

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

MAMARONECK ICES, INC. d/b/a
RALPH'S ITALIAN ICES and
SCOTT ROSENBERG,

Petitioners,

Decision & Order
Index No.: 61570-17
(Seq. 1-4 Disp.)

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

THE VILLAGE OF MAMARONECK,
The ZONING BOARD OF APPEALS of the VILLAGE OF
MAMARONECK, DAN GRAY, in his capacity as BUILDING
INSPECTOR of the VILLAGE OF MAMARONECK, DORAC
PETROLEUM CORP., CHRIS FISHER, SUSAN FISHER,
JOHN GARFUFFI, JOHN FIGLIOMENI, STEPHANIE
FIGLIOMENI, GAETANO MAFFEL, MARIA MAFFEL
ANTHONY FRANCELLE, KAREN FRANCELLE and
MARIA PROUDRIAN

Respondents.
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MINIHAN, A.J.S.C.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 191 were read on this order to show cause and verified petition/complaint (NYSECF Doc. No. 23) brought by petitioners, owners of an ice cream shop known as Ralph's Italian Ices, located at 946 East Boston Post Road in the Village of Mamaroneck, for an order 1) reversing the Village Board's Resolution filed with the Village of Mamaroneck Clerk on July 25, 2016, thereby allowing petitioners to resume operations in accordance with the initially issued Certificate of Occupancy; 2) for an order reversing, the Village Board's Resolution filed with the Village of Mamaroneck Clerk on February 8, 2017, thereby allowing petitioners to resume operations in accordance with the initially issued Certificate of Occupancy; 3) for an order reversing the Board's Resolution filed with the Village of Mamaroneck Clerk on July 10, 2017, thereby allowing petitioners to resume operations in accordance with the initially issued Certificate of Occupancy; 4) in the alternative, for an order reversing the Board's Resolution filed with the Village of Mamaroneck Clerk on July 10, 2017, and directing respondents to grant petitioners a special permit to operate Ralph's Italian Ices as a fast food restaurant within the Village of Mamaroneck; 5) for an order pursuant to 42 U.S.C. § 1983, awarding compensatory damages to petitioners estimated to be in excess of \$75,000, as well as punitive damages, attorneys' fees and costs; and 6) for an order granting temporary and preliminary injunctive relief, pursuant to CPLR 6301, allowing Ralph's Italian Ices to reopen and operate pursuant to its original Certificate of Occupancy or, solely in the alternative, under the conditions Ralph's was operating under prior to the Board's Resolution filed on July 10, 2017, during the pendency of this case; 7) for an order awarding costs and

attorneys' fees, together with such other and further relief as the Court deems just and proper and 8) for an order for temporary injunctive relief pursuant to CPLR 6301 allowing Ralph's to immediately reopen and operate pursuant to its original Certificate of Occupancy during the pendency of this case¹.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 191 were read on this notice of motion to dismiss and answer by Village Respondents for an order (1) dismissing the first, second, third, sixth and seventh causes of action of the verified petition/complaint pursuant to CPLR Sections 3211(a)(2), 3211(a)(5), 3211(a)(7) and 7804(1) on the grounds that 1) the first cause of action is barred by petitioners' failure to exhaust their administrative remedies; 2) the second and third causes of action are barred by the statute of limitations; 3) the third cause of action is moot and barred by the equitable principle against inconsistent positions; and 4) the sixth and seventh causes of action fail to state a cause of action cognizable at law.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 191 were read on this notice of motion by petitioners pursuant to CPLR 3217 discontinuing this action without prejudice, or alternatively ordering that the fifth, sixth and seventh cause of action be dismissed without prejudice and the first through the fourth causes of action be dismissed with prejudice.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 191 were read on this notice of motion cross-motion by Village respondents for an order granting dismissal of the first, second, third, sixth and seventh causes of action as unopposed, based on petitioners' default in answering the motion.

From May 2016 through July 14, 2017, petitioners operated Ralph's Ices at the intersection of U.S. Route 1 (Boston Post Road) and N.Y. Route 127 (Keeler Avenue) in the Village of Mamaroneck. In May 2016, Dan Gray, the Building Inspector of the Village of Mamaroneck, issued a certificate of occupancy to Ralph's Italian Ices for use as a retail store which was later revoked by the ZBA after deciding an appeal by Village residents, that Ralph's Ices was a food service establishment that provided only outdoor counter service and otherwise violated the zoning code of the Village. Thereafter, the ZBA stayed the revocation so that Ralph's Ices could operate while seeking the necessary permits.

¹On August 9, 2017, after consideration of the order to show cause and petition, and upon oral arguments before this court, petitioner's application for temporary and preliminary injunctive relief, pursuant to CPLR 6301 was denied, as petitioners failed to establish that they would sustain immediate and irreparable injury if injunctive relief were not granted. The court held that petitioners had demonstrated only economic injuries, including a loss of revenue, money expended on renovations and overhead expenses, which were insufficient to constitute irreparable harm for the purposes of granting injunctive relief. This court noted that even if the injunctive relief were granted, petitioners were still not be permitted to reopen unless and until affirmative steps were taken to obtain a health permit.

Prior to the instant proceeding, petitioners commenced an Article 78 proceeding, *Mamaroneck Ices, Inc. v Village of Mamaroneck, et al.*, Index no. 2546-16 (Sup. Ct Westchester Cty.) wherein petitioners claimed that a challenge to the issuance of the building permit was untimely and that the July 18, 2016 resolution should be declared null and void because it was in excess of the ZBA's jurisdiction and that the appeal to the ZBA was barred by laches on the grounds that the residents failed to take action with respect to petitioners' use of the property until after a certificate of occupancy and construction was completed so as to constitute unreasonable delay resulting in prejudice; and petitioners sought temporary and preliminary relief pending final determination of the proceeding enjoining some conditions set forth in the July 18, 2016 resolution. By stipulation dated April 26, 2017, the court [Zambelli, J.], so-ordered the stipulation discontinuing the prior Article 78 proceeding without prejudice.

In this hybrid proceeding, petitioners challenge three resolutions of the ZBA as arbitrary and capricious and not supported by substantial evidence and also assert substantive due process claims seeking damages under 42 U.S.C. § 1983 and the New York State Constitution.

By motion to dismiss, Village respondents argue that petitioners' first, second, third, sixth and seventh causes of action including their claim for damages pursuant to 42 U.S.C. § 1983 and the New York State Constitution should be dismissed as they fail to state a cause of action. Specifically, Village respondents contend that the first cause of action seeking to invalidate the first resolution dated July 18, 2016 should be dismissed as untimely and that the challenge to the second resolution dated February 2, 2017 should be dismissed as untimely. Respondents argue that the third cause of action should be dismissed as it is without merit since the ZBA's determinations as set forth in the third resolution dated July 6, 2017 are fully supported by substantial evidence and are not arbitrary and capricious. Village respondents argue that Ralph's Ices' proposed use is unsuitable given its location, size, intensity, operation, traffic, noise and inadequate parking and that the petitioners do not have the required setback variances or approvals from the New York State Department of Health.

By verified answer, Village respondents deny the fourth and fifth causes of action and assert eight affirmative defenses and objections in point of law.

The first resolution, dated July 18, 2016, decided an appeal by a group of Village residents who argued that the Village building inspector erroneously issued a building permit to Ralph's Ices without mandating that petitioners first obtain a special permit from the ZBA, which is required for a "food service establishment." The ZBA upheld the appeal, determining that the building inspector had erroneously classified Ralph's Ices as a "retail use" and further determined that the petitioners' business required a special permit and site plan approval by the Planning Board, which the petitioners had never obtained. As a result, the ZBA revoked petitioner's certificate of occupancy, and stayed the revocation to permit petitioners to apply for a special permit. Respondents urge that petitioners' assertion that the residents' appeal to the ZBA as untimely and their first cause of action to nullify the first resolution on that basis, is waived since it they failed to raise it before the ZBA. Respondents also urge that petitioners' challenge to the merits of that portion of the first resolution which determined that a special permit from the ZBA and site plan approval from the Planning Board were required for the business to operate is

equally meritless as the issue was not raised in a timely fashion. Village respondents argue that petitioners are estopped from challenging the ZBA's determination that their use requires a special permit by their representations to the ZBA that they would pursue the necessary permits, which the ZBA relied upon in staying the revocation of petitioners' certificate of occupancy to permit operation while the permits were pursued. Lastly, Village respondents contend that the untimeliness issue raised by petitioners with respect to the 2016 ZBA decision is now moot.

The second resolution, dated February 2, 2017, denied petitioners' application for a variance allowing them to operate an outdoor counter service based on the undesirable change to the character of the neighborhood. Village respondents argue that petitioners' challenge to the February 2, 2017 resolution for the first time in this proceeding is untimely.

The third resolution, dated July 6, 2017, denied petitioners' application for a special permit and concluded that the criteria for granting a special permit set forth in section 342-71 of the Village Code had not been met. Village respondents argue that this claim is equally without merit noting that the resolution is fully supported by substantial evidence and are not arbitrary and capricious. Village respondents argue that Ralph's Ices proposed use is unsuitable given its location, size, intensity, operation, traffic, noise and inadequate parking and that the petitioners do not have the required setback variances or approvals from the New York State Department of Health.

By notice of motion for discontinuance without prejudice pursuant to CPLR 3217 (b) & (c), petitioners seek to preserve their constitutional claims and acknowledge that the only claims subject to CPLR 3217 (c) dismissal with prejudice are the first, second, third and fourth causes of action, as they were subject to the previous stipulation of discontinuance. Petitioners, however argue that the fifth, sixth and seventh causes of action should be discontinued without prejudice. Petitioners contend that due to the respondents' aggressive actions coupled with the fact that the store is closed and since there is no income they wish to discontinue this petition. Petitioners contend that they attempted in good faith to resolve the discontinuance without prejudice to no avail. Petitioners maintain that there is no prejudice to respondents by discontinuing this action without prejudice as the litigation is in its earliest stages, and the parties have not yet engaged in any discovery.

By notice of cross-motion, Village respondents move to dismiss the first, second, third, sixth and seventh causes of action as unopposed based on petitioners default in answering the motion. Village respondents contend that instead of answering or opposing the motion to dismiss, petitioners seek a discontinuance for the second time without a sound reason. The store has been closed for more than three months prior to commencing this proceeding so their basis to discontinue, because Ralph's Ices is closed and not generating revenue, is not credible they argue. So too, Village respondents contend that petitioners sought consent to a discontinuance without prejudice after the motion to dismiss, answers and one day before petitioners' papers were due. To that end, they argue that the timing of petitioners' request alone shows that the driving force was to avoid an adverse decision and since courts have consistently refused to allow a discontinuance without prejudice under those circumstances, their application to discontinue should be denied.

By reply affirmation in further support of the motion to discontinue, petitioners contend Village respondents drove them out of business after successfully operating for a year. Petitioners argue that they failed to file answering papers as they moved for discontinuance without prejudice after seeking consent from respondents, which was refused.

An application for leave to discontinue an action without prejudice is addressed to the legal, not the arbitrary, discretion of the court, and thus should be granted unless there are reasons which would justify its denial (*Valladares v Valladares*, 80 AD2d 244, 257-258 [2d Dept 1981]). The general rule is that plaintiff should be permitted to discontinue the action without prejudice, unless defendant would be prejudiced thereby (*Valladares v Valladares*, 80 AD2d at 258). A motion to discontinue without prejudice is properly denied when the relief sought is to avoid an adverse decision on merits (*Baltia Air Lines, Inc. v CIBC Oppenheimer Corp.* [1st Dept 2000], *leave to appeal denied*, 95 NY2d 767, *reargument denied*, 96 NY2d 755 [2001]; *see also Turco v Turco*, 117 AD2d, 719 [2d Dept 2014]).

The record demonstrates that petitioners failed to answer the Village respondents' motion to dismiss or reply to the Village respondents' answering papers. Rather, they filed a notice of discontinuance after their time to answer expired and after the respondents served their responsive pleadings. Since petitioners acknowledge that the first, second, third and fourth causes of action were subject to the first so-ordered stipulation of this court and acknowledge they are subject to dismissal with prejudice, and since they have failed to answer or oppose the first through fourth causes of action, their claims are dismissed with prejudice. The underlying purpose of CPLR 3217(c) is to curb the use of discontinuance as a device for harassment and as a source of unnecessary repetitive litigation. Petitioners have not demonstrated that they obtained the necessary health permits to re-open the store and the respondents have shown that inequity and prejudice would ensue if these claims were dismissed for a second time without prejudice.

As to the fifth cause of action, since the case was fully submitted to the court, a discontinuance can only take place upon a stipulation by all the parties and the court. After the case has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action (CPLR 3217 [b]; *Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 549 [2d Dept 2014]). In this case, since the parties have not agreed to a voluntary discontinuance, the court must deny the petitioners' motion as to the fifth cause of action for a discontinuance without prejudice. Given petitioners' failure to submit opposition to the Village respondents' motion to dismiss, and their failure to offer a valid excuse, the motion to dismiss the fifth cause of action is granted on default (*Kubicko v Westchester County Elec., Inc.* [2d Dept 2014]).

As to the constitutional claims that were not raised in the first proceeding at the sixth and seventh causes of action, they are not subject to the prior so-ordered stipulation, and even though petitioners have not submitted answering papers, respondents' have not demonstrated that dismissal of the sixth and seventh causes of action without prejudice would be inequitable.

Accordingly, it is hereby ORDERED that the first, second, third, and fourth causes of action are dismissed with prejudice; and it is further

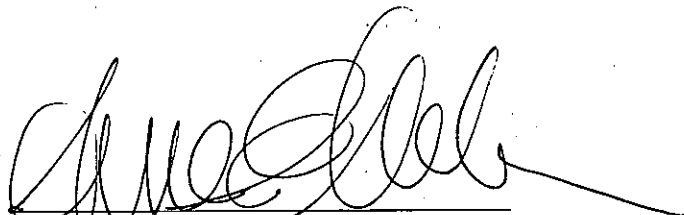
ORDERED that the fifth cause of action is dismissed based upon default; and

ORDERED that the sixth and seventh causes of action are dismissed without prejudice with the condition that petitioners pay for costs and attorney fees of all the named respondents' in the future proceeding should they pursue these claims in the future.

All other claims have been considered and denied including for costs and fees.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
December 12, 2017


Honorable Anne E. Minihan, A.J.S.C.

TO: NYCEF