STATE OF NEW YORK
SUPREME COURT :: COUNTY OF ERIE

FRANK VACANTI, CAROL VACANTI, and DOMINIC LoVALLO,

Plaintiffs,

v.

The ESTATE of PETER K. COUREY, and NORMAN COUREY as Administrator of the Estate of Peter K. Courey

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION AND IN FURTHER SUPPORT OF MOTION TO DISMISS

Index No. 2006-6955

A. Plaintiffs Were Required to Exhaust their Administrative Remedies and Have Failed to State a Cause of Action under Section 268 of the Town Law

1. Section 268(2) of the Town Law is Not Designed to Provide Aggrieved Taxpayers an Alternate Means to Challenge the Town's Decision to Issue a Permit

Section 268(2) of the Town Law is designed to address the situation when a homeowner or business owner fails to obtain a building or use permit, or acts in violation of a permit, and the Town refuses for whatever reason to take action to enforce its zoning laws. This is the "official lassitude or nonfeasance in the enforcement of zoning laws" referenced by the Court of Appeals in Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977). Section 268(2) is only available when the Town has not taken action and the Town's interpretation of its Zoning Code is not at issue. In such a case, there is no determination of the Town to be appealed to the Zoning Board of Appeals, and no determination of the Zoning Board of Appeals to be challenged in a proceeding under Article 78 of the CPLR.

Section 268(2) is designed to provide a remedy where elected officials refuse to take

action. Where the actions of those officials are challenged, Section 268(2) gives way to Section 267-a and the Zoning Board of Appeals and Article 78 processes. When the Town has issued a building permit, it has taken action with respect to that building's compliance with the zoning laws, and has determined, correctly or incorrectly, that the building complies with the zoning code. Any complaint with the Town's interpretation of its zoning code cannot be characterized as one of "lassitude and nonfeasance," but one of incompetence and misfeasance. The Town's alleged misfeasance in any incorrect interpretation of its zoning code can only be challenged in an appeal to the Zoning Board of Appeals. An unsuccessful appeal to the Zoning Board of Appeals can only be challenged in a proceeding under Article 78 of the CPLR.

Stated another way, an allegedly aggrieved taxpayer cannot use Section 268(2) to challenge the Town's determination that a permit should issue, because under Section 268(2), an aggrieved taxpayer steps into the shoes of the Town. If the Town has already issued a permit, the Town has moved beyond the determination that the proposed construction complies with the Town's Zoning Code. The aggrieved taxpayer cannot take action that is inconsistent with the position of the Town. Forget v. Raymer, 65 A.D.2d 953, 954, 410 N.Y.S.2d 483, 484 (4th Dep't 1978) ("In this case the town could not question the validity of defendants' use of the subject property because the town building inspector and the Town Zoning Board of Appeals had declared formally that the use was a legal and nonconforming use. . . . Inasmuch as the town officials could not institute legal action to enjoin the use, the plaintiffs may not do so"); Beresford Apartments, Inc. v. City of N.Y., 238 A.D.2d 218, 219, 656 N.Y.S.2d 607 (1st Dep't 1997) ("a taxpayer's suit is not a vehicle for . . . reviewing determinations supposedly made in violation of law"). Section 268(2) is not unique in this regard. This section is analogous to the

many citizen suit provisions of environmental statutes which do not permit a suit if the government is taking or has already taken action to enforce the law. See, e.g., 42 U.S.C. § 7604 (CAA § 304) (Clean Air Act); 33 U.S.C. § 1365 (FWPCA § 504) (Clean Water Act); 42 U.S.C. § 6972 (SWDA § 7002) (Resource Conservation and Recovery Act); 42 U.S.C. § 9659 (CERCLA § 310) (Comprehensive Environmental Response, Compensation, and Liability Act); 15 U.S.C. § 2619 (TSCA § 20) (Toxic Substances Control Act); 16 U.S.C. § 1540(g) (ESA § 11(g)) (Endangered Species Act).

The affidavit of Plaintiffs' counsel suggests:

> By adopting the Defendants' arguments, once a determination was made (which no determination was ever made in this case), an appeal would be taken to the Zoning Board of Appeals, and if that were unsuccessful, then an Article 78 proceeding would be brought; once a decision was reached in the Article 78 proceeding, the Plaintiffs could never bring an action under Town Law Section 268, since such an action would be barred by the doctrine of res judicata by the determination that was made in the Article 78 proceeding. . . . The Defendants' arguments make absolutely no sense, since Town Law Section 268 would then have absolutely no purpose and would never be invoked.

Lorigo Affidavit sworn to on Sept. 19, 2006 at ¶¶ 39 & 40.

Contrary to Plaintiffs' argument, Section 268(2) is quite useful, even where it is not available to parties seeking to overturn an unfavorable interpretation of the Zoning Code by the Building Inspector or Zoning Board of Appeals. Its use is limited, however, to situations where the Town has failed to interpret its zoning laws by issuing or denying a permit, or has failed to enforce the terms of an existing permit, and is not available where the Town's interpretation is alleged to be incorrect. If Plaintiffs' counsel were correct, there would be no need to appeal the Town's unfavorable interpretation of the Zoning Code to the Zoning Board of Appeals and to comply with the short appeal time and the deferential standard encountered in an Article 78

proceeding.

2. Plaintiffs' Failure to Exhaust Administrative Remedies is Not Excused by Their Asserted Right to Seek Injunctive Relief

Where, as here, the issue before the Court is the proper interpretation of the Zoning Code, and the Town has interpreted the Zoning Code and issued the requisite permit so that there has been no "official lassitude or nonfeasance," the proper procedure is an appeal to the Zoning Board of Appeals. Insofar as Plaintiffs seek declaratory judgments as to the validity of the Building Permit and the compliance or conformity of the property improvements with the Town of Grand Island Zoning Code, this matter should be addressed by the Zoning Board of Appeals, because the Zoning Board of Appeals has the expertise to properly decide such issues. The Haddad case cited by the Plaintiffs (see Lorigo Affidavit sworn to on Sept. 19, 2006 at ¶ 27) stands for this proposition. Haddad goes a long way toward reconciling the apparently inconsistent rules articulated in the Lesron (1st Dep't 1961) case cited by Plaintiffs and the Sloane (2d Dep't 1996), Levine (2d Dep't 2003), and Marlowe (3d Dep't 2004) cases cited by Defendants. As described in Haddad, there is nothing that would prevent an appeal to the Zoning Board of Appeals and a simultaneous application to the Supreme Court for an injunction. Haddad distinguished Lesron, and made clear that a failure to exhaust administrative remedies will not be excused by a plaintiff's decision to seek injunctive relief. In Haddad, the Second Department "directed [the plaintiffs] to pursue relief in the Board of Standards and Appeals to determine the legality of the defendants' proposed construction under the New York City Zoning Resolution," and disposition of the action was "stayed pending that determination." Haddad v. Salzman, 188 A.D.2d 515, 516, 591 N.Y.S.2d 193, 194 (2d Dep't 1992). The Court explained:

The plaintiffs' first cause of action seeks a declaratory judgment on the legality,

> within the purview of the New York City Zoning Resolution, of various elements of the construction to be performed on the defendants' property. Under the circumstances of this case, application of the provisions of the zoning ordinance to the facts herein is peculiarly within the specialized knowledge and experience of the administrative bodies authorized to administer and enforce the ordinance. Although the instant action should not be dismissed for failure to exhaust administrative remedies, pursuant to the doctrine of primary jurisdiction, the plaintiffs should pursue relief in the New York City Board of Standards and Appeals for resolution of the numerous factual issues raised by their cause of action for declaratory relief, and disposition of the action is stayed pending that determination.

Haddad v. Salzman, 188 A.D.2d 515, 517, 591 N.Y.S.2d 193, 195 (2d Dep't 1992) (emphasis added).

Plaintiffs' counsel appears to be confusing the injunction remedy with the underlying substantive law applicable to the ultimate determination relative to whether such an injunction should issue. The need to pursue the injunction remedy in the Supreme Court and the inability of the Zoning Board of Appeals to provide complete relief to the plaintiffs (if they are, in fact, entitled to that relief) does not end the inquiry.

For example, if a plaintiff had two causes of action, one alleging that a permit which was issued by the Town was issued in error, and another alleging that the same permit was being violated, that case could be commenced prior to exhausting administrative remedies in the Supreme Court with a demand for an injunction and a request for a temporary restraining order and a preliminary injunction. See Lesron Junior, Inc. v. Feinberg, 13 A.D.2d 90, 213 N.Y.S.2d 602 (1st Dep't 1961). But, at the same time, such a plaintiff would also be required to seek review by the Zoning Board of Appeals to determine whether the building inspector was correct in his or her determination that the issuance of a building permit was appropriate, in light of the relevant sections of the Zoning Code. See Haddad v. Salzman, 188 A.D.2d 515, 591 N.Y.S.2d 193 (2d Dep't 1992). This is necessary because the decision of the Town is entitled to deference

and the Court must review the decision of the Zoning Board, and cannot simply make a de novo decision on the propriety of the issuance of the permit. Once an appeal to the Zoning Board of Appeals is determined, the review of that decision in an Article 78 proceeding might be consolidated with the original lawsuit. Under such circumstances, the Court would decide whether the permit was being violated. That issue would be decided with a de novo standard of review, whereas the decision of the Zoning Board of Appeals would be entitled to deference and would not be overturned unless the determination was arbitrary, capricious, or otherwise inconsistent with the law.

The Lesron case stands for the proposition that a party should not be prevented from complete relief based on a failure to first exhaust administrative remedies. In this context, and in light of Haddad, Lesron does not stand for the proposition that administrative remedies need not be pursued, but only that they need not be pursued prior to the commencement of an action seeking an injunction in the Supreme Court. The New York Practice Guide explains:

> Although a private party may bring an administrative appeal at the board of appeals when it seeks to challenge the decision of an administrative agency . . . , a private plaintiff may not be required to appeal administratively the decision which it challenges prior to commencing judicial proceedings if the party seeks immediate injunctive relief. See, e.g., Lesron Junior, Inc. v. Feinberg, [13 A.D.2d 90, 213 N.Y.S.2d 602 (1st Dep't 1961)]. See also Haddad v. Salzman, 188 A.D.2d 515, 591 N.Y.S.2d 193 (2d Dep't 1992) (one suffering special damages as a result of violation of zoning ordinance may bring an action for injunction and damages and is not required first to appeal to Board of Standards and Appeal, where Board is unable to provide adequate and complete relief in the form of an injunction).

2-16 N.Y. Practice Guide: Real Estate § 16.06(3)(b) (Matthew Bender 2006) (emphasis added).

Haddad clarifies that an administrative appeal may be brought concurrently with an action in the Supreme Court for injunctive relief. However, it remains necessary that the plaintiffs exhaust administrative remedies, and neither that requirement nor its accompanying

statute of limitations is eliminated by virtue of the plaintiffs' asserted right to seek immediate injunctive relief.

3. The Town's Decision to Issue the Building Permit is Entitled to Deference, Based on the Town's Expertise in the Interpretation of its Zoning Code

Plaintiffs attempt to avoid the expertise of the Zoning Board of Appeals and to avoid the deference afforded the Zoning Board of Appeals by the Supreme Court in an Article 78 proceeding. Plaintiffs instead attempt to avail themselves of a direct action against the Defendants under Section 268(2), with no deference to the Zoning Board, and indeed no involvement of the Town whatsoever. Section 268(2) should not be construed in a manner which would allow aggrieved taxpayers to avoid the deference afforded the Town's interpretations of its own Zoning Code.

It makes sense that where the Town has granted a building permit, as it did in this case, its interpretation of its Zoning Code should be afforded the deference warranted by its specialized knowledge and experience. It also makes sense that where a building permit has been granted and the time for appeal to the Zoning Board of Appeals has passed, the owner should be entitled to build without the threat that a neighbor, who disagrees with the Town's interpretation of the Zoning Code that gave rise to the issuance of the permit, will attempt to have that issue revisited by a Judge at any future time, without limitation. Under these circumstances, it would be inappropriate for Plaintiffs to proceed under Section 268(2).

On the other hand, had the Town failed to act, as it might by a failure to require a defendant proceeding in the absence of a proper building or use permit to cease work until he or she has obtained such a permit, or as it might by a failure to enforce the terms of a permit it has

issued, then the Town would have been guilty of "official lassitude or nonfeasance" by its failure to enforce its Zoning Code, and there would be no interpretation of the Zoning Code to which the Court would be required to defer. This Court may then have appropriately interpreted the Code on its own under Section 268(2), and the standard of review would not be deferential, but de novo. This is not the case here.

Plaintiffs' counsel attempts to recharacterize the action required from the Town under Section 268(2) as a responsive letter from the Town to the allegedly aggrieved taxpayer. The statute requires "the town to institute any such appropriate action or proceeding" within 10 days of a written request. N.Y. Town Law § 268(2) (Consol. 2006). There would be nothing appropriate about an action by the Town to enjoin the construction of a building if that building is being constructed according to plans that the Town itself has reviewed and determined to be consistent with the zoning laws, as the Town of Grand Island did in this case when it issued the building permit for the construction of the home at 3741 East River Road.

4. The Town's Interpretation of the Term "Footprint" is a Rational and Practical Interpretation Which Relieves the Building Inspector of the Responsibility of Carrying out the Work of a Surveyor Upon its Review of Each Permit Application.

The permit issued on July 7, 2005 by the Town of Grand Island required that the proposed structure be no closer to the side lot line than the prior structure. The prior structure was approximately six feet from the side lot line at its closest point. The structure as built is 6.17 feet from the side lot line at its closest point. See Survey dated August 14, 2006 attached at Tab 3. Based on these facts, the Town of Grand Island determined that the new structure was built within the footprint of the former structure. The proposed structure was within the area that included the 12-foot side yard setbacks, as reduced by the pre-existing non-conforming use.

That is, 12 feet reduced to 6 feet on the northwest side, and 12 feet reduced to 5 feet at the detached garage on the southeast side. See Building Permit dated July 7, 2005 attached as Exhibit 2 to the Affidavit of Norman Courey sworn to on August 23, 2006 ("6.1' Min" and "Detached Garage 5' Min Sideyard").

This is a rational interpretation of the undefined term "footprint" – the side yard setbacks required by the Code as reduced by the pre-existing non-conforming use. Plaintiffs' position is that the new structure can at no point be any closer than the old structure, whereas the Town has interpreted the Code to require only that the new structure be at least as far from the side lot line as the former structure at its nearest point. This is a rational interpretation of the Code.

It is also a practical interpretation of the Code. By contrast, Plaintiffs' interpretation of the Code, while perhaps technically rational, is extremely impractical and would require the Building Inspector to act as a surveyor. It would also require the Town to preserve the arbitrary and crooked lines and angles of older former structures like the one which had previously existed at 3741 East River Road. Under these circumstances, the Zoning Board of Appeals would uphold the Building Inspector's decision to issue the permit and the Supreme Court would defer to that decision as neither arbitrary, capricious, nor otherwise contrary to law. The permit is validly issued, Defendant has complied with its terms, and the time to appeal the issuance of the permit has expired.

B. Statute of Limitations

The statute of limitations ran long ago on any appeal by Plaintiffs to the Zoning Board of Appeals of the Town of Grand Island's issuance of the building permit. Plaintiffs bring this action in an attempt to avoid the timeliness requirements associated with the Zoning Board

appeal process and the statute of limitations associated with an Article 78 proceeding. Plaintiffs' position would make an appeal to the Zoning Board of Appeals consistent with Section 267-a an option instead of a requirement. A property owner's right to build based on the issuance of a permit by the Town would never be settled, but would be subject to an action under Section 268(2) even ten years later. This result makes sense for the landowner who fails to get a permit, but for one who follows the proper procedure and obtains a permit, such a rule would be unnecessarily harsh.

Consistent with Plaintiffs' erroneous interpretation of Section 268 of the Town Law, Plaintiffs suggest that their claims are not subject to the defense of laches. Plaintiffs in this action may not properly step into the shoes of the Town under Section 268, and therefore, like any other private plaintiff, Plaintiffs are not entitled to enjoy protection from the laches defense.

Plaintiffs' analysis of the statute of limitations implications under Section 267-a is similarly misguided. Plaintiffs' counsel suggests:

> Therefore, if the Defendants' arguments were correct, an applicant for a building permit could act in concert with the town to obtain a building permit clearly in violation of the Town Code, and then wait 61 days to start any construction; by adopting the Defendants' reasoning, even though no one was on notice that any building permit was granted until construction commenced, by the time construction commenced, it would be too late to challenge the issuance of the illegal building permit, since an appeal to the Zoning Board of Appeals would be untimely, and an action under Section 268 would be barred because the appeal was not taken to the Zoning Board of Appeals.

Lorigo Affidavit sworn to on Sept. 19, 2006 at ¶ 66. What Plaintiffs' counsel has failed to recognize is the principle that the time to appeal is tolled when the prospective appellant does not have notice of the decision to be appealed:

> [W]here the prospective appellant has no notice of the decision from which the appeal is taken, the period of limitations on the filing of an appeal may be tolled until

> the appellant becomes chargeable with notice. Farina v. Zoning Bd. of Appeals, 2002 N.Y. App. Div. LEXIS 5173 (2d Dep't 2002); Highway Displays, Inc. v. Zoning Bd. of Appeals of the Town of Wappinger, 32 A.D.2d 668, 300 N.Y.S.2d 605 (2d Dep't 1969). See also Pansa v. Damiano, [14 N.Y.2d 356, 251 N.Y.S.2d 665] (1964); Cowger v. Mongin, 87 A.D.2d 932, 450 N.Y.S.2d 81 (3d Dep't 1982), cert. denied, [459 U.S. 1095] (1983) (holding timely an appeal commenced thirty days after the administrative agency formally rejected a request for revocation of the permit). A prospective appellant is required to act promptly once it becomes charged with notice lest its rights be lost by reason of laches or undue delay. Spandorf v. Building Inspector of the Incorporated Village of East Hills, 193 A.D.2d 682, 598 N.Y.S.2d 28 (2d Dep't 1993) (filing of appeal before Board of Appeals was untimely, where petitioners waited approximately one year after they discovered issuance of certificate of occupancy and of annual swimming pool use permit); Maroney v. Friere, 74 Misc. 2d 339, 343 N.Y.S.2d 183 (Sup. Ct. Westchester County 1973).

2-16 N.Y. Practice Guide: Real Estate § 16.06(3)(a) (Matthew Bender 2006) (emphasis added).

The law provides for situations where it would be inequitable to deny review to an aggrieved party that moved quickly to take action after learning of the decision to be appealed. The plaintiffs in this matter did not need the benefit of these provisions, because within two weeks of the issuance of the building permit at issue, one of the plaintiffs had hired an attorney and that attorney had written a letter to the Town of Grand Island requesting a "cease work order." See Letter from John J. Lavin to the Town of Grand Island Zoning Inspector dated July 20, 2005 (attached as Exhibit 4 to the Affidavit of Norman Courey, M.D. sworn to on August 23, 2006); see also Phoenix Tenants Ass'n v. 6465 Realty Co., 119 A.D.2d 427, 431, 500 N.Y.S.2d 657, 661 (1st Dep't 1986) ("Such delay was particularly inexcusable in this case where plaintiffs' counsel had been aware of the statute, and had even written articles about it, for some time prior to the commencement of the action"). The time to appeal to the Zoning Board of Appeals expired no later than sixty days after the date of that letter.

C. Plaintiffs Should be Denied the Equitable Remedy Based Upon Their Own Inequitable Conduct

Plaintiffs cite potentially misleading facts in support of their laches arguments. Contrary to Plaintiffs' assertion that Dr. Courey first contacted the contractor on July 26, 2006, the truth is that Dr. Courey gave the contractor the go-ahead on that date. Consequently, the Estate of Peter K. Courey became contractually obligated to build the home at 3741 East River Road on July 26, 2006.

Moreover, work had in fact commenced prior to the service of the Complaint: lumber had been purchased. There was nothing clear about the likelihood of an amicable resolution of this matter, since Plaintiffs' counsel was ignoring a letter attempting to resolve the issues as they were drafting and serving the Complaint. See Letter from Frank J. Jacobson of Law Office of Ralph C. Lorigo to Paul Michael Hassett of Brown & Kelly, LLP dated August 4, 2006 (attached as Exhibit 12 to the Affidavit of Norman Courey, M.D. sworn to on August 23, 2006).

Finally, while the motion was filed on August 10, 2006, on August 16, 2006, Defendants' counsel contacted Plaintiffs' counsel to request an extension of its time to answer. See Letter from R. Hugh Stephens to Frank J. Jacobson of Law Office of Ralph C. Lorigo dated August 16, 2006, attached at Tab 1 (confirming grant of request for extension). At no time during that conversation did Plaintiffs' counsel give Defendants' counsel any indication that an order to show cause had been filed ex parte. See Letter from Ralph C. Lorigo to the Estate of Peter Courey accompanying Order to Show Cause, dated August 16, 2006, received by Stephens & Stephens on August 21, 2006, attached at Tab 2. This is not somehow, in the words of Plaintiffs' counsel, "unseemly," but having decided not to disclose the existence of the order to show cause, Plaintiffs' counsel should not be permitted to argue that Defendants should have somehow known of the progress of this action prior to receipt of the Order.

The important questions relative to the letter sent by Ralph C. Lorigo to the Town of Grand Island and copied to Dr. Saran, the potential purchaser of 3741 East River Road, is not whether it contained something "unseemly," but whether Plaintiffs' counsel's conduct is actionable. There is no requirement that a potential purchaser be copied on a letter to the Town under Section 268(2) of the Town Law. The important question is whether copying the potential purchaser would support a rational juror's finding that such conduct constituted third-party interference with a contract or an abuse of process, and whether that conduct was the proximate cause of significant damages to the Estate. These are not the main questions relevant to the disposition of this motion, but the Court would certainly be supported in a determination that Plaintiffs are not guilty of simple lassitude by their failure to take action at the time of the first letter to the Town of Grand Island, less than two weeks after the issuance of the building permit and within a week of the pouring of the foundation, but instead are guilty of a tactical use of delay in the pursuit of a specific legal outcome. An appeal of the decision of the Building Inspector to the Zoning Board of Appeals followed by a challenge of that decision in the Supreme Court in an Article 78 proceeding is an uphill battle, and losing two appeals under such circumstances can be bad for business. By contrast, waiting until there is a potential purchaser and a signed contract and only at that point threatening legal action, thereby killing the deal, creates an opportunity for the plaintiff to purchase the property at a significant discount. This is certainly one way to interpret the series of events that led up to Mr. Vacanti's offer to purchase the property in the wake of the collapse of the contract with Dr. Saran. This inequitable conduct would support the Court's denial of Plaintiffs' requests for relief.

D. This Action Should be Removed to the Surrogate's Court

To the extent that this Court cannot immediately dismiss this action, Defendants ask that this action be removed to the Erie County Surrogate's Court consistent with CPLR 325(e), which states, in relevant part,

> Where an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove the action to such surrogate's court upon the prior order of the surrogate's court.

N.Y. C.P.L.R. § 325(e) (Consol. 2006); Moser v. Pollin, 294 F.3d 335 (2d Cir. 2002) ("Despite the existence of concurrent subject matter jurisdiction, 'the Supreme Court ordinarily refrains from exercising the concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court where the matter is pending'") (citing In re Estate of Moody, 6 A.D.2d 681, 176 N.Y.S.2d 1 (1st Dep't 1958) ("[I]n the absence of special circumstances or where the Surrogate has already acted, the Supreme Court has exercised its concurrent jurisdiction sparingly")).

"[A]lthough CPLR 325(e) 'does not contain mandatory language,' this section 'expresses a preference for removal to Surrogate's Court of all matters affecting the administration of a decedent's estate.'" Hoffman v. Sitkoff, 297 A.D.2d 205, 745 N.Y.S.2d 539 (1st Dep't 2002).

> While the Supreme Court and Surrogate's Court [may] have concurrent jurisdiction in matters involving [a] decedent's estate, the Supreme Court's jurisdiction is general whereas the Surrogate's Court's jurisdiction is specialized to handle these matters. The Surrogate's Court has a staff specially geared to handle such matters which provides the expertise and resources needed to oversee the "detailed and painstaking statutory procedure for the administration of the affairs of decedents."

McGee-Ross v. Cook, 194 Misc. 2d 510, 755 N.Y.S.2d 559 (Sup. Ct. Nassau County 2002). Further, "the Supreme Court has jurisdiction to . . . transfer to any other court any action in the Supreme Court. . . . It is th[e] [Surrogate's] [C]ourt's duty to accept the transfer if it so be

ordered by the Supreme Court." In re Meister, 55 Misc. 2d 1050, 287 N.Y.S.2d 511 (Surr. Ct. N.Y. County 1968).

"It is well settled that Surrogate's Court is a court of limited subject matter jurisdiction and may only entertain those proceedings and exercise those powers conferred upon it by statute." In re Wallace, 239 A.D.2d 14, 667 N.Y.S.2d 768 (3d Dep't 1998). Article VI, Section 12 of the New York State Constitution provides, in relevant part, a broad mandate:

> d. The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.
>
> e. The surrogate's court shall exercise such equity jurisdiction as may be provided by law.
>
> f. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article.

N.Y. CONST. art. VI, § 12. Consistent with the Constitution's provision for the jurisdiction of the Surrogate's Court "as may be provided by law," the Surrogate's Court Procedure Act (SCPA) provides that authority at Section 201 (entitled "General jurisdiction of the surrogate's court"):

> 1. The court has, is granted and shall continue to be vested with all the jurisdiction conferred upon it by the Constitution of the State of New York, and all other authority and jurisdiction now or hereafter conferred upon the court by any general or special statute or provision of law, including this act.
>
> 2. This and any grant of jurisdiction to the court shall be deemed an affirmative exercise of the legislative power under § 12(e) of article VI of the Constitution and shall in all instances be deemed to include and confer upon the court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred.
>
> 3. The court shall continue to exercise full and complete general jurisdiction in law

> and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

N.Y. Surr. Ct. Proc. Act. § 201 (Consol. 2006). The New York Court of Appeals recounted the history of Section 201 in In re Piccione, where the Court stated,

> the obvious effect of [the 1962 amendment to Section 201 of the SCPA], among other things, was to secure the advances in Surrogate's Court jurisdiction over matters 'relating to' the affairs of decedents against the possibility of legislative withdrawal. Absent the need for specific statutory authorization for a particular proceeding, the emphasis now shifted so that, 'for the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate.'

In re Piccione, 57 N.Y.2d 278, 456 N.Y.S.2d 669 (1982). "Piccione is considered to have expanded the jurisdiction of the Surrogate's Court such that, rather than finding jurisdiction based solely on the type of relief requested, the Surrogate will instead look broadly to the suit's overall connection to the decedent's estate." Moser v. Pollin, 294 F.3d 335 (2d Cir. 2002) (citing 1 Warren's Heaton on Surrogate's Courts § 2.04(2) (6th rev. ed. 2002); 1 Joseph A. Cox, Joseph T. Arenson & Standish F. Medina, New York Civil Practice § 201.12 (Mar. 2002) ("Since the decision in In re Piccione, the trend has been to find that the Surrogate's Court has subject matter jurisdiction over a particular matter pending before it")). "The Surrogate's Court possesses ancillary and incidental jurisdiction to resolve matters in dispute between the parties which must be resolved in order to effect a complete disposition of a matter properly before it." In re Kummer, 93 A.D.2d 135, 461 N.Y.S.2d 845 (2d Dep't 1983).

Matters found to relate to the affairs of a decedent or the administration of his estate

include matters involving real property claimed to be an asset of a decedent's estate. See In re Barrie, 134 Misc. 2d 440, 511 N.Y.S.2d 524 (Surr. Ct. Nassau County 1987) ("The proceeding at hand presents a controversy over the ownership of real property which affects the decedent's estate because the house is claimed to be an asset thereof. The dispute, therefore, falls squarely within the parameters of this court's enumerated constitutional powers. . . . This court . . . retains jurisdiction of the proceeding pursuant to SCPA 201 and 202. To do otherwise would be a tacit indorsement of the delay and extra expense attendant to shunting litigants between courts or giving preference to form over the substance of a petition").

The property at 3741 East River Road that is the subject of this action is an asset of the Estate of Peter K. Courey. The improvements made on that property directly affect the administration of the Estate in that the solvency of the Estate depends upon those improvements. This is therefore a matter which should be removed to the Surrogate's Court.

E. Counsel Fees Are Appropriately Included in a Calculation of Damages for Purposes of Ascertaining the Amount of an Undertaking

Plaintiffs suggest in error that "there is . . . no statute allowing for the recovery of counsel fees" and that "CPLR Rule 6312[,] which specifically addresses the issue, makes no mention of the Defendants' entitlement to recover attorney's fees." Lorigo Affidavit sworn to on Sept. 19, 2006 at ¶¶ 192-194. On the contrary, CPLR 6312(b) provides for an undertaking in the amount of "all damages and costs which may be sustained by reason of the injunction." N.Y. C.P.L.R. § 6312(b) (Consol. 2006). This may include counsel fees sustained by reason of the injunction. Bausch & Lomb, Inc. v. Hydron Pacific, Ltd., 82 Misc. 2d 576, 579, 371 N.Y.S.2d 292, 297 (Sup. Ct. Monroe County 1975) ("Defendants are entitled to their legal fees and expenses incurred and to be incurred in making their application to assess their damages"); Marietta Corp.

v. Pacific Direct, Inc., 9 A.D.3d 815, 817, 781 N.Y.S.2d 387, 388 (3d Dep't 2004) ("counsel fees and damages to a business, including reduced sales, lost contracts and lost profits, are recoverable where it can be demonstrated that such losses have actually been suffered by the claimant"); Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement, 232 A.D.2d 216, 648 N.Y.S.2d 25 (1st Dep't 1996) ("Defendant is also entitled to counsel fees incurred, not only in relation to the injunction itself, but also in litigating the issues at trial and appeal since they were inseparable from the issues pertaining to the injunction. Indeed, the trial was the only means by which defendant was able to remedy the injunction"); A & M Exports v. Meridien Int'l Bank, 222 A.D.2d 378, 380, 636 N.Y.S.2d 35, 37 (1st Dep't 1995) ("Such an award may include counsel fees incurred in connection with an 'erroneously granted temporary restraining order' [or preliminary injunction], where supported by the record"); Drexel Burnham Lambert, Inc. v. Ruebsamen, 171 A.D.2d 457, 567 N.Y.S.2d 40, 41 (1st Dep't 1991) ("respondents' attorneys' fees incurred in connection with vacating the restraint are recoverable as damages pursuant to CPLR 6312(b)"); cf. In re Simonsen v. Zoning Board of Appeals of Town of Huntington, 24 A.D.3d 787, 788, 806 N.Y.S.2d 724, 726 (2d Dep't 2005) ("The Supreme Court erred in determining that [respondents] were entitled to recover certain awards of counsel fees in the amount of $5,000, which were solely related to a prior appeal taken from a judgment of the Supreme Court. . . . Such counsel fees were not incurred 'by reason of the injunction'").

F. The Court's Inquiry is Not Limited to the Four Corners of the Complaint

Counsel begins with a suggestion that the Court's inquiry should be limited to the four corners of the complaint. While that contained within the four corners of the complaint is central

to a determination of a motion to dismiss, CPLR 3211(c) provides that,

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

N.Y. C.P.L.R. § 3211(c) (Consol. 2006); Lustig v. Congregation B'Nai Israel of Midwood, 62 Misc. 2d 216, 308 N.Y.S.2d 480, 482 (Sup. Ct. Kings County 1970) ("The practice in the State of New York under N.Y. C.P.L.R. 3211 differs from Fed. R. Civ. P. 12(b) in two respects, in that in New York State '(1) the court apparently has no discretion to refuse to receive matter outside the pleadings if a party chooses to present it, and (2) the court has discretion as to whether to treat the motion as one for summary judgment'"); 1 N.Y. Civil Practice: CPLR P 3211.43 ("CPLR 3211(c), which expressly authorizes the treatment of a motion under CPLR 3211(a) as a motion for summary judgment, implicitly authorizes searching of the record on a motion by the plaintiff under CPLR 3212(b) and a dismissal of the complaint if warranted by the record. Accordingly, as a general rule, the court on a motion to dismiss a defense may search the record and dismiss the complaint"). While Plaintiffs ignore, and would prefer that this court ignore, certain facts not set forth in plaintiffs' complaint, specifically the fact that Defendants have received and relied upon a valid building permit issued by the Town of Grand Island, CPLR 3211(c) discourages such ignorance.

G. Conclusion

For the reasons stated herein and in the memorandum of law dated August 24, 2006, Plaintiffs' motion should be denied, Defendants' motion should be granted, and this action should be dismissed with prejudice.

Dated: Buffalo, New York
November 6, 2006

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