SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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SUSAN McWHINNEY, GERARD GOGGIN, THOMAS REYNOLDS, DR. STUART RASCH, CAROLYNN RASCH, DR. PETER TAUB, JOYCE TAUB, JOHN TORPEY, BRENDA TORPEY, CHRISTOPHER VAN HOUTEN, SHARON VAN HOUTEN, PAUL CUSTER, and FAITH CUSTER,

Plaintiffs/Petitioners,

-against-

ROCKLAND CIDER WORKS, LLC, and VAN HOUTEN FARM MARKET BENEFIT TRUST, intending to be all those persons having any management, control, occupancy, or use of the premises which is the subject matter of this litigation, the TOWN OF ORANGETOWN, TOWN OF ORANGETOWN OFFICE OF BUILDING, ZONING, PLANNING, ADMINISTRATION AND ENFORCEMENT, JANE SLAVIN, in her official capacity as Director of The Town of Orangetown Office of Building, Zoning, Planning, Administration, and Enforcement, and Interested Party, the NEW YORK STATE DIVISION OF ALCOHOLIC BEVERAGE CONTROL and THE NEW YORK STATE LIQUOR AUTHORITY,

Defendants/Respondents.

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ROCKLAND CIDER WORKS, LLC, VAN HOUTEN FARM MARKET BENEFIT TRUST, ELISABETH VAN HOUTEN and DARIN VAN HOUTEN,

Counterclaimants,

-against-

SUSAN McWHINNEY, GERARD GOGGIN, THOMAS REYNOLDS, DR. STUART RASCH, CAROLYNN RASCH, DR. PETER TAUB, JOYCE TAUB, JOHN TORPEY, BRENDA TORPEY, CHRISTOPHER VAN HOUTEN, SHARON VAN HOUTEN, PAUL CUSTER, and FAITH CUSTER

Counterclaim Defendants.

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HON. THOMAS P. ZUGIBE, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION AND ORDER

Index No. 32665/2022
Motion Seq. #9 & #10

The following papers filed to NYSCEF as Documents #227-257, 264-272, 273-274 were read on the summary judgment motion brought by Plaintiffs/Petitioners (seq. #9) on their Complaint/Petition and to dismiss the Counterclaimants' counterclaims and on the cross-motion (seq. #10) brought by Counterclaimants, Rockland Cider Works, LLC (RCW), Van Houten Farm Market Benefit Trust (the Trust), Elisabeth Van Houten and Darin Van Houten, for an order dismissing the action as moot and for voluntary dismissal of all counterclaims.

Upon the foregoing papers, the motions are determined as follows:

Plaintiffs commenced this hybrid declaratory judgment action and NYS Town Law §268(2) Taxpayers Action to stop the operation of a cidery business known as Rockland Cider Works (RCW) located in Orangeburg, which property is owned by the Trust. This matter arises from a prolonged contentious history spanning several years and a litigation history of more than three years. The parties involved are highly familiar with the factual and procedural background, which has been the subject of multiple pleadings, motions, and prior rulings. In light of the extensive record already established, the Court finds it unnecessary to recount the full background at length in this decision.

It is undisputed that use of the subject property as a cidery business is not permitted as of right under the Town Code, and that a use variance is required for such operation. Rather than obtain a use variance, the Respondents have, instead, withdrawn their pending zoning text amendment application and site plan application, and surrendered their farm winery license and warehousing permit. According to Respondents' counsel, the cidery operation is now located entirely in Gilboa, New York in Schoharie County.

Petitioners now move for summary judgment granting (1) declaratory judgment that the use and operation of a cidery business is in violation of the Town Code and a nuisance; (2) a permanent injunction restraining and enjoining the Respondents from using, operating or engaging in any activities related to its cidery business at the Property; (3) judgment awarding Plaintiffs just and adequate compensation for their personal and property damage caused by Respondents' violative use and setting the matter down for hearing; and (4) dismissal of Respondents' counterclaims.

Instead of submitting opposition, Respondents cross-move for an order to voluntarily dismiss their counterclaims, and to dismiss the petition/complaint contending, *inter alia*, in effect that the proceeding has been rendered academic by the relocation of the business and surrender of Respondent's winery license and warehousing permit. Petitioners oppose the cross-motion, contending that such withdrawal would only serve to reward the Respondents by allowing them to avoid the consequences of their bad actions and that the doctrine of mootness is inapplicable.

Since a decision on the cross-motion may ultimately determine Petitioners' motion, the Respondents' cross-motion shall be addressed first. Turning to the request for a voluntary discontinuance of their counterclaims, " '[t]he determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR 3217 (b) rests within the sound discretion of the court' " (*Haughey v Kindschuh*, 176 AD3d 785, 786 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v*

Chaplin, 107 AD3d 881, 883 [2d Dept 2013]) and shall be " 'upon terms and conditions, as the court deems proper' " (*Kondaur Capital Corp. v Reilly*, 162 AD3d 998, 999 [2d Dept 2018], quoting CPLR 3217 [b]). "[O]rdinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted" but, where there are "special circumstances," including prejudice to an adverse party, leave to discontinue may be denied (*Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *see Haughey v Kindschuh*, 176 AD3d at 786).

Here, Respondents assert three counterclaims sounding in (1) declaratory judgment, (2) trespass and invasion of privacy and (3) intentional infliction of emotional distress. The second and third counterclaims are asserted only as against Petitioners, McWhinney and Goggin. There is no dispute that the first counterclaim is without merit and there are no special circumstances preventing the Court from granting its discontinuance. As to the second and third counterclaims, Petitioners contend that they are SLAPP suits providing Petitioners with an award of attorney's fees if dismissal is granted.

"SLAPP suits—strategic lawsuits against public participation—[ ] are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future" (*600 W. 115th St. Corp. v. Von Gutfeld,* 80 N.Y.2d 130, 137 [1992], *cert denied* 508 U.S. 910 [1993]). In 1992, as a response to "rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards," New York enacted legislation "aimed at broadening the protection of citizens facing litigation arising from their public petition and participation" (*id*., citing L 1992, ch 767). The New York anti-SLAPP statute initially limited its application to instances where speech was aimed toward "a public applicant or permittee," i.e. an individual who applied for a permit, zoning change, lease, license, or other similar document from a government body (L 1992, ch 767, § 3). As applied, the statute was "strictly limited to cases initiated by persons or business entities [ ] embroiled in controversies over a public application or permit, usually in a real estate development situation" (Sponsor's Mem, Bill Jacket, L 2020, ch 250).

In 2020, the legislature amended New York's anti-SLAPP statute to "broaden the scope of the law and afford greater protections to citizens" beyond suits arising from applications to the government (*Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998, 1000 [2d Dept. 2021]). Among other changes, Civil Rights Law §76-a was amended to expand the definition of an "action involving public petition and participation" to include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (Civil Rights Law § 76-a[1][a][1]). The amended law further provides that "public interest" "shall be construed broadly and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a[1][d]). Additionally, Civil Rights Law §70-a was amended to mandate, rather than merely permit, the recovery of costs and attorneys' fees upon demonstration "that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for extension, modification or reversal of existing law" (Civil Rights Law §70-a[1][a]).

Here, Petitioners have established that McWhinney and Goggin's purported actions and statements were made "in connection with an issue of public interest" (Civil Rights Law §76-a[1][a][1], [d]) and not a sham protest. Respondents failed to satisfy their burden of demonstrating that their claims have any substantial basis. In fact, Respondents failed to make any argument to support their claims. While the Respondents' claim to have attempted a settlement, the Court is not persuaded. Many of the actions were made in response to various violations and letters received from the Town and the State Liquor Authority. The timing and nature of this so-called last-ditch effort to resolve this matter suggest it was less than genuine. Instead, it appears to be a calculated effort to avoid the repercussions of their actions. Genuine settlement efforts are typically made early and in good faith—not as a last-minute shield against accountability. Respondents' motion for an order to voluntarily dismiss the counterclaims is denied, and Petitioners are entitled to summary judgment dismissing the counterclaims, as Respondents have failed to raise any genuine issues of material fact. Petitioners' request for attorney's fees shall be determined at a hearing for damages, provided they are able to parse out the portion of fees incurred solely in defense of the counterclaims.

In response to Petitioners' seeking judgment on their claims, Respondents argue that in light of the changed circumstances, the relief sought by the Petitioners is no longer necessary or capable of resolution by the court, rendering their claims moot. Petitioners assert five causes of action, including causes of action seeking judgment declaring that the operation of the cidery business violates the Town Code, that the cidery operation constitutes a nuisance, and that the farm winery license is invalid; a cause of action seeking to recover personal and property damage resulting from the cidery operation; and a cause of action seeking injunctive relief enjoining RCW and the Trust from operating the cidery business.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980] [citations omitted]; *see Matter of Ruotolo v State of New York Div. of Hous. & Community Renewal*, 211 AD3d 955, 956 [2d Dept 2022]). A matter is academic if "an adjudication of the merits will [not] result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Matter of Ruotolo v State of New York Div. of Hous. & Community Renewal*, 211 AD3d at 957). An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts (*see City of New York v Maul*,.14 NY3d 499 [2010]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Here, because the cidery operation is now located in a different county and RCW has withdrawn all applications and surrendered their farm winery license and warehousing permit in connection with the subject property, the underlying controversy has been rendered moot and a judicial determination relative to the injunctive declaratory relief sought would constitute the

rendering of an advisory opinion. Moreover, this case does not warrant the invocation of the exception to the mootness doctrine.

Although Petitioners argue there is a likelihood of recurrence given Respondents' history of repeated violation of the Town Code despite the issuance of violations by the Town, such contentions are speculative, at best. That being said, it is *strongly recommended* Respondents refrain from operating its cidery business at the subject property without obtaining the required variances and permits. Petitioners' additional arguments of exception to the mootness doctrine are equally unavailing. The issues presented here do not "typically evade review," nor are they substantial or novel. Nonetheless, this does not in and of itself obviate Petitioners' claim for actual compensatory damages.

Petitioners still have a viable claim for private nuisance against RCW and the Trust. The elements of a cause of action for private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." (*Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.,* 41 N.Y.2d 564, 570 [1977]); *Taggart v. Costabile*, 131 A.D.3d 243, 247 [2d Dept. 2015]). In its Decision and Order dated January 13, 2023, (NYSCEF #87), this Court has already determined that the Petitioners have demonstrated that the cidery business has resulted in not only diminutions in their respective properties' values but significant interferences with their use and enjoyment thereof.

Under New York law:

> The interference may take the form of (1) damage to plaintiff's land, buildings or vegetation, [cit.om.], (2) annoyance, inconvenience or discomfort to one who has the necessary property interest, [cit.om.], or (3) the threat of future substantial damage to the plaintiff's property, [cit.om.]. However, damage to the property is not required, [cit.om.]. The interference must be substantial, not trifling, material and actual not fanciful or sentimental, [cit.om.].

The standard by which substantiality is measured is whether the situation would disturb the physical comfort of normal persons in the community, [cit.om.], not whether plaintiff because of an illness or idiosyncrasy has in fact been discomforted... [cit.om.]....(2A NY PJI3d 3:16, at 150-151 [2020] [citing cases]). Since actual damage to the Plaintiffs' property is not required for a private nuisance to occur, the operation of the cidery business, a nonresidential use, that creates noxious or objectionable noise and odors could meet the legal requirement for an "interference" in the sense that it constituted an "annoyance, inconvenience or discomfort to one who has the necessary property interest" or a "threat of future substantial damage to the plaintiff's property" (*See, id*.). Respondents do not contend otherwise. Petitioners are entitled to a hearing on monetary damages for the harm they already suffered.

The parties' remaining contentions have been considered and are found to be without merit.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion (sequence #9), to the extent that it seeks summary judgment on their claim for monetary damages on their private nuisance claim and to dismiss the counterclaims of Counterclaimants, RCW, the Trust, Elisabeth Van Houten and Darin Van Houten, is granted. The motion is otherwise denied; and it is further

ORDERED, that the cross-motion (sequence #10) by RCW and the Trust to dismiss Petitioners' declaratory judgment claims as moot is granted. The motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned for an in-person status conference on ***Monday, October 27, 2025, at 2:00 p.m***. in order to discuss potential settlement of this damages issue, and, if not successful in settlement, to schedule the hearing.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
September 29, 2025

HON. THOMAS P. ZUGIBE, J.S.C.

To: All counsel via NYSCEF