

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of MAMARONECK
ICES INC. and SCOTT ROSENBERG,

DECISION & ORDER

Petitioners,

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

Index No.: 2546-16

-against-

THE VILLAGE OF MAMARONECK, VILLAGE OF
MAMARONECK ZONING BOARD OF APPEALS,
DAN GRAY, in his capacity as BUILDING
INSPECTOR OF THE VILLAGE OF
MAMARONECK, SUSAN FISHER, CHRIS
FISHER, STEPHANIE FIGLIOMENI, JOHN
FIGLIOMENI, KAREN FRANCELLA, ANTHONY
FRANCELLA, MARIA MAFFEL, GAETANO
MAFFEL, MARIA PROUDIAN and JOHN
GARFUFFI,

Respondents.
-----X

ZAMBELLI, A.J.S.C.

The following papers numbered 1-9 read on this application for a temporary
restraining order and preliminary injunction in this Article 78 proceeding:

PAPERS NUMBERED

Order to show Cause, Verified Petition	1-2
Petitioners' Memorandum of Law	3
Figliomeni Affidavit in Opposition	4
Gray Affidavit in Opposition	5
Village Respondent' Memorandum of Law in Opposition	6

-1-

PAPERS NUMBERED

Petitioners' Reply Affirmation	7
Petitioners' Reply Memorandum of Law	8
Exhibits	9

Upon the foregoing papers It is ordered that:

The application for a temporary restraining order ("TRO") and a preliminary injunction: 1) staying the Resolution dated July 18, 2016 and filed on July 25, 2016, which imposed certain conditions with respect to the operation of Ralph Italian Ices being operated by Petitioner at the property located at 946 East Post Road, Mamaroneck, New York and; 2) "enjoining Respondents the Village and Building Inspector, from requiring Petitioner to comply with the conditions in the Resolution or otherwise limiting the hours of operation of Ralph's Italian Ices" pending determination of the underlying proceeding is denied.

Temporary restraining orders and preliminary injunctions are drastic remedies which should be used sparingly (see, Kutter v. Cuomo, 147 A.D.2d 215 (3rd Dept. 1989), aff'd, 75 N.Y.2d 596 (1990)). To obtain a temporary restraining order, therefore, it is Petitioners' burden to demonstrate: (1) irreparable injury absent the grant of the injunction; (2) a likelihood of success on the merits; and; (3) that the balance of equities lies in movant's favor (see, Bailey v. Ossi Sport Club, Inc., 71 A.D.3d 1069 (2d Dept. 2010); Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Buildings., 65 A.D.3d 1051 (2d Dept. 2009)).

Petitioners' have failed to show irreparable harm. It is well established that irreparable injury, for purposes of an injunction, means an injury for which money

damages are insufficient (Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635 (2d Dept. 2009); Matter of Walsh v. Design Concepts, Ltd., 221 A.D.2d 454 (2d Dept. 1995)). As for the claim that the schedule set forth in the Resolution for the relevant filings will cause Petitioners injury, the option to request an extension makes this claim speculative (see, Golden v. Steam Heat, Inc., 216 A.D.2d 440 (2d Dept. 1995)). Equally unavailing is Petitioners' implication that the costs of preparing and filing the Special Permit application and site development plan and the enforcement of the limitations on late night operation hours might eventually result in financial losses that necessitate the abandonment of the business (see, Rockland Development Associates v. Village of Hillburn, 172 A.D.2d 978 (3d Dept. 1991)). Accordingly, Petitioners have not proven damages that demonstrate irreparable harm in the absence of a TRO injunction (see, 1659 Ralph Ave. Laundromat Corp. v. Ben David Enters., 307 A.D.2d 288 (2d Dept. 2003)).

In addition, Petitioners' claim that the equities in this proceeding favor their position is rejected. There is nothing to indicate that the denial of an injunction would result in any hardship to Petitioners outweighing that which would be sustained by Respondents in the event that such relief was granted (see, Rockland Development Associates v. Village of Hillburn, supra). Even assuming that Petitioners are likely to succeed on the merits, therefore, the injunction is denied as Petitioners failed to establish irreparable injury and that the balance of equities fall in their favor as is required to warrant the grant of injunctive relief.

The failure to establish irreparable harm and the balance of equities in their favor sufficient to obtain a TRO is also fatal to the application for a preliminary injunction (Wheaton/TMW Fourth Ave., LP v. New York City Dept. Of Buildings, 65 A.D.3d 1051,

1052 (2d Dept. 2009); Matter of Related Properties, Inc. v. Town Bd. of Town / Village of Harrison, 22 A.D.3d 587, 590 (2d Dept. 2005)). A party seeking such an injunction must establish a clear right to that relief under the law and the undisputed facts (Id.).

Accordingly, given that injunctive relief is a drastic remedy which should be issued cautiously (Matter of Related Properties, Inc. v. Town Bd. of Town / Village of Harrison, supra at 590), under the circumstances of this case, the Court declines to issue a temporary restraining order or preliminary injunction in this matter.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
August 9, 2016


BARBARA G. ZAMBELLI
A.J.S.C.

Lester D. Steinman, Esq.
Attorneys for Respondent Village of Mamaroneck
Zoning Board of Appeals
McCarthy Fingar, LLP
11 Martine Avenue, 12th Floor
White Plains, New York 10606-1934

Eric Gordon, Esq.
Keane & Beane, P.C.
Attorney for Petitioners
445 Hamilton Avenue, 15th Floor
White Plains, New York 10601

Patricia Gurahian, Esq
McCullough Goldberger & Staudt, LLP
Attorneys for Respondent Village of Mamaroneck
and Dan Gray, in his capacity as Building Inspector
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605

-4-

Chris and Susan Fisher
132 Frank Avenue
Mamaroneck, NY 10543

John and Stephanie Figliomeni
1105 Jensen Avenue
Mamaroneck, NY 10543

Anthony and Karen Francella
1008 Keefer Avenue
Mamaroneck, NY 10543

Gaetano and Maria Maffei
111 Frank Avenue
Mamaroneck, NY 10543

Maria Proudian
226 Frank Avenue
Mamaroneck, NY 10543

John Garfuffi
1020 Keeler Avenue
Mamaroneck, NY 10543

Nancy Barry, Esq.
Chief Clerk

BEZ

At an IAS Part of the Supreme Court of the
State of New York, held in and for the County
of Westchester County Courthouse, located at
111 Dr. Martin Luther King Jr. Boulevard,
White Plains, New York, on the 7 day
Of August, 2016

HON. BARBARA G. ZAMBELLI
PRESENT: ACTING SUPREME COURT JUSTICE ----- X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----- X

In the Matter of the Application of
MAMARONECK ICES INC. and SCOTT
ROSENBERG,

Petitioners,

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

-against-

THE VILLAGE OF MAMARONECK, VILLAGE OF
MAMARONECK ZONING BOARD OF APPEALS,
DAN GRAY, in his capacity as BUILDING
INSPECTOR OF THE VILLAGE OF
MAMARONECK, SUSAN FISHER, CHRIS
FISHER, STEPHANIE FIGLIOMENI, JOHN
FIGLIOMENI, KAREN FRANCELLE, ANTHONY
FRANCELLE, MARIA MAFFEL, GAETANO
MAFFEL, MARIA PROUDIAN and JOHN
GARFUFFI,

Respondents.
----- X

**ORDER TO SHOW
CAUSE FOR PRELIMINARY
INJUNCTION WITH A
TEMPORARY RESTRAINING
ORDER**

Index No. 2546-16

Assigned to:
_____, J.S.C.

Upon the annexed Verified Petition, the Affidavit of Scott Rosenberg, sworn to on
August 3, 2016, together with the exhibits annexed thereto, and the Memorandum of Law
submitted herewith, and sufficient cause appearing therefore,

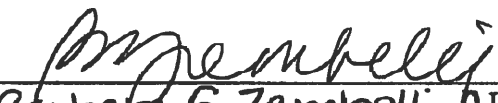
Now, on motion of Keane & Beane, P.C., attorneys for Petitioners, MAMARONECK
ICES INC. and SCOTT ROSENBERG, it is hereby

ORDERED, that Respondents, the VILLAGE OF MAMARONECK (the "Village"), VILLAGE OF MAMARONECK ZONING BOARD OF APPEALS (the "ZBA"), DAN GRAY, in his capacity as BUILDING INSPECTOR OF THE VILLAGE OF MAMARONECK (the "Building Inspector"), SUSAN FISHER, CHRIS FISHER, STEPHANIE FIGLIOMENI, JOHN FIGLIOMENI, KAREN FRANCELLE, ANTHONY FRANCELLE, MARIA MAFFEL, GAETANO MAFFEL, MARIA PROUDIAN and JOHN GARFUFFI (collectively the "Respondents") show cause before this Court at an IAS Part to be held in the Supreme Court in and for the County of Westchester, located at 111 Martin Luther King, Jr. Boulevard, Room 203, White Plains, New York on the 16 day of ^{September}~~August~~, 2016 at 9 o'clock a.m., or *on papers, no appearance required* as soon thereafter as counsel can be heard, why an Order should not be issued: (i) staying the Resolution dated July 18, 2016 and filed on July 25, 2016, approved and adopted by Respondent ZBA (the "Resolution"), which imposed the following conditions with respect to the operation of Ralph's Italian Ices located at 946 East Post Road, Mamaroneck, New York:

1. Hours of operation shall be limited to no later than 10pm Sunday through Thursday and 11:30pm Friday and Saturday, to be effective seven (7) days after the filing of this resolution with the Village Clerk.
2. Ralph's Ices must promptly file a site plan application with the Planning Board so that the application can be placed on the September 14, 2016 Planning Board meeting agenda and must meet applicable deadlines for application submission.
3. Ralph's Ices must promptly file a special permit application with this Board so that the application can be heard and properly noticed for the September 8, 2016 Zoning Board meeting and must meet applicable deadlines for application submission.
4. Ralph's Ices must diligently proceed with its applications before the Planning Board and Zoning Board of Appeals and promptly provide all necessary information to facilitate review of the site plan and special permit applications until final determinations are made on both applications.

IT IS FURTHER ORDERED, that service of the copy of this Order, together with the papers on which it is based, via personal delivery pursuant to CPLR §308 upon the individual Respondents and pursuant to CPLR §311 upon the municipal Respondents, including the Building Inspector, on or before August 12, 2016, shall be deemed good and sufficient service thereof.

ENTER:


Hon. Barbara G. Zambelli, A.J.S.C.