SUPREME COURT CHAMBERS
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CHRISTOPHER E. CAHILL
Supreme Court Justice

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Principal Law Clerk

June 18, 2015

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275 North Street
Newburgh, New York 12550
Attn: Anthony R. LoBiondo, Esq.

Re: Brander, et al. v. County of Orange, et al.
Orange County Index No. 15-2312

Dear Counsel:

Enclosed please find a copy of a Decision and Order in the above-entitled matter. Kindly direct your attention to the last paragraph of the Decision and Order regarding filing, entry and notice of entry. For purposes of notice of entry, counsel can contact the Orange County Clerk directly for the date of filing.

Very truly yours,

Susan B. Suppies

Susan B. Suppies, Secretary to
CHRISTOPHER E. CAHILL, JSC

/sbs
Enclosure

cc: With original papers:
Lynn McKelvey, Chief Clerk

STATE OF NEW YORK
SUPREME COURT **ORANGE COUNTY**

STEPHAN BRANDER, FRANK CARBONE, and
VINCENT FERRI,

Plaintiffs,

-against-

Decision & Order
Index No.: 15-2312

COUNTY OF ORANGE and **STEVE NEUHAUS, COUNTY EXECUTIVE, LEIGH BENTON,**

Defendants.

Supreme Court, Orange County
Motion Return Date: June 8, 2015

Present: Christopher E. Cahill, JSC

Appearances:

Sussman & Watkins
Attorneys for Plaintiffs
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By: Michael H. Sussman, Esq.

Langdon C. Chapman, Esq.
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Newburgh, New York 12550
By: Anthony R. LoBiondo, Esq.

Cahill, J.:

In this action, plaintiffs' basic contention is that defendants, the County of Orange (hereinafter "the County"), Steve Neuhaus, as the County Executive, and Leigh Benton, individually, have engaged in a lengthy course of conduct constituting waste which has culminated in the legislative adoption of a plan in December 2013, referred to in the submissions as "BB+," which will demolish section II of the existing Orange County Government Center, renovate sections I and III, and construct an adjacent building. In connection therewith, the Orange County Legislature voted bonding authority for up to $77,000,000.00 for the project. Specifically, the verified complaint alleges four causes of action under General Municipal Law § 51 which include claims: (1) that defendants County and Neuhaus' "refusal to engage in substantive negotiations" with a third party (non-party Gene Kaufman), coupled with defendants' collusion with others who favored the construction of a new government center, amounted to a substantial waste of public resources since Kaufman in 2014 had, in response to County-issued requests for proposals (hereinafter "RFPs"), offered to purchase and preserve the existing Government Center for $5,000,000.00 and build a new government center at a cost of $50,000,000.00--a cost considerably less than the projected cost of BB+; (2) that the County's completion of the SEQRA long form is dishonest and fraudulent since it does not accurately assess the actual project being constructed; (3) that defendants have engaged in ultra vires

conduct through the continued implementation of the current design which exceeds the scope of legislative approval; and finally (4) that ultra vires waste would occur by defendants' acceptance of either of two demolition bids it has received, both of which exceed the $3,800,000.00 demolition estimate which would "disable defendants from completing the balance of the project within the projected bonding authority, potentially leaving the County with demolition but no construction." It is upon these claims that plaintiffs seek to permanently enjoin defendants from implementing the BB+ plan.

Pursuant to CPLR § 3211 (a) (2), (7), (10) and § 1001 and § 1003, defendants County and Neuhaus have brought a pre-answer motion to dismiss, contending that plaintiffs have failed to join necessary parties, that the complaint fails to state a cause of action under GML § 51, and that plaintiffs not only lack standing to challenge the SEQRA review but also that all SEQRA challenges are time-barred. While these defendants acknowledge that on a motion to dismiss made pursuant to CPLR § 3211 (a) (7), the Court must afford the complaint a liberal construction, accept the allegations therein as true and draw all reasonable inferences in favor of the non-moving party (see Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 [2002]), they maintain that this Court should not consider the affidavits of Francis C. Wickham and Vincent Ferri which are frequently referred to in the complaint since plaintiffs failed to include those affidavits when they effectuated service upon them. With no opposition raised by plaintiffs on this issue, and despite the fact that this Court could have considered such affidavits if they

were submitted by plaintiffs in response to this motion to remedy any defects in the complaint (see Leon v Martinez, 84 NY2d 83, 88 [1994]; Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635-636 [1976])--a complaint which shall be reviewed to determine whether the facts fit within any cognizable legal theory (see Leon v Martinez, supra)--these affidavits will not be considered. Acknowledging, however, that this dismissal motion is grounded upon CPLR 3211 (a) (7), and not upon either CPLR 3211 (a) (1) or a CPLR 3212 motion for summary judgment based upon CPLR 3211 (a) (7), defendants' affidavits and documentary submissions in support of their motion will also not be considered (see Miglino v Bally Total Fitness of Greater NY, Inc., 20 NY3d 342, 351 [2013]; Rovello v Orofino Realty Co., supra).

With the plaintiffs' complaint premised upon violations of GML § 51, which authorizes private taxpayer suits against "all officers, agents, commissioners and other persons acting, or who have acted, for or on behalf of any county . . . and each and every one of them . . ." (id.), plaintiffs have set forth in their allegations a long narrative of defendants' conduct relating to the Government Center, completed in 1970, which was designed by architect Paul Rudolph and widely considered to be a classic example of "Brutalist style" architecture. Stretching from September 2011 when the Government Center was closed due to flooding caused by Hurricane Irene to May 2015, plaintiffs allege that many members of the Legislature wanted to conduct studies of how best to renovate it while then County Executive, Edward Diana, presented proposals for

demolishing the Government Center and building it anew. On May 3, 2012, Diana's proposal to build a new 175,000 square foot Government Center for $75,000,000.00 failed to pass the Legislature. Subsequently, the Legislature created a committee to investigate the status of the Government Center which resulted in a lengthy series of hearings.

In February 2013, following a hearing, the Legislature voted 15-6 for a bond resolution to raise $10,000,000.00 to plan the renovation of the Government Center. The plaintiffs allege that thereafter Diana and his successor, defendant Neuhaus, along with all allies in the Legislature, engaged in a course of conduct involving dilatory tactics and subterfuge to undermine the February 2013 resolution.

The result of this course of conduct was that in December 2013, the Legislature ultimately voted for the BB+ plan, whose designers included Holt and Clark, Patterson & Lee (hereinafter "CPL"). In May 2014, the Legislature passed a $77,000,000.00 bonding resolution for the project and assumed lead agency status under SEQRA which required the completion of an Environmental Assessment Form. Despite the lack of an outstanding RFP, Mr. Kaufman made a public proposal in May 2014 to purchase the Government Center and build a new center at a lesser cost than BB+. Neuhaus thereafter embraced the concept of selling the Government Center, prompting the Legislature in October 2014 to pass a local law authorizing an RFP for its sale. That RFP generated two responses, one being Mr. Kaufman's. Defendant Neuhaus, changing course again,

subsequently vetoed the local law authorizing the RFP; the Legislature did not attempt to override the veto.

Hence, with this Court left to assess whether these allegations can survive a motion to dismiss plaintiffs' GML § 51 claims, it is by now well settled that the equitable jurisdiction conferred by GML § 51 " 'lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes' " (Godfrey v Spano, 13 NY3d 358, 373 [2009], quoting Mesivta of Forest Hills Inst. v City of New York, 58 NY2d 1014, 1016 [1983]; the threatened action on the part of public officials must be demonstrated to be "illegal in the sense that it is fraudulent or beyond or in excess of the scope of their power" (Hansen v Ludera, 67 Misc2d 574, 578 [Sup Ct, Erie County 1971]). "[M]ere . . . failure to observe statutory provisions does not constitute the fraud or illegality necessary to support a taxpayer action under this section" (Matter of Resnick v Town of Canaan, 38 AD3d 949, 951 [2007]). As this Court must accept the facts alleged as true, that same assumption does not apply to conclusory allegations, speculative assertions or bare charges of fraud (see Hansen, supra at 581).

Here, "[s]tripped of excess verbiage and irrelevant allegations" (id. at 579), the illegality charged, arising from the factual context described above, is that after the Legislature passed its February 2013 resolution in favor of renovation, Mr. Diana, along with his successor, Mr. Neuhaus, and his primary legislative ally, defendant Benton,

undermined that plan in favor of a plan involving demolition. According to the complaint, their dilatory tactics and subterfuge included, *inter alia*, the creation of an ad hoc legislative committee comprised of Diana allies which explored and sought alternatives to renovation. They further allege that contracts relating to renovation were delayed, and, secretly, with the assistance of the Physical Services Committee (hereinafter "PSC") chaired by defendant Benton, developed three conceptual options for the Government Center which were subsequently narrowed to two, only one of which, BB+, was approved by the PSC for a full legislative vote. Plaintiffs further claim that the costs of renovation were purposely inflated, that Neuhaus obtained significant campaign contributions from those interested in obtaining subcontracts for the work and that Benton had accepted employment with CPL which was never publicly disclosed until after the Legislature adopted the BB+ plan he supported; Benton was later found by the County Ethics Board to have violated the County Code of Ethics and fined $1,000.00.

Finally, plaintiffs allege that when the Legislature completed the Environmental Assessment Form for this project as lead agency, the representations made therein were untrue since the project had increased in size. The project, they assert, was ultra vires since it subjects the taxpayers to excessive cost overruns, all the while disregarding Kaufman's proposed alternative which was to buy and renovate the Government Center at a significant savings--a proposal never opened or seriously considered.

In this Court's view, a fair reading of all of these allegations leads to the

conclusion that they are simply "[b]ald conclusory statements of misrepresentations, conspiracy, collusion and malfeasance" (Hansen, supra at 581) insufficient to demonstrate the requisite fraud, collusion or malfeasance in either the voting or resolutions adopted by the Legislature or in the actions taken by defendant Neuhaus to sustain an action under GML § 51. While not determinative, not one statute, charter, code or regulation is alleged to have been violated. Similarly insufficient is defendant Benton's ethical violation which was not cause for his removal or the allegedly inadequate SEQRA review.

In essence, "[t]he resolution of the legality of the position taken by the County Executive and the County Legislature involves . . . the determination of complex questions of fact . . ." (Hansen, supra at 580). Such determination is premised upon the long-standing principle of deference: "motives of individual lawmakers inducing legislative action are not subject to judicial inquiry in an action or proceeding involving the validity or application of such legislation (id. at 581). ' "The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones" (id. at 581, quoting People ex rel Wood v Draper, 15 NY 532, 535 [1857]). Political maneuvering in policy battles, while not always pretty to observe, especially to the losing side, is not, in itself, illegal.

Had this Court reached a different conclusion as to whether a cause of action has been stated, it would have concluded that to the extent that defendants view the allegations in the complaint as a challenge to SEQRA review--a contention disputed by plaintiffs--the proper vehicle for doing so would have been through an Article 78 proceeding. As no such proceeding was commenced within the applicable time period (see CPLR 217 [1]) and to the extent that plaintiffs are attempting an Article 78 review now, it must be dismissed as untimely.

But, with plaintiffs' allegations further contending that defendants acted beyond the scope of authority granted by the Legislature or that the Legislature's own acts, in its lead agency status in SEQRA review, constituted a GML § 51 violation, this Court would have concluded that the Legislature is a necessary party since the legality of its official acts, either through its committees or by its full vote, could be inequitably affected by a judgment in this action (c.f. Hicks v Cocks, 167 AD 862 [2d Dept 1915]; see generally Matter of Ayres v New York State Com'r. of Taxation & Fin., 252 AD2d 808 [1998]). Similarly, Holt, CPL and Helmer-Cronin Construction Inc. would also have been found to be necessary parties since they were the successful bidders or subcontractors and, having invested significant resources in reliance on their contractual expectations of demolishing, constructing and/or overseeing the work at the Government Center, would be inequitably affected had an injunction been issued (see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. and Appeals, 5 NY3d 452 [2005]; Matter of

Amodeo v Town Bd. of Town of Marlborough, 249 AD2d 882 [1998]; see generally Matter of Long Is. Contractors Assn. v Town of Riverhead, 17 AD3d 590 [2d Dept 2005]); such finding, however, would not support joinder of the New York State Unified Court System Office of Court Administration or the New York State Court Facilities Review Board. Hence, had a determination on the issues raised under CPLR § 1001 and § 1003 been made, this Court would have granted that portion of defendant Benton's motion which sought to dismiss all claims against him in his individual capacity.

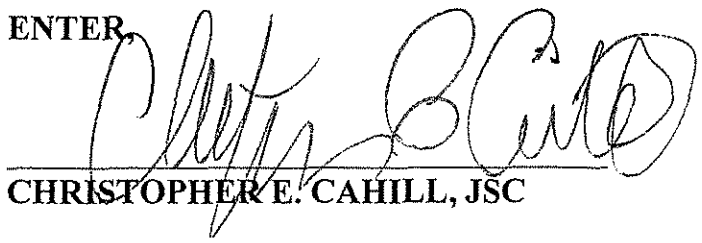
As the Court is granting defendants' motion to dismiss under CPLR 3211 (a) (7), plaintiffs' motion for a preliminary injunction must be denied as moot.

This shall constitute the decision and order of the Court. The original decision and order and all motion papers are being delivered to the Supreme Court Clerk for transmission to the Orange County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
June 18, 2015

ENTER,



CHRISTOPHER E. CAHILL, JSC

Papers considered: Order to Show Cause dated April 10, 2015; Summons dated March 27, 2013; Verified Complaint March 26, 2015 with exhibits; Notice of Motion dated April 16, 2015 with Affirmation in Support by Hyun Chin Kim, Esq., dated April 16, 2015 with exhibits and Memorandum of Law dated April 16, 2015; Plaintiffs' Memorandum of Law in Opposition dated April 27, 2015; Affirmation in Reply by Hyun Chin Kim, Esq., dated May 4, 2015 with exhibits with Memorandum of Law dated May 4, 2015; Supplemental Affirmation in Reply by Hyun Chin Kim, Esq., dated May 12, 2015 with exhibit; Notice of Motion by Defendant Benton dated May 1, 2015 with Affirmation in Support by Anthony R. LoBiondo, Esq., dated May 1, 2015 with exhibits; Affirmation in Opposition by Michael H. Sussman, Esq., dated May 14, 2015 with exhibit.