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Matter of Dreyer v Stachecki
2020 NY Slip Op 50134(U) [66 Misc 3d 1219(A)]
Decided on February 4, 2020
Supreme Court, Suffolk County
Quinlan, J.
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Decided on February 4, 2020

Supreme Court, Suffolk County

In the Matter of the Application of Anthony J. Dreyer, Petitioner,**against****Thomas R. Stachecki, Alfred S. Kreymborg, and Antone F. Hugel,
Respondents.**

623015/2019

Alex Kriegsman, Esq.

KRIEGSMAN PC

Attorneys for Petitioner

279 Main Street

Sag Harbor, NY 11963

Thomas R. Stachecki

redacted

Water Mill, NY 11976

Alfred S. Kreymborg

redacted

Southampton, NY 11968

Antone F. Hugel

redacted

Water Mill, NY 11976

Robert F. Quinlan, J.

Upon the following papers read on this application for *pre action disclosure*; Notice of Motion/ Order to Show Cause and supporting papers (Doc #1-12); it is,

ORDERED that petitioner Anthony J. Dreyer's unopposed motion for pre action discovery against respondents Thomas R. Stachecki, Alfred S. Kreymborg and Antone F. Hugel is denied.

On November 22, 2019 petitioner commenced this special proceeding pursuant to CPLR 3102(c) by filing an order to show cause, verified petition and supporting documents with the Suffolk County Clerk. The petition seeks an order pursuant to CPLR 3102(c) for the production of documents and directing respondents Thomas R. Stachecki, Alfred S. Kreymborg and Antone F. Hugel appear for deposition.

Respondent Thomas R. Stachecki is the owner of a 20 acre parcel of land located at 1205 Majors Path, Southampton, Suffolk County ("the property"). Petitioner is the owner of a home that borders the property. On April 2, 2019 the Town of Southampton's Department of Land Management, Building and Zoning Division issued Stachecki a Certificate of Occupancy granting permission for the following use of the property: Pre-existing non conforming use for the receipt of natural organic wastes (trees, brush, stumps, leaves and other clearing debris). Petitioner contends that all three respondents signed false affidavits to procure this change to the certificate of occupancy so that "the zoned use of the property ultimately can be changed to a 120-unit condominium development, thereby enabling

Respondent Stachecki to sell the land to a developer and make millions of dollars in profit" (Petition ¶2).

Petitioner's counsel contends the pre-action discovery is necessary to demonstrate the alleged falsity of respondents' affidavits and that the anticipated action would seek a declaratory judgment, pursuant to Article 78, and likely would assert claims including but not limited to "fraud, constructive fraud, tortious interference with economic relations, and tortious interference with prospective economic advantage." Petitioner moves by order to show cause to conduct pre-action discovery arguing it is necessary he obtain the requested discovery before the Town of Southampton Zoning Board of Appeals considers the appeal of the April 2, 2019 certificate of occupancy, and both the Zoning Board of Appeals and Planning Board consider an application to permit construction of 120 condominium units at the property.

CPLR § 3102(c) provides that "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." Pre-action disclosure can be used "to enable the plaintiff to frame a complaint," "to preserve evidence for a forthcoming lawsuit," and to "ascertain[] the identities of prospective defendants" (*Bumpus v. New York City Transit Authority*, 66 AD3d 26 [2d Dept 2009]; *see also Stewart v. New York City Transit Authority*, 112 AD2d 939 [2d Dept 1985]). Pre-action disclosure may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing (*see Uddin v New York City Transit Authority*, 27 AD3d 265 [1st Dept 2006]). A petition for pre-action discovery should only be granted when petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong (*see Uddin v New York City Transit Authority, supra*, quoting *Holzman v Manhattan & Bronx Surface Transit Operating Autho.*, 271 AD2d 346 [1st Dept 2000]; [see *Thomas v MasterCard Advisors, LLC*, 74 AD3d 464](#) [1st Dept 2010])). To satisfy its burden petitioner must allege facts fairly indicating that he has some cause of action ([see *Konig v CSC \[*2\] Holdings, LLC*, 112 AD3d 934](#) [2d Dept 2013]). Documents submitted to demonstrate the existence of a prima facie cause of action must be based on first-hand knowledge (*see Matter of Nicol v Town of Rotterdam*, 134 AD2d 754 [3d Dept 1987]; *see also, Matter of Hughes v Witco Corp.—Chemprene Div.*, 175 AD2d 486 [3d Dept 1991]; *Ero v Graystone Materials, Inc.*, 252 AD2d 812 [3d Dept 1998]).

Petitioner has not demonstrated to this court that he has a meritorious cause of action. Petitioner failed to submit an affidavit by someone with firsthand knowledge of facts establishing a cause of action. Instead the application relies on the verified petition and affirmation of counsel which consist of unsubstantiated conclusory allegations in support of petitioner's theory that respondents submitted purportedly fraudulent affidavits to enable Stachecki to obtain the April 2, 2019 certificate of occupancy establishing the pre-existing non-conforming use at the property. "Pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists" ([*Bishop v Stevenson Commons Assocs.*, 74 AD3d 640](#) [1st Dept 2010] *lv. denied* 16 NY3d 702 [2011]), quoting *Liberty Imports v. Bourguet*, 146 AD2d 535 [1st Dept 1989]). Here petitioner failed to demonstrate facts which fairly indicate that he has some cause of action against the respondents which warrants pre-action disclosure (*see Konig v CSC Holdings, LLC, supra*; *Matter of Scattoreggio v Cablevision Sys. Corp.*, 203 AD2d 468 [2d Dept 1994]; [*Falzone v RBS Citizens Bank, N.A.*, 146 AD3d 882](#) [2d Dept 2017]).

Finally petitioner's counsel indicates any action he may commence would be in the nature of a special proceeding pursuant to Article 78, which this court presumes would involve a challenge to the April 2, 2019 Certificate of Occupancy issued by the Town of Southampton Department of Land Management, Building and Zoning Division, which municipal entity is not a party to this proceeding. Except for notices to admit, disclosure in special proceedings is available only by leave of court (CPLR 408), and because special proceedings are summary in nature, the court has broad discretion in granting or denying disclosure, although it must balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality (*see Bramble v New York City Dep't of Education*, 125 AD3d 856 [2d Dept 2015]). Here the court declines to participate in an end run around the limits to disclosure in special proceedings to grant petitioner pre action disclosure to which he would not necessarily be entitled if his application had been made to the court during the pendency of an Article 78 against the municipality.

Accordingly the application is denied and the petition dismissed.

The foregoing constitutes the decision and order of this court.

Dated: February 4, 2020

Hon. Robert F. Quinlan, J.S.C.

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