People v Diorio
2017 NY Slip Op 30509(U)
March 17, 2017
City Court of Peekskill, Westchester County
Docket Number: 16-1051
Judge: Reginald J. Johnson

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

Plaintiff,

--against--

Index No. 16-1051

ALFRED P. DIORIO, JR.,
Defendant.
----------x
Appearances:

People by Ingrid E. O'Sullivan, Esq.
City Prosecutor
City of Peekskill
Corporation Counsel's Office
840 Main Street
Peekskill, New York 10566
(914) 829-4801

Defendant by Clifford L. Davis, Esq.
200 Mamaroneck Ave, Third Floor
White Plains, New York 10601
914-761-1003

REGINALD J. JOHNSON, J.

The Defendant moves to dismiss the Information (#002034) charging him with a violation of the §575-50(A)(1) [certificate of occupancy law] pursuant to Criminal Procedure Law ("CPL") §§1, 100.15.2, 240.20, 255.20, 30.10, 150, 170, and the doctrines of collateral

estoppel, res judicata, release and in the interests of justice, together with request that the that the People be directed to turn over Brady material. The People oppose the motion.

For the reasons that follow, the motion is decided in accordance herewith.

In deciding this matter, the Court considered the following evidence:

1. Defendant's Notice of Motion filed on October 28, 2016 with Affirmation in Support of Motion to Dismiss Criminal Action by Clifford L. Davis, Esq., together with annexed exhibits "A" through "T";
2. Notice of Opposition to Defendant's Motion to Dismiss filed on December 15, 2016 by Ingrid O'Sullivan, Esq. together with annexed exhibits "1" through "9".
3. Reply Affirmation in Support of Motion to Dismiss Criminal Action filed on January 18, 2017 by Clifford L. Davis with annexed exhibit "U".

Factual and Procedural History

In 2005, the Defendant commenced a civil rights action against the City of Peekskill ("the City") and alleged that his civil rights were violated when the City arbitrarily denied his July 12, 2000 application for a Special Permit to Alter a Nonconforming Use ["zoning application"]

located at 630 North Division Street on September 10, 2001 (See, Defendant's Motion, Exh. "D" at ¶¶ 6-10).

On July 18, 2006, the City filed an Answer with Counterclaim to the Defendant's action and alleged that Defendant's property located at 327 Washington Street, Peekskill ["the subject premises"] contained illegally created apartments since February 2001 in violation of applicable building, fire, safety and zoning codes of the State and City (Id. at Exh. "E" at ¶¶ 56-59).

On September 18, 2006, the parties settled the civil rights lawsuit by Settlement and Stipulation of Voluntary Discontinuance with prejudice (Id. at Exh. "F") ["the Settlement"]. The Settlement specifically stated that the "action and counterclaim are settled and voluntarily discontinued with prejudice" (Id.) (emphasis added).

On or about July 5, 2016, the City received a written complaint from tenants at the subject premises that electricity was terminated and that there was overcrowding at the subject premises (City's Aff. In Opp. at ¶ 4).

On July 7, 2016, Brent Van Zandt, Director of City Services, attempted to gain access to the subject premises to determine if there was heat and electricity[1] to rest of the building, but he was denied access by the Defendant (Id. at ¶ 5).

[1] The notice of violation for terminated electricity at the premises was corrected by the Defendant and

Index No. 16-1051

On July 14, 2016, the City obtained an Administrative Inspection Warrant from this Court and unsuccessfully attempted to execute same on July 20 and 21, 2016 (Id. at ¶ 6).

Thereafter, the City commenced the within criminal action against the Defendant with an Appearance Ticket and Summons/Information Number 002034[2] and charged him with violating §575-50 A (1) of the Code of the City of Peekskill ("the Code") because the subject premises contained seven (7) apartments on July 29, 2016, which was contrary to the certificate of occupancy which permitted only four (4) apartments (Id. at ¶ 8).

On September 16, 2016, the Defendant was arraigned in Peekskill City Court where a plea of not guilty was entered on his behalf. The case was adjourned to October 28, 2016 (Id. at ¶¶ 9-10).

On October 28, 2016, the Defendant appeared with counsel, Clifford L. Davis, Esq., and submitted the within motion to dismiss the Information (#002034) which charged him with a violation of the §575-50(A)(1) [certificate of occupancy law] pursuant to Criminal Procedure Law ("CPL") §§1, 100.15.2, 240.20, 255.20, 30.10, 150, 170, and the doctrines of collateral estoppel, res judicata, release and in the interests of justice (Id. at ¶ 10).

The Court set a motion schedule as follows: Opposition papers no

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therefore never submitted to the Court for prosecution. See, City's Aff. In Opp. at ¶¶ 5-6.

later than 12/8/16; Reply papers, if any, no later than 12/22/16; Decision by 1/30/17. The return date of the Opposition and Reply papers were extended, at the request of the parties, to 12/15/16 and 1/19/17 respectively.

The City submitted Opposition papers on December 15, 2016.

The Defendant submitted Reply papers on January 18, 2017.

On January 19, 2017, the Court marked the motion to dismiss fully submitted.

Legal Analysis and Discussion

I. Defendant argues Res Judicata bars this prosecution

The Defendant argues that the Information charging him with violating Code §575-50 A (1), because there are seven (7) apartments at the subject premises when the Code only permits four (4) apartments, should be dismissed based on a 2006 Settlement executed by the parties (Defendant's Motion, Exh. "G"). In that Settlement, the Defendant claims, the City agreed that it would waive its counterclaim as set forth in paragraphs 56-59 of its Answer which collectively alleged that the premises contained "illegally created units in February of 2001 in violation of applicable building, fire, safety and zoning codes of the State of New York and the City of Peekskill" (Id. at Exh. "E").

Based on the Settlement, the Defendant argues that res judicata and

[2] The Information in this matter was filed with the Court on August 3, 2016.

collateral estoppel bar the City from commencing the within criminal action against him based on the same facts [seven (7) apartments at the subject premises] that existed on October 18, 2006 (Id. at ¶¶ 36-37, 60-63). Specifically, the Defendant argues that the Settlement was the functional equivalent of a judgment on the merits and therefore it operates as res judicata and collateral estoppel in this proceeding (Id. at ¶¶ 39-41).

The City contends that res judicata and collateral estoppel are not applicable to this proceeding because the Settlement pertained to 630 North Division Street, Peekskill—not the same premises in this proceeding (City's Aff. In Opp. at ¶¶ 14-18). Additionally, the City maintains that even if the Court were to conclude that the Settlement pertained to the subject premises, "in a situation where a municipality provided a document to an individual in violation of the law, estoppel may not be used to prevent the municipality from amending or retracting the document" (Id. at ¶¶ 19, 19.a, 20-28). Specifically, the City argues, *inter alia*, that "the City does not have the authority to make any agreement that contravenes any law or ordinance. The law, in this case COTCOP Section 575-50, requires an updated Certificate of Occupancy when there is a use contrary to the current Certificate" (Id. at ¶¶ 20, 20.a).

"The general doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to

an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein" Landau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 13, 892 N.E.2d 380, 862 N.Y.S.2d 316 [2008], *quoting* Matter of Shea, 309 N.Y. 605, 616, 132 N.E.2d 864 [1956]. New York has adopted the transaction approach to res judicata which states that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or is seeking a different remedy" O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981]; see also, Toscano v. 4B's Realty VIII Southampton Brick & Tile, LLC, 84 A.D.3d 780, 780, 921 N.Y.S.2d 882 [2d Dept. 2011].

In the context of a stipulation of discontinuance with prejudice, the Courts generally accord such a stipulation res judicata effect, thereby barring discontinued claims. See, Pawling Lake Prop. Owners Assn., Inc. v. Greiner, 72 A.D.3d 665, 897 N.Y.S.2d 729, [2d Dept. 2010]; Matter of State of New York v. Seaport Manor A.C.F., 19 A.D.3d at 610; Matter of Hofmann, 287 A.D.2d 119, 123, 733 N.Y.S.2d 168 [1st Dept. 2001]; see also, Matter of Olympic Tower Assocs. v. City of New York, 81 N.Y.2d 961, 615 N.E.2d 961, 615 N.E.2d 219, 598 N.Y.S.2d 762 [1993] [res judicata effect given settlement agreements]. It has been held that the "with prejudice" language contained in such stipulations can be

"narrowly interpreted when the interests of justice, or the particular equities involved, warrant such approach" Dolitsky's Dry Cleaners v. YL Jericho Dry Cleaners, 203 A.D.2d 322, 323, 610 N.Y.S.2d 302 [2d Dept. 1994]. Also, where a stipulation of settlement reserves all future rights, res judicata will not apply. See, Yanguas v. Wai Pun, 147 A.D.2d 635, 538 N.Y.S.2d 41 [2d Dept. 1989]. Lastly, stipulations of settlement will not necessarily preclude a party from asserting a cause of action which only arose after the stipulation became operative. See, Pawling Lake Prop. Owners Assn., Inc. v. Greiner, 72 A.D.3d at 668.

The Defendant argues that the Settlement clearly included the City's waiver of its counterclaim which alleged that the subject premises contained seven (7) illegal apartments [Defendant's Motion at ¶¶ 29-30]. This Court agrees. The City's argument that the Settlement did not include the subject premises is easily belied by a perusal of the City's Answer with Counterclaim [Id. at Exhs. "E" and "G"]. The dispositive question is whether the City is barred from commencing this criminal proceeding against the Defendant for having seven (7) apartments at the subject premises after October 18, 2006—the date the Settlement was filed with the Westchester County Clerk [Defendant's Motion, Exh. "G"]. See also, Civil Practice Law and Rules ("CPLR") §3217(c)[3]. The Court answers this question in the negative.

[3] The Settlement was formally denominated "Settlement and Stipulation of Voluntary Discontinuance."

Index No. 16-1051

This Court is supremely aware that stipulations disposing of proceedings and actions are favored by the courts and are not to be lightly set aside, particularly where the party seeking to vacate the stipulation was represented by counsel. See, Sheng v. State Div. of Human Rights, 93 A.D.3d 851, 941 N.Y.S.2d 215 [2d Dept. 2012]. Stipulations are favored by the courts because they preserve judicial resources and promote efficient dispute resolution. See, National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanda Energy USA, Inc., 40 Misc.3d 703, 967 N.Y.S.2d 636 [Sup. Ct., New York County, 2013]; Tverskoy v. Ramaswami, 83 A.D.3d 1195, 920 N.Y.S.2d 803 [3d Dept. 2011].

However, a municipality may not enter an agreement that would violate public policy—i.e., an agreement to waive the enforcement of its statutory obligations. See, Snowpine Village Condominium Bd. Of Managers v. Great Valley, 144 Misc.2d 1049, 1055, 545 N.Y.S.2d 1004 (Sup. Ct., Cattaragus County, 1989) ["It is an accepted rule that parties may not enter into stipulations which are 'unreasonable' or 'against good morals' or against 'sound public policy'" (citations omitted)]. Specifically, parties cannot enter a stipulation or agreement to waive in advance the provisions of a statute—in this case, Code §575-50(A)(1). See, Estro Chem. Co. v. Falk, 303 N.Y. 83, 87 [1951]. Accordingly, the Court finds that the Settlement was void *ab initio* to the extent that it

waived the City's statutory obligation to enforce Code §575-50(A)(1). Although a stipulation of discontinuance with prejudice does carry res judicata weight with respect to the same cause, a Court may narrowly interpret the language "with prejudice" when the interests of justice or the particular equities warrant such an approach. Dolitsky's Dry Cleaners v. YL Jericho Dry Cleaners, 203 A.D.2d at 323; Klein v. Gutman, 121 A.D.3d 859. For the aforesaid reasons, the Court limits the legal effect of the "with prejudice" language in the Settlement only as it relates to the City's enforcement of Code §575-50(A)(1).

One last point regarding the Settlement requires some elaboration. Since the parties disposed of the civil rights lawsuit by Settlement and Stipulation of Voluntary Discontinuance, it appears that the party who seeks to enforce the terms of the Settlement should do so by commencing a plenary action in the State Supreme Court. See, Town of Carmel v. Melchner, 105 A.D.3d 82, 962 N.Y.S.2d 205 [2d Dept. 2013]. A stipulation of settlement is a contract and, as such, is governed by contract principles for its interpretation and effect. Id. at 98. A plenary action to enforce the provisions of the Settlement should have been commenced in the State Supreme Court. To the extent that the Defendant sought to raise the res judicata effect of the Settlement as a basis to dismiss the Information, the application is denied for the reasons aforesaid.

Index No. 16-1051

II. Defendant argues collateral estoppel bars this prosecution

The doctrine of collateral estoppel or issue preclusion precludes a party from revisiting an issue that has already been raised and decided in a prior litigation. See, Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349, 712 N.E.2d 647, 690 N.Y.S.2d 478 [1999]. It is well settled that to invoke the doctrine of collateral estoppel, the issue which was necessarily decided in the prior action must be decisive in the present action, and there must have been a full and fair opportunity to contest the decision which is now said to be controlling. See, Buechel v. Bain, 97 N.Y.2d 295, 303-304, 766 N.E.2d 914, 740 N.Y.S.2d 252 [2001]. The burden is on the party seeking to invoke the doctrine of collateral estoppel to show that the issue on which collateral estoppel is sought was decided in the prior action. However, if the party against whom collateral estoppel is sought claims that he, she or it did not have a full and fair opportunity to address an issue in the earlier action, the burden of that showing is on that party. See, Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 [1969].

As is correctly argued by the Defendant, collateral estoppel principles do apply to criminal proceedings. See, People v. Hilton, 95 N.Y.2d 950 [2000]; People v. Howard, 152 A.D.2d 325, 548 N.Y.S.2d 785 [2d Dept. 1989]. However, "[s]trong policy considerations militate against giving issues determined in prior litigation preclusive effect in a

criminal case...” (See, People v. Plevy, 52 N.Y.2d 58, 65, n 4). Further, “Collateral estoppel is a flexible doctrine, not to be applied automatically just because its formal prerequisites are met” People v. Fagan, 66 N.Y.2d 815, 816 [1985] *citing* Gilbert v. Barbieri, 53 N.Y.2d 285, 292 [1981].

The Court of Appeals stated that

> Collateral estoppel originally developed in civil litigation, but it is now clear that the doctrine applies generally to criminal proceedings as well [citations omitted]. It is not applied in quite the same way, however, because the preeminent concern in criminal cases is to reach a correct result whereas in civil litigation the focus is on the swift, impartial and peaceful resolution of disputes. The desire to avoid repetitious litigation must sometimes give way to concerns peculiar to criminal prosecutions [citation omitted].

See, People v. Goodman, 69 N.Y.2d 32, 37 [1986].

In this Court’s view, to permit the Defendant to invoke the doctrine of collateral estoppel against the City on the issue of the concededly illegal seven (7) apartments at the subject premises would be detrimental to the health, safety and welfare of the residents of this City. One of the purposes of Code §575-50 A (1) is to ensure that changes to residential premises in zoned areas be approved by the City [Planning and/or Zoning Boards] to ensure that the changes meet building, fire and safety

standards, which in turn safeguards the health, safety and welfare of the occupants, the surrounding community, and even first responders. See, American Friends of Society of St. Pius, Inc. v. Schwab, 68 A.D.2d 646, 417 N.Y.S.2d 991 (2d Dept. 1979); see also, Uniform Building Code Act, Executive Law §371(2)(b) [provides for local enforcement of "a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction"]; Executive Law §§373[1]; 374, 377, 378.

The City makes a forceful argument that it "cannot be expected to turn away a citizen who has a complaint of a violation of the Code today based on a settlement from 2006. Settling a matter does not afford a defendant the right to violate the law indefinitely" [City's Aff. In Opp. at ¶ 21]. This Court agrees. The doctrine of collateral estoppel cannot be invoked against the City to preclude it from performing its statutorily authorized duty—i.e., enforcing its zoning laws. See, Bonded Concrete, Inc., v. Town of Saugerties, 3 A.D.3d 729, 770 N.Y.S.2d 786 [3d Dept. 2004]; Matter of Parkview Assoc. v. City of New York, 71 N.Y.2d 274, 282, 519 N.E.2d 1372, 525 N.Y.S.2d 176 [1988] ("Generally, the doctrine of estoppel is not available against a governmental agency to prevent it from discharging its statutory duties, even when the results are harsh."). Further, to preclude the City from discharging its statutory duties based

on estoppel "could easily result in large scale public fraud" (Matter of E.F.S. Ventures Corp. v. Foster, 71 N.Y. 359, 370 [1988]. Accordingly, the Defendant's application to dismiss the Information based on the doctrine of collateral estoppel is denied.

III. Defendant argues the Information should be dismissed based on the Statute of Limitations

The Defendant argues that the Information should be dismissed based on the statute of limitations [Defendant's Motion at ¶¶ 69-79]. It is beyond cavil that the Information herein charges the Defendant with a violation, which is a petty offense with a one-year statute of limitations [Defendant's Motion Exh. "A"; Criminal Procedure Law ("CPL") §§1.20(39), 30.10(2)(d); Penal Law §55.10(3)]. The City counters that the one-year statute of limitations should not apply in this case because to do so:

> …would be unfair and unsafe to the Public to require a City to File a Notice of Violation for a Building/Zoning Code violation within any time period. There are many reasons a City might not be able to bring charges at a given time and the City should not be precluded from bringing them at any point especially considering the potential impact on the safety and welfare of its citizens.

[City Aff. In Opp. at ¶ 29].

The City further contends that even if the Court were to consider the one-year statute of limitations applicable, the statute of limitations began to run on July 29, 2016—the date the violation was observed by the City [Id. at ¶ 29(b)(ii)]. Although the City failed to cite any case law in support of its position, the Court agrees that the Information should not be dismissed based on the statute of limitations for the reasons set forth below.

The statute of limitations is a statute of repose. See, People ex rel. Reibman v. Warden of County Jail, 242 A.D. 282, 284 [3d Dept. 1934]. The Reibman Court stated

> In the absence of statute of limitations specifically applicable to criminal cases, a prosecution may be instituted at any time, however long after the commission of a criminal act. An act of limitations is an act of grace in criminal prosecutions…. A Statute of Limitations in criminal cases, therefore, differs from one applicable to civil actions, for while the latter bars the remedy only and not the cause of action, a statute limiting criminal prosecutions destroys the right of action as well as the remedy…. In other words, statute of limitations in criminal cases differs from those in civil cases in that civil cases they are statutes of repose while in criminal cases they create a bar to the prosecution.

Id. at pp. 17-18.

In the Court's view, the City was not mandated to commence criminal proceedings against the Defendant after it is made aware of a potential zoning violation at his property. See, Fried v. Fox, 49 A.D.2d 877, 878 [2d Dept. 1975] (a "zoning ordinance does not impose a clear and positive duty on appellants to remove all violations of the zoning laws. The decision by city officials to enforce any of the myriad zoning violations existing in a given municipality must, of necessity, be left to the discretion of these officials."); Saks v. Petosa, 184 A.D.2d 512 [2d Dept. 1992]; Manuli v. Hildenbrandt, 144 A.D.2d 789, 534 N.Y.S.2d 763 [3d Dept. 1988] ("the decisions of local municipal officials on whether to enforce zoning codes are discretionary and not subject to judicial oversight in a civil suit or by way of mandamus."). Hence, the Court agrees with the City that it was not mandated to commence criminal proceedings against the Defendant in 2001 or within one-year after the filing of the Settlement on October 18, 2006 [City's Aff. In Opp. at ¶ 29a]. See, Young v. Huntington, 121 A.D.2d 641 [2d Dept. 1986].

Further, the Court finds that Defendant's violation of Code §575-50(A)(1) is a continuous violation and that the continued presence of the seven (7) illegal apartments at the subject premises tolls the statute of limitations. See, People v. Fletcher Gravel Co., 82 Misc.2d 22, 368 N.Y.S.2d 392 [County Court, Onondaga County, 1975]. The Fletcher

Court aptly stated that

> Although it might be stated that the completion date of a building is definite, an addition to a nonconforming use so long as it exists is on-going and continuous. The illegality of the nonconformity to the zoning regulations does not start from the completion of an enlargement of a nonconforming use, but subsists and comes into existence when the prohibited expansion begins and continues to be illegal after completion because of its very existence in a zone prohibiting its existence.

Id. at pp. 31.

This Court agrees with the reasoning of the Fletcher Court and finds that so long as the seven (7) illegal apartments exists, the violation of Code §575-50(A)(1) is on-going and continuous and tolls the statute of limitations under the continuous violation doctrine. See, Town of Kinderhook v. Slovak, 21 Misc.3d 1115(A), 873 N.Y.S.2d 238 [Supreme Court, Columbia County 2006]. "Despite the general principle that a cause of action accrues when the wrong is done, regardless of when it is discovered, if the wrong is continuing, so that each day gives rise to a new cause of action, then each day will also bring a new statute of limitations." McLaughlin, Practice Commentaries, McKinney's Con Laws of NY, Book 7B, CPLR C203:1, at 141.

Index No. 16-1051

IV. Defendant argues that the Information should be dismissed as fatally defective

The Defendant argues that the Information should be dismissed because it is fatally defective because it:

> ….fails to designate the offense charged and fails to set forth each of the factual elements of the offenses, which if true, would constitute the offense. The Information is signed by Jeffrey P. Roma.

[Defendant's Motion at ¶ 101].

The Defendant goes on to claim that the supporting deposition of Jeffrey P. Roma is defective because he made no observations of the premises because none of the occupants opened their door even though the City obtained an Administrative Warrant [Id. at ¶¶ 103-105]. Further, the Defendant argues that all the City does is recite the language of the statute without any supporting facts and that Mr. Roma cites no facts to support the charge against the Defendant [Id. at ¶¶ 112-113]. The City counters that the Information includes all requisite factual allegations, that the case is viable, that anything beyond what is stated in the Information is a question of fact for trial, and that therefore it should not be dismissed [City's Aff. In Opp. at ¶ 37-38]. The City further states that should this Court find the Information to be defective, it requests permission for leave to amend the Information [Id. at ¶ 39].

Index No. 16-1051

CPL §100.40 states

1. An information, or a count thereof, is sufficient on its face when:

(a)It substantially conforms to the requirements prescribed in section 100.15; and

(b)The allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and

(c)Non-hearsay allegations of the factual part of the information and/or any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.

It is well settled that if the factual allegations of an information give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading. See, People v. Konieczny, 2 N.Y.3d 569, 780 N.Y.S.2d 546, 813 N.E.2d 626 (2004) (*citing* People v. Casey, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 [2000]. The Court of Appeals made clear that it is a fundamental and non-waivable jurisdictional prerequisite that an

information state the crime with which the defendant is charged and the particular facts constituting that crime, every element of the crime charged and the defendant's commission thereof must be alleged. See, People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56, 401 N.E.2d 179 [1979]. However, an information need not contain the most precise words or phrases which most clearly express the thought, but it only needs to allege the crime and set forth the specifics so that a defendant can prepare for trial and so that a defendant will not be tried again for the same offense. See, People v. Hall, 4 Misc.3d 60, 781 N.Y.S.2d 395 [App. Term 9th &10th Jud. Dists. 2004].

A review of the Information [Defendant's Motion Exh. "A"] and the Supporting Deposition of Jeffery P. Roma, Assistant Building Inspector for the City of Peekskill [Id. at Exh. "Q"], indicate that they satisfy the requirements of CPL §§100.15 and 100.40 in that the factual allegations of the Information taken together with the Supporting Deposition of Inspector Roma is sufficient on its face, because said Information alleges "every element of the offense charged and the defendant's commission thereof…by non-hearsay allegations of such information and… supporting deposition" CPL §100.15(3).

The Court finds that the Information is facially sufficient and therefore denies the motion to dismiss on this ground. The Information and Supporting Deposition of Inspector Roma properly informs the

Defendant of the charge against him in sufficient non-hearsay detail to enable him to prepare a defense to it. The accusatory portion of the Information sufficient sets forth the charge against the Defendant. Any alleged contradictions in the Information and/or supporting deposition goes to their weight which can be further explored or used as a basis for impeachment through cross examination at trial.

V. The Defendant argues that the Information should be dismissed in the interests of justice

The Defendant argues that the Information should be dismissed in the interests of justice pursuant to CPL §170.40[1](a)-(j) and [2] (Defendant's Motion at ¶¶ 80-97]. The Defendant addresses each factor under §170.40[1](a)-(j) for the proposition, *inter alia*, that a dismissal in the interest of justice would not have an adverse impact on the court system or the community at large. The City argues that there are no relevant factors that would warrant a dismissal in the interest of justice and that the City is prosecuting this case based on a complaint of a violation in July of 2016, and that there may be a detriment to the community and there may be a concern for the welfare of the City's citizenry as evidenced by the complaint [City's Aff. In Opp. at ¶¶ 30-31]. A motion to dismiss an Information in the interest of justice is addressed to the sound discretion of the court. See, People v. Kelly, 141 A.D.2d 764, 529 N.Y.S.2d 855 [2d Dept. 1988]. After a review of the compelling

factors set forth in CPL§170.40, this Court denies the application for a dismissal in the interests of justice. Specifically, a zoning violation of the kind set forth in the Information presents a clear and present danger to the community at large. Further, a dismissal in this case would send a very negative message to the community at large which could result in the erosion of the public's confidence in the criminal justice system. For at least these reasons, the Court is compelled to deny the Defendant's application for an interest of justice dismissal.

VI. Defendant argues that Information should be dismissed because of improper service

The Defendant argues that the Information should be dismissed because it was improperly served in that it was not served pursuant to CPL §150 or CPLR §308 [Defendant's Motion at ¶ 98]. The City counters that the summons was served via certified mail, that the Code permits service by mail, and that once a defendant's presence is acquired by a criminal court, it is irrelevant how his presence is secured [City's Aff. In Opp. at ¶¶ 33-39, *citing* cases]. Since the Defendant personally appeared and was arraigned in this Court on September 16, 2016, this Court has jurisdiction over him regardless of how he received the notice to appear. See, People v. DiLorenzo, 149 Misc.2d 791, 795, 566 N.Y.S.2d 458 [Crim. Ct., Bronx County 1990] ("Once the defendant appears, even if in response to an improperly served or defective ticket, the Criminal

Index No. 16-1051

Court acquires jurisdiction over his person."). Accordingly, the Defendant's motion to dismiss the Information based on improper service is denied.

Any further arguments not addressed by this Decision and Order are denied.

Ordered, that the Defendant's motion to dismiss is denied in its entirety.

This constitutes the decision and order of the Court.

_____
Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
March 17, 2017

Order entered in accordance with the foregoing on this ____ day of March 17, 2017.

_____
Concetta Cardinale
Chief Clerk