S.C.
ENTER:

Footnotes

Footnote 1: The Court notes that the Agreement was subsequently amended on August 1, 2012 and November 1, 2012.

Footnote 2: Insofar as petitioner claims that the bid for construction approved by the Town Board on July 2, 2018 was based upon specifications and drawings which did not comport with the MPR, the Court notes that such claims were raised for the first time in his reply papers and, as such, not properly before the Court (*see Kurbatsky v Intl. Conference of Funeral Serv. Examining Bds.*, 162 AD3d 1379, 1380 n 1 [2018]; *Matter of Jay's Distribs., Inc. v Boone*, 148 AD3d 1237, 1241 [2017], *lv denied* 29 NY3d 918 [2017]; *Matter of Rosenfelder [Community First Holdings, Inc.—Commissioner of Labor]*, 137 AD3d 1438, 1440 [2016]).

Footnote 3: The Court notes that petitioner submitted correspondence dated August 20, 2018 in further support of his motion. This correspondence was not considered, however, as it was submitted approximately one month after the return date.

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