SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARK C. DILLON

Justice.

SUPREME COURT: DUTCHESS COUNTY

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DECISION AND ORDER

TOWN OF BEEKMAN,

Plaintiff,

INDEX
NUMBER 2377/02
MOTION
DATE 3/11/03

-against-

JOSEPH GIANGRANDE

Defendant.

To commence the statutory time period 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.

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THE FOLLOWING PAPERS NUMBERED 1 TO 19 READ ON THIS MOTION by the plaintiff, Town of Beekman, for an Order pursuant to CPLR Rule 3212 granting Summary Judgment and dismissing the defendant's affirmative defense and granting a permanent injunction pursuant to CPLR Article 63, and this cross-motion by the defendant, Joseph Giangrande, for an Order pursuant to CPLR Rule 3025 granting leave to file and serve an amended answer and for an Order pursuant to CPLR Rule 3212 granting Summary Judgment upon the counterclaim, or alternatively, deferring final determinations pending the defendant's certification of his property as part of an agricultural district.

	PAPERS NUMBERED
NOTICE OF MOTION-AFFIDAVITS-AFFIRMATIONS	1, 2
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BRIEFS: PLAINTIFF'S/PETITIONER'S DEFENDANT'S/RESPONDENT'S

The defendant, Joseph Giangrande ("Giangrande") owns a parcel of property consisting of approximately 7.1 acres at Route 216 in the Town of Beekman, County of Dutchess, State of New York. This action was commenced by the plaintiff, Town of Beekman ("Beekman"), by the filing of a summons and Verified Complaint on May 22, 2002. By its complaint, Beekman seeks a permanent injunction under CPLR Article 63 against the defendants of retail sale of various products, on the ground that retailing is prohibited within the R-45 Residential Zone in which the defendant's property is located.

Issue was joined by the filing on behalf of the defendant of an appearance dated June 3, 2002 and Verified Answer dated September 16, 2002. By his answer, the defendant, Giangrande, denied the material allegations contained in the plaintiff's complaint and set forth a single affirmative defense that he is entitled to sell agricultural products from his property under the applicable provisions of the Beekman Town Code and the Agricultural & Markets Law of the State of New York.

Pending litigation of Beekman's request for a permanent injunction, the defendant has been subject to a Temporary Restraining Order ("TRO") prohibiting him from retailing any agricultural products at the property that are not indigenously grown at the same property.

By notice motion, the plaintiff, Beekman, seeks an Order pursuant to CPLR Rule 3212 dismissing the defendant's affirmative defense and granting Summary Judgment on its request for a permanent injunction. The plaintiff argues that Article 25-AA of the

New York State Agricultural & Markets Law ("AML") does not preempt or limit the authority of municipalities to enact and enforce zoning ordinances, and pertains to properties ten (10) acres or more in size. Beekman concedes that Resolution #202197 of the Dutchess County Legislature, passed in August of 2002, recommended that the state amend the AML to alter certain provisions regarding agricultural districts but that the county recommendation does not have the force of law. Most significantly, Beekman argues that an R45 Residential Zone, in which the defendant's acreage is located, expressly permits activities that are "Farming/Agriculture" in nature but specifically prohibits in Schedule A of Permitted Uses the sale in such zones of "Retail goods." Thus, according to the plaintiff, it is immaterial whether products sold by the defendant are grown upon his property or imported from other sources as the property is zoned in a district that prohibits retail sales in all forms.

The defendant, Giangrande, cross-moves for an Order pursuant to CPLR Rule 3025 amending the complaint to the extent of interposing a counterclaim against Beekman. By his proposed counterclaim, the defendant argues that the Zoning Code contains no definition for retail sales and that any prohibition against the retailing of products grown on farmed agricultural property violates protections set forth in the AML, rendering the Zoning Code unconstitutional, arbitrary and capricious.

By cross-motion, the defendant also seeks Summary Judgment on his affirmative defense, that the sale of agricultural products upon the property is permitted under the Town's Code and the state's AML.

Alternatively, the defendant seeks an Order merely maintaining the *status quo* pending the certification of his property by the New York State Department of Agriculture as an agricultural district which, in turn, would permit the sale of products grown upon the property under state law. Giangrande maintains that all conditions that must be met for the property's designation as an agricultural district have been completed, but for a certification by the Commissioner of Agriculture that is subject to a ninety (90)-day waiting period. The defendant therefore suggests that if all other relief is denied, the *status quo* should be maintained and the matter otherwise held in abeyance pending the certification procedure with the state.

Summary judgment is designed to expedite all civil cases by eliminating claims which can properly be resolved as a matter of law. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). As each party seeks Summary Judgment, each party bears it own burden of tendering evidentiary proof in a form admissible at trial to establish entitlement to Summary Judgment as a matter of law. *Friends of Animals v. Association of Fur Manufacturers*, 46 N.Y.2d 1065 (1979). Upon a party's establishment of a *prima facie* entitlement to Summary Judgment, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude Summary Judgment. *Alvarez v. Prospect Hospital, et. al.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Indig v. Finkelstein*, 23 N.Y.2d 728 (1968). In assessing the record "all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion and all

doubts as to the existence of a genuine issue for trial should be resolved against the moving party." *Demarco v. Bansal*, 826 F. Supp. 785 (S.D.N.Y., 1993) (applying New York law), *quoting Brady v. Town of Colchester*, 863 F.2d 205, 210 (2nd Cir. 1988). Mere conclusory and unsubstantiated assertions not supported by competent evidence are insufficient to defeat an otherwise meritorious motion for Summary Judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Thus, a party opposing a Summary Judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist. *Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772 (1st Dept. 1983), *aff'd.* 62 N.Y.2d 686 (1984). The issue must be shown to be real, not feigned, since sham or frivolous issues will not preclude Summary Judgment. *Kornfeld, supra*, at 773 citing *Sprung v. Jaffe*, 3 N.Y.2d 539 (1957).

In determining zoning-related Summary Judgment issues, a Town's zoning ordinance must be strictly construed in favor of the property owner. *Frishman v. Schmidt*, 61 N.Y.2d 823, 825 (1984); *Matter of Allen v. Adami*, 39 N.Y.2d 275, 277 (1977); *Saglibene v. Baum*, 246 A.D.2d 599 (2nd Dept. 1998). Strict construction is appropriate because a zoning ordinance, being in derogation of common law, otherwise limits or interferes with a property owner's free use of the land. *Accord, Thomson Industries, Inc. v. Incorporated Village of Port Washington North*, 27 N.Y.2d 537 (1970); *People v. Mazzochetti*, 181 Misc.2d 701, 702 (Justice Court, Town of Irondequoit 1998).

In addressing Beekman's Summary Judgment motion, it is clear that the R45 Residential Zone, in which the defendant's acreage is located, permits farming and agricultural uses. The Code goes to great length in providing a list of definitions of terms used in the local ordinance. The Schedule of Permitted Uses for an R45 Zone lists the activity of "Retail goods" as impermissible. The Court is perplexed that the Zoning Code, having defined many other terms used in the ordinance, contains no definition whatsoever of the term "Retail goods."

Independent of the instant Summary Judgment motion, the Court presided over a civil contempt application filed against Giangrande for his alleged marketing conduct violative of the terms and conditions of an existing TRO. During the contempt hearing in which Giangrande prevailed, the Court received detailed evidence concerning the nature and extent of the defendant's marketing of various agricultural-based products at the premises. The Court can take Judicial Notice of the evidence adduced at the contempt hearing. The hearing evidence demonstrates that the defendant's marketing of agricultural products is significant and ongoing, though seasonal. While the Zoning Code fails to contain a specific definition of "Retail goods," which cannot be marketed in an R45 Residential Zone, there is no interpretation of the term "Retail goods" that could not include the defendant's significant and ongoing marketing business. Indeed, using even a dictionary understanding of "Retail goods," and even affording the Code a strict construction, it is clear that Giangrande's sales to the public at the premises is not a permissible use of property in an R45 Residential Zone. The absence of a specific definition of "Retail goods" in the Zoning Code does not, in and of itself, alter the

evidence that Giangrande is engaged in a significant retailing operation upon his premises, which is among the defined categories of impermissible activities in the R-45 Residential Zone. A permanent injunction in favor of Beekman, against the defendant's continuation of impermissible retailing activities, therefore appears warranted.

AML §305-a (1) does not cause or require a contrary result. The statute provides that local governments, in enacting ordinances, "shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this Article . . ." AML §305-a (1) cannot be construed, by any stretch, as prohibiting municipalities from imposing restrictions upon the uses of properties, including those which may be agricultural in nature. The statute merely provides that any such restrictions or regulations not be unreasonable. The Court therefore declines to find that the Zoning Code and its schedules, on their face, are unconstitutional, arbitrary, capricious or pre-empted by higher controlling state law. Viewed strictly in that additional light, it appears that the plaintiff, Beekman, should be entitled to a permanent injunction prohibiting Giangrande engaging in his farm-related marketing activities at the premises in violation of the permissible activities for a R45 Residential Zone.

A necessary further consideration is whether, under AML §305-a (1), Beekman's prohibition against the retailing of farm products is "unreasonable." The defendant has provided a copy of the New York State Department of Agriculture's Guidelines for Review of Local Laws Affecting Direct Farm Activities ("the Guidelines"). The Guidelines are dated October 1, 2002. They provide that "direct farm marketing" is

considered a "farm operation," and is therefore protected against unreasonable local restrictions by AML §305-a. The Guidelines provide that direct farm marketing should be permitted for properties that are within county-adopted state certified agricultural districts. The Guidelines also provide that the degree of regulation that would be reasonable in any given instance depends upon a variety of factors including the size and scope of the retailer, the nature of activities, the size and complexity of any structures upon the property, and the type of regulatory processes that a property owner would be expected to hurdle.

The defendant has therefore endeavored, consistent with the Guidelines, to bring himself within a county-adopted state certified agricultural district. Following procedures set forth in Article 25-AA of the AML, the Dutchess County Legislature enacted on August 12, 2002 an Agricultural District Re-Certification, Resolution No. 202197, which amended county agricultural districts to include the defendant's seven (7)-acre parcel. While the Resolution is county-adopted, it is, according to the defendant, awaiting state certification which requires the filing of maps and formal adoption by the Commissioner of Agriculture that is then subject to a ninety (90)-day waiting period. Thereafter, should the certification process be completed and accomplished at the state level, the Commissioner of Agriculture may, pursuant to AML§305-a , challenge any local law which the state believes is contrary to the intent of state agricultural law. According to defendant's counsel, the filing of amended maps has been accomplished. However, whether the state certification process results in

approval by the Commissioner of Agriculture is, in the view of the Court, more speculative.

Giangrande cross-moves for alternative relief, that the *status quo* be maintained until such time that there is a finalization of the certification process of his property, at the state level, as included within an agricultural district. Beekman opposes any such stay or *status quo* arguing, on the basis of correspondence from agricultural Commissioner Nathan L. Rudgers dated February 12, 2001, that even with state certification, Giangrande is not entitled to the protections of AML §305-a unless he generates fifty thousand ($50,000) dollars per year from his horticultural specialties upon his 7.1 acres of property. Implicitly, Beekman suggests that since the defendant has not demonstrated the threshold amount of gross revenue from his marketing of products at the property, the continuation of the *status quo* should be rejected as the parties and the Court should not expect any state challenge to Beekman's Zoning Code under AML §305-a.

Upon due deliberation, the Court, while not finding a basis to void the impermissible marketing of retail goods from properties within the R45 Residential Zone, believes that the state process should be permitted to run its course. In fairness to Beekman, the state certification process should not be open-ended. As things stand now and absent future intervention by the New York State Department of Agriculture, the defendant's marketing activities are in violation of the Town's Zoning Code and should be permanently enjoined. Since it is documented that the certification of

amended agricultural districts is a process that is already well underway, having cleared the county level and having moved to the state level, Giangrande should be permitted on a temporary basis to maintain the *status quo*, strictly subject to all terms and conditions of this Court's prior and continuing TRO regarding marketing activities at the property. A reasonable time for obtaining the Commissioner's approval of the amended county agricultural districts, plus the ninety (90)-day waiting period, plus an opportunity for the Department of Agriculture to challenge Beekman's Zoning Code, if any such challenge is to be commenced at all, should not exceed, at most, six (6) months. The TRO shall therefore remain in effect for a period not to exceed six (6) months from the date of this Decision, subject to any further extension that could conceivably be granted under appropriate circumstances in the discretion of the Court upon the presentation of appropriate proof and notice. The entry of any permanent injunction against the defendant, as sought by the Town, shall be stayed pending that time frame. However, if at any time within the six (6)-month stay, approval by the Commissioner is affirmatively denied and documented, or if despite approval, the Department of Agriculture determines that it shall not challenge Beekman's R45 Residential Zoning as contrary to the intent of the AML, then this Court's stay of a permanent injunction shall automatically expire and the permanent injunction shall trigger pursuant to CPLR Article 63.

The Court finds unpersuasive the defendant's arguments regarding his interpretation of a "farm operation" under AML §301 (11). The Court has considered the remainder of the contentions of the parties with respect to zoning, agricultural and

marketing issues and finds them to be either without merit or mooted by other aspects of this Decision.

The defendant cross-moves for leave to file and serve an amended answer containing a counterclaim against Beekman. CPLR Rule 3025 (b) provides that leave to amend pleadings shall be freely granted. Counsel for the plaintiff, professionally, consents to the filing and service of the proposed amended pleading. Independent of such consent, proposed amended pleadings should not be permitted where doing so would cause undue prejudice to an adversary, or where the proposed amendment lacks legal merit. *Boyd v. Trent*, 297 A.D.2d 301 (2nd Dept. 2001); *Guiliano v. Carlisle*, ___ A.D.2d ___ 744 N.Y.S.2d 895 (2nd Dept. 2002). Here, there is no discernable prejudice to Beekman, particularly as the *status quo* shall be maintained consistent with the terms and conditions of the TRO for an extended period not to exceed six (6) months. It cannot be said that the proposed counterclaim lacks merit, notwithstanding this Decision, if *arguendo* the Department of Agriculture seeks to challenge the Zoning Code of the Town of Beekman in regards to the retailing of agricultural products. Since the proposed amended answer with an affirmative defense and counterclaim was annexed as an exhibit to the defendant's cross-motion, and since a Reply to the counterclaim was annexed as an exhibit to the plaintiff's further submission to the Court, the exchange of these additional pleadings shall be deemed accomplished by the parties.

In light of the foregoing, it be and is hereby

ORDERED, that the motion of the plaintiff, Town of Beekman, for an Order pursuant to CPLR Rule 3212 granting Summary Judgment in its favor, dismissing the defendant's affirmative defense and imposing a permanent injunction, is conditionally granted six (6) months from the date of this Decision unless, within that time, the New York State Department of Agriculture initiates a challenge pursuant to AML §305-a or otherwise to the plaintiff's Zoning Code which prohibits the retailing of goods from property contained within the R45 Residential Zone; and it is further

ORDERED, that in the event a challenge is initiated by the New York State Department of Agriculture pursuant to AML §305-a or otherwise, the stay of the permanent injunction shall be extended pending resolution of said challenge; and it is further

ORDERED, that the permanent injunction, if and when triggered, shall forever enjoin, prohibit and prevent the defendant, Joseph Giangrande, from retailing goods or any farming, agricultural, fruit, vegetable or other crops or products from his property at Route 216 in the Hamlet of Poughquag, Town of Beekman, consistent with the current restrictions of R45 Residential Zoning; and it is further

ORDERED, that the permanent injunction shall automatically trigger if a determination is made by the Commissioner of the New York State Department of

Agriculture that the property of the defendant, Joseph Giangrande, shall not be certified by the state as an agricultural district, or if certified, a determination is made by the Commissioner of the New York State Department of Agriculture that no challenge shall be undertaken of the Zoning Code for the Town of Beekman pursuant to AML §305-a or otherwise relative to its R45 Residential Zoning; and it is further

ORDERED, that the cross-motion of the defendant, Joseph Giangrande, for an Order pursuant to CPLR Rule 3212 granting Summary Judgment upon his affirmative defense as contained in the original answer, or upon the counter-claim in his opposed amended answer, is denied; and it is further

ORDERED, that the cross-motion of the defendant, Joseph Giangrande, for leave to file and serve an amended answer pursuant to CPLR Rule 3025 (b) is granted upon consent; and it is further

ORDERED, that the cross-motion of the defendant, Joseph Giangrande, for the alternative relief of maintaining the *status quo* pending finalization of the certification process of the defendant's property as within an agricultural district, by the New York State Department of Agriculture, is granted upon terms and conditions as set forth hereinabove; and it is further

ORDERED, that a status conference shall be conducted in this matter on September 12, 2003 at 9:15 a.m. in Courtroom #378 of the Dutchess County Courthouse located at 50 Market Street, Poughkeepsie, New York.

Dated: March 28, 2003
Poughkeepsie, New York

HON. MARK C. DILLON
JUSTICE OF THE SUPREME COURT

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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

To commence the statutory time period 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.

Present:

Hon. MARK C. DILLON
Justice

SUPREME COURT: DUTCHESS COUNTY

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SUPPLEMENTAL
DECISION & ORDER

TOWN OF BEEKMAN,

Plaintiff,

-against-

JOSEPH GIANGRANDE,

Defendant.

INDEX
NUMBER 2377/02

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By Decision and Order dated March 28, 2003, this Court granted the motion for Summary Judgment by the plaintiff, Town of Beekman (the "Town"), and imposed a preliminary injunction subject to a six (6)-month stay. During the six (6)-month period, the Court expected the New York State certification process to conclude with a determination as to whether or not the defendant's property is part of an agricultural district. In June 2003, the undersigned was transferred to the Westchester County Supreme Court. As a result, this matter was re-assigned to Justice James V. Brands.

The Court has recently been advised by Justice Brands that there is a dispute as to whether or not a permanent injunction is presently in effect. Justice Brands, on consent of the undersigned, issued an Order dated April 8, 2004 referring the disputed issue to this Court.

The Court has carefully reviewed its Decision and Order dated March 28, 2003, together with plaintiff's and defendant's briefs, accompanying correspondence and the relevant law.

The parties' dispute revolves around the issue of whether or not the actions of the State of New York Department of Agriculture and Markets (the "Department") constitutes a "challenge" as referenced by the Court in the March 28, 2003 Decision and Order. The Town argues that by using the word "challenge," the Court intended that the Department commence a formal legal action/proceeding against the Town's enforcement of its Zoning Code. Since there had been no formal legal proceeding, but instead an exchange of correspondence between the Town and the Department, the Town contends that the permanent injunction is in effect, having been automatically triggered by the absence of a legal action/proceeding. The defendant argues that the Department, via its review procedure and correspondence with the Town, definitively concluded that the defendant's business constituted a "farm operation" within a county adopted, state certified agricultural district. As such, the Town is prohibited from enforcing its Zoning Code to restrict the defendant's operations.

It is clear to this Court that the Department, at the request of defendant's counsel, conducted a formal review of the Town's Zoning Code for compliance with AML §305-a (1). As part of the review, it afforded the Town the opportunity to participate in the review process. By written correspondence dated December 4, 2003, Kim T. Blot ("Blot"), the Director of the Department's Division of Agricultural Protection and Development Services, advised John Adams, the Town Supervisor, that enforcement of the Zoning Code to prohibit defendant's direct farm marketing of crops, livestock and livestock products unreasonably restricted the defendant's farm operation. Blot further stated that the Town failed to demonstrate a threat to the public health or safety by the defendant's continued operation. Supervisor Adams, by letter dated December 24, 2004, advised Ms. Blot, *inter alia*, that as a result of her determination, the Town would no longer proceed against the defendant's operation as long as he met the State's "farm operation" criteria and complied with local public safety regulations.

The intention of the Court in staying the permanent injunction for a period of six (6) months from the March 28, 2003 Decision and Order was to allow a reasonable time for the State process to go forward and reach a conclusion. The Court did not employ the word "challenge" as a legal term of art. When the Court stated that the waiting period would give the Department an "opportunity" to challenge the Zoning Code, it neither stated nor implied that the status of the injunction was contingent upon formal legal action. Further, nothing in the decretal paragraphs of the Decision and Order mandated State commencement of a formal action/proceeding. It has been held, moreover, that the Department is not required to commence a plenary action in order to

enforce an Order requiring a municipality's compliance with the Agriculture and Markets Law. *See, Town of Butternuts v. Davidsen*, 259 A.D.2d 886 (3rd Dept. 1999).

Obviously, the State took action by virtue of conducting a review process and making the determinations as set forth above. This procedure clearly constituted a "challenge" to the Zoning Code as intended by the Court as that word is defined in common English language usage.

On the basis of the foregoing, it is hereby

ORDERED, that in light of the December 4, 2003 determination by the State of the New York Department of Agriculture and Markets, the Temporary Restraining Order and six (6)-month stay of the permanent injunction are lifted and the permanent injunction denied; and it is further

ORDERED, that any further proceedings and/or Court appearances in this matter shall be heard by the assigned Justice in Dutchess County Supreme Court.

This constitutes the Supplemental Decision and Order of this Court.

Dated: April 22, 2004
White Plains, New York

HON. MARK C. DILLON
JUSTICE OF THE SUPREME COURT