

Toporoff v Galli

2021 NY Slip Op 34280(U)

September 23, 2021

Supreme Court, Westchester County

Docket Number: Index No. 56780/2013

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
RUTH TOPOROFF and MICHAEL RICHMAN,
Plaintiffs,

-against-

Index No. 56780/2013
Motion Sequence Nos. 8, 9

SUZANNE and STEFANO GALLI,
Defendants.

Decision and Order

-----X
EVERETT, J.

The following papers were considered on the motions:
Decision and Order dated April 7, 2021/Notice of Motion/
Affirmation/Court Notice/Correspondence/Affirmation of Service/
Correspondence/Notice of Cross Motion/ Affirmation/Exhibits/
Affidavit of Service/Court Notice/ Correspondence/Exhibit/
Affirmations/Correspondence/Exhibits
(NYSCEF documents numbered 363, 366-387)

The factual and procedural background of this action is detailed in the decision and order of this Court dated April 7, 2021 (NYSCEF document number 363). In that decision and order, this Court, among other things, granted a preliminary injunction. The defendants and their agents were enjoined and restrained from selling or transferring title to the property at 341 Succabone Road, Bedford, until the Town of Bedford Zoning Board of Appeals (ZBA) issued an amended variance grant. The Court also, among other things, directed the plaintiffs, pursuant to CPLR 6312(b), to post an undertaking in the sum of \$500,000. Now, in motion sequence number 8, the plaintiffs move to be discharged of their obligation to post an undertaking or, in the alternative, to reduce the amount of the undertaking. In motion sequence number 9, the

defendants cross-move to vacate the preliminary injunction, to instruct the parties to file stipulations of discontinuance, to hold the plaintiffs in civil contempt for, among other things, failing to post the undertaking, and for an award of attorneys fees and costs pursuant to 22 NYCRR 130-1.1. The Court decides the motion and cross motion as set forth herein.

It is undisputed that the ZBA issued an amended variance grant. Thus, in accordance with the decision and order of this Court dated April 7, 2021 (NYSCEF document number 363), since the ZBA issued an amended variance grant, the preliminary injunction is no longer in effect. The defendants and their agents are not enjoined or restrained from selling or transferring title to the property at 341 Succabone Road, Bedford. In any event, to the extent vacatur of the preliminary injunction may be required, the Court grants that branch of the cross motion which is to vacate the preliminary injunction.

The posting of an undertaking is a condition for the granting of a preliminary injunction (see CPLR 6312[b]), but here an undertaking is no longer required since the preliminary injunction is no longer in effect (see *Quandt's Wholesale Distribs. v Giardino*, 89 AD2d 669 [3d Dept 1982] ["Since the posting of an undertaking is a condition for the granting of a preliminary injunction (CPLR 6312, subd. [b]), it would be inconsistent to order the posting of an undertaking subsequent to the vacatur of the injunction. Thus, while Special Term may have erred in failing

to require the posting of an undertaking, since this was not remedied by a motion to amend the preliminary injunction to provide for an undertaking (see CPLR 5518), and since the preliminary injunction was vacated on appeal, any issue regarding the failure to require an undertaking is now moot"]. As a result, the Court denies, as moot/academic, the plaintiffs' motion to be discharged of their obligation to post an undertaking or, in the alternative, to reduce the amount of the undertaking.

The Court denies the other requests for relief at this time.

Accordingly, it is,

ORDERED that the plaintiffs' motion to be discharged of their obligation to post an undertaking or, in the alternative, to reduce the amount of the undertaking, is denied as moot/academic; and it is further,

ORDERED that the defendants' cross motion to vacate the preliminary injunction, to instruct the parties to file stipulations of discontinuance, to hold the plaintiffs in civil contempt for, among other things, failing to post the undertaking, and for an award of attorneys fees and costs pursuant to 22 NYCRR 130-1.1, is granted only to the extent that the Court grants that branch of the cross motion which is to vacate the preliminary injunction, and otherwise denied; and it is further,

ORDERED that the plaintiffs must, within ten days of the date of entry, serve a copy of this decision and order with notice of entry upon the defendants; and it is further,

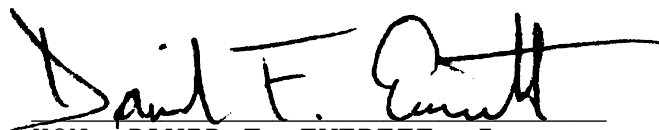
ORDERED that the plaintiffs must, within ten days after

service of the notice of entry, file proof of that service via NYSCEF.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 23, 2021

ENTER:

A handwritten signature in black ink, appearing to read "David F. Everett", written over a horizontal line.

HON. DAVID F. EVERETT, J.
Justice of the Supreme Court

Filed via NYSCEF