

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of
EVELYN BYRNES, MAUREEN WOODWARD, MARY
LEDDY, VIOLET CAVATI, THOMAS SHINE,
DOROTHY BROPHY, ERNEST AUTUMN VAN DEN
HEUVEL, and STONY POINT ACTION COMMITTEE
FOR THE ENVIRONMENT (S.P.A.C.E.), INC.,

DECISION AND ORDER

INDEX NO. 11007/08

MOTION DATE: 1/23/09

Petitioners/Plaintiffs,

-against-

TOWN OF STONY POINT, THOMAS GUBITOSA,
PETER MULLER, EUGENE KRAESE, THOMAS
McMENAMIN, GERRY ROGERS, GLADYS ANN
CALLAGHAN, LUANNE KONOPKO, constituting
and as the Board of the Planning Depart-
ment of the Town of Stony Point, PHILIP
A. MARINO, LOU VICARI, JIM WHITE,
GEOFFREY FINN, STEPHEN COLE-HATCHARD,
constituting and as the Town Board of the
Town of Stony Point, WILLIAM SHEEHAN and
CROSSROADS COMPANY, LLC,

Respondents/Defendants.

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The following sets of papers numbered 1 to 11 were
considered on the respondents' motion to dismiss the petitioners'
Article 78 proceeding:

- Notice of petition, summons,
verified petition, and exhibits A-P 1
- Stony Point respondents' notice of
motion, affirmation, affidavit, and
exhibits A-E; memorandum of law 2,3
- Crossroads Company, LLC's notice of
motion, affidavit, and exhibits 1-11 4
- Affirmation in opposition to Stony
Point's motion and exhibits A-C;

memorandum of law; affirmation in opposition to Crossroads' motion and exhibits A-C; memorandum of law	5-8
Stony Point's reply affirmation	9
Crossroads' reply affirmation; memorandum of law	10, 11

Upon review of the foregoing, the respondents' "motions to dismiss," which are actually objections in point of law, are granted.

There is no question that Dynamic Fitness, Inc. ("Dynamic"), as the owner of the property which was the subject of the determinations by the Town Board and the Planning Board, was a necessary party to this proceeding. See, *East Bayside Homeowners Association, Inc. v Chin*, 12 AD3d 370 (2d Dept 2004), *lv app den*, 4 NY3d 704 (2005). The pertinent questions are (1) can Dynamic be joined as a respondent, and (2) if Dynamic cannot be joined, should the proceeding be permitted to continue without Dynamic?

Dynamic cannot be joined because the statute of limitations has run. See, *Artrip v Incorporated Village of Piermont*, 267 AD2d 457 (2d Dept 1999). Even assuming that the petitioners' mistake regarding the identity of the owner was excusable, Dynamic and Crossroads are not so united in interest as to permit application of the doctrine of relation back. See, *Ferruggia v Zoning Board of Appeals of the Town of Warwick*, 5 AD3d 682 (2d Dept 2004). As for whether this action can proceed without Dynamic, CPLR 1001(b) outlines the factors which the Court must

consider:

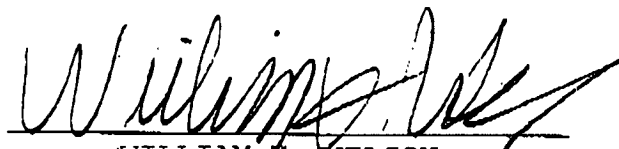
1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Applying these five factors, the Court finds that this proceeding may not proceed in the absence of Dynamic. Although the petitioners will not have another effective remedy, there is prejudice to Dynamic in proceeding in its absence; the prejudice could have been avoided if the petitioners had named Dynamic as a party; no protective provision is feasible; and it is doubtful that an effective judgment can be rendered without Dynamic as a party. *See, Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals*, 49 AD3d 749 (2d Dept 2008).

This decision shall constitute the order of this Court.

E N T E R

Dated: New City, New York
March 9, 2009


WILLIAM R. NELSON
ACTING SUPREME COURT JUSTICE