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SHORT FORM ORDER

INDEX
NO.: 37847-10

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-22-12; 5-17-12
SUBMITTED: 6-21-12
MOTION NO.: 001-MD
002-XMOT D

TOWN OF RIVERHEAD,

Plaintiffs,

-against-

TASTE OF COUNTRY, INC., RENEE C. REEVE a/k/a RENEE C. KAELIN, JOHN A. REEVE, and JOHN DOES and MARY DOES "1" to "10," said names being fictitious and presently unknown but who are believed to be tenants, operators, contractors, invitees, and/or licensees of 5506 Sound Avenue, Riverhead, New York,

Defendants.

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Upon the following papers numbered 1-47 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-11 ; Notice of Cross Motion and supporting papers 12-42 ; Answering Affidavits and supporting papers 43-45 ; Replying Affidavits and supporting papers 46-47 ; it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint and granting judgment in their favor on the counterclaims is denied; and it is further

ORDERED that the cross motion by the plaintiff for summary judgment on the first through sixth causes of action is granted on the fourth and fifth causes of action and on the sixth cause of action on the issue of liability only; and it is further

ORDERED that the cross motion is otherwise denied; and it is further

ORDERED that the defendants, their agents, servants, employees, contractors, members, tenants, lessees, licensees, representatives, and all other persons acting on their behalf or in concert with them are hereby enjoined and restrained from operating a delicatessen and/or take-out restaurant on the premises that is the subject of this action and from preparing and/or selling hot and cold short-order type foods, cooked-to-order foods, as well as catered foods on or from the premises; and it is further

ORDERED that it is hereby adjudged and declared that the defendants' operation of a delicatessen and/or take-out restaurant on the premises that is the subject of this action, including the preparation and/or sale of hot and cold short-order type foods, cooked-to-order foods, and catered foods, violates § 108 of the Riverhead Town Code as well as the certificate of occupancy for the farm stand or accessory building on the premises.

The defendants John and Renee Reeve (the "Reeve defendants") are the owners of a 1.837- acre parcel of real property located in the Hamlet of Jamesport, Town of Riverhead, State of New York. When the Reeve defendants purchased the property in 2001, it had on it, inter alia, a house, a barn, a farm stand, and housing for agricultural workers (the "ag house"). In 2002 or 2003, the Reeve defendants applied for a permit and variances to knock down the ag house and erect a new, prefabricated ag house on the premises. The application was denied, and the Reeve defendants appealed to the Zoning Board of Appeals. By a determination dated July 24, 2003, the Zoning Board of Appeals granted the application and variances on the conditions, inter alia, that no more than two farm workers employed by the Reeve defendants occupy the ag house, that the Reeve defendants actively farm at least five acres of land within three miles of the property, and that they submit proof thereof to the Zoning Board of Appeals annually. The Reeve defendants failed to erect the new ag house, and the Town of Riverhead subsequently changed the zoning of the property from Agriculture A to RA-80, which did not permit agricultural worker housing.

In December 2004, the Reeve defendants made a second application for permission to erect a new ag house on the property, which was denied. In March 2005, the Town Board adopted a resolution authorizing agricultural worker housing in the RA-80 zoning districts. The Reeve defendants appealed. By a determination of the Zoning Board of Appeals dated May 26, 2005, the Reeve defendants were granted permission to erect a new, prefabricated ag house on the parcel and a variance because the parcel consisted of 1.837 acres instead of the required 5 acres. The second determination, like the first, was granted on the conditions that no more than two farm workers employed by the Reeve defendants occupy the ag house, that the Reeve defendants actively farm at least five acres of land within three miles of the property, and

that they submit proof thereof to the Zoning Board of Appeals annually.[1] The Reeve defendants subsequently erected a new, prefabricated ag house on the premises.

In 2001, when the Reeve defendants purchased the property, there was a moveable-cart farm stand on it. In 2002, they applied for a permit to construct an accessory building to replace the moveable-cart farm stand. That application was granted and a building permit issued on February 13, 2002. The property was rezoned in 2004. In 2003, prior to the rezoning, the Reeve defendants added some limited cooking facilities to the farmstand to serve hot food and applied to the Suffolk County Heath Department for a permit. On November 23, 2004, the Suffolk County Health Department sent the following e-mail to the Riverhead Building Department:

> Taste of the Country zoning issue. We have a farm stand that was converted to a commercial use and needs the Health Dept. to issue them a permit for a restaurant. Taste of the Country isn't located in an area that the Town of Riverhead would issue a commercial application to.

The Building Department Administrator responded by the following e-mail dated November 23, 2004:

> The above site has pre-existing use status. All zoning districts have been repealed and replaced. The Town of Riverhead re-wrote a new Ag Stand code that has been held for public hearing, but is still not adopted. The Town felt that the code involving farm-stand zoning was so weak, it was almost impossible to enforce.
>
> The ZBA gave this place an area variance, knowing the use, but realized it was such a grey area, it granted relief. Based on my prior experience in dealing with enforcement issues, I believe, this is an existing use that has been Grand-fathered.

On February 22, 2005, the Riverhead Building Department issued a temporary certificate of occupancy for the farm stand "subject to conditions as set forth in permanent certificate of occupancy." The following conditions were set forth in the permanent certificate of occupancy, which was issued on March 2, 2005:

> SUBJECT TO The sale at retail of homegrown or homemade products, provided that all retail uses shall be subject to the

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[1]The third condition, that dry wells or leaching pools be installed to maintain water runoff from the ag house, if deemed necessary, is not at issue.

> provisions of Chapter 108. The farmer may sell supporting farm products and farm products not grown by the farmer, provided that the area devoted to the sale of said products at no time exceeds 40% of the total merchandising area.

By a letter dated March 16, 2005, the Riverhead Building Department Administrator sent the certificate of occupancy to the Reeve defendants. The Administrator reiterated the conditions found in the certificate of occupancy, i.e., that the items sold at retail be homegrown or homemade products and that other products might be sold as long as they did not exceed 40% of the merchandising area. The Administrator went on to advise the Reeve defendants that no cooked-to-order or short-order type foods might be sold on the premises.

The Town of Riverhead commenced this action on October 13, 2010, alleging that the Reeve defendants had failed to comply with the conditions set forth in the certificate of occupancy for the farm stand and the conditions set forth in the Zoning Board of Appeals' determination for the ag house. Specifically, the Town alleged that the Reeve defendants were operating a restaurant out of the farm stand and that the ag house was occupied by the Reeve defendants' daughter and not agricultural workers. The Town also alleged that the Reeve defendants had failed to submit annual proof to the Zoning Board of Appeals that they were farming five acres within three miles of the property. The first, second, and third causes of action seek declaratory relief, injunctive relief, and civil penalties, respectively, in connection with the ag house. The fourth, fifth, and sixth causes of action seek injunctive relief, declaratory relief, and civil penalties, respectively, in connection with the farm stand. The seventh cause of action seeks injunctive relief in connection with alleged fire code violations. The defendants' answer contains three counterclaims for declaratory relief and money damages. Both sides move for summary judgment.

In support of their motion for summary judgment, the defendants have produced a certificate of compliance from the Riverhead Building Department dated January 31, 2011, certifying that the Town's yearly inspection of the ag house had been completed and that it complied with, inter alia, the Agricultural Housing Code of the Town of Riverhead. The defendants argue that this document conclusively establishes their entitlement to judgment as a matter of law on the first three causes of action.

The proponent of a motion for summary judgment carries the initial burden of the production of evidence, as well as the burden of persuasion. The moving party must tender sufficient evidence to demonstrate, as a matter of law, the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion regardless of the sufficiency of the opposing papers (**Kuang v Board of Managers of the Biltmore Towers Condominium Assoc.**, 22 Misc 3d 854, 864 [and cases cited therein], *affd* 70 AD3d 1004).

The court finds that the defendants have failed to establish, prima facie, their entitlement to judgment as a matter of law on the first three causes of action. While the January

31, 2011, certificate of compliance may be sufficient to establish that the ag house complied with the Riverhead Agricultural Housing Code during the year 2011, it fails to establish such compliance during any prior years, specifically the years 2005 through 2010, and continued compliance in the present year. Accordingly, the defendants' motion is denied as to the first three causes of action.

In support of its cross motion, the Town has produced two letters from Brad Reeve, Sr., to the Town. The first letter, which is dated December 13, 2004, advised the Town that the Reeve defendants had leased 5 acres of farmland from Brad & Lorraine Reeve & Son for the growing of vegetables. The second letter, which was received by the Town on October 25, 2010, advised the Town that the Reeve defendants had leased 5 acres of farmland from Brad & Lorraine Reeve & Son and would be leasing an additional 17 acres from them for the growing of vegetables. Relying on the defendants' failure to produce any additional proof that they have complied with the condition that they notify the Zoning Board of Appeals annually that they are actively farming at least five acres of land within three miles of the property, the Town contends that it has established as a matter of law that the defendants have failed to comply therewith. A party does not carry its burden in moving for summary judgment by pointing out gaps in its opponent's proof (*see*, **Corrigan v Spring Lake Building Corp.**, 23 AD3d 604, 605 [and cases cited therein]). Moreover, there are triable issues of fact regarding whether the defendants have complied with the condition that no more than two farm workers employed by the Reeve defendants occupy the ag house. Accordingly, the plaintiff's cross motion is denied as to the first three causes of action.

In support of summary judgment on the fourth through sixth causes of action, the defendants rely on the 2002 building permit issued by the Town for the construction of the farm stand and the 2003 determination of the Zoning Board of Appeals, which the defendants contend declares the farm stand to be build in conformance with the Zoning Code except for the location of a walk-in refrigerator. The defendants argue that these documents, as well as the e-mail dated November 23, 2004, from the Building Department Administrator, conclusively establish that the farm stand is a legal, non-conforming use.

In opposition and in support of its cross motion, the Town acknowledges that the farm stand became a permitted, pre-existing, non-conforming use upon the revision of the Town Code in 2004. The Town contends that the defendants have enlarged the manner in which the farm stand operates well beyond the continuance of a prior, non-conforming use. The Town has submitted evidence in admissible form that the farm stand was operated by the defendant Renee Reeve until August 2009; that the goods sold included homemade baked goods, farm-raised fruits and vegetables, as well as cooked foods such as eggs and prepared foods such as sandwiches; that the Reeve defendants then leased the farm stand to tenants who operated it first as a delicatessen and then as a Mexican restaurant; and that the farm stand no longer sells any farm products.

In opposition to the Town's cross motion and in further support of their own

motion, the defendants do not dispute any of the foregoing facts, but reiterate their argument that the farm stand is a legal, pre-existing, non-conforming use.

The parties agree that the farm stand is a pre-existing, non-conforming use. However, it is not currently being operated as a farm stand, but as a restaurant in violation of the Riverhead Zoning Code. While neither the former nor the current Zoning Code explicitly prohibit the sale of cooked-to-order or short-order type foods at farm stands, both require that the goods sold at farm stands be homegrown or homemade products mainly raised or produced on the premises (Riverhead Zoning Code § 108-22 [C] [2]); former § 108-21 [C] [1]). Moreover, the current Riverhead Zoning Code further restricts the sale of supporting farm products and farm products not grown by the farmer to no more than 40% of the total merchandising area (§ 108-22 [C] [2]). The Town has produced evidence in admissible form that the Reeve defendants' farm stand no longer sells any farm products and that it is currently being operated exclusively as a restaurant. In fact, the Suffolk County Department of Health Services issued a permit for a 16-seat food establishment on the premises on October 29, 2010. Accordingly, the court finds that the Town has established, prima facie, its entitlement to judgment as a matter of law on the fourth through sixth causes of action.

In opposition to the Town's prima facie showing, the defendants have produced only an attorney's affirmation, which is of no probative value in opposing a motion for summary judgment (**Zuckerman v City of New York**, 49 NY2d 557, 563; **Hasbrouck v City of Gloversville**, 102 AD2d 905, *affd* 63 NY2d 916). Accordingly, the Town is entitled to summary judgment on the fourth cause of action for injunctive relief, on the fifth cause of action for declaratory relief, and on the sixth cause of action for civil penalties on the issue of liability. The issue of the amount of such penalties is referred to the trial or other disposition of this action.

The defendants have failed to establish, prima facie, their entitlement to summary judgment on the seventh cause of action, which seeks injunctive relief in connection with alleged fire code violations. The conclusory and self-serving assertions of the defendant John Reeve that all of the violations have been cured and that, if they were not, the Health Department would not have issued a permit for the premises, are insufficient to establish as a matter of law that the violations have, in fact, been cured. Accordingly, the defendants' motion is denied as to the seventh cause of action.

Finally, it is unclear whether the defendants' counterclaims for declaratory relief and money damages refer to the ag house, the farm stand, or both. In any event, the defendants are not entitled to a declaration in their favor with regard to the farm stand. The remaining issues are referred to the trial or other disposition of this action.

Dated: September 20, 2012

HON. ELIZABETH HAZLITT EMERSON
J.S.C.