

Cooper v Town of Islip

2007 NY Slip Op 32721(U)

August 15, 2007

Supreme Court, Suffolk County

Docket Number: 0006105/2005

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 6105/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 JAMES COOPER,

Plaintiff,

-against-

TOWN OF ISLIP,

Defendant.

ORIG. RETURN DATE: APRIL 4, 2007
 FINAL SUBMISSION DATE: APRIL 19, 2007
 MTN. SEQ. #: 001
 MOTION: MD

ORIG. RETURN DATE: APRIL 4, 2007
 FINAL SUBMISSION DATE: APRIL 19, 2007
 MTN. SEQ. #: 002
 CROSS-MOTION: MD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 9 read on this motion _____
TO REMOVE ACTION AND CROSS-MOTION TO DISMISS

Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Memorandum of Law 7; Answering Affirmation and supporting papers 8; Reply Affirmation and supporting papers 9; it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 325(b) and 326, removing to the Supreme Court an action entitled, "The People of the State of New York against James Cooper," now pending in the Suffolk County District Court, Fifth District, under Docket Number ISTO 1942-06, on the grounds that the District Court does not have jurisdiction to grant the relief of a declaratory judgment, is hereby **DENIED** for the reasons set forth herein; and it is further

ORDERED that this motion by defendant TOWN OF ISLIP ("Town") for an Order, pursuant to CPLR 3211(a)(2), (4), (7), (8) and (10), dismissing plaintiff's complaint in its entirety and vacating the stay granted by *ex parte* Order dated March 21, 2007 (Pitts, J.), is hereby **DENIED** for the reasons set forth herein.

Plaintiff filed the instant action, on or about March 18, 2005, seeking a judgment: (1) declaring that the property located at 24 Lockwood Road, Bay Shore, New York is a legal three-family dwelling; (2) directing the Town to adequately set forth upon its records that the property is a legal three-family dwelling; (3) directing that the Town issue a rental permit for the property as a three-family dwelling and issue any certificates and/or permits to confirm same; and (4) staying all proceedings inconsistent with the requested relief, pending the trial of this action. Thereafter, on or about August 15, 2006, the Town issued a summons to plaintiff alleging that plaintiff rented the subject premises as a three-family dwelling without the proper rental permit, in violation of Islip Town Code § 68-30(B)(28)(A). That action, entitled, "The People of the State of New York against James Cooper," is currently pending against plaintiff in the Suffolk County District Court, Fifth District, under Docket Number ISTO 1942-06. In light of the summons issued by the Town, on or about March 21, 2007, plaintiff filed the instant application, by Order to Show Cause in Supreme Court, seeking to remove the District Court action to the Supreme Court. Plaintiff's application was granted by *ex parte* Order dated March 21, 2007 (Pitts, J.), which included a stay of the District Court proceedings pending a hearing and determination of the instant application.

Plaintiff alleges that when he purchased the subject property on or about June 15, 1970, it was a legal three-family dwelling. In support thereof, plaintiff has annexed a certificate of occupancy issued by the Town, dated March 12, 1982, which indicates that the subject property is a "3-Family Dwelling." Notwithstanding the foregoing, plaintiff alleges that the Town refuses to recognize the property as a legal three-family dwelling. Plaintiff submits that he has sought the proper rental permit from the Town, but was refused based upon the Town's assertion that the property is a one-family dwelling.

CPLR 325(b) provides in pertinent part, "[w]here it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the

action to itself upon motion” (CPLR 325[b]). The Court finds that removal of the District Court action to the Supreme Court is not warranted herein. An action alleging a town ordinance violation is quasi-criminal in nature, and is therefore within the jurisdiction of the District Court (see UDCA 2001; see generally *Beauchamp v Lucander*, 257 AD2d 494 [1999]). As such, removal to the Supreme Court is not necessary, and plaintiff’s motion is denied.

The Town has filed a cross-motion to dismiss the action and to vacate the stay, upon the grounds of, among other things, lack of subject matter jurisdiction; the existence of another action pending; and the absence of indispensable parties. The Town has annexed a subsequent certificate of occupancy, dated October 24, 1988, indicating that the subject property is a “1-Family Dwelling.” This certificate of occupancy clearly conflicts with the certificate submitted by plaintiff; however, the certificate provided by the Town postdates plaintiff’s certificate by approximately six and one-half years. The Town alleges that the property may only be used as a one-family dwelling, and that plaintiff, as absentee landlord, is illegally renting the premises without the proper rental permit. Moreover, the Town argues that plaintiff has not joined parties to this action that ought be parties, to wit: the Fifth District Court and the People of the State of New York, thereby warranting dismissal of the action on that ground.

With respect to that branch of the Town’s motion to dismiss pursuant to CPLR 3211(a)(2), lack of subject matter jurisdiction, this argument must fail as the supreme court is a court of general original jurisdiction. Article VI, section 7(a) of the New York State Constitution provides that, “the supreme court shall have general original jurisdiction in law and equity” (NY Const, art VI, § 7[a]). “The New York Supreme Court is a court of original, unlimited, and unqualified jurisdiction and is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed” (*Fry v Village of Tarrytown*, 89 NY2d 714 [1997]; see also *Matter of Ballard v HSBC Bank USA*, 6 NY3d 658 [2006]; *Doe v Riback*, 7 Misc 3d 341 [2005]). Further, CPLR 3001 specifically grants the supreme court jurisdiction to issue a declaratory judgment. As such, the Town’s allegation that this Court does not have subject matter jurisdiction to hear the instant declaratory judgment action is unavailing, and that branch of the motion is denied.

With respect to the branch of the Town’s motion to dismiss pursuant to CPLR 3211(a)(4), that there is another action pending between the same parties for the same cause of action in another court in New York State, this

argument must also fail. Although there is another action pending involving these parties in the Suffolk County District Court, that action alleges plaintiff violated the Islip Town Code by failing to secure the proper rental permit prior to renting the property to third parties. The instant action seeks, among other things, a declaratory judgment that the property is a legal three-family dwelling. Thus, the two actions and the relief sought by them are not the same or substantially the same (see *Zirmak Inves. v Miller*, 290 AD2d 552 [2002]; *Casa de Cambio Delgado, Inc. v Casa de Cambio Puebla, S.A. de C.V.*, 196 Misc 2d 1 [Sup Ct, Queens County 2003]). In addition, the general rule is that for the instant action to qualify for dismissal on this ground, the other must have been commenced first (see e.g. *Izquierdo v Cities Service Oil Co.*, 47 Misc 2d 1087 [Sup Ct, Kings County 1965]). Here, the instant action was commenced first. Accordingly, this branch of the Town's motion is denied.

Next, regarding that branch of the Town's motion to dismiss pursuant to CPLR 3211(a)(7), failure to state a cause of action, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that the complaint is legally sufficient. As such, this branch of the Town's motion is also denied.

Regarding that branch of the Town's motion based upon CPLR 3211(a)(8), lack of personal jurisdiction, the Town failed to raise this as an affirmative defense in its answer, or in a pre-answer motion to dismiss. As such, this objection has been waived (see CPLR 3211[e]; *Aretakis v Tarantino*, 300 AD2d 160 [2002]; *Hatch v Tu Thi Tran*, 170 AD2d 649 [1991]).

Finally, with respect to that branch of the Town's motion based upon CPLR 3211(a)(10), that plaintiff has not joined parties to this action that ought be parties, to wit: the Fifth District Court and the People of the State of New York, the Court finds that the Fifth District Court and the People of the State of New York are not "necessary" parties to this action, as contemplated by CPLR 1001(a). As this action seeks a judgment declaring the rights of plaintiff with respect to the subject property, complete relief can be granted in the absence of those parties (CPLR 1001[a]). Accordingly, this branch of the Town's motion is denied.

In view of the foregoing, that branch of the Town's motion to vacate the stay currently imposed on the District Court action by *ex parte* Order dated March 21, 2007 (Pitts, J.), is denied. The stay contained therein shall continue and remain in effect until further Order of this Court.

Finally, the Town's application for costs, disbursements, and reasonable attorneys' fees is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: August 15, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court