Warren 1983 (4/25)

- Brief in Opposition to Motion for Summary Judgement
- ~~Order~~ - Order (1982) - signed

Pgs. 18

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LAWRENCE V. STEINBAUM, Plaintiff; vs. BOARD OF ADJUSTMENT OF THE TOWNSHIP OF WARREN AND THE TOWNSHIP OF WARREN, a municipal corporation of the State of New Jersey; Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY Docket No. L-59706-81 Civil Action

BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

GLUCKSMAN & WEITZMAN
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(201) 267-2900
Attorneys for Plaintiff

PHILIP R. GLUCKSMAN, ESQ.
On the Brief

STATEMENT OF FACTS

Lawrence V. Steinbaum is the owner of certain premises located on Mount Horeb Road and commonly known as Block 313, Lots 22, 23, 24, 33B, as shown on the Tax Map of Warren Township. The above property consists of 30.09 acres in an area located approximately one mile from the center of Warren Township and is an irregular flag lot and presently contains a lake and open fields.

The subject parcel is bounded on several sides by industrial uses and there are hosts of other non-residential uses immediately adjacent to the site. The residences that are immediately adjacent to the subject parcel are small in nature and contain delapidated chicken coops. In 1979, Mr. Steinbaum (hereinafter plaintiff) contacted the Warren Township Planning Board, requesting that they consider rezoning his property to permit construction of multi-family dwellings. The Warren Township zoning ordinance did not provide for this use in that period.

Plaintiff appeared approximately five times before the Warren Township Planning Board and several times he presented expert witnesses who stated that the land was uniquely and particularly suited for this use and that the introduction of this use would not have a negative impact on the adjacent area or the community as a whole. Although there were some affirmative votes, a majority of the Planning Board voted not to recommend a rezoning of the subject parcel.

On July 16, 1980, the plaintiff then filed an application for development, more particularly for a use variance to permit construction of 300 townhouses on the subject lot. Approximately twenty hearings were held before the Warren Township Board of Adjustment between September 1980 and May 21, 1982. During the course of these hearings, the plaintiff reduced the number of townhouses requested from 300 to 184. The plaintiff, in his opinion, produced a substantial amount of evidence indicating that he was entitled to the use variance requested and that the granting of the variance would not impair the negative criteria of the statute. Certain witnesses testified that septic systems for one-family dwellings could not be utilized on the subject property. Further, it was established that one-family homes could not reasonably be constructed on the property, nor would they be readily marketable.

On May 21, 1982, the Warren Township Board of Adjustment adopted a resolution denying plaintiff's request for a use variance. This resolution was published on May 27, 1982.

On Jun 23, 1982, plaintiff filed a complaint in the Superior Court of New Jersey, Law Division, against the Township of Warren and the Warren Township Board of Adjustment. This complaint requested a reversal of the Board's decision denying the use variance and reversal because of improper conduct in questioning by the Board attorney, a return of an excessiving filing fee, a declaration of the invalidity of the Warren Township zoning ordinance because it failed to provide for its fair share of low and moderate multi-family housing and a declaration of inverse condmenation.

The Warren Township attorney then filed an order to show cause in the Superior Court of New Jersey, Law Division, Somerset County, returnable before the Honorable Arthur S. Meredith, which requested a stay of the Steinbaum case as well as other related cases. A hearing was held on this request and the order to show cause was denied. An order was entered, signed by Judge Meredith, denying the Warren Township's request for a stay. A copy is annexed hereto as Schedule A. Warren Township is now seeking to relitigate these precise issues in this motion.

On October 29, 1982, all parties in this matter attended a pretrial conference before Judge Robert E. Gaynor. At that time it was specifically agreed and made part of the pretrial order that the defendant had 60 days from October 29, 1982 to file any motion seeking dismissal of the complaint because of the plaintiff's alleged failure to exhaust administrative remedies. The plaintiff also had a 60-day period in which to file a motion seeking permission to use the minutes of the Board of Adjustment in lieu of a transcript. A copy of the pretrial order is annexed hereto as Schedule B.

The above 60-day period elapsed and the defendant did not file the motion for dismissal within the requisite time period. The plaintiff then ordered the transcripts in this hearing, which are in the process of being prepared, some of which have already been prepared. On March 22, 1983, almost three full months after the required time period for the filing of pretrial motions had expired, Warren Township sought to file such a pretrial motion seeking dismissal on various grounds.

I. THE PLAINTIFF'S PRETRIAL MOTION SHOULD BE BARRED BECAUSE IT WAS NOT FILED WITHIN THE REQUISITE TIME PERIOD AS PRESCRIBED BY THE PRETRIAL ORDER.

A pretrial order was entered in this matter on October 29, 1982. On that date, the issue of the timeliness of pretrial motions was specifically raised. It was agreed by all parties and made part of the pretrial order signed by the Court that the parties would have 60 days in which to file certain pretrial motions. Indeed, defendant was specifically mandated to file a motion to dismiss for alleged failure to exhaust administrative remedies within that 60-day period. Specific reference is made thereto in paragraph 13 of the pretrial order.

The plaintiff was also to file a certain motion within that 60-day period, which would have permitted him to use the minutes of the Board of Adjustment in lieu of the transcript.

After the 60-day period had expired, the plaintiff, cognizant of the fact that the defendant had failed to file the above motion in the requisite time period, thereupon ordered the transcripts in this matter. It would be totally unfair for the defendant to come in a very belated and cavalier manner ninety days later to request dismissal on this ground. No reason is offered whatsoever as to why the defendant violated the terms of the pretrial order by filing the within motion almost ninety days late. There is no excuse for hardship which would presently allow the filing of the motion on such a tardy date. In the meantime, the plaintiff undertook to forego filing his motion

that 60-day period because he obviously was given the indication that the defendant would not be filing his motion within that period. It would now be unfair to permit the defendant to file this motion at such a late date after the plaintiff had relied upon the provisions of the pretrial order and assume that such a motion would not be instituted. If the Court should consider this untimely motion, then it is respectfully submitted that the motion is without merit.

In the instant case, the plaintiff spent approximately three years before various administrative bodies in Warren Township seeking to have his property zoned for multi-family use. Initially, in 1979, he appeared before the Warren Township Planning Board approximately five times with expert witnesses and his request for rezoning was denied. Thereafter, the plaintiff expended two years before the Warren Township Board of Adjustment seeking a use variance permitting multi-family swellings. This involved attendance at approximately twenty meetings with expert witnesses. It is the plaintiff's opinion that these meetings were needlessly protracted because of repeated unnecessary questioning by the Board's attorney of its expert witnesses. However, the plaintiff did undergo the expense of attending those twenty meetings and producing witnesses for same. While the case was pending before the Warren Township Board of Adjustment, various candidates for mayor made statements to the local newspapers indicating that they were running on a platform which would prohibit the introduction of multi-family dwelling use in Warren Township.

After the Board of Adjustment denied the plaintiff's request for a use variance, the Superior Court, Law Division, Somerset County, in the case of AMG Realty Co. and Skytop Land Corp. v. The Township of Warren, Docket No. L-23277-80, entered an order invalidating the then existing Warren Township zoning ordinance and ordering that Warren Township provide its fair share of multi-family dwellings for low and moderate income housing.

The within plaintiff, Lawrence V. Steinbaum, immediately wrote a letter to the Warren Township Committee requesting again that his land be rezoned to permit multi-family dwellings. The plaintiff followed up with this request by appearing before the Warren Township Committee and again detailing the many reasons why the subject parcel would be appropriate for multi-family use. However, the Warren Township Committee did rezone some parcels of land in Warren Township for the multi-family use but the plaintiff's parcel was not one of those rezoned.

As can be seen by the above, the plaintiff at every turn and level has been frustrated by the Warren Township Planning Board, Warren Township Board of Adjustment and Warren Township Committee. They have repeatedly denied all his requests for a rezoning of his parcel to permit multi-family dwellings. Under these circumstances, it is patently obvious that it would be a completely vain and futile effort for the plaintiff to appear before the Warren Township Committee and again argue that his property should be permitted to be utilized for multi-family dwellings and that the Board of Adjustment decision was incorrect.

This has been unsuccessfully attempted by the plaintiff time and time again.

The Courts have continually held that a plaintiff need not be required to exhaust administrative remedies where such attempts at exhaustion would be a vain and futile effort. In Deal Gardens, Inc. v. Board of Trustees of Loch Arbor, 48 N.J. 491 (1967), the Supreme Court of New Jersey held that the plaintiff need not exhaust his administrative remedies before the local Board of Adjustment where an attempt would have been "futile." In Matawan Borough v. Monmouth County Tax Board, the Supreme Court stated the following in this regard: "Ordinarily, administrative remedies must be exhausted before resort is had to the Court, but the exhaustion is neither jurisdictional nor absolute and may be departed from where in the opinion of the Court the interest of justice so requires." 51 N.J. at 296. See also Waldor v. Untermann, 10 N.J. Super. 188 (1951); Central Railroad of New Jersey v. Neeld, 26 N.J. and N.J. 172 (1958); cert. denied, 357 U.S. 928 (1958). Further, the particular state statute providing for appeals from Board of Adjustment decision further provides that "Nothing in this act shall be construed to restrict the right of any party to a review by any Court of competent jurisdiction according to law." N.J.S.A. 40: 55D 17(h).

The instant case is to be distinguished from that situation where the plaintiff makes no attempt to go before any municipal administrative agency. In the within case, as stated

above, the plaintiff made appearances before all three administrative agencies which total approximately 26 or 27 hearings before various agencies in Warren Township. Thus, it can clearly be seen that the plaintiff through 26 appearances over a period of almost three years has attempted in vain to obtain permission to utilize his property for townhouses. Most recently, the plaintiff appeared before the Warren Township Committee when that committee was mandated to rezone districts to permit introduction of multi-family uses. However, the plaintiff was completely unsuccessful in attempting the rezoning of his tract. Hence, any further attempts to appear before the municipality would be completely futile as has been shown by the efforts of the past three years.

In view of the foregoing cases and for these reasons, it is respectfully submitted that the plaintiff is properly before this Court.

II. THE DEFENDANT, TOWNSHIP OF WARREN, IS NOT ENTITLED TO A DISMISSAL OR STAY ON THE OTHER COUNTS.

The defendant, Township of Warren, argues that because of the decision in AMG Realty Co. and Skytop Land Corp. v. Township of Warren, Docket No. L-23277-0, then allegedly Counts Four and Five of the plaintiff's Complaint become moot and should be dismissed. However, this precise issue has already been litigated by the defendant.

In June 1982, the defendant, Township of Warren filed an Order to Show Cause in the Superior Court, Law Division, Somerset County, why the plaintiff's Complaint should not be stayed because of the decision in AMG Realty Co. A hearing was held on the above Order before Arthur Meredith and the defendant's Order for stay was denied. A copy of the proposed Order of denial is annexed hereto as Schedule A.

Thus, this issue is res ajudicata as Judge Meredith has already disposed of the defendant's contention. The defendant raises this precise issue of a stay before Judge Meredith. Indeed, a close inspection of the Brief submitted by the defendant in support of this contention before Judge Meredith is exactly the same one submitted by the defendant before the Court in support of this Motion (pg. 11-14). A copy of the defendant's Brief submitted to Judge Meredith is annexed hereto as Schedule C. The Court is invited to make an inspection which will reveal that the argument is exactly the same one in a verbatim matter. Additionally, the defendant, Warren Township's, argument in this

regard is completely moot as the pretrial order already provides that the issues of the validity of the application of the zoning ordinance is severed from the Board of Adjustment matter for the present time. Lastly, the defendant's contention with regard to inverse condemnation is completely without foundation. It is the plaintiff's contention that he proved through the twenty hearings before the Board of Adjustment that the land cannot be used for one-family dwellings. There is much expert testimony in support of this argument. Accordingly, there is no question that there is a genuine dispute as to material fact and, thus, that fact in dispute cannot be disposed of by means of summary judgment. In fact, the whole process of a motion for summary judgment is contracry to the procedure in lieu of prerogative writ.

CONCLUSION

In view of the above case and for all the reasons stated above, it is respectfully submitted that the defendant's motion be denied.

Respectfully submitted,

GLUCKSMAN & WEITZMAN
Attorneys for Plaintiff

By 
Philip R. Glucksman

Dated: April 25, 1983.

EXHIBIT A

KUNZMAN, COLEY, YOSPIN
and BERNSTEIN, PA
15 Mountain Boulevard
Warren, NJ 07060
(201) 757-7800
Attorneys for Defendant

AMG REALTY COMPANY, A Partnership organized under the laws of the State of New Jersey, and SKYTOP LAND CORP., a New Jersey Corporation,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
	:	SOMERSET COUNTY
	:	DOCKET NO. L-23277-80
Plaintiffs,	:	
vs.	:	Civil Action
THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey,	:	ORDER
Defendant	:	

This action coming on to be heard before this Court in the presence of Joseph E. Murray, Esquire, (McDonough, Murray & Korn, P.A.), attorneys for the Plaintiffs and John E. Coley, Esquire, (Kunzman, Coley, Yospin & Bernstein, P.A.), attorneys for the Defendant, Barry M. Hoffman, Esq. (Bernstein and Hoffman) attorneys for the Warren Twp. Board of Adjustment, Philip R. Gluckman, Esq. (Gluckman and Weitzman) attorneys for Lawrence V. Steinbaum, Terrence O'Connor, Esq. (Richardson and O'Connor, P.A.) the Warren Twp. Public Advocate Ralph J. Pacaro, Esq., attorney for F&W Associated, Joseph J. Triarsi, Esq. (Pisano Triarsi) attorney's for Esposito Enterprises, Ltd. and the Court having considered the briefs, certifications and oral argument of counsel, that the Defendant is not entitled to the relief demanded its order to show cause dated June 10, 1982:

IT IS on this day of July , 1982,

adjudged as follows:

(a) The stays sought in the order to show cause dated June 10, 1982 obtained by the Defendant in the above matter are hereby denied.

(b) The Zoning Ordinance 16-1 of the Township of Warren, County of Somerset and State of New Jersey shall remain in full force and effect until the same is replaced by a new ordinance in compliance with the judgment of this court in the above entitled matter.

ARTHUR S. MEREDITH, J.S.C.

E/ 2

Steinbaum vs. Board of Adj. of Twp. Warren and Twp of Warren

11. Briefs on all issues relating to Board of Adjustment denial to be submitted, and issues not briefed will be deemed abandoned. Plaintiff to file and serve brief no later than 60 days following filing and service of transcripts of hearings; and defendants to file and serve briefs within 30 days thereafter.

12. Usual.

13. Issue of validity and application of Zoning Ordinance is severed and subject to the filing of an amended complaint subsequent to adoption of amendments to Zoning Ordinance pursuant to the judgment in AMG v. Warren. Plaintiff to file a motion for permission to sue minutes of Board of Adjustment in lieu of transcript within 60 days of this Pretrial Order. Defendants to file a motion within same time period seeking dismissal of complaint or other relief on account of plaintiff's failure to exhaust Administrative Remedies.

14. Plaintiff - Philip R. Glucksman, Esq.-Glucksman & Weitzman
Defendant, Bd. of Adj. - Barry M. Hoffman, Esq. - Bernstein, Hoffman & Clar
Defendant, Twp./Warren - John E. Coley, Jr., Esq.-Kunzman, Coley, Yospin & Bernstein

Plaintiff Attorney

Defendant, Bd. of Adj. Atty.

Defendant, Twp./Warren Atty.

15. 1/2 day for issue of Board of Adjustment denial.

16. To be assigned.

Robert E. Gaynor, J.S.C.

EXHIBIT C

ARGUMENT

In the leading case of Landis v. North American Co., 299 U.S. 248, 57S.ct. 163 (1936), the United States Supreme Court recognized the propriety of staying proceedings in one suit until the decision in another. In our present case, this theory would allow the Court to stay proceedings before the Warren Township Zoning Board of Adjustment until the AMG Realty Company case against Warren Township has been finally decided by the Court approving a Warren Township zoning ordinance which complies with the mandates of Mt. Laurel. In Landis, two utility companies had filed separate suits in the District of Columbia to enjoin enforcement of the Public Utility Holding Company Act of 1935 as unconstitutional. At the same time, the Government brought suit in the Southern District of New York to enforce the same statute against other holding companies. The Government then moved for a stay of the proceedings in the District of Columbia actions until the Supreme Court had rendered a decision in the case pending unheard in New York. The trial Court granted the stay, the District of Columbia Court of Appeals reversed the trial Court. The United States Supreme Court reversed the Court of Appeals and remanded with instructions.

The United States Supreme Court recognized the importance of judicial flexibility when broad public policy issues are being litigated. In the instant case, the re-zoning of a Township is definitely a broad public policy issue and for the people of that Township, is probably one of the most important matters of concern to them. Justice Cardozo said:

> We must be on our guard against depriving the processes of justice of their suppleness of adaption to varying conditions. Especially in cases of extraordinary public moment. The individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences, if the public welfare or convenience will thereby be promoted.

It is submitted that the stay of the cases pending before the Warren Township Zoning Board of Adjustment and the stay of any appeal relative to the

case decided by the Zoning Board of Adjustment would not be oppressive in its consequences. It is also submitted that the delay of approximately eight months would not be excessive. It would go without much serious dispute that the public welfare would be carried out by a complete review of all parcels of land situated in Warren Township with the view of re-zoning the Township in its entirety, without collateral re-zoning being conducted by the Warren Township Zoning Board of Adjustment collaterally.

The United States Supreme Court in Landis also rejected the suggestion that a stay should not be granted because the parties and issues in the various cases are not identical and address the broader issues:

> ...The power to stay proceedings is incidental to the power inherent in every Court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interest and maintain an even balance. True, the applicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that that stay for which he prays will work damage unto someone else. 299 U.S. at 254-255; 57S.ct. at 166.

In the present case, there does not appear to be any real hardship or inequity to be suffered by the applicant before the Board of Adjustment in the event the Court orders a stay as requested by the Township of Warren. See the introduction heretofore.

In Devlin v. National Broadcasting Co., Inc., 47 N.J. 126 (1966), the New Jersey Supreme Court in a defamation case which was an action where certain litigation was pending in New Jersey and California, and New Jersey stayed its case because it felt that the California case had the predominant contacts and was where the major consequences of the litigation occured, stated that because

> ...Many of the issues raised by the plaintiffs may have been effectively disposed of or may have become moot...the power to grant a stay is unquestioned (at page 131).

In the present case, the applicants before the Board of Adjustment may have their case become "moot" in the event the Township re-zones their property for

multi-family uses. Thus, the Court has the power to grant a stay in the instant matter.

In Lumberman's Mutual Casualty Co. v. Carriere, 163 Super 7 (App Div -. 1978), the Court stated at page 14 that the granting of a stay rests in the sound discretion of the trial Court. It is submitted that the Court should and, in fact, must issue a stay in the instant matter to preserve the Township's right to re-zone the Township as a whole without interference from collateral re-zoning in sections of the town by the Township Board of Adjustment. The Landis rule which was set forth above has been met in the instant case and the defendant has shown a "clear case of hardship" if it is required that the pending Board of Adjustment variance cases for multi-family housing are allowed to proceed.

CONCLUSION

For the foregoing reasons, this Court should order a stay of all presently pending Board of Adjustment variance applications for multi-family uses and should also stay any appeal for cases that have been decided by the Zoning Board of Adjustment relative to variance applications for multi-family uses.

Respectfully submitted,

KUNZMAN, COLEY, YOSPIN
and BERNSTEIN, PA

By: /s/ John E. Coley Jr.
JOHN E. COLEY, JR., Attorney for
The Township of Warren