

2018 WL 2946114  
Supreme Court, Orange County, New York.

Claudio **GUAZZONI** and  
Robert Zgonena, Plaintiffs,

v.

**VILLAGE OF TUXEDO PARK**, David McFadden,  
Mayor, **Village of Tuxedo Park**, and John  
Ledwith, as a necessary party, Defendants.

EFO00551-2018

|  
Decided on June 12, 2018

**Attorneys and Law Firms**

For the Plaintiffs: Michael Sussman, Esq., Sussman &  
Associates, Goshen, NY

For the Defendants: Brian Nugent, Esq., Feerick Lynch  
MacCartney & Nugent, PLLC, South Nyack, NY

Catherine M. Bartlett, J.

**\*1 Factual Background**

On September 13, 2017, the Board of Trustees of the  
defendant **Village of Tuxedo Park** (the "**Village**") adopted  
a Resolution stating as follows:

Resolved that the **Village** enter into  
a Consulting Agreement with John  
Ledwith under which Mr. Ledwith  
would provide consulting services to  
the **Village**, such agreement to be  
substantially in the form reviewed  
by the Trustees, together with such  
changes as may be reviewed by  
counsel, and approved by the Mayor  
and Trustee Gluck.

A certified copy of the Resolution and a copy of the  
Board of Trustees Minutes of the September 13, 2017  
Meeting are proffered via the affidavit of Paul Gluck, a  
duly elected member of the **Village** Board of Trustees. Mr.  
Gluck's affidavit further states: "Pursuant to the authority  
granted by the **Village** Board on September 21, 2017,  
Mayor McFadden executed a consultant agreement with  
John Ledwith in accordance with the September 13, 2017  
Resolution of the **Village** Board."

**The Complaint**

On January 19, 2018, Plaintiffs Claudio **Guazzoni** and  
Robert Zgonena commenced this action, asserting two  
causes of action.

The first cause of action seeks a declaratory judgment  
that the **Village's** consulting agreement with John Ledwith  
is null and void because executed by defendant Mayor  
David McFadden in violation of New York law. The  
Complaint alleges:

17. **Village** Law prescribes the duties of the Mayor and  
the **Village** Board of Trustees.

18. A **Village** Mayor is not authorized to himself enter  
into any employment agreement which binds the **village**  
to expend public funds.

19. The terms of any such agreement must be approved  
by the Board of Trustees which is responsible for the  
management of **village** property and finance, V [illage]  
L[jaw] Section 4-412, and only upon that occasion may  
the Mayor sign any such agreement.

20. The consulting agreement for defendant John  
Ledwith is a legal nullity, having never been  
appropriately approved by the **Village** Board of  
Trustees.

21. Defendant McFadden acted in an *ultra vires*  
manner and contrary to law in signing said consulting  
agreement and approving monthly payments in the sum  
of \$5,371.74 to defendant Ledwith and other benefits  
set forth therein.

The second cause of action seeks an order pursuant to  
**Village** Law § 4-412(12) requiring defendant McFadden  
to repay the **Village** all sums paid to John Ledwith under  
the consulting agreement. The Complaint alleges:

23. Any person who assumes to create a liability for  
a **village** or approves the expenditure of **village** funds  
without specific authorization to do so is personally  
liable for the sum so expended. *See*, VL 4-412(12).

24. Since September 25, 2017, defendant Ledwith has  
been paid the sum of \$5371.74 / month plus at least  
an additional sum of \$800 / monthly from **village** funds  
based upon a document signed by McFadden without

specific authorization or approval by resolution of these terms.

\*2 25. Said payment had been occasioned by and only by the *ultra vires* actions of defendant McFadden which actions were contrary to law and specifically unauthorized.

### ***Defendants' Motion to Dismiss***

Defendants move to dismiss Plaintiffs' Complaint, first, pursuant to CPLR § 3211(a)(1), on the ground that documentary evidence conclusively establishes that Mayor McFadden was legally authorized to sign the consulting agreement on behalf of the **Village**; second, pursuant to CPLR § 3211(a)(5), on the ground that Plaintiffs' claims are governed by the four (4) month Statute of Limitations for Article 78 proceedings and the action was untimely commenced; and third, pursuant to CPLR § 3211(a)(3), on the ground that plaintiff Claudio **Guazzoni** lacks capacity and standing to prosecute this action.

### **A. Documentary Evidence**

#### **1. The Legal Standard Governing Dismissal Based On Documentary Evidence**

“ ‘On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference’ [cit.om.]. ‘A motion pursuant to CPLR 3211(a) (1) to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law’ [cit.om.]” *Gad v. Sherman*, 160 A.D.3d 622, — N.Y.S.3d — (2d Dept. 2018). *See, Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002); *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994).

#### **2. The Meaning Of The September 13, 2017 Resolution**

Defendants' motion for dismissal based on documentary evidence is predicated on the Resolution adopted by the **Village Board** on September 13, 2017, which states:

Resolved that the **Village** enter into a Consulting Agreement with John

Ledwith under which Mr. Ledwith would provide consulting services to the **Village**, such agreement to be substantially in the form reviewed by the Trustees, together with such changes as may be reviewed by counsel, and approved by the Mayor and Trustee Gluck.

Salutary canons of construction require that legislative enactments be construed as a whole; that all parts thereof be read and construed together to determine the legislator's intent; that all parts thereof be harmonized with each other; and that effect and meaning, if possible, be given to the entire enactment and every part and word thereof. *See, New York Statutes* §§ 97, 98; *Sanders v. Winship*, 57 N.Y.2d 391, 395–396, 456 N.Y.S.2d 720, 442 N.E.2d 1231 (1982).

The Resolution consists of a single sentence with two operative provisions: the Board thereby (1) authorized the **Village** to enter into a Consulting Agreement with John Ledwith “*substantially* in the form reviewed by the Trustees”, and concomitantly (2) delegated authority to incorporate “such changes as may be reviewed by counsel, and approved by the Mayor and Trustee Gluck.” Reading and construing these two provisions of the Resolution together so as to harmonize them and give effect and meaning to the entire Resolution and each part thereof, the Court concludes that by its Resolution, the **Village Board** intended to approve the *substance* of the Agreement while delegating limited power to approve, not any and all changes, but only such as—upon review by legal counsel for compliance with law, including the terms of the Resolution—did not alter the *substance* of the Board-approved Agreement. Contrary to Plaintiffs' suggestion (*Sussman Aff.* ¶ 30), the Resolution cannot reasonably be read as having conferred authority on the Mayor and Trustee Gluck to alter the Agreement however they liked, as such a construction would wholly negate the Board's explicit directive that the Agreement “be substantially in the form reviewed by the Trustees.”

#### **\*3 3. Pertinent Legal Principles Governing Municipal Contracting**

“Municipal contracts which violate express statutory provisions are invalid.” *Granada Buildings, Inc. v. City of Kingston*, 58 N.Y.2d 705, 708, 458 N.Y.S.2d 906, 444 N.E.2d 1325 (1982). *See, Kelly v. Cohoes Housing*

*Authority*, 23 N.Y.2d 692, 693, 296 N.Y.S.2d 139, 243 N.E.2d 746 (1968); *Albany Supply and Equipment Company v. City of Cohoes*, 18 N.Y.2d 968, 969, 278 N.Y.S.2d 207, 224 N.E.2d 716 (1966); *Infrastructure Management Systems, LLC v. County of Nassau*, 2 A.D.3d 784, 786, 770 N.Y.S.2d 119 (2d Dept. 2003).

[A] municipality's power to contract is statutorily restricted for the benefit of the public. Statutory restrictions on a municipal corporation's power to contract protect the public from the corrupt or ill-considered actions of municipal officials. To allow recovery under a contract which contravenes such restrictions gives vitality to an illegal act and grants the municipality power which it does not possess "to waive or disregard requirements which have been properly determined to be in the interest of the whole."

*Genesco Entertainment, A Division of Lymutt Industries, Inc. v. Koch*, 593 F.Supp. 743, 748 (S.D.N.Y. 1984) (quoting *Lutzken v. City of Rochester*, 7 A.D.2d 498, 499, 184 N.Y.S.2d 483 [4th Dept. 1959]). See, *Henry Modell & Company, Inc. v. City of New York*, 159 A.D.2d 354, 355, 552 N.Y.S.2d 632 (1st Dept.), *appeal dismissed*, 76 N.Y.2d 845, 560 N.Y.S.2d 129, 559 N.E.2d 1288 (1990).

Thus, the Court of Appeals has held that "[where the Legislature provides that valid contracts may be made only by specified officers or boards and in specified manner", a contract which "fails to comply with statutory restrictions and inhibitions" is invalid and creates no obligation or liability of the municipality. See, *Seif v. City of Long Beach*, 286 N.Y. 382, 387, 36 N.E.2d 630 (1941); *New York Telephone Company v. Town of North Hempstead*, *supra*. See also, *Infrastructure Management Systems, LLC v. County of Nassau*, *supra*.

#### 4. Relevant Statutes

The powers and duties of **village** boards of trustees are set forth in **Village Law** § 4-412. Section 4-412(1)(a) provides:

1. General powers of the board of trustees. a. In addition to any other powers conferred upon **villages**, the board of trustees of a **village** shall have management of **village** property and finances, may take all measures and do all acts, by local law, not inconsistent with the

provisions of the constitution, and not inconsistent with a general law except as authorized by municipal home rule law, which shall be deemed expedient or desirable for the good government of the **village**, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions.

\*4 The powers and duties of **village** mayors are set forth in **Village Law** § 4-400. Section 4-400(1)(i) provides that, "It shall be the responsibility of the mayor...to execute all contracts in the name of the **village**..."

By way of comparison, **Town Law** § 64, concerning the powers and duties of town boards, provides in subdivision "6" thereof that a town board "[m]ay award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board." **Town Law** § 64(6). See, *New York Telephone Company v. Town of North Hempstead*, 41 N.Y.2d 691, 697, 395 N.Y.S.2d 143, 363 N.E.2d 694 (1977).

**5. The September 13, 2017 Resolution Constitutes A Lawful Exercise Of The Village Board's Authority**  
Plaintiffs' Complaint alleges that under the **Village Law**, the Mayor is not authorized to himself enter into any employment agreement which binds the **Village** to expend public funds, and that:

The terms of any such agreement must be approved by the Board of Trustees which is responsible for the management of **village** property and finance, **Village Law** § 4-412, and only upon that occasion may the Mayor sign any such agreement. (Complaint ¶ 19) The **Village Board** in fact adopted a Resolution authorizing the Mayor to enter into a Consulting Agreement with John Ledwith “*substantially* in the form reviewed by the Trustees, together with such changes as may be reviewed by counsel, and approved by the Mayor and Trustee Gluck.”

Plaintiffs argue:

The **Village Board** never authorized the Mayor to sign the challenged consultancy agreement, but, instead, impermissibly delegated to him authority with Trustee Gluck and **village** counsel to alter or supplement whatever terms... were discussed and assented to by that Board during the executive session. That delegation violated **Village Law** which requires the **Village Board** to approve the terms of any such agreement before its execution and does not contemplate delegation of that final approval only to the Mayor.

(Sussman Aff. ¶ 43)

The broad grant of authority to **village** boards over “management of **village** property and finances” and of power to undertake all lawful acts “deemed expedient or desirable for the good government of the **village**, its management and business” encompasses **village** contracting, including the Consulting Agreement at issue here. See, **Village Law** § 4-412(1)(a). Nevertheless, two considerations militate against Plaintiffs' position.

First, contrary to Plaintiffs' assertion, the **Village Law** did not explicitly require the **Village Board** to approve all

terms of the Consulting Agreement before its execution. Except for the provision that the mayor “execute all contracts in the name of the **village**” (**Village Law** § 4-400[1][i]), the **Village Law** does not specify the manner in which **village** contracts must be made. Unlike Town Law § 64(6), which governs the operation of town boards, the **Village Law** contains no express statutory provision requiring **village** boards to approve contracts in their entirety before their execution by the mayor. Hence, the **Village Board** did not violate any express statutory provision. Cf., *Seif v. City of Long Beach, supra*; *New York Telephone Company v. Town of North Hempstead, supra*; *Infrastructure Management Systems, LLC v. County of Nassau, supra*.

\*5 Second, and again contrary to Plaintiff's assertion, the **Village Law** does not prohibit but in fact expressly permits delegation of the Board's authority:

The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions.

**Village Law** § 4-412(1)(a). See, *Fairgrieve v. Incorporated Village of Mineola*, 238 A.D.2d 466, 656 N.Y.S.2d 643 (2d Dept. 1997).

In view of the foregoing, the substance of the September 13, 2017 Resolution comports with both the letter and the spirit of New York law. Nothing in the **Village Law**, or elsewhere, so far as the Court can determine, prevented the **Village Board** from exercising its plenary authority with respect to **Village** contracting by (1) approving a Consulting Agreement “*substantially* in the form reviewed by the Trustees”, and concomitantly (2) delegating authority to incorporate “such changes as may be reviewed by counsel, and approved by the Mayor and Trustee Gluck.” By its Resolution, the **Village Board** approved the *substance* of the Agreement and effectively constituted the Mayor and Trustee Gluck an *ad hoc* “commission” (within the meaning of the delegation provision **Village Law** § 4-412[1][a]) with limited power to approve only such changes as did not alter the *substance*

of the Board-approved Agreement. The Board having approved the substance of the Consulting Agreement, nothing in the **Village Law** (unlike the Town Law) required the Board to further approve non-substantial changes implemented by its constituted delegates before the Agreement's execution by the Mayor.

**6. Defendants' Documentary Evidence Does Not Utterly Refute Plaintiffs' Allegations Or Conclusively Establish A Defense As A Matter Of Law**

Given the Court's construction of the September 13, 2017 Resolution of the **Village Board**, it is clear that the Defendants' documentary evidence does not utterly refute the Plaintiffs' allegations and conclusively establish a defense as a matter of law to Plaintiffs' Complaint.

Defendants proffer the September 13, 2017 Resolution, but not the Consulting Agreement "in the form reviewed by the Trustees." Additionally, Trustee Paul Gluck merely avers in conclusory fashion that defendant David McFadden executed a Consulting Agreement "in accordance with the September 13, 2017 Resolution," without even alluding to the question whether, or in what respect(s), the Board-approved Agreement was changed before it was executed by Mr. McFadden. As a result, it cannot be determined on the record before the Court whether those changes, if any, accorded with the substance of the Board-approved Agreement, as the Resolution required. Defendants also failed to establish whether any such changes were reviewed by legal counsel and approved by Mr. Gluck, as required by the Resolution.

Therefore, Defendants' evidence does not conclusively rebut Plaintiffs' allegation that Mr. McFadden acted in an *ultra vires* manner and contrary to law in signing the Consulting Agreement. Consequently, their motion to dismiss the Complaint on documentary evidence pursuant to CPLR § 3211(a)(1) is denied.

**\*6 B. Statute of Limitations**

Plaintiffs style their claim as one for a declaratory judgment that the actions of Mayor David McFadden were *ultra vires* and illegal. Defendants assert that Plaintiffs' action should properly have been brought pursuant to Article 78 of the Civil Practice Law and Rules, and is barred by the four (4) month Statute of Limitations.

Insofar as Plaintiffs' Complaint is predicated on the claim that the **Village Board** did not authorize Mr. McFadden to execute the Consulting Agreement on September 21, 2017, there is no statute of limitations issue, since this action was commenced on January 19, 2018, within four (4) months of the date the contract was executed. However, insofar as Plaintiffs' Complaint is predicated on the claim that the September 13, 2017 Resolution authorizing the Consulting Agreement was legally invalid because the **Village Board** did not approve all of the terms of that Agreement, the limitations issue must be addressed because this action was commenced more than four (4) months after the date the Resolution was adopted.

"[T]he statute of limitations in an action for a declaratory judgment is determined 'by reference to the gravamen of the claim or the status of the defendant party' [cit.om.]. If a declaratory judgment action could have been commenced by an alternative proceeding 'for which a specific limitation period is statutorily provided, then that period' applies instead of CPLR 213(1)'s six-year catchall provision [cit.om.]." *Gress v. Brown*, 20 N.Y.3d 957, 959, 958 N.Y.S.2d 675, 982 N.E.2d 595 (2012). *See, Press v. County of Monroe*, 50 N.Y.2d 695, 701, 431 N.Y.S.2d 394, 409 N.E.2d 870 (1980); *Solnick v. Whalen*, 49 N.Y.2d 224, 229-230, 425 N.Y.S.2d 68, 401 N.E.2d 190 (1980); *Save The View Now v. Brooklyn Bridge Park Corporation*, 156 A.D.3d 928, 931-932, 68 N.Y.S.3d 478 (2d Dept. 2017). Thus, "[r]egardless of how a pleading is styled, courts have a responsibility in the first instance to ascertain the true nature of a case in order to determine whether to apply the four-month statute of limitations governing CPLR Article 78 proceedings or a longer statute of limitations that may control declaratory judgment actions." *Matter of Dandomar Co., LLC v. Town of Pleasant Valley Town Board*, 86 A.D.3d 83, 90, 924 N.Y.S.2d 499 (2d Dept. 2011).

"The general rule is that an Article 78 proceeding is unavailable to challenge the validity of a legislative act such as a zoning ordinance [cit.om.]. However, when the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an Article 78 proceeding [cit.om.]." *Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987). *See also, Miranda Holdings, Inc. v. Town Board of Town of Orchard Park*, 152 A.D.3d 1234, 1235, 58 N.Y.S.3d 851 (2d Dept. 2017) (challenge to substance of local law subject to

6 year statute of limitations); *Matter of Highland Hall Apartments, LLC v. New York State Div. of Housing and Community Renewal*, 66 A.D.3d 678, 681, 888 N.Y.S.2d 67 (2d Dept. 2009) (challenge to substance, wisdom, merit or constitutionality of resolution properly brought by way of action for declaratory judgment). Accordingly, the Second Department in *Martin Goldman, LLC v. Yonkers Indus. Dev. Agency*, 12 A.D.3d 646, 785 N.Y.S.2d 517 (2d Dept. 2004), held that a declaratory judgment action was the proper vehicle for challenging the IDA's resolution on the ground that it had acted outside the scope of its statutory authority. *Id.*, 12 A.D.3d at 648, 785 N.Y.S.2d 517. The Court wrote:

\*7 ...[A] declaratory judgment action rather than a proceeding pursuant to CPLR Article 78 is the proper vehicle for resolving the dispute presented by this case. The gravamen of the plaintiff's complaint is that the defendant Yonkers Industrial Development Agency acted outside the scope of its statutory authority by enacting a resolution ratifying the formation of a private, for-profit subsidiary corporation. The complaint seeks a construction of a statute rather than review of a particular agency determination or procedure [cit.om.]. Accordingly, this action is not governed by the four-month statute of limitations applicable to Article 78 proceedings (*see* CPLR 217[1]).... Consequently, the six-year limitations period provided in CPLR 213(1) applies.

*Martin Goldman, LLC v. Yonkers Indus. Dev. Agency*, *supra*. *See also*, *Jones v. Amicone*, 27 A.D.3d 465, 470, 812 N.Y.S.2d 111 (2d Dept. 2006) (determination of City's authority to transfer parkland for non-park purposes subject to 6 year statute of limitations); *Capruso v. Village of Kings Point*, 78 A.D.3d 877, 879, 912 N.Y.S.2d 244 (2d Dept. 2010) (same); *Town of Riverhead v. County of Suffolk*, 39 A.D.3d 537, 539, 834 N.Y.S.2d 219 (2d Dept. 2007) (same).

Here, Plaintiffs' Complaint alleges that the Village Law prescribes the duties of the Village Board and the

Mayor, and challenges the legal validity of the Village's Consulting Agreement with John Ledwith on the ground that the Board did not approve its terms. (*See*, Complaint ¶¶ 17–21) Fairly within the intendment of this pleading is a challenge to the substance of the September 13, 2017 Resolution on the grounds that insofar as the Village Law required the Board to approve the Agreement, the Board acted outside the scope of its authority in delegating to the Mayor and Trustee Gluck the authority to approve changes thereto. Much as in *Martin Goldman, LLC v. Yonkers Indus. Dev. Agency*, *supra*, Plaintiffs' claim involves interpretation of the law rather than review of a particular determination or procedure.<sup>1</sup> Therefore, Plaintiffs' cause of action was properly styled one for a declaratory judgment, and was not required to be brought pursuant to Article 78.

Consequently, Defendants' motion to dismiss the Complaint on the ground that it is barred by the Statute of Limitations is in all respects denied.

#### C. Standing

Plaintiffs do not challenge Defendants' showing that plaintiff Claudio Guazzoni lacks capacity and standing to prosecute this action. Therefore, Defendants' motion to dismiss the Complaint with respect to plaintiff Guazzoni is granted.

#### D. Sanctions

It is apparent from the foregoing that Defendants' motion for the imposition of sanctions pursuant to 22 NYCRR 130-1.1 is without merit. The motion is therefore denied.

It is therefore

ORDERED, that Defendants' motion to dismiss the Complaint with respect to plaintiff Claudio Guazzoni only is granted, and it is further

ORDERED, that Defendants' motion is in all other respects denied.

#### All Citations

--- N.Y.S.3d ----, 2018 WL 2946114, 2018 N.Y. Slip Op. 28177

Footnotes

- 1 While Plaintiffs in their motion papers challenge in various respects the *procedures* which led to the **Village Board's** adoption of the September 13, 2017 Resolution, those challenges are not part of the Complaint and would now be barred by the four (4) month Statute of Limitations governing Article 78 proceedings.

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