

Town of E. Hampton v HCDC LLC

2016 NY Slip Op 32658(U)

December 16, 2016

Supreme Court, Suffolk County

Docket Number: 15-13787

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-25-15 (001)
MOTION DATE 8-19-16 (002)
ADJ. DATE 9-21-16
Mot. Seq. # 001 - MotD
002 - MD

TOWN OF EAST HAMPTON,

Plaintiff,

- against -

HCDC LLC, HAMPTON COUNTRY DAY
CAMP, DORIS ROSEN, DAVID SKOLNIK,
and JOHN DOES and JANE DOES Nos. 1
through 25, names being intended to be unknown
individuals using and occupying a single-family
residence located at 17 Ocean Blvd., Town of
East Hampton, County of Suffolk and more
particularly described as SCTM#300-147-9-6.3,

Defendants.

MICHAEL SENDLENSKI, ESQ.
Town Attorney for Town of E. Hampton
159 Pantigo Road
East Hampton, New York 11937

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Attorney for Plaintiff
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Smithtown, New York 11787

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Building One
Water Mill, New York 11976

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Upon the following papers numbered 1 to 30 read on this motion for preliminary injunction; motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-22 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23-24 ; Replying Affidavits and supporting papers 25-26; 27-28; 29-30 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for an order (a) preliminarily enjoining and restraining the defendants, their agents, servants, invitees, members, tenants, lessees, representatives, guests and all other persons acting on their behalf, or in concert with them, from using or occupying the premises commonly known as 17 Ocean Boulevard, East Hampton, New York and more particularly described on the Suffolk County Tax Map as #300-147-9-6.3 (i) in any manner not consistent with the permitted use pursuant to its certificate of occupancy, to wit: "two-story, one family residence having

one kitchen only with roofed porch; with conversion of 238 sq. ft. existing attached garage to living space; 250 sq. ft. wood decking; 255 sq. ft. first floor addition; 733 sq. ft. second floor addition; 506 sq. ft. attached garage; 200 sq. ft. wood deck; 528 sq. ft. vinyl swimming pool with proper fencing, dry well and 1036 sq. ft. brick patio,” (ii) in an overcrowded manner in violation of the New York State Fire Prevention and Building Code and the Town Code of the Town of East Hampton, (iii) from using three illegally constructed and/or converted bedrooms above the garage, one illegally constructed and/or converted bedroom in the original portion of the house, and three illegally constructed and/or converted bathrooms at the premises without first obtaining the necessary permits, approvals and certificate of occupancy from the Town of East Hampton and the Suffolk County Health Department, and (iv) by a group of unrelated persons numbering more than four, and (b) in the event preliminary injunctive relief is granted, directing an immediate hearing pursuant to CPLR 2512 to fix the limit of the plaintiff’s liability for damage if it is ultimately determined that it was not entitled to the injunctive relief requested, is granted to the extent indicated below, and is otherwise denied; and it is further

ORDERED that motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) and (7) is denied.

This is an action for permanent injunctive relief, *inter alia*, preventing the defendants’ continued use and occupancy of a single-family residence known as 17 Ocean Boulevard, East Hampton, New York for the illegal housing of camp counselors employed seasonally at Hampton Country Day Camp, also located in East Hampton, New York. The plaintiff claims, in principal part, that as of August 5, 2015, the defendants were housing at least 26 of their summer camp counselors at the property, that there were four bedrooms and three bathrooms at the property that had been constructed or converted without the benefit of necessary permits, that all but one of the bedrooms was overcrowded and, for those and other reasons, that the defendants’ use and occupancy of the property was in violation of the East Hampton Town Code (“Town Code”).

According to the complaint, the plaintiff, as authorized by its Town Board, is entitled to maintain this action under Town Law § 268 (2) and section 255-10-50 (D) of the Town Code. Chapter 255 of the Town Code, in which section 255-10-50 and all subsequently-referenced code sections reside, is also known as Town of East Hampton Zoning Code and will be referred to herein as “Zoning Code.” Town Law § 268 (2) provides, in part, that

In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is used, or any land is divided into lots, blocks, or sites in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, use or division of land, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use in or about such premises.

Section 255-10-50 (D) of the Town Code similarly provides that

In addition to other remedies provided for by law, any appropriate action or proceeding, whether by legal process or otherwise, may be instituted or taken by the Town of East Hampton to prevent unlawful erection, construction, reconstruction, alteration, repair, conversion, change, demolition, razing, moving, maintenance or use of any building, structure, lot or land or any activity in violation of this chapter being undertaken or carried out therein or thereon; to restrain, correct or abate such violation; to prevent the occupancy of such building, structure or lot; or to prevent any illegal act, conduct, business, trade or use in or about such premises.

The plaintiff alleges twelve separate causes of action in its complaint. The first is for a permanent injunction pursuant to Town Law § 268, prohibiting the defendants from maintaining or using four additional bedrooms in violation of the Zoning Code. The second is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting the defendants from maintaining or using four additional bedrooms in violation of the Zoning Code. The third is for a permanent injunction pursuant to Town Law § 268, prohibiting the defendants from maintaining or using three additional bathrooms constructed without building permits in violation of the Zoning Code. The fourth is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting the defendants from maintaining or using three additional bathrooms constructed without building permits in violation of the Zoning Code. The fifth is for a permanent injunction pursuant to Town Law § 268, prohibiting the overcrowding of bedrooms in violation of the Zoning Code. The sixth is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting the overcrowding of bedrooms in violation of the Zoning Code. The seventh is for a permanent injunction pursuant to Town Law § 268, prohibiting the defendants from use and occupancy of the premises by more than four unrelated adults in violation of the Zoning Code. The eighth is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting the defendants from use and occupancy of the premises by more than four unrelated adults in violation of the Zoning Code.

Further, the ninth cause of action is for a permanent injunction pursuant to Town Law § 268, prohibiting the defendants from use and occupancy of the premises as a two-family, multi-family, dormitory or other group quarters dwelling in violation of the Zoning Code. The tenth is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting the defendants from use and occupancy of the premises as a two-family, multi-family, dormitory or other group quarters dwelling in violation of the Zoning Code. The eleventh is for a permanent injunction pursuant to section 255-10-50 (D) of the Town Code, prohibiting, as violative of the Zoning Code, use and occupancy of the premises in any manner not consistent with its permitted use as a “two-story, one family residence having one kitchen only with roofed porch; with conversion of 238 sq. ft. existing attached garage to living space; 250 sq. ft. wood decking; 255 sq. ft. first floor addition; 733 sq. ft. second floor addition; 506 sq. ft. attached garage; 200 sq. ft. wood deck; 528 sq. ft. vinyl swimming pool with proper fencing, dry well and 1036 sq. ft. brick patio.” The twelfth is for a permanent injunction pursuant to Town Law § 268, prohibiting, as violative of the Zoning Code, use and occupancy of the premises in any manner not consistent with its permitted use as a “two-story, one family residence having one kitchen only with

roofed porch; with conversion of 238 sq. ft. existing attached garage to living space; 250 sq. ft. wood decking; 255 sq. ft. first floor addition; 733 sq. ft. second floor addition; 506 sq. ft. attached garage; 200 sq. ft. wood deck; 528 sq. ft. vinyl swimming pool with proper fencing, dry well and 1036 sq. ft. brick patio.”

Among the provisions of the Town Code relevant to this matter is section 255-1-20, which defines “single-family residence” as “[a] residential use of land consisting of a detached and freestanding building, commonly called a ‘house,’ designed or arranged for occupancy by one family as defined herein * * *. After the effective date hereof, no ‘single-family residence’ shall be erected, constructed, reconstructed or altered, moved or used except in accordance with §§ 255-11-60 through 255-11-68 of this chapter.” Section 255-11-62 sets forth the uses permitted in single-family residences, and provides, in part, that

The following are the only uses permitted in single-family residences in the Town of East Hampton:

A. Principal residence. Permanent, seasonal or intermittent occupation by the owner’s family as principal residence.

B. Nonprincipal residence. Temporary, seasonal or intermittent occupancy by the owner’s family as nonprincipal residence, vacation residence or second home.

* * *

D. Supplemental use when owner and owner’s family not in residence. During periods of nonoccupancy by all persons in the owner’s family, and subject to the provisions of § 255-11-64 hereof, occupancy of the entire residence by one family as guest of owner or as tenant. In the case of such occupancy, the supplemental uses set forth in Subsection C(1), (2) and (5) of this section may be engaged in by a resident tenant, but the uses in Subsection C(3) and (4) thereof shall be prohibited. Where there is occupancy of the entire residence by one family as guest or tenant of the owner, the supplemental uses provided for in Subsection C(6) may be engaged in by a resident tenant or guest only where such resident or guest can provide proof of leasing a premises in the Town of East Hampton for at least one year prior to application for the supplemental use and that he or she is the owner and operator of the business that operates out of the small taxi office.

Section 255-11-64 sets forth the uses prohibited in single-family residences. It provides, in part, that

No person, including the owner, shall use or permit to be used any single-family residence for any of the following:

A. Two-family residence: creation, use or maintenance of a two-family residence, as defined herein, except as may be authorized in certain cases by special permit pursuant to

the Use Table and Article V.

B. Multifamily occupancy: occupancy at any time by more than one family, except as permitted by § 255-11-62C(3) and (4) hereof.

C. Partial occupancy or rental: rentals to, or use or occupancy by, any person or persons of less than the entire residence, except as permitted in § 255-11-62C(3) and (4) hereof.

* * *

H. Overcrowding: occupancy of any bedroom by more occupants than permitted by the minimum area requirements set forth in § 255-11-67A(9). This occupancy limitation applies to all bedrooms in single-family residences, including guest rooms in single-family residences as provided in § 255-11-62C(3), immediately upon the effective date of this subsection regardless of whether such residences were constructed before the effective date of this subsection and regardless of the number of occupants before said effective date.

Also germane to this action is the definition of "family," codified at section 255-1-20 of the Town Code.

A. The following shall constitute a family hereunder:

(1) Any number of persons occupying a dwelling unit, provided that all are related by blood, marriage or legal adoption and provided that they live and cook together as a single housekeeping unit; or

(2) Any number of persons not exceeding four occupying a dwelling unit and living and cooking together as a single housekeeping unit, where not all are related by blood, marriage or legal adoption.

B. A group of persons whose association or relationship is transient or seasonal in nature, rather than of a permanent and domestic character, shall not be considered a family.

C. A group of unrelated persons numbering more than four and occupying a dwelling unit shall be presumed not to constitute a family. This presumption can be overcome only by a showing that, under the standards enumerated in § 255-8-50 hereof, the group constitutes the functional equivalent of a family. A determination as to the status of such group may be made in the first instance by the Building Inspector or, on appeal from an order, requirement, decision or determination made by him, by the Zoning Board of Appeals.

D. Persons occupying group quarters, such as a dormitory, fraternity or sorority house or a seminary, shall not be considered a family.

Section 255-8-50 of the Town Code, which sets forth the standards and criteria governing determinations made by the Zoning Board of Appeals, provides at subdivision (F), entitled "Occupancy by Family," that

(1) A group of more than four unrelated persons shall be deemed to constitute a single-family for the purpose of occupying a dwelling unit only if the group is the functional equivalent of either of the two entities described in Subsection A of the definition of "family," found at § 255-1-20 of this chapter. The Board of Appeals shall determine that a group of more than four unrelated persons is a family only if it finds that:

(a) The group is one which in size, function and structure resembles a traditional family unit.

(b) The group will live and cook together as a single housekeeping unit.

(c) The group is of a permanent nature and is neither a framework for transient or seasonal living nor merely an association or relationship which is transient or seasonal in nature.

(d) All other requirements of this chapter regarding the use and occupancy of the dwelling unit in which the group resides will be met.

(2) Any determination under this subsection that a particular group of persons constitutes a family shall constitute a determination as to the status of that particular group only and shall not be interpreted as authorizing any other occupancy, use or activity.

"Dwelling unit" is defined under section 255-1-20 of the Town Code as

Any apartment, motel unit, mobile home or single-family residence as defined herein. Any building or discrete space within a building which is used by a family for cooking, living or sleeping purposes or which is designed or equipped to be so used shall be considered a dwelling unit. A two-family residence, for example, is deemed to have two dwelling units.

As to "overcrowding," referred to in section 255-11-64 (H) of the Town Code, section 255-11-67 (A) (9) of the Town Code establishes the minimum square footage per occupant of a bedroom, as follows:

Area for sleeping purposes. Every bedroom occupied by one person shall contain at least 70 square feet (6.5 m²) of floor area, and every bedroom occupied by more than one person shall contain at least 50 square feet (4.6 m²) of floor area for each occupancy thereof. Bedrooms having a sloped ceiling over all or part of the room shall have a clear ceiling height of at least seven feet over not less than ½ of the required minimum floor area and only those portions of the floor area with a clear ceiling height of five feet or more shall be included in calculating the floor area of such bedroom. A violation of the

rational connection between the facts needed to be proven and the fact presumed, and there is a fair opportunity for the opposing party to make his defense” (*id.* at 485, 607 NYS2d at 384).

The defendants do not contest the validity of the presumption. Instead, they claim that the exclusion of groups “whose association or relationship is transient or seasonal in nature” lacks a rational relationship to the goals to be achieved by preserving the character of single-family neighborhoods. That claim, however, does not state a relevant defense; the plaintiff has not sought injunctive relief in this action prohibiting the defendants from use and occupancy of the premises based on the seasonality of their occupancy, nor has it been shown that a finding of partial invalidity would necessarily render any remaining portion of the definition unenforceable (*see generally Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 550 NYS2d 879 [1989]). In any event, the creation of permanent, stable family structures, as opposed to temporary residences for transients, has long been recognized as a legitimate objective of single-family zoning (*see e.g. Group House of Port Washington v Board of Zoning & Appeals of Town of N. Hempstead*, 45 NY2d 266, 408 NYS2d 377 [1978]; *City of White Plains v Ferraioli*, *supra*). The court, therefore, finds the seventh and eighth causes of action sufficiently pleaded to withstand dismissal. Likewise, as to the ninth and tenth causes of action, while they may ultimately prove to be in some or all respects duplicative of the relief sought in the seventh, eighth, eleventh, and twelfth causes of action, the court is unable to conclude at this juncture that they fail to state valid claims for relief.

The second of the defendants’ arguments, addressed to the first through sixth, eleventh, and twelfth causes of action, is also lacking in merit. The sole function of a temporary restraining order, as here, is to provide injunctive relief pending the determination of the plaintiff’s motion. It has no effect on the ultimate relief sought in the complaint. “The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits and the issues at hand are to be decided as though no such injunction had been sought” (*Papa Gino’s of Am. v Plaza at Latham Assoc.*, 135 AD2d 74, 77, 524 NYS2d 536, 538 [1988]). That being the case, the court finds no basis for a finding that those causes of action are moot. The defendants’ motion is, therefore, denied in its entirety.

Turning, then, to the plaintiff’s motion, the court notes that under Town Law § 268, a town seeking to preliminarily enjoin a violation of its zoning ordinance may obtain such relief without satisfying the traditional three-part test, but “need only show that it has a likelihood of ultimate success on the merits and that the equities are balanced in its favor” (*First Franklin Sq. Assoc. v Franklin Sq. Prop. Account*, 15 AD3d 529, 533, 790 NYS2d 527, 532 [2005]). A strong *prima facie* showing that the defendants are violating one or more provisions of the ordinance is generally sufficient to satisfy the town’s burden on a motion for preliminary injunctive relief (*Town of Islip v Modica Assoc. of NY 122*, 45 AD3d 574, 846 NYS2d 201 [2007]).

In support of its motion, the plaintiff submits the affidavit of Donald Kauth, a town ordinance enforcement officer duly certified by the State of New York as a code enforcement official. Based on his affidavit, it appears that on August 5, 2015, as part of his duties of employment, he accompanied the East Hampton Town Police in executing a search warrant on the premises; that he was assigned to document the size and occupants of the room located in the main section of the house; that although the

building plans for the main section of the house provided for only four bedrooms, five bedrooms were found there; that the first bedroom was illegally converted living space; that the second bedroom was found to have 70.29 square feet of space and was being occupied by three individuals; that the third bedroom was found to have 81.99 square feet of space and was being occupied by three individuals; that the fourth bedroom was found to have 128.25 square feet of space, was being occupied by three individuals, and had no smoke detector; that the fifth bedroom was found to have 204 square feet of space and was being occupied by six individuals; that in all the bedrooms other than the first, there was no proper means of egress in the event of an emergency due to the positioning of beds and the blocking of windows by air conditioning units; that all the doors to the bedrooms had key locks, suggesting occupancy by persons of less than the entire residence; that there was also an illegally constructed or converted bathroom in the main portion of the house that was not provided for in the building plans; that a total of 26 individuals, all over the age of 18 and all identifying themselves as camp counselors at the Hampton Country Day Camp whose living arrangements had been provided by their employer, were found to be using and occupying the premises; that he also examined the outdoor pool area; that the pool was in an unsanitary, opaque condition, making it impossible to ascertain if anyone should mistakenly fall in; and that the pool barrier system was noncompliant with the New York State Property Maintenance Code, as the gates opened the wrong way, were not self-closing or self-latching, were left open, and lacked required alarms, and portions of the fence were in a dilapidated condition.

The plaintiff also submits the affidavit of Kelly Kampf, a town ordinance inspector duly certified by the State of New York as a code official capable of reviewing and investigating New York State building, property maintenance, plumbing, mechanical, and fire codes, attesting that upon observing an open pool gate on the premises on August 1, 2015, she knocked on the door and was able to speak to a person who identified himself as Brendan Shane Emery; that Brendan stated that he was not the owner of the premises but lived there with 26 other people, all employees of the Hampton Country Day Camp, that he was not related to any of the other occupants, and that he shared a single bedroom with six other men; that Brendan did not allow her to inspect the interior of the home; that she subsequently made application for a search warrant and, on August 5, 2015, accompanied the East Hampton Town Police in executing the warrant on the premises; that she was assigned to document the size and occupants of the room located above the garage; that instead of a single room as provided in the building plans, it had been divided into four rooms, three utilized as bedrooms and one as a bathroom; that the first bedroom was found to have 264 square feet of space and was being occupied by five individuals; that the second bedroom was found to have 81.99 square feet of space, was being occupied by four individuals, and had no smoke detector; that the third bedroom was found to have 97.5 square feet of space and was being occupied by three individuals; that in all the bedrooms, there was no proper means of egress in the event of an emergency due to the positioning of beds and the blocking of windows by air conditioning units; that the rooms were configured in such a manner that the only way to access the second and third bedrooms was to walk through the first bedroom, violating a building code provision requiring every bedroom to have direct access to a hallway or a room that is not a bedroom; that all the doors to the bedrooms had key locks, suggesting occupancy by persons of less than the entire residence; that the bathroom had been illegally constructed or converted; that there were additional building code violations in the manner of its construction, with the waste lines having been cut directly through the sheetrock in the floor leading down to the garage; and that an area in the main part of the house, right near the entry to the space above the garage, had been converted to a second bathroom without the benefit of permits.

Additionally, the plaintiff submits the affidavit of Ann Glennon, the principal town building inspector, to which is attached what she identifies as the property record card, the most recent certificate of occupancy for the premises, the most recent survey of the property, and a copy of the building plans filed in the town building department. In her affidavit, she states that the sanitary system at the property is designed to accommodate a four-bedroom, two-bathroom house; that the addition of four bedrooms and three bathrooms, all without the benefit of approvals or permits, renders the sanitary system at the premises noncompliant with the requirements of the Suffolk County Health Department; that the occupancy of the premises by 26 unrelated individuals constitutes a violation of section 255-11-64 (A) and (B) of the Town Code; and that based on the square footage and number of occupants of each bedroom as described in the Kauth and Kampf affidavits, seven of the bedrooms are overcrowded in violation of section 255-11-67 (A) (9) of the Town Code.

Based on the Kauth, Kampf, and Glennon affidavits, the court finds that the plaintiff established its likelihood of success on the merits by demonstrating that the defendants are violating, *inter alia*, their certificate of occupancy by the addition of four bedrooms and three bathrooms, all without the benefit of approvals and permits, as well as section 255-11-64 (C) of the Town Code by allowing use of the premises for partial occupancy. While it is presumed that the overcrowding conditions observed at the property on August 5, 2015 are no longer extant as that summer camp season has long since concluded, the court notes that the defendants “agree to the extension of the Court’s outstanding temporary order in such format as the Court determines is appropriate.” The court also finds that due to enhanced risks to the health, safety, and welfare of occupants and nearby residents in the event such violations are permitted to continue, the balance of the equities weighs in favor of the plaintiff.

Accordingly, the plaintiff’s motion is granted to the extent of (a) enjoining and prohibiting the defendants, their agents, servants, invitees, members, tenants, lessees, representatives, guests and all other persons acting on their behalf, or in concert with them, during the pendency of this action or, if earlier, until such time as all necessary permits, approvals, and certificates of occupancy are obtained, from use or occupancy (i) of the premises in a manner inconsistent with the use permitted in their certificate of occupancy, in an overcrowded manner in violation of application laws and regulations, and by a group of unrelated persons numbering more than four, and (ii) of the illegally constructed or converted bathrooms and bedrooms at the premises, as alleged in the Kauth, Kampf, and Glennon affidavits, and (b) directing the parties and their attorneys to appear for a hearing on January __, 2017 at 10:00 a.m. at IAS Part 32 of the Supreme Court, One Court Street, Riverhead, New York for the purpose of fixing the limit of the plaintiff’s liability for damages in the event it is ultimately determined that the plaintiff was not entitled to an injunction (*see* CPLR 2512 [1]; *Town of Putnam Val. v Cabot*, 50 AD3d 775, 856 NYS2d 166 [2008]).

Dated: Dec. 16, 2016

W. Gerald Ashe
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION