Town Bd. of the Town of Southampton v 1110 North Sea Co., Inc.
2015 NY Slip Op 31058(U)
June 12, 2015
Supreme Court, Suffolk County
Docket Number: 08-12376
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

INDEX No. 08-12376
CAL. No. 13-01599OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12-16-14
ADJ. DATE 2-26-15
Mot. Seq. # 008 -MG

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TOWN BOARD OF THE TOWN OF SOUTHAMPTON,

Plaintiff,

- against -

1110 NORTH SEA CO., INC, DONALD MACPHERSON and "JOHN DOES" and "JANE DOES" Nos. "1" through "5", names being and intended to be unknown individuals residing at and/or occupying the premises located at 1110 North Sea Road, Hamlet and Town of Southampton, County of Suffolk, State of New York,

Defendants.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-19; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff, Town of Southampton ("Town"), for summary judgment dismissing the defendants' counterclaims as without merit is granted.

This is an enforcement action by the Town of Southampton ("Town") to enjoin the continued illegal use and occupancy of a single family home located at 1130 North Sea Road, in the Town of Southampton.

Plaintiff Town now moves for summary judgment dismissing the defendants' counterclaims. In support of the motion, it submits, *inter alia*, its attorney's memorandum of law, the pleadings, with attached

affidavits, the transcripts of the hearings held in this matter on September 11, 2008, September 15 and October 17, 2008. In opposition, the defendants submit their attorney's affirmation and the affidavit of defendant Donald MacPherson, sworn to January 2, 2015.

An investigation was commenced in this matter on or about December 2, 2007 when an area resident complained about garbage and excessive vehicles parked at the subject property located at 1110 North Sea Road in the Town of Southampton. Ordinance Inspector Kaitlin Grady was assigned to investigate the complaint. Conversations with two different occupants of the subject property, on two separate occasions, presented conflicting statements as to the number of occupants and bedrooms contained in the residence. The information also contradicted information with regard to the structure contained in Town records. As a result of the investigation, application was made for a search of the subject property, which was granted by Southampton Town Justice Deborah Kooperstein on or about December 12, 2007. The warrant was executed on or about December 12, 2007. The search also revealed that the residence, which had a certificate of occupancy/compliance for a two story, four bedroom single family dwelling had been converted to a structure containing 10 bedrooms, 2 kitchens and four bathrooms. The search found numerous violations of the Town Zoning Code, and the New York State Uniform Fire Prevention and Building Code ("Fire Code"). The basement, which had been approved as a recreation room, wine cellar, closet and sewing room had been converted into four bedrooms, a kitchen and two laundry rooms. Three of the bedrooms contained no windows and the fourth contained a window which was too high and too small for emergency egress in violation of the Fire Code, creating a grave potential hazard should a fire break out in the house above. There were numerous missing or inoperative smoke detectors in the building, including the basement. Other non-compliant building, electrical and plumbing changes were also observed. There were also safety violations regarding the swimming pool on the premises. Thirty four people resided at the subject property, ten of whom were children. On April 1, 2008, this Court, on the Town's application, issued an order to show cause with a temporary restraining order prohibiting the occupancy of the premises, until certain conditions were fulfilled. On or about June 4, 2008, defendants filed a verified amended answer with counterclaims. After an evidentiary hearing held over a three day period, and based upon a finding that there was "overwhelming and essentially unrefuted evidence of numerous violations at the subject premises", this Court granted plaintiff a temporary injunction, by a memorandum decision and order dated October 2, 2009, which included the following directives:

> (A) The tenants and occupants of the subject premises, including any and all dwellings, structures and buildings on the subject premises shall vacate the premises forthwith, and defendant owner 1110 North Sea, Inc. shall lock, barricade or otherwise secure all windows, doors and other openings on those dwellings, building and structures on the premises until such time that the premises are deemed safe, secure and in full compliance with the Town and State Codes, as determined by Town enforcement officials.
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> (B) Until such determination by this Court that the subject premises are safe, secure and in full compliance with the Town and State Codes, defendants are enjoined from using or occupying the premises as a rental that does not comply with the provisions of the Town code.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The plaintiff has established its prima facie entitlement to summary judgement dismissing defendants' counterclaims. It has done so by presenting evidence that the Town properly moved to shut down an overcrowded rental property, which contained numerous Town Code and Fire Code violations that created numerous dangerous conditions which threatened to both life and property.

In opposition, the defendants interpose a number of stratagems. It is alleged that the proof submitted is not proper because it is not accompanied by an affidavit of a person with personal knowledge. However, the failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to a motion where, as here, the moving party submits other proof, here deposition testimony and previously filed affidavits, placed in context by the plaintiff's memorandum of law (*see* ***Notskas v Longwood Assoc., LLC***, 112 AD3d 599, 976 NYS2d 176 [2d Dept 2014]; ***Vetrano v J. Kokolakis Contr., Inc.***, 100 AD3d 984, 986, 954 NYS2d 646 [2d Dept 2012]).

It is also claimed that the plaintiff has failed to submit all of the hearing transcripts in this matter. This is based on a statement in the October 17, 2008 transcript that the hearing was being adjourned to October 31, 2008, in order to allow the defendants to submit evidence, if they wished. However, the Court's records indicate that only a conference was held on that date, after which the decision on the plaintiff's application was reserved. Thus, there is no missing transcript.

The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595; ***Hubbard v County of Madison***, 93 AD3d 939, 939 NYS2d 619 [3d Dept 2012]; ***Sanabria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Prince v Accardo***, 54 AD3d 837, 863 NYS2d 819 [2d Dept 2008]). To the extent that plaintiff's counsel makes various conclusory statements in her affidavit, not based on personal knowledge, they have not been considered by the Court.

Defendants next attack the search warrant issued herein on the basis that the issuing Justice should have recused herself because of the fact that a federal lawsuit had been brought against the Town's justices by defendant MacPherson, and, as a result, the justices were recusing themselves from all matters relating to that defendant.

Ordinarily, an arrest or search pursuant to a warrant issued by a neutral magistrate is presumed reasonable because such warrants may issue only upon a showing of probable cause" (***Walczyk v Rio***, 496 F3d 139, 155–156 [2d Cir. 2007]). Thus, a party may overcome a search warrant's presumption of reasonableness by: (1) establishing that the warrant application, on its face, fails to establish probable cause (i.e., a facial challenge), or (2) by establishing that the warrant applicant made false statements or material omissions, either knowingly and intentionally or with reckless disregard for the truth (*see* ***Walczyk v Rio***, *supra*, at 156). Unless disqualification is required under Judiciary Law § 14, a judge's decision whether to recuse is one of discretion (*see* ***People v Moreno***, 70 NY2d 403, 405-406, 521 NYS2d 663 [1987]). "This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of nonjuridical data" (*id.*). For any alleged bias and prejudice to be disqualifying, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case" (*id.* at 407, 521 NYS2d 663, quoting ***United States v Grinnell Corp.***, 384 US 563, 583, 86 S Ct 1698 [1966]. However, this issue never arose before Justice Kooperstein, because an examination of the search warrant application reveals that no mention of defendant MacPherson is made anywhere in the application, nor is there any indication that Justice Kooperstein would have any way of knowing of MacPherson's involvement with the property. Thus, there is no evidence that Justice Kooperstein's decision granting the search warrant was based on anything other than the merits thereof, untouched by any bias. Furthermore, an examination of the search warrant application reveals that, based on the affidavits submitted therewith, there was a more than adequate factual basis for the issuance of the search warrant. As a result, there is no basis to exclude the evidence obtained as a result of the issuance of the search warrant.

Defendants also claim that the preliminary injunction should not have issued because the Town failed to meet the required "three prong test" i.e. "[a] party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (***Berkoski v Board of Trustees of Inc. Vil. of Southampton***, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]; *see* ***Shasho v Pruco Life Ins. Co. of N.J.***, 67 AD3d 663, 665, 888 NYS2d 557 [2d Dept 2009]). This claim is without legal basis and blithely ignores longstanding precedent that a municipality has authority to obtain a preliminary injunction strictly enforcing its zoning code without application of the three-pronged test for injunctive relief (***Incorporated Vil. of Freeport v Jefferson Indoor Mar.***, 162 AD2d 434, 436, 556 NYS2d 150 [2d Dept 1990]; *see* ***Village of Fayetteville v Shaheen***, 38 AD3d 1251, 834 NYS2d 893 [4th Dept 2007]). The cases sited by defendants do not require a different result.

Defendants correctly state that the plaintiff is in default in replying to their counterclaims. This, however, merely forms a basis for the dismissal of their counterclaims under CPLR 3215, since they failed to act within one year of said default. While counterclaims are not specifically mentioned in CPLR 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints (*see* 5 N.Y. Adv. Comm. Rep. A–476 [Advance Draft 1961]; 7 Weinstein–Korn–Miller, Civ. Prac. § 3215.08). CPLR 3215 (c) has, in fact, been applied to parties asserting unanswered counterclaims (*see* ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 307–308, 926 NYS2d 546 [2d Dept 2011]; ***Clemente v Clemente***, 50 AD3d 514, 857 NYS2d 78 [1st Dept

2008]; ***Iovine v Caldwell***, 256 AD2d 974, 977, 682 NYS2d 288 [2d Dept 1998]). (*See also,* ***Pipinias v J. Sackaris & Sons, Inc.***, 116 AD3d 749, 752–753, 983 NYS2d 587 [2d Dept 2014]; ***Wells Fargo Bank, N.A. v Chaplin***, 107 AD3d 881, 883, 969 NYS2d 67 [2d Dept 2013]).

The language of CPLR 3215 (c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" (***Giglio v NTIMP***, *supra*; *see* ***Butindaro v Grinberg***, 57 AD3d 932, 871 NYS2d 317 [2d Dept 2008]; ***DuBois v Roslyn Natl. Mtge. Corp.***, 52 AD3d 564, 565, 861 NYS2d 73 [2d Dept 2008]). "The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if 'sufficient cause is shown why the complaint should not be dismissed'" (***Giglio v NTIMP***, *supra*, quoting CPLR 3215[c]). "This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that there is potentially meritorious cause of action " (***Giglio v NTIMP***, *supra*; *see* ***Ryant v Bullock***, 77 AD3d 811, 811, 908 NYS2d 884 [2d Dept 2010]; ***Solano v Castro***, 72 AD3d 932, 932–933, 902 NYS2d 95 [2d Dept 2010]). Defendants have failed to show any reason for their more than six year delay, nor have they, as shall be shown below, established that their counterclaims are meritorious.

The defendants' counterclaims allege that their civil rights were violated by the plaintiff through "unlawful eviction from real property."

It is noted that the mere fact that the temporary restraining order was entered ex parte does not, without more, establish that defendants were denied due process of law, since defendants could have moved to modify or vacate the temporary restraining order (*see* ***Gozelski v Wyoming County***, 115 AD2d 1000, 1001, 497 NYS2d 562, appeal dismissed 67 NY2d 1027, 503 NYS2d 102]; ***Nadeau v Sullivan***, 204 AD2d 913, 914, 612 NYS2d 501, 503,[3d Dept 1994]. Defendants also made no attempt to appeal the granting of the preliminary injunction.

The takings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. "Governmental regulation of private property effects a taking if it is 'so onerous that its effect is tantamount to a direct appropriation or ouster'" (***Consumers Union of U.S., Inc. v State of New York***, 5 NY3d 327, 357, 806 NYS2d 99 [2005], quoting ***Lingle v Chevron U.S.A. Inc.***, 544 US 528, 537, 125 S Ct 2074 [2005]).

To state a substantive due process claim in the land-use context, a petitioner must allege "(1) the deprivation of a protectable property interest and (2) that 'the governmental action was wholly without legal justification'" (***Matter of Ken Mar Dev., Inc. v Department of Pub. Works of City of Saratoga Springs***, 53 AD3d 1020, 1024–1025, 862 NYS2d 202 [3d Dept 2008], quoting ***Bower Assoc. v Town of Pleasant Val.***, 2 NY3d 617, 627, 781 NYS2d 240 [2003]; *see* ***Town of Orangetown v Magee***, 88 NY2d 41, 52–53, 643 NYS2d 21 [1996]). Governmental regulation effects a per se regulatory taking only where the owner of real property has been called upon to sacrifice all economically beneficial uses for the common good, leaving the property economically idle (***Rent Stabilization Ass'n of New York City, Inc. v Higgins***, 83

NY2d 156, 164–165, 608 NYS2d 930, [1993]). To show that a non-possessory governmental regulation of property has gone so far as to constitute a taking, the property owner must show by dollars and cents evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue ***Matter of New Cr. Bluebelt, Phase 4***, 122 AD3d 859, 997 NYS2d 447 [2d Dept 2014]).

Herein, the defendants are only enjoined from using or occupying the premises as a rental that does not comply with the provisions of the Town code. Thus, the only deprivation that the defendants have suffered is the ability to utilize the land illegally. By producing "overwhelming" evidence of multiple zoning, fire and building code violations, the Town has established that it had legal justification for its actions (*see* ***Matter of Ken Mar Dev., Inc. v Department of Pub. Works of City of Saratoga Springs***, *supra).* The defendants have produced no evidence to show that there is no viable economic use of the property. Nor is there any explanation as to why the defendants have failed, after more than six years, to correct the code violations on the premises, which would allow them to rent the property. Finally it is noted that the conclusory, speculative and evasive affidavit submitted by defendant MacPherson fails to raise any issues of fact.

In light of the foregoing, and pursuant to CPLR 3212 and CPLR 3215, the plaintiff's motion to dismiss defendants' counterclaims is granted in all respects.

Dated: June 12, 2015

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION