

Town of Southold v Kelly

2021 NY Slip Op 33892(U)

March 29, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 611268/2020

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 611268/2020

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE: 1/9/2020

ADJ. DATE: 1/16/2021

MOT. SEQ. # 001 - MG

MOT. SEQ. # 002 - MotD

-----X

TOWN OF SOUTHOLD,

Plaintiff,

- against -

FRANK J KELLY, ELIZABETH B KELLY

Defendants.

-----X

Upon the following papers e-filed and read on this motion for an injunction/default judgment: Order to Show Cause and supporting papers (seq. # 001) by plaintiff, dated, August 24, 2020; Notice of motion and supporting papers (seq. # 002) by plaintiff, dated November 30, 2020; Answering Affidavits and supporting papers (# 001) by Thomas Horne, Esq. dated September 15, 2020; Replying Affidavits and supporting papers (#001) by plaintiff, dated September 16, 2020; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that plaintiff’s motion for an order granting it a preliminary injunction, restraining defendants Frank Kelly and Elizabeth Kelly from keeping, storing, erecting, housing and/or placing structures, vehicles and trailers on the real property owned by them located at 1900 Peconic Bay Boulevard Laurel, New York in the Town of Southold, County of Suffolk, which lack necessary permits, approvals and certificates of occupancy is granted; and it is further

ORDERED that plaintiff’s motion for leave to enter a default judgment against defendants and granting it a permanent injunction is granted; and it is further

ORDERED that defendants are directed to remove from 1900 Peconic Bay Boulevard, Laurel, New York, in the Town of Southold, County of Suffolk, the structure and vehicles for which no building permits or certificates of occupancy were obtained and such removal shall be completed within 45 days of service of a copy of this Order with Notice of Entry; and it is further

ORDERED, ADJUDGED, AND DECREED that defendants, Frank Kelly and Elizabeth Kelly and any of their employees, agents, servants, representatives, tenants, lessees and all other persons acting

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on their behalf or in concert with them agents be and they are permanently enjoined and restrained from: keeping, storing, erecting, housing and/or placing structures, vehicles and trailers on the real property owned by them located at 1900 Peconic Bay Boulevard Laurel, New York in the Town of Southold, County of Suffolk, which lack necessary permits, approvals and certificates of occupancy; and it is further

ORDERED that if this Order has not already been entered, plaintiff is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action on August 21, 2020 for an injunction permanently enjoining the use and occupation of the premises known as 1900 Peconic Bay Boulevard, Laurel, Town of Southold, County of Suffolk, New York, “until such time as defendants have obtained certificates of occupancy and all other necessary permits for such use from the Town of Southold and State of New York and until such time as defendants have abated the public nuisance on the premises; 2) compelling defendants to remove all non-complying/illegal structures, vehicles and trailers from the premises; 3) directing defendants to maintain the premises in accordance with all rules, regulations, codes and laws of the Town of Southold.”

A previous action was commenced by plaintiff, Town of Southold, in August 2015 (index number 15142/2015) for an injunction directing defendants to comply with the Town Code of the Town of Southold by maintaining their property under the direction of the ordinances, namely, by obtaining a certificate of occupancy and permits before using the premises known as 1900 Peconic Bay Boulevard, Laurel, Town of Southold, County of Suffolk, New York, for parking and using recreational vehicles, travel trailers, and tents for living quarters, inter alia, allowing and/or permitting the subject premises from being used, occupied and/or maintained for the operation of a Marina.

By order, dated March 21, 2018, the Court (Luft, J.) granted summary judgment to the Town of Southold awarding “a permanent injunction is granted enjoining the defendants and their employees, agents, servants, representatives, tenants, lessees and all other persons acting on their behalf or in concert with them from operating a Tourist Camp and/or Recreational Vehicle Park, as those terms are defined and regulated in Chapter 253 of the Code of the Town of Town of Southold, including but not limited to, parking, and/or using recreational vehicles, travel trailers automobile trailers, house cars and tents for living quarters and/or overnight sleeping purposes on the property located at 1900 Peconic Avenue (“Premises”) unless and until such time as all necessary certificates of occupancy, permits and/or approvals for such use are obtained from the Town of Southold.”

This matter was brought by order to show (seq. # 001), dated August 24, 2020, issued by the Court (Emerson, J.) for a preliminary injunction pursuant to CPLR Article 63 and Town Law §135 enjoining defendants from maintaining, storing and erecting, housing or placing structures, vehicles and trailers on the subject property which lack necessary permits, approvals and certificates of occupancy and which violate the Town Code of the Town of Southold.

Plaintiff also moves (seq. # 002) for an order granting it leave to enter a default judgment against defendants based upon their failure to serve an answer to the complaint.

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In support of its motion, the Town of Southold (hereinafter the Town) submits a copy of the complaint, affidavits by Lester Baylinson and John Burke, an affirmation by John Denby, copies of photographs, a verdict sheet, excerpts from a transcript of trial and a copy of a resolution adopted by the Town Board.

A preliminary injunction may only be sought in a pending action (CPLR § 6301), and it is considered a drastic remedy (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, 177 AD3d 924, 112 NYS3d 196 [2d Dept 2019]; *Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 53 NYS3d 157 [2d Dept 2017]; *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]). The burden is on the movant to demonstrate, by clear and convincing evidence, a likelihood of succeed on the merits, irreparable injury if the provisional relief is withheld, and a balancing of the equities in the movant's favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 800 NYS2d 48 [2005]; *Doe v Axelrod*, 73 NY2d 748, 536 NYS2d 34 [1988]; *Jones v State Farm Fire & Cas. Co.*, 189 AD3d 1565, 138 NYS3d 609 [2d Dept 2020]).

A town's authority to seek injunctive relief is statutory and is conferred by Section 135 of the Town Law. To obtain preliminary injunctive relief based on a violation of zoning ordinances, a town need not satisfy the traditional three-part test for injunctive relief. Rather, a town is only required to show a likelihood of success on the merits, and that the equities are balanced in its favor (*Town of Brookhaven v MMCCAS Holdings, Inc.*, 137 AD3d 1258, 29 NYS3d 389 [2d Dept 2016]; *Town of Oyster Bay v Baker*, 96 AD3d 824, 946 NYS2d 257 [2d Dept 2012]; *Incorporated Vil. of Plandome Manor v Ioannou*, 54 AD3d 364, 863 NYS2d 241 [2d Dept. 2008]).

The affidavit of Larry Baylinson is submitted. In his affidavit, Baylinson states that he works as an ordinance inspector for the Town, and his duties include reviewing and investigating complaints regarding violations of the Town's ordinances and issuing summonses. He states that he is familiar with the subject property, and that he conducted a search of the Town's records and examined the deed which indicates that defendants are the owners of the subject property. He states that he visited the premises on various occasions during the time period between May 2018 through May 2019, and that he issued 23 summonses to defendants for maintaining a recreational vehicle and a trailer/camper, among other things, on the property which is located in a M-1 district, and that such use is in violation of the Town's ordinances. Baylinson further states that a trial was held on September 17, 2019 before Town of Southold Justice Brian Hughes, and that defendant was convicted of all 23 violations.

Baylinson states that he visited the subject property in January 2020, and that he observed the presence of the recreational vehicle and trailer/camper on the premises and avers that the violations are continuing and have not been remedied.

A verdict sheet from the trial held in the Justice Court for the Town of Southold is submitted, and it confirms Baylinson's statement in his affidavit that defendant was convicted of all charges.

An affidavit by John Burke, an assistant town attorney for the Town is submitted. In his affidavit, Burke states that he visited the subject premises on August 10, 2020 after receiving complaints from defendants' neighbors, and that he observed several recreational vehicles and residential-type trailers on the premises. He states further that while he was present on the property on August 10, 2020, a "semi-permanent residential structure was delivered and was being prepared for installation. He states that

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defendant was on the premises and supervising the installation. Burke states that the presence of such structure and other vehicles is in violation of the Town code, and that defendant does not have a permit or certificate of occupancy for same.

Burke states that defendant told him that he was aware that he was violating the Town code by having the structure and vehicles on the premises, and that he indicated that he had no intention of complying with the order of Justice Luft.

A copy of correspondence by the Town Board indicates that Resolution NO. 2018-539 was adopted by the Board on June 5, 2018, denying an application by defendants to maintain a trailer on the property, as “use of the trailer as applied for is inconsistent with the Town’s Policy Regarding Trailer Permits.”

In opposition to the Town’s instant motion (seq. # 001), defendants merely submit an affirmation by counsel; no affidavit by either of the two defendants is submitted. The affirmation fails to address the substance of plaintiff’s arguments.

Here, the Town’s submissions satisfy its burden of demonstrating the likelihood of success on the merits. Furthermore, defendants’ continued noncompliance with the Town’s zoning ordinances and defendants’ failure to deny the substantive allegations balance the equities in plaintiff’s favor.

Accordingly, the Town’s application for a preliminary injunction is granted, and defendants are hereby enjoined from: keeping, storing, erecting, housing and/or placing structures, vehicles and trailers on the real property owned by them located at 1900 Peconic Bay Boulevard Laurel, New York in the Town of Southold, County of Suffolk, which lack necessary permits, approvals and certificates of occupancy unless and until such time as defendants have obtained all necessary approvals from the Town of Southold.

Plaintiff also moves for an order granting it leave to enter a default judgment against defendants on the ground that they have not served an answer to the complaint and have failed to appear in this action. The complaint seeks a permanent injunction restraining and enjoining defendants from using the premises located at 1900 Peconic Bay Blvd as a tourist, trailer and/or recreational vehicle park, and the operation of a marina, restraining and enjoining defendants from parking and/or storing recreational vehicles, travel trailers, boats and equipment. Plaintiff alleges that the structure violates, inter alia, sections 280-115, 280-130, 280-52 and 144-8 of the Town Code of the Town of Southold, and that such usage and the prohibited objects on the premises without a certificate of occupancy violate § 280-154(A) of the Town Code of the Town of Southold.

Plaintiff alleges further that “defendants have deliberately overburdened the small lot and are misusing the land to the detriment of the Town and its residents. The misuse of the premises is spoiling the wetlands and destroying the habitat of the animals, birds and fish that rely on the wetland environment. . . . and that such misuse of the land has the potential to cause an environmental and ecological catastrophe.

Further, plaintiff alleges “that defendants conscious and deliberate conduct in adding a prohibited structure on their property in blatant violation of the Town Code and the Supreme Court's prior order is

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frivolous within the meaning of 22 N.Y.C.R.R. § 130 warranting the imposition of sanctions, costs and fees.”

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant’s default in answering or appearing (*Wilmington Savings Fund Society, FSB v Chishty*, 179 AD3d 1147, 114 NYS3d 701 [2d Dept 2020]; *Moran v BAC Field Services Corporation*, 164 AD3d 494, 83 NYS3d 111 [2d Dept 2018]; *BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]). CPLR § 3215 (f) requires that proof of the facts constituting the claim be established for the entry of a default judgment. To establish proof of the claim, an affidavit made by a party who has firsthand knowledge, alleging the facts of the claim, or a complaint verified by the party is necessary to demonstrate a viable cause of action (*Woodson v Mendon Leasing Corp.*, 100 NY2d 627, 760 NYS2d 727 [2003]; see also *L & Z Masonry Corp. v Mose*, 167 AD3d 728, 90 NYS3d 92 [2d Dept 2018]; *Gerhardt v Salacqua Contr. Co.*, 181 AD2d 719, 581 NYS2d 227 [2d Dept 1992]).

The affidavit of service of the summons and complaint indicates that Frank Kelly was served pursuant to CPLR 308 (1), by personally delivering the documents to him on August 27, 2020 at his residence located at 12 Bayview Avenue, East Islip, New York. Therefore, service was complete on August 27, 2020, and defendant Frank Kelly should have answered the complaint by September 17, 2020.

The affidavit of service of the summons and complaint indicates that Elizabeth Kelly was served pursuant to CPLR 308 (2), by leaving a copy of the summons and complaint with a person of suitable age and discretion, Frank Kelly, at her dwelling, 12 Bayview Avenue, East Islip, New York, on August 27, 2020, and also by mailing the documents to Kelly in accordance with the requirements set forth in the statute. The affidavit of service was filed with the Clerk of the Court on September 4, 2020. Therefore, service was complete on September 14, 2020, and defendant, Elizabeth Kelly, should have answered or appeared by October 19, 2020. Plaintiff’s counsel avers that the Kelly defendants did not answer the complaint and have not appeared in this action.

The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction, except that plaintiff must ultimately succeed on the merits.

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, 833 NYS2d 519 [2d Dept 2007], citing, NYS Town Law §§ 135, 268; *Town of Huntington v. Albicocco*, 256 AD2d 330, 681 NYS2d 341 [2d Dept 1998]).

Here, plaintiff has established that defendants were served with process, that they did not serve an answer to plaintiff’s complaint, the defendants defaulted, and plaintiff has submitted proof of the facts constituting the claim. Having established that defendants were acting in violation of the applicable provisions of local law, plaintiff is entitled to a permanent injunction (*Inc. Vil. of Sea Cliff v Larrea*, 106 AD3d 876, 965 NYS2d 552 [2d Dept 2013]). Therefore, defendants are permanently enjoined and restrained from keeping, maintaining, operating and using the premises owned and controlled by them described in the complaint for the uses and purposes complained of in violation of the Town Code of

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Southold, and defendants are directed to promptly remove from 1900 Peconic Bay Boulevard, Laurel, New York, in the Town of Southold, County of Suffolk, the structure and vehicles for which no building permits or certificates of occupancy were obtained and such removal shall be completed within 45 days of service of a copy of this Order with Notice of Entry.

Plaintiff also seeks civil penalties in the amount of \$100,000.00. However, no allegations or proof is submitted to demonstrate how this amount was derived. Accordingly, the branch of the Town's motion for civil penalties is denied without prejudice upon submission of proper proof.

Nothing in this Order contradicts or modifies the Court's March 21, 2018 Order (Luft, J.), but merely reiterates the March 21, 2018 Order's directives and addresses a structure that was installed in August 2020, after the Order was issued.

Anything not specifically granted herein is hereby denied.

This constitutes the Decision and Order of the Court.



LINDA KEVINS, JSC

Dated: 3/29/21

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION