SUM

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

SVETLANA STRISHAK,

INDEX NO.:021493/08

Plaintiff,

MOTION DATE:12-14-09
SUBMIT DATE:12-21-09
SEQ. NUMBER - 001 & 002

-against-

TOWN OF NORTH HEMPSTEAD and KEVIN M. CRONIN, BUILDING COMMISSIONER OF THE TOWN OF NORTH HEMPSTEAD,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-23-09.....1
Notice of Cross-Motion, dated 12-4-09.....2
Affirmation in Reply, dated 12-11-09.....3

This motion by the plaintiff for summary judgment on her complaint and dismissal of the counterclaim asserted by defendants (sometimes jointly referred to here as "the Town"), and the cross motion by the defendants for summary judgment on their counterclaim and to dismiss the complaint, are decided as follows:

This is an action to resolve an open permit, which had allowed construction of a fence on the residential property formerly owned by the plaintiff and her husband. They sold the subject property in May, 2008 to Keith and Vanisa McGrath, non-parties to this action, but because of this and two other open permits had agreed to have their attorney hold $20,000

in escrow until all were closed of record by defendants by way of a writing. In the escrow agreement, the purchasers agreed that the seller would "perform... all services which may be necessary to obtain the same." That money is still being held in escrow.

The three open permits were for an alteration/addition (issued May, 1986), for moving a play structure (issued September, 1993) and for installation of a new fence (issued May, 1997). In March, 2008, in obvious contemplation of the sale, plaintiff asked the Building Department to inspect the premises. Such an inspection occurred and resulted in a report dated April 22, 2008, confirming that no alteration/addition had been made and that the play structure had been removed, but no mention was made of the fence. The report also stated a need to see the plans for the E.U. (Certificate of Existing Use) and that the Town may need new plans for the dwelling. Thereafter, defendants did not respond to several telephone calls attempting to resolve the issue prior to the closing of title on the house. The official sign-offs for indicating the closing of the open permits were not forthcoming by the time of the closing, and this led to the escrow agreement noted above.

On June 24, 2008 defendant Building Commissioner issued a letter closing two of the permits, but not the one for the fence. Plaintiff states that upon a follow-up telephone call she was advised that the fence permit would be closed upon payment of a $100 permit renewal fee, which plaintiff paid on August 8, 2008. Nevertheless, the permit was not closed, and no certificate of completion was issued.

This law suit was then commenced, seeking a declaration that the work for which the fence permit was issued was performed and that the permit is closed, and for a direction that the defendants furnish a writing to that effect. The defendants' answer sets up several

affirmative defenses: that (i) plaintiff failed to comply with various conditions of the Code of the Town of North Hempstead; (ii) plaintiff failed to mitigate damages; (iii) plaintiff's own action/inaction caused the damages complained of; (iv) the plaintiff failed to submit required building plans to the Town, and (v) any alleged action/inaction was related to a legitimate governmental purpose.

The Town also asserts a counterclaim, in which it claims that upon its inspection it discovered a half bathroom on the first floor that was not installed under a permit, that it asked for but did not receive from plaintiff plans therefor under an existing Certificate of Existing Use. The Town contends that this request was well founded because such Certificate declared that it is void if the structure was altered "for any purpose for which it is certified." The Town asks for its own declaration that its actions were proper. The Town also issued a summons and commenced a proceeding against plaintiff in the District Court of Nassau County for a violation of the Code of the Town of North Hempstead regarding the half floor bathroom.

In her reply to the counterclaim, plaintiff asserts by way of an affirmative defense that neither she nor her husband had owned the property when the bathroom was installed, that it had been available for inspection when they sought permits for other purposes and that no violations were issued, and that the District Court proceeding was in retaliation for the instant law suit.

Given the foregoing, the Court finds that the appropriate procedural vehicle for the plaintiff's claim is an Article 78 proceeding sounding in mandamus to compel, as she seeks a ruling that the defendant Building Commissioner failed to perform a duty enjoined upon

him by law. CPLR 7803(1). It therefore converts the action to a special proceeding, and deems the verified complaint to be a verified petition, and the notice of motion to be a notice of petition. CPLR 103.

The plaintiff has provided affidavit proof that the fence was erected under the permit, and documentary proof that the Town's report after inspection did not mention the fence at all. At a minimum, this silence must be read as indicating that there were no violations noted regarding the fence. Pursuant to the Code of the Town of North Hempstead ("Code") § 2-17, the Building Commissioner therefore was obliged to issue her a certificate of completion for the fence under the open permit after she paid the fee to renew it. In its entirety, this section provides as follows:

> In those instances where *work* is performed under a permit but no certificate of occupancy is required, the Building Commissioner *shall issue* a certificate of completion if it is found that the *proposed work* has been completed substantially in accordance *with the permit and the laws applicable thereto*. The certificate shall also indicate the use or uses to which the structure or installation may thereafter be put and to what extent.

(Emphasis supplied.)

Accordingly, the Court finds that the plaintiff has made out a *prima facie* case that she was entitled to receive the certificate, closing the open fence permit.

Initially, the Court finds that the Town's procedural objections are without merit. It argues that the plaintiff cannot sue because she did not own the premises at the time she commenced this proceeding, and thus "surrendered any and all right... including the ability to bring this action and continue with its prosecution." Pitnick Aff., ¶ 34. This is, of course,

a reference to standing. However, this issue was waived when defendants did not make a pre-answer motion to dismiss, and served their answer without raising standing as an affirmative defense. CPLR 3211(a)(3), (e); *see, Countrywide Home Loans v Delphonse,* 64 AD3d 624 (2d Dept. 2009). Further, the Town contends that the statute of limitations of four months applicable to an Article 78 proceeding had run. However, this too was not raised and was waived. CPLR 3211(a)(5), (e); *see, Johnson v Civilian Complaint Review Board,* 30 AD3d 201 (1st Dept. 2006). In any event, the proceeding was timely commenced. Given the Town's advices that the fence permit could be closed if the renewal fee was paid, which it was, the triggering date for statute of limitations purposes based on the Building Commissioner's inaction would be no earlier than August 15, 2008, when petitioner's counsel wrote to him attaching a copy of the receipt for the fee and asking for the sign-off. The summons with notice was filed on December 1, 2008, within four months of this final attempt to get action on the fence permit after the Town's instructions were followed.

The failure to exhaust administrative remedies also is asserted, but this common prerequisite to court action has no application when a writ of mandamus is sought. *Matter of Milnarik v Rogers,* 298 AD2d 637 (3d Dept. 2002); *Matter of Friends Academy v Superintendent of the Div. of Building of Town of Oyster Bay,* 134 AD2d 497, 498 (2d Dept. 1987). Finally, the Town asserts that the matter should be dismissed for failure to join necessary parties, the buyers of plaintiff's property and current owners. However, pursuant to Code § 2-9 [C], applications regarding permits may be made by one who is not an owner where the owner authorizes the same, as was clearly the case here under the side escrow

agreement executed by the parties to the purchase. While the Code contemplates an affidavit from the owner being attached to any application, the clear intendment of this requirement is to assure Town officials of the applicant's power to act on behalf of the owner, and here the escrow agreement clearly serves that purpose. The Court therefore finds that for purposes of seeking an order compelling the Town to issue the certificate of completion, joinder of the owners is unnecessary.

Turning to the merits, defendants raise § 2-24 of the Code, which provides that appropriate actions or proceedings may be taken to prevent unlawful construction or to "correct or abate a violation." However, this is raised with respect to the first floor bathroom, and not the fence. The Town's position, succinctly stated by counsel, is that the "Town's action and/or inaction in withholding the issuance of the requested Certificate of Completion for the fence permit and commencing the criminal prosecution against the Plaintiff was warranted by virtue of the existence of the unpermitted half bathroom on the first floor of the Subject Premises and Plaintiff's continued failure to provide the Town with the building plans requested in the Inspection Report."

This is, in effect, an admission that as a factual matter there was no reason not to issue the certificate of completion for the fence, but also an assertion that the defendants had a right under the Code to use another, unrelated violation as a reason not to do what the Building Commissioner otherwise must do, *i.e.*, issue a certificate regarding the work that had been properly completed under the permit. This position is untenable under section 2-17, reproduced above.

This provision, read with section 2-24, clearly gives the Town the power to regulate,

in its discretion, any work for which a permit is required. However, the italicized portions of section 2-17 set forth above just as clearly indicate that the process leading to the issuance of a certificate of completion concerns the work contemplated under the permit, not any and all other work that may require other, separate permits. The phrase "with the permit and the laws applicable thereto" refers to the "proposed work" *i.e.,* the permit work, not some other project – and if properly completed, the certificate must issue. There is no other reasonable way to read this statute. While construction of statutes and regulations by those responsible for their administration generally will be upheld if not irrational or unreasonable, there is little basis for relying on any special competence or expertise where, as here, the matter is one of pure statutory construction and analysis. *Matter of Gaffney v Village of Mamaroneck,* 21 AD3d 1031 (2d Dept. 2005); *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.,* 14 AD3d 553 (2d Dept. 2005). As noted, the respondents do not raise any issue about the proper completion of the fence, but only the unrelated half bathroom. Accordingly, the respondent Building Commissioner was obliged to issue the certificate of completion pursuant to Code § 2-17. He is directed to do so within twenty days of the date of this order.

The Court rejects the Town's secondary argument that this application by the plaintiff is premature, in that discovery has not been undertaken, citing CPLR 3212(f). However, there is no reason to deny the petition on this ground where there is no showing that any of the facts presented by the parties regarding the fence could change as a result of disclosure. The mere hope that something might be found to strengthen the Town's case is insufficient. *Companion Life Ins. Co. of N.Y. v All State Abstract Corp.,* 35 AD3d 519, 521 (2d Dept.

2006). Indeed, as with much of defendants' papers, this argument is based upon the status of the bathroom, not the fence.

Finally, the Town's request to interpose an amended answer is denied. While leave is generally to be freely given, the sole basis here is to assert a statute of limitations defense. The Court may grant such an application even where the defense was waived by a failure to assert it in the original answer or in a preanswer motion to dismiss, but in this case the Court finds such a defense to be without merit, as indicated above. *See, Ingrami v Rovner,* 45 AD3d 806 (2d Dept. 2007).

However, the Court denies that branch of the plaintiff's application that is to dismiss the counterclaim. As noted, the Town's claim seeks a declaration that it acted properly in not issuing the certificate of completion for the fence given the status of the first-floor bathroom, and in bringing on the proceeding in the District Court. Although the Court has found that the Building Commissioner did not act properly, the counterclaim also concerns the bathroom itself, and on the present record the Court cannot make a determination with regard thereto. Moreover, unlike the situation with the open permits, the plaintiff is not authorized to defend an attack on the certificate of existing use/bathroom made by the defendants. As the owners' rights in their property are at issue, the McGraths must be joined as parties as plaintiffs on the counterclaim. CPLR 1001; *see, Censi v Cove Landings, Inc.,* 65 AD3d 1066 (2d Dept. 2009); *Matter of Caltagirone v Zoning Bd. of Appeals,* 49 AD3d 729 (2d Dept. 2008).

Accordingly, the counterclaim is severed from the main proceeding, is converted upon such severance to a counterclaim in an action, defendants are directed to add the McGraths

as plaintiffs (for purposes of the counterclaim only) within twenty days of the date of this order, and the McGraths, after proper service of the answer containing the counterclaim upon them, shall then serve a reply/answer to the counterclaim.

Should the defendants be so advised, they may withdraw the counterclaim without prejudice to commencement of a new action consistent with this order.

The plaintiff's request for sanctions is denied.

The foregoing constitutes the Decision and Order of the Court.

DATED: January 14, 2010

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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