

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

SCAN

Present:

HON. BERNARD F. McCAFFREY

Justice

\_\_\_\_\_  
TRIAL/IAS, PART 1  
NASSAU COUNTY

JOHN J. PURCELL and NANCY M. PURCELL,

INDEX NO. 25135/98

Plaintiffs,

MOTION SUBMISSION  
DATE: 9/5/00

MOTION NO. 2

TOWN OF HEMPSTEAD,

Defendant.

\_\_\_\_\_  
Plaintiffs' application, pursuant to CPLR 3025(b), for leave to serve and file an amended complaint adding the Town of Hempstead Housing Authority as a defendant is determined as hereinafter provided.

Plaintiffs are senior citizens who reside at a cooperative apartment complex, "The Knolls of East Meadow" located at 1812 Salisbury Park Drive, East Meadow, New York. The cooperative was created in 1992 and designed to house senior citizens with moderate incomes. The builders were therefore granted various tax incentives and a zoning change to encourage the development (see gen. "Keeping the Elderly in the Towns They Helped Build, 7/2/00 New York Times).

On or about 4/7/92 the Town Board adopted a resolution (Resolution No. 410-1992) accepting a declaration of restrictive covenants incidental to the zoning change from "Residence B" to a "Golden Age" residence district (Town of Hempstead Housing Authority's exhibit 1).

More specifically, the resolution expressly restricts ownership and occupancy to “persons who are 62 years of age or older and each of whose incomes do not exceed \$35,000.00 annually” (para. 3). Those requirements explicitly apply to “the original purchasers of units as well as to resales and conveyances by way of gift, devise, bequest or inheritance” (id.). The final provision, paragraph 18, declares, however, that the restrictive covenants may be “modified, altered or revoked by the written consent of the Town Board...”

On or about 10/6/97 plaintiffs executed an irrevocable trust agreement (plaintiff’s exhibit A) which purports to irrevocably transfer their ownership in, inter alia, the cooperative to their children while awarding them a life estate at the premises. On or about 10/7/99 plaintiffs’ counsel therefore sought to have the shares in the cooperative transferred to the trust. On or about 6/12/98 a Deputy Town Attorney, Eugene K. Ferencik, Esq., wrote an inter-departmental memorandum (Town of Hempstead Housing Authority’s exhibit 6) declaring the proposed transfer “not acceptable” and violative of the aforementioned restrictive covenants. On 6/17/98 the Town Housing Authority relayed that conclusion to plaintiffs’ representatives.

Ultimately, on or about 10/10/98 plaintiffs filed the within action. Issue was joined by the Town on or about 11/13/98. Defendant’s pleading included an affirmative defense asserting an alleged failure to name indispensable parties e.g., the Town of Hempstead Housing Authority.

Plaintiffs’ 6/2/00 application, pursuant to CPLR 3025(b), for leave to serve and file an amended complaint adding the Town of Hempstead Housing Authority as an additional defendant was dismissed on 7/14/00 due to plaintiffs’ failure to provide a copy of their proposed amended pleading. Plaintiffs have presently renewed their earlier request with a copy of a proposed 8/8/00 verified amended complaint.

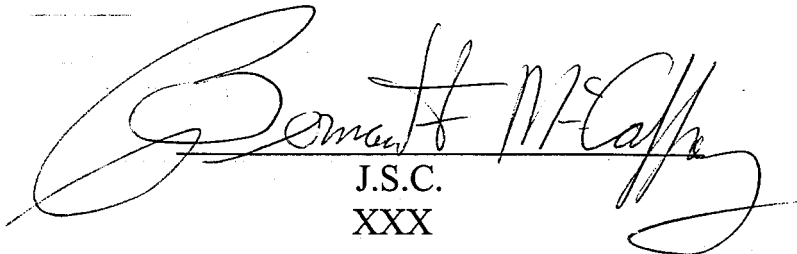
The proposed pleading alleges (consistent with the original) that the Town and Housing Authority’s refusal to permit the transfer is “arbitrary, capricious, unconscionable, and illogical” (paragraph Nineteen). The “wherefore” clause demands an order compelling the Town and Housing Authority to consent to the transfer “conditioned upon the continued use of the premises by the plaintiffs, or the survivor of the plaintiffs....”

Even liberally construed in a light most favorable to plaintiffs, their mislabelled action at law constitutes a demand, pursuant to CPLR Article 78, in the nature of either certiorari to review the purportedly arbitrary and capricious refusal (§ 7803[3]) or mandamus to compel the transfer (§ 7803[1]). A special proceeding (CPLR Article 4) pursuant to CPLR Article 78, rather than an action at law is therefore the appropriate procedural vehicle.

Moreover, if either the 6/12/98 inter-departmental memorandum or 6/17/98 letter constituted a "final" determination (§ 7801[1]), plaintiffs' application may be untimely (CPLR §217).

Accordingly, plaintiffs' defective pleading is dismissed.

Dated: SEP 27 2000

  
J.S.C.  
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