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Matter of MMSI Props. LLC v Warren-Washington Assn. for Mental Health Inc.
2020 NY Slip Op 51193(U)
Decided on October 13, 2020
Supreme Court, Warren County
Muller, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 13, 2020

Supreme Court, Warren County

**In the Matter of the Application of MMSI Properties, LLC,
Petitioner, for Judgment Pursuant to Article 78 of the New York
Civil Practice Law and Rules and Injunctive Relief,**

against

**Warren-Washington Association for Mental Health, Inc., THE CITY
OF GLENS FALLS, THE CITY OF GLENS FALLS PLANNING
BOARD and AMH RESOURCES CORP., Respondents.**

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Stafford, Carr & McNally, P.C., Lake George (Nathan Hall of counsel), for petitioner.

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (Karla Williams Buettner of counsel), for respondents Warren-Washington Association for Mental Health, Inc. and AMH Resources Corp.

McPhillips Fitzgerald & Cullum, LLP, Glens Falls (Eric C. Schwenker of counsel), for respondents City of Glens Falls and City of Glens Falls Planning Board.

Robert J. Muller, J.

The facts of this matter are set forth in a prior decision (67 Misc 3d 1230[A], 2020 NY Slip Op 50677[U] [Sup Ct, Warren County 2020]). Briefly, respondent Warren-Washington [*2] Association for Mental Health, Inc. (hereinafter WWAMH) is a not-for-profit corporation formed to improve the quality of life for those affected by mental illness and to promote the importance of mental health in the community. Respondent AMH Resources Corp. (hereinafter AMH Resources) is a related not-for-profit corporation which maintains the real property and equipment used in WWAMH's operations. In December 2018, AMH Resources purchased real property in respondent City of Glens Falls (hereinafter the City) for WWAMH to use in connection with a supportive housing project. Specifically, WWAMH planned to construct a 29-unit apartment complex on the property for chronically homeless individuals and families, as well as individuals suffering from mental illness and victims of domestic violence. Petitioner owns and operates a business on neighboring property, with the parties' respective properties located within the City's light industrial district.

On May 15, 2019, WWAMH filed an application with respondent City of Glens Falls Planning Board (hereinafter the Planning Board) for approval of its plan to build the 29-unit apartment complex. The Planning Board then passed a resolution approving the site plan on September 3, 2019 and, on October 2, 2019, petitioner commenced this CPLR article 78 proceeding to vacate the approval as arbitrary and capricious. Petitioner alleges (1) that the Planning Board failed to adhere to § 202.20 (A) of the City's Zoning Code; (2) that the Planning Board failed to consider the impact the project will have on the City's already overburdened mental health care providers; and (3) that the stormwater management plan for the project fails to comply with the New York State Stormwater Management Design Manual (hereinafter the Design Manual). While petitioner failed to name AMH Resources as a respondent in the original petition, it subsequently moved to amend — which motion was granted on June 8, 2020 (2020 NY Slip Op 50677[U], *2). Presently before the Court is petitioner's second amended verified petition, [\[FN1\]](#) naming all necessary parties.

At the outset, in its answer AMH Resources asserts that the proceeding must be dismissed as against it because the statute of limitations expired on October 3, 2019 (*see* General City Law § 27-a [11]), well before it was served with the second amended verified petition. Indeed, petitioner does not dispute this point. Instead, petitioner relies upon the relation back doctrine, which

"permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioner[] as to the later-added respondent's identity, the proceeding would have also been brought against him or her" ([*Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518, 1520 \[2017\]](#); *see* [*Matter of Sullivan County Patrolmen's \[*3\] Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd.*, 179 AD3d 1270, 1271 \[2020\]](#)).

Here, there is no question that the claims arose out of the same occurrence, nor that AMH Resources is united in interest with WWAMH. As such, petitioner has succeeded in demonstrating the first and second prongs. Insofar as the third prong is concerned, petitioner blames its failure to name AMH Resources as a respondent in the original petition on an "inadvertent omission," arguing that the site plan application submitted to the Planning Board named WWAMH as owner of the property. Petitioner further contends that WWAMH and AMH Resources share many of the same officers, directors and key personnel and, as such, AMH Resources certainly knew or should have known that, but for petitioner's "inadvertent omission," the proceeding would have been brought against it as well.

To the extent that WWAMH and AMH Resources are not only interconnected but also represented by the same counsel, the Court agrees that AMH Resources knew the proceeding would have been brought against it — were it not for petitioner's "inadvertent omission." The issue, however, is whether this "inadvertent omission" is entitled to the benefit of the relation back doctrine. Inasmuch as petitioner fails to offer any explanation for its "inadvertent omission," the Court is left to surmise — based upon the content of its argument — that it believed WWAMH owned the property. This constitutes a mistake of identity, which is entitled to the benefit of the doctrine (*see* [*NYAHS Servs., Inc., Self-Ins. Trust v People Care Inc.*, 167 AD3d 1305, 1307 \[2018\]](#); [*Branch v Community Coll. of the County of Sullivan*, 148 AD3d 1410, 1410 \[2017\]](#), *lv denied* 29 NY3d 911 [2017]) — provided the petitioner can demonstrate "that diligent efforts were made to ascertain the unknown party's identity prior to . . . expiration of the statute of limitations" ([*Walker v Hormann Flexon, LLC*, 153 AD3d 997, 998 \[2017\]](#), quoting [*Holmes v City of New York*, 132 AD3d 952, 954 \[2015\]](#); *see* [*Goldberg v Boatmax, Inc.*, 41 AD3d 255, 256 \[2007\]](#); [*Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249, 253 \[1997\]](#)).

Here, the first page of the site plan application lists WWAMH as the applicant relative to the project. There is then a space available to list the owner of the property "if different," which space is left blank — an oversight which implies that WWAMH is the owner, as petitioner points out. The application, however, includes the deed to the property — which clearly indicates that AMH Resources is the owner — and the cover letter accompanying the application expressly states that the "29-unit apartment building . . . will be owned by AMH Resources . . . and operated by [WWAMH]." To that end, a careful review of the application easily reveals AMH Resources as the owner of the property.

The minutes of the August 6, 2019 Planning Board meeting also reference AMH Resources, stating as follows:

"Commissioner Accardi asked about the name on the application — AMH Resources . . . yet the legal ad states [WWAMH]. Why the difference?"

"Mr. Jarrett [\[FN2\]](#) replied one is the landowner and AMH [Resources] is the applicant here.

"Attorney Fitzgerald asked if there is a lease between the two entities for the property?"

Mr. Jarrett replied that the operating company, AMH [Resources] is applying for the [\[*4\]](#)[s]ite [p]lan [r]eview."

Notwithstanding Jarrett's erroneous description of AMH Resources as the applicant and not the owner, this discussion nonetheless apprised all attendees at the meeting of AMH Resource's existence and its interest in the project. Notable in this regard is that both Elizabeth Miller — petitioner's principal member — and counsel for petitioner were present at the meeting and participated, with both offering remarks in opposition to the project.

Under the circumstances, the Court finds that petitioner has failed to demonstrate that diligent efforts were made to ascertain AMH Resources' identity as owner of the property prior to expiration of the statute of limitations. Petitioner therefore has not satisfied third prong of the inquiry based upon its alleged mistake of identity in believing that WWAMH owned the property (*see Walker v Hormann Flexon, LLC*, 153 AD3d at 998).

To the extent that petitioner was perhaps aware that AMH Resources owned the property and simply failed to name it as a respondent in the original petition — which is the more likely scenario given the record before the Court — this would constitute a mistake of law,

which also fails to satisfy the third prong of the inquiry (*see Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd.*, 179 AD3d 1270, 1271 [2020]; *Windy Ridge Farm v Assessor of Town of Shandaken*, 45 AD3d 1099, 1099 [2007], *aff'd* 11 NY3d 725 [2008]).

In view of the foregoing, the Court finds that petitioner's reliance on the relation back doctrine is unavailing. As such, AMH Resources is entitled to dismissal of the second amended verified petition as against it. The Court further finds that — because AMH Resources is a necessary party to the proceeding — the second amended verified petition must also be dismissed as against WWAMH, the Planning Board and the City (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 727 [2008]; *Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd.*, 179 AD3d at 1271; *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 AD3d 1474, 1476 [2014]).

While the merits of the second amended verified petition need not be addressed, the Court nonetheless observes that — even if petitioner had been able to benefit from the relation back doctrine — the relief requested would still be denied. In its first claim, petitioner contends that the Planning Board failed to adhere to § 202.20 (A) of the City's Zoning Code in approving the site plan, which section provides as follows: "While there are some residential uses in the [light industrial] district, further expansion of those uses through construction of new residential structures should be discouraged in order to provide space for the commercial/industrial uses and to avoid conflicts in land use."

This contention is without merit, however, as the City's Zoning Board of Appeals (hereinafter the ZBA) — and not the Planning Board — has the authority to interpret the Zoning Code (*see Matter of Catskill Heritage Alliance, Inc. v Crossroads Ventures, LLC*, 161 AD3d 1413, 1415 [2018]; *Matter of Woodland Community Assn. v Planning Bd. of Town of Shandaken*, 52 AD3d 991, 993 [2008]; *Matter of Swantz v Planning Bd. of Vil. of Cobleskill*, 34 AD3d 1159, 1160 [2006]). Indeed, § 220-41 (A) of the City's Zoning Code expressly provides that the "chapter shall be administered and enforced by the . . . Code [E]nforcement [O]fficer," with § 220-47 (B) (2) (b) then providing that "[t]he [ZBA] shall hear and decide appeals from and review any order, requirement, decision or determination made by the [E]nforcement [O]fficer."

Counsel for AMH Resources in fact sent correspondence to the City's Code Enforcement [*5]Officer on April 17, 2019 in accordance with § 220-41 (A) of the Zoning Code, describing the project and stating as follows:

"This project is on a parcel of land that is 2.42 acres in size and is in the light industrial zone. As defined in the City Code, a multifamily use is a permitted use in the light industrial zone. Please confirm that this is your determination by signing below so that we can have this in our file moving forward."

The Code Enforcement Officer then signed the correspondence, expressly "agree[ing] and acknowledg[ing] that the proposed use is permitted in the [l]ight [i]ndustrial [z]one." Petitioner appealed this determination to the ZBA — in accordance with § 220-47 (B) (2) (b) of the Zoning Code — and it was upheld in July 2019. Any claims with respect to an alleged violation of § 202.20 (A) (4) of the Zoning Code should have been made in the context of a CPLR article 78 proceeding challenging that determination. Notably, no such proceeding was ever commenced.

Turning now to petitioner's second claim that the Planning Board failed to consider the impact the project will have on the City's already overburdened mental health care providers, any such impact is too speculative to constitute a valid factor for consideration by the Planning Board. Indeed, petitioner has supported its claim with nothing more than an August 30, 2019 press release from Glens Falls Hospital advising of its plan to discontinue outpatient behavioral health services and two newspaper articles on the topic. The record contains no evidence whatsoever that Glens Falls Hospital has in fact discontinued its services or that such discontinuance — to the extent it has occurred — has resulted in a shortage of mental health care providers in the area. Indeed, one of the newspaper articles submitted suggests that other providers will be taking over for Glens Falls Hospital once its outpatient behavioral health services are discontinued. Under the circumstances, it cannot be said that the failure to consider the impact this project may have on the City's mental health care providers somehow rendered the Planning Board's determination arbitrary and capricious.

Finally, insofar as the third claim is concerned, petitioner contends that the stormwater management plan for the project fails to comply with the Design Manual. More specifically, petitioner contends that the site plan approved by the Planning Board uses rain gardens in a fill site, which is prohibited by the Design Manual. Petitioner supports this contention with a copy of an unsworn report prepared by an engineer on its behalf and submitted to the Planning Board during the site plan approval process. That being said, both the City and

WWAMH submitted affidavits from their respective engineers which refute the opinions set forth in this report. Indeed, according to these engineers — both of whom were actively involved throughout the site plan approval process — none of the rain gardens proposed in the site plan are located in a fill site. Again, it cannot be said that the Planning Board's decision to adopt the opinions of these engineers over that proffered by petitioner's engineer rendered its determination arbitrary and capricious.

Briefly, inasmuch as petitioner contends that counsel to the Planning Board provided "incorrect" advice during the site plan approval process and "wrongly precluded the Planning Board from performing its codified duties," such contention was raised for the first time in petitioner's reply papers and, as such, is 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 [*6]Distrib., 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]).

Based upon the foregoing, the second amended verified petition is dismissed in its entirety and the relief requested denied.

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

Therefore, having considered the Notice of Petition, dated October 1, 2019; Verified Petition with exhibits attached thereto, dated October 2, 2019; Amended Notice of Petition, dated October 7, 2019; Verified Answer of the City of Glens Falls and City of Glens Falls Planning Board, dated November 14, 2019; Municipal Record/Return, certified November 15, 2019; Affidavit of Steven Gurzler, P.E. with exhibits attached thereto, sworn to January 16, 2020; Memorandum of Law in Opposition to Verified Petition of Eric C. Schwenker, Esq., dated January 21, 2020; Verified Answer of Warren-Washington Association for Mental Health, Inc., dated November 18, 2019; Affidavit of H. Thomas Jarrett, sworn to January 17, 2020; Memorandum of Law in Opposition to Verified Petition of Karla Williams Buettner, Esq., undated; Reply Memorandum of Law in Further Support of Verified Petition of Nathan Hall, Esq., dated February 18, 2020; Second Amended Verified Petition with exhibits attached thereto, dated June 18, 2020; Verified Answer to Second Amended Verified Petition of the City of Glens Falls and City of Glens Falls Planning Board, dated July 10, 2020; Memorandum of Law in Opposition to Second Amended Verified Petition of Eric C.

Schwenker, Esq., dated July 16, 2020; Verified Answer to Second Amended Verified Petition of Warren-Washington Association for Mental Health, Inc. and AMH Resources Corp., dated July 17, 2020; Memorandum of Law in Opposition to Second Amended Verified Petition of Karla Williams Buettner, Esq. with exhibit attached thereto, undated; and Reply Memorandum of Law in Further Support of Second Amended Verified Petition of Nathan Hall, Esq., dated July 23, 2020; and oral argument having been heard on October 7, 2020 with Nathan Hall, Esq. appearing on behalf of petitioner, Eric C. Schwenker, Esq. appearing on behalf of respondents City of Glens Falls and City of Glens Falls Planning Board, and Karla Williams Buettner, Esq. appearing on behalf of respondents Warren-Washington Association for Mental Health, Inc. and AMH Resources Corp., it is hereby

ORDERED AND ADJUDGED that the second amended verified petition is dismissed in its entirety and the relief requested denied.

The original of this Decision, Order and Judgment has been filed by the Court together with the submissions enumerated above. Counsel for WWAMH and AMH Resources is hereby directed to obtain a filed copy of the Decision, Order and Judgment for service with notice of entry in accordance with CPLR 5513.

Dated: October 13, 2020

Lake George, New York

s/
ROBERT J. MULLER, J.S.C.

ENTER:

Footnotes

Footnote 1: As noted by the Court in its prior decision, petitioner served an amended notice of petition on October 7, 2019, but the petition itself was not previously amended. As such, the "second amended verified petition" — as labeled by petitioner — in fact constitutes an amended verified petition. This notwithstanding, the Court will adopt petitioner's label in order to avoid any confusion.

Footnote 2: H. Thomas Jarrett is the engineer retained by WWAMH in connection with this project.

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