SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT
----------X

In the Matter of

RICHARD A. BRUMMEL, JOSHUA DICKER and DAVID GREENGOLD,

Petitioners-Appellants,

-against-

THE TOWN OF NORTH HEMPSTEAD TOWN BOARD a/k/a TOWN COUNCIL, THE NASSAU COUNTY LEGISLATURE, NASSAU COUNTY EXECUTIVE EDWARD P. MANGANO, and THE ROSLYN WATER DISTRICT,

Respondents and Necessary Parties-Appellees

----------X

DOCKET NO. 2014-10641

AFFIDAVIT IN SUPPORT OF MOTION TO RE-ARGUE MOTION FOR PREFERENCE

Table of Contents

Exhibits

1 Affidavit in Support of Motion for Preference

2 Letter requesting permission of the Court to file a reply

3 Denial of permission to file a reply

4 Roslyn Water District affirmation in opposition to motion for preference

5 Nassau County affirmation in opposition to motion for preference

6 News article, The Roslyn Times, on imminent commencement of construction

7 Appellate TRO in this matter

8 Brummel Affidavit re Water Leak

State of New York, County of Nassau, SS:

Richard Brummel, 15 Laurel Lane, East Hills, New York 11577, Joshua Dicker, 17 The Tulips, Roslyn Estates, New York, 11576, and David Greengold, 29 Diana's Trail, Roslyn Estates, New York, 11576, being duly sworn, do depose and say: We are the Petitioners in this matter and we submit this affidavit in support of a motion under the authority of 22 NYCRR 670.6(a), and 670.7(b)(1), the rules of this Court.

Preliminary Remarks

1. *Pro se* Petitioner-Appellants have before this Court an appeal of the denial of their standing to sue in an article 78 proceeding they brought to challenge the environmental review of a project planned to construct a water decontamination facility in the recreational forest of a county park in Nassau County.

2. Petitioner-Appellants seek by the present motion to re-argue the denial of their motion for preference (Exhibit 1) in hearing their appeal.

3. Petitioner-Appellants filed the article 78 on June 24, 2014; the trial court granted a motion to dismiss based on standing on September 19, 2014; Petitioners sought and obtained an appellate TRO on November 19, 2014; the TRO was vacated on December 5, 2014; Petitioners perfected the appeal on April 3, 2015.

4. Petitioner-Appellants submitted a motion for calendar preference May 18, 2015; and the motion for preference was denied on May 21, 2015. Upon the advice of Court staff, *pro se* Petitioners moved by order to show cause in submitting the motion for preference.

5. Petitioner-Appellants were unaware the motion had been denied until about two weeks after the decision was issued.

6. Petitioners argued the interests of all parties would be served by an accelerated determination of standing because Respondents planned imminently to commence construction that would cause substantial environmental damage potentially unnecessarily, and the expenditure of large amounts of public funds which might ultimately be found unlawful and improper.

7. Ultimately, it is Petitioners hope and expectation that a finding of standing will lead to a judicially imposed recommencement of the environmental review -- which had not even included an Environmental Impact Statement, and then to a decision to rationally mitigate environmental impacts by moving the proposed "air stripper" facility out of the middle of an oasis of public woodland and into the adjacent water-district compound, as was originally planned.

8. Respondents submitted opposition to the motion, arguing among other things that the article 78 petition lacked merit and that Petitioners were dilatory in perfecting the appeal, and so deserved no such consideration from the Court. Further they argued that the motion for preference was a drastic remedy reserved for the most urgent cases.

9. Petitioners attempted to rebut the assertions by reply, for which they submitted a request to be permitted to file (Exhibit 2), but the papers were "rejected" because the Court explained there was no opportunity for reply on an order to show cause, even upon request (Exhibit 3).

10. Petitioners herein seek to re-argue the motion for preference and to respond to the Respondents' entirely erroneous assertions which have stood unanswered before the Court.

11. Petitioner-Appellants were unaware that the choice of moving by order to show cause would leave them defenseless to answer what has been a pattern of falsehood and distortion by Respondent-Appellees, and believe the Court will reconsider when the facts and law are fairly considered.

Argument

12. Petitioner-Appellants requested an accelerated disposition in this case because of the risky and fluid situation faced by all parties to the case that does not benefit from continued uncertainty from this litigation.

13. Respondent-Appellees prefer to gamble with the public's purse and natural resources, and surprisingly opposed the motion for preference.

14. The substance of their opposition, measured in verbiage, is that Petitioner-Appellants' case lacks merit, and that case law creates a high hurdle to preference.

15. Respondent-Appellees did not in any way challenge Petitioner-Appellants' stated belief that they plan to commence construction imminently, nor do they dispute the assertion that a determination by this Court sustaining Petitioner-Appellants' standing could lead to significant waste and to major changes in the project.

16. Respondent-Appellees offer no argument that granting preference would injure or prejudice them, and they do not challenge Petitioner-Appellants logic on the reasons for which expedited resolution benefits all parties.

17. Respondent-Appellees erroneously claim case law supports them.

18. Respondent-Appellees also clearly imply the courts have repeatedly and exclusively ruled against Petitioner-Appellants on the merits of injunctive relief in

this case.

19. Both assertions are false, *infra*, and the truth on both counts actually supports Petitioner-Appellants' argument for preference.

20. In their opposition to the motion, Respondent-Appellees also add new and erroneous claims to the record, as to both facts and the issues of this case.

21. Inasmuch as Respondent-Appellees Nassau and the RWD[1] stuff their affirmations with pleadings'-worth of argument, substantially echoing their appellate answering briefs, Petitioner-Appellants refer the Court to their own reply brief.

22. The Court's attention is directed to the reply brief in addressing such issues as the size of the contested project (Exhibit 4, Respondent-Appellee Roslyn Water District (hereafter "RWD") affirmation, pp. 8-9), the alleged deficit in water resources (RWD affirmation, p. 5), the scurrilous implication of financial motivation (Exhibit 5, Respondent-Appellee Nassau County (hereafter "Nassau") affirmation, pp. 3-4) -- all of which Petitioner-Appellants answer at length in their reply brief (Petitioner-Appellants reply brief p. 15 (size of project); p. 14, p. 15 (water supply) p. 33 ("professional" activist)).

Respondent-Appellees Did Not Claim Any Harm To Them If The Motion Were Granted

23. Respondent-Appellees did not offer any clear reason for opposing the motion based on its impact upon them. They argued simply for a principle of waiting one's turn (RWD affirmation, ¶23; Nassau affirmation, ¶¶6-9).

[1] No opposition to the motion for preference was received from Respondent-Appellee Town of North Hempstead.

24. They did not submit any reason that by granting a preference they themselves would be injured or prejudiced in any way.

25. In actuality, the interest of Respondent-Appellees may simply be to delay. It is a tactic -- not a legal argument -- meant to wear out the *pro se* Petitioner-Appellants, create a *fait accompli* on the ground that would generate public hostility to Petitioner-Appellants' continued efforts to obtain justice in this case, and thus to extra-judicially "win" the case by derailing it through simple attrition.

26. Creating the *fait accompli* could also create hurdles and complications to judicial action that would not exist while the project remained abstract (Petitioner-Appellants' uniform applications for injunctive relief protect their interests in reversing any actions taken with this lawsuit pending).

27. Such a strategy by the Respondent-Appellees should be offensive to the Court, as it undermines the rule of law, deprives the Court of its prerogatives, and serves to weaken the important protections of the State Environmental Quality Review Act ("SEQRA") that are fundamentally at issue here.

28. Absent a showing of harm to them, it appears Respondent-Appellees' opposition actually supplies the Court no real basis for denying Petitioner-Appellants' motion.

The Case Cited By Both Respondent-Appellees Actually Supports The Granting Of Preference In The Present Case

29. Respondent-Appellees' own citation of case-law supports granting a preference.

30. In the case cited by both RWD and Nassau, a preference was in fact granted because a plaintiff was said to be at strong risk of dying before trial could be

scheduled.

31. There was no requirement of a showing that the plaintiff had a likelihood of prevailing. All that was required by the Court was a showing that the matter was urgent because of the plaintiff's condition:

> "The order should be reversed and a preference granted.
>
> Plaintiff is 74 years of age, and he has made a strong showing, supported by an unreserved and unequivocal affidavit by a physician, that he will not survive for the length of time it will take for his case to come to trial."
>
> Dodumoff v. Lyons, 4 AD 2d 626 (First Dep't, 1957) at 627, (internal quotations and citations omitted) (where the Court granted preference in a personal injury case on authoritative showing the plaintiff medically would not survive until a trial on the regular court schedule)

32. The present case is similar. The public record indicates that Respondent-Appellees are planning to commence land-clearing and construction imminently (Petitioner-Appellants affidavit in support of motion for preference, ¶9) and Respondent-Appellees submitted no denial as to that fact.

33. Indeed there is further evidence on the public record -- in the media -- indicating the plan to commence work imminently (Exhibit 6, News article, The Roslyn Times).

34. In other words, similar to the situation in Dodumoff, the 'patient' is in a tenuous state: The subject Park and forest will soon be irreversibly damaged, and public funds expended in a manner that may prove to be unwarranted and counter-productive.

35. The objective facts thus warrant granting the preference in deciding the narrow matter before this Court, based on the case law as cited.

36. The fact that Petitioner-Appellants were denied a preliminary injunction is a

separate subject that should not prejudice the determination of the preference, as the grounds for relief and the consequences of the relief are entirely different.

Nassau Misstates Petitioner-Appellants' Track-Record On Injunctive Relief

37. Nassau alleges Petitioner-Appellants' case has no merit, hence there is no point to an accelerated hearing, and it submits as probative evidence the false assertion that Petitioner-Appellants were unsuccessful in obtaining injunctive relief "on five occasions" (Nassau affirmation, ¶ 5).

38. As stated above, the case law supports a preference independent of the merits of the underlying case, where the facts warrant it, so Nassau's argument is not dispositive. But it is also untrue.

39. Nassau's claim is untrue and calculatedly deceptive. Not only is the number essentially false, but the fact is that on three of the alleged occasions the Court did not deny the injunctive relief on the merits, but rather on a sense of 'accommodation' to all parties.

40. On the facts of this case, Petitioner-Appellants were in fact granted two temporary restraining orders ("TROs"), by the Supreme Court (Winslow, J., on June 24, 2014) and this Court (Sgroi, J., on November 19, 2014) (Exhibit 7).

41. On three, not five occasions, preliminary injunctions or temporary restraining orders were denied. On two of those occasions, the previously-granted temporary restraining orders were vacated on the same grounds. Respondent Nassau appears to double-count those decisions that vacated a TRO while denying the preliminary

injunction.

42. Nassau deliberately submits an inaccurate portrayal of the courts' generally sympathetic view of this case, and Nassau then deceptively twists the arithmetic to inflate its misrepresentation.

43. The trial Court specifically ignored the merits of the case in denying relief on two occasions encompassing three of the alleged denials. s

44. The trial Court denied the preliminary injunction and a later TRO because it said that its final decision in the case would be issued prior to any commencement of construction, and therefore the 'harm' was not 'imminent enough' to warrant relief (RWD appendix RA-32 to RA-35). Otherwise it agreed to re-visit the issue (*ibid*., RA-34-35).

45. This Court found Petitioner-Appellants' case compelling enough to grant a TRO (*supra*) but subsequently vacated it for reasons not specified[2].

46. Petitioner-Appellants surmise however the latter action was connected to the RWD's false and much-exploited claims of 'urgency' and "emergency" which Petitioner-Appellants have repeatedly disproved (A271ff.)[3].

47. Petitioner-Appellants' batting-average with injunctive relief actually reinforces the notion this case has merit, in contrast to Nassau's tricky math and implications to

---

[2] Second Department, Slip Opinion No: 2014 NY Slip Op 92002(U) Decided on December 5, 2014.

[3] Petitioner-Appellants continue to invoke the canard that the off-line water well "supplies" 21 percent of its water (RWD affirmation, p 2). But in reality this well may constitute that portion of its theoretical capacity, but at present it has been idle since November, 2013 (RWD appendix RA-39), See ¶¶74*ff.*

the contrary.

48. Furthermore the role of injunctive relief is not comparable to preference in hearing a case. The former would require potentially months of enforced inactivity by Respondent-Appellees, while the latter would require at most a small delay in the adjudication of other worthy matters.

49. Thus one has direct impact, the other indirect impact if any on issues that may or may not be time-sensitive.

50. While time itself is undeniably valuable to all Applicants before this Court, Petitioner-Appellants surmise only a relatively few cases waiting to be heard involve imminent irreversible environmental damage and improper expenditure of public money that may directly hinge on the Court's determination.

51. Thus Nassau inaccurately portrays the facts regarding injunctive relief in this case, falsely portraying the merits as well as misconstruing the relevance to the question of preference.

Respondent-Appellees Claim The Case Is Not About SEQRA Or Other Cognizable Cause of Action

52. Respondent-Appellee Nassau County claims the case is a backwards "NiMBY" ("not-in-my-backyard") case (Nassau affirmation, p. 2, ¶ 10; p. 4, ¶¶ 19-21), and Respondent-Appellee RWD claims the case has nothing to do with SEQRA, and that Petitioner-Appellants are merely seeking a platform for their antipathy to "air-strippers" (RWD affirmation, pp. 7-8).

53. Both assertions are absurd, cynical efforts to distract the Court's attention from

the merits -- a tactic that the Respondent-Appellees have used endlessly in this case, including the very issue now before this Court, standing to sue.

54. Respondent-Appellee RWD states: "[T]his case is not about SEQRA compliance" (RWD affirmation, p. 8).

55. This would be news to the trial Court which stated clearly the prayers for relief of this hybrid special proceeding all turned on violations of SEQRA (Appendix, RA18-19).

56. Inasmuch as "NiMBY" denotes the disingenuous effort to oppose an action on one basis where the true motive is to protect one's own self-interest, the accusation of engaging in "the exact opposite of NiMBY" (Nassau affirmation, p. 4, ¶ 20), as Respondent-Appellee Nassau County alleges, is in reality no indictment at all.

57. The two neighboring Petitioner-Appellants have lived with a water district compound in their midst for years and they do not object to the construction of the air-stripper there.

58. They do object to the destruction of a portion of the pristine forest they actively enjoy, and they oppose the unnecessary construction of a quasi-industrial facility with a fenced lighted compound and an access roadway over 300 feet within it -- which will drastically alter its undeveloped character.

59. They have participated in the environmental review process and have identified and documented numerous instances in which the SEQRA review was unlawfully deficient on substantive and procedural grounds.

60. They have argued that a full and proper SEQRA review, informed by the

compilation of an Environmental Impact Statement, will assure that the park and forest they value is extended all the protections required under state law.

61. Thus if the case a "NiMBY in reverse" it is indeed one motivated by the public good -- not private interest, and based on clearly articulated argument -- not disingenuous ulterior motives.

62. Further, it is a case squarely within the zone of interests of SEQRA.

63. Whether this case provides a "platform" for Petitioners to assert their antipathy to air-strippers or the RWD or anything else is untrue, irrelevant, immaterial, and offensive.

64. Of course the case does not exist in a vacuum and the wish to enforce SEQRA corresponds to a wish to protect the forest, but every SEQRA case is about a substantive issue to which plaintiffs believe the law would give them assistance, as opposed to an idle exercise, for otherwise no requisite "injury" would lie.

65. There could be no case providing more of a textbook example than the present case of (i) Petitioners with standing to sue; (ii) a case where SEQRA is applied for the core purpose of protecting the environment; and (iii) a case where the violations of SEQRA are blatant and facial.

Respondent-Appellee RWD Is Wrong That Petitioner-Appellants Were Dilatory In Perfecting The Appeal

66. Respondent-Appellee RWD incorrectly asserts that Petitioner-Appellants should be denied the preference because they were dilatory in perfecting the appeal (RWD affirmation, p. 9), but the record reflects a diligent effort to meet the requirements of

a full and persuasive appeal.

67. Petitioner-Appellants are *pro se* litigants who had limited experience with judicial appeals, their multiple procedural demands and their peculiar time-schedules.

68. Considerable time and effort went into preparing the application for an appellate TRO, and Petitioner-Appellants believed that they had six months to perfect. They were relieved that the TRO was granted and expected the preliminary injunction would follow.

69. When Petitioner-Appellants became aware in late December, 2014, that the preliminary injunction was denied, they accelerated their preparations to perfect the appeal, which required analysis of all the documents in the record, selection of those to be certified, and the extensive effort to write a compelling brief.

70. Contrary to the Respondent-Appellee's assertion, the brief required extensive analysis of the Petitioner-Appellants' own documents, those of three Respondent-Appellees, the Court's decision, and the record of a hearing.

71. With the full knowledge of the Respondent-Appellees, Petitioner-Appellants mistakenly wasted time seeking from Respondent-Appellees a stipulation and then certification regarding the hearing record -- although it was not germane to the appeal, as Petitioner-Appellants later realized.

72. Respondent-Appellees never assisted *pro se* Petitioner-Appellants in short-circuiting the time, effort, and delay by agreeing on the transcript or other issues raised with them.

73. Contrary to Roslyn Water District's assertions, the time spent on the perfecting

the appeal was necessary and required. Several weeks were lost when one Petitioner-Appellant was called out of town on an urgent matter of environmental litigation and had another legal issue on an unbending deadline, but otherwise the effort to perfect the appeal was diligent and unimpeachable.

Respondent-Appellee RWD Introduces Prejudicial False Claims About The Water "Emergency"

74. RWD repeats its discredited pressure-tactic regarding a purported water-deficit[4].

75. While the non-functioning water-well -- one of a total of eight -- may account for a certain percentage of the RWD's theoretical capacity, inasmuch it has been out of commission since November, 2013 (RWD appendix, RA-39), and there are no significant water usage-restrictions in place, the capacity is evidently superfluous and the claim the well "supplies 21% of the District's water supply" (RWD affirmation, p. 5, ¶ 11) is highly deceptive since presently the well accounts for none of the supply, nor has it for 19 months.

76. Yet the RWD repeats this assertion at least four times in its nine-page text (RWD affirmation, ¶ 4, 6, 11, 24). It does so for prejudicial effect, yet falsely so.

[4]All the while it asserts there is an "emergency" that favors its actions, lawn-sprinklers throughout its service-area are operating throughout the day and night, pools are full and fresh, and in one Petitioner's witnessing, a water-pipe pouring roughly three-hundred gallons of water per hour into the gutter was permitted by Respondent Roslyn Water District to continue over about 48 hours because, Petitioner was told by District staff, the homeowner was responsible for the pipeline at the curb of its property and the street, and the homeowner was being given a fair period of time to address the rupture. In 48 hours, at the estimated rate of leakage of 5 gallons a minute, or 300 gallons an hour, 14,400 gallons would have been wasted, with no intervention from the Roslyn Water District despite its knowledge, from a system allegedly in an "emergency" situation. Petitioner-Appellant Brummel happened by the scene, which was well-known to neighbors, on his way home on a quiet street. (Exhibit 8, Brummel Affidavit).

77. Furthermore, the RWD has given the Court no specifics of its overall current water-demand, its current capacity without the off-line well, or the dynamics in its water supply, such as increased pumping from elsewhere in the system.

78. Furthermore while repeatedly pointing to "restrictions" it offers no specifics -- and no rebuttal of Petitioner-Appellants dismissal of their actual significance (RWD affirmation, p. 5, pp. 8-9).

79. The RWD's argument against preference based on some 'sympathy' for its water situation is false and misleading.

Other Issues Raised By Respondent-Appellees

80. Respondent-Appellee Nassau County has been a harsh adversary and is true to form in its affirmation. As stated above, as Nassau repeats its answering brief almost verbatim, the Court would do well to consult Petitioner-Appellants' reply-brief for appropriate rebuttals of its factual distortions.

81. The reply-brief answers Nassau's fanciful claims about the "backwardness" of the case as a NiMBY case in reverse; the role of one Petitioner-Appellant who has been an environmental activist; and the falsely-alleged absence of expert opinion except that of Respondent-Appellees' water resources engineer in contesting the endless sequence of documented SEQRA-violations (Nassau affirmation p. 2 and p. 4; 4, pp. 3-4; p. 5, respectively; reply-brief p. 26; pp. 33ff.; pp. 23ff.).

Conclusions

82. Petitioner-Appellants have submitted a strong case that they have standing in

this matter, and that if this Court is to rule on the issue, the interests of all parties would be served by a prompt decision, assisted by a preference in scheduling.

83. Through their ignorance as *pro se* litigants, Petitioner-Appellants were unaware they could not file a reply in the motion for preference if they commenced the motion by order to show cause, and thus were blind-sided by the false and erroneous assertions of the Respondent-Appellees that prevailed.

84. Petitioner-Appellants thus seek to re-argue and properly challenge -- and correct -- the opposition to their motion.

85. Petitioner-Appellants have met the legal requirements of standing by their proven and uncontested regular use and enjoyment of the public forest at issue; by the scenic view of the forest two of them enjoy from their residences; by the injury the proposed project would cause; and by the relevance of SEQRA to the purpose of preventing such injuries.

86. If this Court sustains standing in Petitioner-Appellants' appeal, the case will be returned to the trial Court for a decision on the merits. A subsequent revisitation of the SEQRA process, if fairly undertaken, could ultimately invalidate the project, an issue best settled earlier rather than later.

87. A decision by this Court upholding Petitioner-Appellants' standing would signal to the parties that the required provisions of the SEQRA review will be enforced and the project should be scrutinized before counter-productive further actions are undertaken.

88. Whatever Respondent-Appellees motivation for fighting the scrutiny this special

proceeding seeks to impose, it is a disservice to the public interest and should be defeated as quickly as possible.

Nassau County, New York
June 17, 2015

_____

RICHARD A. BRUMMEL
15 Laurel Lane
East Hills, N.Y. 11577
(516) 238-1646

_____

JOSHUA DICKER
17 The Tulips
Roslyn Estates, N.Y. 11576
516-478-5451

_____

DAVID GREENGOLD
29 Diana's Trail
Roslyn Estates, N.Y. 11576
516-993-9522

Sworn before me this _____ day of June, 2015

_____

NOTARY PUBLIC