SHORT FORM ORDER

INDEX No. 19533-09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/20/10
ADJ. DATES 5/28/10
Mot. Seq. # 002 - MOTD

TOWN OF SOUTHAMPTON, Plaintiff, -against- COUNTY OF SUFFOLK, JANET DeMARZO, as Commissioner of Social Services for the County of Suffolk, JOHN DOE a/k/a THEODORE WELLS, JOHN DOE a/k/a CARLOS RIVERA, FRANTZ OCCEL, JAMEL FERGUSON, JOSEPH COLLIER, WESLEY HARRIS, LUIS CASANOVA: JEROME WATTS, GLENN RYDER, ANTHONY CONSOLAZIO, MANUEL HERNANDEZ, WILLIAM CRUZ, AKBAR OWENS, CARMINE CALIFIANO, ABRAHAM CROSBY, JESUS VAZQUEZ, ERIC GALLON and JOHN and JANE DOES Nos. 1-24, being and intended to be unknown: individuals occupying and/or residing in Suffolk County Department of Social Services trailers located at a parcel commonly known as 100 Center Drive, Riverhead, NY 11901, and more particularly described on the Suffolk County Tax map as number 900-137-1-27, Defendants.	MICHAEL C. SORDI, Town Attorney By: MICHAEL SENDLENSKI Assist. Town Atty. Atty. For Plaintiff 116 Hampton Rd. Southampton, NY 11968 CHRISTINE MALAFI Suffolk County Atty. By: JOHN R. PETROWSKI Assist. County Atty. Atty. For County Defendants PO Box 6100 Hauppauge, NY 11788

Upon the following papers numbered 1 to 10 read on this motion for preliminary injunctive relief and to amend pleadings; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6-87; Replying Affidavits and supporting papers 9-10; Other ; (~~and after hearing counsel in support of and in opposition to the motion~~) it is,

ORDERED that those portions of this motion (#002) by the plaintiff an order granting it leave to amend its complaint is considered under CPLR 3025 and is denied as unnecessary; and it is further

ORDERED that those portions of this motion (#002) by the plaintiff for preliminary injunctive relief is considered under Article 63 and is granted; and it is further

ORDERED that a hearing shall be held on Friday, **June 18, 2010** at 9:30 am to fix the plaintiff's liability should it be later determined that the plaintiff was not entitled to an injunction as contemplated by CPLR 2512(1) and CPLR 6312(b).

In May of 2009, the plaintiff commenced this action for a permanent injunction restraining and enjoining the defendants, County of Suffolk and Department of Social Services, from continuing or expanding its use of a trailer to house registered sex offenders at its current location on a County owned parcel of real property situated within the Town of Southampton. This parcel is located within the hamlet of Riverside at the County Center which houses the Suffolk County jail and other State and County offices. The plaintiff claims that the County's installation of the trailer and its use of it to house registered sex offenders violates various sections of the Town Code of the Town of Southampton, including its zoning provisions. The plaintiff further claims that this trailer and its current use violates a myriad of State environmental laws and other State statutes, as well as, local laws enacted by the County itself.

The record reflects that the trailer at Riverside was the second trailer which the County installed in 2007 within the boundaries of the Town of Southampton. The first trailer was installed in February of 2007, at a parcel located in the hamlet of Westhampton. Like the Riverside parcel, the Westhampton parcel is County owned. It is comprised of 114 acres and it is used to facilitate the Suffolk County Police and Sheriff's Department impound and law enforcement training activities, as well as, a storage facility for the Suffolk County Clerk and Suffolk County Department of Public Works. According to the County, both trailers were necessary to discharge the County's obligation to provide "temporary emergency shelter to homeless, registered sex offenders". Occupancy of the trailer by homeless, registered sex offenders is limited to 8:00 p.m. to 7:30 a.m. on weekdays and 8:00 p.m. to 10:00 a.m. on weekends and holidays. Occupants are transported to a Department of Social Services Center on weekdays for purposes of searching for permanent housing and work.

The Westhampton trailer has room for eight occupants and one security guard. It measures 10' x 46' and has one bathroom with a flushable toilet, a basin sink and running hot water. There are no shower facilities and no meals are provided. It is serviced by one of several cesspools on the premises. Water and electricity are provided from a storage facility previously occupied by the Sheriff's Department.

The Riverside trailer is larger as it can accommodate 18 persons. It contains a sleeping area with two bathrooms having one sink and one toilet. Hot water is provided with a six gallon water heater that re-heats its water within one hour. There are no shower facilities and no meals are provided.

In 2009, several of the persons who occupied the Riverside trailer requested a "fair" hearing on, among other things, the issue of the adequacy of the temporary housing afforded by the County's trailer at Riverside. The plaintiff was not joined as a party to these proceedings and no notice thereof was given to the plaintiff. After conducting the administrative fair hearing, the Suffolk County Department of Social Services found that the trailer provided adequate temporary housing to those housed at the Riverside trailer.

An appeal of that determination was taken to the New York State Office of Temporary and Disability Assistance. On February 18, 2010, the determination of the Department of Social Services was

affirmed in large part. However, the Administrative Law Judge who heard and determined the appeal found that the lack of showers and the 6 gallon water tank at the Riverside trailer were inadequate. In so finding, the ALJ stated on page 10 of his February 18, 2010 determination, that "[W]hile the regulations do not cite specific standards for temporary housing accommodations other than in Part 419 [which the ALJ found were not applicable], the courts have asserted that minimal standards should be met". The County was thus directed to "provide showers with sufficient hot water for the number of residents" (*see* Exhibit G of the County's opposing papers). There is no evidence in the record that the County defendants appealed this determination.

In March of 2010, the Suffolk County Department of Social Services requested the Suffolk County Department of Public Works "to order a new trailer built with two (2) shower stalls to replace the trailer located on the County's Westhampton parcel" on an emergency basis, without a public bid. On March 22, 2010, the DPW ordered the new trailer for a purchase price of $57,000.00. At 11:30 p.m on the evening of May 3, 2010, the County delivered the newly ordered trailer to the Westhampton site. On the morning of May 4, 2010, workers from the DPW disconnected the electrical and plumbing lines connected to the Westhampton trailer. However, the work was stopped and the connections to the old trailer reinstalled after the plaintiff obtained a temporary restraining order in the afternoon of May 4, 2010, in the order to show cause [Gazillo, J] by which this motion was interposed. The temporary restraining order was extended by order of this court on May 21, 2010. The parties stipulated to adjourn the motion to May 28, 2010 on which date, it was marked submitted to this court.

By the instant motion, the plaintiff seeks leave to amend its complaint to substitute the current Commissioner of the Suffolk County Department of Social Services for the previous one named in the caption. The amendment also includes an expansion of the plaintiff's claims for injunctive relief with respect the Riverside parcel and new claims for permanent injunctive relief against the County defendants with respect to their continued use of the existing Westhampton trailer and its expansion by replacement with the new trailer delivered to the site on May 3, 2010. The plaintiff further demands a preliminary injunction enjoining and restraining the County defendants from altering, expanding, replacing or changing the physical structure of the trailers currently situated on the County's Riverside and Westhampton parcels.

Those portions of the instant motion wherein the plaintiff seeks an order granting it leave to amend its complaint is considered under CPLR 3025(b) and is denied as unnecessary. The record reflects that a motion (001) by the County defendants for dismissal of the plaintiff's complaint pursuant to CPLR 3211(a) has been pending without submission for eight months, as the same has been repeatedly adjourned pursuant to 22 NYCRR 202.8 upon the written stipulations of counsel. Interposition of that motion by the County defendants extended their time to answer (*see* CPLR 3211 [f]), which, in turn, extended the time within which the plaintiff could amend its complaint as of right in accordance with CPLR 3025 [a] (*see* ***STS Mgt. Dev. Inc., v New York State Dept. of Taxation***, 254 AD2d 409, 678 NYS2d 772 [2d Dept 1998]). The record reflects that a proposed amended complaint, which is denominated as an amended and supplemental complaint, was served upon the County defendants on May 4, 2010, in conjunction with the instant motion by the plaintiff. Under these circumstances, the court denies as unnecessary, those portions of this motion wherein the plaintiff seeks leave to amend its complaint pursuant to CPLR 3025 (b). The time within which the County defendants must answer the amended and supplemental complaint is hereby extended to thirty days from the date of this order.

The remaining portions of the plaintiff's motion, wherein it seeks a preliminary injunction restraining and enjoining the County defendants from altering, expanding, replacing or changing the physical structure of the trailers currently situated on the County's Riverside and Westhampton parcels, is granted. It is well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Wheaton/TMW Fourth Ave. LP . v New York City Dept. of Bldgs.,*** 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see* ***Tatum v Newell Funding, LLC.,*** 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]), as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]). Factors militating against the granting of preliminary injunctive relief include: that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Dana Distrib., Inc. v Crown Imports, LLC***, 48 AD3d 613, 853 NYS2d 111 [2d Dept 2008]); that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept 2005]); or would effect an alteration, rather than a preservation, of the status quo (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.***, 65 AD3d 1051, *supra*; ***Automated Waste Disposal, Inc. v Mid Hudson Waste, Inc.***, 50 AD3d 1072, 857 NYS2d 648 [2d Dept 2008]).

It is equally well established that a municipality which seeks preliminary injunctive relief to restrain violations of zoning regulations and other provisions of local codes and ordinances such as building permit regulations need only show that it has a likelihood to succeed on the merits of its claims and that the equities are balanced in its favor (*see* Town Law § 268; ***Town of Riverhead v Silverman***, 54 AD3d 1024, 864 NYS2d 169 [2d Dept 2008]; ***Town of Islip v Modica Assocs. of NY 122, LLC***, 45 AD3d 574, 846 NYS2d 201 [2d Dept 2007]; ***First Franklin Sq. Assoc. v Franklin Sq. Prop. Account***, 15 AD3d 529, 790 NYS2d 527 [2d Dept 2005]). A strong prima facie demonstration that the defendants are violating one or more provisions of a zoning or other like ordinance is generally sufficient to satisfy the municipality's burden on a motion for preliminary injunctive relief (*see* ***Town of Islip v Modica Assocs. of NY 122, LLC***, 45 AD3d 574, *supra*). Nevertheless, appellate courts have instructed that "[A] town has the right pursuant to its police powers to prevent conditions dangerous to public health" and that "it is not for the court to determine finally the merits of an action upon a motion for preliminary injunction; rather the purpose of the interlocutory relief is to preserve the *status quo* until a decision is reached on the merits. Viewed from this perspective, it is clear that the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with a showing of a certainty of success" (***Incorporated Vil. of Babylon v John Anthony's Water Café, Inc.***, 137 AD2d 791, 525 NYS2d 341 [2d Dept 1988]).

Here, the plaintiff's claims for injunctive relief include claims that the County defendants are violating the plaintiff's zoning ordinance and building permit requirements and that these defendants are also violating State laws and the County's own local laws. The lesser standard afforded municipalities under Town Law §268 is thus applicable to the plaintiff's demands for preliminary injunctive relief.

The moving papers sufficiently established that residential trailer housing is not a permitted use in the zoning districts whereat the trailers are located and that the County did not obtain from the plaintiff any of the required variances, approvals, permits or occupancy certificates required by the Town Code prior to the installation and use of the subject trailers. The moving papers also established that the health,

safety and welfare of the residents of the plaintiff Town are exposed to the risks associated with and posed by the establishment of multiple room occupancy trailers which likely violate the plaintiff's zoning and building ordinances. Moreover, the temporary, emergency trailer housing employed at the two sites in the Town of Southampton, and at no others throughout the County, has been repeatedly touted by the County defendants to be only temporary in nature. Its continuance for a period of more than two years, however, gives it a more permanent quality. The plaintiff has thus established a likelihood of success on the merits of its claims and that a balance of the equities tips in favor of the plaintiff.

In opposing the plaintiff's motion, the County does not deny its non-compliance with the plaintiff's zoning regulations or the other laws and statutes cited by the plaintiff in its complaint and amended complaint. Instead, the County argues that it is exempt from complying with the plaintiff's zoning regulations and the other permit requirements applicable to the subject trailers that now serve as temporary emergency housing facilities for registered, homeless sex offenders since the County defendants are bound to provide such facilities under state statutes and the recent decision of the New York State Office of Temporary and Disability Assistance.

In support of their claim of governmental immunity, the County defendants rely upon the balancing of public interests approach which is applicable to resolving issues of municipal immunity from land use regulations. This approach was adopted by the Court of Appeals in 1988 in the seminal case of ***Matter of the County of Monroe*** [City of Rochester] (72 NY2d 338, 533 NYS2d 702) and it involves a thorough examination and a balancing of the several enumerated factors deemed necessary and material by the Court of Appeals in determining the competing interests of municipalities with respect to the land use project at issue in an action. In that case, the Court of Appeals held that the Rochester City Code and permit requirements did not apply to the County of Monroe's expansion of a county airport situated within the city limits.

However, the procedural posture of the ***Monroe*** case differs remarkably from the procedural posture of this case. In ***Monroe***, the County of Monroe and the City of Rochester jointly sought a judicial declaration of rights on the County's claim to immunity upon an agreed statement of facts which was presented directly to the Appellate Division, Fourth Department pursuant to CPLR 3222(b)(3). The summary procedures afforded under CPLR 3222 contemplate a determination, as a matter of law, of the legal issues framed by the agreed statement of facts Notably, a preliminary injunction is not an available remedy to litigants who proceed on an agreed statement of facts pursuant to CPLR 3222 (*see* CPLR 3222[b][1]).

In plenary actions for permanent injunctive relief wherein a demand for preliminary injunctive relief is met with an assertion of governmental immunity which invokes application of the balancing of public interests approach enunciated in ***Matter of the County of Monroe*** [City of Rochester] (*Id.*), determination of that governmental immunity claim has been found to be premature where a developed record does not exist and the papers before the court reveal the existence of various unestablished and facially conflicted facts (*see* ***Town of Riverhead v County of Suffolk*** , 66 AD3d 1004, 887 NYS2d 650 [2d Dept 2009]; *see also* ***Town of Riverhead v County of Suffolk***, 39 AD3d 537, 834 NYS2d 219 [2d Dept 2007]). Here, the plaintiff seeks a preliminary injunction, not to acquire the ultimate relief demanded in its complaint, but merely to maintain the status quo pending final determination of its pleaded claims for relief. In opposition, the County asserts a claim of governmental immunity, determination of which, requires resort to the balancing of public interests approach enunciated in ***Matter of the County of Monroe*** [City of Rochester] (*supra*).

Although this litigation has been pending for more than a year, the parties were engaged in settlement discussions which led to the repeated adjournment of the first motion interposed herein, namely, the motion by the County defendants to dismiss the original complaint on statute of limitations and other grounds. With the flurry of transactions engaged in by the County in May of this year, the plaintiff interposed the instant motion to amend the complaint and for an award of the subject preliminary injunction. This action is thus at its earliest stages and the alteration of the status quo by the County in early May of this year was met by the plaintiff's immediate interposition of this motion for a preliminary injunction and other relief. There is no developed record nor any establishment of the several enumerated factors necessary for the application of the balancing of public interests approach. On the record before it, this court finds that the opposing papers submitted by the County failed to demonstrate its entitlement to a summary determination that it is immune from complying with the zoning and building codes of the plaintiff and/or the laws promulgated by the governmental bodies including the State and the County.

The County defendants' further claims that preliminary injunctive relief with respect to the Westhampton parcel is not available to the plaintiff for want of pleaded claims with respect thereto is without merit. This claim has been rendered academic by the plaintiff's service of its amend complaint pursuant to CPLR 3025 (a). Also lacking in merit are the defendants' claims that the plaintiff is guilty of laches and thus should be precluded from obtaining the preliminary injunctive relief demand by it.

Equally unavailing are the County defendants' claims that all of causes of action asserted by the plaintiff in this action are time barred under the four month statute of limitations imposed by CPLR 217. That limitations period is applicable to CPLR Article 78 proceedings and has no application to this action for permanent injunction relief, including mandatory injunctive relief, which differs, both in substance and in form, from relief in the nature of mandamus to compel. The County defendants' claims that this action should have been brought as an Article 78 proceeding and within four months of the placement of the trailers are without merit.

In view of the foregoing, the plaintiff's application for preliminary injunctive relief is granted. The defendants are hereby restrained and enjoined from constructing, placing, altering, expanding, removing, replacing or in any way changing the physical structure of the trailers currently situated on the County's Riverside and Westhampton parcels.

Pursuant to CPLR 2512, the plaintiff is not required to post an undertaking notwithstanding the award of preliminary injunctive relief in its favor under the terms of this order. Nevertheless the court is required to by CPLR 2512(1) to fix the limit of the Town's liability for damages if it is ultimately determined that its was not entitled to the injunctive relief granted herein (*see* ***Town of Putnam v Cabot***, 50 AD3d 775, 856 NYS2d 166 [2d Dept 2008]). To determine this amount, the court will conduct a hearing on Friday, **June 18, 2010** at 9:30 a.m. in Part 33, located on the first floor of the Supreme Court Annex Building at One Court Street, Riverhead, New York, 11901. Counsel for the respective parties are thus directed to appear at the appointed time and place ready to present evidence of the CPLR 2512 issues framed by the terms of this order.

DATED: 6/8/10

THOMAS F. WHELAN, J.S.C.