

Town of Riverhead v Gezari

2008 NY Slip Op 32117(U)

July 11, 2008

Supreme Court, Suffolk County

Docket Number: 0005317/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 5317/2008

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

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 TOWN OF RIVERHEAD,

Plaintiff,

-against-

WALTER GEZARI, DEBBIE F. MA and
 INTER-ARCHIPELAGO AIRWAYS,
 INCORPORATED,

Defendants.

ORIG. RETURN DATE: FEBRUARY 28, 2008
 FINAL SUBMISSION DATE: MARCH 13, 2008
 MTN. SEQ. #: 001
 MOTION: MG

ORIG. RETURN DATE: FEBRUARY 28, 2008
 FINAL SUBMISSION DATE: MARCH 13, 2008
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:

DAWN C. THOMAS, ESQ.
 RIVERHEAD TOWN ATTORNEY
 BY: DANIEL P. McCORMICK, ESQ.
 DEPUTY TOWN ATTORNEY
 200 HOWELL AVENUE
 RIVERHEAD, NEW YORK 11901
 631-727-3200

DEFT'S/RESP ATTORNEY:

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 206 ROANOKE AVENUE
 RIVERHEAD, NEW YORK 11901
 631-727-3904

Upon the following papers numbered 1 to 10 read on this motion _____
FOR A PRELIMINARY INJUNCTION AND CROSS-MOTION TO DISMISS _____.
 Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting
 papers 4-6; Affirmation in Opposition and supporting papers 7, 8; Other Transcript of
February 1, 2008 Proceedings - 9; Stipulation of February 27, 2008 - 10; it is,

ORDERED that this motion by plaintiff for an Order enjoining and restraining defendants, their agents, servants, employees, members, tenants, lessees, representatives and all other persons acting on their behalf or in concert with defendants, from causing, allowing and/or permitting, in any manner or by any means, pending the determination of this action, from the following acts on two separate parcels of property known and designated as 269 Deep Hole Road, Calverton, Town of Riverhead, County of Suffolk, State of New York, which parcel

of property is more particularly described on the Suffolk County Tax Map as District 0600, Section 100.00, Block 02.00, Lot 019.012, and 230 Deep Hole Road, Calverton, Town of Riverhead, County of Suffolk, State of New York, which parcel of property is more particularly described on the Suffolk County Tax Map as District 0600, Section 080.00, Block 01.00, Lot 006.000 (the "subject premises"):

(a) the use, occupancy and/or maintenance of the subject premises for all aircraft, airplanes and/or helicopters, including but not limited to a helicopter known by the registration number "N119RW" (the "subject helicopter") until such time as defendants have obtained all of the necessary permits and approvals for the use and occupancy of the subject premises for the take-off and landing of aircraft, airplanes and/or helicopters from the Town of Riverhead pursuant to the Code of the Town of Riverhead, is hereby **GRANTED** for the reasons provided hereinafter; and it is further

ORDERED that this cross-motion by defendants for an Order, pursuant to CPLR 3212, dismissing the within action based upon the fact that there is no merit to the cause of action, is hereby **DENIED**.

Plaintiff commenced this action by Order to Show Cause and summons and verified complaint on or about February 1, 2008, seeking: (1) an injunction enjoining and restraining defendants from utilizing the subject premises for the landing and/or taking-off of aircrafts, airplanes and/or helicopters, including the subject helicopter, until such time as defendants have obtained all of the necessary permits and approvals for the use and occupancy of the subject premises for the taking-off and landing of aircraft, airplanes and/or helicopters from the Town of Riverhead pursuant to the Code of the Town of Riverhead; (2) that the Court set forth an Order directing defendants to comply with all of the rules and regulations of the Code of the Town of Riverhead in regard to the use and occupancy of the subject premises; and (3) that the Court award damages against defendants, jointly and severally, in an amount of not less than fifty thousand dollars (\$50,000.00) for the alleged violations of the Code of the Town of Riverhead.

By the instant application, plaintiff seeks a preliminary injunction as described hereinabove, and had sought a temporary restraining order enjoining defendants from using, occupying, or maintaining the subject premises for all

aircraft, airplanes and/or helicopters, including but not limited to the subject helicopter until such time as defendants have obtained all of the necessary permits and approvals for the use and occupancy of the subject premises for the take-off and landing of aircraft, airplanes and/or helicopters from the Town of Riverhead pursuant to the Code of the Town of Riverhead. After oral argument held on the record on February 1, 2008, the Court (Whelan, J.) enjoined defendants solely to the following extent:

“Only 269 Deep Hole Road, Calverton, NY, the use, occupancy, and/or maintenance for all aircraft, airplanes and/or helicopters including but not limited to a helicopter known by the registration number N119RW for the take-off and landing of aircraft, airplanes and/or helicopters from the Town of Riverhead.”

By stipulation of the parties dated February 27, 2008, the parties agreed to continue the temporary restraining order until the Court renders a determination on defendants' motion to dismiss the action.

Plaintiff alleges that defendants have been taking-off and landing the subject helicopter on the subject premises without a special permit and in violation of the Riverhead Town Code. In support thereof, plaintiff has submitted affidavits of Riverhead Town Police Officer Kimberly Holt; Riverhead Town Senior Investigator Kevin G. Maccabee; John A. Morrow Jr.; Richard Craven; Michael T. Cuevas; Barbara Grattan, Riverhead Town Clerk; Joanne Krajewski, Riverhead Town Building Department Senior Clerk Typist; and Kim Fuentes, Riverhead Town Account Clerk Typist. Plaintiff argues that defendants' activity on the subject premises render the premises an “airport” as that term is defined in the Town Code. As such, plaintiff alleges that defendants activity without the requisite special permit or use permit violates Riverhead Town Code Section 108-73. Plaintiff has annexed the aforementioned affidavit of Barbara Grattan, Riverhead Town Clerk, who alleges that a search of the records of the Riverhead Town Clerk's Office in regard to the subject premises reveal that both parcels are situated within the Agricultural Protection Zoning Use District, and that no special permit or use permit for an “airport” was issued to defendants. Plaintiff has also annexed the aforementioned affidavit of Joanne Krajewski, Riverhead Town Building Department Senior Clerk Typist, who alleges that a search of the records of the Riverhead Building Department in regard to both parcels similarly reveal that no use permit had been applied for or issued for an “airport” or helicopter

landing site, nor had a certificate of occupancy been issued for either parcel. Moreover, within the affidavit of Kim Fuentes, Riverhead Town Account Clerk Typist, Ms. Fuentes avers that a search of the records of the Riverhead Town Planning Department and Zoning Board of Appeals in regard to the subject premises reveals that there is no record of a special permit or use permit for an "airport" having been issued by the Town Board of the Town of Riverhead.

As such, plaintiff argues that defendants' alleged use of the subject premises as an airport and/or helicopter landing site: (1) violates Section 108-22 of the Riverhead Town Code, in that the activity is a non-permitted use in an Agricultural Protection Zoning Use District; (2) violates Section 108-130, as defendants have not obtained an approved site plan from the Planning Board; and (3) violates Section 108-73, as defendants have not obtained the necessary use permit from the Town Board. Plaintiff argues that if defendants are not in compliance with the Town Code, irreparable injury will result, as the violations may cause a detriment to the health and safety of those utilizing the subject premises, as well as defendants' neighbors residing in the vicinity.

In response, defendants have filed a motion to dismiss the action based upon the fact that there is "no merit to the cause of action." Defendants claim that the provision of the Town Code relied upon by plaintiff does not in any way relate to the activity being undertaken by defendants. As such, defendants argue that they are entitled to summary judgment pursuant to CPLR 3212. Defendants allege that when this legislation was passed by the Town Board in 1979, it was not the Board's intention to legislate out of existence the casual use of aircraft by individual land owners within the Town. In support thereof, defendants have submitted an affidavit of ALLEN M. SMITH, the supervisor of the Town of Riverhead from January of 1976 until December 31, 1980. Mr. Smith avers that it was not the intent of the legislation to limit the occasional intermittent use of aircraft by individuals upon their property, and that helicopters are being used for other applications within the Town without special permits, i.e., agricultural use and hospital emergency use.

Defendants have also submitted an affidavit of defendant WALTER GEZARI, who avers that the subject helicopter is used solely by him for his personal transportation, as well as in connection with traveling "about the east coast" for business purposes. Mr. Gezari indicates that he purchased 230 Deep Hole Road, a ten acre vacant parcel, specifically to facilitate his landing and takeoff. Further, Mr. Gezari claims that at no time does he fly over his neighbors' homes, and that weeks go by without any helicopter activity on his property.

The Riverhead Town Code defines the term “airport” as “[a]ny landing area used regularly by aircraft for receiving or discharging passengers or cargo or for the landing and takeoff of aircraft being used for personal or training purposes” (Riverhead Town Code § 108-3[B] [emphasis supplied]). Moreover, section 108-62 of the Town Code, entitled “[a]irport facilities and accessory uses,” provides, “[n]o airport facility or accessory building, structure or use shall be constructed, expanded, installed, used, maintained, arranged or designed to be used, erected, reconstructed or altered in any use district except when authorized by special permit from the Town Board” (Riverhead Town Code § 108-62). Defendants argue that there is no interpretation of the definition of “airport” that would encompass defendants’ personal helicopter use on the subject premises. However, the Court finds that the definition of “airport” expressly includes “the landing and takeoff of aircraft being used for personal . . . purposes,” the admitted purposes of the subject helicopter. Defendants further argue that “regular” use of aircraft must be found to satisfy the definition, and that defendants’ use of the subject helicopter is not regular. The Court finds this argument to be unpersuasive. The term “regularly” is found in the *first* clause of the definition, and applies to any landing area used by aircraft for receiving or discharging of passengers or cargo. That term does not appear in the second clause of the definition to describe aircraft being used for personal or training purposes. Thus, contrary to defendants’ argument, “regular” use of a landing area by aircraft for personal purposes, such as in the case at bar, need not be found to satisfy the definition of “airport” under the Town Code.

To be entitled to preliminary injunctive relief with respect to a violation of its ordinance, a municipality need not meet the traditional three-prong test. Instead, it must demonstrate both a likelihood of success on the merits and that the balancing of equities weighs in its favor (see Town Law § 268[2]; *Town of Thompson v Braunstein*, 247 AD2d 753 [1998]; *City of Albany v Feigenbaum*, 204 AD2d 842 [1994]; *Town of Lake George v Dehaan*, 192 AD2d 820 [1993]; *Town of Esopus v Fausto Simoes & Assocs.*, 145 AD2d 840 [1988]; *Town of Islip v Clark*, 90 AD2d 500 [1982]). A preliminary injunction will not be granted absent a showing that there is a clear right to such relief on the undisputed facts presented (*Town of Smithtown v Carlson*, 204 AD2d 537 [1994]). Moreover, since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]).

The Court has weighed the elements necessary for the granting of injunctive relief to plaintiff, and finds that an injunction is warranted herein based upon the undisputed facts that defendants are utilizing the subject premises as an "airport," as that term is defined by the Riverhead Town Code, without an approved site plan or special permit issued by the Town. Based upon the foregoing, the Court finds that plaintiff has made a strong showing of a likelihood of success on the merits. Further, in balancing the equities, the Court finds that the scale tips in favor of plaintiff, as defendants continue their activity within the Town without the requisite permit. Defendants do not deny their helicopter activity, but instead argue that such activity does not fall within the definition of "airport." As discussed hereinabove, this Court disagrees. Moreover, defendants' continued activity could have an adverse effect on the health, safety, and welfare of the populace of the Town of Riverhead.

Accordingly, plaintiff's motion for an Order granting the preliminary injunction described hereinabove is **GRANTED** with respect to the premises known as 269 Deep Hole Road, Calverton, New York, and 230 Deep Hole Road, Calverton, New York, pending the determination of the instant action. Defendants' cross-motion to dismiss the action is **DENIED**, as the Court finds, for the reasons stated, that plaintiff's action has merit.

The foregoing constitutes the decision and Order of the Court.

Dated: July 11, 2008



HON. JOSEPH FARNETI
Acting Justice Supreme Court