

Pellegrino v Vogelsang
2019 NY Slip Op 34243(U)
April 11, 2019
Supreme Court, Suffolk County
Docket Number: 610487/2017
Judge: John H. Rouse
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INDEX NO. 610487/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 02/20/2019
ADJ. DATE: 03/13/2019
Mot. Seq. 001-MD
e-filed full participation

Susan Pellegrino,

Plaintiff

90 DAY DEMAND

-against-

with

Lisa Vogelsang d/b/a Brown Dog Farms,

Defendants

DECISION & ORDER

TO:

SCHEYER & STERN, LLC
110 LAKE AVENUE SO, STE 46
NESCONSET, NY 11746
631-265-8500

LAW OFFICE OF JOHN F. RAI0
181 BURRS LN
DIX HILLS, NY 11746
631-839-6232

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause granted on January 11, 2019 requiring the Defendant to show cause why an order should not issue granting the Plaintiff a preliminary injunction and preventing Defendant from using the Vogelsang Property located at 80 Deer Path Road, Central Islip, NY for non-residential purposes, together with such other relief as the Court deems just, proper, and equitable; and (2) all e-filed documents numbered 1-28; it is:

DEMAND: Plaintiff must resume prosecution of this action and serve and file a note of issue within ninety days after receipt of this demand, and know that the default by the Plaintiff in complying with this demand within said ninety day period will serve as a basis for a motion by the Court or any party pursuant to CPLR § 3216 for dismissal of the action for unreasonably neglecting to proceed. Plaintiff commenced this action seeking equitable relief on June 5, 2017. It was not until the following year on June 21, 2018 that Plaintiff sought a preliminary conference that was held on August 8, 2018 and all disclosure was to be made within thirty days. The parties further agreed to conduct depositions on December 5, 2018 and an end date for disclosure of June 1, 2019 was set. With no motions having been made by either party to compel discovery

and the Plaintiff only now seeking a preliminary injunction there is no reason a note of issue with certificate of readiness can not be filed and this case brought to its just conclusion.

ORDERED that the Clerk of the Court is directed to mail this 90 Demand to file a Note of Issue to the Plaintiff by certified mail to:

SCHEYER & STERN, LLC
110 LAKE AVENUE SO, STE 46
NESCONSET, NY 11746

ORDERED that the Clerk of the Court is further directed to schedule this case for *conference at 2:00 o'clock in the afternoon on Wednesday, May 8, 2019* for the parties to discuss possible settlement, *only attorneys fully familiar with the action and authorized to make binding stipulations and a settlement are authorized to appear and they must be accompanied by their client*; and it is further

ORDERED that the motion (Seq. #001) by Plaintiff for a preliminary injunction is denied; and it is further

ORDERED that Defendant is directed to serve upon the Plaintiff a copy of this decision and order with notice of entry as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.*
<https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

and it is further

ORDERED that the parties, if they have not done so already, are directed to review the rules of this part found at: https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Rouse.pdf

DECISION

Plaintiff's Motion for a Preliminary Injunction

This action was commenced by filing a summons and complaint in June of 2017. Plaintiff now moves by order to show cause for a preliminary injunction. A "party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840; and see CPLR 6301). In this case Plaintiff contends the Defendant is using her property in violation of the local zoning law. When a continuing use violates a valid zoning restriction it must, subject to the existence of any appropriate equitable defenses, be unconditionally enjoined in favor of a party that has incurred special damages. *Little Joseph Realty, Inc. v. Babylon*, 41 N.Y.2d 738 (1977).

THE COMPLAINT

Plaintiff is the owner of a single-family residential home on a half-acre of property located on Deer Path Road in Central Islip, Suffolk County, New York.

The Defendant, Lisa Vogelsang, is the owner of property located diagonally across the street from the Pellegrino Property at 80 Deer Path Road in Central Islip, Suffolk County, New York (the "Vogelsang Property"). Upon information and belief, the Defendant, Lisa Vogelsang, conducts a business from the Vogelsang Property known as Brown Dog Farms.

The Vogelsang Property is located in a Residential AAA zoning district which does not allow business uses. The defendant herein is engaged in ongoing conduct described herein as operating a horse farm, horse boarding, horse maintenance, and equine facilities of one type or another on the Vogelsang Property. As a result of the Defendant's business activities there are numerous trucks delivering hay and other materials, people parking along the street and horses walking up and down the street. This conduct is exacerbated on the weekends and, on occasion, the Defendant has conducted events such as horse shows which further exacerbate the noise and nuisance issues. The actions on the part of the Defendant affect the quiet enjoyment of the Plaintiff of the Pellegrino Property and subject her to a major commercial enterprise in this residential AAA Zone which is the most restrictive residential zone in the Town of Islip.

The activities of the aforementioned defendant decrease the value and liquidity of the Pellegrino Property and interfere with the Plaintiffs quiet enjoyment and use of her property. The actions of the Defendant places a taint over the Pellegrino Property which hamper the Plaintiffs ability to sell should she choose to do so. The operations of this business by the Defendant is a violation of the current zoning which allows people to maintain a private horse but does not allow a commercial business including a horse farm, breeding, renting horse facilities, etc.

Based on the foregoing, the Plaintiff seeks a mandatory injunction preventing the defendant from continuing her illegal activities and requiring her to restore the Vogelsang Property to a residential state and allow only uses that are permitted by the Town of Islip Zoning Code, free of a reputational taint and potential environmental handicaps and to discontinue daily conduct which would affect the use, quiet enjoyment, marketability of plaintiffs property and property values which brings a claim primarily in the nature of a nuisance.

Plaintiff has submitted in support of her motion Facebook posts that suggest that premises depicted in photographs are being used for commercial purposes.

Defendant opposes the motion and asserts that under the zoning code she is entitled to keep up to nine horses on the subject premises and that she is not operating a commercial activity.¹ With respect to the Facebook posts Defendant alleges she has no recollection of the posts, states "*they may be doctored*" and are from 2016.

This action was commenced on June 5, 2017, it was only in December of 2018 that Plaintiff, moved for a preliminary injunction. This alone is sufficient reason to deny the Plaintiffs motion. for such interim emergency relief. The motion (Seq. 001) is denied.

The foregoing shall constitute the decision and order of the court.

Dated: April 11, 2019



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION

¹The zoning code requires 20,000 feet for every two horses. Plaintiff has not alleged that Defendant is in violation of this restriction, nor has she provided proof of the size of the subject premises.