

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. R. BRUCE COZZENS - SUPREME COURT JUSTICE

L & S REALTY CO. LLC,

Petitioner,

-against-

THE TOWN BOARD OF THE TOWN OF
HEMPSTEAD,

Respondent.

TRIAL/ IAS PART 1

NASSAU COUNTY

INDEX NO. 614954/2023

MOT. SEQ.#001

The following papers read on this Article 78 Petition:

NYSCEF 1 through 43

Order to Show Cause by the Petitioner for an Order and Judgment on the Petitioner’s First, Second and Third Causes of Action issuing a Writ of Prohibition pursuant to CPLR §7803(2) prohibiting Respondent from continued application and enforcement against Petitioner of Chapter 91 of the Town Code of the Town of Hempstead; and, on Petitioner’s Fourth Cause of Action pursuant to CPLR 7803(4) annulling the determination of Respondent against the Petitioner, rendered under Chapter 91 of the Town Code of the Town of Hempstead is hereby denied in its entirety.

This Court previously denied the Order to Show Cause insofar as it sought injunctive relief pursuant to CPLR §7805.

The background of this matter includes the following. The Respondent Town submitted an affidavit of Daniel Leo a Deputy Commissioner and a Plan Examiner responsible for visiting various sites to investigate complaints and field conditions and ensure compliance with the Town’s Building Code. Daniel Leo states that on May 19, 2023 he inspected the Motel and found a violation as to the carbon monoxide detectors/alarms. On August 7, 2023 a follow up inspection of the Motel was made. In light of the criminal arrests (including gun related and prostitution) a police escort was requested. It was observed that none of the concerns and safety issues were being addressed. An outside engineering and architectural firm was retained. The Senior Architect, Joseph Iannucci conducted an inspection. An affidavit has been submitted by

Joseph Iannucci. He determined the rear staircase was structurally unsecured and was in an unsafe and hazardous condition which constituted violations of Chapter 90. The first floor of the two-story building was in a greater threat of imminent harm in the event of a fire. In certain of the guest rooms there would be an inability to escape. Self-closing fire doors had been removed. Temporary columns were sitting on the basement floor and were not supported as required by the New York State Property Maintenance Code. Guest rooms had high volumes of trash and several were infested by insects, including roaches on the walls. A full electric stove/range had been installed without a proper permit. In several areas there was exposed wiring. In the basement there were gasoline filled containers and snowblowers filled with gasoline which does not comply with the Fire Code. The Motel had failed to replace the carbon monoxide detectors as directed in the prior inspection nor was there a hard-wired system. The Fire Marshall was called in who observed the use of extension cords instead of permanent wiring, uncovered outlets and junction boxes, failure to comply with the prior order of March 15, 2023 of the Fire Marshall.

Based upon the observations of the consultant Iannucci, the Fire Marshall and the DOB they determined the building was in an imminent risk of danger particularly of fire. The Motel presented in a state of emergency as defined in 90-15 of the Town Code. As the Motel had previously failed to effectuate repairs the Town directed the Motel be shuttered and the exterior doors were chained and locked. Appearance tickets were issued by the Town and the Fire Marshall.

The Petitioner argues that the Town lacks authority to notice, hold and conduct a public hearing to consider if a building constitutes a public nuisance but rather the Petitioner must seek relief from the Court prior to taking action. The law is clear that a municipality may seek to summarily abate a public nuisance without Court intervention. This record indicates criminal activity which includes *inter alia* two predicate arrests as defined under Chapter 91 of the Town Code.

Under Section 91-5 if there have been at least two predicate arrests within twelve months the Town may commence a summary proceeding before the Town Board or commence an action in a court to enjoin further occupancy. The Defendant was served notice on July 27, 2023 of the occurrence of a first predicate offence which happened on July 24, 2023 involving an arrest for the offense of prostitution in violation of Penal Law §230. On August 7, 2023 following an inspection, the Town's Department of Buildings declared the Motel to be an imminent and immediate threat to life, health and safety and thus that the Motel be vacated and shuttered. Prior action, (*L&S Realty Co., LLC v. Department of Buildings of the Town of Hempstead and the Town of Hempstead* - Index No. 613206/2023). There were violations of the New York State Building Code and fire safety codes. The Defendant sought to reopen notwithstanding the fire and safety concerns which was denied by the Court.

The second predicate offense which occurred at the Motel on August 1, 2023 involved an arrest for the offense of sale of a controlled substance under Section 220.39 of the Penal Law. A public hearing was scheduled for August 31, 2023 for the consideration of whether the Motel should be determined to be a public nuisance. At the public hearing the Town Board heard testimony from the Commanding Officer of the Fifth Precinct regarding the extensive history of

criminal activity at the property. Defendant's counsel appeared and was heard at the hearing in opposition. The hearing continued to September 6, 2023 and the Town Board voted and passed a resolution finding the Motel constituted a public nuisance under Chapter 91 and ordered the Motel be boarded and shuttered.

The Petitioner filed a Notice of Discontinuance of the action under Index Number 613206/2023 on September 14, 2023 and the same day filed this Article 78 Proceeding under Index No. 614954/2023.

The Town Law Section 130(15) states that the Town Board may enact regulations to promote health, safety, morals or general welfare of the community. Having two predicate arrests provides the jurisdictional basis for the commencement of either an administrative or judicial proceeding to declare the property a public nuisance. In addition, the Police Department has made multiple other arrests including response after a 911 call of a male with a gun. The two arrests are not the extent of the criminal activity and since August of 2022 the Nassau County Police Department made 89 arrests, including 27 felony arrests at the Motel and 51 arrest for offenses involving controlled substances.

The Petitioner argues that the Town's alleged failure to include a copy of Chapter 91 with the First Predicate Notice renders this Chapter 91 proceeding jurisdictionally defective. The Petitioner's actual notice of the hearing date and attendance at the pertinent public hearings refutes any claim of prejudice, *Brew v. Hess*, 124 A.D.2d 962 (3d Dep't. 1986). Further, Chapter 91 was included with the Second Predicate Notice. The Petitioner's counsel was heard in opposition at the hearing on August 31, 2023. The Hearing was continued to September 6, 2023 and once again arguments were made on behalf of the Petitioner.

The United States Supreme Court has long recognized that States and under the Municipal Home Rule Law counties, cities, towns and villages have clear authority to protect their citizens and this includes safety, health, morals and criminal activity. Statutes are presumptively valid, and unconstitutionality of the local law must be proven beyond a reasonable doubt which has not been done in this case. The intent of Chapter 91 is clear. The Town's public nuisance law was enacted to provide the Town with a way to ensure buildings within the Town do not become places where crime including the sale and consumption of narcotics is permitted, promoted and/or condoned. Arrests clearly violate what the municipalities seek to protect their citizens from through the statute. A local municipality has the ability to abate public nuisances as a proper exercise of its police power, *Brancato v. City of New York*, 244 F.Supp. 2d 239 (S.D.N.Y. 2003). The Town may summarily abate a public nuisance without seeking permission of the Courts, *4M Holding Co. v. Town Bd. Of Town of Islip*, 81 N.Y.2d 1053 (1993).

Petitioner argues that the Town Supervisor and a Board Member exhibited bias by holding a press conference to announce the scheduled Chapter 91 public hearing. The Court of Appeals has held that an Official taking a public position on a policy issue is not sufficient to require a disqualification, *1616 Second Ave. Rest., Inc. v. New York State Liquor Auth.*, 75 N.Y.2d 158 (1990).

Section 91-5 of the Town Code grants the Town to commence an action to enjoin further occupancy of the building. The Petitioner has been heard in this Court and on application to the Appellate Division along with the administrative hearing which provides the Petitioner with due process and an opportunity to be heard. Thus due process is satisfied under the law. Further the personal fault (or lack thereof) of the owner is not a material and relevant consideration nor is ignorance of the offenses, *City of New York v. Castro* 160 A.D.2d 651 (1st Dep't 1990).

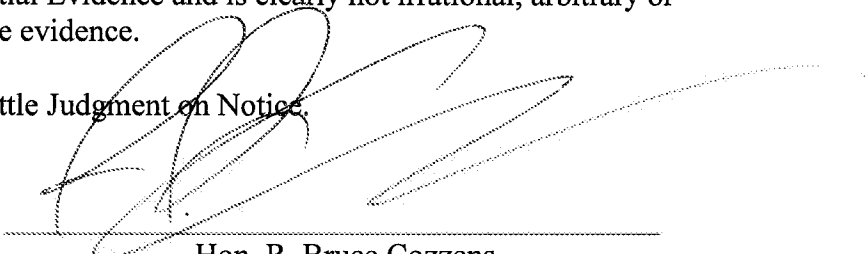
The Petition seeks with respect to the first three Causes of Action, a Writ of Prohibition barring the Town from “enforcing the determination rendered against Petitioner pursuant to Chapter 91 declaring the Motel a public nuisance and ordering the Motel closed for one year.” Prohibition is an extraordinary remedy, *Brown v. Blumenfeld*, 89 A.D.3d 94 (2d Dep't 2011). It is only granted where the body or officer is without jurisdiction or exceeds its authorized powers. There must be a clear right to relief which is not present in this case. The Board was exercising its powers in conducting the hearing in accordance with Chapter 91 of the Town Code.

In the Fourth Cause of Action, Petitioner argues that the “substantial evidence in the record does not establish grounds under Town Code Chapter 91 to declare the Motel a Public Nuisance...” The determination being challenged by Petitioner was made after a hearing. In making its determination the Court may review all the facts and circumstances set forth in the record i.e. the entire record, and determine whether the determination of the Town Board was a reasonable one. Administrative hearings are not bound by the traditional rules of evidence. In this case the Town Board heard statements and arguments from the Motel along with the Police and members of the Community. Petitioner relies on the case of *Bd. Of Trustees of Vill. Of Groton v. Pirro*, 152 A.D.3d 149 (3d Dep't. 2017). The *Pirro* case is distinguishable from this matter in that Chapter 91 does not penalize a property owner for 911 calls made from the property or for police responses but rather limits predicate offenses to incidents involving arrests for a distinct and finite number of penal law violations. The argument made by the Petitioner that the record lacks Substantial Evidence in that the arrests on August 1, 2023 occurred at the Speedway Gas Station across the street does not have merit. The Police Report states that while conducting surveillance of the Motel they observed suspect number 1 enter a room in the Motel, meet suspect no. 2 in the Motel's parking lot then the two proceeded to the gas station where they purchased crack-cocaine from suspect no. 3. The fact that they met at the Motel and immediately did their drug deal qualifies as the second predicate offense particularly when considering the volume of other non predicate arrests.

The determination of the Town Board under Chapter 91 that the Motel constituted a public nuisance was a proper exercise of its Police power. The determination was a rational and reasonable one supported by Substantial Evidence and is clearly not irrational, arbitrary or capricious or against the weight of the evidence.

The Petition is dismissed. Settle Judgment on Notice.

Dated: **MAR 20 2024**



Hon. R. Bruce Cozzens
Supreme Court Justice
XXX

ENTERED
Mar 22 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE