Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21497
Y/prt

_____AD3d_____ Argued - November 6, 2008

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
STEVEN W. FISHER
RANDALL T. ENG, JJ.

2007-07157 DECISION & ORDER

Incorporated Village of Asharoken, et al., appellants,
v Long Island Lighting Company, respondent.
(Action No. 1)

Anthony Sbarro, et al., plaintiffs, Arnold Gallo,
appellant, v Long Island Lighting Company,
respondent.
(Action No. 2)

(Index Nos. 4032/96, 12433/98)

Schlam Stone & Dolan, LLP, New York, N.Y. (Richard M. Dolan and Michael C. Marcus of counsel), for appellants.

Arnold & Porter, LLP, New York, N.Y. (Michael B. Gerrard of counsel), for respondent.

In two related actions, inter alia, for injunctive relief to abate a private nuisance, which were joined for trial, the plaintiffs in Action No. 1 and Arnold Gallo, a plaintiff in Action No. 2, appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Suffolk County (Tanenbaum, J.), dated June 29, 2007, as, after a nonjury trial, is in favor of the defendant and against them, dismissing the complaints insofar as asserted by them in both actions.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

The defendant in these two actions maintains jetties and channels in Long Island Sound in connection with the operation of a power station. These structures block sand that would otherwise naturally accrete onto the shores of Asharoken Beach. Pursuant to the conditions of its permit from the United States Army Corps of Engineers that allows it to maintain these structures, the defendant is required to periodically deposit sand onto Asharoken Beach to compensate for the sand that it blocks.

The appellants, the Incorporated Village of Asharoken and a number of individual property owners, commenced these two related actions alleging that the defendant is causing erosion at Asharoken Beach by blocking more sand than it is depositing, and that these actions constitute a public and private nuisance (*see Copart Indus. v Consolidated Edison Co. of N.Y.,* 41 NY2d 564, 568-569). At trial, the appellants failed to prove by a preponderance of the evidence that the defendant is blocking more sand than it is depositing; thus, the appellants failed to prove that any erosion that is occurring at Asharoken Beach is being caused by the defendant, as opposed to other factors. Accordingly, the Supreme Court properly dismissed the complaints insofar as asserted by the appellants in the two actions.

MASTRO, J.P., RIVERA, FISHER and ENG, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court