

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1036

CA 14-00094

PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THEODORE HOLZ AND LINDA HOLZ,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

OLD ORCHARD BEACH TAXPAYERS ASSOCIATION, INC.
AND RICHARD SCHARET, SR., DEFENDANTS-RESPONDENTS.

KELLY & KELLY ESQUIRES, PERRY (DEVON M. KELLY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 16, 2013. The judgment granted the amended motion of defendants for summary judgment, denied the cross motion of plaintiffs for summary judgment and dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint insofar as it sought a declaration and granting judgment in favor of defendants as follows:

It is ADJUDGED and DECLARED that plaintiffs have acquired no title to the lands described in paragraph 39 of the verified complaint

and as modified the judgment is affirmed without costs.

Memorandum: Defendants are entitled to judgment in their favor for reasons stated in Supreme Court's decision. Because plaintiffs seek declaratory relief, however, "the proper course is not to dismiss the complaint [in its entirety] but rather to issue a declaration in favor of the defendants" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court