

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

In the Mater of the Application of ALFRED EVANS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Laws and Rules,

-against-

THE CITY OF GLEN COVE, THE BOARD OF
ZONING APPEALS OF THE CITY OF GLEN COVE,
RALPH V. SUOZZI, as Mayor of the City of Glen Cove,
LEN BARON, as Buildings Department
Administrator, VINCENT TARANTO, as the City
Attorney for the City of Glen Cove,

Respondents.

**MICHELE M. WOODARD,
J.S.C.
TRIAL/IAS Part 16
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Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

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The Petitioner moves in Motion Sequence Number one (1), for an order pursuant to CPLR Article 78 to set aside the City of Glen Cove's denial of Petitioner's application for a use variance to permit the conversion of an existing one-family dwelling into a two-family dwelling.

In Motion Sequence Number two (2), Respondents The Board of Zoning Appeals of the

City of Glen Cove cross-move to dismiss the Verified Petition upon the Objection in Point of Law that the Verified Petition is banned by the State of Limitations.

In Motion Sequence Number Three (3), Respondents City of Glen Cove, Ralph V. Suozzi, as Mayor of the City of Glen Cove, Len Baron, as Building Department Administrator, and Vincent Taranto, as the City Attorney for the City of Glen Cove move for an order pursuant to CPLR §7804(F), dismissing the Verified Petition in this matter upon the grounds that the Petitioner is time barred from commencing the within action pursuant to General City Law §81-C(1).

Petitioner brings this article 78 proceeding seeking to reverse and vacate a decision and order of the City of Glen Cove Board of Zoning Appeals (the Board). Petitioner sought to convert a non-owner occupied single-family residence to a two-family residence. His application for a variance was denied on the grounds that he failed to make the necessary showing that the applicable zoning regulations placing the residence within an R3A residence district caused “unnecessary hardship” as required by General City Law § 81-b(6).

The Board denied Petitioner’s application for a use variance by Notice of Decision and Order dated October 4, 2007. The Order was filed on October 5, 2007 giving Petitioner until November 4, 2007 to commence this action under General City Law § 81-c(1). It was not commenced until February 1, 2008, and although within the four-month limitations period for an article 78 provided by CPLR §217, it was not timely under the relevant, binding and shorter provision of the General City Law.

The Petitioner contends that the following events tolled the statute of limitations, or estopp Respondents Suozzi and Taranto (hereafter Respondents) from asserting a statute of limitations defense. He avers that sometime in September, after being orally informed that his

application had been denied, he went to the Mayor's office to complain that he had not been treated fairly. Suozzi told Evans that he agreed that the neighborhood would not be changed if Evans was granted a variance. Two weeks later, he returned to Mayor Suozzi, who called Deputy Mayor Brenner to make a note to contact a certain board member and several City attorneys with regard to Evans' problem. Evans admits in the petition that he does not know whether the statements were straightforward or a smoke screen. On or about October 23, Taranto told Evans that Mayor Suozzi was "in his corner." Evans asserts that thereafter Taranto and the City of Glen Cove refused to respond to his correspondence and telephone calls.

As noted, Evans asserts several grounds to toll the statute. First he argues that his contact with Mayor Suozzi and City Attorney Taranto constituted an administrative appeal, and that this "exhaustion of administrative remedies" tolled the limitations period.

As a general rule, there is no remedy of mandamus to review without first exhausting administrative remedies. The exhaustion of administrative remedies is "a condition precedent to the commencement of an article 78 proceeding," i.e., a party "must pursue that appeal before seeking judicial review" (*Di Pietro v State Ins. Fund*, 206 AD2d 211, 214-215 [4th Dept 1994]). This proceeding does not involve any question concerning administrative remedies or exhaustion as no administrative review is required prior to commencement of this Article 78 proceeding for denial of a variance (see, General City Law § 81-c[1]). As noted, exhaustion is an issue only where a duty to pursue an administrative review exists (*Di Pietro v State Ins. Funds, supra*; see also, *Roufaiel v Ithaca College*, 241 AD2d 865, 868 [3d Dept 1997])["grievance procedure was not mandatory; instead it merely provided Plaintiff with an alternative forum in which to seek to vindicate her rights. In light of this, her invocation of the grievance procedure did not toll the

running of the Statute of Limitations""). Evans was not required to appeal to the Mayor of Glen Cove, indeed the Mayor had no authority to overrule or reverse the Board. Accordingly, exhaustion is not an issue and cannot operate to toll the statute of limitations.

Evans' additional assertions are that he was misled or defrauded into missing the deadline by the Respondents' representations and that he made his decision not to file suit under duress. With respect to duress, there was simply no contractual relation or transaction between the parties with regard to commencing suit. Evans does not allege that anyone threatened him or imposed due or undue pressure. A threat constitutes the essence of duress, as well as a required element of the cause of action (*Fred Ehrlich, P.C. v Tullo*, 274 AD2d 303, 304 [1st Dept 2000]).

With regard to his claim of fraud, the petition does not assert any misrepresentation of existing fact, or even a promise on the part of Respondents to produce a result. Assuming arguendo that Suozzi and Taranto promised to help Petitioner, a vague promise of help does not form a basis for a claim of fraud or estoppel.

The doctrine of estoppel will be applied against governmental agencies only in exceptional cases * * *. A municipality may be estopped from asserting that a claim was untimely filed when its improper conduct induced reliance by a plaintiff who changed his or her position to his or her detriment . . . Only a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon, will justify the imposition of estoppel" (*Yassin v Sarabu*, 284 AD2d 531 [2d Dept 2001], *app dsmd* 98 NY2d 645 [2002]). Contrary to Petitioner's suggestion, the alleged actions of Respondents in assuring him that a new master plan might aid him and that they were on his side "do not rise to the level of affirmative wrongdoing" and do not equitably estopp them from asserting the statute of limitations defense (*Academy*

Street Associates v Spitzer, 44 AD3d 592, 593 [1st Dept 2007]).

Moreover, the law is settled that in order to establish fraud, the complainant must demonstrate “(1) misrepresentation of a material fact; (2) scienter; (3) justifiable reliance; and (4) injury or damages” and, “[i]t is the general rule that fraud cannot be predicated upon statements which are promissory in nature at the time they are made and which relate to future actions or conduct” (*P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385 [1st Dept 1994]).

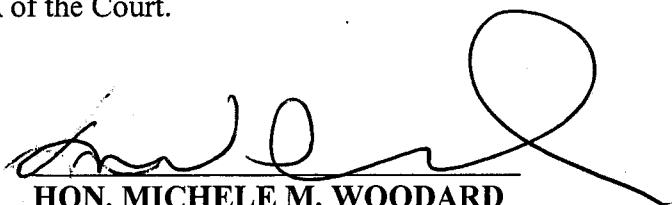
Respondents made no statements upon which Petitioner could justifiably rely to delay commencement of an article 78 proceeding. At all times, it was possible that the Mayor’s promised investigation into Evans’ claim of unfair treatment would fail to secure results in his favor. Evans cannot point to an “unequivocal promise” of any kind, much less that a variance or change in the master plan would be forthcoming (see, *Roufaiel v Ithaca College*, 241 AD2d 865, 869 [3d Dept 1997]). The Respondents motions are **granted**. It is hereby

ORDERED, that the Petition is **dismissed** with prejudice for failure to timely commence this proceeding within thirty (30) days after the Board of Zoning Appeals of the City of Glen Cove filed its decision and order denying the Petitioner a use variance for failure to demonstrate unnecessary hardship.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: November 10, 2008
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**