

Incorporate Vil. of Lindenhurst v Parthe

2010 NY Slip Op 30999(U)

April 9, 2010

Supreme Court, Suffolk County

Docket Number: 16965/2009

Judge: Joseph Farneti

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

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 INCORPORATED VILLAGE OF
 LINDENHURST,

Plaintiff,

-against-

EDWARD G. PARTHE and JOHN FRANCIS,

Defendants.

ORIG. RETURN DATE: JUNE 17, 2009
 FINAL SUBMISSION DATE: JUNE 25, 2009
 MTN. SEQ. #: 001
 MOTION: MG

ORIG. RETURN DATE: JUNE 17, 2009
 FINAL SUBMISSION DATE: JUNE 25, 2009
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEYS:

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 631-321-1400

SELF-REPRESENTED DEFENDANTS:

EDWARD G. PARTHE
 10 SYLVAN LANE
 P.O. BOX 359
 MILLER PLACE, NEW YORK 11764
 631-988-3972

JOHN FRANCIS
 790 SOUTH HICKORY STREET
 LINDENHURST, NEW YORK 11757
 631-918-2364

Upon the following papers numbered 1 to 12 read on this motion _____
FOR A PRELIMINARY INJUNCTION AND CROSS-MOTION TO COMPEL
 Order to Show Cause and supporting papers 1-4; Memorandum of Law 5; Affidavit in
 Opposition to Order to Show Cause and supporting papers 6, 7; Notice of Cross-motion and
 supporting papers 8-10; Replying Affirmation and supporting papers 11, 12; it is,

ORDERED that this motion by plaintiff INCORPORATED VILLAGE
 OF LINDENHURST ("plaintiff") for an Order:

1. That pending a determination on the merits of this action,
 enjoining and restraining defendants, their lessees, tenants, assigns, agents,

contractors, subcontractors and all others acting on their behalf from allowing to be used for purposes of any residential occupancy (repairs being excepted), the property located at 790 South Hickory Street, Lindenhurst, New York 11757 (Suffolk County Tax Map No. 103-21-3-45) ("Premises") and any buildings and/or structures located thereon, until such time as the Premises has been determined safe and in compliance with the Code of the Incorporated Village of Lindenhurst;

2. That pending a determination on the merits of this action, enjoining and restraining defendants, their lessees, tenants, assigns, agents, contractors, subcontractors and all others acting on their behalf from allowing to be used for purposes of rental occupancy, the Premises and any buildings and/or structures located thereon, until such time as the Premises has a rental occupancy permit as required by § 193-246 of the Code of the Incorporated Village of Lindenhurst;

3. That pending a determination on the merits of this action, enjoining and restraining defendants, their lessees, tenants, assigns, agents, contractors, subcontractors and all others acting on their behalf, from occupying, using, allowing to be occupied or allowing to be used, the Premises and any buildings and/or structures located thereon as a dwelling, until corrections of dangerous and hazardous zoning code and ordinance violations have brought the Premises into full compliance with the Code of the Incorporated Village of Lindenhurst;

4. That pending a determination on the merits of this action, requiring the defendants to secure and make safe the Premises and cure all municipal violations including removal of junk, debris, lumber and dock materials stored on the Premises and removal of a barge with a crane moored at the rear of the Premises, or in the alternative, authorizing the plaintiff to enter onto the property and secure and make safe that property thereafter to cure any municipal violations including the removal of all junk, debris, lumber and dock materials and the barge with a crane, and charge the expenses of such entry and remedial actions in the same manner as provided in Article 22 of the Village Law for the collection and removal as a special ad valorem levy;

5. Awarding plaintiff the costs and disbursements of this action, including legal fees as mandated by § 193-138E of the Code of the Incorporated Village of Lindenhurst; and

6. Awarding civil penalties against the defendants as follows: in the sum of \$350.00 for the first day after the date of service that the property contains violations of the Code of the Incorporated Village of Lindenhurst; \$750.00 for the second such day; and \$1,000.00 for each additional day,

is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant EDWARD G. PARTHE ("defendant") for an Order:

1. Directing that plaintiff provide to defendant, within three weeks of this Order, a Rental Permit Application Form that is fully compliant with barring warrantless searches of defendant's Premises by plaintiff as a condition for the issuance of a one-family rental permit by plaintiff;

2. Directing that plaintiff cannot bring any actions against defendant in another Court for complaints that are presently before this Court without first obtaining permission of this Court;

3. Directing that plaintiff must use a duly appointed Code Enforcement Officer to enforce plaintiff's Rental Permit Law;

4. Directing that defendant does not have to submit to plaintiff a Rental Permit Application Form until such time as he offers the subject dwelling for rent;

5. Directing that upon defendant submitting a complete Rental Permit Application Form to plaintiff, that plaintiff has one week to approve or deny said application; and

6. Directing that plaintiff cannot apply a higher approval standard(s) to defendant's Rental Permit Application than it applies to similar applications,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

By Order dated June 3, 2009 (MacKenzie, J.), the Court issued a temporary restraining order to the following extent:

ORDERED, that pending the determination on the merits of this motion, defendants, their lessees, tenants, assigns, agents, contractors, subcontractors and all others acting on their behalf, are enjoined and restrained from occupying, using, allowing to be occupied or allowing to be used for residential rental purposes the property located at 790 South Hickory Street, Lindenhurst, New York 11757 (Suffolk County Tax Map No. 103-21-3-45) and any buildings and/or structures located thereon as a rental residence, until such time as the Premises has been inspected by the Incorporated Village of Lindenhurst and in compliance with the Code of the Incorporated Village of Lindenhurst and until such time as the Premises has a rental occupancy permit as required by § 193-246 of the Code of the Incorporated Village of Lindenhurst; and it is further

ORDERED, that pending the return date, defendants are to secure and make safe the above mentioned property, including all buildings and structures located thereon.

This action was commenced by plaintiff to permanently enjoin and restrain defendants, their lessees, tenants, assigns, agents, contractors, subcontractors and all others acting on their behalf from occupying the Premises as a residential rental occupancy, or otherwise, unless and until all the required permits are obtained pursuant to the Code of the Incorporated Village of Lindenhurst ("Village Code"), and directing the removal of lumber and dock materials stored on the Premises and the removal of a barge with a crane moored at the rear of the Premises. Plaintiff also seeks an award of the costs and disbursements of this action, including legal fees, pursuant to Village Code § 193-138E, awarding civil penalties against the defendants in the sum of \$350.00 for the first day after the date of service that the property contains violations of the Code; \$750.00 for the second such day; and \$1,000.00 for each additional day.

Plaintiff has filed the instant application for a preliminary injunction as described hereinabove. Plaintiff alleges that defendant owns and manages the

Premises, and that defendant JOHN FRANCIS is the tenant of the single family residence thereupon. Plaintiff informs the Court that the Premises is located within the Village of Lindenhurst, and is zoned "Residence C," which permits single family use, but requires a rental permit for single family rental use. Plaintiff further informs the Court that the Premises has no rental permit, in violation of Village Code § 193-246. In addition, plaintiff alleges that a 10' high stack of creosote dock lumber exists on the south side of the Premises, in violation of Village Code § 155-1, and moored to the rear of the Premises is a 25' "rusted hulk of a crane sitting atop a decrepit barge," in violation of Village Code § 193-39. Plaintiff contends that defendant is a dock builder and improperly uses the Premises for storage of his dock-building materials.

Moreover, plaintiff contends that the Premises is in generally poor condition, as a boathouse thereon is structurally unsound and in danger of collapse; the roof is missing in sections; there are broken windows; there is junk, old tires and other debris thereon, in violation of Village Code § 155-3; and the grass and weeds are overgrown, in violation of Village Code § 43-1. Plaintiff informs the Court that a number of citations were issued to defendant returnable in Lindenhurst Village Justice Court, and that on May 26, 2009, a written Order was served upon defendant by Village officials directing defendant to cease all rental occupancy and to remove the barge with the crane and the lumber. However, plaintiff alleges that defendant has failed to comply with the May 26, 2009 Order, in violation of Village Code § 125-3. In addition, plaintiff indicates that on May 30, 2009, an electrical fire occurred at the Premises causing moderate damage and rendering the Premises uninhabitable as it now has no electric, gas or water service. As such, plaintiff argues that it is and will continue to be irreparably damaged and injured unless the Court issues a preliminary injunction directing defendants to discontinue any rental use of the Premises until such time as a rental permit is issued, and directing removal of the barge with the crane and the lumber. In support thereof, plaintiff has submitted, among other things, an affidavit of plaintiff's Fire Marshall and Building Inspector.

The Court has received an affidavit in opposition to plaintiff's application from defendant JOHN FRANCIS, indicating that he is the tenant of the dwelling on the Premises, but that he does not own the barge with the crane or the lumber, and did not place such items on the Premises. In addition, Mr. Francis alleges that upon a written demand to vacate from Village authorities dated May 26, 2009, and upon the fire on May 30, 2009, Mr. Francis vacated the Premises on May 30, 2009, and states that he will not return until defendant

secures the proper permits for the Premises. Further, Mr. Francis contends that prior to the fire, defendant was in the process of upgrading the dwelling, including installing new doors, windows, and appliances.

In opposition to plaintiff's application, defendant has filed a cross-motion to compel plaintiff to provide to defendant, within three weeks of this Order, a Rental Permit Application Form that is fully compliant with barring warrantless searches of defendant's Premises by plaintiff as a condition for the issuance of a one-family rental permit by plaintiff; directing that plaintiff cannot bring any actions against defendant in another Court for complaints that are presently before this Court without first obtaining permission of this Court; directing that plaintiff must use a duly appointed Code Enforcement Officer to enforce plaintiff's Rental Permit Law; directing that defendant does not have to submit to plaintiff a Rental Permit Application Form until such time as he offers the subject dwelling for rent; directing that upon defendant submitting a complete Rental Permit Application Form to plaintiff, that plaintiff has one week to approve or deny said application; and directing that plaintiff cannot apply a higher approval standard(s) to defendant's Rental Permit Application than it applies to similar applications. Defendant argues that the Village Code requires an unconstitutional warrantless search of a premises prior to the issuance of a rental permit. Defendant proclaims that when the Village Code is revised to omit such unconstitutional search, he will apply for a rental permit. Further, defendant alleges that the storage of the lumber is permitted by Village Code § 193-3 (A), and that the docking of the barge with the crane is lawful pursuant to a prior Lindenhurst Village Justice Court decision.

Defendant informs the Court that the barge with the crane will be used to install the bulkhead. Defendant further informs the Court that in 2007, he applied for the necessary permits to build the bulkhead, and is still awaiting the NYSDEC permit and the Army Corps of Engineers Permit. With respect to the storage of the barge with a crane, defendant alleges that the Village Court found that such storage did not violate the Village Code, as the barge is not located within the boundaries of the Premises. Furthermore, defendant argues that when he purchased the Premises in 1982, it was zoned for business use, and therefore he stores the barge at the Premises to maintain the non-conforming use.

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 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]). 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])

The Court has weighed the elements necessary for the granting of injunctive relief to plaintiff, and finds that an injunction is warranted herein. Plaintiff has demonstrated, without dispute from defendant, that defendant rents the dwelling on the Premises without a rental permit therefor. With respect to defendant's constitutional argument, the Court finds that Village Code § 193-249 (B) does not require an inspection prior to the issuance of a rental permit, but rather a certification from a licensed architect, a licensed professional engineer, or a Village building inspector, that the property is in compliance with the Village Code. Further, the Court finds that despite defendant's contention, the storage of the dock lumber at the Premises is not authorized under Village Code § 193-3 (A), as that section does not authorize such storage, but rather governs the height such materials may be stacked in zoning districts where outdoor storage is permitted. In a Residence "C" zone, outdoor storage of building materials is not permitted (see Village Code § 193-39; *Village of Lindenhurst v Retsel Enterprises, Inc.*, 140 AD2d 521 [1988]). Finally, the Court finds that as the barge is tied to land within the Village of Lindenhurst, the Village can regulate the uses thereof (see *Town of Islip v Powell*, 78 Misc 2d 1007 [Sup Ct, Suffolk County 1974]). Regarding defendant's claim of a prior non-conforming use, the Court finds that a dock building business was not permitted in a Business District Zone when defendant purchased the property in 1982 (see Village Code § 85-36, as amended on October 30, 1979 by Local Law No. 9-1979).

Based upon the numerous potential violations of the Village Code existing at the Premises, 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 defendant admits to renting the Premises without the proper permits, and does not dispute the storage of the dock lumber or the barge with the crane, all in violation of Village Code.

Accordingly, plaintiff's motion for a preliminary injunction is **GRANTED** to the following extent:


Defendants, their lessees, tenants, assigns, agents, contractors, subcontractors and all others acting on their behalf, are enjoined and restrained from occupying, using, allowing to be occupied or allowing to be used for residential rental purposes the property located at 790 South Hickory Street, Lindenhurst, New York 11757 (Suffolk County Tax Map No. 103-21-3-45) and any buildings and/or structures located thereon as a rental residence, until such time as the Premises has been brought into compliance with the Village Code, and until such time as the Premises has a rental occupancy permit as required by § 193-246 of the Code of the Incorporated Village of Lindenhurst.

The Court notes that pending the return date herein, defendants were Ordered to secure and make safe the Premises, including all buildings and structures located thereon (MacKenzie, J.).

With respect to defendant's cross-motion, the Court finds that the issues defendant raises are not ripe for adjudication by this Court. Defendant has not alleged that the Village has arbitrarily denied his application for a rental permit, or any other permit or variance, and that he has exhausted his administrative remedies with respect to that denial. In any event, plaintiff indicates that defendant has been given an updated rental permit information sheet, and that, of course, defendant needs no rental permit if he chooses not to rent. Accordingly, this cross-motion by defendant is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: April 9, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court