

SHORT FORM ORDER

INDEX No. 200389/2022

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-15-2022

SUBMIT DATE 3-23-2023

Mot. Seq. # 01 - MG

Mot. Seq. # 02 - MD

Mot. Seq. # 03 - MD

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TOWN OF ISLIP,

Plaintiff,

-against-

777 CHRIS'S WAY LLC, and
SLOTH ENCOUNTERS.COM LTD,

Defendants.

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Upon the following papers read on these motions for a preliminary injunction, to dismiss and to file amicus curiae; e-filed on the NYSCEF system as documents: 11 - 20, 25 - 29, 30 - 35, 36 - 42, 47 - 49, 51 - 52, 53 - 54, 55 - 58; it is:

In this proceeding seeking injunctive relief, plaintiff Town of Islip seeks an order enjoining and restraining defendants, 777 CHRIS'S WAY LLC, and SLOTH ENCOUNTERS.COM LTD:

- (i) Enjoining Defendants' illegal use, occupancy and operation of an animal exhibit d/b/a "Sloth Encounters LI," in a commercially zoned property located in the Town of Islip Business-2 Zoning District at 551 Veterans Memorial Highway, Hauppauge ("Premises"), during the pendency of this litigation and through to a determination on the merits; and
- (ii) Enjoining Defendants' violation of Town Zoning Code §§ 68-25(B)(l) and 68-289.1; and
- (iii) Enjoining Defendants' illegal harboring and possession of wild animals in any place within the Town of Islip other than the following locations certified by

Islip v 777 Chris's Way LLC, et al.
Index # 200389/2022
Page 2

the Town for such use: [a] a zoological park for which a certificate of occupancy ("CO") has been issued by the Town of Islip Division of Building; [b] a laboratory operated pursuant to §504 of the Public Health Law, [c] carnival, circus or public outdoor show for which a special permit from the Town of Islip Town Board has been obtained; or [d] an educational or scientific institution chartered or licensed by the State of New York for such purpose. Enjoining Defendants' violation of Town Code § 12-23.A(1).

The defendants oppose this application and separately move to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7). The plaintiff opposes this application in all respects. Humane Long Island has separately filed a motion seeking amicus curiae relief.

Motion to Dismiss

To succeed on a motion to dismiss pursuant to CPLR 3211(a) for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (see *Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has pled causes of action cognizable at law as against the defendants. Therefore the defendants' motion to dismiss is denied.

Islip v 777 Chris's Way LLC, et al.
Index # 200389/2022
Page 3

Amicus Curiae Relief

In *Danskammer Energy LLC v. NYS Dep't of Envtl. Conservation*, NYLJ, Jun. 28, 2022 at p.17, col. 3, [Sup Ct, Orange County 2022, Onofry, J.], held that

The Court of Appeals is the only court that has promulgated a rule specifying the standard for granting a motion for amicus curiae status. 22 NYCRR 500.11(e). The rule provides:

A brief may be filed only by leave of court granted on motion, or upon the court's own request. Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief, must include consideration of and satisfaction to the court of at least one of the following criteria:

- (1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;
- (2) that movants would invite the court's attention to the law or arguments which might otherwise escape its consideration; or
- (3) that amicus curiae briefs would otherwise be of special assistance to the court.

The Court in *Danskammer Energy* further stated that

The Appellate Division, Second Department has promulgated a rule which addresses the method for seeking amicus curiae status: "Permission to file an amicus curiae brief shall be obtained by persons who are not parties to the action or proceeding by motion on notice to each of the parties." 22 NYCRR 670.11(a). The Second Department does not permit oral argument, unless ordered by the court. 22 NYCRR 670.11(b).

Id.

Here the parties are capable of giving this Court a full and adequate presentation of this action. Therefore, the motion filed by Humane Long Island seeking amicus curiae relief is denied in all respects.

Preliminary Injunction

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury

Islip v 777 Chris's Way LLC, et al.
Index # 200389/2022
Page 4

absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (see, generally, *Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; *Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (see *Dixon v Malouf*, supra; *Ruiz v Meloney*, supra). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [2d Dept 1998]; see *Hoeffner v John F. Frank, Inc.*, 302 AD2d 428 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35 [2d Dept 2000]; *Nalitt v City of New York*, 138 AD2d 580 [2d Dept 1988]).

In *Smithtown v Schleider*, 156 AD2d 668, 668-669 [2d Dept 1989], the Court held that

The plaintiff town demonstrated a likelihood of success on the merits as to the underlying action for a permanent injunction and it was not necessary for the plaintiff to demonstrate that the defendant's allegedly illegal use of his property was causing irreparable injury (see, *Village of Pelham Manor v Crea*, 112 AD2d 415, 416; *Town of Islip v Clark*, 90 AD2d 500). Further, in balancing the equities, the protection of the public is of paramount consideration. Thus, the issuance of a preliminary injunction was proper.

The defendants claim that they are no longer "operating a 'petting zoo' at the location" and "not harboring 'wild animals' at the Premises as Sloth's, by definition, are not 'wild animals'." The defendants also, in their reply papers to their motion to dismiss, include the Town of Islip Code Section 12-22, in its entirety", which defines "wild animals" as:

"An animal of any species which in its natural habitat is wild, dangerous or ferocious, including any such animal which may have been trained and domesticated. "Wild animals" include but are not limited to the following: all members of the dog family (canidae), except domestic dogs; all members of the cat family (felidae), except the common domestic cat; all predator birds, such as eagles, hawks, falcons and owls; all venomous snakes or constricting snakes; all venomous insects, such as tarantulas, black widow spiders and scorpions; and all venomous lizards, snapping turtles, alligators and iguanas." (Emphasis added).

Islip v 777 Chris's Way LLC, et al.
Index # 200389/2022
Page 5

At this stage of the proceeding the plaintiff has demonstrated what can be construed as a likelihood of success on the merits. Further, a balancing of the equities is in favor of the plaintiff and protection of the public pending resolution of this matter. Therefore the motion for a preliminary injunction is granted in all respects pending the resolution of this action against the defendants, 777 CHRIS'S WAY LLC, and SLOTH ENCOUNTERS.COM LTD. The defendants are directed to immediately cease any operations that are a violation the Town of Islip Code; and it is further

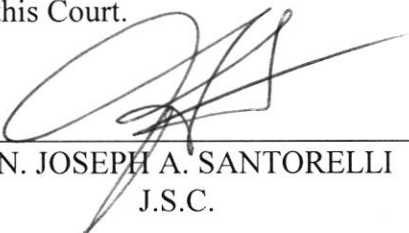
ORDERED that a copy of this order shall be served by the plaintiff on the defendants' attorney by regular mail on or before April 27, 2023; and it is further

ORDERED that the defendants shall serve their answer within twenty (20) days from service of a copy of this order; (*see Arias v First Presbyterian Church*, 97 AD3d 712, 948 NYS2d 665 [2d Dept 2012]; *see also Schonfeld v Blue & White Food Products Corp.*, 29 AD3d 673, 814 NYS2d 711 [2d Dept 2006]), and it is further

ORDERED that counsel for the plaintiff and the defendants are directed to complete a preliminary conference stipulation/order and upload it into the NYSCEF system on or before **May 11, 2023**.

The foregoing shall constitute the decision and Order of this Court.

Dated: March 30, 2023



HON. JOSEPH A. SANTORELLI
J.S.C.

___ FINAL DISPOSITION ___ NON-FINAL DISPOSITION