

Incorporated Vil. of Lindenhurst v Parthe

2010 NY Slip Op 32599(U)

September 15, 2010

Sup Ct, Suffolk County

Docket Number: 16965/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 16965/2009

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: APRIL 1, 2010
 FINAL SUBMISSION DATE: APRIL 22, 2010
 MTN. SEQ. #: 003
 MOTION: MG RRH

ORIG. RETURN DATE: APRIL 22, 2010
 FINAL SUBMISSION DATE: APRIL 22, 2010
 MTN. SEQ. #: 004
 CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEYS:

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Upon the following papers numbered 1 to 9 read on this motion _____
TO PUNISH FOR CONTEMPT AND CROSS-MOTION TO MODIFY ORDER
 Order to Show Cause and supporting papers 1-3; Affidavit in Opposition and supporting papers
4, 5; Notice of Cross-motion and supporting papers 6-8; Replying Affirmation 9; it is,

ORDERED that this motion by plaintiff INCORPORATED VILLAGE OF LINDENHURST ("plaintiff") for an Order: (1) pursuant to Judiciary Law § 750, holding defendants EDWARD G. PARTHE and JOHN FRANCIS (hereinafter "PARTHE" or "FRANCIS" and collectively "defendants") in criminal contempt, or

in the alternative, pursuant to Judiciary Law § 753, holding defendants in civil contempt, and fining and/or incarcerating, or penalizing defendants in a manner commensurate with their conduct for their knowing, wilful and repeated violation of the temporary restraining Order heretofore issued in this action on June 3, 2009 (MacKenzie, J.) ("TRO"); (2) awarding plaintiff compensatory and punitive damages; and (3) reimbursing plaintiff for the cost of this application, including reasonable attorney's fees, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion by the self-represented defendant PARTHE for an Order: (1) modifying the TRO to remove any restrictions that prohibit PARTHE, the owner of the real property commonly known as 790 South Hickory Street, Lindenhurst, New York ("Premises"), from placing on the Premises a trailer of the type normally placed on residential premises after a fire renders the house uninhabitable; and (2) prohibiting plaintiff from imposing conditions or requirements on PARTHE for the placement of the trailer that are more restrictive than plaintiff customarily requires of applicants for the placement of such trailer, is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

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 defendants in the sum of \$350.00 for the first day after the date of service that the property contains violations of the Village Code; \$750.00 for the second such day; and \$1,000.00 for each additional day.

The subject TRO, issued on June 3, 2009 (MacKenzie, J.) in connection with plaintiff's prior application for a preliminary injunction, provided in its entirety:

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 [Premises] 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 [Village Code] and until such time as the Premises has a rental occupancy permit as required by § 193-246 of the [Village Code]; and it is further

ORDERED, that pending the return date, defendants are to secure and make safe the [Premises], including all buildings and structures located thereon.

By Order dated April 9, 2010, this Court granted plaintiff's application for a preliminary injunction 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 [Premises] 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 [Village Code].

The Court had weighed the elements necessary for the granting of injunctive relief to plaintiff, and found that an injunction was warranted based upon the undisputed facts presented therein, including that PARTHE rents the dwelling on the Premises without a rental permit therefor; that despite PARTHE's contention, the storage of dock lumber at the Premises is not authorized under Village Code § 193-3 (A); that plaintiff can regulate the use of the barge at the Premises as it is tied to land within the Village of Lindenhurst; and that PARTHE's claim of

maintaining a prior non-conforming use by storing the barge at the Premises was without merit, as a dock building business was not permitted in a Business District Zone when defendant purchased the Premises in 1982 (see Village Code § 85-36, as amended on October 30, 1979 by Local Law No. 9-1979).

Moreover, this Court found that based upon the numerous potential violations of the Village Code existing at the Premises, plaintiff had made a strong showing of a likelihood of success on the merits. Further, in balancing the equities, the Court found that the scale tipped in favor of plaintiff, as PARTHE admitted to renting the Premises without the proper permits, and did not dispute the storage of the barge or dock lumber, all in violation of the Village Code.

Plaintiff has now filed the instant application to hold defendants in criminal or civil contempt, alleging that defendants have wilfully and repeatedly violated the TRO. Plaintiff filed this application prior to the issuance of the preliminary injunction on April 9, 2010, but the Court notes that the language of the preliminary injunction mirrors the language of the first paragraph of the TRO. Plaintiff alleges that FRANCIS continues to use and occupy the Premises, and that PARTHE as the owner of the Premises, is permitting the such use and occupancy. Specifically, plaintiff alleges that FRANCIS is residing in the house at the Premises, as well as on a boat tied to the bulkhead at the Premises in violation of Village Code § 193-50. In support of the foregoing, plaintiff has submitted, among other things, an affidavit made by two neighbors based upon personal observations, and an affidavit of a Suffolk County police detective confirming that FRANCIS, a registered Level 3 Sex Offender, has reported to them after the date of the TRO that he continues to reside at the Premises. In addition, plaintiff has submitted an affidavit of the Building Inspector of the Village of Lindenhurst who avers that the Premises has remained unchanged since the issuance of the TRO, as neither the 10' high stack of dock lumber, nor the "rusted hulk of a crane sitting atop a decrepit barge" has been removed, and the house and boathouse continue to be in a state of disrepair. Further, plaintiff informs the Court that subsequent to the issuance of the TRO, PARTHE was convicted on July 20, 2009 in Lindenhurst Village Justice Court of violating Village Code §§ 193-139, 193-246, and 193-247, in connection with his renting of the house without a permit, the outdoor storage of the dock lumber, and violations of the directives of the Building Inspector. Finally, plaintiff informs the Court that PARTHE has also been charged with 260 new counts of weekly violations of the Village Code and the New York State Building Code. Thus, plaintiff seeks an

Order holding defendants in criminal or civil contempt and imposing penalties and sanctions upon defendants.

FRANCIS has filed an affidavit in opposition to plaintiff's motion. FRANCIS acknowledges that he lives on his boat which is attached to the bulkhead at the Premises, but claims that this does not violate the TRO as he does not "actually live in the residence." As such, FRANCIS contends that he has not wilfully violated the TRO.

PARTHE has filed the instant cross-motion seeking to modify the TRO to permit PARTHE to place on the Premises a trailer of the type normally placed on residential premises after a fire renders the house uninhabitable, and prohibiting plaintiff from imposing conditions or requirements on PARTHE for the placement of the trailer that are more restrictive than plaintiff customarily requires of applicants for the placement of such trailer. In opposition to plaintiff's motion, PARTHE claims that plaintiff's allegations of violations of the TRO are "generic" and "frequently confusing," and that plaintiff has presented no proof that FRANCIS actually resides in the house located at the Premises. PARTHE contends that FRANCIS is using his boat as a night watchman's shack, and that this does not violate the TRO as the boat is not within the geographical or tax map boundaries of the Premises. PARTHE argues that the TRO directs defendants to secure and make safe the Premises, which PARTHE claims is accomplished by FRANCIS residing on his boat. Furthermore, PARTHE alleges that FRANCIS has not resided in the house at the Premises since the date of the fire, to wit: May 30, 2009.

With respect to PARTHE's cross-motion regarding placement of a trailer on the Premises, the Court finds the same to be procedurally defective, as the notice of cross-motion was signed on April 22, 2010, and made returnable that same day (see CPLR 2215). In any event, if PARTHE objects to an act of plaintiff he must exhaust all available administrative remedies before being permitted to litigate in a court of law (see *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52 [1978]; *Matter of Mirenberg v Lynbrook Union Free Sch. Dist. Bd. of Educ.*, 63 AD3d 943 [2009]; *NYCLT 1998-2 Trust v T. Jan Realty Corp.*, 63 AD3d 810 [2009]). Accordingly, this cross-motion by defendant is **DENIED** in its entirety.

The failure to obey a lawful Order of a court is a species of contempt. A contempt of court ultimately may constitute a criminal contempt, a civil

contempt, or both a criminal and a civil contempt; a period of incarceration may be imposed upon a finding of either a criminal or civil contempt (*Matter of Rubackin v Rubackin*, 62 AD3d 11 [2009]). To prevail on a motion to punish for civil contempt, the movant must establish, by clear and convincing evidence: (1) that a lawful Order of the Court, clearly expressing an unequivocal mandate, was in effect; (2) that the Order was disobeyed and the party disobeying the Order had knowledge of its terms; and (3) that the movant was prejudiced by the offending conduct (see *Town of Riverhead v T.S. Haulers, Inc.*, 68 AD3d 1103 [2009]; *Coyle v Coyle*, 63 AD3d 657 [2009]; *Kalish v Lindsay*, 47 AD3d 889 [2008]; *Gloveman Realty Corp. v Jefferys*, 29 AD3d 858 [2006]). To prevail on a motion to punish for criminal contempt, the movant must establish, beyond a reasonable doubt, the wilful disobedience of a court's lawful mandate (see Judiciary Law § 750 [A] [3]; § 751; *Muraca v Meyerowitz*, 49 AD3d 697 [2008]).

Based upon the foregoing record, plaintiff's application is **GRANTED** to the extent that the parties are directed to appear for a contempt hearing on **October 28, 2010, at 10:30 a.m., Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**, based upon defendants' alleged non-compliance with the TRO issued on June 3, 2009 (MacKenzie, J.) and the preliminary injunction issued by this Court on April 9, 2010 (see Judiciary Law §§ 750, 753).

The foregoing constitutes the decision and Order of the Court.

Dated: September 15, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court