Town of Riverhead v Baiting Hollow Farms, LLC
2017 NY Slip Op 31503(U)
July 10, 2017
Supreme Court, Suffolk County
Docket Number: 10-27827
Judge: Peter H. Mayer
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SHORT FORM ORDER

COPY

INDEX No. 10-27827
CAL. No. 15-01528-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12/14/16 (#003)
MOTION DATE 12/9/16 (#004)
ADJ. DATE 1/20/17
Mot. Seq. #003 - MotD
Mot. Seq. #004 - MotD

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TOWN OF RIVERHEAD,

Plaintiff,

- against -

BAITING HOLLOW FARMS, LLC, BAITING HOLLOW FARM VINEYARD, LLC, STEVEN L. LEVINE, SHARON R. LEVINE, and RICHARD RUBIN,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated November 9, 2016, and supporting papers (including Memorandum of Law); (2) Notice of Motion by the defendants, dated November 10, 2016, and supporting papers (including Memorandum of Law); (3) Affidavits and Affirmation in Opposition by the defendants, dated January 4, 5, and 6, 2017, and supporting papers (including Memorandum of Law); (4) Affirmation in Opposition by the plaintiff, dated January 6, 2017, and supporting papers (including Memorandum of Law); (5) Reply Affirmation by the plaintiff, dated January 19, 2017, and supporting papers (including Memorandum of Law); and (6) Reply Memorandum of Law by the defendants, dated January 19, 2017; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

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

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212, granting summary judgment in its favor and against the defendants for the injunctive relief demanded in the complaint, is granted to the extent of granting summary judgment in its favor and against the defendants on its fourth and fifth causes of action, enjoining the defendants' use of a gazebo, a shed, an expanded

patio, a second-floor balcony, and a wine processing plant on their property until such time as they have obtained the required building permits and certificates of occupancy, and is otherwise denied; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, is granted to the extent of granting summary judgment (i) dismissing the first cause of action in its entirety, (ii) dismissing so much of the second cause of action as is to recover damages, and (iii) dismissing so much of the sixth cause of action as is against defendants Baiting Hollow Farm Vineyards, LLC, Steven L. Levine, Sharon R. Levine, and Richard Rubin, and is otherwise denied.

In this action, the plaintiff seeks injunctive relief and damages relating to the defendants' use and occupancy of property located at 2114 Sound Avenue, Baiting Hollow, New York. The plaintiff alleges that certain aspects of the defendants' operation of a farm winery on the property violate provisions of the Riverhead Town Code regulating special events and noise, the site plan approval issued by the Town, the Town's zoning laws, and the covenants and restrictions recorded against the property as part of the site plan approval process.

The plaintiff pleads six causes of action in its complaint. The first is to enjoin and restrain the defendants from using or occupying the premises for any "special events," including events where food is being provided, outdoor events, and events with amplified music, until such time as the defendants have obtained an approval from the Town Board to hold a special event upon the premises, and for damages based on alleged violations of the Town Code. The second is to enjoin and restrain the defendants from using or occupying the premises with any amplified sound or music creating unreasonable noise, and for damages based on alleged violations of the Town Code. The third is to enjoin and restrain the defendants from using or occupying an 11.5-foot by 15.5-foot wood frame gazebo, a 16.3-foot by 10-foot wood frame shed, a brick patio of approximately 1,013 square feet to the north of the tasting room, a second-floor balcony and conference rooms, unauthorized parking areas to the east and west of the two-story structure, and a 270-square-foot wine processing building on the premises, and from using or occupying the premises for catering and special events in violation of the site plan approval granted by the Town's planning board on April 5, 2007, and for damages based on alleged violations of the Town Code. The fourth is to enjoin and restrain the defendants from using or occupying the gazebo, shed, patio, balcony and conference rooms, and wine processing building until such time as the defendants have obtained all necessary permits and approvals from the Town, and for damages based on alleged violations of the Town Code. The fifth is to enjoin and restrain the defendants from using or occupying the gazebo, shed, patio, balcony and conference rooms, and wine processing building until such time as the defendants have obtained all necessary certificates of occupancy from the Town, and for damages based on alleged violations of the Town Code. The sixth is to enjoin and restrain the defendants from using or occupying the premises in violation of the recorded declaration of covenants made for and in consideration of the April 5, 2007 site plan approval.

The defendants contend, in part, that the plaintiff's premise in bringing this action was wrong, because the Town Code allows agricultural activities of all types and exempts structures for such activities from site plan approval, and that their tasting house, outdoor wine tasting areas, catered events,

and other marketing activities are all protected as agricultural uses under New York "right to farm" laws and regulations issued by the New York State Department of Agriculture and Markets.

On April 5, 2007, the Town's planning board granted the site plan application of Baiting Hollow Farms, LLC ("BHF"), subject to conditions,

> to renovate an existing residence to add a tasting room, retail sales, an office, and an employee break room and pantry to the first floor; to renovate the second floor which will remain in residential use; and to add a veranda and portico, a deck and ramp, a brick walkway, a concrete patio, a covered cellar entrance, a future tent site, and related improvements including a paved parking area * * *.

As a requirement of site plan approval, BHF was required to record a declaration of covenants against the property, containing all of the limitations and provisions of the site plan approval and providing that such covenants "shall be enforceable by the Town * * * by injunctive relief or by any other remedy in equity or law." Among the conditions (Condition No. 18) is that "the future tent site shall not be used without the issuance of a building permit or the approval of a Chapter 90 application by the Town Board."

According to the plaintiff, in the time since the defendants received site plan approval, they have engaged or are engaging in the following activities:

- constructing additional buildings on the property, including a wood-framed gazebo, a wood-framed shed, a wine processing plant, and tents, all without obtaining amended site plan approval and without building permits or certificates of occupancy;
- expanding parking areas without obtaining an amended site plan approval;
- erecting tents on the site in areas not designated as the future tent site on the approved site plan without site plan approval or requisite permits;
- converting the second floor of the existing building from the approved residential use to a commercial use, including conference rooms and a kitchen for cooking food for retail sale without an amended site plan approval;
- expanding the future tent site without obtaining an amended site plan approval;
- conducting "special events" at the site without obtaining a special events permit under chapter 255 [former chapter 90] of the Town Code;
- permitting the playing of amplified music outdoors, despite having represented in their liquor license application to the New York State Liquor Authority that the music on the premises will be "background music from in-house sound system, occasional acoustic live performances. These will be minimally audible from outside the licensed premises";

- serving food prepared on site and operating a bistro/café/restaurant without obtaining an amended site plan approval; and

- posting temporary signs along Sound Avenue advertising, among other things, live bands and music.

Now, discovery having been completed, the plaintiff moves for summary judgment on its claims for injunctive relief, and the defendants move for summary judgment dismissing the complaint.

Preliminarily, as it appears that certain of the defendants' arguments are addressed to multiple causes of action or to the complaint as a whole, the court will discuss those before proceeding to analyze the parties' arguments as to any specific cause of action.

To the extent that the defendants may be seeking to argue that the ongoing activities on the property are part of "farm operations" (Agriculture and Markets Law § 301 [11]) exempt under Agriculture and Markets Law article 25-AA from all local restrictions on agricultural uses–and, hence, beyond the reach of the Town's relevant zoning laws–such an argument must be rejected. Pursuant to Agriculture and Markets Law § 305-a (1) (a), local governments "shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." Nowhere in the record submitted does it appear that the property lies within an "agricultural district" created by the county legislature (*see* Agriculture and Markets Law § 303), nor that the Department of Agriculture and Markets has been called upon to evaluate whether the Town's zoning laws unreasonably restrict or regulate farm operations within such a district (*see* Agriculture and Markets Law § 305-a [1] [b]).

Insofar as the defendants' motion is addressed to the plaintiff's various requests for damages, it is granted to the extent of granting summary judgment dismissing the plaintiff's claim for damages as set forth in its first and second causes of action. As to the first cause of action, section 255-20 of the Town Code provides that any violation of the Town's "special events" ordinance (section 255, article II) shall, upon conviction thereof, be punishable by a fine, imprisonment, or both. As to the second cause of action, section 251-8 similarly provides that any person who violates the Town's "noise" ordinance (chapter 251, article I) shall be subject to a fine not to exceed $250 for each offense. Significantly, both of those sections authorize the imposition of "fines," not monetary civil penalties, for their violation–although the Town was empowered to provide a civil penalty for either violation (*see* Town Law § 135), it did not–and fines, being quasi-criminal in nature, may not be collected in a civil action (***Town of Solon v Clark***, 97 AD2d 602, 468 NYS2d 201 [1983]). (By contrast, section 301-320 [E] [1], which applies to the alleged violations of the Town's zoning laws [chapter 301] set forth in the third, fourth, and fifth causes of action, provides that "[a]ny person found to have violated any of the provisions of this chapter shall be subject to a civil penalty.")

The defendants' further claim, that the complaint should be dismissed against the individual defendants because "all of the pleaded allegations are as to 'Defendants' with no person or entity specified," seems to imply the existence of a pleading requirement heretofore unknown in the annals of New York civil practice. It is, therefore, rejected.

As for their argument that the plaintiff may not seek summary judgment on claims that were "never pleaded in its complaint"–namely, converting the second floor of the existing building to a commercial use, operating a bistro/café/restaurant, and posting temporary signs–the court notes that summary judgment may be granted, even on an unpleaded cause of action, "if the proof supports such cause and if the opposing party has not been misled to its prejudice * * *. As with a trial, the court may deem the pleadings amended to conform to the proof" (***Weinstock v Handler***, 254 AD2d 165, 166, 679 NYS2d 48, 49 [1998]). Here, it appears that a reference to the second-floor conference rooms appears in the complaint, and that allegations as to the restaurant and the signs were also included in court papers as early as 2010, in connection with the plaintiff's motion for a preliminary injunction. Absent any tangible prejudice, the plaintiff will not be barred from seeking summary judgment as to those claims.

The court will now address seriatim the parties' respective claims as to each of the plaintiff's individual causes of action.

The plaintiff's first cause of action, relating to the defendants' alleged use of the property for special events without the requisite permits, is based on chapter 255, article II of the Town Code, section 255-8 of which provides that a "special event" is "[a]ny form of entertainment, eight weeks duration or less, open to the public with or without an admission fee and held on a one-time or occasional basis, which may include but not be limited to, for example, carnivals, circuses, fairs, bazaars and outdoor shows, horse shows or exhibitions, concerts, road rallies and parades," but which "shall not include any activity having fewer than 100 spectators at any one time during the duration of the event." Section 255-9 provides that no person shall allow property to be used for a "special event" unless a written permit has been issued by the Town Board.

According to the affidavit of Richard Rubin, a named defendant and the managing member of BHF and Baiting Hollow Farm Vineyard, LLC ("BHFV"), the defendants acknowledge providing their customers with recorded music or live music, generally from afternoon to early evening on weekends, and offering the use of its facilities for catered private parties such as weddings, anniversaries, and birthdays, and for small fundraisers for local charities, as well as for its daily and weekly wine tastings, but contend that none of those activities is a "special event" within the meaning of the Town Code; they also deny having held any "special events" on the property since their "Late Harvest Holiday Celebration" from November 21, 2007 through December 31, 2007, and claim that they applied for and obtained the requisite permit for that event.

Based on Richard Rubin's affidavit, and as it is evident that the types of ongoing events described in his affidavit are not forms of public "entertainment" involving "spectators" as the relevant definition would seem to require, the court finds that the defendants established their prima facie entitlement to summary judgment dismissing the first cause of action. The plaintiff, in opposition, failed to raise an issue of fact. Although the plaintiff submits the affidavit of Stacy Yakaboski, a neighboring property owner, and excerpts from the defendants' web event calendar in support of the claim that the defendants have used and continue to use the future tent site to erect tents and conduct events, "including weddings, events with the provision of food, outdoor events with live amplified music, pony rides, face painting, horse exhibitions and other such events during and on a continuous basis during 2010," it has not been demonstrated that any of those activities may be found to constitute a "special event." Nor, in

any event, does it appear from the plaintiff's proof whether such activities have continued since that time. All of the plaintiff's supporting affidavits, in fact, date from 2010. "A town is entitled to a permanent injunction to enforce its building and zoning laws upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law" (***Town of Brookhaven v Mascia***, 38 AD3d 758, 759, 833 NYS2d 519, 521 [2007]).

Summary judgment is granted, therefore, dismissing the first cause of action, and that branch of the plaintiff's motion which is for summary judgment in its favor on the first cause of action is correspondingly denied.

As to the second cause of action, relating to noise, the defendants' motion is granted only to the extent of granting summary judgment dismissing the plaintiff's claim for damages (as noted previously), and the plaintiff's motion is again denied.

Noise is regulated under chapter 251, article I of the Town Code, section 251-1 of which provides that "unreasonable noise" is "[a]ny excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensitivities or which causes injury to animal life or damage to property or business." Section 251-1 also lists the standards to be considered in determining whether unreasonable noise exists in a given situation, as well as the exceptions to the application of the regulation, which include "agricultural operations." Section 251-5 provides, in part, that a person who operates, uses, or causes to be operated or used "any sound reproduction device in any public place in such a manner that the sound emanating therefrom creates unreasonable noise across a real property boundary" shall be declared in violation of the section.

The defendants do not dispute the playing of amplified music on their property, but claim that they are exempt from chapter 251 enforcement because section 251-6 excepts "agricultural operations" from its scope. More specifically, they argue that the term "agricultural operations" is not defined in the Town Code; that the term "farm operations," as defined in Agriculture and Markets Law § 301 (11), is essentially synonymous with the undefined term; that the New York State Department of Agriculture and Markets considers "on-farm" marketing as part of a farm operation; and that the defendants are engaged in farm operations–the implication being that all elements of the defendants' marketing, including the playing of amplified music on their property, is therefore beyond the scope of enforcement by the Town's noise control or police officers. The court rejects that argument for a number of reasons, including that the term "agricultural operations" is, in fact, discussed at section 201-4 of the Town Code in the context of protected farm practices, without any reference to marketing;[1] that there has been no

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[1] Section 201-4 (B) allows farmers the right "to undertake protected farm practices in the active pursuit of agricultural operations, including but not limited to clearing, grading, plowing, aerial and ground spraying, the use of legal agricultural chemicals (including herbicides, pesticides and fertilizers), raising horses, poultry, small livestock and cattle, processing and marketing produce, installing water and soil conservation facilities, utilizing crop protection devices, designing, constructing and using structures, including barns, stables, paddocks, fences,

(continued...)

showing that Agriculture and Markets Law article 25-AA, of which Agriculture and Markets Law § 301 is a part, has any application to this matter; and that a reading of the Town Code giving the defendants carte blanche to circumvent the Town's noise ordinance other than in connection with protected farm practices seems inherently unreasonable. Whether, as the defendants claim, notices of violation were improperly issued by the Town is immaterial for purposes of their motion. That the playing of live or recorded music at farm wineries may be customary is likewise irrelevant. The court also rejects, in light of Town Law § 135, the defendants' further argument that injunctive relief is not available to restrain violations of chapter 251.

As for the plaintiff, although it submits the affidavits of Stacy Yakaboski and Kevin G. Maccabee, a senior town investigator, regarding their observations as to the volume of music emanating from the defendants' property, the court is again constrained to note that all such evidence dates from 2010 and, hence, the absence of contemporaneous proof of violations to support the granting of summary injunctive relief.

In regard to the third, fourth, and fifth causes of action, it is the plaintiff's position that the defendants constructed additional buildings, expanded parking areas and the future tent site, and erected tents in areas not designated as the future tent site, all without obtaining amended site plan approval and without building permits or certificates of occupancy. Relative to that position, section 301-303 (G) provides that "[i]t shall be unlawful for any person, firm or corporation to construct, alter, repair, move, remove, demolish, equip, use, occupy or maintain any real property, building or structure or portion thereof in violation of the approved site plan." Section 301-20 (C) (2) provides that all retail uses, including the sale of homegrown or homemade products, are subject to site plan approval. Sections 301-303 (D) and 301-305 (E) provide that no building permit required by chapter 217 is to be issued until the required site plan approval is granted. Section 301-303 (E) similarly provides that no certificate of occupancy is to be issued until all requirements and conditions of site plan approval have been met.

The defendants counter, with respect to the third cause of action, that amended site plan approval was not required, claiming that all of the improvements on the property qualify as "agricultural and its attendant accessory uses" exempt from site plan review and approval under section 301-304 (A) of the Town Code. As to the fourth and fifth causes of action, the defendants submit the affidavit of Melvin I. Gonzalez, a licensed architect, who claims that he was requested by BHF and BHFV beginning in 2008 to design and secure building permits for a variety of structures on the property, but that he was repeatedly informed by the Town's building department that those applications would not be processed absent amended site plan approval. Based on his affidavit, the defendants contend that any alleged violations of the Town Code arising from their failure to obtain building permits and certificates of occupancy are "technical violations" arising from the plaintiff's wrongful insistence on requiring amended site plan approval.

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[1](...continued)
greenhouses and pump houses, using water, pumping, spraying, pruning and harvesting, disposing of organic wastes on the farm, extensive use of farm laborers, training and others in the use and care of equipment, animals, traveling local roads in properly marked vehicles and providing local farm produce markets near farming areas." Section 201-4 further notes that these activities "can and do generate * * * noise."

Under the circumstances, the court deems it appropriate to defer resolution of the parties' motions relative to the third cause of action pending referral of the dispute to the Town's planning board for its review. Since that agency must be presumed to have specialized knowledge and expertise as to when site plan review and approval are required, the court will refrain, pursuant to the doctrine of primary jurisdiction, from adjudicating the parties' respective claims as to the third cause of action until an administrative determination as to the need for amended site plan approval has been made (*see generally* ***Sohn v Calderon***, 78 NY2d 755, 579 NYS2d 940 [1991]; ***Guglielmo v Long Is. Light. Co.***, 83 AD2d 481, 445 NYS2d 177 [1981]).

A different result is warranted as to the fourth and fifth causes of action. Based on the affidavit of Kevin G. Maccabee, it appears that certain structures–namely, a gazebo, a shed, an expanded patio, a second-floor balcony, and a wine processing plant–were erected on the property after the initial site plan was approved in 2007, all without building permits and certificates of occupancy and, therefore, in violation of the Town's zoning laws. The defendants do not dispute the existence of those structures,[2] nor that the required permits and certificates were never obtained, but claim only that the Town refused to process their building permit applications without additional site plan approval and, for the same reason, that it would have been futile to seek certificates of occupancy. Even assuming, as the defendants claim, that all of those structures are "permitted uses" within the meaning of section 301-20 (A) of the Town Code, the defendants were still obligated to obtain building permits and certificates of occupancy for all such uses. Section 301-317 (A) provides that "[p]ermitted uses require a building and/or use permit from the Building Department," and section 301-318 (A) provides that "[n]o building, structure or other construction specifically required by this chapter to have a permit shall be used or occupied in whole or in part until a certificate of occupancy shall have been issued." Irrespective, then, of whether amended site plan approval was required for those structures, the defendants could not simply overlook the building department's position and proceed to use and occupy them without obtaining the required permits and certificates. Accordingly, the plaintiff is entitled to summary judgment on its fourth and fifth causes of action to the extent of enjoining the defendants' use of those structures until such time as they have obtained the required building permits and certificates of occupancy (*see* ***Town of Brookhaven v Mascia***, *supra*).

Finally, as to the sixth cause of action, the defendant's motion is granted only to the extent of granting summary judgment dismissing the plaintiff's claims against BHFV and the individual defendants–BHF being the sole defendant to have bound itself to the terms of the recorded covenants, including the covenant to refrain from erecting tents on the future tent site without obtaining a requisite permit–and the plaintiff's motion is denied, again in the absence of current proof that BHF is violating the covenant. Contrary to the defendants' argument, whether a building or "special events" permit might not otherwise be required under the zoning code for the erection of a temporary structure such as a tent, does not alter the fact that BHF, as declarant, expressly agreed to the covenant. A property owner is presumably free, as a condition of site plan approval, to accept terms above and beyond that which might otherwise have been required of it under the zoning code. As for the defendants' claim that injunctive

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[2] As those structures are, ostensibly, permanent, the court will presume that the violations continue to date.

relief is not available for violation of a recorded declaration, it suffices to note BHF's agreement in the declaration that the Town may seek injunctive relief to enforce any of the covenants therein.

The court directs that all claims as to which summary judgment was granted are hereby severed and that all remaining claims–including the third cause of action, as to which the judicial process is to be suspended pending referral of the issue as to the need for amended site plan approval to the Town's planning board for its review–shall continue (*see* CPLR 3212 [e] [1]).

Dated: July 10, 2017

Peter H. Mayer
PETER H. MAYER, J.S.C.