

Borrok v Town of Southampton
2014 NY Slip Op 31412(U)
May 19, 2014
Supreme Court, Suffolk County
Docket Number: 08918/2014
Judge: Jerry Garguilo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 Supreme Court Justice

 ANDREW BORROK,

Petitioner,

-against-

TOWN OF SOUTHAMPTON, ZONING BOARD
 OF APPEALS OF THE TOWN OF
 SOUTHAMPTON, AND 34 COVE, LLC,

Respondents.

RESPONDENT'S ATTORNEY:

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ORIG. RETURN DATE: 5/14/2014
 FINAL SUBMISSION DATE: 5/14/2014
 MTN. SEQ. # 001
 MOTION: MD

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The Petitioner, Andrew Borrok, petitions the Court by way of an Order to Show Cause with Temporary Restraining Order for orders seeking the following relief:

1. A Preliminary Injunction enjoining Respondents, their agents, servants, employees and others acting in concert with them from issuing any building permits in connection with the construction of a tennis court and accessory structures on the premises located at 34 Cove Avenue, Water Mill, New York as contemplated by the Zoning Board of Appeals approval dated April 3, 2014; and
2. From performing any and all work in furtherance of the construction of the tennis court and accessory structures as contemplated by the Zoning Board of Appeals.

On April 30, 2014, the Hon. W. Gerard Asher allowed the issuance of a temporary restraining order. To wit:

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ORDERED, that pending the hearing and determination of Petitioner's motion for a preliminary injunction, Respondents and their agents and anyone working in concert with them, herein be and hereby are restrained from:

1. Issuing any building permits in connection with the construction of a tennis court and accessory structures on the premises located at 34 Cove Ave., Water Mill, New York as contemplated by the Zoning Board of Appeals approval dated April 3, 2014; and if any permits have already been issued, they are suspended until decision on the preliminary injunction is made by the Court.
2. Performing any and all work as contemplated by the Zoning Board of Appeals approval dated April 3, 2014.

On April 30, 2014, the Petitioner presented his Order to Show Cause, Counsel's Affirmation in Support with Exhibits A through J. The Court has also reviewed the minutes of Petitioner's application before Mr. Justice Asher.

On May 14, 2014, the parties appeared before this Court to be heard concerning the preliminary injunction. The Respondent, 34 Cove, LLC presented the Court with counsel's Affirmation In Opposition accompanied by Exhibits A through C and a "Memorandum of Law In Opposition to Petitioner's Motion for a Preliminary Injunction." The Petitioner presented an Affirmation of Counsel "in further support" with Exhibits A and B. The Respondent municipality presented the Court with an Attorney's Affirmation noting "that Respondents Town of Southampton and Zoning Board of Appeals of the Town of Southampton take no position as it relates to Petitioner's request for a Preliminary Injunction and stay, except to note that Respondents maintain that Zoning Board of Appeals decision D014031, dated April 3, 2014, was not arbitrary, capricious, or irrational, both fully supported by a rational basis in the record.

Before this Court is the issue as to whether or not to allow a preliminary injunction. The Court having considered all submissions makes its determination.

On April 3, 2014, the Town of Southampton Board of Appeals issued decision number D014031. The Respondent, 34 Cove, L.L.C., application for a variance was granted. The Board's determination is as follows:

This Board grants applicant relief from (i) Town Code Section 330-76C (1) to allow for the construction of a 110" x 60" tennis court on a nonconforming lot without a principal building; (ii) Town Code Section 330-11 (residential districts table of dimension regulations) for an accessory distance from street setback of 17 feet where 90 feet is required; and (iii) Town Code Section 330-76D (placement of accessory buildings and uses in all districts) and Section 330-83C (yards) to allow a proposed tennis court to be located within the required front yard as shown on the survey of Saskas Surveying Company, P.C., dated November 13, 2013. Grant of the foregoing relief is subject to the applicant planting and maintaining the Planting Plan & Schedule prepared by Edmund Hollander, Landscape Architect Design, P. C., submitted with the application.

In short, the Petitioner objects to the construction of the tennis court.

The Petitioner's Affirmation in Support (107 paragraphs) details in what respect the Zoning Board of Appeals departed from its statutory mission.

Article 63 of the CPLR supplies the provisional remedies of the Preliminary Injunction, which keeps status quo while an action is pending, and the temporary restraining order (TRO), which keeps status quo while a motion is brought for a Preliminary Injunction. See Siegel, New York Practice 5th ed., section 327. Professor Siegel continues to note CPLR § 6301 authorizes a Preliminary Injunction in either of two situations:

(1) 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 (2) 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.

The Court is persuaded that the Petitioner cannot meet the criteria whereby he may benefit by a Preliminary Injunction. The petition is ***DENIED*** and any injunctive relief granted heretofore is ***VACATED***.

A Preliminary Injunction is a drastic remedy (*William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423, 424 [2nd Dept. 2001]). “A party seeking the drastic remedy of a Preliminary Injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional remedy is withheld, and (3) a balancing of the equities in movant’s favor” (*Temple-Ashram v. Satyanandji*, 84 AD3d 1158, 1161 [2nd Dept. 2011]).

The real properties involved in the matter before the Court can only be described as exquisite. The Petitioner’s property is in excess of 4 acres with many amenities including a tennis court. More particularly, Petitioner owns a 4.211 acre lot with a dwelling measuring approximately 20,000 square feet. The Board of Zoning Appeals after considering evidence issued a decision granting the area variances. In a four page written opinion, the Zoning Board of Appeals recounted the evidence and testimony submitted at the hearings and in the written submissions of the Petitioner as well as correspondence from counsel representing another adjacent land owner. The Zoning Board of Appeals determined that “the benefit to the applicant in granting relief outweighs any perceived detriment to the neighborhood or community.” The Zoning Board of Appeals further found: (1) the proposed tennis court is consistent with the character of the neighborhood as the arial photograph reveals tennis courts and accessory structures are a common amenity to the neighborhood; (2) the relief sought was the least amount necessary and would have no discernible impact on the neighborhood whatsoever since the location was specifically chosen to both meet applicant’s desire to have a north/south court and also to maximize setbacks from the properties in closest proximity; (3) ample screening... and sinking of the court will address the perceived impact of the adjacent property owners as well as any possible impact on the street...with the...planting of a vegetated buffer along Cove Avenue; (4) 34 Cove, LLC could not construct a tennis court by any method other than area variances; (5) alternatives presented at the public hearing on the matter were inadequate because they did not meet the applicant’s desire of having a north/south orientation of the court... or also balancing the setbacks/impact to the adjoining property owners most affected by the court; (6) the area variances were not...substantial because the proposed court was slightly smaller than standard, and setbacks from neighbors most affected were maximized under the proposal; (7) the court would not have any adverse effect or impact on the physical or environmental conditions within the neighborhood and that the removal of the septic system on the lot was a benefit to the environment; and (8) the difficulty was not self-created.

The Court is not convinced that the Petitioner can demonstrate any irreparable harm. As noted in Respondent’s submission, “any alleged harm is clearly reparable.” This is so because should Petitioner ultimately prevail on the merits in his Article 78 proceeding, the tennis court can easily be deconstructed and the property restored to its original condition, at no expense to Petitioner. The Court is further persuaded that contrary to preventing

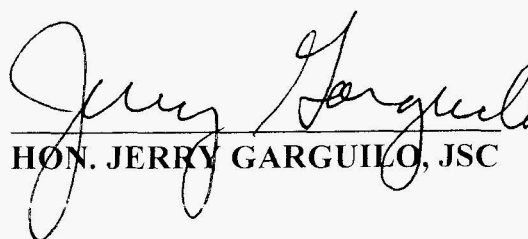
irreparable harm, a Preliminary Injunction would disturb the status quo and award Petitioner the ultimate relief sought, and probably serve as a “end-run” around the Article 78 proceeding. The “ordinary purpose of Preliminary Injunctive relief... is to maintain the status quo and to prevent any conduct which might impair the ability of the Court to render final judgment” (*St. Paul Fire and Marine Insurance Co., v. New York Claims Service, Inc.*, 308 AD2d 347). In short, a mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the Petitioner would receive the “ultimate relief” sought. The Court finds the “status quo” is the existence of a variance allowing the Respondent to exercise its right to construct a desired tennis court as well as to allow the processing of a building permit by the Southampton Building Department to construct said tennis court.

The Court is further persuaded that the Petitioner cannot demonstrate a likelihood of success on the merits or that the absence of a Preliminary Injunction would cause him, greater injury than the imposition of the injunction would inflict on the non-moving party. *See Copart of Connecticut, Inc., v. Long Island Auto Realty, LLC*, 42 AD3d 420, 421 [2nd Dept. 2007].

It is **ORDERED ADJUDGED AND DECREED** that the petition for Preliminary Injunction is **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: May 19, 2014


HON. JERRY GARGUILO, JSC