SHORT FORM ORDER

INDEX No. 10-27444



SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

***PRESENT:***

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 8-11-10 (#007)
MOTION DATE 9-8-10 (#008)
MOTION DATE 11-16-10 (#009)
MOTION DATE 5-26-11 (#010)
MOTION DATE 7-7-11 (#011)
ADJ. DATE 12-7-11
Mot. Seq. # 007 - MD # 010 - MD
# 008 - MD # 011 - MD
# 009 - MotD

---X

TOWN OF HUNTINGTON,

Plaintiff,

- against -

JOHN MASTROIANNI, JOHN'S BAY LIMOUSINE & 320 BROMPTON ENTERPRISES, INC.,

Defendants.

---X

JOHN J. LEO, ESQ.
Attorney for Plaintiff
191 New York Avenue
Huntington, New York 11746

JOHN G. POLI, III, P.C.
Attorney for Defendants Mastroianni and John's Bay Limousine
P.O. Box 59
Northport, New York 11768

KAREN KERR, ESQ.
Attorney for Defendant 320 Brompton
191 New York Avenue, Suite 202
Huntington, New York 11743

Upon the following papers numbered 1 to 90 read on these motions and cross motions to vacate TRO, for preliminary/permanent injunction and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 44 - 45, 46 - 54, 81 - 90; Notice of Cross Motion and supporting papers 1 - 15, 35 - 38; Answering Affidavits and supporting papers 16 - 25, 26 - 30, 39 - 43, 55 - 68, 69 - 72, 73 - 78; Replying Affidavits and supporting papers 31 - 34, 79 - 80; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions and cross motions are hereby consolidated for purposes of this determination; and it is further

***ORDERED*** that the cross motion by the defendants John Mastroianni and John's Bay Limousine, Inc. for an order pursuant to CPLR 3211 (a) (8) dismissing the action, and pursuant to Town Law 135 and

22 NYCRR 202.7 (f) vacating the temporary restraining order granted in this matter on July 27, 2010, is denied; and it is further

***ORDERED*** that the cross motion by the defendant 320 Brompton Enterprises, Inc. for an order pursuant to 22 NYCRR 202.7 (f) vacating the temporary restraining order granted in this matter on July 27, 2010 is denied as academic, and it is further,

***ORDERED*** that the motion by the plaintiff brought on by order to show cause for a preliminary injunction pending the outcome of this litigation, or a permanent injunction, enjoining the defendants from conducting a used car dealership, or the storing or repairing of cars at the subject premises, awarding monetary penalties to the plaintiff, and directing the defendants to remove three signs, a retaining wall, and an awning from the subject premises is granted to the extent of granting a preliminary injunction against the defendants pending final disposition of this action enjoining the defendants from: 1) operating a used car dealership at 324 Depot Road, Huntington, New York and 320A Depot Road, Huntington, New York, 2) selling or storing used cars for sale at 324 Depot Road, Huntington, New York and 320A Depot Road, Huntington, New York, and 3) repairing, servicing or detailing new or used cars at 320A Depot Road, Huntington, New York.

***ORDERED*** that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor, permanently enjoining the defendants from conducting a used car dealership or the storage of cars at the subject premises, awarding monetary penalties to the plaintiff, and directing the defendants to remove three signs, a retaining wall, and an awning from the subject premises, is denied; and it is further

***ORDERED*** that the resubmitted motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor, permanently enjoining the defendants from conducting a used car dealership or the storage of cars at the subject premises, awarding monetary penalties to the plaintiff, and directing the defendants to remove three signs, a retaining wall, and an awning from the subject premises, is denied.

This is an action in which the Town of Huntington (Town) seeks, *inter alia*, permanent injunctive relief to stop the defendants' alleged violations of the Huntington Town Code (Town Code), and for monetary penalties authorized by said Code. The Town has been intermittently prosecuting the defendants John Mastroianni (John) and John's Bay Limousine, Inc. (JBL) (collectively Mastroianni) since 2004 for violations of the Town Code taking place at 324 Depot Road, Huntington, New York (324 Depot). On June 10, 2004 the Town Zoning Board of Appeals (ZBA) denied Mastroianni's application for a special use permit to operate a used car business at 324 Depot due in part to the small size of the parcel and the resulting danger created by the loading and unloading of cars on public streets adjacent to the site. In October 2004, Mastroianni pled guilty to violating the Town Code in two separate District Court actions. A third District Court action, under Index No. HUC 04-3139, was settled pursuant to stipulation of the parties. Said stipulation provided that Mastroianni would "permanently cease and desist from the storage or sale of any vehicles at the subject premises" after an adverse judgment in an article 78 proceeding commenced by Mastroianni to challenge the ZBA denial, and the exhaustion of any appeals. On April 5, 2005, said stipulation was vacated by the District Court upon motion by the Town alleging that Mastroianni had violated the terms thereof, and the action was reinstated. Despite Mastroianni's assertion that the third action was voluntarily discontinued by the Town, the record does not reveal the

disposition of the action. By decision dated February 2, 2006, the Hon. Elizabeth Hazlitt Emerson upheld the ZBA's denial of Mastroianni's application for a special use permit, and dismissed the article 78 petition.

On July 27, 2010, the Town commenced this action to enjoin Mastroianni's allegedly continued use of 324 Depot as a used car dealership and for car storage, for monetary penalties, and to enjoin the defendants' expansion of the car dealership to, and/or use as an auto repair shop at, 320A Depot Road, Huntington, New York (320A Depot). The latter premises is owned by the defendant 320 Brompton Enterprises, Inc. (Brompton), and leased to Mastroianni. The Town moved by order to show cause for a temporary restraining order enjoining the defendants from conducting a car dealership at 324 and 320A Depot, and directing the removal of three signs, a retaining wall, and an awning which allegedly are in violation of the Town Code. The order to show cause was signed, and the temporary restraining order granted, on June 27, 2010.

Mastroianni moves (# 007) for an order vacating the temporary restraining order and dismissing the complaint for lack of personal jurisdiction over them. Brompton moves (# 008) for an order vacating the temporary restraining order pursuant to 22 NYCRR 202.7 (f). It is undisputed that the issues of personal jurisdiction and notice pursuant to 22 NYCRR 202.7 (f) were discussed amongst the parties in a conference before the Hon. Jeffrey A. Spinner, who permitted the plaintiff to obtain jurisdiction over the parties, and to provide notice to them, by service on their respective counsel. It is also undisputed that proper service was made pursuant to the order to show cause (# 009) granted on November 4, 2010 which provided for such service. In addition, the record reveals that, on November 19, 2010, a hearing was conducted before the Hon. Jeffrey A. Spinner pursuant to the latter order to show cause in which the parties appeared, and to which they made no objection regarding personal jurisdiction or notice pursuant to 22 NYCRR 202.7 (f) in this matter. After the hearing, the Court granted an extension of the temporary restraining order dated November 4, 2011. Accordingly, Brompton's motion (# 008), and the branch of Mastroianni's motion (# 007), which seek to vacate the temporary restraining order granted on July 27, 2010 on the ground that they did not receive proper notice are denied as academic. The Court notes that Mastroianni's motion emphasizes its allegations that they were not given proper notice regarding the initial order to show cause, and that they were not properly served with said papers. In addition, the affidavit submitted in support of Mastroianni's motion to dismiss the complaint for lack of service does not dispute the affidavit of service filed in this matter, except as it pertains to the first order to show cause. Accordingly, Mastroianni's motion (# 007) is denied in its entirety.

The Town moves by order to show cause (# 009) for a preliminary injunction seeking injunctive relief as set forth in its complaint, as well as additional relief. To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 808 NYS2d 418 [2d Dept 2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see* ***Dixon v Malouf***, *supra*; ***Ruiz v Meloney***, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see* ***Dixon v Malouf***, *supra*; ***Ruiz v Meloney***, *supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a

clear right to such relief which is plain from the undisputed facts (***Blueberries Gourmet v Aris Realty Corp.***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see* ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; ***Peterson v Corbin***, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2000]; ***Nalitt v City of New York***, 138 AD2d 580, 526 NYS2d 162 [2d Dept 1988]).

Applying these principles here, the Court finds that the Town has sufficiently demonstrated its entitlement to injunctive relief pending the determination of the action (*see* CPLR 6301; ***Winchester Global Trust Co. Ltd v Donovan***, 58 AD3d 833, 873 NYS2d 130 [2009]). First, the likelihood of success on the merits has been demonstrated given the fact that there was uncontroverted testimony in a hearing before the Court regarding the use of the subject premises, and considering the past history regarding the Town's successful prosecution for Code violations. In addition, when seeking an injunction to enforce its zoning ordinances a Town is not required to show irreparable injury (***Town of Southampton v Sendlewski***, 156 AD2d 669, 549 NYS2d 434 [2d Dept 1989]; ***Town of Esopus v Fausto Simoes and Assoc.***, 145 AD2d 840, 535 NYS2d 827 [3d Dept 1988]). However, irreparable injury in the absence of a preliminary injunction herein is obvious (*see* ***New York State Thruway Authority v Dufel***, 129 AD2d 44, 516 NYS2d 981 [1987]). It is undisputed that the Town has obtained a final determination that 324 Depot is not a large enough parcel of land to operate a used car dealership. Clearly, the ongoing operation of a used car dealership on the parcel places the public at risk during the loading and unloading of vehicles for sale thereon. Lastly, a balancing of the equities in this case weighs in favor of the Town (*see* ***New York State Thruway Authority v Dufel***, *id.*).

However, as noted below, the Town has not established its right to a permanent injunction herein. It is undisputed that the Town issued a certificate of occupancy permitting use of 320A Depot as a "garage and workshop" in 1958. The Town has not established its claim that such use has been abandoned, and that the rezoning of the area to R-15 residential use in 1989 prohibits such use of the parcel, nor has it established in what manner Mastroianni may temporarily keep cars on the premises and for what purpose.

Accordingly, the Court grants the Town's motion solely to the extent of granting a preliminary injunction against the defendants pending final disposition of this action enjoining the defendants from: 1) operating a used car dealership at 324 Depot and 320A Depot, 2) selling or storing used cars for sale at 324 Depot and 320A Depot, and 3) repairing, servicing or detailing new or used cars at 320 A Depot. The preliminary injunction shall be effective immediately upon service of a copy of this order with notice of entry upon the defendants.

The Town moves twice for an order granting it summary judgment and permanently enjoining the defendants from conducting a used car dealership or the storage of cars at the subject premises, awarding monetary penalties to the plaintiff, and directing the defendants to remove three signs, a retaining wall, and an awning from the subject premises. The papers submitted by the Town in support of these two motions are identical, except in the second motion the Town adds its complaint as an exhibit. The first motion (# 010) is opposed by the defendants on multiple grounds, including the failure of the Town to include the pleadings within its submission. CPLR 3212 (b) requires that a motion for summary judgment be supported by a complete set of the pleadings (***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [2001]; ***Hamilton v City of New York***, 262 AD2d 283, 691 NYS2d 108 [1999]; ***Mathiesen v Mead***, 168 AD2d 736, 563 NYS2d 887 [1990]). Therefore, this Court is constrained to deny this first motion for summary judgment, and generally this denial would be without prejudice to renewal upon proper papers.

However, the Town apparently believes that it can cure its failure to include the pleadings by bringing a second identical motion (# 011), and including its complaint therein. Unfortunately, the Town fails to include the defendants' answers in motion # 010 or # 011, and the matter is complicated by the fact that the defendants have not submitted (or re-submitted) opposition to the second motion.

In light of the unusual circumstances herein, and in the interest of judicial economy, the Court has considered the entire record, including the consolidated motions, and it finds that it has all of the pleadings in this action. In this limited case, the Town's procedural defect may be overlooked as the record is sufficiently complete and the opposing parties have not been prejudiced (*see* CPLR 2001; *see also* ***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [3d Dept 2005]; ***McNamara v Regensburg***, 2010 NY Slip Op 31163U [Sup Ct, Suffolk County 2010]; ***Julien v New Greenwich Gardens Assoc., LLC***., 21 Misc 3d 1132A, 875 NYS2d 821 [Sup Ct, Kings County 2008]; ***Hamawi Deli, Inc. v Psaras***, 14 Misc 3d 1205A, 836 NYS2d 485 [Sup Ct, Nassau County 2006]). The Court finds that the defendants' opposition papers submitted in motion # 010 address all of the issues in the Town's identical second motion (# 011).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Here, the Town has failed to establish its entitlement to summary judgment herein. There are multiple issues of fact requiring a trial in this action including, but not limited to, whether a permanent injunction should issue, what should be the scope of any permanent injunction, which uses of 324 Depot may Mastroianni continue, whether Mastroianni has been prevented from applying for approvals of the retaining wall, signs and awning at 324 Depot, whether any monetary penalties are due herein, and what are the legal uses of 320A Depot. Accordingly, the Town's motion (# 011) for summary judgment is denied.

Dated: 12 April 2012

J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**