

Zupa v Grannis

2007 NY Slip Op 32406(U)

July 31, 2007

Supreme Court, Suffolk County

Docket Number: 0020457/2007

Judge: Gary J. Weber

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE: July 5, 2007
Motion Seq. # 001 *CASEDISP*

VICTOR J. ZUPA, MARY S. ZUPA, and
PARADISE POINT BASIN ASSOCIATION, INC.,

WICKHAM, BRESSLER,
GORDON & GEASA, P.C.
BY: ERIC BRESSLER, ESQ.
Attorney for Petitioner
13015 Main Road, POBox 1424
Mattituck, New York 11952

Petitioner,

For a judgment pursuant to Article 78 of the
Civil Practice Laws and Rules,

PATRICK HENRY, ESQ.
Attorney for Petitioner
320 Carleton Avenue
Central Islip, New York 11722

-against-

ALEXANDER B. GRANNIS, Commissioner of the
New York State Department of Environmental
Conservation, PETER S. SCULLY, Regional Director
of the New York State Department of Environmental
Conservation, THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and PARADISE POINT
ASSOCIATION, INC.,

ESSEKS, HEFTER & ANGEL, LLP
BY: ANTHONY C. PASCA, ESQ.
ATTORNEY FOR DEFENDANT
108 East Main Street
P.O. Box 279
Riverbed, New York 11901

Respondents.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
BY: GREGORY J. NOLAN, ESQ.
120 Broadway
New York, New York 10271-0332

This is an application brought on by Order to Show Cause dated July 5, 2007 and originally returnable July 16, 2007.

On consent of all of the parties the matter was adjourned until July 23, 2007 when the arguments of counsel for all parties, including Gregory J. Nolan, Esq., Assistant Attorney General of the Environmental Protection Bureau on behalf of the N.Y. State Department of Environmental Conservation (hereinafter "D.E.C.") were placed on the record.

The Court has read and considered the Order to Show Cause and its supporting papers as well as the Affidavit in Opposition to the Order to Show Cause dated July 12, 2007 and its supporting papers as well as the Memorandum of Law of the Respondent Paradise Point Association, Inc. dated July 17, 2007.

Counsel for all parties have agreed to adjourn the hearing on a Preliminary Injunction sought by the Petitioners Victor J. Zupa, Mary S. Zupa and Paradise Point Basin Association, Inc. (hereinafter "Zupa") until September 11, 2007.

The Order to Show Cause signed by Justice Thomas F. Whelan of this Court on July 5, 2007 contained stay provisions to the following effect:

“ORDERED, that pending the return date of this motion, the Respondent, their agents, employees, attorneys, successors or assigns, and anyone acting with, in concert with or on behalf of any of the said Respondent, be and the same hereby are temporarily restrained from building, rebuilding, relocating, reconfiguring or in any way modifying the docks attached to the property located at 580 Basin Road, Southold, N.Y”

The undersigned extended the above stay until July 31, 2007 with the understanding that a decision as to whether to vacate, modify and/or extend the stay would be forthcoming by July 31, 2007.

Thus, in so far as this application is concerned, the only consideration now before the Court is as above stated - although there are certainly topics to be addressed in coming to a conclusion on any extension or modification of the stay.

The Facts

Mary Zupa owns the property known as 580 Basin Road, Paradise Point, Southold, New York (hereinafter “the 580 Property”) and that property is presently burdened by two easements. One of these was created by deed and the other is a prescriptive easement found to exist by Hon. James Catterson, Jr. which such finding and order was affirmed by the Appellate Division, Supreme Court, Second Department.

The Respondent Paradise Point Association, Inc. (Hereinafter “The Association”) has located certain docks and gained access to them by virtue of the above described easements, the existence of which the “Zupa” interests have contested over many years of litigation, which such efforts are presently continuing on many legal fronts and battlegrounds.

Since the zoning authorities of the Town of Southold require “The Association” to join in any application for variances needed in order for Mary Zupa to build a house on “the 580 Property” and “The Association” and “Zupa” have not been able to come to terms on conditions under which this might be accomplished, “Zupa” has evidently concluded that the best remaining way to gain permission to build a house from the aforesaid zoning authorities is to obtain a determination that the docks of “The Association” are illegal,¹ toward the end of having them removed through the force of law; thereby enhancing the “Zupa” position to the extent that the proposed “Zupa” house would, arguably, be the only and exclusive use on the property, despite the existence of whatever easements or rights of way that there might be in “The Association”.

Apparently, as on of his efforts, “Zupa” has complained to the New York State Department of Environmental Conservation (D.E.C.) concerning, among other things, the fact that “The Association” has begun to build, rebuild, relocate and reconfigure the docks attached to “the 580 Property” without benefit of any D.E.C. permit.

On September 29, 2006, one Charles T. Hamilton, Regional Supervisor of Natural Resources for the D.E.C. issued a Notice of Violation to “The Association” which alleged in part as follows:

“Article 25, Tidal Wetlands Act
Section 25-0401.1 6NYCRR Part 661

In that you caused, or permitted to be caused:

1) Installation of 3'x27' open pile pier, 2.5' x 12' ramp, 6'x20" float and two pilings in a regulated tidal wetland without the required NYSDEC permit. (North dock)

¹for Zupa’s apparent purposes any concerned agency, state or local, will do

- 2) Installation of (6) 6" pilings beneath 4'x20' catwalk in a regulated tidal wetland without the required NYSDEC permit. (middle dock)
- 3) Installation of 17' timber bulkhead in a regulated tidal wetland without the required NYSDEC permit. (south dock)
- 4) Installation of electric utility in and adjacent to a regulated tidal wetland without the required NYSDEC permit.
- 5) Installation of 4"x4" pilings and 2.5'x19' ramp in a regulated tidal wetland without the required NYSDEC permit. (south dock)
- 6) Installation of 2'x12' ramp in a regulated tidal wetland without the required NYSDEC permit. (south dock)
- 7) Expansion/Installation of 6'x40' and 4'x12' floats on offshore end of main dock in an L-shape in a regulated tidal wetland without the required NYSDEC permit (south dock)
- 8) Installation of (3) 6'x20' finger floats in a regulated tidal wetland without the required NYSDEC permit. (south dock)
- 9) Installation of (6) pilings in a regulated tidal wetland without the required NYSDEC permit. (south dock)

Contravention of this/these Article(s) of the ECL is a violation and/or a misdemeanor punishable by a fine of no more than \$10,000 per violation. Penalties may be assessed for each day that the violation continues.

Please be further advised that violations of the ECL which are not resolved may be the subject of an administrative hearing pursuant to Title 6 of the Official Compilation of Codes, Rules & Regulations of the State of New York (6NYCRR, Part 622).

You are hereby advised to cease your operation at the referenced location immediately.

On May 23, 2007 the "D.E.C." and "The Association" entered into an "Order on Consent" wherein and whereby it was agreed that "the Association" would pay a monetary fine and, most importantly, adhere to a "compliance schedule" which provides in relevant part as follows:

“II. REMOVAL REQUIREMENTS:

Within ninety (90) days from the date this order is executed, Respondent have conducted the following removal:

Remove pilings and two dock structures and reduce
And reconfigure remaining structure, all as shown in
The "Site Map" dated April 17, 2007, prepared by
Inter-Science Research Association, Inc. Provide
Town Trustee approval for the modification to the
prior Trustee-approved plans.

III. RESTORATION REQUIREMENTS:

No restoration required.”

Implicit in the "Order on Consent" is the principal that "The Association" will be able to continue to do work and modify the docks without benefit of any D.E.C. permit. Otherwise, there is no way "The Association" could meet the so called "Removal Requirements of the "Order on Consent".

The Assistant Attorney General explained that because of the then outstanding violations, above described, which were in existence prior to the execution of the consent order, that the D.E.C., as a matter of policy, had halted the review process of a permit application submitted by "The Association", in order to do the various work which Regional Supervisor Hamilton complained of as being unpermitted by his notice of violation of September 26, 2006.

Decision

The Court cannot see how, on the one hand, the D.E.C. can charge "The Association" with violations for not obtaining a permit, and, on the other, settle with it, on the basis that construction on the docks is not only to continue without any D.E.C. permit(s), but is in certain respects, mandated by the terms of the "Order on Consent". This is especially puzzling where the D.E.C., as a sanction, for not getting the permit(s) in the first place had already halted "The Association's" permit application process. This seems analogous to directing an unlicensed driver to go practice his or her driving on the public highways with the idea of considering the issuance of a license to do so at a later date.

It may very well be that "The Association" is entitled to and will receive the required permits from the D.E.C., but that is not the situation which prevails now. For now, there are no D.E.C. permits for any work on the docks whatsoever, only a consent order arising from alleged violations concerning the failure to possess the permits.

Accordingly, Justice Whelan's Temporary Restraining Order is continued with modifications.

The D.E.C. is directed to process any application now pending before it or any similar new application, (if a new filing be necessary, by "The Association") for the disputed docks, in the same manner and fashion as is routinely accorded any such application by the Department.

So much of the order on consent as requires "The Association" to complete the work described in the consent order within 90 days is ordered tolled until such time as any restraints arising from orders of this court pertaining to the same are lifted.

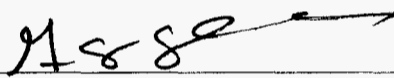
Upon the grant of such application for permit(s) by the D.E.C., the Respondent "The Association" shall have the right, by letter application, to make application to this Court for an order to dissolve this Temporary Restraining Order.

Further, the Court will entertain any application brought on notice to dissolve the Temporary Restraining Order which contains a certification by the D.E.C. that no permits were necessary for work to commence on the subject docks as of September 29, 2006 - in other words, that the violations issued by Regional Supervisor Hamilton were given due to an error of fact or law, or both.

Let this memorandum decision also constitute the order of the court.

Petitioners' attorneys are directed to serve a copy of this order with notice of entry upon opposing counsel with all convenient speed.

Dated: July 31, 2006



Gary J. Weber, Acting J.S.C.

Final Disposition
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