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January 28, 2016

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Re: *Hanover Farms, Inc. v. Town of Shandaken, et al*
Ulster County Supreme Court – Index No. 12-1068 (Action No. 1)

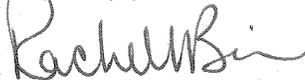
Town of Shandaken v. Hanover Farms, et al
Ulster County Supreme Court – Index No. 12-1357 (Action No. 2)

Dear Counsel:

Enclosed please find a copy of the decision rendered in the above matter. The original decision, together with all original motion papers, have been forwarded to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing.

Please note that counsel is not relieved from the applicable provisions of CPLR §2220 concerning filing, entry, and notice of entry. For purposes of notice of entry, counsel must contact the Ulster County Clerk's Office directly at (845) 340-3288 for the date of filing.

Very truly yours,



Rachel V. Boice
Secretary to Hon. Mary M. Work
Acting Supreme Court Justice

RECEIVED
FEB 02 2016

BY:

SUPREME COURT OF THE STATE OF NE W YORK
COUNTY OF ULSTER

TOWN OF SHANDAKEN AND RICHARD STOKES AS BUILDING
INSPECTOR, ZONING ENFORCEMENT OFFICER AND CODE
ENFORCEMENT OFFICER OF THE TOWN OF SHANDAKEN,

Counterclaim- Plaintiffs,

-against-

HANOVER FARMS, INC. AND MICHAEL HIGLEY,

Counterclaim- Defendants,

DECISION

Index No. 12-1357
RJI. No. 00956

HON. MARY M. WORK
Assigned Justice

Appearances:

JACOBOWITZ & GUBITS, LLP
BY: MICHAEL L. FOX, ESQ.
Attorney for Counterclaim-Plaintiffs

THE LAW OFFICES OF PHILIP A. WELLNER, PLLC
BY: PHILIP A. WELLNER, ESQ.
Attorney for Counterclaim-Defendants

WORK, M., J.

This decision relates to a dispute between the Town of Shandaken (the Town) and Hanover Farms, Inc. (Hanover) and Michael Higley (Higley) over construction work performed on a farm stand on Route 28 in the Town of Shandaken. The Supreme Court litigation was commenced by Hanover, which filed a complaint against the Town seeking a judgment declaring that each of several stop work orders issued by the Town were void and permitting Hanover to complete their work on the farm stand. The Town filed an answer and counterclaim against Hanover and Higley, owner of the land on which the farm stand is located. The counter-claim

alleged that counter-claim defendants had violated a number of provisions of the Town Code.

The Town sought an order directing removal of all structures built and installed in violation of the Town code, enjoining the operation of the farm-stand and a mandatory injunction requiring its removal. The Town also sought a civil penalty of \$200.00 per day for each day's violation of Chapter 74 of the Town Code.

Hanover, Higley and the Town filed motions for summary judgment. By decision and order signed on November 27, 2013, this Court denied the motion for summary judgment filed by Hanover and Higley. The motion was based on alleged defects in the content and service of three stop work orders issued by the Town. The Court dismissed the complaint and there has been no appeal.

The Court granted the motion for summary judgment filed by the Town, enjoining Hanover from conducting a farm-stand or retail business at 5200 Route 28 unless and until a valid special use permit was in place for the operation of the business directing Hanover to cease doing business, ordering that Hanover remove the improvements constructed and installed in violation of the Town Code within sixty days of the date the order was signed. The Court reserved decision on the Town's request for cost disbursements and penalties pending a hearing. Hanover did cease doing business at the farm stand upon service of this Court's decision and order, but did not remove the improvements as ordered.

The Town did not seek enforcement of the order directing removal of the improvements. By letter dated February 13, 2014, the Town submitted to the Court a proposed consent order amending this Court's decision order. The Court refused to approve the order. On May 6, 2014, the Court signed a modified proposed consent order signed by counsel for the Town, counsel for

Higley and counsel for Hanover. It provided that Hanover and Higley would not be required to immediately remove the improvements constructed on the Higley property, that the determination of costs, disbursements and statutory fines after a hearing would be held in abeyance and rescheduled upon the completion of the application process set forth in the Court order. By the terms of the consent order, Hanover and Higley were to prepare and submit to the Town of Shandaken complete applications for authority to construct improvements to their premises, such submissions were to be submitted on or before sixty days from the date of the consent order. If Hanover and Higley were denied permission to make the improvements, they were required to remove the improvements existing on the premises that were the subject of this Court's decision and order dated November 27, 2013, within sixty days of the filing of the denial unless the defendants obtained a stay from this Court.

By letter dated December 30, 2014, counsel for the Town informed the Court that the defendants' applications were submitted to the Town Board and denied by the Zoning Board of appeals "as of October 15, 2014". Counsel requested the Court schedule an inquest hearing for the determination of costs, disbursements and statutory fines to be paid by the defendants. Counsel for Hanover responded that there had not been a final denial by the Board and asked for a delay in the hearing until a final resolution with the Town. Counsel for the Town insisted there had been a denial. Hanover and Higley hired a different attorney than the ones who had negotiated the consent order. He asked for time to prepare for the hearing.

The hearing was held on June 25, 2015. At that hearing, the Court heard the testimony of Robert Stanley, Supervisor of the Town of Shandaken and Alfred Higley, President of Hanover. Received in evidence were the time sheets of Jacobowitz and Gubits (plaintiff's two) and the

invoices of Jacobowitz and Gubits(plaintiff's three), the law firm that had represented the Town for most of the litigation.

The Town and Richard Stokes as Building Inspector, Zoning enforcement Officer and Code Enforcement Officer of the Town sought the imposition of civil penalties in the amount of \$200.00 per day for each day's violation of Chapter 74 of the Town of Shandaken Code from March 18, 2012, the date of the first stop work order to December 9, 2013 the date the decision and order in the above matter was filed. The total number of days is 631 and the total amount sought in penalties is \$126,200.00. They also sought \$250.00 per day for the same period for violation of Town Code §116-65A which was \$283,950.00. They also claimed that Hanover was in violation of the directive to remove the farm-stand which allegedly became effective under the terms of the consent order on December 21, 2014 (sixty days after the alleged denial by the zoning board of Hanover Higley's application for a permit) through March 26, 2015, the date counsel for the Town signed an affirmation containing their calculation of and rationale for the costs, disbursements and fines they were seeking. They stated that the penalty should be set at \$250.00 per day for ninety- six days for a total of \$24,000.00. The total amount sought was \$317,150.00 in fines. They argued that the amount of fines was reasonable given the amount they had spent on legal fees and the gravity of the offense. Their legal fees as of the date of the affirmation were reported to total over \$53,000.00.

Several significant facts were developed at the hearing on penalties. The first was that Hanover continued to operate the farm- stand until ordered to cease doing so by this Court on November 27, 2013. During that time, it did not have a certificate of occupancy for the premises, nor a permit to operate their business. Alfred Higley testified to these facts. The second is that

the Town had not sought to use any of the remedies available to it under Town Law to stop Hanover from operating the business in violation of the code except for issuing the stop work order and making application to the Supreme Court.

Counsel for Hanover and Higley argues that the only issue before the Court is the alleged ten day violation of the stop work order. He claims that alleged violations of other provisions of the Town Code are not properly before the Court because the Town did not afford Hanover the due process required by the Town Code. §74-15 of the Town code does provide a process for enforcing stop work orders by the Code Enforcement Officer which was not pursued by the Town. However, §74-15(D) permits the Town to seek injunctive relief in a Court of competent jurisdiction and §74-15 (E) states that the remedies listed are not exclusive. It is notable in this case that the recourse to Supreme Court was first made by Hanover.

In addressing this defense of a violation of due process, the Court will start with the Town's Verified Answer and Counterclaim that was filed on April 24, 2012. It should be noted that the Town obtained a new index number for the Answer and Counter-Claim and a Summons addressed to Michael Higley who was not a plaintiff in Hanover's complaint. These proceedings were referred to as action number one and action number two in the Court's decision on the summary judgment motions. For purposes of this decision, the Town has been referred to as plaintiff and Hanover and Higley as defendants. This Court granted summary judgment in favor of the Town on all claims listed below.

The Town's three counter claims which start with paragraph 27 of their answer and counterclaim to Hanover's complaint each repeat, reallege and incorporate the first twenty six

paragraphs that contain plaintiff's answer and affirmative defenses. Of relevance to this decision is the fourth affirmative defense which states:

24. A Declaratory Judgment action is equitable in nature. As such, the legal principle that 'he who seeks equity must do equity' applies.
25. The plaintiff defied and violated the laws of the Town of Shandaken in that it has:
 - A. Ignored the stop work orders;
 - B. Undertaken a vast expansion of its prior retail foot print without a building permit or site plan approval;
 - C. Created a new structure without a building permit or site plan approval;
 - D. Installed new electric wiring, installed new insulation, a new roof (and ceiling) which is many times larger than existed previously and a new concrete floor 20 times larger than the prior concrete slab without a building permit or inspections by the Town of Shandaken;
 - E. Expanded the front of the retail space placing it too close to NYS RT. 28 in violation of the 2004 building permit and in violation of the Town of Shandaken Code.
 - F. Ignored the limited scope of work allowed under the building permit and created a new retail emporium that is more than 26 times larger than the area authorized by the special use permit and site plan approval issued by the Town for said retail stand in 2004;
 - G. Failed to comply with SEQRA
 - H. Failed to seek or secure site plan approval from the Town of Shandaken for the construction and operation of said retail stand;
 - I. Failed to comply with the Town of Shandaken Local Law No. 2 of 2012.

As such, plaintiff has unclean hands and is not entitled to equitable relief.

The first counter-claim alleges that Michael Higley is the owner of certain real property situated at 5200 Route 28, Mt. Tremper, New York and that Alfred Higley is an officer of Hanover Farms, Inc., a company authorized to do business in New York State. It is alleged that on or about March 1, 2012, Alfred Higley signed an application for a zoning permit and building

permit that was delivered to the Town of Shandaken. Alfred Higley identified himself as the owner of the premises located at 5200 Route 28, Mt. Tremper, New York. Hanover, Inc.'s ownership of the farm-stand business was not mentioned nor was the fact that Al Higley's son, Michael Higley, owned the property where the farm-stand was located. The description on the zoning portion of the application was: "Remove and repair concrete from Hurricane Irene, repair roof and roof structure." In the building portion of the application the work was described as "repair and replace concrete slab and replace tarps on building". It was alleged that the only concrete slab existing on the premises at the time the permit was sought was approximately 105 square feet. It was alleged that Hanover arranged for a new concrete floor to be installed on the premises measuring approximately 2,184 square feet. An entirely new roof was constructed by defendants that was 26 times as big as the one authorized by the Town. Hanover installed new electric wiring, roof insulation and a plywood ceiling, none of which were listed in the building permit application. The first counterclaim cited to violations by defendants of the following laws: Town of Shandaken Code 74-4H, Shandaken Code 74-5A, Town of Shandaken Code 74-6E, Town of Shandaken Code 116-9(a) and §52 of the New York State Highway law.

The second counterclaim alleged that on April 14, 2004, site plan approval was granted to Hanover Farms LLC by the Town of Shandaken Planning Board for a 100 square foot roadside stand, that in 2007 defendants were advised by the Town of Shandaken Planning Board that their farm-stand was not in compliance with limitations set in the 2004 Special permit and that they could not expand without a variance from the Zoning Board of Appeals. It was alleged that they did not secure a variance and the stand constructed on Michael Higley's property in 2012 encompasses approximately 2,695 square feet plus an additional retail area cover by an awning

that covers 414 square feet. Violation of Town of Shandaken Local Law No. 2 of 2012 and Town of Shandaken Code 116-40 T is alleged.

The third counterclaim alleges that defendants have been in violation of Chapter 74 of the Code of the Town of Shandaken since March 18, 2012 and that the maximum fine permissible under the Code of the Town of Shandaken should be imposed from March 18, 2012 through the date of judgment. Town of Shandaken Code 74-15(c) provides that the maximum penalty that can be imposed for a violation of Chapter 74 is \$200.00 per day.

§74-4 Building Permits provides as follows:

- A. Building permits required. Except as otherwise provided in Subsection B of this section, a building permit shall be required for any work which must conform to the Uniform Code and/or the Energy Code including, but not limited to, the construction, enlargement, alteration, improvement, removal, relocation or demolition of any building or structure or any portion thereof, and the installation of a solid-fuel-burning heating appliance, chimney or flue in any dwelling unit. No person shall commence any work for which a building permit is required without first having obtained a building permit from the Code Enforcement Officer.

Subsections B&C deal with exemptions to the building permit requirement that are not applicable to this case. Section D deals with the contents of an application for a building permit. There were several problems with this application for a building permit. Al Higley stated that he was the owner of the property where the work was to be performed. He is not. His son, Michael, owns the property. He is the President and sole stock holder of Hanover, Inc. which runs the farm stand. There is a provision for an authorized agent to sign for the owner. Al Higley did not sign as an authorized agent of Michael Higley. The scope of the work Al Higley intended to

perform on the property was not accurately set forth in the application for a permit. From March 18, 2012 until March 28, 2012, defendants continued and completed the extensive work noted above that was not authorized by the permit and in violation of a stop work order. Clearly, this work constituted a violation of the provisions of Article 74-4 concerning building permits. Simply put, defendants not only continued construction in violation of the stop work order, they also engaged in construction for which a permit was required and for which they had no permit. They had no permit to lay a concrete slab that was 2,480 square feet to replace one that was 100 square feet. They had no permit for much of the other work they did during those ten days because it was not work that was authorized by the building permit they had obtained. They also violated the Town Code by closing up the work they had done without calling the Building Inspector to check it. They were clearly in violation of Article 74-4 for the ten days they worked on the building without a valid permit and thereafter for not leaving the work open for inspection. Because of this violation, they were unable to obtain a certificate of occupancy (provided for in Article 74) and a special use permit which were necessary to run their business.

The Court finds that plaintiff's cross claim gave defendant ample notice of details of their alleged lack of compliance with the Town Code. During the course of the litigation, they had the opportunity to apply for a building permit and correct the deficiencies in their original application. The Town's willingness to cooperate with the defendants in any good faith effort to bring the farm stand into compliance with the law is demonstrated by their willingness to agree to the consent order that allowed defendants to reapply for a permit without removing the improvements as ordered. This agreement was made after the Town had been successful in obtaining all the relief they sought in the action before this Court. Throughout the settlement

negotiations prior to the filing of the summary judgment motions, both the Court and the Town urged defendants to resubmit a permit application. Instead, they choose to rely on their argument that the stop work order was defective. They did not argue that the structure they erected was authorized by the building permits they obtained.

It is undisputed that defendants continued to operate the farm stand from March 18, 2012 until December 9, 2013 when the order was entered directing them to cease operation and tear down the improvements to the stand within sixty days. It is undisputed that they stopped operation at that time. It is undisputed that they did not have a valid Certificate of Occupancy that would have allowed them to occupy the structure they had built without a valid building permit from March 18, 2012 until December 9, 2013. The Court finds that they were in violation of §74 of the Town Code for that entire time and is imposing the maximum penalty of \$200.00 per day. The total number of days is 631 and the total fine is \$126,200.00.

Plaintiffs seek penalties of \$250.00 per day for violations of several laws noted in their counter-claims in addition to §74. They operated the farm-stand without a special use permit. The farm-stand violated State Highway Law because it was too close to a state road. The statutes cited provide for these penalties but they were not sought in the Counter-Claim which only seeks fines for violation of §74. The Court will not award fines violations of the law other than §74.

Plaintiffs also seek penalties for the period defendants were allegedly in contempt of this Court's order to remove the installations that exceeded those allowed by the building permit. Counsel for Hanover and Higley argues that the Court should not consider these in the context of penalties sought in the counterclaims for violating the Town Code. The Court agrees. If plaintiff seeks fines for contempt allegedly occurring after this Court rendered its decision on November

27, 2013, it must seek them in a separate application.

Counsel for plaintiff stated at the beginning of the hearing on costs and penalties that he was seeking reimbursement for attorney fees. The Court asked him to brief this issue in his post trial submission. When he did not do this, the Court inquired and plaintiffs' counsel indicated that he believed counsel fees would be covered by the fine. Counsel fees incurred by the town now exceed \$60,000.00. The fine imposed upon Hanover and Higley is substantially more than these fees and should also reimburse the town for the additional expenses it has incurred. The Court has not been provided with any authority for awarding counsel fees and will adhere to the common law practice of requiring each party to bear its own counsel fees.

The Court has elected to impose the maximum per day fine for the period defendants violated §74 of the Town Code because of the egregious and flagrant nature of their violations. Defendants continued to work on their building knowing the work was far beyond the scope of their permit and despite being ordered to stop. They did not arrange for inspection of the work they had done. They did this for ten days until they had completed the renovations and expansion they desired to make. They continued to operate a business open to the public in a building on which they had done unauthorized structural and electrical work which has never been inspected. They continued to sell to the general public from a farm stand that was located dangerously close to the road. The Court is constrained not to order defendants to pay fines for its numerous violations not covered by §74 of the Town Code because they were not sought in the pleadings. Imposing the maximum fines for the violations of §74 is reasonable under these circumstances. The tax payers of Shandaken should not have to bear the expense of this litigation.

This constitutes the decision of the Court. Counsel shall submit an order in accordance with this decision. The original decision, together with all original motion papers, are delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision and order, and delivery of a copy of the decision and order to counsel, shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding filing, entry and notice of entry.

DATED: January 28, 2016
Kingston, New York

ENTER:



MARY M. WORK
Acting Supreme Court Justice