

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

GREENTREE REALTY, LLC.

Petitioner/Plaintiff,

-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.

Index No. 05-11872
(Action 1)

Assigned Judge:
Hon. Francis A. Nicolai

VILLAGE OF CROTON-ON-HUDSON

Plaintiff,

-against-

NORTHEAST INTERCHANGE RAILWAY, LLC, AND
GREENTREE REALTY, LLC

Defendants.

Index No.: 05-22176
(Action 2)

AFFIRMATION OF MICHAEL B. GERRARD

MICHAEL B. GERRARD, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalties of perjury and pursuant to CPLR 2106:

1. I am a member of the firm of Arnold & Porter LLP, counsel to the Village of Croton-on-Hudson (the "Village"). I am familiar with the facts and circumstances surrounding this case. I make this affirmation in opposition to the joint motion of Greentree Realty, LLC ("Greentree") and Northeast Interchange Railway, LLC ("NIR") for a preliminary injunction to

toll the operation of the nonconforming use discontinuance provision of the Village Zoning Code.

Greentree's Tardy Application

2. On July 5, 2006, NIR (with Greentree's consent) filed with the Village an application for a special permit for re-issuance of a 1998 Special Permit to operate a construction and demolition debris ("C&DD") processing facility. Two days later, on July 7, 2006, NIR and Greentree brought the instant motion complaining that "it is unlikely that the Village will process NIR's Special Permit application and render a decision" before the end of August 2006.

(Affirmation of David S. Steinmetz, July 7, 2006 ("Steinmetz Aff.") ¶11)

3. NIR has known for nearly a year that it wanted to operate a C&DD processing facility at 1A Croton Point Avenue in Croton-on-Hudson. On July 29, 2005, NIR filed a notice with the Surface Transportation Board stating that it had reached an agreement with Allied Waste North America, Inc. to acquire ownership of Metro Enviro Transfer, LLC, including its lease with Greentree of the subject site. *See* Exhibit A hereto. In September 2005 NIR applied to the Westchester County Solid Waste Commission to operate a C&DD processing facility at 1A Croton Point Avenue.

4. Greentree and NIR have known since August 25, 2005 that a special permit would be required before C&DD operations could resume at the site. On that date, this Court issued a decision (Ex. H to Steinmetz Aff.) that stated, on page 4, that Greentree could apply to this Court for appropriate relief "in the event that Respondents' review of the required permits and/or approvals is unreasonably delayed."

5. In December 2005 the Village filed the instant action in this court in response to NIR's statement to the Village Manager the prior month that NIR did not need a special permit.

NIR did not immediately litigate this matter; rather, it sought multiple adjournments, the last one extending the return date to March 21, 2006.

6. On April 27, 2006, this Court issued a decision (Ex. A to Steinmetz Aff.) that stated, on page 4, that “NIR and its affiliate RSA are therefore enjoined from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village’s Zoning Code.”

7. In view of these actions, the Village was fully expecting to receive a special permit application from Greentree or NIR, and was aware that it was obligated to process any such application promptly.

8. On July 5, 2006, Janine King, Assistant to the Village Manager, received a call from Zarin & Steinmetz informing her that a special permit application would be delivered that day. The office usually closes at 4:00 p.m., but at the request of Zarin & Steinmetz, Ms. King stayed until 4:15 p.m. to wait for their paralegal.

9. Ms. King put the matter on the agenda of the Village Board of Trustees for its meeting of July 10. Zarin & Steinmetz initially requested that the matter not be put on the agenda until July 24, due to Mr. Steinmetz’s vacation plans. However, Zarin & Steinmetz subsequently changed its mind and requested placement on the July 10 agenda.

10. The Village Board of Trustees did indeed take up the application on July 10, and promptly referred the matter to the Planning Board, as required by the Village Zoning Code. These events are recounted in the accompanying Affidavit of Janine King.

11. Thus the Village has acted with great speed and diligence so far in processing the special permit application. It is not the Village’s acts that have held up the application from Greentree and NIR or slowed down the process. What slowed down the process was that

Greentree and NIR waited nearly ten months to file the application after this Court said it would be necessary, and more than two months after this Court enjoined NIR and RSA from operating without obtaining a special permit. Instead, Greentree and NIR waited until there was less than two months left to obtain the permit, and a mere two days later they moved to stop the clock.

12. The fact that Greentree and NIR had not entered into the lease is immaterial. Greentree, as the property owner, or NIR as the contract vendee/lessee, could have applied for the special permit concurrently with the other steps they were taking to start up CD&D operations in the Village.

13. Greentree and NIR cite what they call “a history of prolonging the permitting process for the Facility” (Steinmetz Aff. ¶11). As shown below, this is a pure fabrication.

14. As the initial basis for this claim, Greentree and NIR say that “the Village took slightly less than eight (8) months to render its decision” when the Special Permit was initially issued in 1998. (Steinmetz Aff. ¶12) That time was perfectly reasonable, given that the application was for first issuance of a permit. It took some time to understand the proposal, conduct the necessary studies, hold hearings, frame the permit conditions, and issue the permit. Furthermore, in the current round, eight months would have been sufficient time for the Village to process the special permit application, had Greentree and NIR applied for one in 2005 when they knew that both the Village and this Court would require one.

15. Second, Greentree and NIR speak of a “staggering” 22 months for the Village to render a decision on the renewal application. (Steinmetz Aff. ¶13) This is highly misleading. During that entire period the Village continually granted short-term extensions to the special permit, so the time did not at all prejudice Greentree and its then-tenant Metro Enviro Transfer, which were in full operation throughout that period. As this Court is well aware, the Court of

Appeals ultimately upheld the Village's decision to deny the renewal application, and it indicated, in its recital of the Village's deliberations, that this time was well spent in documenting and considering the violations.

Inconsistent Statements to State and Federal Courts

16. The Village intends to continue to diligently process the brand new Greentree/NIR submission, notwithstanding the fact that it arrived in the middle of the summer, when many key people have planned vacations. However, at least one aspect of the application gives the Village considerable pause.

17. On June 1, 2006, I appeared before the Hon. Colleen McMahon of the U.S. District Court for the Southern District of New York in a matter entitled *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson et al.* I represented the defendants. Plaintiff Buffalo Southern Railroad ("BSOR") was represented by John T. McManus, Esq. Mr. McManus had previously appeared before this Court on behalf of NIR.

18. In the federal proceeding, BSOR has been seeking a declaration that, because of BSOR's involvement at the Croton site, a federal statute, the Interstate Commerce Commission Termination Act, preempts Village control. BSOR has been claiming that it plans to handle sand and other building materials through the site. See complaint in *BSOR v. Village of Croton-on-Hudson*, ¶35 (Exhibit B hereto). BSOR's papers in the federal court have said nothing about handling solid waste. During the June 1 proceeding, I raised the question of whether solid waste would be handled at the facility. Judge McMahon asked Mr. McManus, "Can you represent to me, as an officer of the court, that Buffalo Southern is not presently dealing with anybody who wants to operate, to trans-ship, solid waste over that 1600 feet of track, which seems to me would be in violation of the State Court judgment?" Mr. McManus replied, "I can make a

representation to you that my understanding of that, as of today, Buffalo Southern doesn't have any relationship with any business to ship solid waste." (Transcript of Proceedings, pp. 30-31, attached hereto as Ex. C)

19. This is a troubling representation. BSOR is a tenant of RSA. The first page of the lease between them is Exhibit D hereto. RSA is an affiliate of NIR and is the actual tenant of the property. Steinmetz Aff. ¶5 n.1. NIR is now appearing, in conjunction with Greentree, before this Court seeking to handle solid waste at the property.

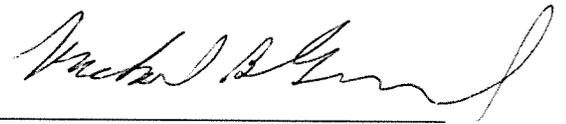
20. In her decision on BSOR's preliminary injunction motion, Judge McMahon stated (on page 23), "Significantly, BSOR represented to the Court during oral argument that no shipment of waste materials is planned. On the record before me, that representation is credible. BSOR is not generally in the business of carrying such materials and it does not appear to have any necessary permits from the New York DEC or Westchester County to do so. Counsel has represented to this Court that plaintiff has no immediate plans to carry such waste. (Admittedly, counsel fudged when asked whether it would so represent for all time.) So there does not appear to be any imminent danger that waste management or recycling operations, which the state courts have already found inimical to the health and safety of Village residents, will resume at the Yard."

Conclusion

21. The accompanying Memorandum of Law shows that the applicable New York law establishes that Greentree and NIR have no right to a tolling of the one-year discontinuance period under the Village zoning ordinance.

22. Greentree and NIR had plenty of time in which to apply for a special permit. It was their own repeated delays that have left the Village with very little time to consider the application before the expiration of the discontinuance period.

23. For the reasons set forth above and in the Memorandum of Law, the motion of Greentree and NIR should be denied.



Michael B. Gerrard
Dated: July 14, 2006