SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD JUDICIAL DEPARTMENT

In the Matter of the Application of
THE CITY OF ITHACA, THE TOWN OF ITHACA, THE TOWN OF ULYSSES, THE VILLAGE OF UNION SPRINGS, JOHN V. DENNIS, Individually and as President of CAYUGA LAKE ENVIRONMENTAL ACTION NOW (CLEAN), an Unincorporated Association, ALFRED THOMAS VAWTER, JOSHUA J. and JENNIFER L. LAPENNA, RODNEY and CYNTHIA HOWELL, KENT and HEATHER STRUCK, JUDITH R. SCOTT, and WILLIAM HECHT,

Petitioners-Appellants,

AFFIDAVIT IN SUPPORT OF MOTION TO RE-ARGUE OR IN THE ALTERNATIVE LEAVE TO APPEAL TO THE COURT OF APPEALS

For a Judgment Pursuant to Article 78 of the New York Civil Practice Laws and Rules

Index No.: EF2017-0285
(Tompkins County)

Appeal No. 529392

vs.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and CARGILL INCORPORATED,

Respondents-Respondents.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

RICHARD J. LIPPES, ESQ., being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York, and I represent the Petitioners-Appellants above-named. I make this Affidavit in support of the Petitioners-Appellants' Motion for Re-Argument, or in the alternative for leave to appeal to the Court of Appeals.

POINTS ALLEGED TO HAVE BEEN OVERLOOKED OR MISAPPREHENDED BY THIS COURT

2. This case deals with Petitioners-Appellants' Article 78 proceeding seeking to void the permit granted by the Department of Environmental Conservation to Cargill, Inc. to build a new shaft allowing for entrance and egress from the existing salt mine under Lake Seneca, and as indicated in the briefs, the shaft will also allow Cargill to mine farther north under the lake where the roof of the mine thins allowing for the potential of a significant mine collapse. Since the Department of Environmental Conservation did not do any Environmental Impact Statement prior to granting the permit of Shaft No. 4, Petitioners-Appellants alleged a violation of the New York State Quality Review Act, Environmental Conservation Law § 1-0101 and sought to void the permit that was granted and institute a permanent injunction until such time as an appropriate environmental review took place.

3. In this Court's Memorandum and Order, which is attached hereto as Exhibit "A", the Court did not reach the merits, rather finding that Petitioners-Appellants' failure to seek a preliminary injunction at the trial level while work was proceeding to the point where it could not be easily undone, mooted the Petitioners-Appellants' appeal.

4. Therefore, the only issue for re-argument concerns the Court's determination that, under the facts of this case, the case is moot. It is respectfully submitted that for the following reasons, the Court misapprehended or misapplied the law as it relates to the New York State Mootness Doctrine.

5. This case presents the first impression issue concerning whether or not it is necessary to move for a preliminary injunction to maintain the status quo when the only thing remaining in the case is the Court's decision on the merits concerning whether to grant a permanent injunction.

6. Therefore, this case was submitted to the Court, including all Memorandums of Law and oral argument on November 26, 2018. At that point, the only work that had been done by Cargill was site preparation work including silt fencing around the construction site, a tie on at the road, and a construction entrance for minimizing the dirt tracked onto the road.

7. Moreover, at this point it was assumed that Petitioners would promptly receive a decision on the merits, which would indicate whether or not Petitioners-Appellants' would receive a permanent injunction concerning any further work to be done.

8. This Court determined that Petitioners-Appellants' failure to seek a preliminary injunction at the trial level as work proceeded was the primary basis for granting Respondents' Motion to Dismiss for Mootness.

9. However, it is respectfully submitted that this Court did not properly provide the appropriate analysis concerning whether or not a motion for preliminary injunction was required to maintain the status quo, when a decision was pending on whether or not a permanent injunction would be ordered. A motion for a preliminary injunction would be supported by the exact same information, expert affidavits, and the like, that was already before the Court pending the Court's decision, and therefore would be merely duplicative of what was already before the Court and the Court analysis would therefore be the same concerning whether to grant a preliminary injunction or permanent injunction.

10. Petitioners-Appellants did not anticipate a nearly five month delay between submission of the case for the Court's Decision and when the Decision was actually rendered on April 22, 2019. During that period, while the parties were waiting for the Court's Decision, Cargill installed an above-grade drill pad and began drilling the 8 inch fully-cased borehole to bring power into the mine. The borehole was completed during April of 2019, and Cargill reported starting further surface work.

11. The Court's five month delay in issuing a Decision should not prejudice the Petitioners-Appellants. Any work that proceeded during that period of time should not support a mootness claim made against the Petitioners-Appellants.

12. After the Court's Decision on April 22, 2019, Appellants promptly filed their Notice of Appeal on May 8, 2019.

13. It was not until July 26, 2019, that it appeared that the drilling of the Shaft No. 4 pilot hole was imminent, and therefore, for the first time, Appellants believed that they could show this Court potential imminent and irreparable injury if Shaft No. 4 was drilled, and therefore, sought a preliminary injunction in this Court.

14. Therefore, it is again respectfully submitted that this Court misapprehended the facts in this case, and failed to credit that the Petitioners-Appellants had sought to maintain the status quo concerning major work that was done, first at the trial level waiting for the Court's Decision on whether to grant the permanent injunction, and at the appellate level, promptly moving for a preliminary injunction once the major work was to proceed that could cause irreparable injury to the environment and could not be easily dismantled (Petitioners' counsel requested in a motion and the undersigned's Affirmation dated July 26, 2019 that a preliminary injunction issue, but this Court denied the motion in its order entered without opinion on October 4, 2019).

15. As this Court, and other courts in New York have regularly indicated, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual

controversy. In the instant case, while this Court determined that Shaft No. 4 could not be safely dismantled, the Court overlooked the fact that the Shaft, which would allow further mining north under the Lake, with a significant risk of mine collapse due to the thinning bedrock above the mines, and which Petitioners-Appellants alleged that the Department of Environmental Conversation did not consider when granting its permit to construct Shaft No. 4, that controversy still exists so that any change in circumstances in nearly completing Shaft No. 4 would not affect Petitioners' concerns of mine collapse as the mining proceeded north under the Lake. See, for example *101 Co, LLC v. New York State Department of Environmental Conservation*, 169 A.D.3d 1307 (3rd Dept. 2019). This Court also incorrectly cites *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn,* 2 NY3d 727 since in this case the record does contain Petitioners' good faith effort in moving for a preliminary injunction, while the record in *Matter of Citineighbors,* Id., did not. This misapprehension provides further basis for granting the instant motion because mootness is not present in this case.

16. Moreover, it cannot be denied that the issue of the risk of mine collapse is a question of general interest and substantial public importance and therefore, even if the mootness doctrine would otherwise apply, the exception to the mootness doctrine as confirmed by the Court of Appeals in *Dreikausen v.*

Zoning Bd. of Appeals of the City of Long Beach, 98 N.Y.2d 165 (2002) would provide an exception to the mootness doctrine to allow the existing controversy to be heard and decided by this Court. See *Friends of the Pine Bush v. Planning Board of the City of Albany*, 86 A.D.2d 246 (3rd Dept. 1982).

17. Therefore, since Petitioners-Appellants in fact sought to maintain the status quo at both the trial and appellate level and the case presents issues of public importance, therefore, Respondents' Motion to Dismiss on Mootness grounds should not have been granted and this Court should allow re-argument on the issues of mootness.

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO THE COURT OF APPEALS IF RE-ARGUMENT IS NOT GRANTED.

18. As previously indicated, the issue of whether or not it is necessary to make a motion for a preliminary injunction after the case had been submitted to the trial court and a decision was pending, is one of first impression. This case would provide the Court of Appeals the opportunity to address that issue.

19. This case will also allow the Court of Appeals to clarify the parameters of the mootness exception for certain public issues, such as the environmental issue in this case.

20. Finally, this case would provide the Court of Appeals with the ability to clarify when a preliminary injunction should be sought. This Court is aware that

one of the three prongs that must be shown in order to receive a preliminary injunction requires proof that irreparable injury would be caused if the preliminary injunction were not granted. In the instant case, as it has been claimed throughout that no irreparable injury would occur until such time as Shaft No. 4 was drilled, presenting the risk of water inundation into the shaft. In this Court's Memorandum and Order, the Court faulted the Petitioners-Appellants for not seeking a preliminary injunction at a much earlier date when work preceded that did not present the risk of irreparable injury to the environment and the public.

21. Therefore, for all of the foregoing reasons, it is respectfully submitted that if this Court does not allow re-argument, the Court should grant leave to appeal to the Court of Appeals to resolve these important issues concerning the mootness doctrine.

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Attorneys for Petitioners-Appellants

Sworn to before me this
4th day of December, 2020

Notary Public

MARIA T. PARRILLA
Notary Public, State of New York
No. 01PA4891745
Qualified in Erie County
My Commission Expires May 4, 2023