

Kverel v Town of Southampton
2015 NY Slip Op 31656(U)
August 25, 2015
Supreme Court, Suffolk County
Docket Number: 05226/2015
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Eugene Kverel and Karine Petrossian,

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Plaintiffs,

Motion Sequence No.: 001; MOT.D

-against-

Motion Date: 4/21/15Submitted: 5/27/15The Town of Southampton, Michael Benincasa,
in his capacity as Chief Building Inspector for the
Town of Southampton and Philip Silverman,Motion Sequence No.: 002; XMDMotion Date: 5/6/15Submitted: 5/27/15

Defendants.

Motion Sequence No.: 003; XMDMotion Date: 5/6/15Submitted: 5/27/15Attorney for Defendant Philip Silverman:Attorney for Plaintiffs:Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104Ruskin Moscou Faltischek PC
1425 EAB Plaza, East Tower
Uniondale, NY 11556

and

Attorney for Defendants
The Town of Southampton
and Michael Benincasa:O'Shea, Marcincuk & Bruyn, LLP
250 North Sea Road
Southampton, NY 11968Tiffany S. Scarlato
Southampton Town Attorney
Attn: Kathryn Garvin, Asst. Twn. Attny.
116 Hampton Road
Southampton, NY 11968Clerk of the Court

Upon the following papers numbered 1 to 90 read upon this application for injunctive relief and two cross-motions to dismiss the complaint: Order to Show Cause and supporting papers, 1 -16; Notice of Cross Motion and supporting papers, 17 - 45; 46 - 58; Answering Affidavits and supporting papers, 59 - 76; Replying Affidavits and supporting papers, 77 - 90; it is

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ORDERED that this application by plaintiffs, Eugene Kverel and Karine Petrossian, for a preliminary injunction enjoining defendant, Philip Silverman, his agents, servants and employees, from constructing the proposed top floor on the structure presently being built at 24 Southway Drive, Shinnecock Hills, Town of Southampton, New York, is granted and, upon the posting of an undertaking by the plaintiffs in the amount of \$10,000 (*see* CPLR 6312[b]), the defendant, Philip Silverman, his agents, employees and all those acting in concert with him, are enjoined from constructing the top floor of the building at 24 Southway Drive, Southampton, New York, until the resolution of this action or further order of this Court; and it is further

ORDERED that the cross-motion of the Town of Southampton and Michael Benincasa, in his capacity as Chief Building Inspector for the Town of Southampton, and the cross-motion of Philip Silverman to dismiss the complaint, as amended, are denied.

Plaintiffs are the owners as husband and wife of residential real property at 16 Southway Drive, Shinnecock Hills, New York, which is adjacent to a 0.6 acre lot that was purchased by defendant Silverman in or about May 2013. Plaintiffs commenced this action by the filing of a summons and complaint on March 24, 2015 for injunctive relief against defendant Silverman, enjoining him from building a proposed top story upon new residential construction on the ground that the proposed building will be in violation of the Code of the Town of Southampton (Code) and will unreasonably obstruct the water view presently enjoyed by plaintiffs. Defendant Silverman served an answer to the complaint with a counterclaim as well as a motion to dismiss, while defendants Town of Southampton and Michael Benincasa made a pre-answer application for dismissal of the complaint on the ground that plaintiffs failed to exhaust their administrative remedies and that the claim is time-barred. On or about May 15, 2015, plaintiffs served an amended complaint in which an injunction is sought to prevent defendant Silverman from building a three-story residential structure in violation of the Code and from building such structure on a substandard-sized lot. Since CPLR 3025 permits amendment of a pleading as of right and without leave of court in a multi-party action within twenty days after service of the last responsive pleading (*see Citibank, N.A. v Suthers*, 68 AD2d 790, 418 NYS2d 679 [4th Dept 1979]), plaintiffs filed an amended complaint. A motion to dismiss a cause of action pursuant to CPLR 3211(a) operates to extend the time in which to serve a pleading in response thereto until 10 days after service of notice of entry of the order disposing the motion and, therefore, the amendment is timely (*see Polish American Immigration Relief Comm., Inc. v Krzyzanowski*, 172 AD2d 374, 568 NYS2d 754 [1st Dept 1991]). Where an amended pleading is submitted in response to a pre-answer motion to dismiss, the provident course of action is to include the amended complaint in the record on the pending motion, which should then be granted or denied based on the sufficiency of the amended pleading (*Uptown Healthcare Mgt. Inc. v Allstate Ins. Co.*, 117 AD3d 542, 543, 986 NYS2d 435 [1st Dept 2014]).

According to the affidavit of Philip Silverman, in 2010 he entered into a contract to purchase property from Nicolette Property Associates (Nicolette) for the price of \$800,000. Prior to the purchase of the property by Silverman in 2013 and the filing of a deed under which the contract amount was reported to be \$500,000, an application for a building permit was filed by Nicolette to build a "single family residence w/ attached 2-car garage, 2nd floor deck, swimming pool & spa, pool

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house w/ attached screened porch, garage roof terrace & outdoor shower.” A building permit was issued by the Town of Southampton on May 8, 2012 for the erection of “Single family, two story dwelling, with covered porch, deck, r [sic], heated swimming pool with code compliant barrier, hot tub, accessory building with screen porch, exercise room, utility space. . . Note 3 bedrooms.” By letter dated May 14, 2012, Silverman provided plaintiffs with a copy of the building permit as well as the survey showing the proposed building specifications which, it is noted, purports to show the dimensions of a two story dwelling with four, not three, bedrooms. On July 5, 2012, plaintiffs filed an application with the Southampton Town Zoning Board of Appeals (ZBA) to challenge the issuance of the building permit on the ground that the building “exceeds the 32 ft. maximum height limitation found in Town code section 330-11 and because the proposed residential building “has 3 stories in violation of the 2 story maximum limitation found in Town code section 330-11. . .” In response to the complaint, Eric Woodward, the architect of the building plans, submitted an amended set of plans on or about August 13, 2012, which “revised the pyramid so that it springs the average existing grade along the side of the building fronting on the street” and by “changing the roof line of [the] building slightly.” The building permit was thereupon amended on August 18, 2012, and plaintiffs’ counsel withdrew their challenge before the ZBA. In addition, plaintiffs entered into a stipulation in which it was agreed that Nicolette and/or Silverman could build upon the property a single family residence “so long as it complies with Town of Southampton law, ordinances, and regulations. . .” In May 2013, the defendant’s plans were amended again to relocate the dwelling, add 171 square feet, revise the pool and spa layout, and to update the structural plans and elevations for the concrete foundation. In November 2013, the plans were revised once again to add an elevator, exterior stair, garbage enclosure and changes to the floor plan with structural and exterior finish updates. On January 9, 2015, an application to amend the building permit was submitted for the “extension of existing retaining walls, addition of driveway turnaround, change of elevator locations & misc. interior framing changes (no square footage addition).” The building permit was amended on February 19, 2015 to reflect the changes.

Plaintiffs contend that photographs of the construction, as well as architectural renderings posted online to advertise the offer of sale of the property, show three stories above the finished grade of the property. Furthermore, plaintiffs allege that very large amounts of fill were used and that the the grade of the property was raised, as shown in photographs submitted to the Court by plaintiffs as well in photographs submitted on behalf of the defendant Silverman. It is plaintiffs’ claim that the construction violates multiple provisions of the Code. In particular, it is asserted that the property is located within the R-60 Residence District and that the minimum lot area of the property does not meet the 60,000 square foot requirement. It is also claimed that the construction exceeds the applicable maximum height of two stories as well as the maximum height of 32 feet. In addition, it is asserted that the construction violates setback and lot coverage requirements under the Code. In her affidavit submitted in support of the motion, plaintiff Karine Petrossian avers that defendant Silverman had offered to build a smaller house than he intended to preserve plaintiffs’ water views if plaintiffs paid him \$250,000. Defendant Silverman admits that he “offered to limit the size of [his] house in a way that would permanently preserve a substantial portion of [plaintiffs’] views [of the water] for a payment from them, the amount of which would be determined based on the size of the house . . .” Plaintiffs declined that offer.

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In support of his cross-motion and in opposition to the plaintiffs' application, defendant Silverman has submitted an affidavit in which he asserts that the plaintiffs' claims are untimely and barred by the doctrine of laches. Under the circumstances of this case, such arguments are without merit. While the parties resolved prior disputes by stipulation, the settlement of their disputes was conditioned upon the requirement that construction on the property would comply with the Town of Southampton law, ordinances and regulations. There is no evidence before this Court, however, that any action or inaction on the part of the plaintiffs prejudiced the position of the defendant. According to the affidavit of Silverman, the erection of structural steel began in February 2015, and framing of the building was undertaken thereafter. Furthermore, it is well-established that a party who suffers special damages as the result of a violation of a zoning ordinance may bring an action to enjoin the violation, and seek damages as well (*Haddad v Salzman*, 188 AD2d 515, 516, 591 NYS2d 193 [2d Dept 1992]).

Plaintiffs contend that the area referred to as the "basement" should be considered the first floor of the residence. Eric Woodward, defendant's architect, notes in opposition that "basement" is defined in § 330-5 of the Southampton Town Code as "[t]hat portion of a building that is partly or completely below grade." Furthermore, Woodward avers that ". . . the portion of the basement on the downhill slope facing South is partially above grade and partially below grade, while the portion of the basement on the uphill slope facing North is almost entirely below grade." Plaintiffs' argument that the construction consists of three stories, however, is supported by the plans and specifications, which show that the area referred to as the "basement" is being constructed above a 6'8" high "crawl space" or cellar that contains a storage closet.

Notwithstanding the foregoing, defendant Silverman, through the affidavit of his architect, argues that the "basement" is not a "story" within the definition of § 330-5 of the Code which, in pertinent part, specifies that, "A basement shall be deemed to be a story when the finished floor immediately above is six feet or more above the average elevation of the finished grade." It is Woodward's contention that his calculation of "the average elevation of the finished grade of the basement was 98.52 feet above sea level" and that "the elevation of the finished floor directly above it was 104.5 feet above sea level." Accordingly, it is argued that the finished floor immediately above the finished grade of the basement is less than 6 feet above it and, therefore, the basement is not a "story" within the meaning of the Code. In support of his assertion, Woodward submitted a copy of the plans depicting the "determination of average elevation of finished grade", identified as drawing "1.e". As it appears upon a review of such document that the "average elevation of finished grade" was calculated by including areas of finished grade beyond the "basement" or "cellar" itself, an issue is raised whether the architect's calculation is a reliable measure of such "average elevation." Furthermore, it is undisputed that the building plans and specifications that were filed in connection with the issuance of the original building permit dated May 8, 2012, were amended on May 30, 2013, on November 7, 2013 and on February 19, 2015. Accordingly, it has not been shown that the calculation of "average elevation of finished grade" in drawings made in 2011 and 2012 is an accurate representation when measured against the building under construction.

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In addition to the foregoing, the Woodward affidavit is insufficient to demonstrate that the building does not exceed the applicable maximum height of 32 feet. Pursuant to the pertinent section of the Code, the height of a structure or building is to be measured as follows: “. . . the vertical distance measured from the average elevation of the existing natural grade (before any fill has been or is proposed to be place thereon) as established on a plan prepared by a licensed professional surveyor, at and along the side of the building or structure fronting on the nearest street to the highest point of the highest roof or, in the case of a structure, to the highest point.” The defendant’s calculation of “the average elevation of the existing natural grade” has not been shown to be “as established on a plan prepared by a licensed professional surveyor”. More significantly, the calculations noted on drawing “1.e” were made in 2011 and 2012, prior to the filing of amended plans in 2013 under which the building was relocated. As such, the 2012 calculation is not competent evidence of the average elevation of the existing natural grade that should be used to measure the height of the relocated building.

The defendant concedes that the size of the lot at 26,677 square feet is substandard and less than the 60,000 square foot size requirement for building in a R-60 Residence District. No evidence has been submitted to show that the lot has been separately owned and not adjoining any lot or land in the same ownership as of the effective date of the Town zoning law.

On a motion for a preliminary injunction, the movants must establish: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movants’ position (*see Aetna Insurance Co. v Capassao*, 75 NY2d 860, 552 NYS2d 918, 552 NE2d 166 [1990]). In view of the concession by defendant that the residence is being built on a substandard lot, the photographic evidence showing that the grading of the lot has been substantially elevated, the construction plans which show a cellar with storage closet being constructed beneath the “basement”, the evidence that the building actually being constructed does not conform with the building permit limitation of three bedrooms, and other undisputed evidence, including evidence that the building obstructs plaintiffs’ water views, plaintiffs have demonstrated their entitlement to the relief sought, and no significant issue of fact has been raised that would require a hearing.

Dated:

August 25, 2015



 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION