

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

HANOVER FARMS, INC.,

Plaintiff,

-against-

TOWN OF SHANDAKEN and RICHARD STOKES,

Defendants.

TOWN OF SHANDAKEN and RICHARD STOKES as
Building Inspector, Zoning Enforcement Officers and
Code Enforcement Officer of the Town of Shandaken,

Counterclaim-Plaintiffs,

-against-

HANOVER FARMS, INC. and MICHAEL HIGLEY,

Counterclaim-Defendants.

DECISION/ORDER

Index No. 12-1068
RJI No. 55-12-00928
Action 1

HON. MARY M. WORK
Assigned Justice

Index No. 12-1357
RJI No. 55-13-00956
Action 2

APPEARANCES:

PATRICIA L. ELLISON, ESQ.
Attorneys for Plaintiff, Hanover Farms, Inc.

JACOBOWITZ AND GUBITS, LLP
By: LARRY WOLINSKY, ESQ.
Attorneys for Defendants, Town of Shandaken and Richard Stokes as Building Inspector,
Zoning Enforcement Officer and Code Enforcement Officer of the Town of Shandaken

SCHIMMERLING LAW OFFICES
BY: THOMAS E. SCHIMMERLING, ESQ.
Attorney for Counterclaim-Defendant, Michael Higley

WORK, M., J.

Hanover Farms Inc. (hereinafter "Hanover") moves, pursuant to CPLR §3212, for a
summary judgment in the first action (Index Number 12-1068), and the Town of Shandaken and

Richard Stokes as Building Inspector, Zoning Enforcement Officer and Code Enforcement Officer of the Town of Shandaken (hereinafter "the Town"), cross-moves for summary judgment dismissing Hanover's complaint. Pending before the Court is also a motion for summary judgment filed by the Town in the second action (Index Number 12-1357).

Hanover operates a seasonal farm stand on Route 28 in the Town of Shandaken, Mount Tremper, New York. Alfred Higley, Sr. is the president and director of Hanover Farms Inc. Michael Higley owns the property on which the farm stand is located. Hanover alleges that in late August 2011, the farm stand suffered damage due to flooding and wind from hurricane Irene. On March 1, 2012, Hanover applied, in writing, to the Town for a building permit to repair and replace the concrete slab and to repair and replace the roof structure and roof. A copy of the application is attached to Hanover's papers. The Court notes that Alfred Higley signed the application indicating the proposed use of the property and building would be the same as before the damage occurred. The application specifically indicates that the work to be done is repair and replacement. The estimated cost of the work to be done is \$5,000 in the application indicates the work would be performed by the homeowner. The Town issued Hanover a building permit dated March 9, 2012. Hanover alleges that in reliance of the building permit, workers were engaged to perform the concrete and roof work and the necessary building materials were ordered, including a truck load of concrete scheduled to be delivered on Monday, March 19, 2012. Plaintiff alleges at approximately 10:30 a.m. on Sunday, March 18, 2012, defendant Richard Stokes, the Chief Enforcement Officer for the Town, came to the farm stand and affixed a stop work order over Hanover's building permit, which was posted at the front of the farm stand. Hanover alleges the stop work order fails to comply with the due process clause of the

Constitution of the United States or the Constitution of the State of New York in that it fails to comply with code of the Town of Shandaken §74-6B in that the stop work order fails to identify the premises or the owner affected, fails to state the reason for the issuance, and does not provide notice as to the conditions that must be satisfied before work will be permitted to resume.

Hanover further alleges that the stop work order was not properly served and the Town did not provide a copy to any officer, director or employee of Hanover, or to any person on the work site.

Hanover alleges a lack of proper service violates the code of the Town of Shandaken §74-6C.

Hanover alleges that on the morning of March 19, 2012 at 7:30 a.m., an employee noticed that the stop work order posted the day before was missing, apparently having been removed by a person or persons unknown.¹ Hanover states based on the defective nature of the stop work order and its subsequent removal, Hanover permitted the concrete to be poured at the site. On March 20, 2012 on or about 3:00 p.m., Mr. Stokes posted a second stop work order at the site. Hanover alleges the second stop work order differed in a number of respects from the original one, but it was backdated to March 18, 2012. Hanover states the second stop work order added the street address and tax identification number of the property, but misidentified the owner of the property as "Al Higley." According to Hanover, the second stop work order stated the work "has not been authorized pursuant to the Town of Shandaken ordinances and laws for enforcing the New York State Building Code," but it was not signed by Mr. Stokes. Hanover alleges the second stop work order was impermissibly vague as to the reasons for its issuance, in violation of the due process clause of the Constitution and the relevant portions of the code of the Town of

¹ Alfred Higley testified at his examination before trial that he believes his wife removed the stop work order in order to make a copy of it.

Shandaken and was impermissibly served. Hanover then alleges on March 21, 2012, a stop work order was received in the mail by Alfred Higley, Sr., an officer of the corporation. Hanover alleges that this stop work order did not contain the street address of the property and was not signed by Mr. Stokes. Hanover alleges on March 21, 2012, the Town held an emergency meeting, without public notice, to discuss legal action against Hanover. Hanover's petition requests a judgment declaring each of the stop work orders issued by the Town to be void, unconstitutional, and of no force and effect, and permit Hanover to proceed and complete the repairs and replacement of the concrete slab and roof structure as authorized by the building permit issued on March 9, 2012. Hanover also requests that defendants be restrained and enjoined from seeking to enforce the stop work orders, either by civil or criminal proceedings. Hanover seeks costs and disbursements of this action.

The Town filed a verified answer and counterclaim. The Town's first affirmative defense is that Hanover's petition should be dismissed for its failure to exhaust its administrative remedies. The Town states that the Town of Shandaken Code §116-68A(1) provides the Zoning Board of Appeals (hereinafter "ZBA") shall hear and decide determinations made by the Zoning Enforcement Officer, and that New York State Town Law §267-a(4) (hereinafter "Town Law") contains a parallel provision. The Town asserts that Hanover's remedy was to bring an appeal to the Town of Shandaken ZBA. The Town's second affirmative defense is that the complaint should be dismissed for the failure to name a necessary party. The Town asserts that the owner of the real property is Michael Higley and a necessary plaintiff. The Town further asserts that the complaint fails to state a cause of action. The Town's fourth affirmative defense concerns the equitable nature of the relief sought by Hanover. The Town contends that the legal principle that

“he who seeks equity must do equity” applies here. The Town alleges that Hanover ignored stop work orders, undertook a vast expansion of its prior retail footprint without a building permit or site approval, created a new structure without a building permit or site approval, installed electric wiring, installation, a new roof and ceiling that is many times larger than existed previously, and a new concrete floor twenty times larger than the prior concrete slab without a building permit or inspections by the Town. The Town further contends that the expanded front of the retail establishment is too close to Route 28 in violation of Hanover’s 2004 building permit and in violation of the Town code. The Town alleges Hanover ignored the limited scope of work allowed under the building permit and created a new retail space that is more than twenty-six times larger than the area authorized by the special use permit and site plan approval issued to Hanover in 2004. The Town alleges Hanover failed to comply with Town of Shandaken Local Law No. 2 of 2012. As and for the fifth affirmative defense, the Town asserts the action for an injunction to enforce the stop work orders is moot since Hanover defied the stop work orders and completed the work on the expanded retail space. The Town argues it is entitled to a mandatory injunction to remove the illegal farm stand. The Town filed counterclaims against Hanover and Michael Higley. The counterclaims allege that Hanover misrepresented the scope of work that was eventually completed in submitting his request for a building permit. The Town asserts that a new concrete floor was installed by Wadler Brothers of Fleischmanns, New York that is twenty times larger than the pre-existing concrete slab, and constructed an entirely new roof that covers an area more than twenty-six times larger than authorized by the Town’s Planning Board in 2004. The Town asserts that new electrical wiring and recessed lighting was put into the new structure and that the new roof was insulated and a plywood ceiling was installed. The Town alleges the

acts and omissions of Mr. Higley and Hanover are in violation of the code of the Town of Shandaken and a mandatory injunction should issue requiring him to remove all the structures built and installed in violation of the Town Code. As and for the second counterclaim the Town seeks a permanent injunction enjoining Hanover from operating the road-side stand and a mandatory injunction requiring its removal. The Town notes that duly enacted Local Law No. 2 of 2012 requires a special permit be secured in order to operate a road-side stand. The Town alleges that Hanover has not applied for a special use permit. The Town states that on April 14, 2004, a site plan approval was granted to Hanover for a 100 square foot road-side stand. The Town further alleges that in 2007, Hanover was advised by the Planning Board that the farm stand was not in compliance with the 2004 special use permit. The Town alleges the current retail area is approximately 3109 square feet. As and for the third counterclaim, the Town asserts they are entitled to a civil penalty of not more than \$200 a day for each day Hanover violates the Town code.

Hanover filed a motion for summary judgment arguing that the stop work orders are unconstitutional and invalid on their face and for declaratory judgment determining that the orders may not be enforced. Hanover argues that the Town failed to set forth the reasons for the issuance of the stop work orders, as well as the conditions that would have to be satisfied in order for the work to resume in violation of Town of Shandaken Code §74-6 B (Local Law No. 1-2008).

Summary judgment is a drastic remedy which will only be granted when there clearly are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (Zuckerman v City of New York, 49 NY2d 557 [1980]). The Court will view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

In reply, the Town argues Hanover has failed to exhaust its administrative remedies. Hanover contends it was not required to exhaust its administrative remedies because of the constitutional claims raised. The Court finds Hanover’s position on this issue unsustainable. Hanover argues the three stop work orders as issued lacked the required information or signature, were vague, and did not give reasonable notice as to their issuance. Hanover complains that the notice was ambiguous and incomprehensible. Hanover argues the stop work orders were not properly served. Each argument Hanover makes, at its core, is that the Town failed to properly complete the stop work order. Hanover does not make an argument that a stop work order fully and properly completed with all the required information is unconstitutional. Hanover complains that the stop work order as completed did not comply with the Town of Shandaken law. Hanover contends the ZBA may not hear the matter because of the constitutional issue raised. However, the ZBA would not be called upon to determine the validity or constitutionality of the Town ordinance, but rather, whether Mr. Stokes complied with the Town ordinance when he filled out the stop work orders; an issue clearly within the purview of the ZBA (Smith v Town of Plattekill,

13 AD3d 695, 697 [3d Dept 2004]). "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (e.g., *Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375)" (*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 [1978]). The failure to exhaust administrative remedies is a jurisdictional defect and, as such, Hanover's complaint is dismissed (*Sabatini v Inc. Vill. of Kensington*, 284 AD2d 320 [2d Dept 2001]). The Town's cross motion in this action (Index Number 12-1068) is dismissed as moot.

The Town filed a motion for summary judgment in the second action (Index Number 12-1357). The motion for summary judgment concerns the Town's counterclaims set forth above. In support of the motion for summary judgment, the Town has submitted multiple exhibits including, but not limited to, the affidavit of Robert A. Stanley, Supervisor of the Town of Shandaken, a series of photographs of the farm market, a copy of the special use permit, and site plan review and approval issued to Hanover Farms LLC dated April 4, 2004, a copy of a variance application signed by Alfred Higley and Michael Higley dated April 29, 2007, a copy of a letter from Glenn E. Miller, Zoning Enforcement Officer, dated May 10, 2007, a copy of a resolution by the Shandaken Planning Board dated June 13, 2007, copies of the memos from the Town of Shandaken Planning Board dated June 13, 2007 and June 18, 2007, a copy of the minutes of the Town of Shandaken ZBA meeting of June 18, 2007, a copy of a letter to Michael Higley dated October 12, 2007, a copy of the Town of Shandaken zoning laws Chapter 116, a copy of Town of Shandaken zoning permit instructions and building permit instructions, a copy of the building permit issued to Hanover Farms dated March 9, 2012, and two copies of a stop work notice. In addition, the Town submitted portions of the examinations before trial of Alfred Higley, Sr.,

Michael Higley and Richard Stokes, as well as a copy of Hanover's complaint for declaratory judgment in action number one, and a letter from the New York State Department of Transportation dated April 19, 2012 directed to Paul Keller, Esq., who was representing the Town at that time, and signed by David M Corrigan. Absent from the motion papers initially submitted was a copy of the counterclaim, and as pointed out by Hanover, a violation of CPLR §3212(b). The Town has subsequently submitted the pleadings in their reply papers. The Court notes that it had the pleadings as they were provided in the motion papers in action number one. The Court will not dismiss this motion for summary judgment on the alleged technical failure (CPLR §2001).

The Town has met its burden on a motion for summary judgment by demonstrating there are no issues of fact, thereby entitling them to a judgment as a matter of law. Hanover obtained a special use permit in April of 2004 to operate a 100 square foot road-side stand in a residentially zoned area of the Town of Shandaken (R1.5). Mr. Higley stated in his deposition that he expanded the farm-stand in either 2005 or 2006. According to the Town, no such building permit was issued, and Mr. Higley has not produced any documentary proof that approval was either sought or obtained. On April 27, 2007, Alfred Higley, Sr., as "applicant," and Michael A. Higley, as "owner," filed an application with the Town to expand the farm stand. Hanover sought to expand the farm stand to 2840 square feet. The Planning Board sent the request to the ZBA. The ZBA, however, did not act. The failure to act constitutes a denial of the application pursuant to Town Law §267-a(13)(b). Alfred Higley stated at his deposition that he waited out what he believed was the statutory time for the ZBA to act and then went ahead and built the addition to the farm-stand without approval, a building permit or any code inspections. Mr.

Stanley notes that Alfred Higley is a former town justice, who previously exercised authority to adjudicate zoning violations, and knew or should have know he was in violation of the Town ordinances and codes. In October 2007, Zoning Enforcement Officer Miller sent a letter to Michael Higley indicating the farm-stand was in violation of the Town Zoning Law. Michael Higley testified at his deposition that he did receive a letter to this fact. In February 2012, the Town of Shandaken Town Board adopted Local Law No. 2 of 2012 amending section 116.4 OT concerning road-side produce stands. On March 1, 2012, Alfred Higley applied for two permits, a zoning permit and a building permit. The details of those permits are discussed above. On March 9, 2012, the Town granted a building permit that permitted Hanover to proceed with the work "as set forth in the specifications and plans or statements" on file with the building department. On March 18, 2012, Mr. Stokes drove by Hanover Farms and notice that forms were being built for the purpose of pouring concrete. Mr. Stokes stopped to inspect the work and determined that the concrete work was not repair work but, in fact, Hanover was preparing to pour new concrete areas, which was out of compliance with building permit. In addition, Mr. Stokes determined a new roof was being constructed rather than a replacement roof of tarpaulins, which was requested in the permit application and authorized by the building permit. On March 18, 2012, a stop work order was issued. As set forth above, three stop work orders were issued. Undeterred, Alfred Higley continued to work expanding the farm-stand and completing it so that he could open for business in Spring 2012.

Attorney for Michael Higley filed papers in opposition to the motion. He asserts he is merely an out-of-possession landlord and, as such, the motion for summary judgment as to him should be denied. This fact is in accordance with Michael Higley's testimony at his examination

before trial, however, there is no affidavit from Mr. Higley as part of his opposition to the motion. The Town ordinance holds the owner of the property responsible and Michael Higley sites to no statutory authority or case law in support of his position.

Hanover Farms filed papers in opposition to the motion. Its first set of arguments concern whether the papers in support of the motion are sufficient and would support the granting of a motion for summary judgment. The Court specifically finds the affidavit of Mr. Stanley, as Supervisor of the Town as Shandaken, is sufficient to support the motion for summary judgment. Mr. Stanley also sufficiently authenticates the photographs taken by Paul Keller, Esq., as he was present when the pictures were taken and stated they were a fair and accurate representation of Hanover's farm-stand as it appeared on the day the photographs were taken. The Court further finds the municipal records attached to the motion and Mr. Stanley's affidavit are admissible. Hanover argues that considering that the Town failed to revoke the special use permit issued in 2004 and their failure to revoke the permit, the Town should be barred from prevailing on this motion. This argument does not raise a question of fact sufficient to defeat the motion for summary judgment and, in addition, "estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws" (Parkview Associates v New York, 71 NY2d 274, 282 [1988]). Hanover attempts to raise a question of fact by noting that the Town, in different papers and pleadings, has represented that the farm-stand measures 2184, 2840, 2695 or 3109 square feet. There is no question that the farm-stand is substantially larger than 100 square feet. Mr. Higley, in fact, sought a variance to expand the farm stand to 2840 square feet, which he went ahead and built, despite no action being taken by the ZBA resulting in a denial of the variance sought. Hanover attempts to avoid summary judgment by raising an issue over the

interpretation and constitutionality of the new Local Law No. 2 concerning farm-stands.

However, this issue is not before the Court, having been raised for the first time in Hanover's papers opposing the motion for summary judgment. The Court finds Hanover Farms has failed to raise a question of fact sufficient to defeat the motion for summary judgment filed by the Town of Shandaken. Accordingly, the motion for summary judgment is granted.

The Town seeks a mandatory injunction, which the Court has the power to order (see Town of Parishville v Contore Co., 237 AD2d 67 [3d Dept 1998]). The Town, in its counterclaim, requests the Court order the removal of the new concrete floor covering an area of approximately 2184 square feet and poured on or about March 19, 2012, and, in addition, the removal of the roof, insulation, electric wiring, electric fixtures, and all other improvements constructed and installed in violation of the zoning and building code since March 1, 2012. The Court grants the mandatory injunction. This drastic remedy is being imposed not only because the expansion of the farm-stand violated the Town zoning and building codes and was completed after the issuance of three stop work orders, but also because none of the construction was subject to inspection to ensure that any portion of this building complies with the relevant New York State and Town building codes, which are in place to ensure the integrity and safety of the structure and all the mechanicals found therein. Hanover has sixty (60) days from the service and entry of this decision and order to comply with the removal ordered herein.

The Town further requests a permanent injunction be issued enjoining Mr. Higley and Hanover from conducting business at said premises. That relief is granted and Alfred Higley and Hanover are permanently enjoined from conducting the business of the farm-stand at said premises until such time as a special permit is approved and issued by the Town of Shandaken.

The Town seeks fines in accordance with Town of Shandaken Code §74-15(c) of \$200 per day since March 18, 2012. This is the maximum fine permitted by the Town code. The Town further seeks costs and disbursements of this action. The Court will hold a hearing to determine what, if any, monetary fines or cause should be imposed on Hanover. The Court will hold a hearing on this issue on February 28, 2014 at 9:30 a.m., to be held in Chambers located in the Ulster County Surrogate's Court, 240 Fair Street, Kingston, New York. Two weeks prior to the hearing, the Town shall submit to the Court for its consideration a proposal concerning the fines sought and the rationale for same, and a detailed accounting of the costs and disbursements it is seeking. One week prior to the hearing, Hanover shall file any reply or rebuttal to the Town's submission.

It is, therefore;

ORDERED that motion for summary judgment filed by Hanover in action one under Index Number 12-1068 is denied and the complaint is dismissed; and it is further

ORDERED that the Town of Shandaken's motion for summary judgment is granted in part; and it is further

ORDERED that Town of Shandaken's request for mandatory order requiring Hanover to remove the improvements constructed and installed in violation of the code and detailed above is granted, and said removal shall be completed with sixty (60) days from the service and entry of this decision and order; and it is further

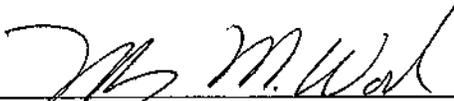
ORDERED that Hanover is permanently enjoined from conducting a farm-stand or retail business at 5200 Route 28 unless and until a valid special use permit is in place for the operation of said business; and it is further

ORDERED that the Court is reserving decision on the issue of costs, disbursements and statutory fines pending a hearing as scheduled above.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for the Town of Shandaken, for filing in the Ulster County Clerk's Office. All original motion papers and a copy of this decision and order 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, 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: November 27, 2013
Kingston, New York

ENTER:



HON. MARY M. WORK
Acting Supreme Court Justice

Papers Considered:

1. Notice of motion by plaintiff for summary judgment dated July 10, 2013, together with the affidavit of Alfred Higley, Sr. dated July 10, 2013, and Exhibit A annexed thereto.
2. Affidavit of Patricia L. Ellison, Esq. in support of the motion for summary judgment dated July 3, 2013, together with the exhibits annexed thereto.
3. Plaintiff's memorandum of law in support of motion for summary judgment dated July 8, 2013, together with the exhibits annexed thereto.
4. Notice of cross-motion in Action 1 dated July 28, 2013, together with the affidavit of Robert A. Stanley dated July 24, 2013, the affirmation of Larry Wolinsky, Esq. dated July 24, 2013, and Exhibits A through S annexed thereto.

5. Defendants' memorandum of law in opposition to plaintiff's motion for summary judgment and in support of cross-motion dated July 24, 2013.
6. Affirmation of Patricia L. Ellison, Esq. dated August 8, 2013 in reply to defendants' memorandum of law, together with Exhibits A and B annexed thereto.
7. Notice of motion for summary judgment in Action 2 dated August 26, 2013, together with the affidavit of Robert A. Stanley dated August 22, 2013, the affirmation of Larry Wolinsky, Esq. dated August 26, 2013, and Exhibits A through P annexed thereto.
8. Affirmation of Larry Wolinsky, Esq. dated August 26, 2013 in support of counterclaim-plaintiffs' motion for summary judgment in Action 2, together with Exhibits 1 through 6 annexed thereto.
9. Memorandum of law dated August 26, 2013 in support of counterclaim-plaintiffs' motion for summary judgment in Action 2.
10. Affirmation of Patricia L. Ellison, Esq. dated September 9, 2013 in opposition to motion for summary judgment in Action 2, together with Exhibits 1 through 3 annexed thereto.
11. Affidavit of Alfred Higley, Sr. dated September 9, 2013 in opposition to motion for summary judgment in Action 2, together with Exhibits A through C annexed thereto.
12. Affirmation of Thomas E. Schimmerling, Esq. dated September 12, 2013 in opposition to counterclaim-plaintiffs' motion for summary judgment in Action 2.
13. Affirmation of Larry Wolinsky, Esq. dated September 16, 2013 in reply to counterclaim-defendant's opposition to summary judgment in Action 2, together with Exhibits A through F annexed thereto.