Analysis
As of: Apr 10, 2015

JAMES A. COHEN, trustee,[1] & others[2] vs. CITY OF SOMERVILLE & another.[3]

1 Of the Comar Real Estate Trust.
2 Jeffry J. Cohen and James B. Marcus, trustees of the Comar Real Estate Trust.
3 Planning board of Somerville.

14-P-125

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 1112; 2015 Mass. App. Unpub. LEXIS 246

March 26, 2015, Entered

PRIOR-HISTORY: *Comar Real Estate Trust v. City of Somerville, 2013 Mass. LCR LEXIS 144 (2013)*

JUDGES: Trainor, Agnes & Maldonado, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue on appeal is whether summary judgment was properly entered for the defendants, the city of Somerville and the planning board of Somerville. We conclude that it was not properly entered on counts one, two, and three, vacate the entry of summary judgment on those counts, and remand for further proceedings.

Background and procedural history. The plaintiffs own the property located at 299 Broadway in Somerville. This property was occupied by a Star Market supermarket for approximately forty years, until January of 2008, when the market stopped operations. In 2009, the plaintiffs entered into a lease agreement with Ocean State Job Lot to open a store at that location.

On February 4, 2010, an application for a building permit was filed by the plaintiffs for proposed construction on the property. The application was denied by a Somerville senior building inspector on February 22, 2010. The building inspector's denial stated that a special permit was required because of the proposed use, the rear yard setback, the side yard setback on the right, and the proposed signage/facade alteration. The denial indicated that the plaintiffs could appeal in accordance with the Somerville zoning ordinance § 3.1.9; the denial also stated: "if you choose to seek zoning approval, please complete the application form that can be found on the

City's website or in the offices of the Planning or Inspectional Services Divisions."

After the denial of the building permit, the plaintiffs filed an application for a special permit with the planning board. The planning board held a public hearing on September 2, 2010, on the plaintiffs' request for a special permit. At the hearing the chair of the planning board made a motion to "accept the staff recommendation for denial," which was seconded and then supported by the other members of the planning board. The planning board's decision indicated that the special permit was denied because it was inconsistent with the "CCD-55 zoning district in § 6.1.22.A" of the Somerville zoning ordinance, which became effective on February 10, 2010.

After the denial of the application for a special permit, the plaintiffs filed a four-count complaint in the Land Court pursuant to *G. L. c. 40A, § 17*, and *G. L. c. 240, § 14A*. The plaintiffs then filed a motion for summary judgment.[4] The plaintiffs' undisputed facts focused almost exclusively on the details of procedural aspects of the planning board's denial of the special permit application.[5] After reviewing the plaintiffs' motion and the defendants' opposition, the judge determined that summary judgment was appropriate for the defendants and not the plaintiffs as a matter of law. See *Mass.R.Civ.P. 56(c)*, as amended, 436 Mass. 1404 (2002) ("Summary judgment, when appropriate, may be rendered against the moving party").

4 The motion did not indicate whether this was only a partial motion for summary judgment or specify what counts of the plaintiffs' complaint were being addressed in each argument.

5 The only exceptions were facts six through nine, which state that the building was legally in existence for forty years and was used by Star Market until that company vacated the premises in 2008; that the applicable section of the Somerville zoning ordinance was amended effective February 10, 2010; and that a building permit application for the property was docketed on February 4, 2010, and then denied on February 22, 2010, because a special permit was required.

Standard of review. We review the allowance of summary judgment de novo. *Targus Group Intl., Inc. v. Sherman, 76 Mass. App. Ct. 421, 428, 922 N.E.2d 841 (2010)*. "The test is whether the evidence, viewed in the light most favorable to the losing party, establishes all material facts and entitles the successful party to a judgment as a matter of law."[6] *Ibid.*

6 The judge stated that she was "drawing all logically permissible inferences from these facts in favor of the municipal defendants (as the nonmoving parties)." This was inappropriate. Although, typically, a summary judgment motion is considered in the light most favorable to the nonmoving party, where the judge determines that summary judgment is not appropriate for the moving party but instead might be appropriate for the nonmoving party, the judge must take all inferences in favor of the party at risk of losing the case. See *Targus Group Intl., Inc. v. Sherman, 76 Mass. App. Ct. at 428.*

Discussion. Exhaustion of administrative remedies. The judge concluded, and the defendants argue, that the plaintiffs are precluded from seeking a declaratory judgment that a special permit was not needed in this case because the plaintiffs failed to exhaust administrative remedies after the building inspector denied the plaintiffs' application for a building permit.

The plaintiffs' case was pleaded under two statutes: *G. L. c. 40A, § 17*, and *G. L. c. 240, § 14A*, as amended by St. 1977, c. 829, § 14.[7] Exhaustion of administrative remedies is not a prerequisite to bringing a claim under *G. L. c. 240, § 14A*. See *G. L. c. 240, § 14A* ("The right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects' plans or drawings for such erection, alteration, improvement or repair have been prepared"); *Gamsey v. Building Inspector of Chatham, 28 Mass. App. Ct. 614, 616, 553 N.E.2d 1311 (1990)* ("In the case of *G. L. c. 240, § 14A*, the Legislature has determined that resort to local zoning procedures is not a necessary prerequisite to obtaining judicial relief") (citation omitted).

7 The complaint did not specify under which statute each count was pleaded.

Here, the plaintiffs are seeking a determination as to the extent to which the local zoning law affects their right to use their property as an Ocean State Job Lot store, which they allege is in accordance with a prior existing use, or alternatively, whether their proposed use is a use as of right under the current zoning law. These types of questions can be reviewed in an action brought under *G. L. c. 240, § 14A*. See *G. L. c. 240, § 14A* ("The owner of a freehold estate in possession in land may bring a petition . . . for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon"). See also *Banquer Realty Co. v. Acting Bldg. Commr. of Boston, 389 Mass. 565, 570, 451 N.E.2d 422 (1983)* (Land Court had jurisdiction under *G. L. c. 240, § 14A*, because the plaintiffs were

seeking "a determination of the extent to which [specific zoning code items] affect a proposed use" and *G. L. c. 240, § 14A*, gives the Land Court jurisdiction over "two kinds of cases, validity and extent cases"); *Derby Ref. Co. v. Chelsea, 407 Mass. 703, 704 & n.3, 555 N.E.2d 534 (1990)* (action brought pursuant to *G. L. c. 240, § 14A*, "to determine whether the new Chelsea zoning ordinance applied to the property" or whether prior nonconforming use protected property from new zoning ordinance).

The defendants argue that despite the analysis above, the plaintiffs had to exhaust administrative remedies because they chose to engage in the administrative process by applying for a building permit, and upon the denial of that permit, applying for a special permit. In *Banquer Realty Co., 389 Mass. at 573*, the Supreme Judicial Court held that the judicial relief that would otherwise be available under the statutory language of *G. L. c. 240, § 14A*, without exhaustion of administrative remedies is not "precluded once a plaintiff has applied for a permit but has been denied." The defendants argue that *Whitinsville Retirement Soc., Inc. v. Northbridge, 394 Mass. 757, 477 N.E.2d 407 (1985)*, limited the *Banquer Realty Co.* holding and, as a result, exhaustion is required whenever a plaintiff has "commenced" the administrative process. We cannot agree.

In *Whitinsville Retirement Soc., Inc., supra at 762-763*, the Supreme Judicial Court concluded that the *Banquer Realty Co.* holding was inapplicable to the situation at hand because "the plaintiff ha[d] not sought a determination as to the validity of the . . . zoning by-law or the extent to which the zoning by-law affects its proposed use of the premises, but rather a determination of the extent of its 1975 special permit" and that claim "does not fall within the language of *G. L. c. 240, § 14A*, and *G. L.c. 185, § 1(j1/2)*." *Whitinsville Retirement Soc., Inc., supra at 763*, clarified that interpretation of the extent to which a special permit applies to a situation is not the same as the extent to which a by-law or ordinance applies to a "proposed use of a property."[8,9] As a result, we continue to follow *Banquer Realty Co.* as clarified by *Whitinsville Retirement Soc., Inc.* Here, the plaintiffs are seeking a determination of "the extent to which [specific zoning code items] affect a proposed use" and not the extent to which a special permit entitles them to engage in a proposed use. *Banquer Realty Co., 389 Mass. at 570*. See *Whitinsville Retirement Soc., Inc., 394 Mass. at 763*. The plaintiffs' decision to apply for a building permit and a special permit did not alter their right to seek a declaratory judgment under *G. L. c. 240, § 14A*.[10]

8 We recognize that the Supreme Judicial Court also stated in *Whitinsville Retirement Soc., Inc., 394 Mass. at 763*, that the "evil to be remedied [by *G. L. c. 240, § 14A*,] is a situation where someone may be forced to invest in land before being able to find out whether there are restrictions. No such situation exists here. Rather, the plaintiff here is seeking to sidestep an appeal to the . . . board of appeal, and, if need be, then to the Superior Court. . . . *General Laws c. 185, § 1(j1/2)*, may not be used to avoid the normal appellate route required in zoning disputes." However, these comments did not overrule or abrogate the holding in *Banquer Realty Co.*, which we are bound to follow.

9 We also are aware that this court has cautioned against reading *Banquer Realty Co.* broadly. See *Clark & Clark Hotel Corp. v. Building Inspector of Falmouth, 20 Mass. App. Ct. 206, 212, 479 N.E.2d 699 (1985)* ("[W]e do not construe *Banquer [Realty Co.]* to mean that every owner denied a building permit by reason of some provision of the zoning law may by-pass the board of appeal and file an action under *c. 240, § 14A*"); *Balcam v. Hingham, 41 Mass. App. Ct. 260, 267, 669 N.E.2d 461 (1996)* (there are only a "narrow range of cases involving the 'validity and extent' of zoning by-laws" where an appeal can be taken under *G. L. c. 240, § 14A*, without exhausting administrative remedies). However, each of these cases was decided based on circumstances that were not substantially similar to *Banquer Realty Co.* or this case. See *Clark & Clark Hotel Corp., 20 Mass. App. Ct. at 212-213* (concluding that plaintiffs were required to exhaust administrative remedies in this case, even if their analysis of *Banquer* was wrong, because case did not involve building permit but only proposed use and action was not brought under *G. L. c. 240, § 14A*, but instead was brought under *G. L. c. 231A*); *Balcam, 41 Mass. App. Ct. at 267* ("[T]he thrust of the plaintiffs' argument . . . is that a prior permit . . . entitles the plaintiffs to proceed without further review by local authorities. The gravamen of this argument concerns the effect of the permit, rather than any interpretation of the by-law" and therefore, exhaustion is required). Regardless, this court has no authority to overrule precedent established by the Supreme Judicial Court.

10 See *Gamsey v. Building Inspector of Chatham, 28 Mass. App. Ct. at 615-616* (plaintiff was not required to exhaust administrative remedies after being told by building inspector and town counsel that zoning by-law required him to obtain special permit to convert his motel to condominiums. In reaching that conclusion, the court simply noted that the claim was brought under *G.*

L. c. 240, § 14A, and "the Legislature has determined that resort to local zoning procedures is not a necessary prerequisite to obtaining judicial relief").

Special permit requirement for this use. The plaintiffs argue that it was error to require them to obtain a special permit for changing the use of the building from the prior existing nonconforming use as a supermarket over 10,000 square feet[11] to an Ocean State Job Lot store over 10,000 square feet.[12] To determine if there is a "change or substantial extension" of a prior nonconforming use, we apply a three-part test. "Under that test, we inquire: (1) 'Whether the [current] use reflects the 'nature and purpose' of the [prior] use,' (2) 'Whether there is a difference in the quality or character, as well as the degree, of use,' and (3) 'Whether the current use is 'different in kind in its effect on the neighborhood.'" *Derby Ref. Co. v. Chelsea, 407 Mass. at 712*, quoting from *Bridgewater v. Chuckran, 351 Mass. 20, 23, 217 N.E.2d 726 (1966)*. As the party seeking protection under the preexisting use status, the plaintiffs have the burden of establishing compliance with the test. *Ibid.* The determination as to whether each prong is satisfied requires findings of fact. See *id. at 713, 714, 717* (explaining that judge's findings after trial concerning prongs were proper). The plaintiffs here argue that the proposed use is the same as the preexisting use and the defendants argue that the plaintiffs' proposal constitutes a "change" in use, and therefore is subject to the current Somerville zoning ordinances.

11 The use as a supermarket with over 10,000 square feet of retail space became a nonconforming use when Somerville adopted a new zoning ordinance requiring a special permit for that use. See *Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317, 321, 565 N.E.2d 1214 (1991)* ("[A] prior use is nonconforming where it predated the requirement of a special permit for that use"). The parties did not point us to evidence concerning when the supermarket became a nonconforming use. It appears that the parties only submitted the ordinance as it was amended and updated in June 10, 2010. The affidavit of the director of planning for the city of Somerville did indicate that the supermarket became a nonconforming use in 1990. However, the defendants admitted to the plaintiffs' undisputed fact that the use of the building at 299 Broadway as a supermarket was a legal use that continued until Star Market vacated the premises in 2008. As a result, we cannot conclude it was undisputed that the use as a retail space over 10,000 square feet has been a nonconforming use at any point before 2010.

12 The judge determined that, among other reasons, the requirement that the plaintiffs obtain a special permit was valid because the prior nonconforming use had been in a period of nonuse for two or more years. See *Ka-Hur Enterprises, Inc. v. Zoning Bd. of Appeals of Provincetown, 424 Mass. 404, 406, 676 N.E.2d 838 (1997)* (explaining difference between abandoning and discontinuing use under *G. L. c. 40A, § 6*). We do not find this reasoning persuasive. It is undisputed that between January of 2008 and January of 2010 a supermarket with more than 10,000 square feet of retail space was not operating on the property. However, neither the parties nor the judge identified when the use as a supermarket became a nonconforming use. See note 11, *supra*. We have not been provided with the relevant ordinance that was in effect prior to February 10, 2010. Moreover, *G. L. c. 40A, § 6*, does not clarify when the nonuse period begins to run. See Healy & Murray, Massachusetts Zoning Manual § 6.9.1, at 6-30 (5th ed. 2013) (explaining that "*Section 6 [of c. 40A]* does not make clear when the two-year period begins to run for a use that became dormant prior to the adoption of a zoning change" and noting that this issue is still undecided in Massachusetts). It could begin to run at the time the ordinance that makes it nonconforming becomes effective. *Ibid.* Alternatively, it could be that since the property was not actively being used in 2010, there was no prior nonconforming use when the relevant ordinance was passed. Further, neither party has argued or addressed how or if the moratorium on any building permits being issued that was put in place during the alleged period of nonuse affects the analysis. In the absence of any briefing on the issue or an undisputed fact concerning when the use became nonconforming, and because we cannot conclude as a matter of law whether the use has been discontinued or abandoned, we do not decide this issue.

The plaintiffs have not come forward with much evidence at this point. They have only argued that an Ocean State Job Lot store is similar to a supermarket, and that an Ocean State Job Lot store is in the same "cluster" of principal use permitted by the current zoning ordinance (i.e., "general merchandise, department store, [and] supermarket"). The plaintiffs also submitted a brochure demonstrating that food products are sold at Ocean State Job Lot stores. Although this is a minimal showing, it is enough to determine that there are not undisputed facts that establish as a matter of law that using the property as an Ocean State Job Lot store is a change in the use of the property as a Star Market.[13] As a result, it was

error to enter summary judgment in favor of the defendants on counts one, two, and three, which essentially assert that such use was a protected preexisting nonconforming prior use.[14]

13 The Reporters' Notes to *Mass.R.Civ.P. 56(c)*, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 994 (LexisNexis 2014-2015), explains that a judge is allowed to grant summary judgment for the nonmoving party: "[b]ecause by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts." Here the undisputed facts are not sufficient to determine the issues presented and, as a result, summary judgment was inappropriate.

14 We recognize that counts two and three include a multitude of other arguments. We are only vacating summary judgment on counts two and three based on the potential preexisting nonconforming use issue.

Remaining arguments. We have reviewed the plaintiffs' remaining arguments and find them without merit.[15]

15 Although the plaintiffs assert they did not intend to move for summary judgment on the takings claim (count four), they did nothing to clarify that their motion was a partial summary judgment motion or make any attempt to distinguish as to what arguments are associated with each count of the complaint. It was appropriate to enter summary judgment on this count.

Conclusion. So much of the judgment as dismissed counts one, two, and three is vacated and those counts are remanded for further proceedings consistent with this memorandum and order. The judgment is otherwise affirmed.

So ordered.

By the Court (Trainor, Agnes & Maldonado, JJ.[16]),

16 The panelists are listed in order of seniority.

Entered: March 26, 2015.

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