SHORT FORM ORDER

INDEX No. 07-493

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-5-11
ADJ. DATE 5-5-11
Mot. Seq. # 008 - MotD
009 - XMD

HUNTER SPORTS SHOOTING GROUNDS, INC.

Plaintiff,

- against -

BRIAN X. FOLEY, STEVE FIORE-ROSENFELD, KEVIN T. MCCARRICK, KATHLEEN WALSH, CONNIE KEPERT, CAROL BISSONETTE, and TIMOTHY P. MAZZEI, Constituting the Town Board of the Town of Brookhaven, and the COUNTY OF SUFFOLK, as a necessary party pursuant to Civil Practice Law and Rules 1001 (a),

Defendants.

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Upon the following papers numbered 1 to 79 read on this motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 42; Notice of Cross Motion and supporting papers 43 - 57; Answering Affidavits and supporting papers 58 - 64; 65 - 66; Replying Affidavits and supporting papers 67 - 77; Other 78 - 79 (sur-reply); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (# 008) by defendant Town Board of the Town of Brookhaven for summary judgment dismissing all claims of plaintiff and all cross-claims of defendant County of Suffolk against it is decided as follows; and it is further

ORDERED that this Court declares that the Town's noise ordinance is constitutional and valid; and it is further

ORDERED that this cross-motion (# 009) by plaintiff for an order granting summary judgment on its first, second, third and sixth causes of action against defendant Town Board of the Town of Brookhaven is denied without prejudice to timely renewal, upon submission of proper papers.

Plaintiff Hunter Sports Shooting Grounds, Inc. ("HSSG") operates a trap and skeet shooting range on County-owned lands as the licensee of the County of Suffolk ("County"). In November and December 2006, the Town of Brookhaven ("Town") commenced a series of proceedings in the Sixth District Court, Suffolk County ("District Court"), alleging that HSSG was in violation of the Town's noise ordinance (i.e., Chapter 50 of the Brookhaven Town Code) at various times. HSSG then commenced this action, *inter alia*, for a judgment declaring that the Town's actions in enforcing the noise ordinance against it were unconstitutional. In a prior order dated May 8, 2007 (Weber, J.), the Supreme Court directed that the County, as the owner of the land where HSSG operated its business, be joined as a necessary party. The Town subsequently moved for summary judgment dismissing the complaint, and HSSG cross-moved for summary judgment in its favor on the first, second, third and sixth causes of action. In an order dated January 30, 2009 (Weber, J.), the Supreme Court, *sua sponte*, dismissed the action on a ground not raised by the Town, i.e., that the resolution of the instant matter should be left to the discretion of the District Court wherein the prosecution of the alleged noise ordinance violations were pending.

By order dated May 4, 2010, the Appellate Division found that the Supreme Court erred in, *sua sponte*, dismissing this action on the ground that the resolution of the instant matter should be left to the discretion of the District Court, because the District Court lacks jurisdiction to award the declaratory relief that was sought in the instant action (*see* ***Hunting Sports Shooting Grounds, Inc. v Foley***, 73 AD3d 702, 901 NYS2d 92 [2d Dept 2010]). The matter was remitted to the Supreme Court for determination of the motion and cross-motion for summary judgment.

HSSG's verified supplemental complaint alleges ten causes of action against the Town, to wit: prior non-conforming use; unlawful confiscation; unlawful taking; due process and equal protection violations; public interest immunity; pre-exemption and Municipal Home Rule law violation; exemption under Brookhaven Code §§ 50-6 (a) and 50-7 (b); unconstitutionality of Brookhaven Code § 50-6 (a); improper enforcement of time limitation under Brookhaven Code § 50-9 (b); and citations numbered 90022 and 90023 being facially defective as they did not comply with Criminal Procedure Law §§ 100.15 and 170.35 (1) (a). In sum, HSSG alleges that the Town's noise ordinance is unconstitutional, and that Brookhaven Code § 50-6 (a) is unconstitutionally vague. HSSG also alleges that the noise ordinance was not lawfully or properly applied to HSSG, and that the application of the noise ordinance to its business constitutes, *inter alia*, unlawful confiscation and taking in violation of its rights under the federal and state due process and equal protection clauses.

In the instant motion, the Town seeks summary judgment dismissing the complaint and all cross-claims against it on the grounds that the Town's noise ordinance is constitutional, and that the noise ordinance was lawfully and properly applied to HSSG.

Brookhaven Town Code § 50-2 (b) defines "noise disturbance" as "any sound that: (1) Endangers the safety or health of any person; (2) Disturbs a reasonable person of normal sensitivities; or (3) Endangers personal or real property."

Brookhaven Town Code § 50-5 (a) states that "[n]o person shall cause, suffer, allow or permit the operation of any source of sound on a particular category of property or any public land or right-of-way in such a manner as to create a sound level that exceeds the particular sound level limits set forth in Table I."

Brookhaven Town Code § 50-6 (a) states that "[n]o person shall cause, suffer, allow or permit to be made verbally or mechanically any noise disturbance. Noncommercial public speaking and public assembly activities conducted on any public space or public right-of-way shall be exempt from the operation of this section."

Brookhaven Town Code § 50-7 (b) states that "[n]oise from municipality sponsored celebration or events shall be exempt from the provisions of this chapter."

Brookhaven Town Code § 50-9 (b) states that "[e]ach two-hour period of violation of any provision of this chapter shall constitute a separate violation."

In challenging the constitutionality of Chapter 50 of the Brookhaven Town Code, HSSG faces a heavy burden (*see* ***Twin Lakes Dev. Corp. v Town of Monroe***, 1 NY3d 98, 769 NYS2d 445 [2003]). It bears emphasis that the burden of proof is upon the party challenging the ordinance (*see* ***Town of North Hempstead v Exxon Corp.***, 53 NY2d 747, 439 NYS2d 342 [1981]). Statutes are presumed to be constitutional, and that presumption can only be rebutted by proof beyond a reasonable doubt (*see* ***D'Amico v Crosson***, 93 NY2d 29, 686 NYS2d 756 [1999]; ***City of New York v State of New York***, 76 NY2d 479, 561 NYS2d 154 [1990]; ***Maresca v Cuomo***, 64 NY2d 242, 485 NYS2d 724 [1984], *appeal dismissed* 474 US 802, 106 S. Ct 34 [1985]). A local ordinance is cloaked with the same strong presumption of constitutionality (*see* ***41 Kew Gardens Road Assocs. v Tyburski***, 70 NY2d 325, 520 NYS2d 544 [1987]; ***D'Angelo v Cole***, 67 NY2d 65, 499 NYS2d 900 [1986]). While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality (*see* ***Marcus Assocs., Inc. v Town of Huntington***, 45 NY2d 501, 410 NYS2d 546 [1978]; ***Lighthouse Shores v Town of Islip***, 41 NY2d 7, 390 NYS2d 827 [1976]; ***American Ind. Paper Mills Supply Co. v County of Westchester***, 65 AD3d 1173, 886 NYS2d 178 [2d Dept 2009]).

Judicial review of a challenged statute or ordinance is limited to determining whether any state of facts, known or to be assumed, justify the law (*see* ***Matter of Malpica-Orsini***, 36 NY2d 568, 370 NYS2d 511 [1975]; ***Bobka v Town of Huntington***, 143 AD2d 381, 532 NYS2d 561 [2d Dept 1988]). Thus, it need only be determined whether the ordinance in question is enacted to further a legitimate governmental purpose and whether the ordinance is a reasonable measure for achieving valid goals of the municipality (*see* ***Matter of Genesis of Mount Vernon v Zoning Bd. of Appeals of City of Mount Vernon***, 81 NY2d 741, 593 NYS2d 769 [1992]; ***Matter of Morrissey v Apostol***, 75 AD3d 993, 906 NYS2d 639 [3d Dept 2010]).

Here, the Town met its burden of demonstrating that its noise ordinance was enacted to further a substantial governmental interest in protecting its citizens from unwelcome noise and is narrowly tailored to achieve that goal (*see* ***Ward v Rock Against Racism***, 491 US 781, 109 S Ct 2746 [1989]; ***Carew-Reid v Metropolitan Transp. Auth.***, 903 F2d 914 [2d Cir 1990]; ***Harlem Yacht Club v New York City Env. Control Bd.***, 40 AD3d 331, 836 NYS2d 66 [1st Dept 2007]). A municipal exercise of the police power which interferes with the beneficial use of property must be a reasonable and legitimate response to a situation which it is within the police power to correct (*see* ***Matter of Charles v Diamond***, 41 NY2d 318, 392 NYS2d 594 [1977]; ***51 St. Nicholas Realty Corp. v City of New York***, 218 AD2d 343, 636 NYS2d 300 [1st Dept 1996]). The abatement of unsafe or dangerous conditions, which constitute a threat to public health, safety and welfare, is an exercise of the municipality's police power which interferes with the beneficial use of property (*see* ***51 St. Nicholas Realty Corp. v City of New York***, *supra*). Government may act reasonably to protect local residents from excessive noise (*see* ***Festa v New York City Dept. of Consumer Affairs***, 12 Misc 3d 466, 820 NYS2d 452 [Sup Ct, New York County 2006]).

The Town also met its burden on the branch of the motion – as to the cause of action alleging that Brookhaven Town Code § 50-6 (a) is unconstitutionally vague, because it relies on a "reasonable person" standard set forth in Brookhaven Town Code § 50-2 (b). Despite HSSG's protestations to the contrary, the noise ordinance's reliance on a "reasonable person" standard does not render it unconstitutionally vague, because the "reasonable person" standard is an objective standard of evaluation (*see* ***People v Lord***, 7 Misc3d 78, 796 NYS2d 511 [App Term, 9th & 10th Jud Dists 2005]). Moreover, the ordinance permits expressive activity so long as the decibel level is not over 65. This Court finds that the Town's determination that 65 decibels is a valid and reasonable level that welcomes free speech, without interfering with the rights of others, is a valid exercise of its legislative responsibility (*see* ***People v Toback***, 170 Misc 2d 1011, 652 NYS2d 946 [Long Beach City Ct 1996]; ***People v Zanchelli***, 8 Misc 2d 1069, 169 NYS2d 197 [Columbia County Ct 1957]). Thus, the Town's noise ordinance is not vague (*see* ***Crockett Promotion v City of Charlotte***, 706 F2d 486 [4th Cir 1983]).

In opposition, HSSG has failed to meet its burden of proving beyond a reasonable doubt the invalidity of the noise ordinance. HSSG has not submitted any evidence showing that no rational relationship exists between the Town's legitimate exercise of its police power and the challenged ordinance. Moreover, there was no discussion in HSSG's opposition regarding its eighth cause of action alleging that Brookhaven Town Code § 50-6 (a) is unconstitutionally vague. Thus, the Court declares that the Town's noise ordinance is constitutional and must be sustained.

The Town also seeks summary judgment dismissing all claims against it on the ground that the noise ordinance was lawfully and properly applied to HSSG. In support of its motion, the Town submits, *inter alia*, the pleadings, a bill of particulars, the affidavit of John Palasek, the affidavit of Douglas Steigerwald, the affidavit of Robert Davis, the affidavit of Eric Zwerling, a noise consultant, and two letters, dated September 8, 2006 and December 1, 2007, written by The Noise Consultancy, LLC, stating that the "sound emission from the Suffolk County Trap & Skeet Range exceeded the permissible level limit of 65 dBA" set forth in the Town's noise ordinance. The Town also submits

numerous residents' complaints and reports with regard to the noise from HSSG, as well as numerous violation tickets issued to HSSG.

In his affidavit, John Palasek stated that he has resided at 25 Quaker Path in Yaphank, New York, and that his property is located approximately 1700 feet away from HSSG's property. He stated that the volume of the gunshot sounds at or around his home was "unacceptable," and that he could not hear the television in his home "without either closing [his] windows or turning up the volume of the television beyond a reasonable level."

In his affidavit, Douglas Steigerwald stated that he has resided at 3 John Court in Yaphank, New York, and that his backyard property line is located approximately 100 feet from HSSG's property. He stated that the sound emanating from HSSG was "almost too much to bear" and "made it impossible to keep our windows open."

In his affidavit, Robert Davis stated that he has resided at 145 Gerard Road in Yaphank, New York, and that, since 2006 when HSSG began operations, "living at [his] home from Wednesday to Sunday became unbearable" due to the "ear-piercing sounds of gunshots."

This Court finds that the affidavit of Eric Zwerling, which was made and notarized in the State of New Jersey, is not in admissible form pursuant to CPLR 2106 and 2309 (c), as it lacks the required certificate of conformity (*see* CPLR 2309 [c]; ***PRA III, LLC v Gonzalez***, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]). The Noise Consultancy's letters, residents' complaints and reports, and violation tickets were all unsworn and uncertified, and, thus, are of no probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Duke v Saurelis***, 41 AD3d 770, 840 NYS2d 88 [2d Dept 2007]). Although the Town submitted three notarized affidavits from citizens who described themselves as residents of the Town of Brookhaven and stated that the sounds of gunshots from HSSG were "unacceptable" or "unbearable," none of them described the noise level in a specific number. The Town did not submit any other evidence showing what was the noise level of HSSG when violation tickets were issued. The Town, therefore, has failed to establish its entitlement to summary judgment as a matter of law as an issue of fact exists as to whether the noise ordinance was lawfully and properly applied to HSSG (*see* ***James v Blackmon***, 58 AD3d 808, 872 NYS2d 179 [2d Dept 2009]).

Plaintiff HSSG cross-moves for an order granting summary judgment on its first, second, third and sixth causes of action against the Town. HSSG's cross-motion for summary judgment, however, is denied as procedurally defective for failure to submit a complete copy of the pleadings (*see* CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]; ***Mathiesen v Mead***, 168 AD2d 736, 563 NYS2d 887 [3d Dept 1990]). HSSG has not submitted copies of the answer of the Town with its moving papers.

In view of the foregoing, the branch of the Town's motion for summary judgment on the issue of the ordinance's constitutionality is granted, and the branch of the Town's motion for summary judgment dismissing the complaint against it on the ground that the ordinance was lawfully and properly applied to

HSSG is denied without prejudice to timely renewal, upon submission of proper papers. HSSG's cross-motion for summary judgment on its first, second, third and sixth causes of action against the Town is denied without prejudice to timely renewal, upon submission of proper papers.

Dated: October 6, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**