

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

19

PRESENT: EDWARD H. LEHNER

~~44~~ PART ~~2006~~

Justice

St. Ann's Committee

INDEX NO. 11100/06

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

Hudson 12th Development LLC

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

FILED
SEP 22 2006
NEW YORK
COUNTY CLERK'S OFF.

SEP 20 2006

Dated: _____

hsh

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
ST. ANN'S COMMITTEE, THE EAST 13TH STREET
COMMUNITY ASSOCIATION, CODA, THE
VILLAGE INDEPENDENT DEMOCRATS,
ELIZABETH LANGWITH, EDWARD MAMET,
HELEN MCMAHON, CATHY PULLIS, MICHAEL J.
FUCHS, DEAN FORMAN, COURT GOLUMBIC,
BETH VERHEY, DR. DAVID MILCH, RUSSEL
ZACK, and ANTHONY MOODY,

INDEX NO.
111100/06

Plaintiffs,

- against -

HUDSON 12TH DEVELOPMENT, LLC, PATRICIA
J. LANCASTER, in her capacity as Commissioner of the
New York City Department of Buildings, CHRISTOPHER
SANTULLI, in his capacity as Acting Manhattan Borough
Commissioner for the Department of Buildings, and
THE CITY OF NEW YORK,

Defendants.

-----X
EDWARD H. LEHNER, J.;

Before the court is a motion by plaintiffs for i) an injunction prohibiting defendant Hudson 12th Development, LLC ("Hudson") from performing "any construction activity" at 120 East 12th Street (the "Premises"), and ii) a direction that the New York City Department of Buildings (the "Department") revoke the permit issued on July 17, 2006 (the "Permit") for construction at the Premises. Since issue has not been joined in this action, the latter request for relief was withdrawn, without prejudice, at oral argument (Tr. p. 10).

FILED
SEP 22 2006
NEW YORK
COUNTY CLERK'S OFFICE

The New York City (the “City”) defendants have moved to dismiss the action pursuant to CPLR §§3211(a) and 7804 on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs have acknowledged that this is a valid defense, but contend that since they intend to file an appeal to the Board of Standards and Appeals (“BSA”) from the order of the Department issuing the Permit, the action should not now be dismissed (see Tr. pp. 6-7).

Hudson has moved to dismiss the complaint pursuant to CPLR 3211(a) 1, 2, 7 and 10 on the same grounds as the City defendants, and also because the action should not proceed in the absence of a necessary party, i.e., the United States Postal Service (the “Postal Service”), from whom Hudson acquired development rights that could increase the height and bulk of the building to be erected at the Premises.

The parties agree that the Postal Service is not restricted by the City zoning resolution insofar as the height and bulk of any building it owns in the City (Tr. pp. 15-18), and concur that the development rights it transferred to Hudson were no greater than the rights that would be transferable if the transferor were a private party (see Tr. pp. 11, 12, 22). Plaintiffs acknowledge that if in fact the transferor was a private party rather than the Postal Service, they would have no claim to prohibit the construction contemplated by the Permit (Tr. p. 21).

The basis of plaintiffs' claim is that while the contracts between Hudson and the Postal Service relating to the transfer of the development rights arguably provide that the Postal Service cannot enlarge its present building (see Tr. pp. 35-40), that provision is only enforceable by Hudson, and thus the City could not prohibit the Postal Service from enlarging its building (see Tr. p. 32). Plaintiffs thus argue that consequently the Postal Service could erect a larger building on top of its present postal facility (see Tr. pp. 32, 44-45), with the result that not one, but two, new buildings could be built in the neighborhood in which the individual plaintiffs reside that would be larger in height and bulk than would otherwise be permitted under the zoning resolution.

"The doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals rather than to the courts" [Young Men's Christian Association v. Rochester Pure Waters District, 37 NY2d 371, 375 (1975)]. While the rule is not inflexible, plaintiffs have not set forth any of the grounds referred to in *Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52 (1978), that would warrant a court not following the doctrine.

Although plaintiffs have acknowledged that the dispute is not now ripe for judicial adjudication because of the contemplated BSA appeal, they nevertheless request denial of the dismissal motions and the issuance of an injunction to prohibit construction pending that appeal. However, in *Uniformed Firefighters Association*

of *Greater New York v. City of New York*, 79 NY2d 236, 239 (1992), it was ruled that the Supreme Court lacked inherent power to grant a preliminary injunction “in connection with a pending administrative proceeding” (emphasis in original). The court pointed out that because of the need for a showing of a likelihood of ultimate success on the merits to obtain such relief, the grant thereof would necessarily improperly involve the courts in an issue before the administrative agency. Hence, in light of the absence of a final administrative determination to be reviewed herein, the motions to dismiss the action are granted, and the plaintiffs’ request for injunctive relief is consequently denied.

Moreover, as has been often stated, “to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor” [*Aetna Insurance Company v. Capasso*, 75 NY2d 860, 862 (1990)]. Here, even if the case were not dismissible for the admitted failure to exhaust administrative remedies, injunctive relief would not be appropriate as it does not appear that plaintiffs have demonstrated a probability of success on the merits. They acknowledged, as above noted, that there would be no legal basis for their action if the transferor of the development rights were a private landowner. To claim that the transfer is invalid because the Postal Service might violate its agreement with Hudson and nevertheless erect a higher building is a highly questionable contention.

Accordingly, the motions of the City defendants and Hudson to dismiss the action are granted and the Clerk shall enter judgment accordingly.

Dated: September 20, 2006



J.S.C.

FILED
SEP 22 2006
NEW YORK
COUNTY CLERK'S OFFICE