Burke v Freije
2026 NY Slip Op 31150(U)
March 26, 2026
Supreme Court, Broome County
Docket Number: Index No. EFCA2025003038
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 14th day of November 2025.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

THOMAS BURKE and LISA BURKE,

Plaintiffs,

DECISION AND ORDER

vs.

Index No. EFCA2025003038

RYAN FREIJE and ERIN FREIJE,

Defendants.

APPEARANCES:

Counsel for Plaintiffs:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider two separate motions. The first motion, filed by Plaintiffs Thomas Burke and Lisa Burke ("Plaintiffs"), seeks a preliminary injunction enjoining Defendants Ryan Freije and Erin Freije ("Defendants") from continuing construction of a pole barn/garage and single-family residence on their property, pending final resolution of the action. Defendants filed a cross-motion to dismiss Plaintiffs' Complaint, and opposition to Plaintiffs' motion. Oral argument was conducted, and attorneys for both parties were present. After due deliberation, this Decision and Order constitutes the determination of this Court.[1]

BACKGROUND FACTS

The Court is already familiar with this dispute, having issued two written determinations in a prior related proceeding (EFCA2024001720). The facts are more fully set forth in those determinations and will be highlighted as pertinent here. That case was an Article 78 action filed by Ryan Freije challenging the denial of two variance applications.

Plaintiffs have lived at 831 Skylane Terrace in Endwell, NY since 1998.[2] In February 2023, the Defendants purchased a 22-acre parcel of land at 1000 Biscayne Terrace, which is adjacent to Plaintiffs' property. Defendants sought to construct a new single-family residence and a second structure which has been described as a "pole barn", "garage", "barn/garage structure" or "accessory building". In their papers, Defendants usually refer to the structure as a garage.

Due to issues in the topography of the land, Defendants' initial design called for the second building to be located in front of the main building. That configuration could potentially require a zoning variance, because per the Town Code "[a]ccessory buildings, other than detached accessory garages, shall be located to the rear of the principal building." Town of Union Code § 300-53.10. On February 16, 2024, Defendants presented two applications for

[1] The Court has considered all the papers filed in support and opposition to the motions, as well as all the other documents contained in the electronic case file.

[2] Defendants' opposition argues that the Skylane Terrace deed is solely titled to Lisa Burke, and Defendants raise an issue as to whether both Plaintiffs reside on the property. The Court lacks sufficient information to make that determination. For purposes of this Decision and Order, the Court is assuming, without finding, that both Plaintiffs reside at the Skylane Terrace property.

variances to the Town of Union Zoning Board of Appeals ("ZBA"). The first variance was to allow the Freijes to locate the proposed garage even with, or slightly in front of, the house. The second variance was to allow the garage to exceed height restrictions, because the Defendants wanted to have a second-floor workspace. After holding multiple public hearings, the ZBA issued a written decision on June 4, 2024 denying both variances. Thereafter, Defendant Ryan Freije filed the aforementioned lawsuit (EFCA2024001720) against the Town of Union and the ZBA, seeking to overturn those denials, and obtain the variances. Eventually, that action was resolved by a Decision, Order and Judgment of this Court dated April 10, 2025, which concluded that the residence/garage orientation issue had been remedied (and agreed to by the Freijes and the Town) and was now compliant with the Town Code; and that the ZBA's denial of a height variance was arbitrary and capricious, so the Court granted the height variance.

After the Court's determination in EFCA2024001720, Thomas Burke sought to intervene in that case and also moved to renew and/or reargue the April 10, 2025 Decision, Order and Judgment. Following briefing and arguments, the Court issued a Decision and Order on September 25, 2025 denying Thomas Burke's motions. The Court concluded that Burke was not a party to that action and he lacked standing to renew and/or reargue; further, his application was untimely. Thomas Burke has appealed from the September 25, 2025 Decision and Order, and it appears that his appeal is still pending.

Plaintiffs commenced this action on September 26, 2025, the day after the Court denied Thomas Burke's motion in EFCA2024001720. Plaintiffs' Complaint contains four causes of action: breach of restrictive covenants, zoning violation, private nuisance and nuisance per se. Plaintiffs then filed a motion on September 29, 2025 for an injunction, followed by Defendants' cross-motion to dismiss on October 16, 2025.

In support of their motion, Plaintiffs filed an affirmation of Thomas Burke, dated September 25, 2025 with Exhibits "A" through "S", an attorney affirmation of Gabriella R. Levine, Esq., dated September 29, 2025 and a Memorandum of Law. Defendants submitted an affidavit of Ryan Freije, dated October 16, 2025, with one Exhibit, an attorney affirmation of Matthew C. Butler, Esq., dated October 16, 2025 and a Memorandum of Law. In Defendants' opposition, it is noted that the garage construction has been completed. (Ryan Freije affidavit dated 10/16/25 and Exhibit, NYSCEF Doc. Nos. 34, 35). Plaintiffs filed additional papers in support of their motion, and in opposition to Defendants' cross-motion. Following oral

argument, Defendants filed an affidavit of Brian Lucas, Town of Union Code Enforcement Officer, addressing permits and inspections done concerning the house and garage; and Plaintiffs filed additional opposition/objections.

LEGAL DISCUSSION AND ANALYSIS

I. Plaintiff's motion for a preliminary injunction

Plaintiffs seek a preliminary injunction to prevent Defendants from continuing construction on the residence and garage while the case is litigated. Defendants argue an injunction would be moot because the garage is already complete.

The two distinct concepts presented on Plaintiffs' motion are preliminary injunction and mootness. The Court will begin with an overview of preliminary injunctions, then move to a discussion of mootness, and then consider how mootness bears on the current situation.

A. Standard for preliminary injunction

A preliminary injunction is a mechanism used "to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" *Waldron v. Hoffman*, 130 AD3d 1239, 1239 (3rd Dept. 2015); *Rattner & Assocs. v. Sears, Roebuck & Co.*, 294 AD2d 346, 346 (2nd Dept. 2002); *see*, CPLR § 6301. "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" *Zwickel v. Underhill Land LLC*, 243 AD3d 973, 975 (3rd Dept. 2025), *quoting Sardino v. Scholet Family Trust*, 192 AD3d 1433, 1434 (3rd Dept 2021) (other citation omitted); *see, Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005); *Cooperstown Capital, LLC v. Patton*, 60 AD3d 1251 (3rd Dept. 2009); CPLR § 6301.

Preliminary injunctions are equitable in nature, and "because preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously" *Uniformed Firefighters Assn. of Greater N.Y. v. City of New York*, 79 NY2d 236, 241 (1992); *see, Rural*

Community Coalition, Inc. v. Village of Bloomingburg, 118 AD3d 1092, 1095 (3rd Dept. 2014) ("A preliminary injunction constitutes drastic relief" [internal quotation marks and end citations omitted]). The grant or denial of a preliminary injunction is not intended as a determination of the ultimate rights of the parties. *See, R. Kelly Freedman Holding Group, LLC v. P & M Brick, LLC*, 242 AD3d 1402 (3rd Dept. 2025); *Rural Community Coalition, Inc. v. Village of Bloomingburg*, 118 AD3d 1092; *Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051 (2nd Dept. 2009). The proponent has an initial burden to show a probability of success, but "[t]he existence of a question of fact 'does not prevent a party from establishing a likelihood of success on the merits; success need not be a certainty to obtain a preliminary injunction'" *Petry v. Gillon*, 199 AD3d 1277, 1278-1279 (3rd Dept. 2021), *quoting Cooperstown Capital, LLC v. Patton,* 60 AD3d at 1252-1253.

B. Mootness

Defendants contend that the application for a preliminary injunction is moot, since the garage has already been constructed. The term "moot" has been defined as "[h]aving no practical significance; hypothetical or academic" or "no longer involving a real, live controversy" Black's Law Dictionary (12th ed. 2024). It has also been recognized that:

> "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172, 774 NE2d 193, 746 NYS2d 429 [2002] [citation omitted]). Where a change in circumstances involves the substantial completion of construction, "courts must consider several factors, including whether the challengers sought preliminary injunctive relief or otherwise attempted to preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*Town of N. Elba v Grimditch*, 131 AD3d 150, 156-157, 13 NYS3d 601 [2015] [internal quotation marks, brackets and citations omitted], *lv denied* 26 NY3d 903 [2015]). Although injunctive relief is theoretically available, as a project can be dismantled, courts consider how far the work has progressed toward completion in determining mootness (*see Matter of Kowalczyk v Town of Amsterdam Zoning Bd. of Appeals*, 95 AD3d 1475, 1477, 944 NYS2d 660 [2012]). A determination of mootness is fact-driven (*see Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d at 173).

Matter of Bothar Constr., LLC v. Dominguez, 201 AD3d 1231, 1232-1234 (3rd Dept. 2022).

A preliminary injunction seeks to maintain the status quo, but when circumstances change, the relief may no longer be available and, in that sense, moot. If the very relief sought by a preliminary injunction is no longer available, then it follows that the request is moot.

C. Is the preliminary injunction moot because of the completion of the garage?

Mootness can refer to interim relief or ultimate relief. Defendants assert that the garage construction has been completed, so the question of enjoining work on that building (interim relief) is moot. Specifically, the Court will not be able to stop Defendants from undertaking further construction on the garage because it is already completed. Putting aside for the moment the issue of the house construction, the issue of a preliminary injunction is, indeed, moot- the Court cannot grant the interim relief to halt construction of the garage which has already been completed. Whatever status quo was sought to be maintained by preventing construction of the garage has been rendered obsolete. The Court can find that a preliminary injunction is moot because the action sought to be enjoined has already occurred, but the Court can still conclude that the matter is not completely moot, i.e. Plaintiff can still seek other remedies, such as a permanent injunction, or damages.

A finding of mootness can result in dismissal of an action, in appropriate cases. Sometimes that is based on the actions of the parties in seeking the interim relief. *See, e.g. Matter of City of Ithaca v. New York State Dept. of Envtl. Conservation,* 188 AD3d 1322 3rd Dept. 2020) [petitioners did not promptly seek injunctive relief and the construction had proceeded to a point where it would not be safe to stop it]; *Matter of Kowalczyk v. Town of Amsterdam*, 95 AD3d 1475 (3rd Dept. 2012) [garage had been fully constructed and petitioners had failed to seek injunctive relief]; *Kverel v. Silverman*, 172 AD3d 1345 (2nd Dept. 2019) [plaintiffs' delay in protecting their interests constituted laches barring the action]; *Matter of Birch Tree Partners, LLC v. Zoning Bd. of Appeals of Town of E. Hampton*, 106 AD3d 1083 (2nd Dept. 2013) [petition properly dismissed due to petitioner's undue delay in challenging construction]). Other times it is based on the fact that the underlying dispute has been resolved. *See, e.g. Matter of Town of Colonie v. City of New York*, 237 AD3d 1398, 1401 (3rd Dept. 2025) (Town's action to prevent asylum refugees from staying at a hotel within the Town was moot because of the expiration of a County Emergency Order and the hotel was no longer being used

to house asylum refugees); *H. Meer Dental Supply Co. v. Commisso*, 269 AD2d 662 (3rd Dept. 2000) (restrictive covenant not to compete was limited to 120 days and had expired).

Up to this point, the Court's discussion has been focused on the garage, as that has also been the primary target of the parties' arguments. However, the Court is cognizant of the fact that Plaintiffs' request seeks a preliminary injunction as to both structures in that it asks the Court to enjoin the Defendants "from continuing development in furtherance of conducting a pole barn and single-family residence on their property pending the final resolution of this action" Notice of Motion, NYSCEF Doc. No. 3; Plaintiffs' Memorandum in Support of Motion, NYSCEF Doc. No. 25 at p.19; Plaintiffs' Memorandum of Law in Further Support of their Motion, NYSCEF Doc. No. 60 at p. 34. Defendants have not offered an update concerning the status of construction concerning the primary dwelling. (Plaintiffs' Memorandum of Law, NYSCEF Doc. No. 60 at pp. 33-34, note 3).

Nevertheless, it is clear that the garage is the main concern for the Plaintiffs, as its size and proximity to their property creates an obstruction to Plaintiffs' view. The Plaintiffs do not challenge the house construction per se, but only the fact that the garage is not properly situated in relation to the house. Both variances that were sought by the Defendants related to the garage. The first variance concerns the location of the garage *vis a vis* the main building, and the second deals with the size of the garage.

Even though the current state of construction concerning the primary building is unknown, there is nothing about the residence in particular that is alleged to be improper. It is only its orientation to the garage that is of concern. If not for the garage, there does not appear to be any legal challenges to the residence. Plaintiffs' complaints are really about the garage, and that is the structure that they want moved, or removed. Therefore, the current status of the residence does not impact the Court's consideration. If Plaintiffs prevail, the garage or residence might have to be removed and re-situated. To the extent that there is potential that a final determination could impact the validity of residential construction, Defendants continue construction at their own risk. *See e.g., Matter of Village of Chestnut Ridge v. Town of Ramapo*, 99 AD3d 918 (2nd Dept. 2012).

Plaintiffs believe Defendants should not be permitted to seek protection based on the mootness doctrine. "Whether the controversy has become moot requires the consideration of various factors, including how far the construction work has progressed towards completion,

whether the work was undertaken in bad faith or without authority and whether the substantially completed work cannot be readily undone without substantial hardship" *Matter of City of Ithaca v. New York State Dept. of Envtl. Conservation*, 188 AD3d 1322, 1323 (citations omitted). Another important consideration is whether the challenger undertook efforts to maintain the status quo. *See, Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn.*, 2 NY3d 727 (2004). Plaintiffs cite *Town of N. Elba v. Grimditch*, 131 AD3d 150 (3rd Dept. 2015) in support of their position that the completion of the garage does not necessarily mean that the issue is moot, even if the remedy may involve removal of a completed structure. Plaintiffs in this case have not presented the quality and quantity of evidence that existed in the *Grimditch* case.

In *Grimditch*, the defendants constructed two boathouses on lakefront property on Lake Placid, without ever getting permits. Soon after construction began on the first boathouse, the Code Enforcement Officer "issued the first of three stop work orders and [plaintiffs] moved for a preliminary injunction to halt construction by [defendants]." *Id.* at 153-154. During the litigation, defendants continued construction on the boathouses without obtaining building permits. The *Grimditch* defendants argued that the claims were moot or barred by laches because the boathouses had been completed. The construction of the boathouses in *Grimditch* had proceeded without permits and in disregard of stop work orders, in what the court described as a race to completion. The challengers had moved promptly and repeatedly to stop the construction. Given those factors, the Third Department concluded it would be inappropriate to invoke the mootness doctrine, which would effectively allow defendants to evade court review and reward them for failing to observe procedures and orders. Therefore, even though the boathouses had been completed, the court ruled that the claims were not moot, and that injunctive relief, including removal of the boathouses, was appropriate.

The present case presents a much different factual background. The Freijes applied to the ZBA for two variances in 2024, which were denied. Defendants then commenced an Article 78 proceeding that was decided in their favor. The Court's April 10, 2025 Decision, Order and Judgment observed that the siting question was already resolved by virtue of the fact that Defendants' adjustments had satisfied the Town, and the Court concluded that the height variance should be granted. That was the Court's final determination on the 2024 variance requests. Following this Court's decree on April 10, 2025, the Friejes moved forward with their

project, relying on this Court's determination. Ryan Frieje obtained a Building Permit from the Town for foundations for the house and pole barn on May 30, 2025 and then a Building Permit for construction of a new single family home and pole barn on July 10, 2025. (Affirmation of Lisa Burke, Exhibits A and B, NYSCEF Doc. Nos. 47, 48). According to the Town Code Enforcement Officer, "Ryan Freije applied for and has been properly issued all of the required permits to build his house and garage" (Affidavit of Brian Lucas, dated November 18, 2025, NYSCEF Doc. No.62 at ¶ 3).

The facts show that the Freijes obtained the necessary approvals and Court orders. Those facts distinguish this case from *Grimditch*. Similarly, in another case cited by Plaintiffs, *Matter of Uciechowski v. Ehrlich*, 221 AD2d 866 (3rd Dept. 1995), the defendants had proceeded without approval or permits, which differs from the current case.

Furthermore, the Burkes did not move promptly to prevent construction. The plaintiffs in *Grimditch* immediately challenged the construction being undertaken which was clearly visible. Here, Plaintiffs did not commence this action until September 26, 2025. The ZBA held a public hearing on the variances in March 2024 at which time Mr. Burke was present and voiced his concerns. (See NYSCEF Doc. No. 15). He was aware of the Defendants' plans but did not attempt to intervene in EFCA2024001720 until after a decision was rendered. He did not attempt to enjoin construction until September 26, 2025, even though the construction was visible from Plaintiffs' property. Plaintiffs did not make sufficient efforts to maintain the status quo, and Defendants did not undertake to defy the Town's authority or trample the rights of others by rushing the project.

It is the Court's conclusion that the completion of the garage prevents the Court from granting a preliminary injunction to stop construction on the garage. The request for that injunction is essentially academic because it has already happened. In addition, even though the residence construction is a separate activity, there is no independent basis to enjoin that construction either. Thus, the request for a preliminary injunction is moot.

Plaintiffs are not left without recourse because they also seek a permanent injunction (Plaintiffs' Complaint NYSCEF Doc. No. 2, ¶¶ 153, 161 and 169), which carries with it the possibility that an "offending structure[] ordinarily can be dismantled" *Town of N. Elba v. Grimditch*, 131 AD3d 150, 157. If Plaintiffs prevail, then they may pursue such a remedy. Since there are other avenues available to Plaintiffs besides a preliminary injunction, the matter is not

completely resolved. Rather, the Court's determination at this time is only on the applicability of a preliminary injunction.

D. A preliminary injunction, even if not moot, is not appropriate

Even if the Court concluded that a preliminary injunction is not moot, Plaintiffs have not established their entitlement to a preliminary injunction. In particular, they have not shown any of the three elements: "irreparable harm", a likelihood of success on the merits or that the balance of equities tips in their favor. *See, Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839.

1. Irreparable harm

There is no irreparable harm because removal of an offending structure may be available. *See, Town of N. Elba v. Grimditch*, 131 AD3d 150. Since removal is still a possibility, Plaintiffs would be in the same position as they were prior to the construction, and the damage will have been undone. Therefore, the harm is not irreparable, and denial of a preliminary injunction is appropriate. *See, Catalogne v. Class Action Recovery, LLC,* 2026 NY App. Div. LEXIS 1138 (2nd Dept. 2026).

2. Likelihood of success of the merits

Plaintiffs have not shown a likelihood of success on the merits. Plaintiffs' causes of action are predicated on three legal theories (breach of restrictive covenant, zoning violations, and nuisance). With regard to breach of restrictive covenant, Plaintiffs allege that the Plaintiffs' and Defendants' property rights derive from the same grantor, Frazier & Son, Inc., in 1963, and are subject to the same restrictive covenant. Plaintiffs highlight the following language in Defendants' deed: (1) "no lots shall be subdivided to allow more than one house"; (2) no temporary dwelling structures nor any "trailer, tent, shack, barn or other outbuilding" shall be permitted on the premises and the exterior of all buildings must be "brick, stone, or stucco construction, or sides or shingles;" and (3) no non-residential purposes are permitted on any of the surrounding circumstances, and "no activities shall be carried on … which may or shall

become an annoyance or nuisance to the neighborhood" Affidavit of Thomas Burke, Exhibit "D", NYSCEF Doc. No. 8 at pp. 18-19. However, there are apparently two different subdivisions; one on which Plaintiffs' property is located and one on which Defendants' property is located. Defendants' property is the only one in that subdivision. "'The law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them'" *Kleist v. Stern*, 174 AD3d 1451, 1453 (4th Dept. 2019), *quoting Witter v. Taggart*, 78 NY2d 234, 237 (1991). Plaintiffs have not established that these two properties are part of the same subdivision such that Plaintiffs should be able to enforce restrictive covenants for their benefit against Defendants. *See e.g. Fleetwood Chateau Owners Corp. v. Fleetwood Garage Corp.*, 153 AD3d 1238 (2nd Dept. 2017). Nor have Plaintiffs shown a likelihood that Defendants have taken actions in violation of the zoning ordinances. In fact, Defendants have obtained approval for the revised location of the structures and obtained Court approval for the height variance. To be sure, Plaintiffs still have disagreement concerning the appropriateness of the approvals, and the Court is not making a final determination regarding that, but at this point, Plaintiffs have not established a likelihood of success concerning zoning violations. Similarly, if Defendants' actions have been in accordance with applicable rules, regulations and determinations from the municipal authorities, and this Court, then a nuisance would not be established.

3. Balance of the equities

The Court is also not persuaded that the balance of equities tip in Plaintiffs favor. Defendants' construction was after the successful Article 78 action, and with Town approvals. Thomas Burke noted his objection during the ZBA review, and made unsuccessful efforts to intervene in EFCA2024001720, rather than seeking an injunction. Instead, he waited until after construction was complete to file this case and try to enjoin Defendants' construction. If the Court grants a preliminary injunction, it could not stop the garage construction, it could only stop construction on the house- but there is no independent argument against the house, and construction time is limited due to weather. Further, now that the garage is complete, the only way to provide relief to the Plaintiffs is by modification or re-siting of the garage (which would only be appropriate after full development of the record), or by monetary damages (which are not

impacted by waiting for final determination). The balance of the equities do not favor the Plaintiffs.

The Court concludes that Plaintiffs are not entitled to a preliminary injunction. Accordingly, Plaintiffs' motion must be denied.

II. Defendants' motion to dismiss

Defendants have also filed a cross-motion to dismiss Plaintiffs' Complaint. Some of the arguments used in opposition to Plaintiffs' motion for a preliminary injunction are also used to support Defendants' motion to dismiss. Defendants contend that they are entitled to dismissal under CPLR 3211(a)(1) [documentary evidence], 3211(a)(3) [lack of legal capacity/standing], 3211(a)(5) [res judicata or collateral estoppel] and 3211(a)(7) [failure to state a cause of action].

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction" *Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002), *see Leon v. Martinez*, 84 NY2d 83, 88 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 (2005); *see Leon v. Martinez, supra*. Although a motion to dismiss does not have the benefit of a full discovery, in some circumstances, a party may seek to rely on written records, which the moving party believes clearly establish that the other party cannot succeed on the claim. This is addressed in CPLR 3211(a)(1) and deals with "documentary evidence." To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890, 893 (2nd Dept. 2008), *quoting Goshen v. Mut. Life Ins. Co.*, 98 NY2d at 326; *see Kolchins v. Evolution Mkts., Inc.*, 31 NY3d 100 (2018); *HSBC Bank USA, N.A. v. Decaudin*, 49 AD3d 694, 695 (2nd Dept. 2008); *Fontanetta v. John Doe 1*, 73 AD3d 78 (2nd Dept. 2010); *see also, Leon v. Martinez, supra* at 88. "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" *Ganje v.*

Yusuf, 133 AD3d 954, 956-957 (3rd Dept. 2015); *citing Midorimatsu, Inc. v. Hui Fat Co.*, 99 AD3d 680, 682 (3rd Dept. 2012), *lv dismissed* 22 NY3d 1036 (2013).

Defendants correctly assert that the deeds, and their restrictive covenants, are materials that can be used under CPLR 3211(a)(1). However, those documents do not conclusively establish Defendants' defenses as a matter of law. In their Complaint, Plaintiffs allege that both properties have a common grantor, who imposed certain restrictions as part of a common plan for residential development. Although Defendants may be able to establish that they are the only owners in their subdivision, which is separate from Plaintiffs' subdivision, the only issue the Court can consider at this point is the sufficiency of Plaintiffs' allegations. The Court concludes that Plaintiffs have adequately alleged they have standing, based on the common grantor, to enforce the restrictive covenants, and that construction of the garage may be in violation of the restrictive covenants (because the garage is actually a barn, and prohibited by the restrictive covenants). Thus, although the deeds are documentary evidence, they do not conclusively establish that Plaintiffs do not have standing to enforce the restrictive covenants, or that the terms of the deeds allow the construction(s) at issue here. Therefore, Defendants are not entitled to dismissal of the Complaint under CPLR 3211(1)(1).

Defendants also argue that Plaintiffs' Complaint is barred by res judicata and collateral estoppel [CPLR 3211(a)(5)] due to the Court's determinations in EFCA2024001720. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action ... One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion" *Simmons v. Trans Express Inc.*, 37 NY3d 107, 111 (2021) (internal quotations marks, citations and end citations omitted). Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue which was already decided in a prior action. The issue must be the same in both cases and the party who it is being used against must have "had a full and fair opportunity to litigate the issue in the earlier action" *Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 (1999).

This Court's determinations in EFCA2024001720 cannot form the basis for res judicata or collateral estoppel because the Burkes were not party to that action (in fact, the Court denied Thomas Burke's motion to intervene) and the only issue that the Court determined was that the Freijes should be allowed a height variance. The Court was not asked to rule upon issues such as

whether the structure was actually a "pole barn", or if there were any restrictive covenants preventing the construction, or whether the requested construction violated any other zoning rules. The Court did not even determine that the locations of the two structures was appropriate because the parties had reached an agreement on that issue.

The Court concludes that Plaintiffs are not limited by the doctrines of res judicata or collateral estoppel. There earlier case did not involve the same parties; Plaintiffs were not even allowed to intervene in the earlier action.

The next matter to be addressed is the 3211(a)(7) motion. CPLR 3211(a)(7) allows a defendant to challenge the legal sufficiency of a Complaint and permits the Court to grant dismissal when the Complaint fails to state a cause of action. That generally involves showing either that the factual allegations do not support a claim recognized under the law, or that even if there is a potential claim, the allegations do not support all the elements. When addressing a motion to dismiss under CPLR 3211(a)(7), the "ultimate criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 AD3d 1314, 1315 (3rd Dept. 2009), *quoting Leon v. Martinez*, 84 NY2d 83, 88. If the plaintiff alleges facts that support a claim, the complaint would be sufficient, even if the causes of action were not specifically and properly identified. The pertinent consideration "'is whether plaintiffs have a cause of action and not whether one has been stated, i.e., whether the facts as alleged fit within any cognizable legal theory'" *Duffy v. Baldwin*, 183 AD3d 1053, 1054 (3rd Dept. 2020), *quoting Alaimo v. Town of Fort Ann*, 63 AD3d 1481, 1482 (3rd Dept. 2009) (other citations omitted). Thus, a poorly drafted complaint will be saved from dismissal if the court can discern a possible cause of action.

The Court has already discussed the Plaintiffs' cause of action for breach of restrictive covenants and concluded that it is not subject to dismissal based on documentary evidence, standing or res judicata/estoppel. It also does state a cause of action because of many of the same reasons. Plaintiffs have alleged that there is a common grantor and that they should be allowed to enforce the restrictive covenants. Those include limitations on the construction of pole barns. The Court cannot make findings of fact at this point, but the allegations are sufficient to state a cause of action.

With respect to the claims for zoning violations and nuisance, the Court concludes that Plaintiffs' Complaint alleges sufficient facts to avoid dismissal. Even if the properties are not

within the same subdivision, Plaintiffs, as abutting property owners, may fall within the category of landowners who can enjoin a violation of the zoning laws. Plaintiffs must establish they suffered special damages due to Defendants' actions or they are "within the zone of interest protected by the zoning laws to establish standing to enjoin a zoning ordinance violation" *Zupa v. Paradise Point Assn., Inc.*, 22 AD3d 843, 844 (2nd Dept. 2005) (quotation marks and end citation omitted). Plaintiffs allege that Defendants' garage exceeds the height restrictions and siting limits, and violates the Town Code. Even though the Court overturned the ZBA's denial of a height variance, new Plaintiffs have come forward with different arguments that the construction violated the Town zoning rules. The allegations are sufficient to at least state a cause of action. Further, even though the Court is declining to grant a preliminary injunction, that does not preclude Plaintiffs from ultimately establishing an entitlement to a permanent injunction, or other damages. To put it differently, although the Court cannot enjoin the Defendants from constructing the garage, that does not mean the Court is ruling the construction was consistent with all zoning ordinances and approvals. Plaintiffs will have to establish some potential violations and then they might be entitled to a permanent injunction or damages.

CONCLUSION

Based on all the foregoing, the Court concludes that Plaintiffs are not entitled to a preliminary injunction because, among other things, the garage has already been built and there is no basis to halt construction of the house-bearing in mind that Defendants bear the risk if they proceed. Further, the Court finds that Plaintiffs' Complaint sufficiently sets forth causes of action described therein, and that Plaintiffs are not estopped from pursing their claims.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for a preliminary injunction is DENIED, and it is further

OREDRED, that Defendants' cross-motion to dismiss Plaintiffs' Complaint is DENIED, and it is further

ORDERED, counsel for the parties are directed to appear for a scheduling conference, to be conducted virtually, on **APRIL 15, 2026 AT 10:00 AM**. Chambers will provide a link to join the conference.

Any issues raised by the parties and not specifically addressed herein have been found to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: March 26, 2026
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

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Assigned Judge: Eugene D. Faughnan

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