City of New York v ASA Petroleum, Inc.
2015 NY Slip Op 30425(U)
March 26, 2015
Supreme Court, Putnam County
Docket Number: 2192/14
Judge: Lewis J. Lubell
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Conference 4/20/15 @ 10 AM W/AAF

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X

THE CITY OF NEW YORK,

Plaintiff,

-against -

ASA PETROLEUM, INC. and AYAZ AWAN, as Chief Executive Officer of ASA PETROLEUM, INC.,

Defendants.

----------X

DECISION & ORDER

Index No. 2192/14

Sequence No. 2
Motion Date 1/26/15

LUBELL, J.

The following papers were considered in connection with **Motion Sequence #1** by plaintiff for an Order preliminarily enjoining defendants from continuing construction or any construction-related activities, including installation and activation of petroleum storage tanks, associated with a proposed gasoline station on property owned by ASA Petroleum, Inc. and located at 1 Fowler Avenue, Town of Carmel, Putnam County Tax Map No. 44.17-1-45 (the "Property"), until the determination of this action or such earlier time as defendants come into compliance with the Rules and Regulations for Protection for Contamination, Degradation and Pollution of the New York Water Supply and its Scources, 15 Rules of the City of New York Chapter 18 ("Watershed Regulations"); and the cross motion, **Motion Sequence #2**, by defendants for an Order pursuant to CPLR 3211(a)(7), dismissing the First and Third Causes of Action set forth in plaintiff's complaint dated November 3, 2014; and for such other and further relief as this Court deems just and proper:

PAPERS	**NUMBERED**
ORDER TO SHOW CAUSE	1
AFFIDAVIT OF JOHN G. DRAKE, P.E./ EXHIBITS A-C	2
AFFIRMATION IN SUPPORT	3
MEMORANDUM OF LAW	4

NOTICE OF CROSS MOTION/AFFIDAVITS/EXHIBITS A-T	5
MEMORANDUM OF LAW	6
MEMORANDUM OF LAW	7
REPLY MEMORANDUM OF LAW	8

Plaintiff, the City of New York ("NYC"), brings this action against ASA Petroleum, Inc. and Ayaz Awan, as its Chief Executive Officer, (collectively referred to as "ASA") to enjoin the continuation of the construction/renovation and operation of a gasoline station at ASA's premises located at 1 Fowler Avenue, Carmel, New York (the "Premises").

By Decision & Order of February 13, 2015, the Court preliminarily enjoined defendants from

> . . . continuing construction or any construction-related activities, including installation and activation of petroleum storage tanks, associated with a proposed gasoline station on property owned by ASA Petroleum, Inc. and located at 1 Fowler Avenue, Town of Carmel, Putnam County Tax Map No. 44.17-1-45, until the determination of this action, such earlier time as defendants come into compliance with the Rules and Regulations for Protection for Contamination, Degradation and Pollution of the New York Water Supply and its Sources, 15 Rules of the City of New York Chapter 18 ("Watershed Regulations") or as otherwise may be Ordered by the Court upon the Court's further consideration of the issue upon ASA's receipt of a DEP-approved SWPPP and upon the Court's determination of ASA's motion to dismiss.

In the interest of judicial economy, the injunction issued upon the uncontested fact that ASA had yet to receive a DEP-approved Storm Water Pollution Protection Plan ("SWPPP"), which is a prerequisite to the performance of activity at the Premises including but not limited to the "[c]onstruction of a gasoline station" (15 RCNY 18-39[3][iv]; 10 NYCRR 128-3.9[b][3][vi]).

Although the Court has not yet been advised of the status of the SWPPP application, it will proceed to a determination of ASA's motion to dismiss the First and Third Causes of Action for failure to state a cause of action (CPLR §3211[a][7]).

By way of its First Cause of Action, NYC contends:

> [ASA has] violated 15 RCNY §18-34(b) and 10 NYCRR §128.3.4(b) by installing underground petroleum storage facilities within 500 feet of a controlled lake in the City's drinking water supply system.

There is no dispute that the Premises is located within 500 feet of Lake Gleneida, a controlled lake within the New York City drinking water supply system, and that the New York City Department of Environmental Protection ("DEP") has authority to regulate activity within the area in which the Premises is located (see Public Health Law 1100) and has promulgated rules and regulations regarding same (see 15 Rules of the City of New York ["RCNY] Chapter 18; 10 New York Codes Rules and Regulations ["NYCRR"] Part 128 [the "Watershed Regulations"]).

It is also not disputed that petroleum was stored at the Premises in underground single-wall steel tanks up until approximately June 2010 in connection with a prior owner's operation of a former gasoline station at the site. The former tanks were removed by ASA upon its purchase of the gasoline station in September 2010. Admittedly, the tanks were out of compliance with state and Federal regulations and needed to be replaced. ASA asserts that it is simply looking to replace old non-compliant storage tanks with new compliant ones in connection with its purchase of the Premises and plans to recommence the operation of a gasoline station at the Premises.

ASA contends that it intends to continue to conduct a "non-complying regulated activity" ("NCRA") within the meaning of the City's Watershed Regulations (see 15 RCNY §18-27, infra) and, as such, does not need US EPA or NYS DEC approval to replace the old nonconforming tanks with new conforming one. Admittedly, it does need various Town of Carmel approvals which it alleges it vigorously sought and pursued and, after four years, finally received. ASA argues that were it not for the delays caused by the Town of Carmel, it would have been able to lawfully exercise its right to continue the non-complying regulated activity at the Premises.

ASA further argues that it is not embarking upon a prohibited activity, as NYC contends, because it is neither constructing "[n]ew aboveground [or] underground petroleum *storage facilities*, which require registration under 6 NYCRR Part 612, [nor is it installing] *new tanks which expand the capacity of existing*

facilities which require registration under 6 NYCRR Part 612 . . . [emphasis added]" (15 RCNY 18-34[b]; see also 10 NYCRR §128.3-4[b]). ASA asserts that it is merely attempting to comply with state and federal obligations to replace in kind existing obsolete petroleum storage tanks with new compliant ones. ASA further notes that 15 RCNY 18-34(e)(3), specifically exempts from 18-34(b) the "replacement in kind of existing petroleum storage facilities or tanks."

Since, admittedly, gasoline has not been stored on the Premises for over four years, NYC argues that the Premises does not enjoy NCRA status (see 15 NYCRR 18-27[a][1]; [4]). As such, ASA's reliance on same is misplaced.

Section 18-27(a) of RCNY provides, in pertinent part:

> Noncomplying Regulated Activities.
>
> (a) General requirements. (1) A noncomplying regulated activity may be continued except where specifically prohibited from continuing by these rules and regulations.
>
> . . .
>
> (4) In the event that any noncomplying regulated activity is discontinued for a period of one year or more, it shall permanently desist.[1]

As such, NYC contends that the intended installation of the tanks at the Premises constitutes a "new . . . storage facility" within the meaning of the prohibition of 15 RCNY §18-34(b), notwithstanding the "replacement in kind" exception found at 18-34(e)(3). This is so since, by application of 18-27(a), the former noncomplying regulated activity including the storage facility and/or storage tanks "permanently desisted" upon their "discontinu[ance] for a period of one year or more" (id).

The parties' positions begs the question as to whether the installation of the new compliant tanks in place of non-compliant tanks can be deemed the installation of a "new . . . underground petroleum storage facilit[y]" within the prohibition of 15 RCNY 18-34(b), notwithstanding the exception for "replacement in kind of

[1] Neither party asserts that any of the enumerated exceptions to (4) applies.

existing petroleum storage facilities or tanks" (see 15 RCNY 18-34[b]), where admittedly the storage of petroleum has been discontinued for "one year or more" (15 RCNY 18-27(a)(4)).

Perhaps a simpler way to look at it is whether the cessation of storing petroleum for "one year or more" constitutes the discontinuance of a "noncomplying regulated activity" even though, during the period of cessation, the owner is otherwise engaged in the pursuit of necessary local, state and/or federal approvals.

> In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Sokol v. Leader, 74 AD3d 1180, 1181 [internal quotation marks omitted]; see Nonnon v. City of New York, 9 NY3d 825, 827; Leon v. Martinez, 84 N.Y.2d 83, 87-88. However, when evidentiary material is adduced in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one and, "unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it is can be said that no significant dispute exists regarding it, ... dismissal should not eventuate" (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275; see Jannetti v. Whelan, 97 AD3d 797, 797-798).

(Vertical Progression, Inc. v. Canyon Johnson Urban Funds, 2015 NY Slip Op 01939 [2d Dept Mar. 11, 2015]).

Upon application of the above standard, the Court concludes that NYC has a cause of action as against ASA for violation of 15 RCNY §18-34(b) and 10 NYCRR §128.3.4(b) due to ASA's clear intention of installing underground petroleum storage tanks at the Premises more than one year after the removal of the former tanks. In response, ASA has failed to show that any material fact advanced by plaintiff, such as the discontinuance of the NCRA for a period of one year or more, is not a fact at all.

ASA's fact-driven argument that "equity dictates that the one year cessation period relied upon by Plaintiff in the First Cause of Action should be tolled by ASA Petroleum's submission of its Site Plan Application to the Carmel Town Planning Board in September 2010" is premature. Among other things, the Court does not see fit to convert defendant's motion to one for summary judgment at this juncture. However, the Court will conference the matter on April 20, 2015 to determine whether and to what extent the parties can come to terms on stipulated facts. Discussion may also be appropriate at to whether an administrative determination on NCRA status is a prerequisite or viable alternative to the first cause of action or any other aspect of this case (see 15 RCNY 18-27[a][6][owner may request a determination as to whether a property or activity is a noncomplying regulated activity]; 15 RCNY 18-61, "Variances"; 15 RCNY 18-28, "Appeals"]).

The Court also finds that NYC has a cause of action as is advanced in its Third Cause of Action. Among other things, the "regulated activities" to which section 18-21(a)(1) applies includes "discharge or storage of petroleum products" and "discharge of stormwater and sediment, and preparation and implementation of stormwater pollution prevention plans." Whether or not petroleum is currently being stored at the Premises and whether or not any petroleum impacts predate ASA's ownership of the Premises does not dictate a different result. Among other things, excavation for the installation of gasoline tanks for the storing of petroleum is a regulated activity requiring a SWPPP.

Having ruled as such, the Court now turns to the preliminary injunction issue.

Generally,

> . . . [t]o be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (see Hightower v. Reid, 5 AD3d 440 [2004]; Evans-Freke v. Showcase Contr. Corp., 3 AD3d 549 [2004]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see Rattner & Assoc. v. Sears, Roebuck & Co., 294 AD2d 346 [2002]). The decision to grant or deny a preliminary injunction rests in the sound

> discretion of the Supreme Court (see Ying Fung Moy v. Hohi Umeki, 10 AD3d 604 [2004]; Matter of Merscorp, Inc., v. Romaine, 295 AD2d 431, 432 [2002]).

(First Franklin Sq. Assoc., LLC v. Franklin Sq. Prop. Account, 15 AD3d 529, 533 [2d Dept 2005]). Even upon application of the three prong standard, as opposed to the less onerous standard argued by NYC (see City of New York v. Bilynn Realty Corp., 118 AD2d 511, 512 13 [1st Dept 1986][three pronged test for injunctive relief not applicable; special damages or injury to public need be alleged; commission of the prohibited act sufficient to sustain injunction]), the Court finds that NYC is entitled to the injunctive relief sought.

At this juncture, the Court finds that NYC has sufficiently established a likelihood of success on the merits of one or more of its causes of action such as would dictate the granting of an injunction. Among other things, NYC has established that ASA is in need of a SWPPP before it can proceed any further and, in any event, that ASA discontinued an NCRA for a period in excess of one year. Whether or not, in the end, ASA can establish a legal or equitable exception to same has not been sufficiently demonstrated at this juncture such as would be sufficient to tip the scales in its favor. In addition, given the environmental harm sought to be prevented, NYC has established irreparable harm and a balancing of the equities in its favor. As such, the Court necessarily finds that NYC has met the less onerous standard found in City of New York v. Bilynn Realty Corp., supra.

These determinations were reached upon due and deliberate consideration of all other arguments made in support and opposition to the parties' respective applications.

Based upon the foregoing, it is hereby

ORDERED, that ASA's motion to dismiss the First and Third Causes of Action is denied; and, it is further

ORDERED, that ASA is hereby preliminarily enjoined from continuing construction or any construction-related activities, including installation and activation of petroleum storage tanks, associated with a proposed gasoline station on property owned by ASA Petroleum, Inc. and located at 1 Fowler Avenue, Town of Carmel, Putnam County Tax Map No. 44.17-1-45, until the determination of this action or as may otherwise be Ordered by the Court; and, it is further

ORDERED, that the parties are directed to appear before the Court at 10:00 AM on April 20, 2015, first for a Conference with Principal Law Clerk, Alfred A. Farella, Esq., and then with the Court as matters may dictate.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
March 26, 2015

S/ _____
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