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| 101CO, LLC v Sand Land Corp. |
| 2016 NY Slip Op 32961(U) |
| May 23, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 600470-16 |
| Judge: Denise F. Molia |
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Index No.: 600470-16

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**
Justice

101CO, LLC, 102CO NY, LLC, BRRRUBIN, LLC,

Plaintiffs,

- against -

SAND LAND CORPORATION, and WAINSCOTT
SAND AND GRAVEL CORP.,

Defendants.

CASE DISPOSED: NO

MOTION R/D: 2/3/16

SUBMISSION DATE: 4/8/16

MOTION SEQUENCE No.: 001 MD

002 MD

003 XMD

ATTORNEY FOR PLAINTIFF

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ATTORNEYS FOR DEFENDANT

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Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated January 19, 2016 (001); Affirmation in Support dated January 12, 2016; Exhibit A annexed thereto; Affidavit dated January 12, 2016; Exhibits A through C annexed thereto; Affidavit dated January 11, 2016; Exhibits 1 through 1-10 annexed thereto; Affidavit dated January 12, 2016; Exhibit 1 annexed thereto; Affidavit dated January 12, 2016; Exhibits A and B annexed thereto; Affidavit dated January 12, 2016; Exhibits 1 through 3 annexed thereto; Affirmation dated January 25, 2016; Exhibits A and B annexed thereto; Affidavit dated February 11, 2016; Exhibits A through C annexed thereto; Reply Affidavit dated February 16, 2016; Supplemental Affidavit dated March 31, 2016; Affidavit dated March 31, 2016; Exhibits A through E annexed thereto; Supplemental Affidavit dated March 31, 2016; Exhibit 1 annexed thereto; Supplemental Affirmation dated April 1, 2016; Plaintiffs' Memorandum of Law; Affirmation in Opposition dated January 19, 2016; Exhibits A through E annexed thereto; Second Affidavit in Opposition dated January 25, 2016; Exhibits A and B annexed thereto; Order to Show Cause dated February 3, 2016 (002); Affirmation dated January 25, 2016; Exhibits 1 through 6 annexed thereto; Affirmation in Opposition dated February 18, 2016; Exhibits A and B annexed thereto; Notice of Cross-Motion dated February 9, 2016 (003);

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Affirmation in Support dated February 9, 2016; Exhibits A through F annexed thereto; Affirmation in Opposition dated February 18, 2016; Exhibits A and B annexed thereto; Reply Affirmation dated February 18, 2016; Plaintiffs' Reply Memorandum of Law; and upon due deliberation; it is

ORDERED, that the motion by plaintiffs, for an Order preliminarily enjoining defendants from entering onto or perform mining activities, including, but not limited to, mining, clearing or constructing and using any road on property belonging to plaintiffs or at the project known as Wainscott Sand and Gravel, 585 Middle Line Highway, Noyac Middle Line Highway - NE End, Bridgehampton, New York 11932 (the "Premises" or "Project Location") within twenty-five (25) feet of property belonging to plaintiffs, pending final determination of this action, and from conducting any mining activities or otherwise altering any of the Premises between the mine floor and Plaintiffs' respective property until Plaintiffs have had opportunity, by and through their geotechnical engineering expert to inspect and perform laboratory testing of defendants' property to evaluate the stability and integrity of the land; is denied.

To obtain injunctive relief, in the form of a temporary restraining order or preliminary injunction, the burden is upon the party seeking such relief to demonstrate (1) a likelihood of success on the merits; (2) irreparable injury in the absence of provisional relief; and (3) that the balancing of the equities falls in favor of the plaintiff. Melvin v. Union College, 195 A.D.2d 447. Under the circumstances presented herein, the plaintiff has failed to meet such criteria.

The relationship between the defendants and their neighbors has a long and tortured litigious history. In this particular matter, the plaintiffs allege that the defendants ("Sand Land") have created unsafe mine faces and slopes exceeding angles permissible under regulations of the New York State Department of Environmental Conservation ("NYSDEC"), thereby presenting a significant risk of harm to individuals in the mine and to surrounding property. Plaintiffs further allege that Sand Land is conducting mining activities in areas denied by NYSDEC, have encroached upon plaintiffs' property while conducting mining activities, damaged trees and caused erosion, and violated a twenty five (25) foot "undisturbed buffer" adjacent to plaintiffs' property. The plaintiffs seek a cessation of the aforementioned alleged activities, as well as a court directive permitting plaintiff's geotechnical engineering expert to enter upon the defendants' property to conduct an inspection and testing of the property.

While the plaintiffs have submitted numerous affidavits and affirmations in support of their request for relief, the sum total of such documents falls short of demonstrating that the plaintiffs are entitled to injunctive relief at this juncture. The plaintiffs have made frequent mention of the defendants' failure to abide by the directives and regulations of the NYSDEC, yet have not sought to submit affidavits from such agency attesting to same; nor has the plaintiff sought to join NYSDEC as a party to the proceedings.

Plaintiffs have not submitted sufficient proof that the alleged encroachments by defendants are ongoing, or have materially changed from the condition or use of the property that has existed during the past several years. The plaintiffs have also not demonstrated by sufficient proof that the activities complained of are in violation of Sand Land's NYSDEC Mining Permit and approved Mining Use Plan. In the absence of evidence that the actions of Sand Land

constitute unapproved mining activities, as opposed to permissible reclamation, the plaintiffs have not demonstrated a likelihood of success on the merits of their claims.

Neither is there sufficient evidence to establish that the harm alleged by the plaintiffs is either imminent or irreparable. Plaintiffs' concerns about possible encroachment on plaintiffs' vacant lots appear far less likely due to the recent installation of a four foot orange snow fence along the length of the property lines between plaintiffs' property and Sand Land's premises. The prior alleged encroachments took place at a time that only wooden stakes denoted the boundaries of such properties. There has been no demonstration that the complained of encroachment is an actual ongoing concern. Where the "harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." See, Matter of N.Y.S. Inspection, Sec. & Law Enforcement Employees, Dist. Counsel 82 AFCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 240.

At this time, based upon the history of this litigation, the exhibits before the Court, and the plaintiffs' failure to join the NYSDEC or provide any evidence from such agency to support the plaintiffs' claims, it cannot be said that the balancing of the equities tip in favor of the plaintiffs. The plaintiffs simply have not met the standard to warrant the imposition of a preliminary injunction at this time.

ORDERED, that the motion by plaintiffs, for an Order finding the defendants to be in contempt for the violation of the temporary restraining order entered in this matter on January 19, 2016, is denied.

By Order to Show Cause dated February 3, 2016, this Court deteremined:

"Ordered, that in the meantime and until the hearing of the motion brought on by this order to show cause, and the entry of an order thereon, Defendants and any other entity or individual operating at the Mine be and are hereby stayed, enjoined and restrained from performing mining operations, including, but not limited to, mining, clearing, or constructing and using any road on the Premises within twenty-five (25) feet of property owned by Plaintiffs".

The only document submitted by the plaintiffs detailing the facts purporting to support a finding of contempt against the defendants is an affidavit of Sam Christiansen dated January 25, 2016. Said affidavit refers to a front end loader transporting and depositing materials "over the cliff", presumably a reference to the depositing of materials into the mine itself, but does not allege that this activity occurred with the 25 foot buffer area between the properties. The affidavit also states that a front end loader "appeared to be within the 25-foot buffer of the property line" as it approached a portion of the mine outside the buffer. Even if the vehicle was actually within the 25 foot buffer area, which is located exclusively on defendants' property, the affidavit does not allege that any mining operations were taking place in the buffer area in violation of the temporary restraining order issued this Court. The observations by the affiant, a private investigator retained by plaintiffs, are insufficient to dispute the contention of defendants that the activities observed constituted permitted reclamation activities required under the defendants'

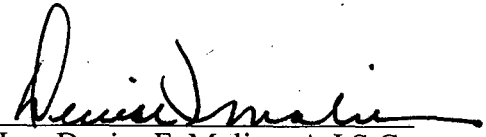
Mined Land Use Plan. Accordingly, the plaintiffs have failed to establish that the defendants are in contempt of this Court's prior Order.

ORDERED, that the cross-motion by defendants, pursuant to CPLR 3211(a)(1), (2), (5), (7) and (10), for an Order dismissing the plaintiffs' Second, Third, Fourth and Fifth causes of action, as well as those portions of the First cause of action seeking to "permanently enjoin Defendants from conducting any mining activities on or within 25-feet of Plaintiffs' property"; and for treble damages pursuant to RPAPL §861, is denied.

Although the plaintiffs have submitted insufficient evidence to support the issuance of a preliminary injunction or a finding of contempt against the defendants, the allegations contained within the four corners of the Complaint are sufficient to present claims which warrant further disclosure and preclude dismissal at this time.

The foregoing constitutes the Order of this Court.

Dated: May 23, 2016


Hon. Denise F. Molia, A.J.S.C.