

Town of Nassau, N.Y. v Nalley

2007 NY Slip Op 31543(U)

June 8, 2007

Supreme Court, Rensselaer County

Docket Number: 0208220/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

TOWN OF NASSAU, NEW YORK,

Plaintiff,

-against-

STEPHEN O. NALLEY d/b/a IMPACT AUTO,

Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-0290-03 Index No. 208220

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DECISION/ORDER

George B. Ceresia, Jr., Justice

By Decision and Order dated August 24, 2006 this Court directed that an evidentiary hearing be held to determine the issue of whether and to what specific extent defendant may have violated the terms of a November 8, 2004 so-ordered Stipulation of Settlement. That agreement, arrived at after much litigation and negotiation, memorialized a number of commitments on defendant's part regarding the manner in which he would operate and maintain a junk yard located in the Town of

Nassau. As detailed more fully in the August 24, 2006 Decision and Order, plaintiff alleges a number of violations of the parties' agreement and seeks enforcement of its provisions regarding a permanent injunction and liquidated damages.

The evidentiary hearing on this matter took place on October 23 and 26, 2006. Town Code Enforcement Officer Rudolph Jahn testified for plaintiff, while defendant called Donald Slovak, former Town Supervisor Carol Sanford, Joseph O'Brien, Lawrence St. Pierre, Barbara Secor, Stephen B. Nalley (defendant's son), and Edwin Brockett. Defendant also testified in his own behalf. Based upon the credible testimony adduced at the hearing, as well as upon the various photographs and other documentary evidence admitted, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

On a number of occasions over the period of time between March 16, and April 19, 2006 Nassau Code Enforcement Officer Rudolph Jahn inspected the premises owned by defendant and operated by him as a junk yard. The purpose of these inspections was to ensure compliance with Town codes, a Town Board resolution dated May 31, 2001 regarding the operation of the junk yard and the so-ordered Stipulation of Settlement of November 8, 2004. Jahn noted a number of apparent violations and took notes and photographs.

The code enforcement officer noted the presence of some 160 vehicles outside the fence of the junk yard, with several pieces of equipment parked along the roadway leading to the main

entrance to the yard.¹ In addition, Jahn saw that the fence which was required to enclose most of the perimeter of the operation was shorter than its mandated height; those sections required to contain solid fencing actually had spaces throughout; and large sections of fencing were missing, with rows of junk trailers and other vehicles being used as fencing material. As to the gates, which were required to be kept closed when not in use, some of these were left open throughout the day; some were broken to the point where they had gaps several feet wide in them; and none of the gates were the same height as their adjoining fence sections, an additional Town requirement. Some gates did not even exist: instead, junked cars had been lined up end-to-end to form makeshift moveable barriers in places where gates should have been installed.

On April 19, 2006 Jahn drew up a formal Notice of Violation and mailed it to defendant at his business address. Upon receipt of the notice, defendant began to take some steps to remedy a number of the violations. He gradually removed the majority of the vehicles located outside the perimeter fence and brought them inside. Defendant's son, with the aid of a few helpers, nailed boards as a makeshift extension atop a portion of the fence in order to raise its height to the requisite twelve feet. Defendant replaced the would-be gate of junk cars with another makeshift barrier, this one comprised of junk semi trailers. The wide gap in the east side gate defendant filled by adding pieces of pipe and chain link fencing.

While the so-ordered Stipulation of Settlement mandated a 48-hour period within which any violations were to be cured, many of these remedial measures were not completed for months.

¹ The November 2004 stipulation banned vehicles that were not "road ready" from being placed outside the fence. While Jahn testified that he was not qualified to determine whether a given vehicle was "road ready," he did note the presence of a truck with no engine or transmission, as well as an "over-the-road" trailer without a "bogey" (wheel assembly).

Moreover, even as of the date of the hearing, much of the fencing comprised of trailers and sheet metal sections had gaps through which access to the premises could easily be gained. Junk trailers also remained in place as substitutes for gates. The wheelless trailer was still outside the fence, ostensibly for use as a storage unit for maintenance equipment. In addition, a large piece of equipment (referred to in the record as the “Trojan loader”) was still parked along the access roadway despite the notice that this also constituted a violation.

CONCLUSIONS OF LAW

It is clear from the so-ordered Stipulation of Settlement that defendant had agreed, and was required, to erect and maintain a perimeter fence of a height of from eight to twelve feet, depending upon its location, around the subject premises.² It is also clear from the hearing testimony and the photographic exhibits that defendant failed to discharge this agreed-upon obligation, and that he failed to remedy this breach of the so-ordered stipulation, even when given adequate notice.

Nowhere in the parties’ stipulation or in any resolution of the Town Board was the word “fence” specifically defined. The dictionary definition of the word is “a freestanding structure designed to restrict or prevent movement across a boundary” (<http://en.wikipedia.org/wiki/Fence>). A broad application of this definition would excuse defendant’s use of truck bodies, semi trailers and sheet metal panels as fencing. The wide gaps through which easy access to the premises was available, however, demonstrate that the failure to provide the necessary materials to render this

² While the phrase “perimeter fence” has been used by the parties frequently throughout the record, it is actually a misnomer. Owing to the topography of the parcel of land in question, the Town has never required defendant to erect a fence along the entire perimeter of the property. A deep ravine forms a natural barrier along a considerable portion of its length. The Town has been satisfied that there is no need for a fence in this particular location.

makeshift fence serve the intended function of restricting access to the property prove that defendant remains in violation of the terms of the so-ordered stipulation.

Defendant had also agreed to be bound by the requirement of equipping the fence with gates that were to be kept closed when not in use. However broadly the term “fence” may be defined, rows of junk cars or rows of junk truck bodies do not constitute “gates.” Likewise, gates that are so ill-fitting and in such disrepair that a person could easily walk through them even when they are closed cannot be said to satisfy any reasonable interpretation of the parties’ intent in their stipulation. On this additional ground, plaintiff has successfully proven that defendant continues to be in violation of the terms of the agreement despite clear notice and more than an adequate opportunity to cure the condition.

Defendant argues that, since the former Code Enforcement Officer had found the makeshift fence and gates to be satisfactory, plaintiff cannot now be heard to complain that defendant is not in compliance with his duties under the stipulation. In essence, defendant is claiming entitlement to an equitable estoppel against the Town. However, such a remedy is not available against the State or its subdivisions (*Piscitella v City of Troy*, 229 AD2d 767, 768 [3d Dept 1996]). This putative defense is thus without merit.

As to the parking of equipment along the access roadway, the record supports the conclusion that defendant failed to rectify this situation after having received notice of the violation. As a result, this particular allegation has also been sustained. Plaintiff has thus established another basis for relief.

On the other hand, while plaintiff proved that over 160 vehicles had been parked outside the perimeter fence, there was little evidence as to whether these were not “road ready” vehicles offered

for sale to the public and thus outside the ambit of the proscriptions of the stipulation. There were, however, two vehicles proven not to be “road ready:” one truck whose engine and transmission had been removed and the “over the road” truck body used for equipment storage. Clearly, a truck without an engine and a trailer without a bogey cannot fit within any reasonable definition of the phrase “road ready.” Thus, as to these two vehicles, plaintiff has met its burden of proving yet another violation of the terms of the so-ordered stipulation.

Plaintiff having proven that defendant is not in compliance with the terms of the parties’ agreement, the nature of the violations, their long-term existence and defendant’s continued reluctance to abate the situation all demonstrate that these violations are hardly *de minimis*. Plaintiff is thus entitled to invoke its right to seek relief under the terms of the so-ordered Stipulation. What remains is the determination of the appropriate relief to be granted. The parties had agreed in their stipulation to a schedule of liquidated damages for certain specified violations, with a “catch-all” provision for liquidated damages for any other violations uncured after 48 hours’ notice. In addition, the so-ordered stipulation provides (at para 16) that plaintiff retained the right to submit an order “on an ex parte basis” that would permanently enjoin defendant’s continued operation of the junk yard in the event he failed to comply with the stipulation, a prior order of September 9, 2002, the Town’s 1989 “Junkyard Ordinance,” or the resolution of the Town Board dated May 31, 2001.

The liquidated damages provision of the parties’ stipulation protects both sides here: it provides plaintiff Town with a remedy where the calculation of actual damages for code violations would be virtually impossible, while it also insulates defendant from a contempt finding (with the concomitant prospect of incarceration) in the event of his non-compliance with the terms of the

order (*Cf. Vacca v Valerino*, 161 AD2d 1142 [4th Dept 1990] [civil contempt not available for violation of a so-ordered stipulation that contains liquidated damages as a specific remedy for non-compliance]).³ Therefore, as the parties had agreed that defendant's failure to maintain the requisite perimeter fencing would subject him to liquidated damages of \$1,000.00 per day, defendant shall pay to plaintiff the sum of forty-seven thousand dollars (\$47,000.00), representing liquidated damages for the fence violation over the period limited by plaintiff's counsel in his opening statement to the forty-seven (47) days following the expiration of the 48-hour notice period (October 23, 2006 Transcript at p 7). It would be inappropriate, however, to assess duplicative liquidated damages for defendant's failure to maintain adequate gates, as these are logically part of the perimeter fence requirement and are not listed in the stipulation as separate items against which such damages may be assessed (*see* so-ordered Stipulation of Nov 8, 2004 at para 5[e]).

Defendant shall also be assessed liquidated damages at the stipulated rate of five hundred dollars (\$500.00) per day for the forty-seven (47) day period during which equipment was parked along the access roadway, plus an additional five hundred dollars (\$500.00) per day for the forty-seven (47) day period during which vehicles that were not "road ready" were parked outside the perimeter fence. . The total damages owed are therefore ninety-four thousand dollars (\$94,000.00). Defendant shall tender payment of this sum within seven days of the date of service of notice of

³ Nothing in this Decision and Order shall be construed, however, as implying that contempt may not lie for any violation of the Temporary Restraining Order (TRO) issued in the Order to Show Cause of June 19, 2006. In a separate noticed motion dated March 12, 2007 plaintiff claimed that defendant had in fact violated that TRO and plaintiff therefore sought an adjudication of contempt. That the liquidated damages clause of the parties' so-ordered agreement provides for remedies other than contempt in the event of a breach by defendant does not deprive the Court of the panoply of remedies available to it should a violation of its clear mandate of June 19, 2006 occur. The Court by Decision/Order dated May 11, 2007 granted the relief sought in the Plaintiff's motion.

entry of this Decision and Order.⁴ Defendant's failure to make this payment in a timely fashion shall entitle plaintiff to enter judgment against him without the need of further notice or Court order. Service of a copy of this Decision and Order with notice of entry upon the escrow agent shall entitle plaintiff to be paid the twenty-five thousand dollar (\$25,000.00) bond toward any unsatisfied portion of the money judgment.

As noted, defendant had also consented to a provision by which his failure to comply with the terms of the parties' stipulation could result in the issuance of a permanent injunction "on an ex parte basis." Here, plaintiff opted to proceed by Order to Show Cause, with notice to defendant of the Town's intent to seek permanent injunctive relief. Defendant therefore cannot complain that he has been afforded more notice than was his due under the terms of the agreement.

The Court is aware that the defendant has been in business for a number of years, and the Court prior to issuing this decision has brought the parties in for conferences on more than one occasion to see if the parties could agree on a settlement. However, the parties have been unable to agree.

Injunctive relief is, however, an equitable remedy and one which should not be imposed lightly (*see, e.g., Warm v State*, 308 AD2d 534 [2d Dept 2003], and cases cited therein). Nonetheless, repeated wrongful actions have led to permanent injunctions even where the violations were slight and damages nominal (*Cf. Danchak v Tuzzolino*, 195 AD2d 936, 937 [3d Dept 1993]). In the present case many factors militate in favor of granting the permanent injunction. This is the third time plaintiff has needed to resort to litigation due to defendant's continued disregard of

⁴ This seven-day period within which liquidated damages are to be paid is based upon the parties' own agreed-upon timetable (so-ordered Stipulation of Nov 8, 2004 at para 8).

zoning ordinances, Town Board resolutions and stipulations of settlement. Defendant has been required to construct adequate fencing around his junk yard for years, yet has consistently failed to do so. Defendant has continued to park equipment along the access roadway despite his knowledge that this is prohibited. Though given more than adequate notice of plaintiff's intention to seek the full panoply of rights and remedies available to it pursuant to a carefully negotiated stipulation entered as a Court Order, defendant has nonetheless steadfastly failed to discharge his long-standing obligations. Under the facts of this case, then, it would be an improvident exercise of discretion to deny the injunctive relief to which plaintiff is so clearly entitled.

Finally, the so-ordered Stipulation of Settlement of November 8, 2004 entitles plaintiff to an award of counsel fees and costs. Plaintiff's counsel shall therefore serve and file an Affirmation of Legal Services detailing the fees to which plaintiff claims entitlement, along with a bill of costs. Should defendant seek to challenge the reasonableness of these fees, his counsel shall notify the Court and plaintiff's counsel in writing within five (5) days of the date of service of notice of entry of this Decision and Order. Absent such a challenge, plaintiff shall be entitled to collect the fees and costs in the same manner as the liquidated damages.

Accordingly, it is

ORDERED that plaintiff's application for an award of liquidated damages against defendant is granted to the limited extent that defendant shall pay to plaintiff, within seven (7) days of the date of service of notice of entry of this Decision and Order, the sum of ninety-four thousand dollars (\$94,000.00); and it is further

ORDERED that, should defendant fail to pay this sum within seven days of the date of service of notice of entry, plaintiff shall be entitled to enter judgment against defendant for any

unpaid amounts, without further notice or Court order; and it is further

ORDERED that service of a copy of this Decision and Order with notice of entry upon the escrow agent shall entitle plaintiff to apply the twenty-five thousand dollar (\$25,000.00) bond previously posted by defendant toward payment of the judgment; and it is further

ORDERED that defendant is permanently enjoined from operating a junkyard in the Town of Nassau; and it is further

ORDERED that, should plaintiff wish to enforce its right to payment of its counsel fees and costs by defendant, plaintiff's counsel shall serve upon defendant's counsel an Affirmation of Legal Services and Bill of Costs; and it is further

ORDERED that, should defendant seek to challenge the reasonableness of such fees and costs, his counsel shall notify the Court and plaintiff's counsel in writing within five (5) days of the date of service of notice of entry of this Decision and Order; and it is further

ORDERED that, absent a challenge to the reasonableness of the counsel fees and costs, plaintiff shall be entitled to collect them in the same manner as the liquidated damages.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for plaintiff, who is directed to enter this Decision and Order without notice and to serve all attorneys of record with a copy of this Decision and Order with notice of entry.

Dated: June 8, 2007
Troy, New York

A handwritten signature in blue ink, reading "George B. Ceresia, Jr.", written over a horizontal line.

George B. Ceresia, Jr.
Supreme Court Justice