

Town of Riverhead v Kar-McVeigh, LLC
2022 NY Slip Op 35239(U)
May 4, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 617144/2021
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 617144/2021

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 9-21-2021
SUBMIT DATE 4-21-2022
Mot. Seq. # 01 - Mot D
X-Mot. Seq. # 02 - Mot D-----X
TOWN OF RIVERHEAD,

Plaintiff,

-against-

KAR-MCVEIGH, LLC, and MATTHEW
KAR,Defendants.
-----X**ROBERT F. KOZAKIEWICZ, ESQ.**
RIVERHEAD TOWN ATTORNEY*Attorneys for Plaintiff*
200 Howell Avenue
Riverhead, New York 19901**MARGOLIN BESUNDER LLP***Attorneys for Defendants*
3750 Express Drive South, Suite 200
Islandia, New York 11749

Upon the following papers read on these motions for a preliminary injunction & to dismiss; e-filed on the NYSCEF system as documents 3 - 17, 19 - 20, 23 - 24, 31 - 48, 49 - 69, 74 - 86, & 87; it is,

In this proceeding seeking injunctive relief, plaintiff Town of Riverhead seeks an order enjoining and restraining defendants, Kar-McVeigh, LLC, and Matthew Kar, their agents, servants, employees, members, tenants, lessees, representatives and all other persons acting on their behalf, or in concert with the defendants: (1) from "using sound reproduction device(s) as defined in the Code of the Town of Riverhead in such a manor to cause 'unreasonable noise' above whereby disturbing the comfort, repose, health and peace of person(s) with normal sensitivities"; (2) from "using 'sound reproduction devices' that produce amplified sound or music as defined in the Code of the Town of Riverhead in such a manor to create Noise sound levels in excess of the permitted decibel limitations set forth in the Code of the Town of Riverhead, Article 1, section 251 entitled 'Noise'"; (3) from "using, occupying the premises for any outdoor events or for outdoor catering"; and (4) from "erecting, using or occupying any tents upon the premises for any purposes". The defendants oppose this application in all respects and cross move to dismiss the action pursuant to CPLR 3211(a)(1), (5) and (7).

The plaintiff commenced this action seeking a declaratory judgment, civil penalties and equitable relief. The plaintiff seeks, among other things, an injunction against the defendants from using the premises, known as the Jamesport Manor Inn, located at 370 Manor Lane, Jamesport, Town of Riverhead, County of Suffolk, State of New York, for catering, outdoor events and wedding events. The plaintiff indicates that

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the defendants “own one tax lot, which is zoned Agricultural Protection (APZ) Zoning and used to operate a restaurant”. The plaintiff contends that the “restaurant is permitted as a non-conforming, preexisting use, but now the subject premises is being used for outdoor catered events, including weddings”. By its complaint, the plaintiff states that defendant “KAR-MCVEIGH, LLC, is a domestic limited liability company organized under and existing by virtue of the Laws of the State of New York, with its principal place of business located in the County of Suffolk, State of New York”, and that defendant Matthew Kar is “the Chief Executive Officer and a principal of KAR-MCVEIGH, LLC”. Both the plaintiff and defendants have set out the prior litigation involved at this located in their papers and the Court will not repeat it here but will rather adopt the history as set out in the exhibits attached to document 50 on the NYSCEF system.

The plaintiff claims that the defendants are using the premises for an unauthorized use without the appropriate variances and permits, and violating Town of Riverhead Town Code chapter 251-5(L) by allowing music to be played in excess of the sound levels authorized by that section.

The defendants move to dismiss arguing that principles of res judicata, collateral estoppel and judicial estoppel all apply and require dismissal as to Matthew Kar individually and Kar-McVeigh, LLC. The defendants claim that in the prior action

Justice Cohalan denied the Barbato petition and dismissed the proceeding concluding that “[b]ased upon the entire record before it the ZBA could rationally conclude that the proposed pre-existing and permitted non-conforming use as a restaurant along with catering facilities as set forth in the respondent’s application was proper, and its determination granting the required relief by the respondent, Kar-McVeigh, was not arbitrary or capricious.” [Exhibit C] at 6. All arguments raised by the Barbato petitioners were thus rejected by the court as it dismissed the petition and did not grant the injunctive relief sought. The ZBA had found in its 2004 Determination that special permits are not required for an adjacent building for catering on the Premises. Justice Cohalan’s determination in Barbato favorably cited to the portion of the ZBA’s 2004 Determination that catering can be either a principal or an accessory use where a restaurant is lawfully permitted and that catering does not require a separate special permit. Justice Cohalan found that the determination granting the “requested relief” (including an adjacent, i.e., separate, building for catering) was not arbitrary or capricious.

The related principles of res judicata, collateral estoppel and judicial estoppel all apply here to show that in view of Barbato, the Town cannot now allege that a special use permit is required for catering to occur in a location that is not inside the restaurant itself and not part of the restaurant’s operations as they existed previously. The Barbato challenge to the ZBA’s 2004 Determination included allegations that a special permit was necessary; the Town’s privy, the ZBA, denied the allegations in the petition that catering in new buildings/structures was an unlawful expansion of the restaurant use. The ZBA’s position was upheld and the ZBA prevailed when the Barbato Article 78 proceeding was dismissed by the

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court and the ZBA's 2004 Determination was upheld. Under the principles of res judicata and/or collateral estoppel, the issue the Town seeks to present to the court in the first and second claims in the Complaint has already been decided; the earlier court ruling applies to the Town because it is in privity with the ZBA. Under the principle of judicial estoppel, since the ZBA prevailed in the Barbato case, the ZBA and its privy, the Town, are estopped from now taking a contrary position that a special permit is required. To allow the Town to take a contrary position would lead to an absurd and unfair result. Nor is there any evidence that the Town Board disagreed with the ZBA's 2004 determination and the court's ruling in Barbato when they occurred; the Town Board never sought to intervene in the Barbato case while it was ongoing, and the Town Code provision that requires special permits from the Town Board in the case of an expansion of a nonconforming use but which makes no mention of an expansion of an accessory to a nonconforming use has remained essentially unchanged since Barbato.

Motion to Dismiss

To succeed on a motion to dismiss pursuant to CPLR 3211(a) for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*see Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (*see Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has pled a cause of action cognizable at law as against defendant Kar-McVeigh, LLC, but has not pled a cause of action

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cognizable at law against defendant Matthew Kar. The proof that the defendants have attached to their moving papers fails to conclusively establish that res judicata, collateral estoppel and judicial estoppel apply to this action. Therefore the defendants' motion to dismiss is granted to the extent that the complaint is dismissed as against defendant Matthew Kar and denied as to defendant Kar-McVeigh, LLC; and it is further

ORDERED that a copy of this order shall be served by the plaintiff on the defendants' attorney by regular mail on or before May 31, 2022; and it is further

ORDERED that defendant Kar-McVeigh, LLC, shall serve its answer within twenty (20) days from service of a copy of this order.

Motion for Preliminary Injunction

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (see, generally, *Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; *Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (see *Dixon v Malouf*, supra; *Ruiz v Meloney*, supra). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [2d Dept 1998]; see *Hoeffner v John F. Frank, Inc.*, 302 AD2d 428 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35 [2d Dept 2000]; *Nalitt v City of New York*, 138 AD2d 580 [2d Dept 1988]).

In *Smithtown v Schleider*, 156 AD2d 668, 668-669 [2d Dept 1989], the Court held that

The plaintiff town demonstrated a likelihood of success on the merits as to the underlying action for a permanent injunction and it was not necessary for the plaintiff to demonstrate that the defendant's allegedly illegal use of his property was causing irreparable injury (see, *Village of Pelham Manor v Crea*, 112 AD2d 415, 416; *Town of Islip v Clark*, 90 AD2d 500). Further, in balancing the equities, the protection of the public is of paramount consideration. Thus, the issuance of a preliminary injunction was proper.

The Town of Riverhead Town Code chapter 251-5(L) states:

Commercial, business and industrial operation.

(1) No person shall operate or permit to be operated on a sound source site a commercial business or industrial operation that produces a sound level exceeding the limitations as provided in this subsection.

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(2) Continuous sound-in-air which has crossed the property line of such sound source site and enters property zoned for residential use or property within a noise-sensitive zone shall not exceed either of the following levels:

(a) Between the hours of 7:00 a.m. and 8:00 p.m.:

[1] A sound level in excess of 65 dBA measured with the slow response of sound-level meter.

[2] An L{10} in excess of 60 dBA.

(b) Between the hours of 8:00 p.m. and 7:00 a.m. the following day:

[1] A sound level in excess of 50 dBA measured with the slow response of a sound-level meter.

[2] An L{10} in excess of 45 dBA.

(c) The sound levels contained herein shall not apply to noise-sensitive zones when the facilities in such zones are not in use.

(3) Continuous sound-in-air which has crossed the property line of a sound source site and enters property which is zoned for business or property where the public in general congregates, except property zoned for industrial use, shall not exceed either of the following levels:

(a) A sound level in excess of 65 dBA measured with the slow response of a sound-level meter.

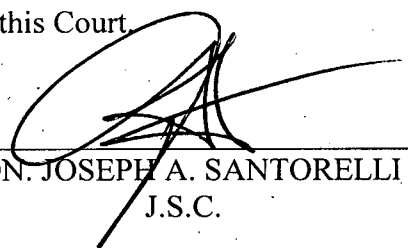
(b) An L{10} in excess of 60 dBA.

(4) The sound levels specified in Subsection L(2) and (3) above shall be decreased by five decibels if the sound contains impulsive sound characteristics.

At this stage of the proceeding the plaintiff has demonstrated what can be construed as a likelihood of success on the merits. Further, a balancing of the equities is in favor of the plaintiff and protection of the public pending resolution of this matter. Therefore the motion for a preliminary injunction is granted to the extent that pending the resolution of this action defendant Kar-McVeigh, LLC, is enjoined and restrained from allowing the sound level to exceed the authorized sound levels set forth in Town of Riverhead Town Code chapter 251-5(L), and is otherwise denied.

The foregoing shall constitute the decision and Order of this Court.

Dated: May 4, 2022


HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION