

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of MAMARONECK
ICES INC. and SCOTT ROSENBERG,

DECISION & ORDER

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No.: 2546-16

-against-

THE VILLAGE OF MAMARONECK, VILLAGE OF
MAMARONECK ZONING BOARD OF APPEALS,
DAN GRAY, in his capacity as BUILDING
INSPECTOR OF THE VILLAGE OF
MAMARONECK, SUSAN FISHER, CHRIS
FISHER, STEPHANIE FIGLIOMENI, JOHN
FIGLIOMENI, KAREN FRANCELLA, ANTHONY
FRANCELLA, MARIA MAFFEL, GAETANO
MAFFEL, MARIA PROUDIAN and JOHN
GARFUFFI,

Respondents.

-----X
ZAMBELLI, A.J.S.C.

The following papers numbered 1-9 read on this application for a temporary
restraining order and preliminary injunction in this Article 78 proceeding:

PAPERS NUMBERED

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| Order to show Cause, Verified Petition | 1-2 |
| Petitioners' Memorandum of Law | 3 |
| Figliomeni Affidavit in Opposition | 4 |
| Gray Affidavit in Opposition | 5 |
| Village Respondent' Memorandum of Law in Opposition | 6 |

PAPERS NUMBERED

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| Petitioners' Reply Affirmation | 7 |
| Petitioners' Reply Memorandum of Law | 8 |
| Exhibits | 9 |

Upon the foregoing papers It is ordered that:

The application for a temporary restraining order ("TRO") and a preliminary injunction: 1) staying the Resolution dated July 18, 2016 and filed on July 25, 2016, which imposed certain conditions with respect to the operation of Ralph Italian Ices being operated by Petitioner at the property located at 946 East Post Road, Mamaroneck, New York and; 2) "enjoining Respondents the Village and Building Inspector, from requiring Petitioner to comply with the conditions in the Resolution or otherwise limiting the hours of operation of Ralph's Italian Ices" pending determination of the underlying proceeding is denied.

Temporary restraining orders and preliminary injunctions are drastic remedies which should be used sparingly (see, Kutter v. Cuomo, 147 A.D.2d 215 (3rd Dept. 1989), *aff'd*, 75 N.Y.2d 596 (1990)). To obtain a temporary restraining order, therefore, it is Petitioners' burden to demonstrate: (1) irreparable injury absent the grant of the injunction; (2) a likelihood of success on the merits; and; (3) that the balance of equities lies in movant's favor (see, Bailey v. Ossi Sport Club, Inc., 71 A.D.3d 1069 (2d Dept. 2010); Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Buildings., 65 A.D.3d 1051 (2d Dept. 2009)).

Petitioners' have failed to show irreparable harm. It is well established that irreparable injury, for purposes of an injunction, means an injury for which money

damages are insufficient (Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635 (2d Dept. 2009); Matter of Walsh v. Design Concepts, Ltd., 221 A.D.2d 454 (2d Dept. 1995)). As for the claim that the schedule set forth in the Resolution for the relevant filings will cause Petitioners injury, the option to request an extension makes this claim speculative (see, Golden v. Steam Heat, Inc., 216 A.D.2d 440 (2d Dept. 1995)). Equally unavailing is Petitioners' implication that the costs of preparing and filing the Special Permit application and site development plan and the enforcement of the limitations on late night operation hours might eventually result in financial losses that necessitate the abandonment of the business (see, Rockland Development Associates v. Village of Hillburn, 172 A.D.2d 978 (3d Dept. 1991)). Accordingly, Petitioners have not proven damages that demonstrate irreparable harm in the absence of a TRO injunction (see, 1659 Ralph Ave. Laundromat Corp. v. Ben David Enters., 307 A.D.2d 288 (2d Dept. 2003)).

In addition, Petitioners' claim that the equities in this proceeding favor their position is rejected. There is nothing to indicate that the denial of an injunction would result in any hardship to Petitioners outweighing that which would be sustained by Respondents in the event that such relief was granted (see, Rockland Development Associates v. Village of Hillburn, supra). Even assuming that Petitioners are likely to succeed on the merits, therefore, the injunction is denied as Petitioners failed to establish irreparable injury and that the balance of equities fall in their favor as is required to warrant the grant of injunctive relief.

The failure to establish irreparable harm and the balance of equities in their favor sufficient to obtain a TRO is also fatal to the application for a preliminary injunction (Wheaton/TMW Fourth Ave., LP v. New York City Dept. Of Buildings, 65 A.D.3d 1051,

1052 (2d Dept. 2009); Matter of Related Properties, Inc. v. Town Bd. of Town / Village of Harrison, 22 A.D.3d 587, 590 (2d Dept. 2005)). A party seeking such an injunction must establish a clear right to that relief under the law and the undisputed facts (Id.).

Accordingly, given that injunctive relief is a drastic remedy which should be issued cautiously (Matter of Related Properties, Inc. v. Town Bd. of Town / Village of Harrison, supra at 590), under the circumstances of this case, the Court declines to issue a temporary restraining order or preliminary injunction in this matter.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
August 9, 2016


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