Town of Onondaga v Grimm
2008 NY Slip Op 33024(U)
November 7, 2008
Supreme Court, Onondaga County
Docket Number: 2007-0078
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on September 9, 2008.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

TOWN OF ONONDAGA BY DAVID COONS, DIANE COONS, MARK HARTNAGEL and JOHN SHAMLIAN, CONSTITUTING THREE DISTRICT TAXPAYERS PURSUANT TO TOWN LAW SECTION 268(2),

Plaintiffs,

v.

MICHAEL GRIMM, MICHAEL GRIMM SERVICES, INC., MICHAEL ROOT GRIMM, LLC and KAREN GRIMM, LLC

Defendants,

DECISION AND ORDER ON MOTION

Index No.: 2007-0078
RJI No.: 33-07-3510

APPEARANCES: **SCOTT F. CHATFIELD, ESQ.**
For Plaintiffs

RICHARD H. SARGENT, ESQ., OF SARGENT & GILMORE, LLP
For Defendants

The plaintiffs have brought this action pursuant to Town Law §268(2) seeking to enjoin the defendants from operating their landscaping business in a residential district. Pursuant to the statute, the plaintiffs seek a permanent injunction prohibiting the defendants' use of the property. The plaintiffs have now moved for summary judgment on their complaint and the defendants have cross-moved for summary judgment claiming a legal non-conforming use as recognized by

the Town Code Enforcement Officer. In addition, the defendants contend that the plaintiffs lack standing as they are neither aggrieved tax payers within the meaning of the statute nor are they in the appropriate zone of interest. Inasmuch as the defendants have raised these threshold issues on their cross-motion, they must be addressed prior to this Court's consideration of the plaintiffs' motion.

Town Law §268(2) provides:

> In any case any building or structure is...erected, constructed, reconstructed, altered, converted or maintained or any building structure or land is used...in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, use or division of land to restrain, correct or abate such violation to prevent the occupancy of such building, structure or land or prevent any illegal act, conduct, business or use in or about such premises; and upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.

Town Law §268(2).

The law is well settled that in order to maintain a private action to enjoin a zoning violation, a plaintiff is required to establish that he or she has standing to do so by demonstrating that special damages were sustained due to the defendants' activities. *See, Williams v. Hertzwig*, 251 AD2D 655 (2d Dept. 1998), citing *Little Joseph Realty v. Town of Babylon*, 41 NY2d 738 (1997). An allegation of close proximity may give rise to an inference of injury enabling a nearby property owner to maintain an action without proof of actual injury. *See, id.*, *citing*

Matter of Sun-Brite Car Wash v. Board of Zoning and Appeals, Town of N. Hempstead, 69 NY2d 406. The injury plaintiffs assert is also required to fall within the "zone of interest" sought to be promoted or protected by the statutory provision; only a property holder in nearby proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damage, inasmuch as the adverse affect or aggrievement may be inferred simply from the proximity. *See, Sun-Brite, supra*. In a case where the plaintiff's property is adjacent to the defendants' property, the plaintiff's proximity allegations are sufficient to establish standing. *See, Williams, supra*. That, however, is not the case here.

Although the plaintiffs have alleged that they are in close proximity to the defendants' property in their complaint, in their cross-motion the defendants have asserted that the plaintiffs are not "jointly or severally aggrieved" as required by the statute due to the location of their residences. The defendants have provided a map indicating the location of plaintiffs' properties. The map indicates that plaintiff Coons lives across the street from the defendants' property, 400 feet away "as the crow flies" and 662.45 feet by road, plaintiff Hartnagle lives several thousand feet from the property (2110.04 feet by straight line and 2651.86 feet by road), and plaintiff Shamlian lives over 3/4 of a mile away by road (3646.10 feet) and by straight line of over half a mile away (2962 feet). These calculations have not been controverted by the plaintiffs. While owners residing within 200 feet of the subject property are considered to be within close proximity *(see, In Re Michalak*, 286 AD2d 906 [4th Dept. 2001]), 4700 feet from the subject property does not fall within the presumption of close proximity (*see, Matter of Powers v. DeGroodt*, 43 AD3d 509 [3d Dept. 2007]). As such, the defendants contend that plaintiffs cannot establish the close proximity of all three plaintiffs and as such, in order to establish

standing, they are required to submit proof of an actual and specific injury. Where, as in this case, the defendants as the moving parties meet their burden in the first instance, the plaintiffs, as the non-moving party, are required to raise an issue of fact through the submission of admissible non-speculative evidence. *See, Majchrzak v. Harry's Harbour Place Grille*, 28 AD3d 1109 (4th Dept. 2006).[1] The plaintiffs have failed to do so. Plaintiffs have not controverted the defendants' argument concerning proximity nor is there any proof in the record of actual or specific injury. Plaintiffs have merely alleged that certain business carried on by the property and that as a result trucks are coming and going from the property. However, such allegations are insufficient to allege a different or unique injury from that experienced by the public at large. *See, Sun-Brite, supra.* Plaintiffs Coons have standing as a result of close proximity given the 400 foot distance from the subject property. Plaintiffs Hartnagel and Shamlian, however, do not given that their distance is beyond 2000 feet. Inasmuch as these plaintiffs have failed to show proof of an actual or specific injury the defendants' cross-motion to dismiss the complaint for lack of standing is granted.

The defendants' second threshold argument on their cross-motion for summary judgment is that the statute does not authorize the plaintiffs' action in the case at bar because the Town has previously issued a proper determination. The defendants contend that the Town of Onondaga has made a determination as to the proper use of the subject property by virtue of previous determinations by the Town of Onondaga Codes Enforcement Officer, Ronald Ryan. The defendants provide correspondence between Ryan and the Town Supervisor in February of 1999

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[1] The plaintiffs fail to submit any opposition to the defendants' cross-motion. Although plaintiffs' counsel orally addressed the issue of standing at the oral argument, nothing in evidentiary form has been offered.

which shows the town was aware of the relocation of the defendants' business to the subject property and commercial use thereof in October of 1998. The defendants have also shown that in 2003 they sought an opinion from Ryan with respect to their use of the property. The opinion indicated that the defendants' landscaping business had relocated to the subject address at the town's urging to reduce the impact that the previous location was creating to area residents and concluded that "Your operation as it is known to exist would be a permitted use on the property described above". *Ryan letter dated July 2, 2003*. In addition, the defendants have offered an affidavit from Ryan which indicates that since the relocation of the business the defendants have continuously operated it without complaint and that no time did any neighbor or resident of the town complain that the use of the property was illegal. However, "in a taxpayers action to enforce compliance with the zoning law upon failure to the town officers to do so the taxpayer plaintiffs have no greater right to demand compliance than do the town officials". *Marlow v. Elmwood, Inc*., 12 AD3d 742 (3rd Dept. 2004). The Codes Enforcement Officer made a determination and found no zoning violation exists; where such a determination is made, there is no "official lassitude or nonfeasance" in the enforcement of the zoning laws which citizen taxpayers may overcome. *See, id., citing Little Joseph Realty v. Town of Babylon, supra*. Therefore, any challenge to the town official's determinations that the defendants' operation comported with zoning requirements should have been properly raised in the appeal to the town's zoning board of appeals (*see, Town Law* §267-a) and thereafter in a timely CPLR Article 78 proceeding. *See, id., citing Matter of Mayes v. Cooper*, 283 AD2d 760 (3d Dept. 2001). As such, whether the officer's determination based on his judgment call of a permitted use or nonconforming use was proper is not for this Court to determine. Although criticized

extensively in the commentaries to the statute[2] this Court affords no weight to the commentator's opinion in this instance. Inasmuch as there is no contrary law in the Fourth Department, this Court adopts the *Marlow* holding here. The plaintiffs again have failed in their burden to raise an issue of fact. *See, Majchrzak, supra*. As such, the defendants' cross-motion for summary judgment dismissing the complaint is granted on this ground as well.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the plaintiffs' motion for summary judgment is denied, and it is further

ORDERED, that the defendants' cross-motion for summary judgment dismissing the complaint is granted.

ENTER

Dated: November 7, 2008
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

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[2] Commentator Terry Rice claims that the decision "judicially imposes prerequisites and conditions to the institution of a taxpayers action pursuant to Town Law §268(2) that are not contained in the statute and that effectively eviscerate the provision as a viable source of redress by aggrieved neighbors of an impermissible land use". However, Rice admits in a footnote to his scathing commentary that he represented the unsuccessful plaintiffs in *Marlow*.