

**Town of Huntington v Mastroianni**

2012 NY Slip Op 33084(U)

December 21, 2012

Sup Ct, Suffolk County

Docket Number: 0027444/2010

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

INDEX NO.: 0027444/2010

SUBMIT DATE: 10/3/2012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 SUFFOLK COUNTY

COPY

Present:

HON. JOHN J.J. JONES, JR.  
Justice

MOTION DATE: 8/15/2012

Mot. Seq. #013 - MOT D

-----X  
TOWN OF HUNTINGTON,

Plaintiff,

-against-

JOHN MASTROIANNI, JOHN'S BAY  
LIMOUSINE & 320 BROMPTON  
ENTERPRISES, INC.,

Defendant.

-----X

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31 Salem Ridge Drive  
Huntington, NY 11743

KAREN KERR, ESQ.  
Atty. for Defendant  
*320 Brompton Enterprises, Inc.*  
191 New York Avenue, Suite 202  
Huntington, NY 11743

Upon the following papers numbered 1 to 49 read on this application for an order appointing and authorizing a temporary receiver to enforce a temporary injunction and other various relief; Notice of Motion/Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 21-36; Replying Affidavits and supporting papers 37-49; Other \_\_\_\_; it is

**ORDERED** that the application of the plaintiff Town of Huntington ["plaintiff" or "the Town"], for an order affirming the preliminary injunction that was granted by order of the court dated April 12, 2012, requiring that the defendants, John

Mastroianni, [“John”], John’s Bay Limousine, Inc., [“JBL”], and 320 Brompton Enterprises, Inc. [“Brompton”], immediately cease the prohibited uses of 324 Depot Road, Huntington Station, New York and identified on the Suffolk County Tax Map by number 00400-151.00-02-084 [“subject premises”], and an Order appointing and authorizing a Temporary Receiver to take all steps necessary to enjoin and restrain the defendants, their servants, heirs, agents, assigns, employees, contractees, tenants, and any and all persons or corporations acting on their behalf from 1) acting in violation of the April 12, 2012 preliminary injunction by operating the used car business at the subject premises; 2) maintaining, operating and/or allowing the use of the subject premises in violation of the Huntington Town Code; 3) an order directing that the costs incurred in connection with the appointment of a temporary receiver to bring the subject premises into compliance with the Town Code be awarded to the Town; 4) an order authorizing the Sheriff of Suffolk County and/or the Suffolk County Police to enter upon the subject premises and take any and all steps necessary to terminate the illegal activities upon the subject premises, including the securing and padlocking of the business structure and gates to the rear property, towing and storage of all unregistered vehicles off the subject premises; 5) an order and judgment in the Town’s favor in the sum of \$500 per day for each day the violations continue, computed from November 4, 2010, the date of the order (Spinner, J.), granting the temporary restraining order in the Town’s favor to April 12, 2012, the date of the order of this court granting a preliminary injunction in the Town’s favor; and 6) an order and judgment in the Town’s favor in the sum of \$1000 per day for each day the violations continue, computed from April 12, 2012, the date of the order of this court granting a preliminary injunction in the Town’s favor, is decided as follows.

**ORDERED** that the application for an order appointing and authorizing a Temporary Receiver to take all steps necessary to enjoin and restrain the defendants, their servants, heirs, agents, assigns, employees, contractees, tenants, and any and all persons or corporations acting on their behalf from acting in violation of the April 12, 2012 preliminary injunction by operating the used car business at the subject premises, is denied; and it is further

**ORDERED** that the application for an order empowering the Temporary Receiver to take all steps necessary to enjoin and restrain the defendants, their servants, heirs, agents, assigns, employees, contractees, tenants, and any and all persons or corporations acting on their behalf from maintaining, operating and/or allowing the use of the subject premises in violation of the Huntington Town Code, is denied ; and it is further

**ORDERED** that the application for an order directing that the costs incurred in connection with the appointment of a Temporary Receiver to bring the subject premises into compliance with the Town Code be awarded to the Town, is denied as

academic; and it is further

**ORDERED** that the application for an order authorizing the Sheriff of Suffolk County and/or the Suffolk County Police to enter upon the subject premises and take any and all steps necessary to terminate the illegal activities upon the subject premises, including the securing and padlocking of the business structure and gates to the rear property, towing and storage of all unregistered vehicles off the subject premises is denied; and it is further

**ORDERED** that the application for an order and judgment in the Town's favor in the sum of \$500 per day for each day the violations continue, computed from November 4, 2010, the date of the order (Spinner, J.), granting the temporary restraining order in the Town's favor to April 12, 2012, the date of the order of this court granting a preliminary injunction in the Town's favor, is denied; and it is further

**ORDERED** that the application for an order and judgment in the Town's favor in the sum of \$1000 per day for each day the violations continue, computed from April 12, 2012, the date of the order of this court granting a preliminary injunction in the Town's favor, to the present, is denied; and it is further

**ORDERED** that the parties appear for a hearing to be conducted before the court on January 30, 2013, to determine the issue of the defendants' compliance with the terms of the preliminary injunction issued on April 12, 2012, and the fines to be imposed, if any, in the event that it is determined that there has been or continues to be a violation.

The underlying facts are set out in the prior order of the Court dated April 12, 2012, and the parties' familiarity with those facts is assumed. The facts will be discussed only as necessary to inform this decision.

The Town commenced the action to enjoin John Mastroianni's allegedly continued use of 324 Depot Road as a used car dealership and for car storage, for monetary penalties, and to enjoin the defendant's expansion of the car dealership to, and/or use as an auto repair shop at the adjoining property designated as 320 A Depot Road. The property designated as 320 Depot Road ["320" or "the 320 property"] is in the C-6 zone, or General Business District. It abuts residential homes on three sides.

The 320 property has a certificate of occupancy for a one-story cinder block garage and service station issued in 1947. The use of the 320 property as a car dealership or for car storage requires a special use permit from the Town's Zoning Board of Appeals ["the ZBA"]. See Huntington Town Code § 198-27-C (2) (a).

The adjoining property, 320A Depot Road, [“320A” or the 320A property”], is a two-family residence with a detached garage that the Town alleges was either fully or partially converted to a business use and workshop equipped with a car-lift. The sixth cause of action of the complaint alleges that the illegal use of 320A as an automobile repair business equipped with a car lift subjects the violator to civil penalties pursuant to Town Code § 198-10A.

The court previously concluded that the Town had sufficiently demonstrated its entitlement to injunctive relief pending the determination of the action. It was and is undisputed that the Town obtained a final determination that 324 Depot Road is not a large enough parcel of land to operate a used car dealership. The ZBA’s denial of a special permit to operate a used car dealership was reviewed and affirmed by the order of the Honorable Elizabeth Emerson dated February 2, 2006.

However, in denying the Town’s most recent application for summary judgment, the Town did not establish its right to a permanent injunction in light of the Town’s issuance of a certificate of occupancy permitting use of the 320A property as a “garage and workshop” in 1958, its failure to establish as a matter of law that such use had been abandoned, or that the rezoning of the area to R-15 residential use in 1989 prohibited such use of the parcel. The Town also did not establish in what manner the 320 property could be used to temporarily keep cars on the premises and for what purpose. There was also an issue of fact whether Mastroianni had been prevented from applying for Town approvals.

Therefore, insofar as the instant application is a revived attempt to receive a permanent injunction, the motion is denied largely for the reasons stated in the prior order of the court dated April 12, 2012.

With respect to the request for the appointment of a temporary receiver, the cost to be reimbursed by the defendants, the relief is likewise denied.

*CPLR* § 6401, entitled “Appointment and powers of temporary receiver” provides:

**(a) Appointment of temporary receiver; joinder of moving party.**

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action

and the person shall be joined as a party.

(b) **Powers of temporary receiver.** The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

A party moving for the appointment of a temporary receiver must submit "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (see *Board of Managers of Nob Hill Condominium Section II v. Board of Managers of Nob Hill Condominium Section I*, \_\_\_ A.D.3d \_\_\_, 2012 WL 5503562 [2d Dept.]).

A temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property because the appointment results in the taking and withholding of that property from a party without an adjudication on the merits (see *Quick v. Quick*, 69 A.D.3d 828 [2d Dept. 2010]). The appointment must be necessary to take, hold and preserve the property at issue while the action is pending. NY CPLR Commentaries C:6401:1 (McKinney).

Here, the Town is improperly attempting to use the provisional remedy of Article 64 receivership as an enforcement tool. If the Town believes that in defiance of the preliminary injunction that has been in place since April 12, 2012, the defendants are using the 340 property in violation of the injunction, the proper remedy is a criminal proceeding in District Court for violations of the Town Code and/or a motion to punish for criminal and/or civil contempt -- not the appointment of a receiver with police powers.

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 Judiciary Law § 753 [A][3]; *Coyle v. Coyle*, 63 A.D.3d 657, 658, 882 N.Y.S.2d 423; *Kalish v. Lindsay*, 47 A.D.3d 889, 891, 850 N.Y.S.2d 599; *Galanos*

*v. Galanos*, 46 A.D.3d 507, 508, 846 N.Y.S.2d 654; *Biggio v. Biggio*, 41 A.D.3d 753, 753-754, 839 N.Y.S.2d 527; *Glovesman Realty Corp. v. Jefferys*, 29 A.D.3d 858, 859, 815 N.Y.S.2d 687).

A civil contempt proceeding carries as a fine any sum that will indemnify the injured party for the actual loss caused by the contempt. The fine is measured by the harm caused to the contempt's victims, and not by the nature of the contempt. It is not designed to punish or to deter but rather, to compensate or indemnify private complainants (see Judiciary Law §773; *Town of Southampton v. R.K.B. Realty, LLC*, 91 A.D.3d 628, 630-631 [2d Dept. 2012]).

The moving papers include proof tending to show that the 320 property continues to be used by defendants in violation of the Town Code and the preliminary injunction issued on April 12, 2012. However, the defendants have raised a factual issue regarding their use of the premises, and whether the use (s) are permitted uses under the existing certificates of occupancy or violate the preliminary injunction warranting a hearing.

A hearing is set down before the court on January 30, 2013, to determine the issue of the defendants' compliance with the terms of the preliminary injunction issued on April 12, 2012, and the fines to be imposed, if any, in the event that it is determined that there has been or continues to be a violation. As part of its affirmative showing to justify the imposition of civil penalties, at the hearing the Town should be prepared to demonstrate the permitted uses of the 320 property, whether the temporary storage of any vehicles is a permitted use under the existing certificate of occupancy, and the actual uses of the property that have defeated, impaired, impeded, or prejudiced the Town's rights or remedies (see Judiciary Law § 753; *Town of Southampton v. R.K.B. Realty, LLC*, 91 A.D.3d 628 [2d Dept. 2012]).

DATED: 21 Dec. 2012



HON. JOHN J.J. JONES, JR.

J.S.C.

CHECK ONE:  FINAL DISPOSITION

NON-FINAL DISPOSITION