

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JOSEPH A. SCALISE, EVELYN SCALISE
and JOSEPH C. SCALISE,

Petitioners,

-against-

OAK ISLAND BEACH ASSOCIATION, INC.
and THE BOARD OF DIRECTORS OF OAK
ISLAND BEACH ASSOCIATION INC.,

Respondents.

for an Order Pursuant to Article 78 CPLR,
directing the aforesaid Respondents to
rescind and annul the determination expelling
Petitioners as members of the Oak Island
Beach Association Inc. and for such other
appropriate relief

ORIG. RETURN DATE: APRIL 3, 2008
FINAL SUBMISSION DATE: JULY 10, 2008
MTN. SEQ. #: 003
MOTION: MOT D RRH

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR CONTEMPT IN AN ARTICLE 78 PROCEEDING

Order to Show Cause and supporting papers 1-3; Answering Affidavits and supporting papers
4-6; Replying Affidavits and supporting papers 7; it is,

ORDERED that this motion by petitioners, for an Order:

(1) pursuant to Judiciary Law §§ 753 and 750, finding respondents in
contempt of court based upon their alleged continuing flagrant and willful violation
of the Amended Order dated January 27, 2006 (Werner, J.) ("Werner Order") and
the Order of this Court dated January 29, 2007, by refusing and failing to provide
petitioners and their representatives access to copy all documents pertaining to

the petitioners, including financial documents of respondent Association, at a mutually agreed time and place;

(2) pursuant to CPLR 8101 and 8301, and the Werner Order, granting petitioners costs and disbursements incurred during and as a result of the underlying Article 78 proceeding;

(3) pursuant to CPLR 8303-a, Rule 130-1 of the Rules of the Chief Administrator, and the Werner Order, awarding petitioners attorneys' fees in the amount of \$53,698.45, in that the Werner Order adjudged the actions of respondents to be arbitrary, capricious, and contrary to law, and thus constituted frivolous behavior; and

(4) further restraining respondents from banning any one of the petitioners from holding any elected position within the respondent Board or any Committee thereof, or otherwise interfering directly or indirectly with the quiet use and enjoyment of petitioners' interests in respondent Association,

is hereby **GRANTED** solely to the extent provided hereinafter.

In this post-judgment Article 78 proceeding, petitioners had filed a prior application seeking an Order holding respondents in contempt of court for their alleged willful violation of the Werner Order, which directed, among other things, that petitioners and their representatives have access to inspect and copy the minutes of the Board meetings commencing from 1998 to the present, and to review all documents pertaining to petitioners, including complaints and statements of witnesses, at a mutually agreed time and place. By Order dated January 29, 2007, this Court granted petitioners' prior application to the extent that respondents were directed to make the subject minutes and records available to petitioners, pursuant to the Werner Order, at a time and place mutually agreed to in writing, but in no event was the inspection to occur beyond March 16, 2007. The Court held that petitioners may renew their application for contempt if respondents failed to make the minutes and records available for inspection and copying on or before March 16, 2007.

Petitioners have now renewed their application for contempt, and seek the additional relief described hereinabove. With respect to that branch of petitioners' motion for contempt, petitioners acknowledge that on March 9, 2007, respondents, in accordance with the Order of January 29, 2007, made the subject

records available for inspection. The Court finds that any additional records sought with respect to financial documents of respondents are not within the purview of the disclosure granted by the prior Orders of the Court. Therefore, the branch of petitioners' motion seeking to hold respondents in contempt is **DENIED**.

Next, petitioners seek their costs and disbursements, and an award of attorneys fees in the amount of \$53,698.45 incurred in connection with the instant special proceeding, pursuant to CPLR 8101 and 8301, and the Werner Order. In addition, petitioners seek sanctions against respondents in the amount of \$10,000.00, pursuant to CPLR 8303-a, Rule 130-1 of the Rules of the Chief Administrator, and the Werner Order, for the "frivolous behavior [of respondents] in attempting to evict the petitioners from their homes without any basis." The Court finds that petitioners are not entitled to sanctions pursuant to CPLR 8303-a or Rule 130-1 of the Rules of the Chief Administrator. CPLR 8303-a concerns costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death, which is not the nature of the frivolous conduct alleged (see CPLR 8303-a). Further, Rule 130-1 authorizes sanctions for frivolous conduct in civil litigation, as such conduct is defined therein, to wit: if the conduct is completely without merit in law, is undertaken primarily to delay or prolong the resolution of the litigation, is undertaken to harass or maliciously injure another, or asserts material factual statements that are false (see 22 NYCRR § 130-1.1 [c]). The Court finds that the alleged "frivolous" conduct of respondents does not fall within any of the aforementioned definitions, as it occurred prior to the underlying Article 78 proceeding, and served as the basis therefor. Rule 130-1 is addressed to frivolous conduct by a party in civil litigation (see 22 NYCRR § 130-1.1; *Casey v Chemical Bank*, 245 AD2d 258 [2d Dept 1997]). It does not apply to tortious conduct in general (see *Matter of Kernisan v Taylor*, 171 AD2d 869 [2d Dept 1991]). Here, although respondents engaged in conduct which caused petitioners to file the underlying special proceeding, the conduct cannot serve as a basis for imposing sanctions pursuant to 22 NYCRR § 130-1.1 (see *Casey v Chemical Bank*, 245 AD2d 258, *supra*).

However, within the Werner Order, the Court held that petitioners may "recover from respondents the costs and disbursements incurred in this prosecution in a sum to be determined" (Werner Order, p. 2). Such sum has yet to be determined herein. Accordingly, these branches of petitioners' application are **GRANTED**, pursuant to CPLR 8101 and 8301, and the Werner Order, to the

extent that the parties are directed to appear for a hearing on the issue of the costs, disbursements, and attorneys' fees incurred by petitioners in the prosecution of this special proceeding, on **March 5, 2009, at 10:30 a.m., Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead.**

Finally, petitioners seek an Order further restraining respondents from banning any one of the petitioners from holding any elected position within the respondent Board or any Committee thereof, or otherwise interfering directly or indirectly with the quiet use and enjoyment of plaintiff's interests in respondent Association. Respondents allege that petitioners have never been banned from holding elected positions, and that under the Associations By-Laws, the president has the authority to make appointments to the committees. Further, respondents inform the Court that petitioner EVELYN SCALISE was offered a position on a committee last fall, but declined the appointment, and that petitioner JOSEPH SCALISE has been appointed to the By-Laws Committee. Moreover, within the Werner Order, the Court had issued a restraining order to the extent that petitioners and respondents, their agents, servants, employees, attorneys or any person acting on their behalf were restrained from actions that may reasonably interfere, directly or indirectly, with the quiet use and enjoyment of the parties' respective interests in the premises. In view of the foregoing, this branch of petitioners' application is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 26, 2008



HON. JOSEPH FARNETI
Acting Justice Supreme Court