

**Town of Riverhead v Silverman**

2006 NY Slip Op 30571(U)

October 25, 2006

Supreme Court, Suffolk County

Docket Number: 14988-06

Judge: Peter Fox Cohalan

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INDEX # 14988-06  
 RETURN DATE: 6-16-06  
 MOT. SEQ. # 001

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

**PRESENT:**

**Hon. PETER FOX COHALAN**

-----x  
 TOWN OF RIVERHEAD,

Plaintiff,

-against-

HENRY B. SILVERMAN, MELISSA SILVERMAN,  
 WELLS CREEK HOME OWNER'S ASSOCIATION,  
 INC., and JP MORGAN CHASE BANK, N.A.,

Defendants.  
 -----x

CALENDAR DATE: October 4, 2006  
 MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:

Town of Riverhead Attorney  
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 Riverhead, NY 11901

DEFT'S/RESP ATTORNEY:

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 Mattituck, NY 11952

Upon the following papers numbered 1 to 37 read on this motion for injunctive relief \_\_\_\_\_;  
 Notice of Motion/Order to Show Cause and supporting papers 1-15;16-21; Notice of Cross-Motion and  
 supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 21-35; Replying Affidavits  
 and supporting papers 36-37; Other \_\_\_\_\_; and after hearing counsel in support of and opposed  
 to the motion it is,

**ORDERED** that this motion by the plaintiff, Town of Riverhead, for injunctive relief pursuant to CPLR Article 63 et seq. restraining the defendants, Henry B. Silverman and Melissa Silverman, from occupying the premises located at 267 Peconic Bay Boulevard in Aquebogue, Town of Riverhead, Suffolk County, New York without a proper Town issued certificate of occupancy, is hereby granted in its entirety. The defendants are restrained and enjoined from occupying the premises heretofore described without a Town authorized certificate of occupancy and/or further order of this Court.

Plaintiff, Town of Riverhead (hereinafter Town), instituted this action seeking to enjoin and restrain the defendants, Henry and Melissa Silverman (hereinafter Silvermans), from occupying or using their newly built two (2) story residence until the Town Code violations previously identified by the Town have been corrected and a certificate of occupancy has been issued by the Town. Plaintiff also complains that the Silvermans have changed the grade of a private road and easement to the dock of the additional defendant, Wells Creek Homeowners Association, Inc., causing neighborhood lands to flood, changed the configuration of the homeowners association dock to accommodate Silvermans' sailboat, to the prejudice of the homeowners association, and brought electric service onto the dock, all in violation of the Town Code. The Silvermans claim that the Town has improperly intervened in a neighborhood dispute and is favoring one side to the Silverman's prejudice and that all requirements for a certificate of occupancy had been met on July 19, 2006. The Silvermans, however, do not deny changing the grading of the road, changing the configuration of the dock or bringing electric service (since removed) to the homeowners association dock.

The Silvermans argue that the Town Code §52-16 (A) provides that within thirty (30) days after application, a certificate of occupancy shall be issued and that the Town's failure to act on the application in a timely manner constitutes approval. The Silvermans argue that their application for a certificate of occupancy made on July 8, 2006 was not acted upon and therefore has been approved. The Town argues that the Town Code §52-16 (A) contains the language "A certificate of occupancy shall be issued, ***where appropriate***, within 30 days..." and that the Silvermans were under continuing violations and orders to correct the road, dock and electric wiring and therefore, the Town need not act on an application which was fundamentally flawed when submitted. The Court conducted an on site inspection of the area on Thursday, August 3, 2006.

The Town now moves for a preliminary injunction and continuation of the restraining order previously granted to the Town by this Court enjoining and preventing the Silvermans from using or occupying the premises involved in this lawsuit pending the correction of the Town Code violations and issuance of a proper certificate of occupancy. The Silvermans oppose the application arguing that, by the Town's failure to act on their application within 30 days, a certificate of occupancy was approved by operation of law. The Court notes that the Silvermans' affidavit in opposition to the Town's motion claims to be in support of a cross-motion to compel issuance of a certificate of occupancy but no cross-motion was ever made.

For the following reasons, the Town's motion for a preliminary injunction, pursuant to CPLR §6301 et seq., is hereby granted and the Silvermans are hereby restrained and enjoined from using or occupying the premises heretofore mentioned without a proper certificate of occupancy issued by the Town and/or further order of this Court.

The purpose of a preliminary injunction is to preserve the status quo pending trial. ***McLaughlin, Piven, Vogel Inc. v. W. J. Nolan & Co., Inc.***, 114 AD2d 165, 498 NYS2d 146 (2nd Dept. 1987), appeal denied 67 NYS2d 606, 501 NYS2d 1024. In order to prevail on a motion for a preliminary injunction, the moving party has the burden of establishing, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent a granting of the requested relief and (3) the equities weigh in its favor. ***Upgrade Education Services, Inc. v. Rappaport***, 136 AD2d 628, 523 NYS2d 872 (2nd Dept. 1988); ***Benjamin Kurzban and Son, Inc. v. Board of Education, City of New York***, 129 AD2d 756, 514 NYS2d 749 (2nd Dept. 1987). Preliminary Injunctive relief lies with the sound discretion of the court [***Geres v Koch***, 62 NY2d 84, 476 NYS2d 73 (1984)] and it is predicated on a clear showing of the aforementioned three prong test. ***W. T. Grant Co., v Srogi***, 52 NY2d 496, 438 NYS2d 761 (1981); cf. ***Albini v. Solork Associates***, 37 AD2d 835, 326 NYS2d 150 (2nd Dept. 1971).

As a provisional remedy, the chief function of a preliminary injunction is to prevent any conduct before judgment which would impair the ability of the Court to render the appropriate final judgment. *Mucchi v. Eli Haddad Corp.*, 101 AD2d 724, 475 NYS2d 35 (1<sup>st</sup> Dept. 1984). Here, in the case at bar, the Town has presented a compelling case to continue in effect the restraining order previously issued by the Court on May 25, 2006 which enjoined the Silvermans from the use and occupancy of their residence prior to the issuance by the Town of a certificate of occupancy. Injunctive relief seeks to maintain the status quo pending resolution of this action. To allow the Silvermans into possession of their residence without correction of the clearly identified and delineated problems with drainage, grading of the property, reconfiguration of the boat dock and removal of all electrical devices, whether connected or not from the dock area, would reward the defendants with possession and occupancy of their home without the proper Town approvals (signified by a Town issued certificate of occupancy). As previously noted, a preliminary injunction is a provisional remedy and its function is not to determine the ultimate rights of the parties but to maintain the status quo. *Bd of Mgrs Columbia Condominium v. Alden*, 178 AD2d 121, 576 NYS2d 859 (1<sup>st</sup> Dept. 1991).

The defendants' argument that the failure of the Town to act on their application for a certificate of occupancy within 30 days, as provided by the Town Code §52-16 (A), would result in an automatic approval by operation of law, fails to appreciate the modifying language within that section which reads:

“A certificate of occupancy shall be issued, *where appropriate*, within 30 days after application therefore is made. Failure to act upon such application within 30 days shall constitute approval of such application, and the building or portion thereof may thereafter be occupied as though a certificate of occupancy has been issued.” (emphasis added)

The modifying language of “**where appropriate**” sets forth a condition to the application for a certificate of occupancy. The Town argues that the Silvermans have been on notice of the violations to the Town Code for three (3) years or longer with regard to the grading of the roadway, the flooding and the exercising of dominion and control over the dock facilities and the electrical system at the dock and therefore filing an application with the Town for a certificate of occupancy is not appropriate and doesn't require the Town to again formally deny that which it has previously denied and on which it has, on many occasions, provided written notice and Town citations to the Silvermans about the violations of the Town Code. The Court finds the Town's argument persuasive. The filing request for a certificate of occupancy by the defendants with the identified Town Code violations still outstanding bars the use by them of the thirty (30) day provision in the Town Code §52-16(A). The Silvermans

acknowledge these difficulties and the Town citations and the Court notes that Henry Silverman pled guilty to these Town Code violations before the Town Justice Court.

While the Silvermans seem to contest ownership of the dock and the roadway, the available evidence appears to support, for the purposes of this motion, that the roadway consists of an easement granted to the Silvermans' neighbors to provide them access to the dock facilities. In any event, the problems with the Silvermans' grading changes to the access roadway which caused flooding of their neighbors' property and the out of compliance dock facilities identified by the Town are both substantial and legally material and warrant corrective action and they not mere nuisances or minor in nature. Nor does the Court find persuasive or compelling the Silvermans' arguments that the Town has involved itself in a neighborhood squabble and has taken the side of the neighbors against the Silvermans. The record appears very clear that there are Town Code violations existing that continue to remain unresolved and uncorrected.

Furthermore, the Silvermans' complaints to the Court and the Town of their treatment and their inability to reside in their home ignore the factual background that the violations and hardships imposed are all self created and result from Silverman's unilateral actions in constructing, changing and grading the roadway, the dock and their residence without the proper and necessary approvals from the Town and without any input from the Wells Creek Homeowners's Association. The fact that the Silvermans have been cited for violations and paid fines to the Town does not ameliorate the continuing violations which prevent the issuance of a certificate of occupancy.

The Town has presented the necessary elements to warrant the injunctive relief requested and to continue the restraining order issued preventing the Silvermans from using or occupying their newly built residence pending the issuance of a certificate of occupancy. Here that issuance is conditioned upon the regrading and resolution of the access road issue and bringing the dock facilities into compliance with the Town Code. The Town has established irreparable harm, likelihood of ultimate success on the merits and that the balancing of the equities lies in its favor. *Trimboli v. Irwin*, 18 AD3d 866, 796 NYS2d 659 (2<sup>nd</sup> Dept. 2005). The continuing violations identified by the Town which remain unresolved to date substantiate the need for injunctive relief. Further, if anything, the Town, through its representatives, and the Town Attorney's Office have exercised the utmost patience and restraint in attempting to work with the Silvermans and this Court to correct the violations and to present a defined remedial plan to allow the issuance of the certificate of occupancy which would allow the Silvermans to occupy their residence.

The Court, in another attempt to resolve the outstanding Town Code violations and to provide a mandated remedial plan, hereby schedules this matter for a conference to be conducted on December 8, 2006 with the parties at which time there should be sufficient resources available to set forth the necessary remedial measures needed to be taken by the Silvermans on a Court ordered time line to allow the issuance of a certificate of occupancy

and Court supervision of the corrective actions necessary to resolve this matter. These remedial measures include, but are not limited to, the use of culverts under the roadway, the reconfiguration of the dock to its original configuration and the removal of all electrical devices and junction boxes installed on the dock facilities by the defendants.

Accordingly, the Town's motion for injunctive relief pursuant to CPLR §6301 et seq., is hereby granted and the restraining order preventing the Silvermans from using or occupying their new residence at 267 Peconic Bay Boulevard, Aquebogue, Town of Riverhead, Suffolk County, New York is continued pending further review and order of this Court.

The foregoing constitutes the decision of the Court.

Dated: October 25, 2006

  
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J.S.C.