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SUPREME COURT : STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 56

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THE CITY OF NEW YORK, and GASTON SILVA, Commissioner of Buildings of the City of New York,

Plaintiffs,

-against-

STRINGFELLOW'S OF NEW YORK, LTD., TEN'S WORLD-CLASS CABARET, GRAMERCY TWIN'S ASSOCIATES, KNOWN AS 33-39 EAST 21st STREET ASSOCIATES, The Land and Building known as 35 East 21st Street, Block 850, Lot 25, County of New York, City and State of New York, and "JOHN DOE," fictitious names, true names unknown, the parties intended being any and all persons and/or entities claiming any right, title or interest in the real property which is the subject of this action, and the New York State Liquor Authority,

Defendants.

Index No.
403724/98
Mot Seq 007
215 of 2/24/99

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A P P E A R A N C E S:

For Plaintiffs

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of the City of New York
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For Defendant

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Stephen G. Crane, J.:

Plaintiffs move to vacate the court's order dated February 12, 1999 allowing defendant Stringfellow's of New York, Ltd. ("Stringfellow's") to reopen under a configuration that satisfies the "substantial portion" language defining "adult establishment" in §12-10 of the Amended Zoning Resolution ("ZR"). This

application is based not on any impeachment of the reconfiguration under the ZR, but because the means to accomplish it--a sliding wall and fireproof curtain-allegedly violate the Building Code.

The order dated February 12, 1999, superseded an order dated the day before authorizing Stringfellow's to reopen as a non-adult restaurant and club pending processing of plans to cure violations and amend the public assembly permit.[1]

Plaintiffs follow their request for vacatur of the February 12 order with a request for a closing order under §7-711(c) of the Administrative Code ("AC") and a companion injunction. These remedies do not flow ineluctably from vacating the February 12 order. By making them, plaintiffs ignore the order of February 11, overlook the background on which the February 11 and 12 orders came about, and divorce the application from the basis on which it rests, namely, non-compliance with the Building Code. This alleged non-compliance is not a basis for a closing order under AC §7-711(c).

BACKGROUND

A bit of background will place this motion in perspective. Stringfellow's was the lead named plaintiff in attacking the facial constitutionality of the ZR when it became effective in 1995. Although the attack was eventually rejected (<u>Stringfellow's of New</u>

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[1] Actually, its restaurant has received critical acclaim. The Community Board and neighborhood residents have supported the continuation of Stringfellow's as an adult establishment seemingly because it is a far more peaceful operation than the non-adult nightclub it replaced.

York, Ltd. v. City of New York, 91 NY2d 382), the courts stayed enforcement of the ZR. These stays ran out in July, 1998.

Meanwhile, in 1997, Stringfellow's had adopted a policy and practice of admitting minors to comply with unambiguous language of the ZR that had been inserted in §12-10 at the behest of the Mayor's office in order to comply with constitutional requirements forbidding content based standards and discretionary enforcement. (See Town of Islip v. Caviglia, 73 NY2d 544). The plaintiffs went ballistic when this court took the ZR at its word. The Appellate Division, based on an argument never raised before me, eliminated the minors exclusion from the ZR, granted partial summary judgment to plaintiffs and authorized a closing of Stringfellow's. (City of New York v. Stringfellow's of New York, Ltd., ___ AD2d ___, 1999 WL 47716 [1st Dept]).

This court then held a trial of remaining issues. Although the resulting permanent injunction has not yet been signed,[2] Stringfellow's asked to abate pursuant to AC §7-714. The orders of February 11 and 12 authorized reopening of the abated nuisance.[3]

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[2] The judgment has been noticed for settlement on March 4, 1999.

[3] The City argues that adult theatres and adult eating and drinking establishments cannot abate by reducing to less than 40% the area devoted to adult activities. Justice Steven Fisher in an opinion dated November 19, 1998, in City of New York v. Wiggles (Index No. 016705/98), has ruled otherwise as has this court in City of New York v. All Male Jewel Theatre, (Index No. 403887/98, decision dated January 22, 1999). This 40% rule was laid down in my initial opinion in City of New York v. Show World, ___ Misc 2d ___, August 28, 1998, cited approvingly by the Appellate Division, First Department in City of New York v. Les Hommes, ___ AD2d ___, 1999 WL 47731.

An undertaking of $150,000 was imposed and ordered to be posted bby March 3, 1999.

Flush from their victory on the minors issue, the plaintiffs were "furious" when this court recognized Stringfellow's genuine efforts at abatement. Because of plaintiffs' bearing in this and other cases, Stringfellow's infers that the City of New York is engaged in a vendetta against it and wants Stringfellow's put out of business. The paranoia of Stringfellow's is heightened by the circumstance that the Department of Buildings ("DOB") has misplaced the file for its building, yet it selectively locates portions of it when the need arises.

In fairness to the City, on the other hand, and the praiseworthy efforts of its attorney Karen Selvin, Esq., it is noted that the DOB and the Fire Department have been prompt - almost immediate - in inspecting Stringfellow's and issuing notices of violation.

When this court reopened Stringfellow's under the 40% rule on February 12, 1999, high level officials of the DOB cooperated by meeting me at the location to assess Stringfellow's plan of abatement and the safety implications of its proposal to use its sliding wall to divide the premises. As a result, the court imposed a draconian cut to the occupancy limit from 900 to 450 as a condition to reopening under the 40% rule. The court also imposed a substantial undertaking. It acted because the remaining building code problems entailed paper work and filing plans the review of which would draw the process out over such a period as to

threaten both the solvency of the establishment in which about $3,000,000 has been invested[4] and the employment of a sizeable staff.

BUILDINGS CODE VIOLATION

Ronny Livian, the Manhattan Borough Commissioner of DOB, who was present when the court inspected the sliding wall on February 12, told the court that the wall violated the Building Code, but he could not bring himself to say it would be unsafe if I reduced the occupancy limit to 450. In support of the motion, he now says that each side of the reconfigured space requires three separate fire exits, not only because the original public assembly plan called for a 900 person limit on occupancy - a concern I had already solved - but because the square footage of the premises mandated it.

On the other hand, Robert Arthur King, a licensed architect and expert on the building code[5], claimed that the two exits on each side suffice. Thus, the deployed status of the sliding wall, even if it impedes the flow of people from one side to the other, does not curtail the number of required fire exits.

Mr. King also points to drawings as far back as 1985 that reveal the sliding wall. Mr. Livian claims it was not legended on

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[4] The defendants, moreover, are fearful that the City's vendetta will result in the rejection of whatever Stringfellow's submits, no matter how lawful.

[5] At the hearing on Stringfellow's abatement plan on February 10, 1999, I found Mr. King not only credible but extremely impressive.

the public assembly drawing and never approved. The original architect, Jeffrey Simon, however, has located his office drawing that establishes the sliding wall was the subject of a legend and a separate detailed drawing. Indeed, he claims it was the centerpiece of Mr. Stringfellow's nightclub and was used in both open and closed positions. Yet Mr. Simon's drawing bears no indication of filing with or approval by DOB. Mr. Livian claims that drawings submitted under Directive 14 are certified by the architect as complying with the building code, but DOB reviews only for compliance with the ZR and does not approve. Besides, the defendant's drawings do not show the wall in the deployed position. For deployment, DOB approval is required.

One fact is known for sure. The sliding wall has existed since 1985 and no building code violation was ever issued for it before February, 1999. What is uncertain, however, is the safety status of this sliding wall when it is deployed. If Mr. Livian is now correct in what his affidavit finally makes clear ---"... the subject premises is still required to have at least three (3) unobstructed means of egress, even if defendants voluntarily choose to reduce their occupancy load to a level under 500 people, because according to approved Building Department records, the net square footage of the subject premises has not changed"--the sliding wall represents an obstruction to a third means of egress. Whether plans for the sliding wall or its deployment were ever approved by DOB is uncertain.

The bottom line is, no matter what are the credentials and credibility of the competing experts, the court is obligated to defer to the DOB, the agency charged with interpreting and enforcing the building code. (Tommy and Tina v. Dept. of Consumer Affairs, 95 AD2d 724, aff'd 62 NY2d 671). If they are taking the position they have adopted for ulterior, retaliatory purposes, Stringfellow's will have its claim for damages. On the other hand, if they are acting in the interest of public safety, not mere technical compliance with the building code, the court will always select public safety. In fact, on February 12 when I expressed the safety concern, no city representative was willing to say it was unsafe to deploy that wall - only that it was not approved, then and now a proposition in doubt.

EQUITIES

Invoking the court's equitable powers, the plaintiffs seek a closure order. The equities disfavor this remedy. The cleanliness of the plaintiffs' hands has been questioned, and they have not taken off their gloves for an inspection. The court is bereft of an explanation for missing filed documents or where plaintiffs find misplaced documents from time to time. Stringfellow's can only litigate as long as it is economically capable, and it has considerable points of arguable merit in its favor. (Cf. Matter of Hearst Corp. v. Clyne, 50 NY2d 707, 714-715 [listing three common factors courts look for in determining whether an action falls within the exception to the mootness doctrine]. Stringfellow's has

been directed to post a sizeable bond, has large numbers of employees and has at stake an investment of millions of dollars.

Accordingly, upon vacatur of the February 12 order the court, rather than padlocking Stringfellow's, will merely reinstate the order of February 11, 1999. Additionally, the court will stay all proceedings to enforce this order vacating the February 12 order pending appeal (CPLR 5519[c]) on condition that Stringfellow's serve and file a notice of appeal within 10 business days of entry of this order and move in the Appellate Division within 20 business days thereafter for an expedited appeal.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion is granted to the extent of vacating this court's order dated February 12, 1999, and otherwise is denied; and it is further

ORDERED that upon vacatur of the order dated February 12, 1999, the order dated February 11, 1999 is reinstated, Stringfellow's undertaking is continued and the DOB and any other city agency involved are directed to determine any applications and review any plans submitted by Stringfellow's promptly and on an expedited basis; and it is further

ORDERED that the first decretal provision hereof vacating the February 12, 1999 order is stayed pending appeal provided that Stringfellow's serve and file a notice of appeal within 10 business

days of entry of this order and provided further that within 20 business days after filing its notice of appeal Stringfellow's moves in the Appellate Division for leave to have its appeal heard on an expedited basis. Upon the failure of either condition the stay provided herein to preserve the status quo shall be deemed vacated and of no further effect.

The foregoing constitutes the opinion and order of the court.

DATED: MAR - 2 1999 ENTER: