STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 75-7-18 Vtec

Burns 12 Weston Street NOV	DECISION ON MOTION

Decision on Cross-motions for Summary Judgment

Charles and Cynthia Burns ("Appellants") appeal a June 19, 2018 decision of the Burlington Development Review Board ("DRB") affirming of a notice of violation ('NOV") alleging an unpermitted duplex use at 12 Weston Street, Burlington, Vermont ("the Property"). Neighboring property owners[1] ("Neighbors") have noticed themselves as interested persons in this matter.[2] The City of Burlington ("City") is also a party to this appeal. Presently before the Court are the Appellants' and Neighbors' competing cross-motions for summary judgment.[3]

Appellants are represented by Brian P. Hehir, Esq. The City is represented by Kimberly J. Sturtevant, Esq. The Neighbors are represented by Norman Williams, Esq.

Procedural Background

This matter has a significant history, which the Court will summarize here to provide context for the pending motions.

a. On June 3, 2014, the Burlington Zoning Administrator issued a certificate of Non-Applicability of Zoning Permit Requirements to the Burnses, which stated that a permit was not required for certain interior renovations of the building on the Property. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. at 1–2 (Vt. Super. Ct. Envtl. Div. June 23, 2015) (Walsh, J.). The Neighbors then appealed this to the DRB. Id. The DRB determined that a permit was not

[1] The Neighbors appearing in this appeal as Interested Persons are Michael and Caryn Long, Paul Bierman, Hamilton Davis, Kathleen Donna, Alex Friend, Greg Hancock, Kari Hancock, Susan Moakley, Matt Moore, Mary Moynihan, Candace Page, Scott Richards, Peg Boyle Single, Richard Single, and Sandra Wynne.

[2] A separate Entry Order filed on April 5, 2019 addressing Neighbors' standing in this matter has been issued.

[3] A separate Entry Order filed on October 25, 2019 by this Court held that while Neighbors' cross-motion for summary judgment was untimely under V.R.C.P. 56 and 16.2(v), it is within this Court's discretion to allow the cross-motion for summary judgment.

required for the Applicant's proposed work. Id. Neighbors then timely appealed the DRB decision to the Environmental Division of the Superior Court of Vermont. Id.

b. On appeal, this Court granted the Burnses' motion for summary judgment against the Neighbors. This Court held that the City zoning official's determination that the duplex was a legal preexisting nonconformity was final and binding, since the Neighbors failed to timely appeal. Id., at 4–7. The Court also affirmed the DRB's decision that the Burnses did not need a permit to renovate the interior of the property because the zoning official's determination was tantamount to an act or decision of the zoning administrator pursuant to 24 V.S.A. §§4472(d) and 4465(a). Id., at 4–7. The Neighbors timely appealed this decision to the Vermont Supreme Court.

c. The Vermont Supreme Court reversed this Court's decision, concluding that the City zoning official's determination that the duplex was a legal preexisting nonconformity was not final and binding. In re Burns Two-Unit residential Bldg., 2016 VT 63, ¶ 9–16, 202 Vt. 234 (holding that the zoning official's determination regarding the Property was not a decision of the administrative officer, thereby allowing the Neighbors to appeal the determination that the use of the Property as a duplex is a permissible nonconforming use). The Supreme Court further held that the Neighbors' claim that the Burnses had increased the Property's living space was appealable. Id., at ¶ 17. The Supreme Court remanded the matter to this Court to allow the Neighbors to present evidence and argument for their claims. Id.

d. On remand, this Court denied the Neighbors' motion for summary judgment, which requested this Court reverse the DRB's decision to uphold the Certificate; find the duplex is not a permissible use of the Property; and find the property does not meet the requirements of a duplex and cannot be zoned as such. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 2 (Vt. Super. Ct. Envtl. Div. Nov. 18, 2016) (Walsh, J.). This Court concluded there was a genuine dispute of material fact regarding whether the Property may be used as a duplex. Id.

e. At the outset of trial on May 11, 2017, the Burnses' verbally moved to withdraw their application for a determination of Non-Applicability of Zoning Permit Requirements. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 2 (Vt. Super. Ct. Envtl. Div. May 11, 2016) (Walsh, J.). The withdrawal of the application effectively revoked this Court's subject matter jurisdiction. Id. Therefore, this Court granted the motion to withdraw and voided the June 3,

2014 Certificate.[4] Id. Subsequently, this Court granted Neighbors' motion to dismiss the matter with prejudice. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 1–2 (Vt. Super. Ct. Envtl. Div. June 8, 2016) (Walsh, J.) (". . . the nature of the dismissal with prejudice in this matter is limited to preventing the Burnses from re-applying for the Certificate of Non-Applicability which is specifically at issue in this appeal. This order does not affect the status or use of the property . . . . [or] prohibit the Burnses from seeking a different Certificate of Non-Applicability.").

f. The dispute presently before the Court concerns an NOV issued on March 1, 2018 alleging the use of an unpermitted duplex at the Burnses' Property. The Appellants timely appealed the NOV to the DRB and claimed that the City was estopped from asserting that the property is in violation of the zoning code and asserted that the city did not act to enforce within 15 years of commencement of the violation. The DRB upheld the NOV, concluding that applying equitable estoppel was not within its authority and the use violation was not subject to the 15-year statute of limitations. Appellants then timely appealed the DRB's decision to this Court and filed a motion for summary judgment. Neighbors subsequently filed a cross-motion for summary judgment.

Factual Background

We recite the following facts solely for the purposes of deciding the pending summary judgment motions. These facts do not constitute factual findings, since factual findings cannot occur until after the Court conducts a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.).

1. Appellants Charles and Cynthia Burnes own a two-unit residential building located at 12 Weston Street, Burlington, Vermont ("the Property"). Appellants purchased the property from Elizabeth L. Gaude ("prior owner") by Trustee's deed on June 6, 2014. The transfer tax return stated the type of building construction as a "multi-family dwelling."

2. The purchase and sale agreement for the Property between Appellants and the prior owner includes a description of the Property as a "lot of land with a two unit apartment building."

[4] This Court noted it was "concerned that the practical effect of granting the motion to withdraw will be inefficient should the underlying dispute continue," but recognized no authority to continue its subject matter jurisdiction. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 2 (Vt. Super. Ct. Envtl. Div. May 11, 2016) (Walsh, J.).

The prior owner subsequently executed an addendum to the purchase and sale agreement in which the prior owner affirmed the Property had been used as a duplex/multi-family dwelling since 1967.

3. On March 14, 2014, a neighboring property owner, Ms. Rosenstreich, submitted a zoning enforcement complaint form to the City that asserted Appellants were conducting renovations on the property without a zoning permit.

4. On May 15, 2014, a Code Enforcement Office ("CEO") Zoning Specialist responded and determined that the building had been used as a duplex from at least 1969 and therefore no zoning permit was required. The determination stated that uses which preceded adoption of the 1973 Burlington zoning ordinance were presumed valid and "may continue to remain as a pre-existing non-conforming use so long as there is no City or other record to the contrary." The decision stated that it was appealable to the DRB and was not made available to the public. Neither Appellant nor the Neighbors contested the May 15, 2014 determination.

5. On June 3, 2014 Appellants and the prior owner filed a certificate of "Non-Applicability of Zoning Permit Regulations" with the City. The form was approved and subsequently appealed by the Neighbors to the DRB.

6. The DRB issued findings of facts and a decision dated July 24, 2014, denying the appeal and concluding that Applicants did not require a permit for the proposed interior reconfiguration. Neighbors timely appealed to this Court.

7. On June 23, 2015 this Court granted Appellants' motion for summary judgement and held that the Zoning Specialists decision was final and binding. Neighbors timely appealed to the Vermont Supreme Court.

8. The Vermont Supreme Court reversed and remanded, directing this Court to consider on the merits the DRB's determination that use of the Property as a duplex is a permissible, nonconforming use and the claim that Appellants had increased the Property's living space.

9. On May 11, 2017 this Court granted the Appellants' motion to withdraw their application.

10. On June 8, 2017 this Court issued a limited dismissal with prejudice that prevented the Appellants from "re-applying for the Certificate of Non-Applicability which [was] specifically at

issue in this appeal." This Court further dismissed without prejudice matters relating to the status or use of the property.

11. On March 1, 2018 the City issued an NOV to the Appellants asserting an "unpermitted duplex" in use at the Property as an enforceable violation. The NOV was timely appealed, and the DRB upheld the NOV concluding that the violation is not subject to the 15-year statute of limitations pursuant to 24 V.S.A. §4454(a).

12. Appellants timely appealed the DRB decision to this Court.

Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). When considering a motion for summary judgment, the nonmoving party receives the benefit of all reasonable doubts and inferences. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. When considering cross-motions for summary judgment, the court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332. In determining whether there is any dispute over a material fact, "we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted); V.R.C.P. 56(c)(1)(A).

Discussion

Appellants moved on July 1, 2019 for summary judgment on Questions 1 and 3 of their Statement of Questions.[5] As a preliminary matter, on August 8, 2019, this Court denied the Appellants' motion to amend their Statement of Questions to add Question 3. In re Burns 12 Weston Street NOV, No. 75-7-18, slip. op. 2–4 (Vt. Super. Ct. Envtl. Div. Aug. 8, 2019) (Durkin, J.).

[5] The Court recognizes that Neighbors' memoranda in opposition to the Appellants' motion for summary judgment addresses Question 2. However, as neither the Appellants nor the Neighbors have moved for summary judgment on this issue, the arguments presented will not be considered for summary judgment.

As such, we recognize that the portions of their motion that relate to Question 3 are **MOOT**.[6] Id. This decision is limited in scope to summary judgment on Appellants' Question 1 and Neighbors' cross-motion for summary judgment on the two pending Questions. See V.R.E.C.P. 5(f); In re Garen, 174 Vt. 151, 156 (2002) (stating that "an appeal to the environmental court is confined to the issues raised in the statement of questions filed pursuant to an original notice of appeal").

Appellants' Question 1 asks: "[w]ether or not the City is estopped from zoning enforcement as to the current duplex use, when the City previously in May 2014 deemed the duplex use lawful and said decision was not appealed." Neighbors cross-move for summary judgment alleging that the issue of whether the Burnses may use their Property as a duplex without a zoning permit violates the doctrine of *res judicata*.

We address the pending legal issues raised by the parties in turn below, beginning with the issues raised by Appellants' Question 1.

I. **Whether the City is estopped from enforcing a zoning violation**.

Appellants argue that the doctrine of equitable estoppel inhibits the City from issuing and enforcing a NOV deeming 12 Weston Street in violation for use as a duplex. In support of this, Appellants contend the City was aware of the Property's use as a duplex and intended its conduct, as evidenced by its May 15, 2014 determination and determination of Non-Applicability of Zoning Permit Regulations, induce reliance. In addition, Appellants argue their lack of specific knowledge indicating the property was not a duplex, their detrimental reliance on the City's representations, and the resulting injustice support equitable estoppel.

Neighbors and City argue the Appellants have failed to satisfy the requirements of equitable estoppel. Both the Neighbors and City contend that the City did not intend its conduct be relied upon, Appellants did not detrimentally rely upon the City's conduct, and Appellants failed to show the resulting injustice would outweigh the negative impacts upon public policy in applying the estoppel.

The doctrine of equitable estoppel "precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his [or her]

[6] The Court recognizes that while the City has addressed Question 3 in its response to the Appellants' motion for summary judgment filed on August 5, 2019, Question 3 will not be considered for summary judgment, given this Court's decision to not allow Appellant's request to amend their Statement of Questions to include a new Question 3.

position in reliance upon earlier representations." My Sister's Place v. City of Burlington, 139 Vt. 602, 609 (1981). This doctrine is founded on "the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon." Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193 (1973). The four elements of equitable estoppel are: "(1) [t]he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." Town of Bennington v. Hanson-Walbridge Funeral Home, Inc., 139 Vt. 288, 293 (1981). Application of equitable estoppel against a government entity requires that all elements of equitable estoppel are met and the injustice resulting from denial of the estoppel outweighs the resulting negative impact on public policy from applying estoppel. In re Griffin, 2006 VT 75, ¶ 18, 180 Vt. 589 (citing Lakeside Equip. Corp. v. Town of Chester, 2004 VT 84 ¶ 8, 177 Vt. 619 (mem.)).

Here, the Appellants' theory of estoppel involves the equitable consequences of the City's May 15, 2014 determination responding to the Rosenstreich complaint affirming the legal status of the Property as a duplex. Appellants further introduced the Zoning Administrator's determination of Non-Applicability of Zoning Permit Requirements (14-1172NA) stating that "two units are recognized" as support for the contention that the City intended its conduct be relied upon. However, this Court recognized the June 3, 2014 determination of Non-Applicability of Zoning Permit Requirements as void. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 2 (Vt. Super. Ct. Envtl. Div. June 8, 2016) (Walsh, J.). The matter presently before the Court challenges Appellants' use of the property as a duplex after the determination of Non-Applicability was voided. Appellants may not raise the determination of Non-Applicability of Zoning Permit Requirements as evidence supporting equitable estoppel because that determination is now void. We therefore complete our analysis of the applicability of the equitable estoppel doctrine without regard to the 2014 Non-Applicability determination.

a. Whether the City intended its conduct be acted upon.

The Vermont Supreme Court has held that equitable estoppel requires the party to be estopped intend their conduct be relied upon. In re Lyon, 2005 VT 63, 20, 178 Vt. 232, 29 (2005) (holding that a Regional Engineer had requisite intent because he informed the permittee of specific steps to be taken, was central to the process as an advisor, and was vested with "authority to issue the permits on behalf of the agency"); In re Langlois/Novicki Variance Denial, 2017 VT 76, ¶ 20, 205 Vt. 340, 349 (2017) (concluding a Zoning Administrator, as an authorized agent of the government, intended to induce reliance when, upon review of relevant materials, he represented no permit was required in two direct conversations with the permittee).

The question remains whether the May 15, 2014 determination provided a targeted and unequivocal manifestation of the City's intent that the Property is not an enforceable zoning violation such that the City intended the Appellant to rely. There are disputed facts regarding whether the City intended that its conduct be acted upon by Appellant. Appellants present a May 15, 2014 determination by an agent of the government as evidence that the City's intended that its conduct be relied upon. Appellants cite the language of the determination, which unambiguously states that "upon investigation . . . [the Property] is not an enforceable zoning violation[.]" Appellants assert this letter was a significant contributing factor to the consummation of their purchase of the Property. Appellants produce affidavits by Appellants and the Property's prior owner in support of their contentions.

The Neighbors and City counter that this determination was confidential in nature and intended solely for a neighboring property owner and the prior owner of the Property. They also argue that the determination's language leaves the Property's status open by stating that if "new information comes to our attention in the future, the CEO may re-evaluate this determination." Furthermore, the Vermont Supreme Court recognized that this determination was not a final and binding decision of a Zoning Administrator. The Neighbors and City therefore argue that the determination does not have a preclusive effect on enforcement on the zoning ordinance. The City contends that Appellants neglected to take further available steps to seek a final and binding zoning status determination. The Neighbors produce affidavits by Norman Williams, Judy Rosenstreich, and Caryn Long in support of these contentions, which this Court accepts as true. See Robertson, 2004 VT 15, ¶ 15. The City and Neighbors also provide the Burlington

Comprehensive Development Ordinance, complaints submitted to the CEO contemplating the use of the Property, and decisions of this Court and the Vermont Supreme Court recounting the procedural history of this case. For all these reasons, we must conclude that one or more factual disputes exist that are material to the legal question of whether the City intended its 2014 letter to Ms. Rosenstreich to be relied upon.

b. Whether the Appellant detrimentally relied on the City's representations

The Vermont Supreme Court has held that detrimental reliance requires a change in the relying party's position and more than mere "misplaced or premature" reliance on a government official's act. Wesco, Inc. v. City of Montpelier, 169 Vt. 520, 524 (1999); In re Griffin, 2006 VT 7, ¶¶ 20–22 (finding no detrimental reliance when a zoning administrator gave incorrect advice but where citizens were "exactly in the same position as they would have been if the former zoning administrator had provided the correct advice").

The issue of whether Appellants detrimentally relied upon the City's representations also presents a genuine dispute of material fact. Appellants assert the purpose of obtaining the Property was to rent it as two units and allege they would not have purchased the property absent the ability to use the Property as a duplex. Neighbors argue the Appellants were firmly committed to purchasing the Property prior to any legal showing of the Property's status as a duplex. In support of this contention, Neighbors proffer two lease agreements entered into by Appellants for the Property that predate the Rosenstreich complaint and the City's May 15, 2014 determination.[7] In addition, Neighbors point to Appellants' application for a Certificate of Non-Applicability after the May 15, 2014 determination as suggestive of the Appellant's uncertainty in the status of the Property.

Based on the facts presently before the Court and giving the non-moving party the benefit of all reasonable doubts and inferences, we find that there are genuine disputes as to the material facts concerning the City's intent that its conduct be relied upon and Appellants' detrimental reliance. For the reasons above, we **DENY** the Appellants' cross-motion for summary judgment on Question 1 of their Statement of Questions.

II. **Whether the Appellants' appeal should be dismissed on the basis of *Res Judicata*.**

[7] These leases were set to commence on June 1, 2014.

Neighbors cross-move for summary judgment and allege that Appellants' appeal is precluded under the doctrine of *res judicata*. Neighbors argue that the issue of whether the Burnses may use the Property as a duplex without a zoning permit is precluded because the Burnses failed to raise it in a prior proceeding. In Appellants' supplemental memoranda filed on November 12, 2019, Appellants do not address the implications of this Court's 2016 dismissal of their prior appeal, resulting in a voiding of the prior City determination.[8] Appellant' Response to Neighbors' Motion for Summary Judgment, at 1–3 filed Nov. 12, 2019; see also, In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 1–2 (Vt. Super. Ct. Envtl. Div. June 8, 2016) (Walsh, J.)

The Vermont Supreme Court has held that the "judgment in [a] prior action 'operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" Tudor v. Kennett, 87 Vt. 99, 100 (1913) (quoting Cromwell v. Sac County, 94 U.S. 351, 352 (1876). Claim preclusion rests upon the "fundamental precept that a final judgment on the merits puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." Faulkner v. Caledonia Cnty. Fair Ass'n, 2004 VT 123, ¶ 8, 178 Vt. 51; Nat. Res. Bd. Land Use Panel v. Dorr, 2015 VT 1, ¶ 11, 198 Vt. 226, 231 (holding that a party was precluded under *res judicata* when they failed to challenge an enforcement action resulting in a final judicial order and judgement being filed and approved). This doctrine only applies to issues that were or could have been adjudicated in the earlier action. Jensen v. State, 136 Vt. 200(1978); Town of Waterford v. Pike Industries, Inc., 135 Vt. 193 (1977).

The Vermont Supreme Court has continuously recognized that a voluntary dismissal with prejudice is "treated as an adjudication on the merits" and "tantamount to a concession." Littlefield v. Town of Colchester, 150 Vt. 249, 251 (1988) (holding that a "plaintiff's voluntary dismissal with prejudice of his appeal of the denial of his subdivision application bars his right, in a separate civil action, to contest the constitutionality" under *res judicata*); Russell v. Atkins, 165 Vt. 176, 180 (1996) (holding that parties are bound by a voluntary dismissal of their suit).

[8] In their November 12, 2019 filing, Appellants reiterated their contention of the applicability of equitable estoppel. Appellant' Response to Neighbors' Motion for Summary Judgment, at 1–3 filed Nov. 12, 2019. Appellants were provided the opportunity to respond to Neighbor's cross-motion for summary judgement, specifically addressing the basis of *res judicata*, in this Court's prior Entry Order. In re Burns 12 Weston St. NOV, No. 75-7-18 Vtec, (Oct. 25, 2019) (Durkin, J.).

However, a dismissal without prejudice is not considered as an adjudication on the merits. Rheaume v. Maguire, No. 2012-040, 2012 WL 5974998, at *2 (Vt. Sept. 26, 2012).

Here, while this Court previously dismissed with prejudice, the dismissal was "limited to preventing the Burnses from re-applying for the Certificate of Non-Applicability which is specifically at issue in this appeal" and expressly stated the dismissal did not affect the status or use of the Property. In re Burns Two-Unit Residential Bldg., No. 120-8-14, slip op. 2 (Vt. Super. Ct. Envtl. Div. June 8, 2016) (Walsh, J.). Therefore, the language of the order indicates the status or use of the property was not prejudiced by the dismissal. The dispute presently before the Court concerns promissory estoppel and application of the 15-year statute of limitations. In other words, it concerns the status and use of the Property. Thus, there has been no decision on the merits of this specific legal issue.

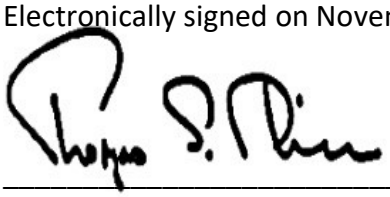
For all these reasons, we **DENY** the Neighbors cross-motion for summary judgment premised upon *res judicata*, as there was no prior final adjudication on the merits on the issue of the property's status or use.

Conclusion

For the forgoing reasons, we conclude that there is a genuine issue of material fact concerning whether the City is equitably estopped from asserting that the property is not in violation of the zoning code. Therefore, we **DENY** Appellants' motion for summary judgement on Question 1 in their Statement of Questions. We also conclude that this Court previously dismissed without prejudice issues concerning the Property's status and use. Consequently, we **DENY** the Neighbors cross-motion for summary judgment on the basis of *res judicata*. We must therefore conduct an evidentiary hearing to determine the historical use of this Property, and whether the credible evidence supports a conclusion that such use has continuously existed to such an extent as to enjoy the statutory limit upon when zoning violations may be prosecuted. See 24 V.S.A. §4544(a); In re 204 N. Ave. NOV, 2019 VT 52.

The Court Operations Manager will set this matter for a pre-trial status conference within the next 45 days, so the Court and parties may discuss trial preparation and scheduling.

Electronically signed on November 19, 2019 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



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Thomas S. Durkin, Superior Judge
Environmental Division