Incorporated Vil. of Lindenhurst v One World Recycling, LLC
2017 NY Slip Op 32798(U)
December 22, 2017
Supreme Court, Suffolk County
Docket Number: 03968-2016
Judge: W. Gerard Asher

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 32 SUFFOLK COUNTY

PUBLISH

INDEX NO.: 03968-2016

PRESENT:
HON. W. GERARD ASHER

Motion Date: May 4, 2016
Adj. Date: June 24, 2016
Mot. Seq. 002 MD

Incorporated Village of Lindenhurst,
Plaintiff,

-against-

One World Recycling, LLC and One World Recycling, Inc.,
Defendants.

Glass & Glass, Esqs.
Attorney for Plaintiff
72 East Main Street, Ste. 3
Babylon, NY 11702

Sinnreich Kosakoff & Messina, LLP
Attorney for Defendant
Courthouse Plaza
267 Carleton Avenue, Ste. 301
Central Islip, NY 11722

Read upon the following papers numbered 1 to 82; Read on this motion for a permanent injunction; Notice of Motion/Order to Show Cause and Supporting Papers 1-21; Notice of Cross Motion and Supporting Papers ; Answering Affidavits and supporting papers 22-77; Replying Affidavits and supporting papers 78-82; Other Exhibits A-P, 1-4;...it is further

ORDERED that plaintiff's application is denied and any and all temporary restraining orders in effect are hereby vacated. Plaintiff moves by Order to Show Cause for an order of the court seeking the following relief:

1. Permanently enjoining and restraining defendants, employees, lessees, tenants, assigns, agents, contractors, subcontractors and all other acting on their behalf from accepting and processing more than 370 tons of commercial waste and/or construction or demolition debris per day, with a weekly combined average not to exceed 2200 tons at the facility located at 685 North Queens Avenue, Lindenhurst, New York (Suffolk County Tax Map No. 103-4-1-64.4).

2. Further preliminarily and temporarily enjoining and restraining the defendants et. al, from accepting and processing more than 500 tons of commercial waste and/or construction or demolition debris per day at the aforementioned facility.

3. Plaintiff further moves for costs and disbursements of this action including legal fees as mandated by §193-138 E of the code of the Village of Lindenhurst, and a further award of civil penalties against the defendants pursuant to§193-139B as set forth in plaintiffs Order to Show Cause; to wit; in the sum of $250.00 to the maximum permitted by law from April 23, 2016, $750.00 for the second day and $1,000.00 for each additional day.

The defendant, by its attorneys oppose plaintiffs application. They argue that the injunctive relief requested should be denied because: (1) One World is operating in accordance with its currently-applicable permit and authorizations governing the tonnage amount of materials which can be processed at the facility issued to it by the DEC; (2) One World's operation of the facility is also in full compliance with all Village ordinances and One World has not been issued a single violation by the Village to indicate otherwise; (3) One World has fully complied with the terms of any and all settlement agreements entered into with the Village or of any and all conditional approvals issued by the Village; (4) the Village lacks standing to even attempt to limit the tonnage processed by the facility as this is within the purview of the DEC, the Village has no local law regulating same and even if it did, the Village could not act inconsistently with the DEC; and (5) One World is providing a necessary service benefitting the health, safety and general welfare of the entire Long Island region and limiting the amount of materials processed at the facility as the Village seeks to do, is detrimental to the general welfare and against public interest.

This action was commenced by the filing of a Summons and Complaint on April 18, 2016, service of which was accepted by Vincent Messina, Esq., on behalf of the defendants on April 19, 2016. The action seeks to

permanently, preliminarily and temporarily enjoin the defendants, One World Recycling, LLC (hereinafter "One World, LLC") and One World Recycling, Inc., (hereinafter "One World, Inc.") (hereinafter collectively "One World") from accepting and processing more than 370 tons of commercial waste and/or construction or demolition debris per day, with a weekly combined average not to exceed 2,200 tons at the facility (hereinafter the "Facility") located at the real property with an address of 685 North Queens Avenue, Lindenhurst, New York 11757 ("Suffolk County Tax Map No. 103-4-1-64.4) (hereinafter, the "Subject Property").

One World LLC, currently own the subject property and operates the facility. One World Inc., was One World LLC's predecessor-in-interest. One World LLC purchased the subject property in November 2012. Prior to that date, One World Inc., was the operator of the facility and a tenant of the subject property's then owner, Synthesis Properties, Inc. After purchasing the subject property, One World LLC became the owner of the subject property and operator of the facility. The facility is a combined solid waste transfer station, construction and demolition debris processing facility an recycling and recovery center equipped with a rail spur which allows transloading of outbound waste.

One World LLC operates the facility pursuant to a permit issued by the New York State Department of Environmental Conservation ("DEC"). (The DEC permit expressly regulates the facility's daily, weekly and annual tonnage limits.) The facility's DEC permit issued in 2003 (the "2003 Permit"). Permit No. 1-4720-01004.00004) authorized it to receive 370 tons per day of commercial solid waste and construction and demolition debris.

After a fire at the facility in 2003, the Village instituted a lawsuit against One World, Inc., and the then property owner, Synthesis Properties, Inc. One of the questions posed in the litigation was whether subsequent to the fire, the subject property's non-conforming use as the location for a transfer station/recycling facility could continue. That litigation and a claim by One World Inc., against the Village (notice but not yet commenced at the time) were settled in 2004 by a Stipulation of Settlement (the "Stipulation"), to which both One World, Inc., and Synthesis Properties, Inc., were signatories.

The stipulation provides, inter alia, that the non-conforming use could be continued and the facility reconstructed at the subject property. The stipulation also expressly provides, in pertinent part, that:

> The defendants agree that they will not modify or change their existing permit with the DEC in such a manner as to expand capacity or scope of such permit without seeking proper governmental authority as required by law. Nothing herein shall be construed to limit the NYS DEC authority as lead agency in connection with any DEC permit. The structures at the property to be rebuilt shall not be rebuilt any larger than originally constructed, or in a manner that varies from the site plan, nor shall any new structures be erected without Village approval.

The stipulation, at paragraph 10, further provides inter alia, that: "The Village agrees to act in good faith in future dealings with the defendants." The stipulation is binding on One World, LLC as One World Inc.'s successor in interest. In 2008, One World Inc., requested that the Village allow it to construct an enclosed rail-car-loading shed at the subject property, and that it be permitted to use rail cars to transport waste from the facility. This application required an amendment to the stipulation, as well as site plan approval from the Village of Lindenhurst Planning Board and area variance relief from the Village of Lindenhurst Zoning Board of Appeals. The application was approved by the Village with restrictions.

The Village Board of Trustees, Planning Board and Zoning Board of Appeals conditioned their approval of One World Inc.'s 2008 request to the acceptance by One World Inc., of amended conditions to the stipulation, which conditions were approved by the Village Board of Trustees by Resolution dated June 16, 2009 ("Resolution"). The conditions of particular interest here are:

> 1. The premises...shall be maintained in accordance with the requirements of the existing restrictions of New York State DEC Permit No.: 1-4720-01004-00004.
>
> 2. The owner shall notify the Village Building Department of any proposed changes, or modification of the DEC Permit requirements.
>
> 15. The use shall not be changed or intensified beyond permit requirements from that existing prior to the introduction of rail service, it being understood that introduction of rail service to the site being intended to create an alternative means of shipping which shall result in less vehicular traffic leaving the facility. No new structures shall be added beyond those proposed without approval.

One World Inc., also had to modify its DEC permit in connection with the addition of rail service. The modified DEC permit was issued in 2008 for the facility (the "2008 Permit", also under Permit No. 1-4720-01004/00004), which authorized it to receive 370 tons per day of commercial solid waste and construction and demolition debris, but expanded the permit to include rail service. On or about August 13, 2008, the 2003 permit was renewed and modified by the DEC, with effective date of August 12, 2008 through August 11, 2013 (the "2008 Permit"), allowing One World Inc., to operate a combined solid waste rail transfer facility consisting of a transfer station, a recyclables handling and recovery facility, and a construction, and demolition debris processing facility. On November 30, 2012, the DEC transferred the 2008 Permit from One World Inc., to One World LLC. In December, 2011, One World LLC provided written notification to the Village that it intended to seek permit

modifications from the DEC for the construction of a building to connect the rail-car-loading shed to the tipping floor building.

The Village review process continued through the Fall of 2012, when Long Island suffered the devastation of Super Storm Sandy on October 29, 2012. As a result of Governor Cuomo's declaration of a statewide "state of emergency", on November 16, 2012, the DEC granted emergency authorizations to One World to handle storm debris, for the transfer of 1,100 tons of storm debris per day. See, Exhibit "F" of the Cullinane Affidavit; and Exhibit "C" to Graziose Affidavit. On December 12, 2012, the original emergency permit was extended by the DEC through January 14, 2013.

Prior to the expiration of the emergency authorization, One World, LLC applied to the DEC for a permit renewal/modification seeking to maintain the emergency throughout authorization of 1,100 tons per day and to construct the building connecting the rail-car-loading shed with the facilities tipping floor building. As per DEC regulations, One World, LLC is operating pursuant to its Emergency Authorization.

Prior to Super Storm Sandy, One World, LLC's records indicate the facility complied with the cap of 370 tons per day of commercial waste, or construction, or debris, and the weekly combined average did not exceed 2,200 tons. The 2015 and 2016 "Monthly Tonnage" and "Daily Average" reports provided by One World, LLC to the Village of Lindenhurst and the NYS DEC, represent the monthly tonnage and daily average of waste processed at the facility for such period. One World, LLC (and previously One World Inc.) has, since the issuance of the DEC's Emergency Authorization, kept the Village informed as to operations at the facility through the delivery of monthly reports as requested detailing the daily tonnage handled and number of transactions performed at the subject property.

Beginning on June 9, 2016, continuing on June 16, 2016 and concluding on June 24, 2016, the Court entertained a hearing regarding plaintiffs application. Both sides presented evidence and testimony of witnesses. The Court concluded the hearing indicating it would consider all evidence presented at the hearing and the submitted papers by both sides.

Plaintiff seeks an order of the court pursuant to NY Village Law §7-714 and CPLR §6314 granting plaintiff a temporary restraining order and a preliminary and permanent injunction enjoining and restraining the defendants from accepting and processing waste in excess of 370 tons per day and no more than 2200 tons per week at their facility. The Court notes that in plaintiff's Order to Show Cause application, the court raised the daily tonnage accepted to 500 tons per day. Presently the defendant's facility is operating at the Emergency Authorization daily tonnage of 1100 tons per day as per the DEC regulations.

Plaintiff in support of its request for both a preliminary and a permanent injunction argues that the Village receives a number of complaints from its residents regarding noise, odors, litter and excessive fuel emissions and truck traffic from the facility. Additionally, the rail use by the facility requires the blockage of the Grand Avenue crossing which is located in a busy neighborhood by trains visiting the facility. Complaints also arose about the inability of traffic to freely travel at the Grand Avenue crossing during pickups from the facility which it is alleged creates an inconvenience to pedestrian traffic but a more serious threat to emergency service vehicles. The plaintiffs claim that based on submitted daily/weekly tonnage reports from the defendant, the defendant has exceeded the 370 daily 2,200 weekly ton limit.

However, the court notes again that the defendant's facility has been operating under the DEC Emergency Authorization which remains in effect until the defendant's application for permission to receive and process additional daily and weekly tonnage is approved or denied. The defendants are permitted to continue to operate under the Emergency Authorization which the Village declined to take action due to the initial public emergency.

Plaintiff, contends, because of the facts setforth above, that it is entitled to a temporary restraining order and a preliminary injunction.

Village Law §7-714 authorizes municipalities to seek injunctive relief to enforce village laws and zoning ordinances. "A municipality has authority to obtain a temporary restraining order and preliminary injunction strictly enforcing its zoning ordinances without application of the three-prong test for injunctive relief." Inc. Village of Freeport v. Jefferson Indoor Marina, 556, N.Y.S. 2d 150, 152 (2nd Dept. 1990). "No special injury or damage to the public need be alleged, and the commission of the prohibited act is sufficient to warrant granting the injunction." Id. At 152; see also A. Vanno v. River Market Commodities, 564 N.Y.S.2d 924 (4th Dept. 1990). The municipality must only show (I) that a Village law was violated, (ii) that it has a likelihood of success on the merits, and (iii) that the equities are balanced in its favor. Village of Chestnut Ridge v. Roffino, 306 A.D.2d 552, 524 (2d Dep't 2003). See, e.g., Village of Babylon v. John Anthony's Water Caf'e, Inc., 137 A.D.2d 792, 794 (2d Dep't 1988) (injunction

proper where "defendants" premises created an increase in noise and traffic congestion which created a hazard to the safety of the area residents and the patrons of the premises"). This action is also authorized by Village Code §193-138.

The plaintiff argue that the defendants are in violation of the law by exceeding the 370 tons per day and 2,200 tons per week, and as such are in violation of Village Code §193-113 of the code of the Village Lindenhurst which governs the permitted use in industrial zones. The plaintiff argues as the defendants use exceeds the Village levels they are non-conforming and in violation.

Plaintiff further allege that defendants are in violation of §193-113 because the defendants facility disseminates a number of nuisances beyond the industrial zone into the neighboring residential areas such as smoke, gas, dust, odor, fumes, noise and or vibration.

Based upon the foregoing, it is the plaintiff's position that they have a high likelihood of success on the merits and the equities are balanced in their favor. Defendants facility has operated in excess of the agreed upon tonnage limits and have failed to remedy the violations nor have attempted. It is the Village position that since the public emergency of Super Storm Sandy has passed, the defendants should operate in accordance with the limitations they agreed and entered into.

Furthermore, based on the foregoing, the Village believes it is entitled to a permanent injunction.

Defendants argue that the plaintiff is not entitled to the requested relief because they have not made the requisite and predicated showing, which must be made be clear and convincing evidence, of any irreparable injury, a likelihood of success on the merits or the equities balance on its own. CPLR § 6301, Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840, 833 N.E. 2d 191 (2005). Defendants argue they are not in violation of any Village ordinance. In fact they are operating under a DEC permitted usage which the Village decided not to act upon.

Defendants argue that the subject property/facility which is within the Village of Lindenhurst is located in an industrial park surrounded by other industries some of which are outside the jurisdiction of the Village, which also use the rail spur in connection with their respective business. Plaintiff draws the conclusion that the defendants are responsible for smoke, gas, dust, odor, fumes, noise and vibration without considering whether these harms also are the result of the other industries in the area. The same argument can be set forth for the use of the rail spur.

The defendants argue that the plaintiff cannot nor do they have the authority to regulate the tonnage amount accepted at the facility; this is regulated by the New York State Department of Environmental Conservation (DEC). The plaintiff cannot "approve or reject" the DEC approved limits nor can the court substitute its judgment for that of the DEC, unless the DEC's determination should be determined to be unreasonable.

Defendants argue that they are not in breach of contract with the plaintiff as they are in compliance with all applicable permits and authorizations issued by the DEC. Nothing contained within the stipulation and the later amended conditions support the plaintiffs contention that they have the authority to regulate the tonnage at the facility.

Defendants allege that the plaintiffs nuisance cause of action must fail because as in this instance, the defendant is authorized by the DEC to accept the tonnage for the operation of its business. They are in compliance with the DEC.

Furthermore, the plaintiff does not allege that the defendant has acted, or failed to act, so as to: "offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (id, at 568), let alone show that a public nuisance exists, by clear and convincing evidence, so as to warrant preliminary injunctive relief. See DeStefano v. Emergency Hous. Grp., Inc., 281 A.D.2d 449, 451, 722 N.Y.S.2d 35 (2d Dep't 2001).

The plaintiffs declaratory judgment cause of action fails as this court does not have the authority to regulate tonnage; this is within the purview of the DEC. During the course of the hearing conducted by the court, inquiry by the court was made as to the status of the defendant's renewal permit with the DEC. The renewal permit issued September 19, 2016, in pertinent part is as follows:

> The facility may receive, process and transfer commercial waste (CW) construction and demolition debris (CD) and recyclables at an average annual rate of 500 tons per day (with the average annual rate being based upon a 312 operating day year). The amount of waste received

on any given day shall not exceed 600 tons. (Permit, p.1).

Should the additional building be constructed, the aforesaid materials may be processed at a rate of 650 tons per day, based upon 312 operating days per year, with a daily maximum of 800 tons. (Id.)

The permit also provides that "[I] in the event of a seasonal induced need for increased rail haulage of CW and C&D debris due to the buildup of inventory of such waste on Long Island, the permitee may petition to the Region 1 Director for a temporary daily tonnage increase up to an amount justified in the petition and as approved by the Department, in writing for specified limited time frame, and until completion of the building construction". (Permit, p.4).

It is clear from the renewal permit issued by the DEC which is presently in effect that the Defendant's application is now limited to 500 tons per day with a cap of receiving up to but not in excess of 600 tons. As it is the purview of the DEC to set the tonnage amounts; to the extent that plaintiff's Order to Show Cause requests a preliminary injunction limiting the defendant to 370 tons per day with a weekly limit of 2200 ton, this requested relief is denied.

Defendants arguments against the plaintiff's claim of nuisance, breach of contract and declaratory judgment, although outside of plaintiffs requested relief in its Order to Show Cause have been considered by the court and addressed accordingly.

The Court further determines that the generalized complaint of the plaintiff about the noise, smoke, gas, fumes, dust and vibration does not rise to the level of a showing of clear and convincing evidence and accordingly a permanent injunction is not granted. There are other industries within the industrial park that can cause the above complaints, however none of these are within the jurisdiction of the plaintiff whereby these businesses are not subject to Village code. This may also apply to those businesses that also use the rail spur which causes traffic and delay. Casting blame only upon the defendant for these nuisances without specific allegations and evidence is not sufficient.

The Court also finds against the plaintiff with respect to its claim that the defendants are in breach of contract. Prior to and during the course of this litigation, the defendants acted within the guidelines setforth by the DEC which was acquiesced to by the plaintiff. Accordingly, the further request for legal fees and counsel fees is denied.

Wherefore, plaintiffs Order to Show Cause and the requested relief contained therein is hereby denied.

Counsel for the defendants is directed to serve a copy of this order with notice of entry upon counsel for the plaintiff.

Dated: December 22, 2017
Riverhead, NY

W. Gerard Asher
J.S.C.