Hunter Sports Shooting Grounds, Inc. v Foley
2012 NY Slip Op 31721(U)
June 21, 2012
Supreme Court, Suffolk County
Docket Number: 07-493
Judge: Joseph Farneti
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 07-493

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-18-12 (#010 & #011)
MOTION DATE 2-27-12 (#012)
MOTION DATE 5-3-12 (#013 & #014)
ADJ. DATE 3-8-12 (#010, #011 & #012)
ADJ. DATE 5-3-12 (#013 & #014)
Mot. Seq. # 010 - MD # 011 - XMD
012 - XMD # 013 - MD
014 - MD

---X

HUNTER SPORTS SHOOTING GROUNDS, INC.

Plaintiff,

- against -

BRIAN X. FOLEY, STEVE FIORE-ROSENFELD, KEVIN T. MCCARRICK, KATHLEEN WALSH, CONNIE KEPERT, CAROL BISSONETTE, and TIMOTHY P. MAZZEI, Constituting the Town Board of the Town of Brookhaven, and the COUNTY OF SUFFOLK, as a necessary party pursuant to Civil Practice Law and Rules 1001(a),

Defendants.

---X

ANDREW L. CRABTREE, ESQ.
Attorney for Plaintiff
225 Broad Hollow Road, Suite 303
Melville, New York 11747

SINTOW KANFER HOLTZER & MILLUS LLP
Attorney for all Defendants except Suffolk County
575 Lexington Avenue
New York, New York 10022

DENNIS M. COHEN, ESQ.
Attorney for Defendant Suffolk County
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788

Upon the following papers numbered 1 to 120 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 38; 39 - 53; 54 - 59 ; Notice of Cross Motion and supporting papers 60 - 70; 71 - 87 ; Answering Affidavits and supporting papers 88 - 101; 102 - 105 ; Replying Affidavits and supporting papers 106 - 113; 114 - 120 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#010) by defendant Town Board of the Town of Brookhaven, these motions (#011 and #014) by defendant County of Suffolk, and these motions (#012 and #013) by plaintiff are consolidated for purposes of this determination; and it is further

ORDERED that this motion (#010) by defendant Town Board of the Town of Brookhaven for summary judgment dismissing the complaint of plaintiff against it is denied; and it is further

ORDERED that this cross-motion (#011) by defendant County of Suffolk for, *inter alia*, an Order granting summary judgment against defendant Town Board of the Town of Brookhaven on the first, fifth and sixth causes of action set forth in the complaint is denied; and it is further

ORDERED that this cross-motion (#012) by plaintiff for an Order granting summary judgment on its first, second, third and sixth causes of action against defendant Town Board of the Town of Brookhaven is denied; and it is further

ORDERED that this motion (#013) by plaintiff for an Order, pursuant to CPLR 6301, enjoining defendant Town Board of the Town of Brookhaven from enforcing, or further proceeding on, noise violations heretofore issued pursuant to Chapter 50 of the Brookhaven Town Code, including the accusatory instruments currently pending in the District Court of Suffolk County, Sixth District is denied; and it is further

ORDERED that this motion (#014) by defendant County of Suffolk, *inter alia*, for an Order, pursuant to CPLR 6301, enjoining the parties from proceeding to trial on the underlying alleged violations of Chapter 50 of the Brookhaven Town Code, pending the hearing and determination of the parties' motions for summary judgment currently pending before this Court is denied; and it is further

ORDERED that counsel for the parties shall appear before the undersigned on **August 9, 2012 at 9:30 a.m.** for a preliminary conference.

Plaintiff Hunter Sports Shooting Grounds, Inc. ("HSSG") operates a trap and skeet shooting range on County-owned lands as the licensee of the County of Suffolk ("County"). In November and December 2006, the Town of Brookhaven ("Town") commenced a series of proceedings in the District Court of Suffolk County, Sixth District ("District Court"), alleging that HSSG was in violation of the Town's noise ordinance (i.e., Chapter 50 of the Brookhaven Town Code) at various times. HSSG then commenced this action, *inter alia*, for a judgment declaring that the Town's actions in enforcing the noise ordinance against it were unconstitutional. HSSG's verified supplemental complaint alleges ten causes of action against the Town predicated on the following legal theories: prior non-conforming use; unlawful confiscation; unlawful taking; due process and equal protection violations; public interest immunity; pre-emption and Municipal Home Rule Law violation; exemption under Brookhaven Code §§ 50-6 (a) and 50-7 (b); unconstitutionality of Brookhaven Code § 50-6 (a); improper enforcement of time limitation under Brookhaven Code § 50-9 (b); and citations numbered 90022 and 90023 being facially defective as they did not comply with Criminal Procedure Law §§ 100.15 and 170.35 (1) (a).

By Order dated October 6, 2011, this Court denied HSSG's cross-motion for summary judgment without prejudice to timely renewal, upon submission of proper papers, and granted the branch of the Town's motion for summary judgment on the issue of its noise ordinance's constitutionality. By the same Order, the Court declared that the ordinance is constitutional and must be sustained. The Court, however, denied the branch of the Town's motion for summary judgment on the issue of whether the noise ordinance was lawfully and properly applied to HSSG.

The Town now moves again for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. It is well-established that multiple summary judgment motions by the same party are disfavored absent a showing of newly discovered evidence or sufficient cause (*see* ***Sutter v Wakefern Food Corp.***, 69 AD3d 844, 892 NYS2d 764 [2d Dept 2010]; ***Lapadula v Sang Shing Kwok***, 304 AD2d 798, 757 NYS2d 869 [2d Dept 2003]; ***Marine Midland Bank v Fisher***, 85 AD2d 905, 447 NYS2d 186 [4th Dept 1981]). Here, the Town seeks the same relief as it sought in its prior motion for summary

[* 3]

judgment, but fails to show newly discovered evidence or other good cause for making a second summary judgment. The Town's motion, therefore, is denied, as it violates the general proscription against filing successive motions for summary judgment (*see* ***Ferguson v Shu Ham Lam***, 74 AD3d 870, 903 NYS2d 101 [2d Dept 2010]; ***Tolpygina v Teper***, 63 AD3d 722, 880 NYS2d 326 [2d Dept 2009]; ***Sutter v Wakefern Food Corp.***, *supra*; ***Rocky Point Drive-In, L.P. v Town of Brookhaven***, 37 AD3d 805, 831 NYS2d 456 [2d Dept 2007]).

The County cross-moves for an Order granting summary judgment against the Town on the first, fifth and sixth causes of action set forth in the complaint.

The First Cause of Action: Prior Non-Conforming Use

The County alleges that since it and its licensees operated the subject range for over twenty-five years before the Town enacted its noise ordinance, the range is exempt from enforcement of the Town's noise ordinance as a prior existing nonconforming use. It is well-established that a prior nonconforming use does not make the landowners immune from laws, ordinances and regulations of a police nature (*see* ***Concerned Citizens of Perinton, Inc. v Town of Perinton***, 261 AD2d 880, 689 NYS2d 812 [4th Dept 1999]; ***Plaattekill v Dutchess Sanitation, Inc.***, 56 AD2d 150, 391 NYS2d 750 [3d Dept 1977]; ***Hempstead v Goldblatt***, 19 Misc2d 176, 189 NYS2d 577 [Sup Ct, Special Term, Nassau County 1959]).

Here, by Order dated October 6, 2011, this Court concluded that the Town's noise ordinance is a reasonable exercise of its police power and, thus, a prior nonconforming use is not immune from the operation of the ordinance. Accordingly, the branch of the cross-motion for summary judgment against the Town on the first cause of action is denied.

The Fifth Cause of Action: Public Interest Immunity

The County alleges that a "balancing of public interests" weighs in favor of its interest in continuing to operate the subject range. The County alleges that, while the range serves an important public benefit by providing recreational shooting activity to thousands of its residents, the Town's interest in enforcing its noise ordinance against the range is limited to mollifying the residents of approximately twenty homes that are adjacent to the range. In support, the County submits a copy of the pleadings, appellate briefs submitted by plaintiff and the County to the Appellate Division, and a decision from an unrelated action.

A dispute between governmental entities regarding whether one entity is exempt from the local regulations of the other is resolved by balancing the public interests (*see* ***Matter of Crown Communication N.Y., Inc. v Department of Transp. of State of N.Y.***, 4 NY3d 159, 791 NYS2d 494 [2005]; ***Town of Fenton v Town of Chenango***, 91 AD3d 1246, 937 NYS2d 677 [3d Dept 2012]). A non-exhaustive list of potential factors to be weighed includes the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests, as well as the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, alternative methods of providing the needed improvement, intergovernmental participation in the

[* 4]

project development process and an opportunity to be heard (*see* ***Matter of County of Monroe***, 72 NY2d 338, 533 NYS2d 702 [1988]; ***Town of Hempstead v State of New York***, 42 AD3d 527, 840 NYS2d 123 [2d Dept 2007]).

Here, the record submitted by the County does not support an award of summary judgment in the County's favor. Under the circumstances, a more complete record, including the depositions of the witnesses with knowledge of the facts relevant to the balancing test, must be developed to inform that inquiry. At this stage, summary judgment would be premature absent depositions of the parties (*see* ***Town of Riverhead v County of Suffolk***, 66 AD3d 1004, 887 NYS2d 650 [2d Dept 2009]). Thus, the branch of the cross-motion for summary judgment against the Town on the fifth cause of action is denied.

The Sixth Cause of Action: Pre-emption and Municipal Home Rule Law Violation

The County alleges that, by enacting County Law § 221, the State Legislature authorized counties to create a county park commission which "shall have the supervision and management of all county parks within the county," and that the enforcement of the Town's noise ordinance against the subject range impairs the power of the County and, thus, violates the New York State Constitution and New York Municipal Home Rule Law. The County further alleges that the Town's noise ordinance cannot apply to the subject shooting range, when the County expressly intended the property to be exempted from its own noise ordinance.

New York's constitutional home rule provision (*see* NY Const, art IX, § 2 [c]) confers broad police power upon local governments relating to the welfare of its citizens, and local governments are authorized to legislate in enumerated areas of local concern. However, local governments cannot adopt laws that are inconsistent with the Constitution or with any general law of the State, and this local power is subject to a fundamental limitation by the preemption doctrine, which embodies the untrammeled primacy of the Legislature to act with respect to matters of State concern (*see id.*; Municipal Home Rule Law § 10 [l] [i], [ii]; ***Matter of Cohen v Board of Appeals of Vil.of Saddle Rock***, 100 NY2d 395, 764 NYS2d 64 [2003]; ***Sunrise Check Cashing & Payroll Servs. v Town of Hempstead***, 91 AD3d 126, 933 NYS2d 388 [2d Dept 2011]). A town has the authority to adopt a noise control ordinance which imposes criminal liability upon violators (*see* ***People v New York Trap Rock Corp.***, 57 NY2d 371, 456 NYS2d 711 [1982]). Moreover, the New York Constitution provides at article IX, § 2 (d) that "a local government shall not have power to adopt local laws which impair the powers of any other local government" (*see also* Municipal Home Rule Law § 10 [5]; ***Mahler v Gulotta***, 297 AD2d 712, 747 NYS2d 562 [2d Dept 2002]).

Chapter 618 of the Suffolk County Code, which was amended and enacted on May 13, 2003, provides in pertinent part as follows: the County's noise ordinance shall not apply to "noise emanating from the recreational discharge of firearms at a County-owned, -operated or -leased shooting range, the site for which was being used as a facility for the recreational discharge of firearms prior to January 1, 1980."

Here, the Court finds that the Town has the authority to adopt a noise control ordinance which imposes criminal liability upon violators. There is nothing in County Law § 221 to indicate an intention by the Legislature, directly or indirectly, to restrict the Town's power to enact a noise ordinance (*see also* ***People v New York Trap Rock Corp.***, *supra*). The Court finds that the Town's noise ordinance is not preempted by state legislation. Moreover, the Court finds that, while Chapter 618 of the Suffolk County Code exempted

the range from the County's noise ordinance, it has no power to impair the Town's noise ordinance which was enacted in 1987 (*see* ***Mahler v Gulotta***, *supra*). Thus, the branch of the cross-motion for summary judgment against the Town on the sixth cause of action is denied.

The County seeks to have the Court declare that the Town's noise ordinance is void and unenforceable as against the County and HSSG. Here, by Order dated October 6, 2011, this Court declared that the Town's noise ordinance is valid. As discussed above, the County has failed to meet its burden of proving beyond a reasonable doubt the invalidity of the noise ordinance.

The County also seeks to have the Court declare that all violations issued by the Town to the County and HSSG based on the sound of gunfire at the subject shooting range are null and void. The County further seeks an Order directing the Town to remove, vacate, cancel and annul all such violations and to cease issuing any such further violations. The County alleges that, in November 2011, the Town issued seven violations to the County arising from the sound of gunfire at the range. To the extent that the County seeks prospective injunctive relief, the County has not pleaded a cause of action for such relief; as to the remaining relief requested, such matters are properly within the jurisdiction of the District Court, and any appropriate court having jurisdiction over an appeal from the District Court.

HSSG cross-moves for an Order granting summary judgment against the Town on the first, second, third and sixth causes of action set forth in the complaint. For the same reasons discussed above, the branch of HSSG's cross-motion for summary judgment against the Town on the first and sixth causes of action is denied.

The Second and Third Causes of Action: Unlawful Confiscation and Unlawful Taking

HSSG alleges that the application of the noise ordinance to its business constitutes unlawful confiscation and taking in violation of its rights under the federal and state Constitution. In support, HSSG submits, *inter alia*, the copy of the pleadings; a document entitled "Range Concession Proposal" prepared by HSSG; various financial documents, including a balance sheet and comparative income statement; and a document entitled "Initial Environmental Evaluation" of the subject range, prepared by a private consulting company.

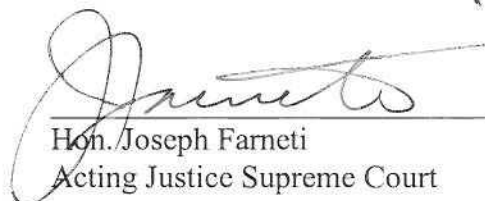
A local law will not be valid if it interferes with the land owner's beneficial enjoyment of its property (*see* ***Matter of MHC Greenwood Vil. NY, LLC v County of Suffolk***, 58 AD3d 735, 874 NYS2d 135 [2d Dept 2009]). A municipality may not invoke its police powers solely as a pretext to assuage strident community opposition (*see* ***Matter of Belle Harbor Realty Corp. v Kerr***, 35 NY2d 507, 364 NYS2d 160 [1974]; ***Cellular Tel. Co. v Village of Tarrytown***, 209 AD2d 57, 624 NYS2d 170 [1995]). Once it has been established that the regulation at issue is a legitimate exercise of police power, the court must next determine whether the regulation results in a taking of the property by depriving the landowner of its property rights (*see* ***Gazza v New York State Dept. of Envtl. Conservation***, 89 NY2d 603, 657 NYS2d 555 [1997]). A municipal exercise of the police power which interferes with the beneficial use of property must be a reasonable and legitimate response to a situation which it is within the police power to correct (*see* ***Charles v Diamond***, 41 NY2d 318, 392 NYS2d 594 [1977]; ***51 St. Nicholas Realty Corp. v City of New York***, 218 AD2d 343, 636 NYS2d 300 [1st Dept 1996]). Determinations of reasonableness must turn upon the facts

and circumstances of particular cases (*see* ***Charles v Diamond***, *supra*; ***51 St. Nicholas Realty Corp. v City of New York***, *supra*). What is an unreasonable exercise of the police power depends upon the relevant converging factors. Hence, the facts of each case must be evaluated in order to determine the private and social balance of convenience before the exercise of the power may be condemned as unreasonable (***French Investing Co. v City of New York***, 39 NY2d 587, 385 NYS2d 5 [1976]; *see* ***51 St. Nicholas Realty Corp. v City of New York***, *supra*).

Here, by Order dated October 6, 2011, this Court concluded that, while the noise ordinance is constitutional and valid, there exists an issue of fact as to whether the noise ordinance was lawfully and properly applied to HSSG. This Court finds that the constitutional confiscation and taking issues are not ripe for review, since there remain several issues of fact as to whether the noise ordinance was properly applied to the subject shooting range and as to what was the noise level of the range when the Town issued violation tickets. Thus, the branch of HSSG's cross-motion for summary judgment against the Town on the second and third causes of action is denied.

In addition, HSSG moves for an Order, pursuant to CPLR 6301, enjoining the Town from enforcing, or further proceeding on, noise violations issued pursuant to the Town's noise ordinance, including the accusatory instruments currently pending in the District Court. Similarly, the County moves for an Order, pursuant to CPLR 6301, enjoining the parties from proceeding to trial on the underlying alleged violations of the Town's noise ordinance, presently on the trial calendar of the District Court, while the hearing and determination of the parties' motions for summary judgment are pending before this Court. CPLR 6301 provides that a preliminary injunction is only available in a pending action (*see* ***Happy Age Shops, Inc. v Matyas***, 128 AD2d 754, 513 NYS2d 710 [2d Dept 1987]). CPLR 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action [or proceeding] is pending may grant a stay of proceedings in a proper case." This section authorizes only courts exercising original civil jurisdiction to grant a general stay of proceedings (*see* ***Schwartz v New York City Hous. Auth.***, 219 AD2d 47, 641 NYS2d 885 [2d Dept 1996]; ***Rhodes v Mosher***, 115 AD2d 351, 502 NYS2d 558 [4th Dept 1985]). HSSG's request for a preliminary injunction is denied since HSSG has not pleaded a cause of action for such relief in this action, and the Court lacks jurisdiction to stay the District Court matter. The County's request for an Order staying further proceedings in the District Court is denied without prejudice to apply for the same relief in the pending District Court proceedings (*see* CPLR 2201; ***Rhodes v Mosher***, *supra*). The Court finds that the County's remaining arguments are without merit.

Dated: June 21, 2012



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION