

Sunrise Check Cashing v Town of Hempstead

2010 NY Slip Op 31005(U)

April 14, 2010

Supreme Court, Nassau County

Docket Number: 16676/08

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

SUNRISE CHECK CASHING and PAYROLL SERVICES, INC., BRENTWOOD CHECK CASHING CORP., NORTH ISLAND CHECK CASHING CORP., AMITYVILLE PAYROLL SERVICE, INC., OAK STREET CHECK CASHING, INC., SABRINA'S CHECK CASHING, INC., CHECKMASTER OPERATING INC. and VAN WYCK CHECK CASHING CORP.,

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 16676/08

Motion Sequence No. 001, 002,
003

Plaintiffs,

- against -

TOWN OF HEMPSTEAD,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3</u>
Answering Affidavits	_____
Replying Affidavits	<u>8</u>
Briefs: Plaintiff's / Petitioner's	<u>4</u>
Defendant's / Respondent's	<u>5, 6, 7</u>

The plaintiff check cashing businesses are owners and tenants of certain real property located within the boundaries of the Town of Hempstead. In November 2005, Building Zone Ordinance Article XXVIII § 302K, which relates to check cashing establishments was enacted by the defendant. The ordinance prohibits all check cashing establishments within the boundaries of the Town of Hempstead, except those check

cashing establishments located in industrial or light manufacturing districts. It also gave check cashing establishments five years to change located to comply with that ordinance or be terminated without any further action by the Town of Hempstead. In September 2008, the plaintiffs commenced the instant action to set aside the ordinance as preempted by the New York State Banking Law for an invalid use of zoning power, and on constitutional grounds.

The plaintiffs now move, in motion sequence one, for summary judgment. The plaintiff check cashing businesses support their contentions in motion sequence one with a June 24, 2009 affirmation by plaintiffs' counsel, a June 24, 2009 affidavit by a member of one of the plaintiffs, and other supporting papers.

The defendant opposes, in motion sequence two, the plaintiffs' motion for summary judgment, and moves for summary judgment and to declare Building Zone Ordinance Article XXVIII § 302K valid. The defendant contends the court is without authority and jurisdiction to grant summary judgment against the defendant, to declare Building Zone Ordinance Article XXVIII § 302K unconstitutional and unenforceable, in the absence of the Town Board, which is an indispensable necessary party. The defendant claims the plaintiffs lack standing to assert alleged constitutional violations of their patrons, and otherwise assert substantial evidence, which the Court must assume, as a matter of law, in assessing this legislative act that the Town Board acted legally and rationally based upon the facts known to the Town Board. The defendant asserts the

plaintiff have no constitutionally protected vested property interest in the prior zoning classification of their properties, particularly in matters involving public health and safety. The defendant avers, absent an evidentiary showing of “dollars and cents” evidence that by reason of the new ordinance, the plaintiffs have been deprived of all but the bare residue of the value of their property, there is no actionable *de facto* regulatory taking of their property. The defendant maintains, in a matter involving the police power of the Town Board involving a threat to public health and safety reasonably apprehended, the fact the plaintiffs’ use is “prior non conforming does not protect the plaintiffs from the application of the new ordinance. The defendant supports its contentions in motion sequence two with a November 30, 2009 affirmation by defense counsel, and other supporting papers, including a memorandum of law.

The plaintiffs counsel reiterates, in a legal memorandum dated January 19, 2010, the plaintiffs’ position, that despite a statewide policy reflected in the Banking Law and the associated regulations, the defendant enacted Building Zone Ordinance Article XXVIII § 302K to prevent check cashing establishments from being located in Business Districts within the Town of Hempstead, or indeed any other district, other than a Light Manufacturing or Industrial District housing oil refineries, recycling facilities, truck depots and the like. The plaintiffs argue the defendant’s relegation of check cashing establishments to those districts is not a proper exercise of its police power because that exercise has nothing to do with the regulation of health, safety, morals and general

welfare. The plaintiffs contend the defendant is only banning the activity of check cashing where the State of New York has preempted that field, and the defendant's actions violate constitutional equal protection concepts. The plaintiffs assert the defendant's dismissal claim for the lack of a necessary party, to wit the Town Board of the Town of Hempstead unnecessarily exalts procedure over substance, so that contention is spurious.

The defense counsel reiterates, in a reply legal memorandum dated January 29, 2010, the defense position in further support of the defense cross motion, and against the plaintiffs' opposition to that cross motion. The defense argues the plaintiffs fail to name and serve the Town Board as an indispensable necessary party. The defense contends the plaintiffs fail to establish either state preemption or a denial of equal protection, or any other basis to challenge this factually supported and fully rational zoning ordinance. The defense points out the subject zoning ordinance does not offend equal protection.

The plaintiffs move, in motion sequence three, pursuant to CPLR 2001 and 3013 to amend the caption of this action to substitute the Town Board of the Town of Hempstead as a defendant in place of the Town of Hempstead. The plaintiffs' counsel states, in a February 11, 2010 affirmation, this motion sequence three is made based on an assertion by the defendant Town in motion papers, to wit the Town Board of the Town of Hempstead is a necessary, proper party instead of the Town of Hempstead because the ordinance was passed by the Town Board. The plaintiffs' counsel maintains the failure to

name the Town Board of the Town of Hempstead was not a jurisdictional infirmity, but instead a procedural defect which in the interest of justice should be disregarded. The plaintiffs' counsel contends, although a motion is unnecessary, this motion sequence three is made to avoid unfavorable consequences to the plaintiffs for failing to name the Town Board of the Town of Hempstead. The plaintiffs support their contentions in motion sequence three with the affirmation by plaintiffs' counsel, and other supporting papers.

The defendant opposes the plaintiffs' motion to add the Town Board of the Town of Hempstead as a party in motion sequence three. The defendant supports its contentions in motion sequence two with a November 30, 2009 affirmation by defense counsel, and other supporting papers, including a memorandum of law dated February 24, 2010. The defense counsel argues this motion is defective while another motion for the same purpose is pending in the same motion Court. The defense counsel asserts plaintiffs' motion to substitute the Town Board as defendant is fatally defective because the Town Board must be joined as a party in its own right, and the Town of Hempstead is also a necessary party defendant. The defense counsel points out there must be service of process on the Town Board once joined as a party.

The plaintiffs' counsel states, in a March 11, 2010 reply affirmation, the defense improperly describes motion sequence three as adding the Town Board as a new party, but the plaintiffs rather seek to simply amend the caption of the underlying action to deem the Town of Hempstead to be the Town Board of the Town of Hempstead. The plaintiffs'

counsel points out the Town Board has already been served with the summons and verified complaint, and it need not be added as a party. The plaintiffs' counsel contends the defense papers do not support the defense claims.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to these motions. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or

unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

The Court of Appeals stated:

The State Constitution’s “home rule” provision (art IX, § 2) “confers broad police power upon local government relating to the welfare of its citizens” (*New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 505 N.E.2d 915 [1987], *aff’d*. 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 [1988]). This grant of authority includes the ability of a municipality to enact local laws regarding the “protection, order, conduct, safety, health and well-being of persons or property” within its borders (N.Y. Const, art IX, § 2[c][ii][10]; *see* Municipal Home Rule Law § 10[1][ii][a][12]). There are, however, important limitations on municipal police powers (*see New York State Club Assn. v. City of New York*, 69 N.Y.2d at 217, 513 N.Y.S.2d 349, 505 N.E.2d 915). First, under the doctrine of conflict preemption, a “local government ... may not exercise its police power by adopting a local law inconsistent with constitutional or general law” (*id.*). Second, under the doctrine of field preemption, a municipality “may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation” (*id.*; *see e.g. Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 546 N.E.2d 920 [1989])

Anonymous v. City of Rochester, 13 N.Y.3d 35, 51-52, 886 N.Y.S.2d 648 [2009].

This Court observes State law does not show the Legislature intended to prohibit the Town of Hempstead nor the Town Board of the Town of Hempstead from enacting Building Zone Ordinance Article XXVIII § 302K. The plaintiffs fail to show the defendant violated the doctrines of conflict preemption and field preemption that is

providing evidence in admissible form that the Town of Hempstead or the Town Board of the Town of Hempstead adopted Building Zone Ordinance Article XXVIII § 302K which is inconsistent with constitutional or general law or exercised police power in an area of regulation preempted by State Legislative or a State regulatory agency with respect to the New York State Banking Law or any regulation (*Anonymous v. City of Rochester, supra*).

This State's Court of Appeals has also stated:

One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances (*see generally*, 1 Anderson, American Law of Zoning § 2.16 [Young 4th ed]; 6-A McQuillin, Municipal Corporations §§ 24.123.20, 24.123.30, 24.123.40 [3d rev ed]; Crocca, Annotation, Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses, 10 ALR5th 538). *In Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126, 131), we held that the "purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally." The AZR does just that, and stands in contrast to laws that regulate alcoholic beverages.

To be sure, by regulating land use a zoning ordinance "inevitably exerts an incidental control over any of the particular uses or businesses which ... may be allowed in some districts but not in others" (*Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 NY2d, at 131, *supra* [emphasis added]; *see also, Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d, at 681-682, *supra*). Nevertheless, as we have observed, "separate levels of regulatory oversight can coexist" (*see, Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 507). State statutes do not necessarily preempt local laws having only "tangential" impact on the State's interests (*see, id.*, at 506). Local laws of general application--which are aimed at legitimate concerns of a local government--will not be preempted if their enforcement only incidentally infringes on a preempted field (*see, Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74

NY2d, at 763, *supra*; *Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d, at 506, *supra*). Thus, as we stated in *People v De Jesus*, an establishment selling alcoholic beverages would not be exempt from a local law “requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness” (54 NY2d, at 471, *supra*). We recognized of course that there are limits to the reach of local law, and held that the ABC Law preempted a provision of the Rochester Municipal Code because that local law dealt “solely with the actions of patrons of establishments which sell alcoholic beverages.” (54 NY2d, at 471.) [FN4] The AZR, however, does nothing of the sort. To the contrary, it applies not to the regulation of alcohol, but to the locales of adult establishments irrespective of whether they dispense alcoholic beverages. In short, plaintiffs come under both regulatory schemes because they simultaneously engage in two distinct activities, each involving an independent realm of governance

DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 96-97, 725 N.Y.S.2d 622 [2001]; *see also Pathmark Stores, Inc. v. Office of Consumer Affairs of County of Nassau*, 1 A.D.3d 520, 768 N.Y.S.2d 15 [2nd Dept., 2003].

Building Zone Ordinance Article XXVIII § 302K comports with the holding in *DJL*

Restaurant Corp. v. City of New York, supra. Building Zone Ordinance Article XXVIII

§ 302K, as applied here, is not preempted by the New York State Banking Law nor any regulations promulgated by that statutory authority.

The Second Department also holds:

When a municipal legislative body enacts an ordinance, a presumption of validity attaches to its resolution (*Rodgers v. Village of Tarrytown*, 302 N. Y. 115; *Shepard v. Village of Skaneateles*, 300 N. Y. 115). The presumption of validity has the effect of (1) imposing the burden of proof on the party questioning the ordinance; and (2) sustaining the ordinance if the propriety of its enactment is fairly debatable. The content of the burden on the assailant is sometimes said to extend further than a mere preponderance of the evidence to proof beyond a reasonable doubt (*Wiggins v. Town of Somers*, 4 N Y 2d 215; *but, see, Thomas v. Town of Bedford*, 29 Misc 2d 861, 866, *affd.* 15 A D 2d 573, *affd.* 11 N Y 2d 428). Still, the presumption is not irrebuttable (*Arverne Bay Constr. Co. v.*

Thatcher, 278 N. Y. 222), and perhaps we may best rationalize the presumption as a reminder of the force of legislative judgment which must be supported by the courts if there is “any state of facts either known or which could reasonably be assumed” on which the ordinance could be based (*United States v. Carolene Prods. Co.*, 304 U. S. 144, 154; *cf. Town of Islip v. Summers Coal & Lbr. Co.*, 257 N. Y. 167) *DeSena v. Gulde*, 24 A.D.2d 165, 169, 265 N.Y.S.2d 239 [2nd Dept., 1965].

Here, the parties discuss declaratory judgment in these motions, to wit the validity of Building Zone Ordinance Article XXVIII § 302K. Notwithstanding those contentions, a presumption of validity attached to its resolution to Building Zone Ordinance Article XXVIII § 302K, and the plaintiffs have not their burden to rebut that presumption.

The Court of Appeals also holds:

[An] ordinance may not be arbitrary. It must be reasonably related to some manifest evil which, however, need only be reasonably apprehended. It is also presumed that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability of the ordinance, and, if any state of facts known or to be assumed, justifies the disputed measure, this court’s power of inquiry ends. Thus, as to reasonableness, plaintiffs in order to succeed have the burden of showing that “no reasonable basis at all” existed for the challenged portions of the ordinance. (See *Matter of Van Berkel v Power*, 16 NY2d 37, 40; *I. L. F. Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263, 269; *Wiggins v Town of Somers*, 4 NY2d 215, 218-219; *Defiance Milk Prods. Co. v Du Mond*, 309 NY 537, 541.)

Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 11-12, 390 N.Y.S.2d 827 [1976].

The plaintiffs fail to meet their burden with respect to their challenge to Building Zone Ordinance Article XXVIII § 302K on equal protection grounds. This Court determines equal protection clauses permit the Town of Hempstead or the Town Board of the Town of Hempstead to exercise a wide scope of discretion in enacting Building Zone Ordinance

Article XXVIII § 302K which affects the plaintiffs (*Lighthouse Shores, Inc. v. Town of Islip, supra*, at p. 13).

Accordingly, the motion by the plaintiffs for summary judgment in motion sequence one is denied. The cross-motion by the defendant in motion sequence two for summary judgment dismissing the complaint is granted. Motion sequence three by the plaintiffs to amend the caption is granted in accord with this decision.

So ordered.

Dated: April 14, 2010

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

APR 16 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**