SHORT FORM ORDER

INDEX #36390-09
RETURN DATE: **6-2-10**
MOT. SEQ. # **002**

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

PRESENT:
Hon. PETER FOX COHALAN

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TOWN OF HUNTINGTON,

-Plaintiff.

-against-

WILLIAM BRAUN, GROWERS MARKET II, INC., ARNN CORP., d/b/a GROWERS OUTLET, and ROBERT IOVANE,

-Defendants.

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CALENDAR DATE: August 25, 2010
MNEMONIC: Mot D.

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-13 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 14-17 ; Replying Affidavits and supporting papers 18-20 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the Town of Huntington seeking summary judgment pursuant to CPLR §3212 on its complaint for permanent injunctive relief alleging violations of the Town of Huntington Code is granted on its complaint as to cause of action #1 and cause of action #2 referring to the storing and displaying of flowers and merchandise on public sidewalks and denied as to its cause of action #3 and its cause of action #4 alleging the operation of a nursery and accessory greenhouse as a non-permitted use as there are readily identifiable issues of fact on those causes of action which preclude summary disposition.

The plaintiff, Town of Huntington (hereinafter Town), instituted this action against William Braun, Growers Market II, Inc., Arnn Corp. d/b/a Growers Outlet and Robert Iovane (hereinafter defendants) in its complaint under cause of action #1 and cause of action #2 seeking to permanently enjoin them from using public sidewalks to display and/or store their merchandise of flowers, plants, soil, mulch and gardening supplies without permission of the Town and under cause of action #3 and cause of action #4 allowing the storage and display of gardening merchandise or permitting a greenhouse on the premises located at 5 Third Avenue in East Northport, Suffolk County on Long Island, New York. This Court, in an order, dated January 27, 2010, and entered on February 1, 2010 granted a preliminary injunction enjoining the defendants from displaying, occupying or storing merchandise and garden products and supplies on the public sidewalks or public right of way. The Town claims that the defendants are illegally occupying, maintaining, using and operating a flower shop, garden center and greenhouse without the necessary certificate of occupancy or certificate of permitted use in the Town's C-6 General Business District and the Town has issued

summons to the principal of the premises, defendant Robert Iovane, for misuse of the land. The defendants contend that the operation of a "retail florist shop" and/or nursery is a permitted use in the C-6 General Business District and includes an accessory greenhouse. They further contend that the Town Zoning Board of Appeals (hereinafter ZBA) did not deny their operation as it presently exists, but only denied a site plan improvement that would have removed a 1½ story frame residence on the property to provide off street parking.

For the following reasons, the Town's motion for summary judgment on its complaint pursuant to CPLR §3212 is granted on its first (1st) cause of action and its second (2nd) cause of action alleging the storage and displaying of garden materials on a public walkway and as to those causes of action, the Court grants the Town's request for permanent injunctive relief and the defendants are permanently enjoined from storing, displaying or selling garden supplies, equipment and inventory on the public walkways of the Town. However, as to its third (3rd) cause of action and its fourth (4th) cause of action alleging that the defendants violated the Town Code by engaging in the operation of a retail/wholesale florist or nursery and by having a greenhouse and masonry addition to the greenhouse in violation of the certificate of occupancy, the Town's motion is denied as there are readily identifiable issues of fact which preclude summary judgment.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). The defendants have failed to assert a defense, argument, justification, material evidence or even an identifiable issue of fact to substantiate a claim of authority to use and exert control over a public walkway for selling, storing and displaying their commercial garden inventory for sale to the public from a public sidewalk.

Town Code §173-16 provides that the owner of such lands fronting or abutting a public sidewalk "shall keep such sidewalk free and clear of... all other obstructions" which would include the use of the public sidewalks to store or display garden materials for sale as part of the defendants' commercial establishment. Town Code §198-27(C)(a) also provides that outdoor areas for display or storage "shall be prohibited on a required sidewalk or within the right of way". The defendants' display and storage of gardening supplies and materials on a public right of way or a public sidewalk is without legal authority and indeed the defendants in their opposition to the Town's motion do not advance an argument or seek to justify the legitimacy of their use of the public sidewalks for the commercial display of their gardening products for sale. Therefore, the Court grants the Town's motion for summary judgment on its complaint pursuant to CPLR §3212 as to those aspects of its complaint dealing with the defendants' illegal use of a public sidewalk and right of way for the sale, display and storage of garden products associated with their business. The Court grants the Town a permanent injunction against the defendants prohibiting them from selling, storing or displaying for

commercial sale the gardening supplies, inventory or stock associated with their business on the public thoroughfare, sidewalk or right of way.

However as to the Town's additional requested relief under its third (3rd) cause of action and its fourth (4th) cause of action which allege the use of the defendants' property in the Town's C-6 General Business District for outside storage and display on the subject premises as well as the greenhouse on the premises without authorization or a certificate of occupancy, the defendants oppose the Town's motion for summary judgment.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [***Robinson v.Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact on the issue of whether or not the defendants' business is a "retail florist shop" which includes an "accessory greenhouse" which is a permitted use within the Town's C-6 General Business District as of right as the defendants contend or is it an unauthorized use as the Town contends because it is not a "retail or wholesale florist shop, nursery sales including accessory greenhouses" as permitted under Town Code §198-27(A), but is in fact a commercial enterprise.

Town Code §198-27(A) defines the permitted uses within the General Business District and provides that a building or premises shall be used for the following purposes and pursuant to Town Code §12:"retail or wholesale florist shop, nursery sales, including accessory greenhouses." The Town contends that under Town Code §198-2(B) a nursery is

defined as "an agricultural enterprise wherein trees or shrubs or other ornamental plants are field grown for profit." Therefore the Town argues that the defendants' are not an agricultural enterprise because the plants, trees, shrubs and ornamental plants are not field grown on the premises. However, a review of the Town Code only states "field grown for profit" not field grown on the premises. The Town argues a more restrictive definition of "field grown on the premises" not contained in its code. The defendants submit that, under Town Code §198-109 (B), the ZBA is vested with the power "to decide any question involving the interpretation of a provision of this chapter". Because there is no administrative determination by the ZBA that "field grown" contains within its definition that the plants, flowers and nursery products must be field grown on premises, the defendants' argue that this raises the very issue of fact requiring denial of the Town's motion.

It is not this Court's role to define as a matter of law that "field grown for profit" within the definition of an agricultural enterprise stated in Town Code §198-2(B) should be characterized or refined even further within its definition to include the restrictive language argued by the Town of "being grown on the premises." The idea that this Court should define the undefined as a matter of law when the Town Code specifically rests that power within the ZBA would usurp powers granted to the ZBA to define its terms as provided in Town Code §198-109 (B). Therefore, the Town has failed to meet its burden as a matter of law in establishing a violation of its Town Code to warrant summary disposition.

Further, the term florist as well as the terms retail and wholesale should not by Court action be defined more restrictively by incorporating within its definition that the products sold be home grown on the property where the sales took place. Ambiguity of language presents a question of fact which may not be resolved by the Court on a motion for summary judgment. See, ***Leon v. Lukash***, 121 AD2d 693, 504 NYS2d 455 (2nd Dept. 1986). Here the ambiguity is readily apparent and raises the question of whether or not the Town Code in its C-6 General Business District (the most permissive zoning) allows the operation of "retail or wholesale florist shop, nursery sales" which only involve such plants, flowers and nursery supplies "field grown for profit" and as the Town contends in support of its request for summary judgment "on the subject premises." There is no rule of law or code provision which provides that these nursery sales must be "field grown on the subject premises" and therefore an issue of fact is raised requiring the denial of the Town's motion. Of course all living plants, grasses, flowers, mulch, etc. have to be "field grown" somewhere since the very nature of their existence requires them to grow or be harvested from the earth or a "field". However, the added provision of grown *on the subject premises* (italics added) does not appear within the Town Code. While this Court views this interpretation of "grown on the premises" as an extremely narrow restrictive interpretation of the Town Code, that decision of the definition to be placed upon the word "field grown" is best left within the ZBA's authority under Town Code §198-109 (B) to determine questions of interpretation.

Finally, the ZBA's statement which describes the defendants' business as "the retail sales of plants, flowers and items related to such products" and which concludes that the "use of the premises should be classified as general retail and not as a 'nursery'" is not dispositive since no findings of fact were stated to substantiate the ZBA's finding. In fact, the ZBA's decision was directed at parking, removal of a 1½ story structure in the back and a request to legalize a pre-existing use. Absent a more detailed finding that the defendants' sale of flowers, plants and growing materials in the C-6 General Business District is not retail or wholesale florist and/or a nursery and the reasons which underlay that determination, this Court is not prepared to accept a mere conclusory term that the defendants' business is not a

florist and/or a nursery with an accessory greenhouse. The question of fact raised is how the defendants' operation of plant and flower sales is different from and/or the same as numerous other plant sales for retail and whether there is a self imposed requirement in this case of "home grown *on the premises*" (italics added) required in order to remain compliant with the Town Code. The Town does not answer how the defendants' operation differs from the Town Code requirement of "[a]n agricultural enterprise wherein trees or shrubs or other ornamental plants are field grown for profit." and therein lies the basis for the denial of the Town's request for summary disposition of this case as a matter of law.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in Court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Here, there are many triable issues of fact on the meaning and definition of "retail or wholesale florist shop and/or a nursery" and whether the defendants are such a business as well as the question of nursery sales and the interpretation and definition of nursery and whether or not it should include an undefined requirement of "home grown" sales or "grown on the premises" as contended by the Town. These fact issues require a trial before a trier of fact and preclude summary judgment. The Town's motion for summary judgment pursuant to CPLR §3212 on its third (3rd) cause of action and its fourth (4th) cause of action is denied.

Accordingly, the Town's motion for summary judgment seeking permanent injunctive relief pursuant to CPLR §3212 is granted on its first (1st) cause of action and its second (2nd) cause of action. The Town's motion is denied as to its third (3rd)cause of action and its fourth (4th) cause of action.

The foregoing constitutes the decision of the Court.

Dated: April 20, 2011

J.S.C.