To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED
AND
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ON 8/26 2005
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - ENVIRONMENTAL CLAIMS PART

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GREENTREE REALTY, LLC and METRO ENVIRO TRANSFER, LLC,

Petitioners/Plaintiffs,

-against-

THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE OF CROTON-ON-HUDSON ZONING BOARD OF APPEALS, and DANIEL O'CONNOR, in his official capacity, as the VILLAGE BUILDING INSPECTOR,

Respondents/Defendants.

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DECISION

Index No. 11872/05

NICOLAI, J.

The following papers numbered 1 to 33 were read on this motion by Petitioners/Plaintiffs for an order:

(1) enjoining the enforcement of a pending Village Board Order adopted by Resolution July 18, 2005, which would prohibit an existing construction and demolition debris processing facility and transfer station located at 1A Croton Point Avenue from accepting new waste and require that Metro Enviro Transfer, LLC commence the 90 day closure procedures;

(2) enjoining Respondents from prohibiting or interfering with Petitioner Greentree Realty's use, including its ability to lease and/or operate, the property for the purposes of solid waste management, including, in particular, the property's current use as host to the existing facility;

(3) enjoining Respondents from prohibiting or in any way interfering with Petitioner Metro Enviro Transfer, LLC's use of the property to operate its existing facility; and

(4) enjoining Respondents from prohibiting or in any way interfering with the

use of the property to operate the existing facility by any entity with appropriate State and County permits and/or approvals;

and cross motion by Respondents/Defendants for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the Petition/Complaint. [1]

Order to Show Cause - Affirmations	1- 6
Notice of Cross Motion - Affirmations	19- 20
Replying Affirmation	29- 30
Memorandums of Law	18, 28, 33
Exhibits	7- 17, 21- 27, 31- 32

Upon the foregoing papers, it is Ordered that the motion and cross motion are decided as follows:

In 1988, the Village of Croton-on-Hudson issued a special use permit to Industrial Recycling Systems ("IRS"), authorizing it to operate a wood processing and recycling transfer station on the property. In 1997, Greentree Realty LLC ("Greentree") purchased the property and leased it to Metro Enviro L.L.C. (an entity distinct from Petitioner) who requested and received a renewal and transfer of the pre-existing special use permit held by IRS. In 1998, the special use permit which included numerous conditions, was issued for a three-year duration. In March 2000, Metro Enviro Transfer ("Metro Enviro") acquired the assets of Metro Enviro L.L.C. for $10 million dollars with the expectation that it would operate on the leased premises for many years. The permit expired on May 5, 2001, but Metro Enviro promptly applied for renewal. On January 27, 2003, the Village Board of Trustees of the Village of Croton-On-Hudson ("Board") issued a Statement of Findings denying the renewal application based upon certain violations of the special use permit. Specifically, the Board cited mishandling of unauthorized waste, exceeding the maximum permitted tonnage, failure to collect leachate on one occasion and failure of certain training, reporting and record-keeping requirements.

In the prior action between Petitioner Metro Enviro Transfer and the Village of Croton-On-Hudson, this Court granted Petitioner's application for an Order annulling the determination of the Board which denied Metro Enviro Transfer's application for renewal of its special use permit and staying the Board's decision requiring Metro Enviro Transfer to cease accepting waste at its transfer station and closing the facility ("the Facility") on February 17, 2003. On appeal, the Second Department reversed and dismissed Metro Enviro's Petition. The Appellate Division stated that the Board did not need to wait for actual harm to occur because it was sufficient that conditions were violated, and there was substantial evidence not only establishing the existence of the violations, but also that they posed a threat to the community and the environment. By Decision dated July 6, 2005, the Court of Appeals held that the Appellate Division properly dismissed the

[1]Papers submitted after the return date of the motion and cross motion were not read or considered.

Article 78 Petition.

Petitioners commenced the present action pursuant to CPLR 3001 for a judgment declaring that the operation of a transfer station and processing facility in the Village on property owned by Greentree is a pre-existing, legal nonconforming use. Greentree, which was not a party in the prior action, purchased the property ("Property") in 1997 with the expectation that the Property would continue to host a solid waste processing facility. Since the use of the Property for processing waste was expressly permitted under the zoning code, Petitioners assert that the Village has sanctioned the Property as a pre-existing, legal nonconfoming use. Petitioners further maintain that substantial investments were made in the Property to upgrade and improve the Facility and a Special Permit was issued. Petitioners now seek a Temporary Restraining Order and Preliminary Injunction enjoining the enforcement of a pending Village Board Order, adopted by Resolution July 18, 2005 which would prohibit the Facility from accepting new waste as of July 23, 2005 (the "Closure Order").

Petitioners recognize that the Court of Appeals upheld the Board's decision to deny renewal of the special use permit that allowed the lessee, Metro Enviro to operate its Facility at the Property. Petitioners claim that decision, however, does not alter the status of the Property as a pre-existing, legal nonconforming use. Petitioners further claim that there are only a few ways in which a pre-existing legal nonconforming use may be terminated; none of which are applicable in the instant case. Notwithstanding the fact that Metro Enviro has no special use permit to operate the transfer station, Petitioners nevertheless contend that the Village may not disregard or invalidate Petitioners constitutionally protected property rights to a pre-existing legal nonconforming use. In addition, Petitioners assert that although the use of the Property for solid waste management was expressly permitted to operate as-of-right under the Village Code until 2001, it is uncontroverted that on June 18, 2001, the Board enacted an amendment to Section 230-18 of the Village Code concerning Prohibited Uses and the transfer station and processing facilities such as Metro Enviro's became "Expressly Prohibited." As a result, Petitioners argue that if this Court does not stay enforcement of the Village's Closure Order requiring that the Facility cease accepting new waste: (1) Petitioners will sustain irreparable damage to their right to use the Property for its allowed non-conforming use, including loss of goodwill and reputation, loss of an established customer base, an indelible taint on the Property's status as a pre-existing, legal nonconforming use, which would likely impede Greentree's ability to re-lease the Property, substantial lost revenue, and losses to the investment of over $10,000,000 in the Facility; and (2) havoc would be wrought upon Westchester County's already stressed solid waste network.

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers (William M. Blake Agency, Inc. v Leon, 283 AD2d 423, 424 (2nd Dept. 2001); and Peterson v Corbin, 275 AD2d 35). To prevail upon a motion for a preliminary injunction, the moving party has the burden of demonstrating that (1) there is a likelihood that it will succeed on the merits of the action, (2) it will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) the balance of equities is in its favor (see Valdez v Northeast Brooklyn Hous. Dev. Corp., 2005 NY Slip Op 50986U; Neos v Lacey, 291 AD2d 434). When the facts are sharply disputed, a preliminary injunction will not be granted (see Price Paper & Twine Co. v Miller, 182 AD2d 748).

Applying these principles to the instant case with respect to Petitioner Metro Enviro, the Court finds that Metro Enviro did not meet its burden of demonstrating a likelihood of success on the merits or that the balance of equities tip in their favor in the absence of a preliminary injunction. Respondents correctly contend the balance of equities strongly favors the Village. The Court of Appeals decision, effectively denying the special use permit to Metro Enviro, is fatal to Petitioner Metro Enviro's argument. It is therefore, the Court's opinion that Petitioner Metro Enviro has failed to demonstrate a clear right to injunctive relief. Thus, Metro Enviro's motion for a preliminary injunction enjoining Respondents from enforcing the Closure Order, is denied in its entirety.

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see First Franklin Square Assocs. v Franklin Square Prop. Account, 15 AD3d 529). Contrary to Respondents' contentions, Petitioner Greentree made the requisite showing. Therefore, as to Petitioner Greentree, the Preliminary Injunction is granted to the extent that Respondents are enjoined from prohibiting or interfering with Greentree's ability to lease and or operate it's property for purposes of solid waste management, with the exception of Metro Enviro, which is required to comply with the Closure Order as described herein. The Preliminary Injunction is necessary to maintain the status quo until this Court determines the merits of the action (see CPLR 6301). The $25,000 bond set on July 21, 2005 shall continue. In addition, upon re-lease of the Property, in the event that Respondents' review of the required permits and/or approvals is unreasonably delayed, Petitioner Greentree may apply to this Court for appropriate relief.

Respondents also argue that the Petition/Complaint must be dismissed since Petitioners failed to exhaust administrative remedies. It is well established that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in ... court." (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52) Courts will generally not review objections to agency determinations that have not been pursued through administrative channels. However, exceptions to the exhaustion requirement clearly exist. The rule of finality and exhaustion may be avoided if the administrative remedy available would be futile or if irreparable harm would ensue without judicial intervention. Here, Petitioners concede that they have not "technically" exhausted their administrative remedies because pursuing such remedies would be an "exercise in futility" in light of Respondents' determined adherence to enforcing the Closure Order. Petitioners maintain that presenting their claim of a legal right to use the Property for solid waste management to the Building Inspector and the Zoning Board of Appeals would result in needless delay and cost. In light of the dismissal of the Article 78 by the Court of Appeals, this Court finds that any attempt by Petitioners to obtain the opinion of the Building Inspector and the Zoning Board of Appeals as to their legal claim, through administrative remedies would be futile, and therefore Petitioners' failure to exhaust their administrative remedies is excused. Accordingly, in the interest of judicial efficiency, and because Petitioners have established that the pursuit of such remedies would be futile (cf Segalla v Town of Amenia, 309 AD2d 742), the cross motion to dismiss for failure to exhaust is denied.

Respondents cross-move for an order pursuant to CPLR 3211 (a)(1), (5) and (7) dismissing the Petition/Complaint upon the grounds that Petitioners' claims are barred by the Statute of Limitations and Petitioners had a full and fair opportunity to litigate the issues that were previously decided by the Appellate Division, Second Department and affirmed by the Court of Appeals. Petitioners have styled this matter as a declaratory judgment action, seeking a determination of the legal status of the Property, and are bound by that tactical decision. The decision to treat a case as a declaratory judgment action instead of a CPLR Article 78 proceeding, however, has enormous significance, most notably for purposes of determining the applicable Statute of Limitations. "In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' (Solnick v Whalen, 49 NY2d 224). If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action [citations omitted]" (Matter of Save the Pine Bush v City of Albany, 70 NY2d 193). Because the CPLR contains no provision setting forth the Statute of Limitations applicable to declaratory judgment actions, the six-year catch-all Statute of Limitations applies (see CPLR 213 [1]). Based upon the foregoing, this Court concludes that the present action was timely commenced and therefore Petitioner's claims are not barred by the Statute of Limitations.

Respondents also cross-move for an order dismissing the Petition/Complaint upon the grounds that Petitioners' claims are barred by the doctrines of res judicata and collateral estoppel. Generally, the doctrine of issue preclusion prevents a party from relitigating issues in a subsequent proceeding which were raised and decided against that party in a prior proceeding (Ryan v New York Telephone Company, 62 NY2d 494, 500). One of the controlling factors is the identity of the issues in the two actions. The identical issue necessarily must have been decided in the prior action and be decisive in the present action. Also, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest that prior determination (D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664; Kaufman v Eli Lilly & Co., 65 NY2d 449; see also Schwartz v. Public Admin. of the Co. of Bronx, 24 NY2d 65). Additional factors which the court must take into consideration are the nature of the forum in the prior litigation, the nature of the litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation (Gilberg v Barbieri, 52 NY2d 285, 292).

Collateral estoppel will only be applied to matters "actually litigated and determined" in a prior action (Restatement [Second] Judgments § 27; see also D'Arata v New York Cent. Fire Ins. Co., supra at 666). For a question to have been actually litigated, "it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding" (Halyalkar 109 v Board of Regents, 72 NY 2d 261). Here, issue preclusion is sought to be applied to the specific finding that the Board was entitled to conclude that the history of repeated wilful violations created an unacceptable threat of future injury to health or the environment; and therefore the Board could order closure of the Facility despite its status as a pre-existing nonconforming use. Contrary to Petitioners' contentions, collateral estoppel precludes relitigation of this issue which was "actually and necessarily decided" in the prior action (see Koether v Generalow, 213 AD2d 379).

The issue of Metro Enviro's right to continue operating was conclusively decided by the Court of Appeals, at which time the Petitioner/ Plaintiff Metro Enviro had a full and fair opportunity to litigate. Accordingly, the cross motion to dismiss the Petition/Complaint of Metro Enviro is granted upon the grounds that Metro Enviro is barred by the doctrine of collateral estoppel from relitigating this issue.

However, the Court must now decide whether issue preclusion is equally applicable to Greentree, as the owner of the property. To determine whether privity has been established – as Petitioners contend – the test to be applied is whether the critical issue to be precluded was necessarily decided by the Court of Appeals and whether Greentree, against whom issue preclusion is sought, had a full and fair opportunity to litigate in the prior action. To establish privity, for estoppel purposes, "the connection between the parties must be such that the interests of the non-party can be said to have been represented in the prior proceeding" (Green v Santa Fe Indus., 70 NY2d 244). Privity has also been found where a person so controlled the conduct of the prior litigation in which they were interested so that issue preclusion may properly be invoked against them (Id at 254). Although Respondents urge that Greentree, as Metro Enviro's landlord, is in privity with Metro Enviro, there is no evidence that Greentree's interests were represented in the prior action. Thus, Petitioners correctly contend that Greentree did not appear in the prior action and therefore was not "accorded a full and fair opportunity to contest the issue."

In light of the foregoing, the Court finds that Respondents' cross motion, insofar as it seeks to dismiss the Petition/Complaint on the basis of collateral estoppel and res judicata brought by Metro Enviro is granted. However, the cross motion to dismiss the Petition/Complaint with respect to Greentree is denied.

Dated: White Plains, New York
August 25, 2005

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A.J.S.C.

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