

City of New York v 64 Annfield Ct. Corp.

2018 NY Slip Op 31579(U)

July 16, 2018

Supreme Court, Richmond County

Docket Number: 100355/2014

Judge: Alan C. Marin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

THE CITY OF NEW YORK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 100355/2014

64 ANNFIELD COURT CORP., MOHAMMED
ELAYYAN, TINA MOHAMMED, ELAYYAN
MUNZER aka MUNZER ELAYYAN, FOUAD
ELAYYAN, the LAND and BUILDING
THEREON KNOWN AS 64 Annfield Court,
Staten Island, also known as Block 878, Lot 133,
Richmond County, City and State of New York,¹

Defendants.

Attorneys for the plaintiff:

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of the City of New York
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Attorneys for the defendants:

Menucci Villa Cilmi, PLLC
By: Jeremy Panzella

This is the decision following the non-jury trial of the City of New York's suit arising from the alleged unlawful construction of a residence at 64 Annfield Court in the Todt Hill section of Staten Island. Construction began in 2008, and the City Department of Buildings has issued multiple stop work orders for various violations.² At the time of trial earlier this year, the construction of the house was still not completed.

¹ The caption has been amended to reflect that the City of New York withdrew its actions against any John or Jane Doe, and that the spelling of one of the named defendants was corrected to "Fouad Elayyan."

² See exhibits 23, 27, 30 and 34.

We heard then from Kirsti Jutila, currently a project manager for the NYC Planning Department at its headquarters; from 1997 to 2015, Ms. Jutila was deputy director of its Staten Island office. In addition to visits in 2010,³ 2012 and 2015, she was at the site a few days before trial began: “I saw a stalled construction site with a concrete and steel three-story building with a roof, but no windows . . . There was a construction vehicle, a big back hoe type thing parked next to it on the site . . . There was a big excavation in the front . . . There were signs of earth having been moved.”

As for the house’s unfinished state, Munzer Elayyan testified that with respect to “real estate taxes, they charge us as a built house, and I [am] fighting it every year.” Munzer Elayyan and his brother had come up with the funds to purchase the property, which the former recalled as between four and six hundred thousand dollars, and which he said was for their mother and another family member.

The subject property is located on an elevated site. It borders on a City park - - Reed’s Basket Willow Swamp Park, and is within a Special Natural Area District, which requires an application process with the Department of City Planning (“City Planning”) and then approval at a public meeting by the City Planning Commission (CPC).

The Court finds that the northern property line for 64 Annfield Court is as testified to by surveyor Leroy Fredericks; it does not include the triangle of land in the survey of Charles Angiulli, prepared in September of 2007 and revised January 4, 2011 (exh 67). Such triangular piece is part of lot 100, which is New York City parks property. As Mr. Fredericks credibly explained, Mr. Angiulli’s straight line, which misses the triangular dip of lot 100 is “totally inconsistent with my survey or any document or record map that I found.”

The prior owners of lot 133 were Clemente and Joanne Alcamo, whose architect was Leonard Rampulla. Their plan for a house at 64 Annfield Court was submitted to and approved by City Planning in 2002. The CPC voted to approve the plan with its building footprint of 4,194 square feet on July 30 of that year.

In 2005, a zoning amendment established a maximum footprint formula of 12.5% of lot size, which for 64 Annfield Court would have limited the ground coverage to 3,051 square feet. The footprint of the Elayyan house is 5,941 square feet (exh 40); in any event, defendants were informed that they would be in compliance at the 2002 approved figure of 4,194 square feet.

Defendants’ case was not very solid. For example, their architect, David Businelli, testified that it was during the trial when he first learned that the footprint of the Elayyan house was 42%

³ See the photos that Ms. Jutila took in 2010 (exhibits 35 and 36).

greater than the prior approved square footage.⁴ Mr. Businelli argued, without any basis therefor, that exceeding the approved footprint by 50% would be significant, but 42% would not be. Mr. Businelli said the project was unique and that, “Everything is up for interpretation, and it was my interpretation that this was okay to do.” In addition, defendants’ architect was initially unaware that a foundation was already in place per the Alcamo/Rampulla plan.

On August 2, 2010, the City Buildings Department issued a three-page Notice of Objections. In addition to the expanded footprint, it covered, among other things: a driveway sloping down to a cellar garage, expanded paving of the entry and rear terraces, and changed elevations for the basement and garage (exh 29A). Moreover, there were encroachments onto City property - - both the park and onto Shady Road, a public right of way. A 10-inch wide concrete wall went 21 feet into the park and 8 feet onto the road. A five to six foot high chain link fence and a two foot wide concrete wall intruded 24 and 8 feet into the park. (See exhibit 66).

Given that 64 Annfield Court is situated in a natural area district and borders on parkland, a fair amount of attention was given to the effect that defendants’ construction had on trees, both on and off the property.⁵ To that end, the plaintiff called to the stand forester-arborists, John Kilcullen and Thomas Russo. Mr. Kilcullen was the Staten Island borough forester from 2008 to 2013; in 2012, he did a report on the impact of the construction and re-visited the site the week before the trial began.

Strictly speaking, Mr. Kilcullen’s jurisdiction covered trees on City parkland and streets, not private property. He testified that City Planning required protection for trees on 64 Annfield Court, but an application was still needed for construction within 50 feet of parkland. Mr. Russo testified that part, not all of the 64 Annfield work, was within 50 feet.

Mr. Kilcullen explained that in evaluating tree damage, they look at “Roots, trunk scaffolding, branches, small branches . . . foliage and buds.” In 2012, using a formula, he calculated damage of \$365,800. There is also a concept known as tree credits; consider this exchange:

Q. Ms. Jutilla, looking at Exhibit 15A [the 2002 plan], could you tell me based on that document how many trees were authorized to be removed according to that plan?

A . . . It’s done as tree credits. [A] large tree might be worth four credits. A small tree is worth one. It says 134 tree credits could be removed.

⁴ 5,941 is 42 percent greater than 4,194.

⁵ See exhibits 49, 51-52, 53A-F and 54.

The damage to trees is important, but calculating the amount therefor may be more art than science. Its resolution is better left to the formulation of an overall remedial plan.

* * *

Running through the defendants' case is the theme that they had permission to go ahead following David Businelli's submission of his firm's plan, for which the Department of Buildings ultimately issued a permit for construction. Mr. Businelli's plan was self-certified, which as a licensed architect, he is entitled to do.⁶ Defendants are effectively arguing that the City is estopped from preventing the Elayyan's house from being built in accordance with Businelli's certified plan.⁷

The Court of Appeals has stated: "We have repeatedly made clear that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties . . . it is foreclosed 'in all but the rarest cases . . .'" (*Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130, Kaye, J).⁸

Munzer Elayyan came across well on the witness stand. Despite the expenditure of "over \$2 million" on the house, it remains unfinished. With that said, there is insufficient support in the record for what they planned to build, what they have built so far and its effects on this natural area.

Essentially "undoing" a construction project, however awry, is not easily accomplished. On cross-examination, Ms. Jutila was asked, "Do you know whether or not it would require heavy machinery to de-construct that structure?" She responded, "I think it would, yeah." Then, there was some back and forth on whether this would further disturb things. But the point here, to state the obvious, is that a case involving natural surroundings exists within a different time horizon than, for example, a dispute between a retail tenant and its shopping center landlord.

The Court had alerted the parties on the fourth day of trial that "It seems to me that it makes more sense to hold in abeyance any penalties [or damages] to see whether compliance can be had within a reasonable period of time."

⁶ See exhibit 24. Neil Adler, a chief plan examiner for the City's Buildings Department, testified that only about 20% of professionally self-certified building plans can be reviewed by his office.

⁷ Munzer Elayyan testified that the City's Buildings Department only issued an objection to their architect's plan after (or upon) their stop work order.

⁸ See also *Matter of Cannavo v Olatoye*, 161 AD3d 620 and *Holdman v State of New York*, 118 AD3d 447, both from the First Department.

