

To commence the statutory time for appeals as of right (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
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF WESTCHESTER

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In the Matter of the Application of

GREENTREE REALTY, LLC,

Petitioner/Plaintiff,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules,

-against-

THE VILLAGE OF CROTON-ON-HUDSON,
THE VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE OF CROTON-ON-HUDSON ZONING BOARD OF APPEALS, and DANIEL O'CONNOR, in his official capacity, as the VILLAGE BUILDING INSPECTOR,

Respondents/Defendants.
-----X

-----X
VILLAGE OF CROTON-ON-HUDSON, NEW YORK,

Plaintiff

-against-

NORTHEAST INTERCHANGE RAILWAY, LLC, and
GREENTREE REALTY, LLC,

Defendants.
-----X

FILED
AND
ENTERED
ON 10-14-2015
WESTCHESTER
COUNTY CLERK

Index No. 11872 / 05
(Action No. 1)

Action Nos.: 1 and 2
consolidated under
Index No. 11872 / 05

Motion Date: 7 / 10 / 15
DECISION AND ORDER

Index No.: 22176 / 05
(Action No. 2)

LEFKOWITZ, J.,

The following documents numbered 1 to 58 were read on this motion by Greentree Realty, LLC (hereafter, "Greentree") – Petitioner/Plaintiff in Action No. 1 and Defendant in Action No. 2 – for discretionary, equitable relief or a preliminary injunction during the pendency of the above-captioned actions:

Order To Show Cause - Affirmation - Exhibits	1 - 15
Affirmation in Opposition - Exhibits - Affidavit in Opposition - Exhibits - Memorandum of Law - Affidavit of Service	16 - 40
Reply Affirmation - Exhibits - Memorandum of Law - Affidavit of Service	41 - 58

Upon consideration of all of the foregoing, and for the following reasons, the motion is denied.

Factual and Procedural Background

In 1988, Respondent/Defendant, The Village Board of Trustees of the Village of Croton-on-Hudson (hereafter, "the Board"), issued a special permit to the owner of property (hereafter, "the Property") located within the borders of Respondent/Defendant, The Village of Croton-on-Hudson (hereafter, "the Village"), to operate a wood processing, material storage and recycling center on the Property. In 1997, Greentree acquired the Property and leased it to Metro Enviro, LLC (hereafter, "Metro Enviro"), to whom the Board issued a special permit (hereafter, "the 1998 Special Permit") to use the Property for a construction and demolition debris processing facility and/or transfer station (hereafter, "a C & DD Facility"); the duration of the 1998 Special Permit was three years. In 2000, the assets of Metro Enviro, including the lease from Greentree were acquired by Metro Enviro Transfer, LLC (hereafter, "MET"). In March 2001, MET applied for renewal of the 1998 Special Permit, which application the Board denied in 2003.

Action No. 1, which was commenced by filing with the Westchester County Clerk on July 20, 2005, is a hybrid proceeding, including:

- (a) an action for a judgment declaring, pursuant to CPLR 3001, (i) that the operation of a [C & DD Facility] . . . in the Village . . . on

[the P]roperty . . . is a pre-existing, legal nonconforming use that is unaffected by the Village's adoption, in 2001, of a local law prohibiting such uses throughout the Village, and (ii) that section 230-18(E) of the Village [of Croton-on-Hudson Zoning Law (hereafter, "Zoning Law")], which purports to prohibit such uses within the Village, is void and of no effect because it is pre-empted by state law; (b) an action for money damages resulting from the Village's taking of the [P]roperty in derogation of Greentree's rights under Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 7 of the New York State Constitution; and (c) a proceeding pursuant to CPLR article 78 to vacate and set aside the determination of [Respondent/Defendant, Daniel O'Connor, in his official capacity, as the Village Building Inspector (hereafter, "the Building Inspector")] that the [C & DD] Facility is not a prior lawful non-conforming use of the [Property].

(Second Amended Verified Petition and Complaint in Action No. 1 at ¶1).

Action No. 2, which was commenced by filing with the Westchester County Clerk on December 27, 2005, is a plenary action:

brought by the Village of Croton-on-Hudson, pursuant to Village Law §§ 7-714 and 20-2006, to temporarily, preliminarily, and permanently enjoin Defendant[, Northeast Interchange Railway, LLC (hereafter, "NIR"),] from commencing a transfer station operation [on the Property] without obtaining the approvals required by the [Zoning Law].

(Complaint in Action No. 2 at ¶1).

As of December 2007, seven Decisions and Orders had been issued in Action Nos. 1 and 2, both by this court (Hon. Francis A. Nicolai, J.S.C., now retired) and the Appellate Division; the most recent Decision And Order was issued by this court (Nicolai, J.) in July 2013.

Following is a chronology and brief synopses of those Decisions and Orders:

August 2005 Decision (Nicolai, J.) dated August 25, 2005, in Action No. 1 (hereafter, the "8/25/05 Decision"). Inter alia, the court denied MET's motion for a preliminary injunction enjoining the Village from enforcing an order of the Board, which would have prohibited the waste transfer/solid waste management facility located on the Property from accepting new waste, but granted Greentree's motion for a preliminary injunction to the extent that the

Village was enjoined “from prohibiting or interfering with Greentree’s ability to lease and or operate [the Property] for purposes of solid waste management, with the exception of [MET].”

An appeal from the 8/25/05 Decision was filed, but voluntarily withdrawn.

April 2006 Decision (Nicolai, J.) dated April 25, 2006, in Action No. 2 (hereafter, the “4/25/06 Decision”). Inter alia, the court consolidated Action No. 2 with Action No. 1, and added Greentree Realty, LLC, as a defendant in the caption of Action No. 2. The court found that the 1998 Special Permit had “expired in 2001, and the termination of the [1998 Special Permit] was upheld by the Court of Appeals.” The court also found that “[w]hile the non-renewal of [the 1998 Special Permit] did not eviscerate the protected property rights at issue, it is undisputed that eight years have elapsed since the [1998 Special Permit] was issued to Metro Enviro, and prior to the issuance of a new special permit, the Village has the right to impose conditions necessary to prevent harm to the community and the environment.”

Consequently, the court granted the Village’s motion for a preliminary injunction enjoining NIR and its affiliate, RS Acquisition Co., LLC (hereafter, “RSA”) – Greentree’s lessee at the time – “from operating a transfer station at the Property without first obtaining a special permit in accordance with the [Zoning Law].”

The 4/25/06 Decision was appealed to the Appellate Division.

On July 5, 2006, NIR filed an application for “reissuance” of the 1998 Special Permit.

July 2006 Decision (Nicolai, J.) dated July 31, 2006, in Action No. 1 (hereafter, the “7/31/06 Decision”). Greentree moved for an order enjoining Respondents/Defendants from enforcing against Greentree and NIR “the one-year abandonment period pertaining to pre-existing nonconforming uses set forth in [the Zoning Law] Section [230]-53(A)(3).” Inter alia, the court granted Greentree’s motion “to the extent that the Abandonment Period is tolled for ninety (90) days following a final determination by the municipality with regard to [NIR’s] Special Permit application, without prejudice to [Greentree] to apply for an additional extension.”

The 7/31/06 Decision was appealed to the Appellate Division.

September 2007 Order (Nicolai, J.) dated August 31, 2007, in Action No. 2 (hereafter, the “8/31/07 Order”), stating, inter alia, that, “this Court, having been informed that NIR is no longer seeking a special permit to operate at [the Property]; it is ORDERED that the Village . . . is no longer required to maintain the undertaking required in the Decision and Order dated April 25, 2006.”

No appeal from the 8/31/07 Order was filed.

December 2007 Order of Appellate Division, Second Department, dated December 4, 2007 in Action No. 2 (*Vil. of Croton-on-Hudson v Northeast Interchange Ry., LLC*, 46 AD3d 546 [2d Dept 2007]). Inter alia, the Court modified this court’s 4/25/06 Decision, “by deleting the provision thereof enjoining the defendant [NIR] and [RSA], ‘from operating a transfer station at the Property without first obtaining a special permit in accordance with the [Zoning Law]’ and substituting therefor a provision enjoining such parties ‘from operating a transfer station at the Property until such time as the Village recognizes the permissibility of their proposed use, it is judicially determined that they may use the Property for its intended purpose as a matter of right, or a use variance is obtained’” (46 AD3d at 546).

The Court held that “the injunction [imposed by the 4/25/06 Decision] should not . . . have required NIR and [RSA], to obtain a special permit pursuant to section 230-53(A)(2) of the [Zoning Law]. Such a special permit is available, by its terms, only where there is a change in the proposed use. Here, NIR and RSA propose to continue the use that had been in place prior to the expiration of the [1998 Special Permit] not to change it” (46 AD3d at 548).

December 2007 Order of Appellate Division, Second Department, dated December 4, 2007 in Action No. 1 (*Greentree Realty, LLC v Vil. of Croton-on-Hudson*, 46 AD3d 511 [2d Dept 2007]). Inter alia, the Court modified this court’s 7/31/06 Decision, “by deleting the provision thereof tolling the one-year discontinuance period prohibiting the reestablishment of preexisting nonconforming uses ‘for ninety (90) days following a final determination by

the municipality with regard to [NIR's] Special Permit application, without prejudice to [Greentree] to apply for an additional extension,' and substituting therefor a provision tolling the one-year discontinuance period prohibiting the reestablishment of preexisting, nonconforming uses for the period of time during which the injunction issued in [A]ction No. 2 is in effect (internal citation omitted) [hereafter, "the Tolling Order"]" (46 AD3d at 512). The Court held that the duration of the toll should not have been defined by the length of the application process because the toll "is necessitated by the fact that Greentree has been prohibited by operation of legal mandate – the preliminary injunction – from exercising the right to use the property in a manner that it asserts is permissible" (46 AD3d at 513).

July 2013 Decision And Order (Nicolai, J.) dated July 18, 2013, in Action No. 1. Inter alia, this court granted Greentree's motion for leave to serve the Second Amended Verified Petition and Complaint; proof of service thereof was filed on November 19, 2013. No appeal from this Decision And Order was filed.

In sum, so far as is relevant to the instant motion, the Village was and remains enjoined from interfering with Greentree's ability to lease and/or operate the Property for the use permitted by the 1998 Special Permit, except where the lessee or operator would be MET (*see* 8/25/05 Decision), NIR and RSA are not required to obtain a special permit pursuant to section 230-53(A)(2) of the Zoning Law in order to continue the use that had been permitted by the 1998 Special Permit prior to its expiration, but they were and remain enjoined from continuing said use unless and until the permissibility thereof is recognized by the Village or determined by this court, or they obtain a use variance (*see Vil. of Croton-on-Hudson v Northeast Interchange Ry., LLC*, 46 AD3d at 546, 548), and the one-year discontinuance period is tolled as against Greentree and NIR while that injunction is in effect (*see Greentree Realty, LLC v Vil. of Croton-on-Hudson*, 46 AD3d at 512).

By Order To Show Cause signed by this court (Hon. Linda S. Jamieson, J.S.C.) on April 7, 2015, Greentree moves for an order:

- a) Pursuant to the Decision . . . dated August 25, 2005, compelling the Village to process the application of City Carting Holding Company, Inc. (hereafter, 'City Carting'), for reissuance of the [1998

Special Permit]; and, permitting City Carting and/or Greentree . . . to operate an as-of-right use of the Property pursuant to Section 230-18 of the [Zoning Law], pending the outcome of the application for reissuance of the [1998 Special Permit], without forfeiture of and reserving any of City Carting and/or Greentree's rights to use the Property as a [C&DD Facility], a prior lawful nonconforming use of the Property; or in the alternative,

b) Permitting City Carting and/or Greentree to operate an as-of-right use on the Property *pending the outcome of this lawsuit* [emphasis in original] without forfeiture of and reserving any of City Carting and/or Greentree's rights to use the Property as a [C&DD Facility], a prior lawful nonconforming use of the Property.

Greentree alleges in support that it "has entered into a purchase agreement with City Carting, contract vendee of the Property," that "[o]n November 17, 2014, City Carting . . . submitted to the Village an application for reissuance of the 1998 Special Permit," and that "the Village, the Mayor and [the] Board . . . refused to process City Carting's application." (Affirmation In Support Of Order To Show Cause [hereafter, "Affirmation in Support"] at ¶¶15, 16).

Respondents/Defendants, the Village, the Board, The Village of Croton-on-Hudson Zoning Board of Appeals, and the Building Inspector (collectively hereafter, "Respondents"), oppose the motion, which was deemed fully submitted on July 10, 2015, the date to which the return date had been adjourned on consent.

Discussion

To the extent that Greentree seeks discretionary, equitable relief, the motion is denied. Greentree argues that the order it seeks should be issued pursuant to the Court's "'inherent plenary power to enforce compliance with' (quoting *Patrana v Cutler*, 115 AD3d 725, 727 [2d Dept 2014])" language contained in the 8/25/05 Decision -- specifically, that "upon re-release of the Property, in the event that Respondents' review of the required permits and/or approvals is unnecessarily delayed, . . . Greentree may apply to this Court for appropriate relief" (8/25/05 Decision at 4). (See Affirmation in Support at ¶17, 18). However, said language can not be construed as requiring Respondents to process City Carting's application. The 1998 Special Permit was issued for a period

of three years and expired in 2001, and there is no provision in the Zoning Law for “reissuance” of a special permit after it has expired. Indeed, as the Appellate Division later held when it modified the injunction imposed by this court’s 4/25/06 Decision, no special permit was available – and no application could be made therefor – precisely because Greentree’s lessee/vendee “propose[d] to continue the use that had been in place prior to the expiration of the [1998 Special Permit]” (*Vil. of Croton-on-Hudson v Northeast Interchange Ry., LLC*, 46 AD3d at 548). Thus, assuming arguendo that some kinds of “permits and/or approvals” were contemplated in the 8/25/05 Decision, they could not have included the “reissuance” for which City Carting has applied. Therefore, no order compelling Respondents to process such an application is necessary to enforce compliance with the 8/25/05 Decision.

Moreover, although Greentree does not specifically invoke CPLR 6301 in support, the orders sought by the instant motion would constitute a preliminary injunction. *See, e.g., Johnson v City of Peekskill*, 91 AD3d 825 (2d Dept 2012); *Niagara Recycling, Inc. v Town of Niagara*, 83 AD2d 316 (4th Dept 1981). Indeed, both the 8/25/05 Decision, which Greentree purportedly seeks to enforce, and the 7/31/06 Decision, pursuant to which the discontinuance period was tolled when NIR and RSA were Greentree’s lessees, were issued upon Greentree’s applications for injunctive relief. Pursuant to CPLR 6301: “A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual.” “Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers, and the burden of showing an undisputed right rests upon the movant’ (*Anastasi v Majopon Realty Corp.*, 181 AD2d 706, 707).” *Kohn v Friedman*, 71 AD3d 1095, 1096 (2d Dept 2010). Greentree has failed to satisfy its burden.

Greentree has not established that it has a clear right to an order compelling Respondents to process City Carting’s application for “reissuance” of the 1998 Special Permit. Even putting aside the label, “reissuance” (*see* Discussion, *supra*), there is no permit, special permit or other form of approval which the Board could grant on the application submitted by City Carting. For example, the holder of a special permit may apply for renewal (*see* Zoning Law §230-56) – just as MET

applied for renewal of the 1998 Special Permit in March 2001 – but not, of course, after the special permit has expired. And given the express prohibitions in the current Zoning Law (*see* Zoning Law §230-18[E]), the Board would have no authority to grant a new special permit for the use that had been permitted under the 1998 Special Permit. Thus, City Carting is applying for something that is not recognized in or authorized by the Zoning Law, and Greentree has failed to establish a clear right under the law for an order compelling Respondents to process that pointless application.

Greentree has not established a clear right to an order permitting it and/or City Carting to operate an as-of-right use of the Property pursuant to Zoning Law §230-18, without forfeiting their asserted right to use the Property for a C&DD Facility, pending the outcome of the above-captioned actions. Such an order would be redundant in light of the Tolling Order. “The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits.” *Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Inc. Vil. of E. Hampton*, 98 AD3d 738, 740 (2d Dept 2012) (*quoting Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596); *see also Bd. of Mgrs. of the Britton Condominium v C.H.P. Y. Realty Assoc.*, 101 AD3d 917, 919 (2d Dept 2012). Thus, a preliminary injunction should not be issued where it is not needed to maintain the status quo because of an existing condition, legal process or court order that provides the same protections. *See, e.g., Serbalik v Gray*, 240 AD2d 999, 1001 (3d Dept 1997) (affirming denial of preliminary injunction because defendant had for 25 years recognized without objection the means of ingress and egress which plaintiff purportedly sought to maintain); *In re Tschernia*, 18 Misc 3d 1114(A) (Sur Ct Nassau Co 2007) (denying as “unnecessary” motion for preliminary injunction prohibiting sale of property while action pending, “since there is a lis pendens filed which will effectively preclude a sale”); *Caso v Gotbaum*, 67 Misc 2d 205, 207 (S Ct Nassau Co 1971) (denying preliminary injunction as “redundant and moot” because existing injunction in another action is “similar in effect”).

Zoning Law §230-18 contains the regulations for the use of property, such as the Property, located in the Light Industrial District. The only way in which an as-of-right use of the Property pursuant to Zoning Law §230-18 might constitute the forfeiture which Greentree apprehends is pursuant to the one-year discontinuance period in Zoning Law §230-53(A)(3). However, pursuant to the Tolling Order, as of December 4, 2007 the discontinuance period was tolled pending one of

three specified events (see *Greentree Realty, LLC v Vil. of Croton-on-Hudson*, 46 AD3d at 512 and *Vil. of Croton-on-Hudson v Northeast Interchange Ry., LLC*, 46 AD3d at 546), none of which has yet occurred. Nor has there been any motion to vacate the Tolling Order. Nor has Greentree submitted in support of the instant motion any evidence that would tend to show that the Tolling Order has been violated or is no longer sufficient to protect Greentree. Consequently, the Tolling Order is still in effect and pursuant thereto Greentree may still use the Property for any use permitted in the Light Industrial District under Zoning Law §230-18 – either in its own name or through its contract vendee¹ – without forfeiting Greentree’s asserted right to use the Property for a C&DD Facility. Greentree has failed to establish a clear right under the law for an additional order providing the same protections.

Accordingly, for the foregoing reasons, it is

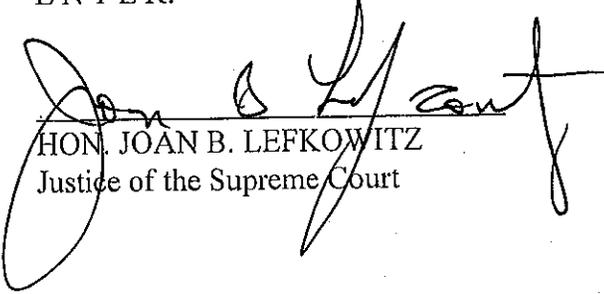
ORDERED that the motion of Petitioner/Plaintiff, Greentree Realty, LLC, for an order compelling Respondents to process the application of City Carting Holding Company, Inc., for “reissuance” of the 1998 Special Permit or, in the alternative, permitting Greentree Realty, LLC, and/or City Carting Holding Company, Inc., to operate an as-of-right use of the Property pursuant to Zoning Law §230-18, without forfeiting the asserted right of Greentree Realty, LLC, to use the Property for a construction and demolition debris processing facility and/or transfer station, pending the outcome of the above-captioned actions, is denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York

October 14, 2015

ENTER:


HON. JOAN B. LEFKOWITZ
Justice of the Supreme Court

To the extent that Greentree’s motion may be construed as an application for an order tolling the discontinuance period against City Carting in its own right, the motion is denied because City Carting is not a plaintiff in Action No. 1 (see CPLR 6301); nor, indeed, is City Carting a party to either of the above-captioned actions.

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