

Town of Oyster Bay v Baker

2011 NY Slip Op 31448(U)

May 25, 2011

Sup Ct, Nassau County

Docket Number: 11-004533

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TOWN OF OYSTER BAY,

Plaintiff,

-against-

JOHN BAKER,

Defendant.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 11-004533

MOTION SUBMISSION
DATE: 4-28-11

MOTION SEQUENCE
NO. 1

This motion by the plaintiff Town of Oyster Bay ("Town") for an order pursuant to CPLR 6311, Town Law 268(2) preliminarily enjoining the defendant from using his property in violation of various provisions of the Town Code, more specifically, occupying, maintaining and operating a commercial landscaping business as a pre-existing nonconforming use in violation of Oyster Bay Town Code §§ 246-3.1, 246-3.2 and 246-5.2; occupying, maintaining and operating the second floor of the double door garage structure located at the premises as two residential living units; occupying, maintaining and operating the first floor of the garage structure as a commercial use; maintaining dangerous and hazardous conditions including (i) a door in the exterior rear wall of the second floor, (ii) a wood deck and staircase in the rear of the garage structure, and (iii) an overhang roof over the first floor side door of the garage structure, in violation of Oyster Bay Town Code §§§ 93-15, 93-28 and 93-30; and, utilizing the

garage structure as a mixed use, i.e., the second floor for residential purposes and the first floor for commercial purposes, is determined as provided herein.

By way of this action, the Town seeks, inter alia, to permanently enjoin the defendant from using his property at 101 Davis Street in Locust Valley as a commercial landscaping business pursuant to his nonconforming pre-existing use privileges. More specifically, it seeks to enjoin him from operating, maintaining, allowing and providing services as a commercial landscaping business in violation of Town Code §§ 246-3.1, 246-3.2, 246-5.2; occupying, maintaining, allowing and operating the second floor of the double door garage structure as two residential living units in violation of the Town Code; occupying, maintaining, allowing and operating the first floor of the garage structure as a commercial use in violation of the Town Code; maintaining a dangerous and hazardous conditions in that the defendant has installed: (i) a door through the second floor rear exterior wall of the garage structure, (ii) a second floor wood deck and staircase in the rear of the garage structure, and (iii) a roof over the first floor side door of the garage structure without the requisite permits in violation of Town Code §§ 93-15, 93-28, 93-30; and, maintaining the premises as a mixed use, in violation of the uses permitted in the R1-7 zoning district by using the second floor of the garage structure for residential purposes and the first floor of the garage structure and the remaining property for commercial purposes. The Town also seeks an order directing the defendant "to remove, raze, tear down or otherwise demolish the second floor deck and staircase, to remove the kitchen on the second floor of the garage structure on the grounds that the defendant did not procure building permits or Certificates of

Occupancy/Completion/Approval in connection therewith and to conform the premises to the R1-7 zoning district's limitations."

"To obtain preliminary injunctive relief based on a violation of its zoning ordinances, a town need only show that it has a likelihood of success on the merits and that the equities are balanced in its favor." Town of Huntington v Reuschenberg, 70 AD3d 814, 815 (2nd Dept. 2009), citing Town of Riverhead v Gezari, 63 AD3d 1042 (2nd Dept. 2009); Town of Riverhead v Silverman, 54 AD3d 1024 (2nd Dept. 208); Town Law § 268 (2).

The commercial use of the defendant's property existed prior to the enactment of the Town Code. Therefore, it is undisputed that the property was entitled to be used as a pre-existing nonconforming use as a landscaping business with a two story garage structure with an office on the top floor.

Upon inspection on August 4, 2009, the Town discovered that the defendant's use of his property had been expanded beyond that permitted as a pre-existing nonconforming use. Specifically, an exterior second floor door with deck and stairway had been added to the rear of the garage structure and the office space on the second floor had been converted to two separate living units. The defendant was notified by the Commissioner of the Town Department of Planning and Development that the property had lost its nonconforming use privileges and that as a result, its use must thereafter conform with the uses permitted under the Town Code. Numerous citations were issued.

After a one week trial, by decision dated December 23, 2010, the Nassau County District Court, Fourth District, found the defendant guilty of violations of Section 93-15 of the Town Code which requires building permits to be procured for certain work; specifically, the second floor door, deck, staircase, side door, roof and change of second story use; Sections 93-28 and 93-30, which prohibits changes in occupancy or use which are inconsistent with those permitted by the Certificates of Occupancy and prohibits any inconsistent uses in excess of 30 days until a Certificate of Occupancy is obtained, in that defendant changed the second story office space into two occupied living areas; and, Section 246-52, which prohibits uses inconsistent with those permitted by the Town Code, in that, again, defendant changed the second floor of the garage to two separate living spaces and the first floor for tools and equipment storage, which mixed use is not consistent with either of the uses permitted via the pre-existing nonconforming use, i.e., equipment storage on first floor and office space on the second floor, or the uses permitted by the Town Zoning Code in the R1-7 residence zone. The defendant was acquitted of the charges that he had installed a kitchen sink on the second floor of the garage structure without a plumbing permit in violation of Town Code § 180-22, and that he failed to properly maintain the premises in violation of Town Code § 135-47. The charge that the defendant's use of the property as a landscaping business was violative of Section 246.5.2 of the Town Code was dismissed in the interest of justice pursuant to a motion by the People.

When a municipality presents evidence of a property owner's criminal convictions based upon his illegal use of his property, it establishes its prima facie

entitlement to judgment as a matter of law with respect to that conduct. Town of Brookhaven v Mascia, 38 AD3d 758 (2nd Dept. 2007); see also, S.T. Groad, Inc. v City of New York, 32 NY2d 300 (1973), rearg den., 33 NY2d 658 (1973) (criminal conviction collaterally estop challenges to underlying conduct in civil actions).

Town Code § 246-4.2.2.5. provides: “[i]f a nonconforming use ceases for any reason for a period of one year or is changed to a conforming use, then any future use of the land, building or structure shall be in conformity with the provisions of this chapter (emphasis added).” By way of the defendant’s criminal conviction, the Town has established that the defendant’s use of his property exceeded that permitted pursuant to his pre-existing nonconforming use, i.e., his residential use of the second floor of the garage structure. Nevertheless, the property continued to be used as a landscaping business. Therefore, the defendant’s conviction did not establish that the nonconforming use ceased for one year nor did it establish that the defendant’s use of the property was changed completely to a conforming use, which is required by Town Code § 246-4.2.2.5 in order to eradicate pre-existing nonconforming use privileges.

Furthermore, while the Town has presently established via an affidavit of a Town Building Inspector that some of the illegal uses for which the defendant was convicted continued as recently as March 11th and 16th, 2011, specifically, the second floor exterior door, deck and staircase, again, that does not establish that the pre-existing nonconforming use was abandoned for a year or that a conforming use was substituted therefor. In fact, Town Inspector James Bandille testified at the defendant’s criminal trial that an inspection done in September, 2009 (only a few weeks after the August 4,

2009 inspection) revealed that the residential use of the second floor had ceased. And, in his Affidavit in Support of the Town's instant application, Inspector Ciambra makes no mention of any residential use of the property as evidenced by his inspections of March 11th and 16th of this year.

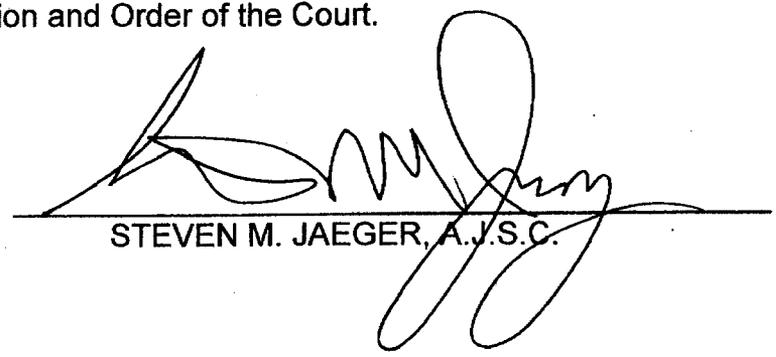
While the property continues to be used as a commercial landscaping business, it is far from clear that the defendant has lost his pre-existing nonconforming privilege of using his property in that fashion. The structural changes, i.e., the second floor exterior door, the deck, the staircase and the roof overhang over the first floor door, are not evidence that the pre-existing nonconforming use ceased for a year nor is that evidence that the property's use has become conforming, which, again, is required under Town Code § 246-4.2.2.5 to eradicate the defendant's pre-existing nonconforming use privileges.

The Town has not established a likelihood of success on the merits and accordingly has not demonstrated its entitlement to injunctive relief regarding the defendant's pre-existing nonconforming use privileges. Furthermore, to enjoin the defendant from using his property as a commercial landscaping business pending resolution of this action could have draconian consequences with no concrete benefit to the Town. Accordingly, the equities tip in the defendant's favor with respect to that issue. The Town's application for a temporary injunction enjoining the defendant from using his property for a commercial landscaping business is denied. Pending further order of this court, the defendant may continue to utilize his property for commercial landscaping purposes and the garage structure for office purposes.

Nevertheless, the defendant is preliminarily enjoined from using the second floor of the garage for residential purposes. The defendant appears to have no right to do so and in fact has not opposed so much of the Town's application. Similarly, the defendant is preliminarily enjoined from utilizing the second floor exterior rear door, deck and stairs and the first floor door overhang roof. The ultimate removal of those structure will be determined subsequently in view of the fact that they are not prohibited per se and the defendant avers that he will seek to legalize those uses.

This constitutes the Decision and Order of the Court.

Dated: May 25, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
MAY 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE