

NNH CV22-6125247 S : SUPERIOR COURT
AMY TORRE, ZONING ENFORCEMENT : JUDICIAL DISTRICT OF
OFFICER, TOWN OF WALLINGFORD, ET AL : NEW HAVEN
V. : AT NEW HAVEN
CALOGERO MARINO, AS TRUSTEE FOR :
ANGELO JOSEPH MARINO TRUST, ET AL : JUNE 7, 2024

MEMORANDUM OF DECISION

The plaintiff, Town of Wallingford Planning and Zoning Commission, brought this two-count complaint alleging that the defendant is using the nonconforming, legal two-family dwelling, located at 5 Cedar Street, Wallingford as a three-family dwelling in violation of § 4.1 of the Town's Zoning Regulations and the conduct is willful. The plaintiff is seeking an injunction prohibiting a third unit, fines, a civil penalty, costs and reasonable attorney's fees.

The defendant, Calogero Marino, in the Answer denied the allegations and left the plaintiff to its burden of proof.

At a trial to the court the plaintiff presented three witnesses: 1) Amy Torre, Zoning Enforcement Officer; 2) Thomas Talbot, former Assistant Town Planner and Zoning Officer; and 3) Justin Rosetti, Chief Building Inspector. The defendant presented one witness himself. The court also admitted twenty-one exhibits into evidence.

EVIDENCE

The Town of Wallingford promulgated Zoning Regulations as amended effective September 29, 1985. The regulations have been amended several times starting December 15, 1985 through and including January 17, 2024 (Exhibit #1). The pertinent amendment effective

January 30, 1990 states the following: additional dwelling units are permitted in an existing multifamily dwelling subject to site plan approval in accordance with Article VII and several conditions including the total number of apartments per dwelling shall not exceed the number of floors per dwelling. Basement apartments will not be permitted and basements cannot be used in determining the number of floors in the dwelling (Exhibit # B, Section C).

The regulations as amended effective January 19, 1992 and November 17, 2007 permits existing legal multifamily dwellings to add units, and subject to site plan approval in accordance with Article VII and all of the following (nine) conditions. Paragraph C states the “total number of units per dwelling shall not exceed the number of stories per dwelling and only one dwelling unit will be permitted in each story except that basement and cellar dwelling units will not be permitted” (Exhibit #1).

In the zoning regulations a dwelling unit is defined as ‘a dwelling or portion thereof, providing a single house keeping units with living, sleeping, cooking and bathroom facilities.’ A multifamily unit is defined as a building designed for more than two families living independently of one another.

There was an initial complaint of a zoning violation at the premises on April 20, 1993. The complaint alleged the property owner had rented new apartments and was in the process of renting and referred to a newspaper classified ad. (This ad was not offered into evidence.) There were two additional complaints on April 21, 1993. The first of the two alleged that the property owner was showing possible new dwelling units in (the) house. The second alleged they had inquired about the number of legal dwelling units in the house (Exhibit #9).

On April 22, 1993 the town sent a letter of inquiry in reference to the complaint. On April 23, 23 (the year appears to be a scrivener’s error and should be 1993 as all the references are to

the year 1993), the defendant called the zoning enforcement department and informed them that he would not allow an inspection until after the Housing Code Officer submitted an affidavit from the previous owner. The zoning department notified the defendant that they accepted the affidavit as proof that the dwelling was a legal two family but there was still a need for an inspection to make sure that there were only two dwelling units since the classified ad suggested otherwise (Exhibit #9).

The previous owner's affidavit dated November 19, 1984, declared ownership since prior to March 4, 1957 and he had been given permission to build an apartment to attach to the dwelling. Everyone agrees that a unit was built over the garage which made the dwelling a legal two family.

The letter dated April 29, 1993 requesting an inspection on May 5, 1993 referenced the affidavit and the defendant's representation that there were no more than two units in the dwelling (Exhibit #12).

By letter dated May 6, 1993 the Assistant Town Planner, Mr. Talbot thanked the defendant for cooperating in the inspection of May 5, 1993 and detailed the finding from the inspection which found separate kitchen facilities in the second floor for a total of four kitchens.

The defendant was also informed that the basement and two upper floors of the main structure constitute one legal dwelling unit and can only be rented as such. Therefore, the second-floor kitchen should be removed. Furthermore, to use 5 Cedar Street as a three-family dwelling he would need site plan approval from the Planning and Zoning Commission as stated in the regulations (Exhibit #11).

By letter dated May 19, 1993 and delivered May 22, 1993, Mr. Talbot notified the defendant of the following: 1) that they are aware of an electrical permit for a 220 amp electrical permit for a second floor electric range at the premises and separate doorbell chimes for the

second floor and the basement, 2) that this information suggests that the defendant did not have any intention of removing the kitchen on the second floor and may be considering renting the two floors of the main section of the house along with the basement as three separate units, 3) that the main section including the two floors and the basement constitutes one legal dwelling unit and the apartment over the garage constitutes another and 4. the second floor kitchen constitutes a third kitchen in a single dwelling unit (Exhibit #14).

Mr. Talbot restated the definition of a dwelling unit as defined in the zoning regulations and outlined what constituted the third dwelling unit of the second floor, i.e. the kitchen, the bathroom, living and/or sleeping area and a separate doorbell. Mr. Talbot also informed the defendant that attempting to create any additional dwelling units, either in the basement or the second floor, is prohibited by the zoning regulations. He also informed him of the section violated and he must remove the kitchen appliances, cabinetry and plumbing within thirty days or legal action will result. The defendant also received notice of the fifteen days to appeal.

The zoning violation log dated June 21, 1993 noted that all kitchen equipment on the second floor has been removed and there were no violations at the time. This compliance lasted until November 1993.

By letter dated November 16, 1993, Mr. Talbot notified the defendant that the office again had been notified that again there was a full kitchen on the second floor of the main dwelling. Having a full kitchen including kitchen cabinets, sink, stove and refrigerator would allow the second floor to be used as a separate dwelling in violation of the zoning regulations. Mr. Talbot again notified the defendant that all kitchen cabinets, plumbing and appliances should be removed (Exhibit #10).

Neither the plaintiff nor the defendant offered any evidence as to what occurred between November 1993 and January 7, 2020 and whether the defendant was in compliance.

The issue concerning whether the premises was a legal two family or became an illegal three family became 'front and center' on January 20, 2020 according to the Zoning Investigation Record (Exhibit #4). The defendant went to the Planning and Zoning Department to apply to convert (legalize) the two family to a three family.

The defendant claimed that there is existing three plus units, and the dwelling has been a three family since he purchased the property with two units on the upper half story. He was advised that the property is a legal two family per the determination in 1993, as well as building permit records and it does not meet the regulations for a multi-family conversion from a two to a three-family November 16, 2021, the Planning and Zoning Department, dwelling.

On January 22, 2020 Planning and Zoning sent a notice of violation based on the defendant's action. The next time for activity concerning this property was November 16, 2021. Unfortunately, the worldwide pandemic struck (i.e. Covid) and there was lax enforcement. The state was 'shut down' in late March 2020 and gradually reopened in 2021.

On November 16, 2021 the Planning and Zoning Department received a referral from the Building Department. The defendant went to the building department looking for a certificate for three units. He requested an inspection of a three family at 5 Cedar Street and an added residential unit on the first floor. However, the address on the record says 155 South Colony Commercial Zone and the defendant was still insisting 5 Cedar Street is a three family.

The defendant's application was not submitted into evidence so the reference in the record to 155 South Colony is unclear. However, what is clear is the ongoing saga on the residence being a legal two family and any addition of a third dwelling unit has not been authorized.

By certified letter dated November 30, 2021, delivered December 4, 2021 the Land Use Specialist/Zoning Enforcement Officer, Ms. Torre issued to the defendant a Notice of Violation. This notice informed the defendant that the subject property remained in violation of the zoning regulations for the continued use of the dwelling as a three-family dwelling, that the property is a legal two family which he continues to rent and use as a three family in violation of the current violations. The defendant was ordered to correct the violation within 30 days of receipt of the notice and noncompliance will result in the issuance of a Cease and Desist Order. He was also notified of the penalties for failure to comply with the order which includes daily fines and/or a one time civil penalty of \$2,500.00. Finally, he was asked to contact Zoning Enforcement to discuss the matter and options to come into compliance.

On November 16, 2021, the defendant went to the Planning and Zoning Department still refusing to comply. He was reminded he could have appealed the issuance of the Cease and Desist Order, he did not do so and the appeal period had expired. There was also another complaint by the tenant and he said he will not comply with the order.

Another Cease and Desist Order was issued dated March 8, 2022 and served in hand on March 17, 2022. The Notice of Violation dated March 9, 2022 was also hand delivered on March 17, 2022. The Notice of Violation outlined the violation resulting from the inspection of March 3, 2022 of converting the two-family dwelling to a three family without zoning approval. The second floor apartment has only one exit and no one-hour fire separation between the first and second floor apartments. This notice informed him of the right to appeal, that variations or exemptions may be granted but the application must be filed with the local building official. The violation also included the penalties pursuant to C.G.S. § 29-254a and § 29-394. The Cease and Desist Order requested the defendant to stop using and renting the legal two-family dwelling as a

three-family unit. Both the Cease and Desist Order and the Notice of Violation encouraged the defendant to make contact to discuss and reach a timely resolution (Exhibits #6 and #15).

The defendant again did not appeal and on April 19, 2022 requested an inspection on the illegal three-family unit. The Building Inspection Department refused and referred the matter to legal.

On November 1, 2023, Michael Szymasek applied for a permit from the Building Department to disconnect the second-floor stove line at the basement panel. He identified the property type as 1-2 family (Exhibit #16).

The Building Department described the permitted activity as follows: “Disconnect/not approved rental unit (P + Z) 2nd floor kitchen range and at basement panel.” The property was inspected on February 16, 2024. The reported results were that 1) the plumbing lines had been capped, 2) the electrical to the stove was still in the panel with the range outlet was still in place and 3) the hood to the stove was still there (Exhibit #18). Mr. Rossetti testified that the basement electrical panel needs termination and the breakers need to be removed.

The defendant submitted a report from Michael Szymasek which stated the stove line to the second floor has been disconnected at the panel and outlet removed. Unfortunately, this report was not dated (Exhibit C). However, the testimony of Ms. Torre indicates there remains a foyer and railing that could be reconnected.

Mr. Marino testified that he believes he has complied except for the removal of the wall described by Ms. Torre. He testified he has disconnected the stove, removed the kitchen and dismantled the foyer where there was the railing. He stated the only thing he has not done is remove the wall because it is attached to the second floor and his granddaughter goes upstairs and the railing is attached to the wall. Additionally, Mr. Talbot never told him to remove the wall.

Mr. Marino is aware of the Cease and Desist Order and understands he cannot rent the second floor as a separate apartment as much as he would like to. He also represented that his son's mother-in-law had occupied the unit, no one has lived there since 2022 and he wants to use it for family members.

CONCLUSION

The court has considered the evidence (exhibits and testimony), weighed the credibility of the witnesses and concludes as follows: this is an ongoing dispute between the parties since 1993. The defendant claims he bought the property as a three family. However, the affidavit from the prior owner shows he obtained a building permit to build the apartment over the garage on the second floor. It does not permit the second floor which is part of the main dwelling to be an additional dwelling unit. In 1993 and 2020, the defendant sought permission for a third dwelling unit and such permission was never granted.

Between 1993 and 2024 there have been violations, inspections, noncompliance and compliance. At this time, the last reported inspection identified some things to be corrected and the defendant believes he is mostly in compliance. The town agrees except for the wall which is described as a separation wall.

The plaintiff is also seeking a finding that the defendant's conduct was willful, penalties of a daily fine between March 8, 2022 until the violations are remedied, a one-time civil penalty of \$2,500.00, costs and attorney's fees pursuant to C.G.G. § 8-12.

The defendant now fully understands that the second floor cannot be used as a separate dwelling unit, even for family members, unless he has site plan approval and has complied with all of the conditions as required in the zoning regulations.

“Whether a party’s conduct is willful is a question of fact . . . the term has many and varied definitions with the applicable definition often turn(ing) on the specific facts of the case and the context in which it is used . . . willful misconduct has also been defined as intentional conduct that is deemed highly unreasonable or indicative of bad faith.”

(Citations omitted; internal quotation marks omitted.) *City of Stamford, et al v. Ten Rugby Street, LLC*, 2022 WL 156677, May 18, 2022 (Hon. Charles T. Lee)

Given the thirty-year history between the plaintiff and the defendant, the periods of compliance and noncompliance, the relationships between the previous Assistant Town Planner/Zoning Enforcement Officer and the defendant, the Land Use Specialist/Zoning Enforcement Officer and the defendant, and the current Building Official and the defendant, the court finds under the facts of this case that the defendant’s conduct was not willful. Additionally, there were different penalties and appeal times stated in the various correspondence and orders from the town. The defendant is an elderly Italian immigrant where he claims his English is not the best. The court takes note that he speaks with a heavy Italian accent. This does not excuse the thirty-year history of compliance and noncompliance and an injunction is appropriate.

Accordingly, the court grants the request for an injunction and the details are in the following order.

ORDER

1. The defendant, Calogero Marino, as Trustee for Albert Terry Marino Trust, is enjoined from using the existing legal two-family dwelling located at 5 Cedar Street, Wallingford as a three-family dwelling unit.
2. The basement and two upper floors of the main structure comprise one legal dwelling unit and can only be rented as such. Therefore, the second floor, even for family members, cannot be used as a separate dwelling unit without site plan

approval from the Planning and Zoning Commission and in compliance with all sections of 6.22 of the Zoning Regulations.

3. Any use of the second floor is ordered discontinued immediately.
4. Any kitchen equipment currently in the second floor unit must be removed within fifteen (15) days of receipt of the court's order. This includes any kitchen cabinets, plumbing or appliances.
5. No separate entrances to either the basement or the second floor is permitted.
6. No installation of separate doorbell or chimes for either the basement or second floor is permitted.
7. If such doorbell or chimes exist, they must be disconnected within fifteen (15) days of receipt of this order.
8. Any reinstallation of separate cooking facilities, plumbing lines, or electrical hookup on the second floor requires permission from the Building Department.
9. You must permit a follow up inspection on the report of the inspection of February 16, 2024 (Exhibits #18 and C) to verify compliance within fifteen (15) days of receipt of this order.

Respectfully submitted,


Crawford, JTR