

**Town Bd. of the Town of Southampton v R.K.B.
Realty, LLC**

2010 NY Slip Op 31452(U)

May 26, 2010

Supreme Court, Suffolk County

Docket Number: 18445/2008

Judge: Paul J., Jr. Baisley

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

PRESENT:

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

-----X
THE TOWN BOARD OF THE TOWN OF
SOUTHAMPTON,

Plaintiff,

-against-

R.K.B. REALTY, LLC, EAST END GUNITE POOLS
SUPPLY, LLC, EAST END CEMENT & STONE,
INC., d/b/a EAST END GUNITE POOL SUPPLIES,
LLC, GARY KALISH, JOSEPH D. BUTTS, PAUL
RINALDI, DAVID T. SCHIAVONI, et al.,

Defendants.

-----X
MARILYN BISHOP, PETER FARMER, DONALD L
FLEXNER, LYNNE D. FLEXNER, et al.,

Plaintiffs,

-against-

R.K.B. REALTY, LLC, EAST END GUNITE POOLS
SUPPLY, LLC, EAST END CEMENT & STONE,
INC., d/b/a EAST END GUNITE POOL SUPPLIES,
LLC, GARY KALISH, JOSEPH D. BUTTS, PAUL
RINALDI, DAVID T. SCHIAVONI et al.,

Defendants.

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Action No. 1

INDEX NO.: 18445/2008
MOTION DATE: 1/22/2009
MOTION NO.: 006 MG
007 MD

Action No. 2

INDEX NO. 18446/2008
MOTION DATE: 1/22/2009
MOTION NO.: 004 MG
005 MD

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Upon the following papers numbered 1 to 137 read on this motion joint motion for contempt and joint motion for relief from order; Notice of Motion/ Order to Show Cause and supporting papers 1-15; 27-39; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 16-20; 40-46; 47-53; 54-62; 63-74; Replying Affidavits and supporting papers 21-26; 75-88; Other 89-103; 104-120; 121-137; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the above-captioned actions are joined and consolidated solely for purposes of the instant determination, and the Clerk is directed to enter this decision and order under the index number of each of the actions so consolidated; and it is further

ORDERED that the joint motion (motion sequence no. 006) of plaintiff Town Board of the Town of Southampton (the “municipal plaintiff”) in Action No. 1 captioned above, and of plaintiffs Marilyn Bishop, Peter Farmer, Donald L. Flexner, Lynne D. Flexner, Shelly Dunn Fremont, Vincent Fremont, Jim Kilpatrick, William Lowe, Harry Neyens, Chester Walker, and Leona Walker (the “individual plaintiffs”) in Action No. 2 captioned above, for an order adjudging defendants R.K.B. Realty, LLC, East End Gunite Pools Supply, LLC, East End Cement & Stone, Inc. d/b/a East End Gunite Pool Supplies, LLC, Gary Kalish, Joseph D. Butts, Paul Rinaldi and David T. Schiavoni in civil and criminal contempt for willfully violating this Court’s orders and to punish them by the imposition of a fine, imprisonment, or both pursuant to New York Judiciary Law §751 and §753 is granted as set forth hereinafter; and it is further

ORDERED that the motion (motion sequence no. 007) of defendants East End Gunite Pools Supply, LLC, East End Cement & Stone, Inc., and David T. Schiavone for an order pursuant to CPLR §5015 granting such defendants relief from the “so-ordered” stipulation entered on September 3, 2008 is denied; and it is further

ORDERED that the parties are directed to appear before the undersigned for a status conference on August 31, 2010 at 11:00 a.m. to determine defendants’ compliance with the instant order and the stipulations and orders dated September 3, 2008 and February 24, 2009.

The individual and municipal plaintiffs commenced these related actions to enjoin the defendants’ allegedly unlawful operation of a concrete manufacturing plant on an industrial parcel in the Town of Southampton. The individual plaintiffs are the owners of residential properties located near or adjacent to the property where the concrete plant is located. The 5.5-acre property is owned by defendant R.K.B. Realty, LLC (“RKB Realty”), whose principals are defendants Paul Rinaldi, Gary Kalish and Joseph D. Butts. RKB Realty leases an approximately 1-3/4-acre portion of the property to defendants East End Gunite Pools Supply, LLC and/or East End Cement & Stone, Inc. (collectively, “the East End defendants”), which own and operate the concrete plant. Defendant David T. Schiavoni is the principal of the East End defendants. (He also claims to own a minority interest in RKB Realty.)

On September 3, 2008, all of the parties in both actions entered into a stipulation, “so-ordered” by the undersigned, that, *inter alia*, directed that the defendants “cease operation” of the concrete plant as of 5:00 p.m. on the following day. The stipulation further directed defendants to remove all sand, gravel and aggregate from the site and restricted defendants from transporting material to or from the site, parking more than five transit trucks for overnight parking only, and performing truck “wash downs” at the site.

In December 2008 the East End defendants and Schiavoni moved for relief from the “so-ordered” stipulation. The plaintiffs thereafter interposed a joint motion to hold defendants in contempt of court for numerous alleged violations of the “so-ordered” stipulation. Both motions were resolved in principle pursuant to a further stipulation dated February 24, 2009 which supplemented the provisions of the September 3, 2008 “so-ordered” stipulation. The further

stipulation, which was reduced to a writing, signed by all parties, was read into the record in open court on February 24, 2009 and thereafter “so-ordered” by the undersigned. The record of the proceedings reflects the defendants’ admission, by defendant Schiavoni, to the storage of sand on the site on December 15, 2008, which defendants conceded was prohibited by the September 3, 2008 stipulation and order, and the Court’s finding and adjudication that defendant Schiavoni was in civil contempt. The record further reflects the parties’ intention, and the Court’s agreement, to vacate that finding of contempt if the “so-ordered” stipulations were thereafter fully complied with, to forbear imposing a penalty for the contempt, and to hold the parties’ motions open pending defendants’ subsequent compliance with the “so-ordered” stipulations.

A conference was thereafter held before the undersigned on March 24, 2009 at the instance of the plaintiffs, who alleged that defendants remained in violation of the September 3, 2008 stipulation and order, as supplemented by the February 24, 2009 stipulation and order. Accordingly, the Court directed that the motions be restored to the calendar and that a hearing be held as to the allegations of contempt. Thereafter, an evidentiary hearing was conducted on various dates in May 2009, at the conclusion of which the Court directed the parties to submit post-hearing memoranda and reserved decision.

Judiciary Law §753 provides that a court “has power to punish [for a *civil* contempt], by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: ...for disobedience to a lawful mandate of the court, or of a judge thereof” (Judiciary Law §753(A)(1)). Judiciary Law §750 provides that a court “has power to punish for a *criminal* contempt [emphasis added], a person guilty of...wilful disobedience to its lawful mandate” (Judiciary Law §750(A)(3)). The same act may be punishable as both a civil and a criminal contempt, depending on the “level of wilfulness associated with the conduct” (*McCain v Dinkins*, 84 NY2d 225 [1994]). Both civil and criminal contempt require a determination that a lawful order expressing an unequivocal mandate was in effect; that there is a reasonable certainty that the order was disobeyed; and that the alleged contemnor had knowledge of the order (*McCormick v Axelrod*, 59 NY2d 574 [1983]).

Upon the testimony adduced at the hearing and a review of the parties’ extensive submissions, the transcripts of the record of the proceedings before the Court, the “so-ordered” stipulations, and the applicable law, the Court finds that all of the defendants are guilty of civil contempt of the Court’s lawful orders, and that the East End defendants and David T. Schiavoni are additionally guilty of criminal contempt.

It is manifest that the intent of the September 3, 2008 stipulation and order – denominated therein as a “standstill agreement” – was to effect an immediate cessation of defendants’ activities in connection with the operation of a concrete manufacturing plant on the subject property, which defendants conceded had been constructed without obtaining building permits or certificates of occupancy for any of the multiple structures on the property. Defendants agreed to and were ordered to remove the sand, gravel and aggregate at the site, park no more than five transit trucks at the site for overnight parking only, cease manufacture or transport of concrete or gunite at or to the site, and refrain from “truck wash down” on the premises. Thereafter, pursuant to the February 24, 2009 stipulation and order, defendants agreed to and were ordered to (*inter alia*) remove “[a]ll structures, sand, bin blocks, aggregate, (including gravel, sand) and wash-out water

settling tank, coverage storage area, bin block walls, outside storage block bins and any other structures,” remove 130 existing pallets of stone from the premises, and cease “storing sand, aggregate or other materials of any kind” or conducting “any operations” or using vehicles for any purpose other than the stone removal required by the order.

The evidence adduced at the hearing reflected that, far from ceasing operations, defendants actually commenced new construction consisting of the installation of reinforced concrete footings for the support of a contemplated (but not approved) building, constructed new retaining walls, and continued to transport concrete/gunite, sand and topsoil at and to the site, store sand and stone aggregate, wash down trucks, and use vehicles, including payloaders, on site for other than parking, in direct contravention of both the letter and the spirit of the stipulations and orders. Defendant Schiavoni conceded that two sand deliveries were made to the site in December 2008, that concrete was delivered to the site for the footings that were constructed in March 2009, that sand continued to be stored at the site, that trucks other than transit trucks continued to enter and exit the site to deliver sand, bluestone block, bluestone tile, rebar, bagged Portland cement, and masonry products, and that a payloader was used on site (Aff. of David T. Schiavoni dated January 14, 2009; 5/8/09 Transcript, p 132, l 12). Those activities, notwithstanding defendant’s self-serving characterization of them as unrelated to gunite or concrete use, are manifestly a violation of the “standstill” agreement and the Court’s orders. Specifically, the Court finds that defendants unequivocally violated five separate provisions of the September 3, 2008 and February 24, 2009 orders: ¶3, prohibiting manufacture at or transport of concrete or gunite to or from the site; ¶12, prohibiting “operations” east of the existing barn, storage of “materials of any kind” and bringing new stone on site; ¶14, prohibiting “equipment of any kind whatsoever” east of the framed barn; ¶15, prohibiting “storage of materials, use of the premises, or operations of any kind” other than certain enumerated exceptions east of the barn; and ¶17, prohibiting deliveries of stone “or any other materials of any type” east of the framed barn.

The clear and convincing evidence reflects, and the Court finds, that defendants’ actions were calculated to and actually did defeat, impair, impede or prejudice the rights or remedies of both the municipal and the individual plaintiffs. Accordingly, the Court hereby finds and determines that all of the defendants are in civil contempt of the Court’s orders. Moreover, the Court finds beyond a reasonable doubt that defendants Schiavone and the East End defendants acted willfully, with full knowledge of the terms and scope of the orders, and with deliberate and calculated intent to evade, avoid and eschew their obligations thereunder, and accordingly finds such defendants in criminal contempt as well.

The penalty to be imposed for a civil contempt is intended to compensate the injured party or coerce compliance with the Court’s mandate, or both; while the penalty to be imposed for a criminal contempt is intended to punish the contemnor for disobedience of the Court’s order (*McCormick v Axelrod*, 59 NY2d 574 [1983]). The maximum fine for a criminal contempt is \$1,000.00 (Judiciary Law §751(1)). In the absence of evidence establishing the actual loss or injury to a party, the maximum fine that may be imposed for a civil contempt is \$250.00, plus the complainant’s costs and expenses (Judiciary Law §773). Where multiple contumacious acts are engaged in, each violation is a separate contempt that warrants a separate fine (*317 West 87th Assoc. v Dannenberg*, 170 AD2d 250 [1st Dept 1991]). In the instant contempt proceeding, no

specific proof was adduced with respect to the damages sustained by the plaintiffs as a result of defendants' proven violations of the orders. However, injury to the municipal defendant may be presumed from defendants' flagrant violation of the Town's zoning codes (*Town of Huntington v Reuschenberg*, 70 AD3d 814 [2d Dept 2010]; *Inc. Village of Plandome Manor v Ioannou*, 54 AD3d 365 [2d Dept 2008]); and to the individual defendants from the noise, dust and truck traffic generated by defendants' illegal activities (*Boomer v Atlantic Cement Co., Inc.*, 26 NY2d 219 [1970]). Moreover, the Court finds that a substantial penalty is warranted in the circumstances to punish defendants' willful conduct in repeatedly flouting the Court's lawful orders.

In consideration of the foregoing, the Court hereby imposes the following penalties upon the defendants:

- In accordance with the prior determination of the undersigned rendered on the record on February 24, 2009 finding and adjudicating defendant David T. Schiavoni guilty of civil contempt for having violated the September 3, 2008 order prohibiting the storage of sand on the subject site, such defendant is hereby fined the sum of \$250.00 to be paid to the Town of Southampton in Action No. 1 within 20 days of service of notice of entry of this decision and order; and the sum of \$250.00 to be paid to each of the eleven individual plaintiffs in Action No. 2, for a total fine of \$2,750.00, within 20 days of service of notice of entry of this decision and order.
- For each of the five separate instances of civil contempt specifically found by the Court herein, the defendants R.K.B. Realty, LLC, East End Gunitite Pools Supply, LLC, East End Cement & Stone, Inc. d/b/a East End Gunitite Pool Supplies, LLC, Gary Kalish, Joseph D. Butts, Paul Rinaldi and David T. Schiavoni, jointly and severally, are fined the sum of \$250.00 pursuant to Judiciary Law §773, for a total fine of \$1,250.00, to be paid to the Town of Southampton in Action No. 1 within 20 days of service of notice of entry of this decision and order, together with a further sum sufficient to compensate the municipal plaintiff for the costs and expenses including reasonable attorney's fees, of this contempt proceeding, the amount of which shall be determined as set forth hereinafter; and the sum of \$250.00, to be paid to each of the eleven individual plaintiffs in Action No. 2 within 20 days of service of notice of entry of this decision and order, for a total fine of \$13,750.00, together with a further sum sufficient to compensate the individual plaintiffs for the costs and expenses, including reasonable attorney's fees, of this contempt proceeding, the amount of which shall be determined as set forth hereinafter.
- For each of the five separate instances of criminal contempt specifically found by the Court herein, the defendants East End Gunitite Pools Supply, LLC, East End Cement & Stone, Inc. d/b/a East End Gunitite Pool Supplies, LLC, and David T. Schiavoni are each fined the sum of \$1,000.00 pursuant to Judiciary Law §751(1), for a total fine of \$5,000.00 to be paid to the Treasurer of Suffolk County within 20 days of service of notice of entry of this decision and order.
- Pursuant to Judiciary Law §753(A), defendant David T. Schiavoni is sentenced to 30 days' incarceration in the Suffolk County Correctional Facility, Riverhead, New York for the civil contempts. Execution of the sentence of imprisonment shall be stayed for a period of thirty days from the date of service of notice of entry of this decision and order pending the payments by defendant Schiavoni, East End Gunitite Pools Supply, LLC, and

East End Cement & Stone, Inc. d/b/a East End Gunite Pool Supplies, LLC, of the monetary fines imposed herein and defendants' compliance in all particulars with the stipulations and orders dated September 3, 2008 and February 24, 2009. Upon defendants' failure to comply as aforesaid, the stay of execution of the sentence will be vacated and a warrant of commitment will issue forthwith.

• Pursuant to Judiciary Law §75.1(1), defendant David T. Schiavoni is sentenced to 30 days' incarceration in the Suffolk County Correctional Facility, Riverhead, New York for the criminal contempts, such sentence to be served consecutively with the sentence imposed for the civil contempts. Execution of the sentence of imprisonment shall be stayed for a period of thirty days from the date of service of notice of entry of this decision and order pending the payments by defendants Schiavoni, East End Gunite Pools Supply, LLC, and East End Cement & Stone, Inc. d/b/a East End Gunite Pool Supplies, LLC, of the monetary fines imposed herein and defendants' compliance in all particulars with the stipulations and orders dated September 3, 2008 and February 24, 2009. Upon defendants' failure to comply as aforesaid, the stay of execution of the sentence will be vacated and a warrant of commitment will issue forthwith.

The plaintiffs in each of the above-captioned actions are directed to submit to the Court, on notice to defendants, proof in admissible form of the costs and expenses, including attorney's fees, incurred in connection with this contempt proceeding, within twenty days of service of notice of entry of this order. Defendants shall have ten days thereafter to respond. The Court will thereafter issue a further order setting forth the additional fines, if any, to be imposed on defendants in accordance with the foregoing determination.

Defendants' motion for relief from the September 3, 2008 stipulation and order is denied. The December 4, 2008 determination of the Town of Southampton Zoning Board of Appeals ("ZBA"), which assertedly concluded that the use of the site as a concrete plant is a legal and permitted use on the site, is irrelevant to the instant actions. In any event, this Court has previously determined that the ZBA erred when it concluded that the approximately 5.5-acre property where defendants' concrete manufacturing activities are conducted on a 1-3/4-acre leased parcel – along with various other permitted uses – satisfies the five-acre minimum lot area requirement of the zoning code for a special exception use (*Matter of Marilyn Bishop, et al. v Town of Southampton Zoning Board of Appeals, et al.*, Sup Ct, Suffolk Cty, September 29, 2009, Baisley, J., Index No. 1311/09; *Matter of East End Gunite Pools Supply, LLC, et al. v Zoning Board of Appeals of the Town of Southampton, et al.*, Sup Ct, Suffolk Cty, September 29, 2009, Baisley, J., Index No. 1363/09).

The parties are directed to appear before the undersigned for a status conference on August 31, 2010 at 11:00 a.m. to determine defendants' compliance with the instant order and the stipulations and orders dated September 3, 2008 and February 24, 2009.

The foregoing constitutes the decision and order of the Court.

Dated: May 26, 2010

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

___ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION