

Town of Southold v Kelly
2018 NY Slip Op 30470(U)
March 21, 2018
Supreme Court, Suffolk County
Docket Number: 15142/2015
Judge: Martha L. Luft
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

COPY

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

TOWN OF SOUTHDOLD, x

Plaintiff,

-against-

FRANK J. KELLY and ELIZABETH G.
KELLY, and JOHN AND JANE DOE(S) 1-
4,

Defendants.
_____ x

Mot. Seq. No. 001 - Mot-D
Orig. Return Date: 09/10/2017
Mot. Submit Date 10/17/2017

Mot. Seq. No. 003 - MD
Orig. Return Date: 03/21/2017
Mot. Submit Date: 10/17/2017

PLAINTIFF'S ATTORNEY

Garrett Swenson, Esq.
76 Bay Road
Brookhaven, NY 11719

DEFENDANTS' ATTORNEY

Daniel Ross, Esq.
Keegan, Keegan, Ross & Rosner LLP
PO Box 146
315 Westphalia Avenue
Mattituck, NY 11952-0146

Upon reading and filing of the following: Summons, Verified Complaint and Verified Answer, Order to Show Cause, Temporary Restraining Order, Motion for a Preliminary Injunction, and Affirmation, Affidavit and supporting documents by plaintiff, Affirmation, Affidavit and supporting papers in opposition to the Motion for a Preliminary Injunction by defendants, Notice of Cross-Motion, Affirmation, Affidavit and supporting papers by defendants.¹

¹As explained herein, the plaintiff's opposition to defendants' cross-motion and the defendants' reply were not considered. Further, a large binder of documents apparently submitted to the Court by the defendants, and not their attorney, and without an affidavit indicating service had been made upon the plaintiff, also was not considered.

ORDERED, that plaintiff's motion for a preliminary injunction is denied as moot; and it is further

ORDERED, that defendants' motion to vacate the temporary restraining order ("TRO") is denied as moot; and it is further

ORDERED, that defendants' motion for summary judgment to dismiss the complaint insofar as it seeks a permanent injunction against that the marina use at the defendants' premises is denied as moot, since the plaintiff has conceded that the defendants now possess a certificate of pre-existing use for the marina use; and it is further

ORDERED, that defendants' motion for summary judgment is otherwise denied and, upon searching the record, summary judgment is granted in favor of the plaintiff insofar as a permanent injunction is granted enjoining the defendants and their employees, agents, servants, representatives, tenants, lessees and all other persons acting on their behalf or in concert with them from operating a Tourist Camp and/or Recreational Vehicle Park, as those terms are defined and regulated in Chapter 253 of the Code of the Town of Southold, including but not limited to, parking, and/or using recreational vehicles, travel trailers, automobile trailers, house cars and tents for living quarters and/or overnight sleeping purposes on the property located at 1900 Peconic Avenue ("Premises") unless and until such time as all necessary certificates of occupancy, permits and/or approvals for such use are obtained from the Town of Southold; and it is further

ORDERED, that, in accordance with Southold Town Code Section 280-115, no single automobile trailer or house car may be located on the Premises unless authorized by the Southold Town Board and subject to such conditions as may be prescribed by Southold Town Board.

Background

The Premises have been owned by the defendants since June 2014 and consist of less than a quarter acre. Although the Premises are zoned M-1, which permits a marina use, the Premises are in a residential area.

The undisputed evidence in the Record indicates that during the summer of 2015 and as the result of complaints made to the Town, a Town code enforcement officer responded to the Premises. During the period from July 31 through August 16, 2015 he made repeated visits to the area and observed motor homes, campers and tents on the Premises being used for living purposes and overnight sleeping. Multiple photographs taken during this time period and depicting these items are contained in the record. The code enforcement officer noted in his affidavit that he was unable to confirm the manner in which sewage was being disposed, although one of the photographs depicts a "porta potty." He also could not confirm the source of electrical power, although his affidavit notes that he observed the motor homes and camper to be illuminated at night and saw an extension cord.

The code enforcement officer also observed that the Premises were being used as a marina and that the defendant Frank J. Kelly admitted to him that the Premises were being used for that purpose. There was no site plan or certificate of occupancy for any use of the Premises during this time period. The code enforcement officer issued several appearance tickets to the defendants during August 2015.

Thereafter, on August 27, 2015, the Town commenced this action for a permanent injunction by summons and verified complaint and brought an order to show cause. A temporary restraining order was issued the same day (Martin, J.). The TRO enjoined, *inter alia*, use or occupation of the Premises as a tourist and trailer camp and/or a recreational vehicle park and marina, as those terms are defined in the Town Code and prohibited the parking of recreational vehicles or travel trailers on the Premises. A hearing was held on September 10, 2015 at the end of which the TRO was extended without modification (Tarantino, J.). The defendants answered the complaint and asserted affirmative defenses, but no counterclaims. The affirmative defenses included, *inter alia*, that the Premises are located in the M-1 Zoning District in which marinas are permitted, that a marina was a pre-existing use such that neither a site plan nor a certificate of occupancy was required, and that the Town Trustees had issued a permit for a marina use at the Premises.

On June 10, 2016 the Town brought a second order to show cause (motion sequence #002) seeking civil and criminal contempt against the defendants for violation of the TRO. The Town's motion was supported by photographs as well as affidavits of a code enforcement officer attesting to her observations that a large RV and white utility trailer were being used and stored at the Premises in violation of the TRO. An order holding defendants in contempt was issued on October 16, 2016. The contempt order found that the defendants had violated the terms of the TRO which prohibited the parking and using of recreational vehicles, travel trailers and tents for living purposes (Tarantino, J.).

The Instant Motion and Cross Motion

A conference was held on December 13, 2016 which resulted in an order dated December 15, 2016 (Tarantino, J.) modifying the TRO. The modified TRO acknowledged the pre-existing marina use at the Premises and the determination by the Town Zoning Board of Appeals that in view of the pre-existing marina use at the Premises, a site plan and certificate of occupancy were not required and that the Premises could be used as a marina. The order did not modify the TRO insofar as the prohibition against parking, storing, sleeping or living in recreational vehicles and travel trailers was concerned and, in fact, reiterated that prohibition. The order also noted that the case inadvertently had been marked "disposed", reinstated it to the calendar and made the preliminary injunction motion returnable on January 20, 2017 (motion sequence #001).

The defendants then cross-moved to vacate the remainder of the TRO which had banned the recreational vehicles and for summary judgment dismissing the complaint (motion sequence #003). The cross-motion was adjourned by the Town several times on consent and then by way

of the Town's application to the Court. This Court issued a written order setting the final motion return date of the preliminary injunction motion and the cross-motion for October 16, 2017. The Town's affidavit of service for the papers in opposition to the cross-motion indicated the opposing papers were not served until the day after the return date. Despite not having received opposition papers, the defendants nevertheless served a "reply" on the return date which attempted to raise new matters. Neither the Town's untimely opposition to defendants' cross-motion nor defendants' unauthorized "reply" has been considered by the Court.

There is nothing in defendants' opposition to the preliminary injunction motion or cross-motion which warrants denial of a preliminary injunction, vacatur of the TRO or a grant of summary judgment dismissing the complaint insofar as the prohibitions against usage, storage and sleeping in recreational vehicles and travel trailers are concerned. As a matter of law, these uses are prohibited by the Town Code.

First, Southold Town Code Section 253-2 prohibits the use of any parcel for a Tourist Camp without a permit from the Town and Department of Health approvals, which defendants do not possess. A Tourist Camp is defined in Section 253-1 as "any lot, piece or parcel of ground where two or more tents, tent houses, camp cottages, house cars or trailers used as living or sleeping quarters are or may be located, said camp being operated for or not for compensation." An "automobile trailer" or "house car" is defined in the same section as "any vehicle used as sleeping or living quarters which is or may be mounted on wheels and is or may be propelled either by its own power or by another power-driven vehicle to which it may be attached."

Second, Southold Town Code Sections 253-20 through 253-24 regulate Recreational Vehicle Parks. Section 253-20 defines a "Recreational Vehicle Park" as "a parcel of land under single ownership, designed and improved for the placement of tents and recreational vehicles as temporary living quarters for recreational or vacation uses." A recreational vehicle is defined as "a portable vehicular unit designed and built to be used for temporary living quarters for recreational, camping or travel uses, which either has its own motor power or is mounted on or drawn by another power-driven vehicle, including travel trailers, motorized homes, pickup coaches and camping trailers, registered and licensed for normal use on the highways of the State of New York." The Town Code requires each recreational vehicle or tent be located on a piece of land with a minimum of twenty-five hundred square feet with front and side yard setbacks of fifteen feet and rear yard setbacks of ten feet.

Thus, the photographs and affidavits submitted by the Town on the preliminary injunction motion establish that the defendants were operating either a Tourist Camp without a permit or a Recreational Vehicle Park in violation of the square footage and setback regulations. Failing to establish a legal use under the foregoing sections of the Town Code, defendants then claim, albeit incorrectly, that their uses of recreational vehicles on the Premises are permissible without Town approval because such uses are not prohibited in the M-1 Zoning District. That argument does not account for Southold Town Code Section 280-115, which states the opposite:

Tourist camps, camp cottages and trailers.

A. Permits required. No tourist camp shall be established, maintained or operated **in any district** nor shall any tent, tent house, camp cottage, house car or trailer to be used or occupied as a place for living, sleeping or eating, whether charge is or is not made, be erected or placed therein, unless authorized by the Town Board pursuant to the provisions of Chapter 253, Tourist and Trailer Camps.


B. Automobile trailers or house cars. Notwithstanding any other provisions of this chapter, a **single** automobile trailer or house car may be located outside a tourist camp **only** when authorized by the Town Board and subject to such conditions as may be prescribed by the Town Board. [*Emphasis supplied.*]

Thus, contrary to defendants' assertions in its cross-motion for summary judgment, the use or storage of even one such recreational vehicle on any property is prohibited without Town Board approval. The defendants' cross motion for summary judgment to dismiss the complaint failed to establish their *prima facie* entitlement to judgment as a matter of law. *Town of Riverhead v. Gezari*, 63 A.D.3d 1042, 1044, 881 N.Y.S.2d 172, 174-75 (2d Dep't. 2009), *citing*, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). This failure required denial of the cross motion, "regardless of the sufficiency of the opposing papers" *Id.*, *citing*, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923(1986).

On the other hand, the Supreme Court has the authority, pursuant to CPLR 3212(b), to search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion before the court. *Marciano v. Ran Oil Co. E., LLC*, 63 A.D.3d 1118, 1119, 882 N.Y.S.2d 452, 453 (2d Dep't. 2009); *Goldstein v. County of Suffolk*, 300 A.D.2d 441, 442, 751 N.Y.S.2d 549 (2d Dep't. 2002). 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 A.D.3d 758, 759, 833 N.Y.S.2d 519, 521 (2d Dep't 2007), *citing*, NYS Town Law §§ 135, 268; *Town of Huntington v. Albicocco*, 256 A.D.2d 330, 681 N.Y.S.2d 341 (2d Dep't 1998); *Town of Islip v. Clark*, 90 A.D.2d 500, 501, 454 N.Y.S.2d 893(2d Dep't 1982). Upon a search of the record and in view of the applicable Town Code provisions, summary judgment is granted to the Town.

ENTER

DATE: March 21, 2018
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION