Town of Riverhead v 801 Realty Corp.
2015 NY Slip Op 31924(U)
September 29, 2015
Supreme Court, Suffolk County
Docket Number: 2734/2009
Judge: James C. Hudson

SHORT FORM ORDER

INDEX NO.: 2734/2009

Supreme Court-State of New York
I.A.S. XL-Suffolk County

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE	2/19/09 (#001)
MOTION DATE	6/10/09 (#002)
MOTION DATE	1/7/10 (#003)
MOTION DATE	5/12/10 (#004)
ADJ. DATE	3/18/15

Mot. Seq. #001 - MD
Mot. Seq. #002 - MD
Mot. Seq. #003 - MD
Mot. Seq. #004 - XMD

X----------X

TOWN OF RIVERHEAD,

Plaintiff,

- against -

801 REALTY CORP., VALERO SERVICES, INC., VALERO RETAIL HOLDINGS, INC., THE SUFFOLK COUNTY NATIONAL BANK and LONG ISLAND COMMERCIAL BANK,

Defendants.

X----------X

ROBERT F. KOZAKIEWICZ, ESQ.
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Riverhead, NY 11901

ROBINSON & ASSOCIATES, P.C.
Attorney for Defendants
35 Roosevelt Avenue
Syosset, NY 11791

Upon the following papers numbered 1 to 116 read on this motion for Preliminary Injunction; Motion to Consolidate; Motion for Summary Judgment and Default Judgment; Cross Motion for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-24; 25-63; Notice of Cross Motion and supporting papers 64-71; Answering Affidavits and supporting papers 72-84; 85-88; 89-107; 108-109; Replying Affidavits and supporting papers 110-113; 114-116; Other 0; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for an order enjoining and restraining the defendants, their agents, servants, employees, members, tenants, lessees, representatives and all other persons acting on their behalf, or in concert with them, from causing, allowing or permitting, pending the determination of this action, the placement and display of any internally illuminated sign which does not have a permit for such from the building department of the Town of Riverhead, as per the Code of the Town of Riverhead, on a parcel of property situated on the south side of Main Road, known and designated as 1563 Main Road, Jamesport, New York, is denied; and it is further

ORDERED that the motion by defendant 801 F Realty Corp. for an order pursuant to CPLR 602 (b), removing three actions pending in the Justice Court of the Town of Riverhead (*People v Chase*, Information Nos. 005537 and 005539, Docket No. 2008 TWC 163; *People v 801 F Realty Corp.*, Appearance Ticket Nos. 6367, 6368, 6369, and 6370, Docket No. 2009 TWC 109; *People v 801 F Realty Corp.*, Appearance Ticket Nos. 005547 and 005549, Docket No. 2009 TWC 162) to this court and consolidating them with this action, is denied; and it is further

ORDERED that the motion by the plaintiff for an order (i) pursuant to CPLR 3212, granting summary judgment in its favor and against defendant 801 F Realty Corp. for the relief requested in the amended complaint, and (ii) granting leave to enter a default judgment against defendants Valero Services, Inc. and Valero Retail Holdings, Inc. for the relief requested in the amended complaint, is denied; and it is further

ORDERED that the cross motion by defendants Valero Services, Inc., Valero Retail Holdings, Inc., The Suffolk County National Bank, and Long Island Commercial Bank for an order pursuant to CPLR 3211 (a) (7) and 3212, granting summary judgment dismissing the complaint against them for failure to state a cause of action, is denied; and it is further

ORDERED that the parties are directed to appear for a status conference on **October 28th, 2015 at 10:00 am at IAS Part XL of the Supreme Court, One Court Street, Riverhead, New York.**

In this action for a permanent injunction, the plaintiff seeks the entry of judgment, *inter alia*, directing the defendants to remove the two-sided, internally illuminated, freestanding sign situated on the property located at 1563 Main Road, Jamesport, New York, as well as the ground lights, air station, shed, and portable toilet on the property until such time as they have obtained all necessary permits and approvals.

Defendant 801 F Realty Corp. ("801 F") is the owner of the property, on which a Valero gas station is operated. The property is located on the south side of Main Road, within a Village Center (VC) zoning use district in the Town of Riverhead and also, as of December 2006, within the Jamesport Hamlet Historic District.

It appears that 801 F has operated the property as a gasoline service station since as early as 1990, when the Town issued a certificate of occupancy for a Metro service station at the location. It also appears that at or about that time, there was present on the property an illuminated, freestanding "price/identification" sign which had previously been approved by permit dated February 17, 1988. In or about 2003, when Valero became the new supplier, 801 F applied to change the face and configuration of its existing sign. On August 19, 2003, the Town's building department issued a permit approving the replacement of the sign.

Through the affidavit of its president, Eugene Buccellato, 801 F alleges that the replacement sign, which was in place from 2003 to 2008, required the station attendant to change the prices with the use of a ladder, and that in 2008, frequent fluctuations in the wholesale cost of gasoline required the prices on the sign to be changed several times per day. Consequently, on or before July 18, 2008, it installed a new, "virtually identical" sign with LED numeric display. 801 F claims that the new sign uses "internal lighting" rather than external fluorescence, is more "energy efficient," "minimizes the impact" of the gasoline station use on the community, and "eliminates the need for a station attendant to physically change the price sign." It is undisputed that 801 F did not seek or obtain a new permit with respect to the sign.

On July 18, 2008 and February 11, 2009, the plaintiff issued a series of appearance tickets to 801 F, alleging violations of Riverhead Town Code provisions relating to 801 F's construction and placement of an internally illuminated sign on the property, including (i) section 108-56 (C) (9), which provides that gasoline station signs are allowed only by permit from the Town of Riverhead, (ii) section 108-56 (H) (6) (a), which prohibits internally illuminated signs in the VC zoning use district, (iii) section 52-6, which generally prohibits work or construction from being commenced or performed without a building permit having first been issued, and (iv) section 108-129 (G) (1), which makes it unlawful to violate an approved site plan. The court notes that those claimed violations remain the subject of a number of criminal proceedings pending in the Justice Court of the Town of Riverhead. Apart from those violations, the plaintiff claims that 801 F also failed to obtain approval for the construction and placement of the sign from the Landmark Preservation Commission and the Architectural Review Board, as required under section 73-5 for properties located within an historic district.

The plaintiff commenced this action by filing of a summons and complaint on January 23, 2009, naming 801 F Realty Corp., Valero Services, Inc., Valero Retail Holdings, Inc., and The

Suffolk County National Bank as defendants. After 801 F served its answer to the complaint on or about February 6, 2009, the plaintiff served a supplemental summons and amended complaint as of right on February 20, 2009, naming Long Island Commercial Bank as an additional defendant. On or about March 13, 2009, 801 F served an answer to the amended complaint. It does not appear that any of the other defendants has answered either the original or the amended complaint.

In its amended complaint, the plaintiff alleges two causes of action: the first, relating exclusively to the claimed violations in regard to the sign, and the second, relating to other claimed violations by the defendants, namely, installing ground lights, an air station, a shed, and a portable toilet in violation of the approved site plan, failing to plant and install the trees, shrubbery, curbing, and restroom required under the approved site plan, failing to obtain a permit for installation of a satellite dish, and failing to keep the property free from litter. As to the first cause of action, the plaintiff seeks the entry of judgment (i) enjoining defendants 801 F Realty Corp., Valero Services, Inc., and Valero Retail Holdings, Inc. from placing any internally illuminated signs on the property without first obtaining a permit, (ii) directing those defendants to remove the existing sign, (iii) in the event that those defendants fail to remove the sign within the time allotted by the court, allowing the plaintiff to remove the sign and to assess the cost of removal as a judgment against those defendants, (iv) directing the defendants to comply with all rules and regulations of the Town of Riverhead in regard to the use and occupancy of the property, and (v) awarding damages against defendants 801 F Realty Corp., Valero Services, Inc., and Valero Retail Holdings, Inc. in the amount of $30,000.00. As to the second cause of action, the plaintiff seeks the entry of judgment (i) directing defendants 801 F Realty Corp., Valero Services, Inc., and Valero Retail Holdings, Inc. to remove the ground lights, air station, shed, and portable toilet pending the issuance of all necessary permits and approvals, (ii) directing those defendants to plant the trees and shrubbery and to install the restroom and curbing required under the approved site plan, (iii) in the event that those defendants fail to refuse to remove the ground lights, air station, shed, and portable toilet within the time allotted by the court, allowing the plaintiff to remove such items and to assess the cost of removal as a judgment against those defendants, (iv) directing those defendants to remove all the litter on the property and, upon their failure or refusal to do so within the time allotted by the court, allowing the plaintiff to remove such litter from the property and to assess the cost of removal as a judgment against those defendants, (v) directing the defendants to comply with all rules and regulations of the Town of Riverhead in regard to the use and occupancy of the property, and (vi) awarding damages against defendants 801 F Realty Corp., Valero Services, Inc., and Valero Retail Holdings, Inc. in the amount of $45,000.00.

Upon commencing this action, the plaintiff simultaneously moved for a preliminary injunction "enjoining and restraining * * * the placement and display of any internally illuminated sign" for which the defendants have not obtained a permit. In signing the order to show cause by which the plaintiff brought on its motion, the court (Farneti, J.) denied the plaintiff's request for a temporary restraining order. 801 F has since moved to remove the Justice Court proceedings to this

court and to consolidate them with this action; the plaintiff has moved for summary judgment against 801 F and for a default judgment against Valero Services, Inc., and Valero Retail Holdings, Inc.; and Valero Services, Inc., Valero Retail Holdings, Inc., The Suffolk County National Bank, and Long Island Commercial Bank have cross-moved for summary judgment. Each of these applications is currently before the court.

The plaintiff's motion for a preliminary injunction is denied. Despite the benign phrasing of the relief requested in the order to show cause, what the plaintiff truly seeks–as evidenced by the supporting affirmation of its attorney–is the removal of the sign pending the resolution of the action. "It is settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 728, 795 NYS2d 690, 691 [2005]). Here, the plaintiff's request for removal of the sign is a branch of the ultimate relief it seeks. Since the plaintiff has failed to demonstrate extraordinary circumstances, preliminary injunctive relief is not available (*see* ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2010]; ***Village of Westhampton Beach v Cayea***, 38 AD3d 760, 835 NYS2d 582 [2007]); directing such relief, moreover, could cause the defendants "to do unnecessary or inadequate work which later would have to be redone, and would deprive the plaintiff of an incentive to prosecute this action to its conclusion" (*id.* at 762, 835 NYS2d at 584; *accord* ***Town of Esopus v Fausto Simoes & Assoc.***, 145 AD2d 840, 535 NYS2d 827 [1988]).

801 F's motion for removal and consolidation is denied as well. "A motion for consolidation is addressed to the sound discretion of the trial court" (***Beerman v Morhaim***, 17 AD3d 302, 303, 791 NYS2d 854 [2005]). Here, despite the shared legal and factual questions, it is clear that the Justice Court is uniquely suited for the prompt and fair adjudication of quasi-criminal matters involving the alleged violation of the Town's zoning ordinance (*see* ***People v Bonnerwith***, 69 Misc 2d 516, 330 NYS2d 248 [1972]; ***Mann v Town of Southold***, 44 Misc 2d 978, 255 NYS2d 308 [1964]).

The plaintiff's motion for dispositive relief, *i.e.*, summary judgment and default judgment, is likewise denied. Initially, the court finds that the plaintiff has failed to establish its entitlement to summary judgment against 801 F. "A town is entitled to a permanent injunction to enforce its building and zoning laws upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law" (***Town of Brookhaven v Mascia***, 38 AD3d 758, 759, 833 NYS2d 519, 521 [2007]). Even assuming, for purposes of this determination, that 801 F was in violation of one or more zoning laws at the time the plaintiff made its motion, the court cannot help but note that the evidence of the violations is based solely on inspections of the property that took place more than 6½ years ago; 801 F, for its part, contends that it was never in violation of relevant zoning laws or, to the extent it was, that any such violation has been fully resolved. Absent evidence of any current violation as might warrant the granting of permanent injunctive

relief, the court is constrained to deny summary judgment at this juncture. To the extent that the plaintiff may be seeking a civil penalty for past violations, it suffices to note that the plaintiff has failed to plead or otherwise cite any provision of its zoning ordinance authorizing the imposition of such a penalty (*see* ***Town of Solon v Clark***, 97 AD2d 602, 468 NYS2d 201 [1983]). Should the plaintiff wish to timely renew its request for summary judgment based on contemporary proof of ongoing violations, it may do so. As to that branch of the motion which is for leave to enter a default judgment against Valero Services, Inc. and Valero Retail Holdings, Inc., the court finds the proof of service of the amended complaint deficient (*see* CPLR 3215 [f]). CPLR 3012 (a) requires that an amended pleading "shall be served upon a party who has not appeared in the manner provided for service of a summons." Here, although those defendants had not yet appeared, the plaintiff did not effect personal service of the amended complaint pursuant to CPLR article 3; instead, the plaintiff served them by mail, presumably under CPLR 2103 (c). Whatever the effect of their earlier default on the plaintiff's obligation to effect such service at all (*see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3012:6), the court can conceive of no basis, under this factual scenario, for an award of judgment by default against them for the relief requested in the amended complaint.

The cross motion by defendants Valero Services, Inc., Valero Retail Holdings, Inc., The Suffolk County National Bank, and Long Island Commercial Bank–which is expressly denominated as a cross motion for summary judgment–is denied as premature. "Any party may move for summary judgment in any action, after issue has been joined" (CPLR 3212 [a]). "It is well settled that a motion for summary judgment may not be granted before issue is joined, and there is strict adherence to that requirement" (***Matter of Rine v Higgins***, 244 AD2d 963, 964, 665 NYS2d 165, 166 [1997]; *accord* ***City of Rochester v Chiarella***, 65 NY2d 92, 490 NYS2d 174 [1985]). Here, as noted previously, none of the cross-moving defendants has answered either the original or the amended complaint. Nevertheless, as the plaintiff's attorney has recently served and filed an affirmation stating that the plaintiff will "offer no opposition" to dismissal of the action against those defendants "based upon the sworn allegations * * * that they have no relationship to the subject premises," the parties are advised to promptly file a stipulation of partial discontinuance.

DATED: SEPTEMBER 29, 2015
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION