

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of the Application of Deborah Kopald,
Petitioner,

For a Judgment Pursuant to Article 78

– against –

The Town of Highlands New York,
David Tonneson, Deborah Tonneson, Jaidin Paisley-
Tonneson,

Respondents.

**AFFIRMATION IN
OPPOSITION BY
RESPONDENT TOWN OF
HIGHLANDS TO THE
PETITIONER-APPELLANT'S
ORDER TO SHOW CAUSE
SIGNED July 20, 2020**

Docket No. 2020-02351

X

Michael J. Matsler, an attorney duly licensed to practice in the courts of the State of New York, affirms under penalty of perjury:

1. I am an officer of Rider, Weiner & Frankel, P.C., counsel for Respondent Town of Highlands. I submit this affirmation in opposition to Petitioner-Appellant Kopald's latest in an interminable series of motions for relief. The return date is July 28, 2020 and oral argument is not required.

2. I am fully familiar with the Respondent Town's files and relevant documents, the applicable state and local law, the proceedings in the trial and appellate court, and with the facts set forth in this affirmation. In that Appellant has not submitted a separate legal brief, and for reasons of economy and time constraints, I respectfully request the Court to allow me to set forth the Town's legal points in this Affirmation.

3. Petitioner-Appellant demands an order directing co-Respondents Tonneson to stop construction work on their property, stop “cutting any more trees on their property”, and “cease all activity” on their property.

4. She demands an order directing the Town to “withdraw” immediately the Certificate of Occupancy issued to co-respondents on June 15, 2020, according to Appellant. (Kopald Aff. At page 6).

5. She does not state a proper claim for relief. Accordingly, her motion must be denied as a matter of law.

Procedural History

6. Appellant filed her first of many Article 78 petitions with order to show cause on or about September 30, 2019. She filed in quick succession several other petitions and motions requesting essentially the same relief, while her original petition and motion for an injunction were still pending. On or about October 28, 2019 Co-Respondent Tonneson filed a motion to dismiss the primary petition. The Respondent Town filed its motion to dismiss on November 1, 2019. Because of the confusion created by Appellant’s incessant motions, petitions and email correspondence, I requested an in-person conference before the Court, which took place before Judge Robert Onofry on November 13, 2019. Judge Onofry directed Appellant to refrain from further motions pending his determination on the Respondents’ motions, and established a briefing schedule. (*See* Judge Onofry’s Order dated December 4, 2019, Ex. “A”).

7. Judge Onofry rendered his Decision on the petition, as amended on February 7, 2020 (annexed hereto as Exhibit “B”). Appellant filed her notice of appeal on or about February 21, 2020.

8. By order to show cause signed May 6, 2020 in this Court, Appellant asked this Court *inter alia* to direct co-respondent homeowners to stop all construction work on their new home, stop using lawn mowers, leaf blowers and other power tools; prohibit the Town from “parking/letting linger noise town equipment in the vicinity of her house”; and that the Court “order the Town of Highlands to withhold a Certificate of Occupancy” to co-respondents Tonneson. The respondent Town filed its opposition in the form of my affidavit of May 13, 2020 and attorney Honan filed co-respondents’ opposition on May 14, 2020. Appellant filed a reply affidavit. The return date was May 18, 2020.

9. As she had done so often before in the lower court, after respondents had served and filed their opposition papers, Appellant attempted to withdraw her motion over the objection of respondents. (*See* E-Mail Correspondence dated May 21, 2020 by counsel for the Town, Ex. “C” hereto). In a discussion among all parties Associate Deputy Clerk Melissa Krakowski confirmed that this Court had denied Appellant’s May 6, 2020 application for a TRO, although apparently she was permitted to withdraw the balance of her motion.

10. Undaunted as ever, on June 18, 2020 Appellant filed in letter form an application with Judge Onofry in the lower court asking for leave to file yet another petition to attack co-respondents’ permit and alleged illegal tree cutting, and to order the Town to enforce the local code, notwithstanding her pending proceedings before the ZBA on these issues and her motion with this Court. Respondents objected by letters dated June 18 and 19, 2020 to which Appellant replied, also in letter form. (Ex. “D” hereto). Judge Onofry denied the request, noting that Appellant was attempting a collateral attack and that mandamus and a private right of action did not lie. (Ex. “E” hereto).

Appellant's Allegations

11. As stated in her numerous affidavits, Appellant lives on property contiguous to Respondents-homeowners' 13-acre parcel in the Town of Highlands. She objected to the Town building inspector issuing permits in September 2019 to the Tonneson family to erect a single-family home. Appellant alleged the building inspector was not allowed to issue a permit to construct a foundation to receive co-respondents' house, a prefabricated modular home. She claimed only the Planning Board has such authority. She also complained about co-respondents' alleged illegal tree cutting during the summer of 2019 and noise she perceived was excessive.

12. As recited by Appellant, the Tonnesons' parcel is at Section 11, Block 1, Lot 1.52 on the tax map. It is undisputed that they are the owners of the lot, and that it is in a residential zone.

13. Appellant's proceedings before the ZBA seeking to annul the permit and "enforce" the code are still pending, upon information and belief and as per Appellant's most recent statements to the Court.

14. Appellant admits that the tree cutting she claims was illegal occurred a year ago. (*See Kopald Aff. at 3-4, 6, 24*). She admits that her remedy regarding the Tonnesons' alleged excessive noise is in the form of an action at law for nuisance. (*Kopald Aff. at 5-6*). She has presented no credible evidence to support her claim that the Town's street cleaning equipment or other vehicles pose any true objectively measurable injury to her, whether irreparable or compensable.

15. As per the Appellant, the Tonnesons' certificate of occupancy was issued over a month ago, on June 15, 2020. (*Kopald Aff. at page 6*).

16. In this latest iteration of Appellant's request for injunctive relief, she summarizes her legal grounds in Point I on page 16 of her affidavit (alleged ultimate success on the merits), and in Point II on page 34 (balance of the equities, alleged continuing harm). The Town addresses each point in turn, as follows.

POINT I

APPELLANT HAS NOT ESTABLISHED ULTIMATE SUCCESS ON THE MERITS

17. Appellant's arguments in her first Point center on the proposition that the lower court erred in requiring her to exhaust her administrative remedies by first proceeding with the Town's ZBA rather than rule on the underlying merits of her Art. 81 petition. She cites to *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 NYS2d 821 (1978) which sets forth exceptions to the doctrine such as proof that the agency's acts were unconstitutional or ultra vires; or when it would be futile to proceed administratively; or when its pursuit would cause irreparable injury. (Kopald Aff. at 17).

18. Appellant has not shown, and cannot show, that the Town's issuance of building permits by its building inspector is somehow unconstitutional or ultra vires. Issuing permits as well as certificates of occupancy is one of the primary functions of building inspectors in this state.

19. A true and accurate copy of the Town of Highlands' relevant Code provisions is annexed hereto as Exhibit "F". Article II, Section 82-10 sets forth the duties of the building inspector. These duties include enforcement of the building and other related codes, and issuing building permits. See section 82-10(A)(1) and (2). Section 82-11(F) provides that "[t]he Building Inspector(s) shall issue a building permit if the proposed work is in compliance with the applicable requirements of the Uniform Code and the Energy Code".

20. Issuing building permits for one and two-family dwellings such as co-respondents' house is not the function of the Town's Planning Board. Section 210-21(A) provides that "[n]o building permit or certificate of occupancy shall be issued for other than a one-family residence, a two-family detached residence or for structures accessory thereto until a site development plan has been approved by the Planning Board in accordance with this section". As a one-family residence, the Tonnesons' house is exempt from the Planning Board's site plan and subdivision jurisdiction.

21. Appellant misreads section 210-21(A) as requiring Planning Board approval for a single-family home whereas the opposite is correct.

22. The Town's Code does not provide for any unique permit specific for modular homes but clearly a modular house falls squarely within the definition of a "building" and "structure" under section 82-3 and is therefore no different than a stick-built or other conventional house. Tonnesons' plans for their modular house were duly filed with the building department with all required professional certifications and examined by the building inspector as set forth in the affidavit of Bruce C. Terwilliger, submitted under Respondent Town's November 2019 motion to dismiss, a copy of which is annexed hereto as Ex. "G".

23. The issuing of a building permit, as well as a certificate of occupancy, is a discretionary act. *See Dinerman v. Poehlman*, 237 A.D.2d 483, 656 N.Y.S.2d 41 (2d Dept. 1997), appeal denied, 90 N.Y.2d 808, 664 N.Y.S.2d 269. The law is settled that mandamus cannot be used to compel an official to reach any particular decisions turning on the exercise of judgment or discretion, which is precisely what the Petitioner seeks to do. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 475 N.Y.S.2d 247 (1984). 28. The Town's issuance of the permits was rational and routine. See, e.g., Shuttle Contracting Corp. v. Planning Board of the Incorporated Village of Great Neck, 73 A.D.3d 789, 900 N.Y.S.2d 387 (2d Dept. 2010). Appellant moreover has presented nothing

more than hearsay statements and inconclusive photographs of trees and woodlands surrounding the Tonnesons' new house and her unsupported statement that "Tonneson had cut at least 39 trees greater than a certain size, when a permit was required to cut more than 3... Those trees were cut before Tonneson ever applied for a foundation permit..." (Kopald Aff. At 20). She repeats this assertion on page 24, that these trees were illegally cut before they applied for any building permit. If, as Appellant contends, trees were removed in violation of law, that is an enforcement matter for the Town to consider in its discretion. Appellant has no standing or entitlement to an injunction. Moreover, the emergency order Appellant is seeking from this Court, prohibiting the Town's building inspector from performing his duty to determine if a certificate of occupancy should be issued, is not a logical remedy to the harm alleged by Appellant – ongoing construction noise and tree removal occurring almost a year ago.

24. Judge Onofry dismissed Appellant's petition, without prejudice, to enable her to exhaust her administrative remedies by appealing the permit issues to the Town's Zoning Board of Appeals ("ZBA"). In correspondence filed by Appellant with the Appellate Court, Appellant contends that her ZBA appeal is still pending and she is awaiting its decision. Appellant cannot therefore show that her ZBA proceedings are futile as she has been fully participating, with counsel, in these proceedings. Her zealous participation in her ZBA challenge renders her present argument moot and estops her from claiming otherwise.

25. Appellant cannot as a matter of law show credible, objective irreparable injury cognizable in a court of law. She has never alleged any damage to her own property by reason of her neighbors' alleged tree cutting or alleged failure to provide proper "erosion control" in erecting their house, all of which occurred months ago and which, even if *arguendo* had been proven by credible, admissible evidence, do not entitle her to any private cause of action nor can these alleged

past acts justify the granting of injunctive relief. If any illegal tree cutting or excessive noise or failure to observe erosion control measures downslope from her own property during the construction of the Tonnesons' home has occurred, as she claims, such alleged harm has already occurred. She has provided no credible evidence whatsoever that these alleged illegal activities will occur in the future and her subjective fears are purely speculative and without legal substance to support the relief she requests.

POINT II

APPELLANT FAILS TO SHOW ENTITLEMENT TO EQUITY OR IRREPARABLE HARM WITH SPECULATIVE ALLEGATIONS OF CONTINUING NOISE OR FUTURE TREE CUTTING, OR TO REQUIRE THE TOWN TO WITHDRAW THE CERTIFICATE OF OCCUPANCY

26. An injunction is a drastic remedy that should be issued with great caution. Related Properties, Inc. v. Town Board of the Town and Village of Harrison, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dept. 2005); Cipriani Fifth Ave., LLC v. RPCI Landmark Properties, LLC, 4 Misc.3d 850, 782 N.Y.S.2d 522 (N.Y. Cty. 2004). The movant has the burden of establishing a clear right to relief under the law and the undisputed facts within the motion papers. County of Orange v. Lockey, 111 A.D.2d 896, 490 N.Y.S.2d 605 (2d Dept. 1985). Movant must show, through admissible relevant evidence, the likelihood of ultimate success on the merits; irreparable harm absent relief; and that an equitable comparison of the hardships incurred by the parties with or without the injunction favor the movant. Faberge International, Inc. v. Di Pino, 109 A.D.2d 235, 491 N.Y.S.2d 345 (1st Dept. 1985). If key facts are in dispute, the application must be denied. Id.

27. Appellant cannot rely on subjective opinion, and hearsay statements of her lawyers or third parties to establish her entitlement. She has presented no objective credible evidence that the alleged noise and tree cutting she speculates will continue entitle her to an injunction. She is,

in fact, participating fully in the ZBA process which she is simultaneously attacking in her appeal to this Court. “In doing so, [she] has waived [her] right to any further action until a determination is reached by the [ZBA].” Angiolillo v. Town of Greenburgh, 21 A.D.3d 1101, 1105, 801 N.Y.S.2d 629, 632 (2d Dept. 2005). Appellant has not demonstrated any rational irreparable harm that will occur by completing her ZBA appeal process. See Golden v. Steam Heat, Inc., 216 A.D.2d 440, 628 N.Y.S.2d 375 (2d Dept. 1995).

28. Prohibiting public officials from performing their duties or engaging in sanitary work for the benefit of the public is a drastic, extraordinary measure which cannot be ordered by the courts without clear and convincing proof of wrongdoing or demonstrable, unreasonable danger to the public. Even then, it is available only against a judicial or quasi-judicial officer or body. Lee v. County Court of Erie County, 27 N.Y.2d. 432 (1971); Feldman v. Marcus, 23 A.D.3d 559, 806 N.Y.S.2d 620 (2d Dept. 2005), leave to appeal denied, 7 N.Y.3d 703, 819 N.Y.S.2d 869 (2006); In Re Incorporation of the Village of Purchase, 80 Misc.2d 541, 363 N.Y.S.2d 183 (Sup. Ct. Westchester Cty. 1974). Appellant has failed to meet her burden. Moreover, an order of prohibition must be rationally based on objective evidence that proves past wrongful or dangerous acts complained of are likely to occur again at a future time. Appellant’s speculation that her subjective irritation with the Town’s leaf removal equipment might occur at the same time she might be drafting legal papers for her attorney to sign, as she claims, and thus purportedly depriving her of “due process”, is too far-fetched to merit consideration. Ironically, the recent noise ordinance of which she complains was adopted by the Town at her request. (See Local Law No. 2 of 2019, Ex. “H” hereto).

29. As with an order of prohibition, mandamus is an exceptional remedy.”Mandamus, of course, is an extraordinary remedy that, by definition, is only available in limited

circumstances.” Klostermann supra, 61 N.Y.2d at 537. Only ministerial acts involving no exercise of judgment or discretion can be subject to an order to compel performance. Gimprich v. Board of Education of the City of New York, 306 N.Y. 401 (1954). Even in those cases a Petitioner must prove a “clear legal right” to the relief requested; any reasonable doubt requires denial. Association of Surrogates and Supreme Court Reporters v. Bartlett, 40 N.Y.2d 571, 388 N.Y.S.2d 882 (1976).

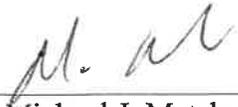
30. Appellant cannot show irreparable harm if what she demands is not granted. The certificate of occupancy was granted six months ago. Her request to withdraw her May 2020 and the Court’s dismissal of a TRO to prohibit the Town from issuing the certificate of occupancy demonstrates the absence of urgency or irreparable harm, as well as the lack of any equitable consideration in her favor.

CONCLUSION

31. Appellant has failed to satisfy the elements required to justify an injunction against Respondent Town whether in prohibition or mandamus. She has failed to demonstrate conduct which, absent Court intervention, will create an objectively real and substantial danger to her health, life or property; there is no objective admissible evidence of any wrongdoing, inequitable or illegal conduct by Respondent Town; she has failed to show a substantial likelihood of success on the merits of her allegations; and she cannot prove that the balance of the equities are in her favor. Appellant has not demonstrated irreparable harm if her application is denied, and she cannot show that she has any cognizable special interest at stake entitling her to an injunction, which is a condition precedent she has failed to meet. See, e.g., Kempner v. Patsy Bello Nurseries, Inc., 31 A.D.2d 748, 297 N.Y.S.338 (2d Dept. 1969); Slevin v. Long Island Jewish Medical Center, 66 Misc.2d 312, 319 N.Y.S.2d 937 (Sup. Ct. Nassau Cty.1977).

32. Accordingly, Respondent Town of Highlands respectfully requests that Appellant's application be denied.

Dated: July 24, 2020
New Windsor, NY



Michael J. Matsler