

Kouril v Muro

2012 NY Slip Op 33259(U)

May 31, 2012

Supreme Court, Westchester County

Docket Number: 52180/2012

Judge: Sam D. Walker

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER , J.S.C.**

-----X
TARA KOURIL and KEVIN KOURIL,

Plaintiffs,

-against-

Index No. 52180/2012
DECISION & ORDER

DANIEL MURO, MELANIE MURO, and AURORA LOAN SERVICES, LLC,
Defendants.
-----X

The following papers were read on plaintiffs' motion for a preliminary injunction:

Notice of Motion/ Affidavits of Kevin and Tara Kouril	1 - 10
Affirmation of Lee A. Pollock, Esq./ Affidavit of Ronald and Catherine Kline	.
Affidavit of Joseph Galella/Affidavit of Frank and Andrea Espinosa	11 - 24
Exhibits 1-12	25 - 36
Affidavit of Daniel Muro in Opposition Affirmation	37 - 51
Memorandum of Law in Opposition to Motion	52 - 62
Reply Affirmation of Lee A. Pollock Esq.,	63 - 70
Reply Affidavit of Kevin Kouril	71 - 76
Reply Memorandum of Law	92 - 102
Exhibits 1-5	109 -114
Affidavit of Barbara Marks/ Exhibit	115-119

PROCEDURAL & FACTUAL BACKGROUND

The instant action arises out of a dispute between neighbors who own properties within the Town of Cortlandt. The Defendants, Daniel and Melanie Muro are alleged to have converted their property to an illegal use by storing and operating heavy construction equipment upon the grounds of their home at 456 Croton Avenue, Cortlandt, NY. Many of the neighboring homeowners, including the Plaintiffs herein, complain that in addition to the illegal use, there is an unsightly appearance to the property caused by the storage of the heavy duty equipment and construction debris. Defendants are also accused of acquiring many small animals, including chickens, rabbits, turkeys and possibly pigs on their property. The Watershed Agricultural Council performed an assessment of the Defendants' property in July 2011. The report noted the complaints of Defendants' neighbors concerning odors and heavy equipment noise that has effected the neighbors quality of life. The report also contains a livestock inventory taken by the Watershed Agricultural Council, Conservation Planner that documents 420 chickens and 120 rabbits on the property.

The Defendants have been issued numerous local zoning and use violations by the Town of Cortlandt since 2009, however, final determinations of the notices of violations have not been obtained and the Defendants are alleged to be vigorously defending against the alleged violations .

Plaintiffs commenced this action by summons and complaint alleging four (4) causes of action all relating to the allegations that Defendants have moved their heavy construction business to the residentially zoned property and that their operation of heavy construction equipment including excavators, dump trucks and construction trailers their acquisition of

small animals including rabbits, turkeys and chickens and their raising of said animals has interfered with Defendants' right to use and enjoy their own adjacent residential property. Defendants are accused of causing noxious and offensive odors to interfere with the neighbors quiet enjoyment, creating excessive noise from roosters crowing, gravel crushing operations, the operation of trucks and other construction equipment leaving and entering the premises, emitting dust and other materials into the air and to travel over and onto Plaintiffs' property and to have interfered with the bucolic vistas and views that Defendants previously enjoyed and that are now disorderly and debris littered. Plaintiffs seek damages, and a permanent injunction against all of the above activities that are objectionable and in violation of local zoning.

Plaintiffs now move by notice of motion seeking a preliminary injunction, that the Defendants "cease and desist" :

1. Storing construction equipment including excavators, dump trucks and construction trailers at their property at 456 Croton Avenue, Cortlandt, NY;
2. Cease operating a construction business from their property at 456 Croton Avenue, Cortlandt, NY;
3. Cease operating excavators, dump trucks or other construction equipment at their property at at 456 Croton Avenue, Cortlandt, NY;
4. Cease manufacturing or storing soil, mulch, gravel or similar products on the property at 456 Croton Avenue, Cortlandt, NY;
5. Cease raising and continuing to maintain animals including chickens, turkeys, rabbits or other small animals in excess of the 24 small animals permitted by the Cortlandt Zoning Code.

6. Cease conduct that unreasonably disturbs the Plaintiffs and other neighbors by creating sounds sights or odors that are noxious, unsightly or offensive and can be seen heard or otherwise detected from the premises of adjoining property; and

7. Cease otherwise violating the Town Code of the Town of Cortlandt by (i) maintaining more than 24 small animals(ii) operating as a general business contractor (iii) maintaining a contractors yard and accessory buildings without certificates of occupancy (iv) storing goods or equipment in trailers, box trailers or similar vehicles or (v) other outdoor storage of goods and equipment.

The motion is supported by affidavits from other neighbors who allege that they have smelled noxious odors emanating from Defendants property, been disturbed in the early morning hours by the sounds of Defendants equipment including the sound of vehicle back up beepers and that they have observed the storage of construction and other heavy equipment on the property. One affidavit alleges that there are "enormous" piles of mulch or other organic material on Defendants' property and that "smoke" has been seen rising from the piles which made the neighbors fearful of the "risk of fire".

In opposition of the motion Defendants conclusively state that the assertions in the complaint are false. Daniel Muro states that he conducts farming activities on his property and has to utilize two small excavators and a small farm tractor required by reason of him suffering a disabling accident. Defendant states that when running, the excavators make less noise than a gas operated lawn mower. He denies creating any unreasonable noise from the occasional movement of soil, mulch or compost on the property. The only movement of rock on the property occurred five years ago and may have generated only momentary noise. Defendant denies operating a construction business from the property or storing heavy equipment on the property. Defendant further denies illegally removing a stand of trees that

previously, may have shielded the view of their property from their neighbors. Defendant states that a stand of trees were removed with the Town's permission in 1998. Defendant alleges the trees were damaging Defendant's roof and that Hurricane Irene/Katrina¹ uprooted/knocked down a number of other trees on the property.

Defendant Daniel Muro denies owning more than 24 small animals while he does admit to owning one rabbit, two turkeys and "a number of live chickens". The chickens are housed in an enclosed chicken coup which the Defendant states is maintained in a clean and odor free condition. Defendant states that the rabbit hutch will be removed from the property and none of the animals have been housed in a construction trailer. In opposition to most of the allegations in the complaint and in support of the motion, Defendant Daniel Muro states that the offensive and noxious odors do not emanate from his property but in fact emanate from the neighboring "Hemlock Hills Farm". Hemlock Hills Farm is alleged to maintain hundreds of livestock, including cattle, sheep, goats, pigs, chickens, geese, guinea pigs and rabbits. Defendant alleges that Hemlock Hills Farm routinely uses pig manure as fertilizer which is responsible for noxious odors that often waft over the neighboring properties. Hemlock Hills Farm routinely operates bulldozers, excavators, backhoes, wood chippers, large farm tractors and large dump trucks. Defendant states the Hemlock Hills Farm equipment are inherently noisy and have back up beepers that are routinely activated and are audible on Defendants' neighboring property. Defendants further blame the loud noises on a neighbor's group home

¹In his affidavit in opposition Defendant state's that "last year" Hurricane Katrina downed trees on his property. In the Memorandum of Law prepared by counsel, it is the 2011 Hurricane Irene that is alleged to have uprooted/knocked down a number of trees.

bus, whose operator routinely sounds the vehicle's horn and engages its back up beeper. In addition, Defendant blames the town sanitation truck for back up beeper noise.

Defendant further alleges that his property cannot be seen from Plaintiff's backyard or pool area as the Defendant's house blocks any view the Plaintiff may have from that location. Defendant states that the plaintiffs were observed enjoying their backyard and pool area during warm weather last summer and did not appear to be disturbed by any noxious odors or excessive noise. Defendant further argues that while the Town of Cortlandt has issued appearance tickets to him and his wife neither have been found guilty of any code violations and do not believe based upon their interpretation of the town ordinances that they are guilty of any violations. In fact, Defendants urge that the violations were instigated by Plaintiffs' complaints to the Town and there have been unlawful entries onto Defendant's properties in the investigation and prosecution of the alleged violations. Defendant maintains that he and his wife engage in farming activities on the property. Their activities involve utilizing a small tractor, an excavator, and from time to time, a dump truck. Defendant alleges these activities are permitted and lawful agricultural use authorized by the table of uses submitted in Plaintiff's Exhibit 7 and a prior non conforming use permitted by Section 307-77 of the Town of Cortlandt Zoning Code.

DISCUSSION

Insofar as relevant, CPLR 6301 provides that:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of

an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

When a party seeks a preliminary injunction pursuant to CPLR 6301 they must prove three things: (1) likelihood of ultimate success on the merits; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of equities in their favor. *Szal v. Pearson*, 289 A.D.2d 562, 562 (2nd Dept., 2001). A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing, *Margolies v Encounter, Inc.*, 42 NY2d 475, 479 (1977). Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party. *Doe v Axelrod*, 73 NY2d 748, 750 (1988); *61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 (1st Dept. 2010), *mod* 16 NY3d 822 (2011); *Stockley v Gorelik*, 24 AD3d 535, 536 (2nd Dept. 2005).

Defendants argue that they have not been found guilty of any violations of town ordinances and that their activities are purely agricultural and they are entitled to be "grandfathered" and would thereby fall within the parameters of pre existing law. However the evidence that has been produced by Plaintiffs is extraordinary in volume, credibility and content. Plaintiffs offer affidavits from other neighbors, from town inspectors, from investigators retained to report on the sights, smells and sounds at the Defendants property. Plaintiff's submission is supplemented by photographs including aerial shots, ground level views and satellite views of the property. Clearly depicted are chickens, turkeys, a row of small animal hutches, the dump truck, excavators, flat bed trailers and accessory buildings. Defendants conclusory and self serving protestations that there are small vehicles used only

for agricultural purposes and that the smells and noises come from another farm, are not supported by affidavits from other neighbors, inspectors or investigators. Defendant also neglected to include with their opposition copies of the Cortlandt Town permits authorizing tree removal, permits for the agricultural use described by Defendants and/or for the commercial animal husbandry that Defendants states that they have engaged in since 1998.

Previously, it had been the law that a preliminary injunction should not be issued where there are sharply conflicting factual claims made by the parties (see *Schneider Leasing Plus, Inc. v. Stallone*, 172 A.D.2d 739,740 (2nd Dept. 1991), *lv. dismissed* 78 N.Y.2d 1043 (1991), rearg. denied 79 N.Y.2d 823 (1991) ("There are sharp factual disputes as to key issues in the record which preclude a finding of likelihood of success and irreparable injury at this juncture and which warrant the denial of the motion"). The 1996 amendment to CPLR 6312 provides:

"Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists." CPLR 6312(c).

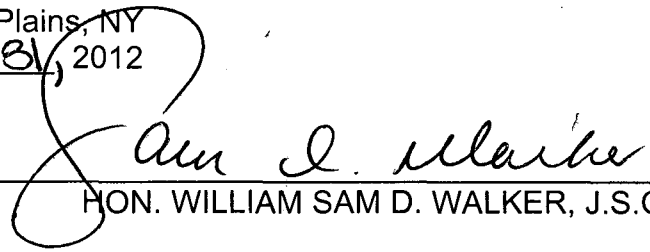
While Plaintiff's offer a compelling argument in favor of granting an injunction, Defendants have raised issues of disputed fact with respect to the elements required to meet this three-prong burden of proof. As a result, a hearing should be held as contemplated by CPLR 6312 (c) 1234. *Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 (1st Dept. 2011); *Jamie v. Hernandez*, 274 A.D.2d 335 (1st Dept. 2000).

On account of the foregoing the motion for a preliminary injunction is GRANTED to the extent that a hearing shall be conducted.

All parties shall appear on July 9, 2012 at 9:30 AM in courtroom 1600 to schedule the hearing.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, NY
~~MAY~~ 31, 2012



HON. WILLIAM SAM D. WALKER, J.S.C.