

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

HOLLY BILLERIS,

Plaintiff,

- against -

THE INCORPORATED VILLAGE OF
BAYVILLE, JAMES A. GOOLSBY, in his
capacity as Building Inspector of THE
INCORPORATED VILLAGE OF BAYVILLE and
the ZONING BOARD OF APPEALS OF THE
INCOORPORATED VILLAGE OF BAYVILLE,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 12521/13

Motion Sequence No. 004

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	<u>4</u>
Defendant's / Respondent's	<u> </u>

The plaintiff-petitioner Holly Billeris moves for an order granting leave to reargue the previously submitted CPLR Article 78 petition and the defendants-respondents The Incorporated Village of Bayville, James A. Goolsby, in his capacity as Building Inspector of The Incorporated Village of Bayville and the Zoning Board of Appeals of The Incorporated Village of Bayville's motion to dismiss the petition and motion to dismiss the complaint, reinstating the complaint, annulling the building inspector's June 12, 2013,

and July 12, 2013 denials of the plaintiff-petitioner's applications for a fence permit, annulling the Zoning Board of Appeals' rejection of the plaintiff-petitioner's appeal of the building inspector's June 12, 2013 and July 12, 2013 determinations and directing the building inspector to issue the fence permit requested by the plaintiff-petitioner in a May 13, 2013 application.

This Court heard oral argument on the motion. The Court reserved decision on the motion for consideration and disposition.

The underlying matter arises from the home owner's application for a fence permit to the Village inspector to erect two fences over Shore Road at the eastern and western boundaries of 60 Shore Road. The plaintiff-petitioner alleges the fences would permit the plaintiff-petitioner to enclose and protect her land by providing twelve foot wide crash gates in order to allow emergency equipment only to enter the private property should emergency access be needed.

The building inspector informed the plaintiff-petitioner that the fence permit application was denied on June 12, 2013, because the Village was bound by the holdings in *Incorporated Village of Wayville v. Viteritti, et al.* (2008 WL 2401224). That Nassau County Supreme Court 2008 decision concluded that a barricade across Shore Road constituted a public nuisance because it was a substantial interference with the health and safety of residents south of the barricade. The plaintiff-petitioner resubmitted the application on July 9, 2013, and the building inspector again denied the application on July 12, 2013. The plaintiff-petitioner submitted an appeal of the building inspector's

determination to the Zoning Board of Appeals on August 9, 2013. The plaintiff-petitioner requested reversal because without the fence it was impossible for the plaintiff-petitioner to prevent the public at large from trespassing upon the property. The plaintiff-petitioner utilized a variance application form to request review of the building inspector's decision, hence to reverse his determination denying the fence permit which the plaintiff-petitioner claims entitlement by right. The parties' attorneys communicated with each other during the appeal process, and on September 20, 2013, the Village Attorney informed the plaintiff-petitioner's counsel that the variance application to the Zoning Board of Appeals had been rejected.

The plaintiff-petitioner argues neither of the causes are time-barred. The plaintiff-petitioner's CPLR Article 78 proceeding was timely commenced under a four-month statute of limitations. The plaintiff-petitioner argues the inverse condemnation claim is timely as it is governed by a three-year statute of limitations. The plaintiff-petitioner argues the petition-complaint should not have been dismissed on the ground that the plaintiff-petitioner lacks capacity to sue. The plaintiff-petitioner argues the petition-complaint should not have been dismissed on the basis of a prior action pending as that doctrine does not apply to this case. The plaintiff-petitioner argues the petition properly stated a claim for relief under CPLR Article 78 and should have been granted as a matter of law. The plaintiff-petitioner argues the defendants-respondents acted without regard for the substantive law. The plaintiff-petitioner argues, even if *Vitteriti* was not overruled, it is legally and factually distinguishable. The

plaintiff-petitioner argues the determinations of the building inspector are arbitrary per se because the determinations deviated from precedent. The plaintiff-petitioner argues the other eleventh hour justifications for the defendants-respondents' conduct did not actually form the basis of their respective determinations and are otherwise substantively unsound. The plaintiff-petitioner argues the defendants-respondents' private easement argument fails. The plaintiff-petitioner argues the defendants-respondents' restrictive covenant argument fails. The plaintiff-petitioner argues the plaintiff-petitioner's complaint clearly and properly states a claim of inverse condemnation.

The defendants-respondents oppose this motion. The defendants-respondents argue the decision on the prior motion to dismiss this petition was properly granted because it was based upon the plaintiff-petitioner's failure to show entitlement to the relief in accordance with CPLR 7803. The defendants-respondents assert the plaintiff-petitioner is using this instant motion to reargue positions already argued before the Court. The defendants-respondents contend the plaintiff-petitioner failed to establish the denials for the fence permit applications were in fact an error of law, or arbitrary, capricious and an abuse of discretion. The defendants-respondents argue the defendants-respondents' assertion that the 2012 decision in *Matter of Marchand v New York State Dept. of Env'tl. Conservation* (19 N.Y.3d 616) overturned the holding in *Incorporated Village of Wayville v. Viteritti, et al.* (2008 WL 2401224) is incorrect because that Court of Appeals ruling dealt with the issue of whether Shore Road was a private or public roadway, and whether the Village could install drainage points on that roadway. The

defendants-respondents maintain the building inspector here at no time issued a fence permit allowing the Marchands to block access to Shore Road nor was it the intention of the Village to permit such fencing to block access to any portion of Shore Road. The defendants-respondents note the Village is currently investigating other violations in the area, and there is no evidence in the documents provided by the plaintiff-petitioner to show Village permitted such fencing to block access to any portion of Shore Road. The defendants-respondents argue they have not prescribed Shore Road to be a public roadway nor does the denial of the applications for a fence permit mandate that the roadway be used and accessed by the public at large. The defendants-respondents instead indicate the denial of a fence permit here is based upon the prevailing case law that blocking Shore Road with fences or gates creates a public nuisance and safety hazard, and the defendants-respondents have not taken Shore Road and acted in contradiction to NY Const Art 1, § 7. The defendants-respondents argue the Court properly dismissed the petition and the complaint based upon the fact that both are time-barred by Village Law §7-712-c which provides a 30-day statute of limitations.

The plaintiff-petitioner replies to the defendants-respondents' opposition, and reiterates some assertions. The plaintiff-petitioner argues it is beyond the pale for the defendants-respondents to assert the Village can lawfully forbid the plaintiff-petitioner from excluding the public from her private property while simultaneously contending it has not committed a *de facto* taking for which the plaintiff-petitioner is entitled to just compensation. The plaintiff-petitioner asserts the defendants-respondents' actions were

arbitrary. The plaintiff-petitioner avers the defendants-respondents cannot use a prior motion decision from another Court as a basis for denying the fence permit applications and the zoning board appeal because that case is factually distinguishable from this matter, and the plaintiff-petitioner was not a party to that earlier case. The plaintiff-petitioner asserts the defendants-respondents' argument that the plaintiff-petitioner lacks standing is a frivolous contention since the plaintiff-petitioner owns the subject property. The plaintiff-petitioner maintains the alleged easements or restrictive covenants do not dictate the necessary parties to this proceeding, and the Village lacks standing to raise these issues in defense of its actions. The plaintiff-petitioner claims all necessary parties have been properly joined to this proceeding. The plaintiff-petitioner contends the defendants-respondents' explanation as to why the plaintiff-petitioner purportedly failed to state an inverse condemnation claim is untenable.

The Court permits leave to reargue the prior decision of the previously submitted CPLR Article 78 petition and the defendants-respondents The Incorporated Village of Bayville, James A. Goolsby, in his capacity as Building Inspector of The Incorporated Village of Bayville and the Zoning Board of Appeals of The Incorporated Village of Bayville's motion to dismiss the petition and motion to dismiss the complaint. The Court determines, as to that branch of the plaintiff-petitioner's motion addressing the time-barred issue, the plaintiff-petitioner satisfies the CPLR 2221 burden of showing the application of a four-month statute of limitations should be applied here rather than a 30-day statute of limitations. Hence, the petition is not time-barred. However, the Court

determines, as to the other branches of the plaintiff-petitioner's motion, that the plaintiff-petitioner fails to satisfy the CPLR 2221 burden of showing the Court allegedly overlooked or misapprehended matters of fact or law in determining that prior motion. The the plaintiff-petitioner fails to establish the denials for the fence permit applications were in fact an error of law, or arbitrary, capricious and an abuse of discretion. In opposition, defendants-respondents show that blocking Shore Road with fences or gates creates a public nuisance and safety hazard, and the defendants-respondents have not taken Shore Road and acted in contradiction to NY Const Art 1, § 7.

ORDERED that the motion is denied except as to that branch of the plaintiff-petitioner's motion addressing the time-barred issue which is granted.

So ordered.

Dated: **December 22, 2014**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED
DEC 23 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE