

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

THE TOWN OF HEMPSTEAD,

Plaintiff,

-against-

L & S REALTY CO. LLC D/B/A CAPRI HOTEL

Defendants.

**TRIAL/ IAS PART 1
NASSAU COUNTY**

INDEX NO. 615185/2023

MOT. SEQ.#001

The following papers read on this Motion to Dismiss:

- Motion/Affidavits/Affirmations/Exhibits.....X
- Memorandum of Law.....X
- Memorandum of Law in Opposition.....X
- Memorandum of Law in Reply.....X

Motion by the Defendant L & S REALTY CO. LLC D/B/A CAPRI MOTEL for an order of this Court pursuant to CPLR 3211§§(a)(1) and (7) seeking to dismiss the Plaintiff’s Verified Complaint is hereby denied.

Defendant states that the Plaintiff, THE TOWN OF HEMPSTEAD, (hereinafter Town) failed to follow the procedures set forth in Chapter 91 for declaring the Motel a Public Nuisance, and, that Chapter 91 is *Ultra Vires*, Unconstitutional and Unenforceable. These arguments fail for the following reasons.

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 for one year. The Town now seeks to have the Motel shuttered for a total of three years.

The Defendant filed a Notice of Discontinuance of the action under Index Number 613206/2023 on September 14, 2023 and the same day filed an 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 Defendant 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. Defendant'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 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.

Section 91-5 of the Town Code grants the Town to commence an action to enjoin further occupancy of the building. The commencement of this action by the Town provides the Defendant 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).

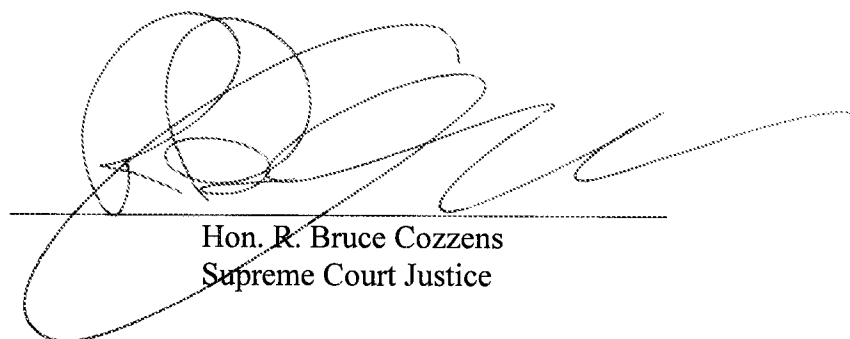
A motion to dismiss based on CPLR 3211 (a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively

establishing a defense as a matter of Law.” *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76 (1st Dep’t. 2022). “The sole issue to be determined in a motion to dismiss for failure to state a cause of action [under CPLR §3211(a)(7)] is whether the Complaint’s, factual allegations, when taken together, manifest any cause of action cognizable at law...” *People ex. Rel. Cuomo v. Coventry First LLC* 13 N.Y.3d 108 (2009). The Court must accept the facts set forth in the complaint as true and provide the Plaintiff with every favorable inference.

Accordingly, the Motion of the Defendant seeking dismissal of the complaint is denied.

Dated:

FEB 27 2024



Hon. R. Bruce Cozzens
Supreme Court Justice

ENTERED

Feb 29 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE