Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 11814/2007
MOTION DATE: 2/19/09
MOTION NO.: 001 MG

TOWN OF SOUTHOLD,

Plaintiff,

-against-

THE ESTATE OF GRACE R. EDSON and LEWIS EDSON a/k/a LEFFERTS P. EDSON,

Defendants.

PLAINTIFF'S ATTORNEY:
SMITH, FINKELSTEIN, LUNDBERG, ISLER & YAKABOSKI
456 Griffing Avenue, P.O. Box 389
Riverhead, New York 11901

DEFENDANT'S ATTORNEY:
WICKHAM, BRESSLER, GORDON & GEASA, P.C.
13015 Main Road, P.O. Box 1424
Mattituck, New York 11952

Upon the following papers numbered 1 to 40 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 15-19; 20-28; 29-32 ; Replying Affidavits and supporting papers 33-40 [1]; ~~Other~~ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of plaintiff Town of Southold for an order pursuant to CPLR R. 3212 granting summary judgment to plaintiff and permanently enjoining and restraining defendants and their agents from using and occupying the accessory agricultural building on their property located at Main Road, Cutchogue, New York for retail use unless and until such time as the violations of the Southold Code and New York State Code have been remedied and defendants have obtained a certificate of occupancy for such use from the Town of Southold is granted.

The record reflects that defendants are the owners of an approximately 23-acre parcel of land located in the Town of Southold (the "Town"). Since approximately 1986, the property has been operated as a tree nursery known as "Santa's Christmas Tree Farm," and the majority of its acreage has been planted with evergreens in various stages of development, principally for sale as Christmas trees during the Christmas season. The property is presently zoned "R-80 Residential Low-Density" (Town Code of Town of Southold §280-5) and is improved with a 2,000-square-foot single-family residence and an approximately 8,000-square-foot "accessory nursery building."

The record further reflects that the original accessory nursery building, comprising approximately 2,520 square feet, was constructed pursuant to a building permit issued on June 27, 1986, and for which a certificate of occupancy was issued on January 13, 1987. Thereafter, on June 1, 1990, a building permit was issued for the construction of a 5,460-square-foot addition to the existing accessory nursery building, and a certificate of occupancy for the addition was issued on August 1, 1990.

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[1] The Court declines to consider the unauthorized "sur-reply affidavit" of defendant Lewis P. Edson (as well as the "supplemental affirmation" of plaintiff's counsel submitted in response).

In its complaint, dated April 11, 2007, plaintiff alleges that since around 1990, defendants have operated a retail store, known as "Santa's Christmas Tree Farm and Gift Shop," in the accessory building, where they engage in the year-round retail sale of holiday ornaments, decorations, figurines, gifts and related products not grown on the premises. Plaintiff alleges that the operation of a retail store is not a permitted use in the R-80 zoning district pursuant to §280-13(A) of the Town Code of the Town of Southold (the "Code"). Plaintiff further alleges that defendants do not have a certificate of occupancy for the retail use of the accessory building, as required by Code §144-15, and that changes to the electrical system have not had the required inspections. Plaintiff further alleges that, without obtaining the necessary approvals, and in violation of the Code, defendants have expanded their accessory retail business to include almost exclusively products not manufactured or grown on the premises, and that defendants' continued use of the premises poses a risk to the health, safety and welfare of the patrons, employees and residential neighbors of Santa's Christmas Tree Farm and Gift Shop. Plaintiff seeks a permanent injunction enjoining the alleged Code violations by defendants, and now moves for summary judgment on its claims.

In support of the motion, plaintiff has submitted the affidavit of the Town's Code Enforcement Director Edward Forrester, sworn to September 8, 2008; the affirmation of its attorney, Phil Siegel, Esq., dated September 8, 2008; a copy of the pleadings; a copy of the building permit/certificates of occupancy issued in connection with the accessory nursery building; copies of the Code provisions alleged to be applicable; and portions of defendants' prior unsuccessful application for a change of zone from R-80 to B Business.

In their answer, dated April 11, 2007, defendants deny the substantive allegations of plaintiff's complaint, and assert the affirmative defenses of estoppel, waiver, selective enforcement, and laches, as well as the existence of a prior action for the same relief under Index No. 8034/2004, as bars to plaintiff's claims. Defendants vigorously oppose plaintiff's motion, and have submitted in opposition the affidavit of defendant Lewis Edson, sworn to December 3, 2008; the affirmation of defendants' attorney, Eric J. Bressler, Esq., dated December 12, 2008; and the affidavit of Richard F. Lark, sworn to November 24, 2008; together with various exhibits including copies of documents allegedly pertaining to the prior action under Index No. 8034/2004[2]; copies of earlier Code provisions alleged to be applicable to defendants' operations at the subject property; a decision of the local criminal court alleged to be relevant; and copies of the certificates of occupancy for the accessory building on the premises.

The affidavit of Edward Forrester, the Town's Director of Code Enforcement, reflects that defendants are operating a large retail establishment in the accessory building on their agricultural property which is located in the R-80 residential zoning district. Mr. Forrester's affidavit further reflects that the vast majority of products sold by defendants in their retail store are not grown on the premises, including manufactured holiday ornaments, decorations, lights, figurines, gifts, and related products. Mr. Forrester avers that with the exception of Christmas trees, garlands and wreaths during the holiday season, the defendants do not sell agricultural products in the accessory nursery building.

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[2] Although it appears that defendants intended to attach copies of the pleadings in the prior action, the summons and complaint annexed to the Edson affidavit as part of "Exhibit A" are those interposed in the instant action.

Code §280-13(A) enumerates the permitted uses for buildings and premises in the A-C, R-80, R-120, R-200 and R-400 zoning districts. As relevant to the instant action, §280-13(A) permits

> "(2) The following agricultural operations and accessory uses thereto...:
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> (a) The raising of field and garden crops, vineyard and orchard farming, the maintenance of nurseries and *the seasonal sale of products grown on the premises*" [emphasis added].
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> (c) Barns, storage buildings, greenhouses (including plastic covered) and other related structures, provided that such buildings shall conform to the yard requirements for principal buildings."

Pursuant to Code §280-8(E), "[a]ny use not permitted by this chapter shall be deemed to be prohibited." Thus, except to the extent of permitting the accessory seasonal sale of products grown on the premises of an agricultural operation, the maintenance of a retail store is not a permitted principal or accessory use within the R-80 zoning district. It is undisputed that the certificates of occupancy for the accessory building, described therein as an "accessory nursery building" and "addition to an existing agricultural building as applied for," do not authorize its use as a retail store.

The affidavit of Mr. Forrester further avers that pursuant to Code §280-127, the expansion of the agricultural building for the operation of defendants' retail store required site plan approval by the Town of Southold Planning Board (the ordinance provides that "[a]ny change in use or intensity of use which will affect the characteristics of the site in terms of parking, loading, access, drainage, open space or utilities will require site plan approval"). The submissions establish that site plan approval was neither sought nor obtained by defendants. In addition, the record reflects that defendants' prior application to change the zoning of the portion of their property occupied by the accessory building from residential to business was denied.

Plaintiff's submissions establish, *prima facie*, that defendants' operation of a large retail establishment in an building authorized to be used only for accessory agricultural use, and the sale therein of products the majority of which are not grown on the premises, is a violation of the Town's zoning ordinances. It is well established that "[a] town is entitled to a permanent injunction to enforce its building and zoning laws upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law" *(Town of Brookhaven v Mascia*, 38 AD3d 758 [2d Dept 2007]). Plaintiff's submissions thus establish its *prima facie* entitlement to a permanent injunction enjoining defendants' operation of their retail store in the accessory building on the premises (*id.*;Town Law §§135(1), 268(2)).

In opposition to the motion, defendants argue that their retail operation is merely incidental and accessory to the principal agricultural use of the property as a Christmas tree farm, and that the Town building department issued the certificate of occupancy for the accessory building with full knowledge of the nature of the use. Defendants contend that the Town – many of whose elected officials regularly patronized the business – recognized its use as legitimate and even took steps to aid in its development. Such assertions, however, even if true, are irrelevant to

defendants' arguments that the Town is estopped from now enforcing its zoning laws against it. It is well established that "estoppel may not be invoked against a municipality to prevent it from discharging its statutory duties" (*Parkview Associates v New York*, 71 NY2d 274 [1988]). Moreover, "a municipality may not be estopped from enforcing its zoning laws either by the issuance of a building permit or by laches" *(City of Yonkers v Rentways, Inc.*, 304 NY 499, 505).

Defendants' further assertions that plaintiff is selectively prosecuting defendants are unsupported by any admissible evidence, and there is no showing that additional discovery will yield facts that support defendants' arguments (*Town of Brookhaven v Mascia*, *supra*, 38 AD3d at 759).

Defendants further argue that the sale of Christmas-related items was permitted under the zoning ordinance in effect at the time they began their retail operations. The affidavit of Mr. Edson asserts that the property was then located in an "A" zoning district, and that there was no restriction regarding the sale of items not grown on the premises. The copy of the "1971 zoning ordinance Section 100-30" annexed to Mr. Edson's affidavit as Exhibit G fails, however, to support defendants' argument. Code §100-30(A), applicable to the "A Residential and Agricultural District," permitted "the following commercial agricultural operations and accessory uses thereto... (a) The raising of field and garden crops, vineyard and orchard farming, the maintenance of nurseries *and the seasonal sale of products thereof* in buildings, subject to the following special requirements: [1] All one-story buildings for display and retail sales of agricultural and nursery products *grown primarily on the premises* shall not exceed one thousand (1,000) square feet in floor area...." [emphasis added]. Contrary to defendants' argument, the statute did not authorize the sale of items not grown on the premises. Moreover, the retail sale of products not grown on the premises is not a generally recognized accessory use to agricultural property and will be prohibited even in the absence of an express statutory provision such as that at issue here (*Ecker v. Dayton*, 234 AD2d 584 [2d Dept 1996]).

Similarly unsupported is defendants' assertion that site-plan approval was not required. The record reflect that Code §280-127 was adopted in 1989 and thus, although not applicable when defendants assertedly commenced their retail operations, was applicable in 1990 when defendants expanded the accessory building. The fact that the building inspector at the time may not have required site plan approval for defendants' planned expansion of the building is not dispositive, as the building permit application building did not give notice of the scope and purpose of the planned expansion, and defendants' own submissions establish the limited scope of defendant's retail operations prior to the expansion of the accessory building.

The affidavit of Richard F. Lark, who describes himself as a former Special Assistant District Attorney of Suffolk County for the purpose of prosecuting violations of the Southold Town Codes and advising the Southold Town Building Department as to zoning and building code matters, reflects Mr. Lark's personal observations of defendants' retail operations in late November or early December of 1986[3] when he was dispatched to the property to investigate possible zoning code violations as a result of "numerous complaints" regarding traffic problems

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[3] In his affidavit Mr. Lark does not expressly state the year of his visit, but it is apparent from the other statements therein that the visit must have occurred at the end of 1986. Mr. Lark states that after his visit, the building inspector visited the property and thereafter issued a certificate of occupancy for the accessory nursery building. Since the certificate of occupancy was issued in January 1987, Mr. Lark's visit must have occurred in 1986.

at the entrance to the farm and allegations regarding the sale of Christmas ornaments, lights and decorations that were not grown or made on the premises. The affidavit reflects that as Mr. Lark entered the (then much smaller) agricultural building he observed "balled Christmas trees, some of which had decorations on them, along with evergreen wreaths and roping on display all of which were for sale....There were several rows of tables upon which various items such [as] Christmas tree ornaments, colored lights and other kinds of Christmas decorations were displayed for sale." Mr. Lark states that Mr. Edson told him at the time that the sale of those items which obviously were not grown on the premises was on a seasonal basis and were used to promote the sale of the Christmas trees, and that the rest of the year the building was used for the storage of supplies, equipment, fertilizer and tractors that were utilized in the nursery. Mr. Lark concluded that the sale of these manufactured Christmas-type items was "accessory and incidental to the prime use of the property which was the planting, cultivation and growing of Christmas trees for sale," and so reported to the then-building inspector. Mr. Lark states that thereafter the building inspector visited the property, concluded that the owner was properly operating within the zoning code, and subsequently issued a certificate of occupancy for the accessory nursery building.

The affidavit of Mr. Lark thus establishes that prior to the 1990 expansion, defendants' retail operations – although concededly including the sale of a limited number of manufactured items not "grown on the premises" – were relatively modest, and that the principal use of the building was for the seasonal sale and display of Christmas trees, evergreen wreaths, and roping grown on the premises. It is undisputed that the present retail operation is vastly expanded, and that the sale of items not grown on the premises now predominates. Indeed, Mr. Lark's description of "several rows of tables" displaying Christmas-related items must be contrasted with defendants' own description of the current use of the "accessory nursery building," as reflected by defendants' webpage, a printout of which is annexed to plaintiff's reply affirmation as Exhibit R. That document begins, "When you walk into our store you will say 'WOW,'" an assessment with which, upon perusing the contents, the Court wholeheartedly agrees. Defendants' webpage boasts that defendants' "retail space measures almost 10,000 square feet making us one of the largest Christmas stores in the northeast" and reports that defendant is "a Dept. 56 retailer of Snow Village, Dickens, The City, New England, the North Pole and Snow Babies. Other lines that we carry include, Yankee Candle, Fontanini, Old World Christmas, Lenox just to name a few. We carry all tree trimmings, gift wrap, cards and many specialty items. We have a large selection of personalized items and have a local artist on premise to personalize any ornament you choose. Also we make our own fresh wreaths decorated on premises. If you visit after Thanksgiving we have Santa here on the weekends."

There is no logical process whereby the above-enumerated list can be considered to constitute usual and customary accessories to an agricultural operation. It is apparent from the record herein that the building permit and certificate of occupancy issued in connection with the construction of the addition to defendant's accessory nursery building in 1990 did not and could not authorize the operation of a 10,000-square-foot retail store for the sale of items the vast majority of which are neither agricultural or nursery-related and which were not grown or produced on the premises (*see, Ecker v Dayton*, *supra,* 234 AD2d at 585 [2d Dept 1996]). The record is clear that the accessory use of the building has expanded well beyond that contemplated by the zoning ordinances, and the Town is properly acting to restrict such impermissible use and protect the character of the residential neighborhood in which defendants' Christmas tree farm is located.

Defendants' submissions in opposition to plaintiff's motion fail to rebut plaintiff's *prima facie* showing of entitlement to summary judgment or to demonstrate the existence of material issues of fact. In light of the foregoing, plaintiff's motion for summary judgment is granted, and defendants are permanently enjoined from operating a retail store on their property for the sale of items not grown on the premises until such time as the violations of the Southold Town Code have been remedied and defendants have obtained a certificate of occupancy for such retail use.

Settle judgment.

Dated: August 6, 2009

PAUL J. BAISLEY, JR.
J.S.C.

__X__**FINAL DISPOSITION** ____**NON-FINAL DISPOSITION**