

Handal v Palm Mgt. Corp.

2007 NY Slip Op 31048(U)

April 23, 2007

Supreme Court, Suffolk County

Docket Number: 0013614/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12/13/06
ADJ. DATE 2/14/07
Mot. Seq. #001 - MotD
Mot. Seq. #002 - XMD

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PATRICIA HANDAL, RICHARD S. W.	:	ESSEKS, HEFTER & ANGEL, LLP
SHEPARD, FRANK P. SHEPARD, III,	:	Attorney for Plaintiffs Handal & Graham
KATHERINE S. GRAHAM and	:	108 East Main Street
NATHANIEL B. SHEPARD,	:	P.O. Box 279
	:	Riverhead, New York 11901
Plaintiffs,	:	
- against -	:	TWOMEY, LATHAM, SHEA, KELLEY,
	:	DUBIN & QUARTARARO, LLP
	:	Attorney for Defendant
PALM MANAGEMENT CORPORATION	:	33 West Second Street
a/k/a PALM MANAGEMENT CORP.,	:	P.O. Box 9398
	:	Riverhead, New York 11901
Defendant.	:	
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Upon the following papers numbered 1 to 16 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers 8-14; Answering Affidavits and supporting papers 15; Replying Affidavits and supporting papers 16; Other plaintiffs' memorandum of law; defendant's memorandum of law; plaintiffs' reply memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiffs Patricia Handal and Katherine S. Graham for an order pursuant to CPLR 3212 granting partial summary judgment (i) on their first cause of action, declaring that defendant's use of a patio on its property located at 74 James Lane, East Hampton, New York for outdoor dining is an illegal nonconforming use, and (ii) on their third cause of action, enjoining defendant from using the patio for outdoor dining and directing defendant to remove any structures or improvements to the patio that were placed there after May 14, 2001, is granted to the extent of granting partial summary judgment on their third cause of action, enjoining defendant from using the patio for outdoor dining and directing defendant to remove any structures or improvements to the patio that were placed there after May 14, 2001, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing all plaintiffs' claims is denied as untimely.

This is an action for declaratory and injunctive relief, *inter alia*, relating to the defendant's use of an outdoor dining area in conjunction with its operation of an inn and restaurant on its property, which is located in an area zoned for residences in the Village of East Hampton. The defendant operates the inn and restaurant as a preexisting, nonconforming use under the local zoning ordinance. The plaintiffs, who are neighboring residents, allege three separate causes of action in their complaint: the first, for judgment declaring, *inter alia*, the extent to which porches and patios on the property may be used to serve food and beverages; the second, for damages on a theory of private nuisance; and the third, for an injunction, *inter alia*, prohibiting the defendant from using the property for purposes other than as previously authorized and approved by the Village.

The relevant facts are not in dispute. On October 29, 2003, following the commencement of this action, the Village code enforcement officer issued a certificate of occupancy to the defendant authorizing, for the first time, the use of a partially covered patio on the property as an "outdoor dining patio." The plaintiffs appealed to the Village zoning board of appeals, contending that use of the patio as an outdoor dining area (as well as the structural improvements made to accommodate such use) violated the zoning ordinance and did not constitute a valid preexisting, nonconforming use. On September 24, 2004, the zoning board adopted a resolution, *inter alia*, annulling that portion of the certificate of occupancy authorizing the use of the patio for outdoor dining and its structural improvements, concluding that the outdoor dining use was neither a preexisting, nonconforming use of the property nor a valid accessory use, and that the structural improvements were not entitled to a certificate of occupancy without the issuance of required special permits. The defendant subsequently commenced an article 78 proceeding (*Matter of Palm Mgt. Corp. v Goldstein*, Suffolk County Clerk's Index No. 04-25542), seeking to reverse the zoning board's determination.¹ By order dated May 2, 2005, this Court (Emerson, J.) denied the petition and dismissed the proceeding. The defendant appealed. By decision and order (one paper) dated May 16, 2006, the Appellate Division, Second Department, *inter alia*, affirmed this Court's order to the extent it was addressed to the use of the patio for outdoor dining (29 AD3d 801, 815 NYS2d 670).² The defendant did not seek leave to appeal from the May 16, 2006 decision and order.³

The plaintiffs now move for partial summary judgment on their first and third causes of action on the ground that the issues regarding the use of the patio for outdoor dining and the accompanying structural improvements to the patio were finally resolved by the zoning board and in the subsequent

¹ Although each of the plaintiffs in this action was named as a respondent in the article 78 proceeding, only plaintiffs Patricia Handal and Katherine S. Graham (hereinafter, "the plaintiffs") answered the petition and participated in the proceeding.

² The plaintiffs evidently interpret the Appellate Division's decision and order as modifying the May 2, 2005 order of this Court (Emerson, J.) to the extent of holding "that only structural improvements made to the patio after May 14, 2001 were illegal" (Plaintiffs' Memorandum of Law, at 12, n 3).

³ The Court of Appeals did grant the plaintiffs leave to appeal on related issues (7 NY2d 710, 822 NYS2d 757 [Sept. 12, 2006]) but subsequently affirmed the Appellate Division's decision and order (2007 WL 895060, 2007 NY LEXIS 322 [Mar. 27, 2007]).

article 78 proceeding.

The plaintiffs' request for partial summary judgment on their first cause of action, declaring that the defendant's use of the patio for outdoor dining is an illegal nonconforming use, is denied. While the plaintiffs correctly note that this issue was finally resolved in the prior proceeding, the upshot of this is that there remains no actual controversy for which declaratory relief is warranted. "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. * * * Where there is no necessity for resorting to the declaratory judgment it should not be employed" (*Walsh v Andorn*, 33 NY2d 503, 507, 355 NYS2d 329, 332 [1974]). Absent a justiciable controversy and, hence, a need to declare the rights of the parties, the Court deems it appropriate instead to award summary judgment in favor of the defendant, dismissing the first cause of action insofar as it seeks the requested declaration (*see*, CPLR 3212 [b]; *Iafallo v Nationwide Mut. Fire Ins. Co.*, 299 AD2d 925, 750 NYS2d 386 [2002]; *Automated Ticket Sys. v Quinn*, 90 AD2d 738, 455 NYS2d 799 [1982], *affd* 58 NY2d 949, 460 NYS2d 533 [1983]).

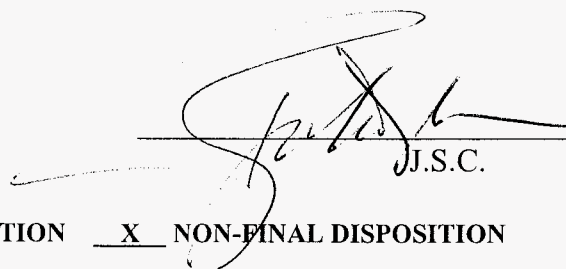
The plaintiffs are, however, entitled to the relief requested on their third cause of action. An action for injunctive relief is the appropriate remedy of an aggrieved property owner to restrain the violation of a zoning ordinance by another property owner (*Little Joseph Realty v Town of Babylon*, 41 NY2d 738, 395 NYS2d 428 [1977]; *Lesron Jr., Inc. v Feinberg*, 13 AD2d 90, 213 NYS2d 602 [1961]; *see also*, Code of the Village of East Hampton § 104-17). Here, the plaintiffs established prima facie that the outdoor dining use was neither a preexisting, nonconforming use of the property nor a valid accessory use, and that the defendant failed to obtain the necessary permits to warrant the issuance of a certificate of occupancy as to the structural improvements. The defendant, in response, failed to raise triable issues of fact as to its defenses of lack of standing, laches, and collateral estoppel.

As for the cross motion, the Court notes that it was made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see*, *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2005]; *see also*, *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]).

The parties shall settle judgment, *inter alia*, specifically identifying which structures and improvements are to be removed.

The Court directs that the remaining claims in this action be severed and continued.

Dated: APR 23 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION