

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
SUSAN HITO SHAPIRO and BENJAMIN OSTRER, as  
CO-EXECUTOR for the ESTATES OF SONYA SHAPIRO  
AND MILTON B. SHAPIRO,

*Plaintiffs,*

-against-

TOWN OF RAMAPO, TOWN BOARD OF TOWN OF  
RAMAPO, SCENIC DEVELOPMENT LLC, FORTY  
SIX-FIFTY TWO WADSWORTH TERRACE CORP.,  
and NEWFIELD ESTATES, INC.

*Defendants.*

-----X  
LYNDA GELLIS and SUSAN HITO SHAPIRO and  
BENJAMIN OSTRER, as Co-Executor  
for the Estate of MILTON B. SHAPIRO, and SUSAN  
HITO SHAPIRO, as Successor Executor for the Estate  
of SONYA SHAPIRO

*Plaintiffs,*

-against-

TOWN OF RAMAPO, THE TOWN BOARD OF THE  
TOWN OF RAMAPO, THE PLANNING BOARD OF  
THE TOWN OF RAMAPO,

*Defendants,*

-and-

SCENIC DEVELOPMENT, LLC, SCENIC  
DEVELOPMENT SM, LCC, and NEWFIELD  
ESTATES, INC.,

*Nominal Defendants*

-----X  
*Thomas E. Walsh, II, J.S.C.*

**ORDER**

Index No. 2418/2013.

- Motion # 2 - MD
- Motion # 6 - MD
- Motion # 7 - MD
- Motion # 8 - MD
- Motion # 9 - MD
- Motion # 10 - MD

- Motion # 11 - MG
- Motion # 12 - MD

Index No. 106/2016

The following papers numbered 1- 22 were read on a Notice of Motion (Motion #2) for an Order pursuant to Civil Practice Law and Rules § 3124 to compel Defendants Scenic

Development LLC and Scenic Development SM, LLC to finally provide the disclosure requested in Plaintiff's interrogatories dated October 21, 2016, as required by Civil Practice Law and Rules § 3101, together with such other and further relief as the Court may seem just and proper; and also considered in connection with a Notice of Motion (Motion # 6) for an Order disqualifying Susan H. Shapiro, Esq. from serving as an attorney in this action pursuant to Rule 3.7, the Advocate-Witness Rule and whatever other, further and different relief that this Court deems just and proper; and also considered in connection with Petitioner's Order to Show Cause (Motion #7) for an Order pursuant to Civil Practice Law and Rules § 2308 to compel non-party witnesses Leonard Jackson Associates, Terry Rice, Esq., and Time Miller Associates to comply with the subpoena duces tecum issued to each of them, served on Leonard Jackson Associates and Tim Miller Associates on or about August 21, 2017 and Terry Rice, Esq. on July 26, 2017 which required each listed non-party witness to produce five (5) categories of documents (the categories of documents are identical in each subpoena) at their offices and permit Plaintiffs to inspect, copy or photograph said documents, on the grounds that said non-party witnesses have refused to comply with said subpoenas, and for such other and further relief as the Court may seem just and proper; and also considered in connection with Defendant's Notice of Motion (Motion #8) for an Order quashing Plaintiff's Third Set of Interrogatories to Defendants Scenic Development LLC and Scenic Development SM LLC and quashing Plaintiff's subpoena duces tecum served upon non-party Greg Fleischer and whatever other, further and different that this Court deems just and proper; and is also considered in connection with Plaintiff's Notice of Motion (Motion #9) for an Order pursuant to Civil Practice Law and Rules § 3124 to compel deposition of Christopher St. Lawrence, a non-party witness in the above referenced actions, together with such other and further relief as the Court may seem just and proper; and is also considered in connection with Plaintiff's Order to Show Cause (Motion #10) for an Order (a) staying all discovery in the above-referenced cases pending this Court's ruling on Plaintiff's Motion to Discontinue without Prejudice, these cases made pursuant to Civil Practice Law and Rules § 3217(b) and (b) such other and further relief as this Court may deem just, proper and equitable; and is also considered in connection with Plaintiff's Notice of Motion to Discontinue Without Prejudice (Motion #11) for an Order pursuant to New York State Civil Practice Law and Rules § 3217(b) to discontinue these actions, without prejudice, because decisions of the Appellate Division Second Department,

dated November 8, 2017 render this case moot at this time; and is also considered in connection with Defendant's Order to Show Cause (Motion #12) for an Order adjudging Deborah Munitz guilty of and punishing her for contempt of this Court for her alleged misconduct in failing to comply with the direction of the Court, compelling non-party Deborah Munitz to appear for a deposition on a date fixed by the Court and why Defendants, Scenic Development LLC and Scenic Development SM, LLC should not be granted such other and further relief as may be just and proper

<u>PAPERS</u>	<u>NUMBER</u>
Notice of Motion (Motion #2)/Affirmation of Susan Hito Shapiro, Esq./ Exhibits (1-8)	1
Affirmation of Terry Rice, Esq. in Opposition to Motion #2	2
Letter to Court from Susan Hito Shapiro, Esq. Dated April 5, 2017 (Motion #2)	3
Notice of Motion (Motion #6)/Affirmation of Adam K. Kurland, Esq./Exhibits (A-F)	4
Affirmation of Edward F. Beane, Esq. in Opposition to Motion #6/ Affirmation of Susan H. Shapiro, Esq./Exhibit A	5
Order to Show Cause (Motion #7)/Affirmation of Edward F. Beane, Esq./ Exhibits (A-H)	6
Affirmation of Adam K. Kurland, Esq. in Opposition to Motion #7/Affirmation of Terry Rice, Esq./Affirmation of Yitzchok Lebovits/Affirmation of Tim Miller/ Affirmation of Leonard Jackson/Exhibits (A-D)	7
Reply Affirmation of Edward F. Beane, Esq. to Motion #7/Exhibit A	8
Notice of Motion (Motion #8)/Affirmation of Adam K. Kurland, Esq./ Affirmation of Greg Fleischer/Affirmation of Yitzchok Lebovits/Exhibits (A-H)	9
Affirmation in Opposition of Susan Hito Shapiro, Esq. (Motion #8)/Exhibits (1-3)	10
Notice of Motion (Motion #9) to Compel Discovery/Affirmation of Susan Hito Shapiro, Esq./Exhibits (A-E)	11
Affirmation of Alan Bertram, Esq. in Opposition to Motion #9	12
Reply Affirmation of Susan Hito Shapiro, Esq. in Further Support of Motion #9/	

Exhibits (1-5)	13
Order to Show Cause (Motion #10)/Affirmation of Susan Hito Shapiro, Esq./ Exhibits (1-3)	14
Affirmation of Janice Gittleman, Esq. in Opposition to Motion #10	15
Notice of Motion to Discontinue Without Prejudice (Motion #11)/Affirmation of Susan Hito Shapiro, Esq./Exhibits (1-3)	16
Affirmation of Adam K. Kurland, Esq. in Opposition to Motion #11	17
Affirmation of Janice Gittleman, Esq. in Opposition to Motion #11	18
Reply Affirmation of Susan Hito Shapiro, Esq. in Further Support of Motion to Discontinue Without Prejudice	19
Order to Show Cause (Motion #12)/Affirmation of Adam K. Kurland, Esq./ Exhibits (A-D)	20
Affirmation of Edward E. Beane, Esq. in Opposition to Motion #12/Exhibits (A-D)/ Affidavit of Deborah Munitz	21
Affirmation of Janice Gittleman, Esq. in Opposition to Motion #12	22

Civil Practice Law and Rules § 3127(b) provides that a court may issue an order directing a discontinuance “upon terms and conditions [that] the court deems proper.” [*Rodriguez v. Samaras*, 117 AD3d 1022, 1024 (2d Dept 2014); *U.S. Bank Nat. Ass’n v. Cockfield*, 143 AD3d 889, 890 (2d Dept 2016)]. “A motion for leave to discontinue an action is addressed to the sound discretion of the court and generally should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid consequences of a potentially adverse determination, or produce other improper results.” [*Blauvelt Mini-Mall, Inc. v. Town of Orangetown*, 158 AD3d 678 (2d Dept 2018); *Tucker v. Tucker*, 55 NY2d 378 (1982); *Turca v. Turca*, 117 AD3d 719 (2d Dept 2014); *GMAC Mtg. LLC v. Bisceglie*, 109 AD3d 874 (2d Dept 2013); *Marinelli v. Wintner*, 139 AD3d 914 (2d Dept 2016)]; “Absent special circumstances...parties should not be compelled to litigate.” [*Cogan v. Cogan*, 90 AD2d 491, 492 (2d Dept 1982); *DuBrey v. Warner Bros. Records, Inc.*, 236 AD2d 312 (1st Dept 1997)].

In the instant action the Plaintiff is seeking a discontinuance as a result of the Appellate Division, Second Department Decisions issued in November 2017. Plaintiff submits.

that those Decisions rendered the instant action "academic at this point in time." According to Plaintiff the Defendant Town of Ramapo can move forward with the new approvals as set forth in the Appellate Division Decisions and it is possible that in an action challenging those future actions some of the allegations in the instant complaints could be relevant in those future legal actions. As such, Plaintiff is seeking to discontinue the instant action without prejudice, as the action has never been discontinued previously and that no prejudice or injustice will result from the discontinuance.

In opposition the Town of Ramapo argues that the recent Appellate Division Decisions annul certain approvals granted by the Planning Board or the Town Board, which are not issues in the instant action. Defendant Town of Ramapo submits that the instant action raises claims of spot zoning and challenges various Town Local Laws, which were not issues dealt with in the recent Appellate Division Decisions. Further, Defendant avers that the recent decisions were limited to those specific approvals that were granted by the Town Board and the Planning Board and as such the Decisions fail to moot the issues raised in the instant action. Despite the foregoing assertions, the Defendant Town of Ramapo takes no position in regards to Plaintiff's motion and leaves the determination to the sound discretion of the Court.

In opposition Nominal Defendants Scenic Development LLC and Scenic Development SM, LLC submits that the November 2017 Appellate Division, Second Department Decisions did not "moot" or make the instant action "academic" as the instant action has a "number of causes of action" which allege that the Defendant Town of Ramapo engaged in spot zoning regarding the Town's adoption of five (5) local law amendments. Defendants further aver that the Appellate Division did not address or consider those five (5) local law amendments and that they all remain in "full force and effect." Additionally, Defendants submit that since the instant action addresses spot zoning, for which the Court must consider the circumstances surrounding the adoption of the local law, that nothing that occurs from today moving forward relates to whether the Plaintiff's claims for spot zoning are viable.

As to prejudice to the Defendants, they assert that the Defendant Scenic must re-apply to the Town Board and/or Planning Board to obtain new approvals, that in considering the new applications the Town Board and/or Planning Board would apply the five (5) local law amendments (among other laws) and that if the approvals are issued the Plaintiffs "would surely

re-commence an action alleging the identical facts as alleged in the instant actions' complaints and requesting identical relief" resulting in further delay in Defendant Scenic's commencing development of the Patrick Farm Project. The Defendants also submit that allowing the Plaintiff to discontinue the instant action at the advanced stage, i.e. after almost all discovery has been completed, motion practice has been extensive and there are compliance issues awaiting this Court's decision, would be a "travesty of justice." Specifically, Defendants assert that as developers, if they had to begin the entire process again their ability to develop the subject land would be put off again, which is detrimental to a developer and would prejudice them immensely.

The third argument raised by Defendants against the granting of the instant dismissal is that the Plaintiffs are engaging in "gamesmanship," in that they are attempting to utilize the discontinuance to gain an advantage in the future. Defendants assert that upon their application again regarding the Patrick Farms Project if the applications are granted the Plaintiffs will merely re-file new complaints with the same claims as exist in the instant action. As such, the Defendants seek to have the Plaintiff's application denied or in the alternative to direct plaintiff's discontinuance be with prejudice.

The Court has considered the arguments raised by all parties and finds that by granting Plaintiff's application a substantial right of the Defendants will not be prejudiced. The Court further finds that the Plaintiffs are not seeking the instant discontinuance to circumvent an order of the court or avoid the consequences of a potentially adverse determination. In discontinuing the instant action the Court notes that the instant action addresses spot zoning, which was not considered by the Appellate Division in its November 2017 Decisions, but is interrelated in a manner that would render continued litigation as to the instant case unproductive for all parties. The Court notes that the Defendants Scenic Development LLC and Scenic Development SM, LLC would incur a delay in development of the Patrick Farm Project based on the requirements set forth in the Appellate Division's November 2017 Decisions and that keeping the instant case pending and allowing it to proceed to trial will not alleviate that delay. Therefore, the Plaintiff's application to discontinue the instant action pursuant to *Civil Practice Law and Rules* § 3217(b) without prejudice is granted (Motion #11).

In light of the Court's decision to grant the Plaintiff's application for a discontinuance, Motions #2, #6, #7, #8, #9, #10 and #12 are all denied as moot.

Accordingly it is hereby:

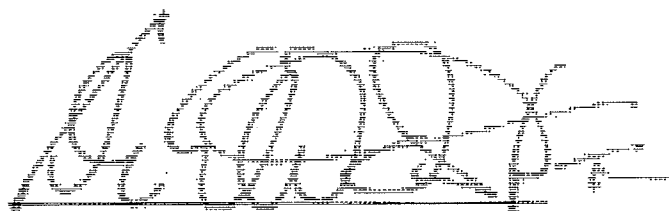
**ORDERED** that Plaintiff's Motion for a Discontinuance pursuant to Civil Practice Law and Rules § 3217(b) (Motion #11) is granted; and it is further

**ORDERED** that the instant action Index # 2418/2013 is discontinued without prejudice as directed in the Court's Decision and Order; and it is further

**ORDERED** that Motions # 2, #6, #7, #8, #9, #10 and #12 are denied as moot.

The foregoing is the Court's Decision and Order on Motions #2, 6, 7, 8, 9, 10, 11 and 12.

Dated: New City, New York  
March 30, 2018



Hon. Thomas F. Walsh II  
Justice of Supreme Court

TO:

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