

Zupa v Paradise Point Assn., Inc.

2007 NY Slip Op 32718(U)

August 29, 2007

Supreme Court, Suffolk County

Docket Number: 0025843/2002

Judge: Gary J. Weber

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

PRESENT:

<p>Hon. <u>Gary J. Weber</u> Acting Justice of the Supreme Court</p> <hr style="border: 0.5px solid black;"/> <p>VICTOR J. ZUPA and MARY S. ZUPA Plaintiffs</p> <p style="text-align: center;">-against-</p> <p>PARADISE POINT ASSOCIATION, INC., Defendants</p> <hr style="border: 0.5px solid black;"/>	<p>MOTION DATE <u>9-26-06</u> Motion Seq. #008 - MOT D 009 - MD 010 - MD</p> <p>WICKHAM, BRESSLER, GORDON P.C. BY: ERIC J. BRESSLER, ESQ. 275 BROAD HOLLOW RD., STE 111 MELVILLE, NY 11747</p> <p>ESSEKS, HEFTER & ANGEL ESQS. BY: STEPHEN R. ANGEL, ESQ. 108 EAST MAIN ST, POB 279 RIVERHEAD, NY 11901</p> <p>TINARI, O'CONNELL, OSBORN & KAUFMAN, ESQS. BY: PATRICK HENRY, ESQ. 320 Carleton Avenue, Suite 6800 Central Islip, New York 11722</p>
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Procedural History

The instant application began as Plaintiffs, Victor J. Zupa and Mary S. Zupa's (hereinafter "ZUPA") application to strike defendant Paradise Point Association Inc.'s (hereinafter The Association) answer for willful failure to disclose, or in the alternative, compelling discovery.

This motion was originally returnable September 26, 2007.

Thereafter, by cross motion dated October 4, 2006 and returnable November 1, 2006 The Association has moved for partial summary judgment dismissing causes of action One and Two in the complaint on the grounds that the Plaintiffs are collaterally estopped from maintaining them. In addition, The Association seeks a protective order limiting Zupa's discovery requests to causes of action Three through Five of the complaint and directing Zupa to respond to their demands in accordance with the Court's order.

By Notice of Motion dated April 18, 2007, returnable May 9, 2007, Zupa has moved this court for Summary Judgment. In support of that application Zupa has filed an Affirmation by Patrick Henry, Esq. dated April 18, 2007, an Affidavit by Victor J. Zupa with attached exhibits dated June 22, 2007 an Affidavit by Mary S. Zupa dated April 17, 2007 with attachments, an Affirmation in Support of Motion to Compel/Strike etc. by Eric J. Bressler, Esq., dated October 25, 2006, Plaintiff's Memorandum of Law in Opposition to Defendants Cross Motion dated July 12, 2007 and Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment dated June 22, 2007.

For its part, The Association has filed an affidavit by Stephen R. Angel, Esq. Dated May 21, 2007 with attachments, a Memorandum in Opposition to Motion to Strike and in Support of Cross Motion etc., dated October 4, 2006, Defendant's Memorandum of Law in Opposition to motion for Summary Judgment dated May 23, 2007 and a Reply Affidavit of Stephen R. Angel dated October 30, 2006.

Decision

As was discussed earlier in the Court's decision under Index No. 07-20457 dated July 31, 2006, which was misdated and should have been dated July 31, 2007, the instant litigation is in large measure fueled by a dispute between the parties over which of them is to have greater control over the land known as 580 Basin Road and its associated dockage.

Zupa claims that the dock/marina presently maintained by The Association on the premises is illegal, essentially because it was either installed after the Southold Town Zoning Ordinance came into effect, which would have prohibited or restricted such use and/or that such use was expanded, after the effective date of the ordinance without the appropriate municipal approval(s), permit(s) or otherwise.

For its part, The Association moves for partial Summary Judgment as against Zupa's First and Second Causes of Action on the ground that Zupa is collaterally estopped from maintaining them because an initial determination made by the Southold Zoning Board of Appeals to the effect that the dock-marina maintained by The Association constituted a prior existing nonconforming use. The Southold Town Zoning Board of Appeals granted a variance to Zupa, but on the condition that "no building permit be issued until the non-conforming marina use is removed or a variance is granted". See *Board of Appeals Town of Southold, Findings, Deliberations, and Determination Meeting of August 2, 2004*. The Board reasoned that either The Association should join in the Zupa Application for a variance or discontinue the dock/marina use in order for Zupa to receive a building permit for the property, in as much as to do otherwise would permit two non-conforming uses on the premises in violation of Section 100-241G of the Southold Town Code. Since The Association did not join in the Zupa application for a variance or discontinue the dock/marina use, the Board granted Zupa a conditional variance only.

This grant of a conditional variance only by the Southold Town Board was affirmed in the Supreme Court by Justice Loughlin (*Mary S. Zupa v. Zoning Board of Appeals of Town of Southold et als.* (Index No. 19605/04) and, later, by the Appellate Division, Second Department, by way of a decision dated July 11, 2006.

Counsel for the Association argues that because the Zoning Board of Appeals held that The Association's dock/marina usage of the property was held to be a non-conforming use by the Southold Town Zoning Board of Appeals and that the Z.B.A.'s position was affirmed all the way "up the ladder" by the Supreme Court and the Appellate Division, and that both Zupa and The Association were parties to such litigation, that Zupa is collaterally estopped, at this point, in the instant litigation from asserting that The Association's dock/marina is not a prior, legal, existing non-conforming use under the Southold Town Code.

Counsel is incorrect in these assertions.

First, the subject matter before the Southold Town Zoning Board of Appeals was whether or not to grant necessary variances to Zupa - not whether or not The Association's dock/marina constituted a valid, legal, prior existing non-conforming use. These are two different questions. While the answer to the second question could conceivably impact the answer to the first, and vice-versa, this is by no means necessarily so.

Indeed, the Zoning Board of Appeals addressed this very topic when it was stated in its opinion, "The only "new" claim Ms. Zupa makes with respect to the marina is that it is "illegal" and that she has demanded its removal. However, that claim does not change the fact that the marina is presently there and in use". This language did not state that the marina was legally in use.

As the Board clearly found, there is no question that The Association's dock/marina is a prior existing non-conforming use. The first real question is at what point in time each structure became pre-existing. The next question, which necessarily depends on the answer to the first, is whether all, some or none of the structures and docks presently maintained by The Association are legal under the Southold Town Code or otherwise. These topics were clearly not addressed by the Southold Town Board of Zoning Appeals in its decision of August 2, 2004 as cited above. The Board was entirely correct in not doing so, because these questions were not before it. What was before the Board was the Zupa application and the fact that The Association's structures were already existing on the subject Zupa property - legally or not. At no point did the Zoning Board ever determine that the dock/marina was a legal use.

Secondly, the Appellate Division, Second Department specifically held, "we do not pass on the issue of the legality of a certain nonconforming marina, the subject of which is being litigated in an action entitled *Zupa v. Paradise Point Assn.*, pending in the Supreme Court, Suffolk County, under Index No. 25843-02". *Zupa v. Z.B.A. Town of Southold, supra*.

The case to which the Justices of the Appellate Division referred to by the specific Index No. 25843-02, is this very case.

It is hard to see how Zupa can be collaterally estopped from arguing the illegality of the dock/marina when the Appellate Division, Second Department has specifically stated that it did not consider the issue, while the Justices who heard the case were clearly aware that this action involving that topic was pending here.

Defendant's motion for partial summary judgment must be denied.

The Applications With Respect
to Plaintiff's Interrogatories

Defendant has responded to plaintiff's demand for sanctions and an order compelling discovery with a request for a protective order. Each application is granted in part and denied in part, since Plaintiff's demands are overbroad and burdensome in many respects.

Interrogatory Number One requests the identity of persons having knowledge of the truth of the allegations contained in the complaint and the answer, as well as the source of such knowledge and any applicable documents.

This, of course, would require all manner of speculation and investigative work by the defendant to accomplish and, even, then as a practical matter, there would be no guarantee that the results would be fruitful or complete.

Interrogatory One is stricken in its entirety.

Interrogatories Two and Three basically are directed at communications between The Association, its members and third parties concerning the disputed docks and any associated documents. Obviously, not all communications concerning the docks are germane to this litigation and much of what plaintiff seems to be seeking is beyond The Association's control. Accordingly, interrogatory demands Two and Three are stricken.

Interrogatories Four, Five, Six and Seven concern the construction and maintenance of the docks in question and, clearly, the questions propounded concerning construction, maintenance and repair regarding them are pertinent to this matter. Accordingly, the Court will not disturb these requests, except to the extent that the Court will modify the request so that The Association need only provide such information as it may have from its own books and records and that knowledge on these topics which any of the officers of The Association may possess. In that latter event, The Association may specify that it has no knowledge or documentary information on the particular topic.

Interrogatories Eight, Nine, Ten, Eleven and Twelve pertain to parking installations by The Association on the property as well as possible territorial claims by The Association as to Lot 16.7. I believe this information is pertinent to the instant litigation but, similarly to the topics above listed, the disclosure should be limited to documentary information in the hands of The Association and/or the knowledge of its officers, as to which "The Association" may specify that its information is limited in such regard.

Interrogatory Thirteen pertains to a topic central to this case - the permits which The Association may have with respect to the disputed docks/marina in the case. It should be complied with by "The Association" as written.

Interrogatories Fourteen, Fifteen and Sixteen pertain to the membership of The Association and seek, not only the identity of all past officers and directors, but also the time periods involved in membership and the amount of fees paid by members for the use of the docks. These three demands are clearly overbroad and burdensome, can contribute little, if anything, to the resolution of this litigation, and are stricken in their entirety for those reasons.

Interrogatory Demand Seventeen pertains to maintenance performed by The Association in the deeded easement area. The Court does not find this particular request objectionable except to the extent, like some of the other demands, it goes beyond what the present officers of The Association and any documents available to them may show. Accordingly, the interrogatory will be allowed, but The Association may answer to the extent that any of the present officers have either documentary or actual knowledge of these things.

Interrogatory Demand Eighteen is a request seeking to find whether The Association paid real property taxes for any part of Lot 16.7. If Plaintiffs are interested in this, they can look up the public records themselves. The demand is stricken.

Interrogatory Demand Nineteen seeks the identity of persons who will provide information or help to prepare the answers to the interrogatories. Aside from having lawyer-client privilege implications, this demand is clearly overbroad, burdensome and, even, perhaps, vexacious. It is stricken in its entirety.

Plaintiff's Motion for
Summary Judgment

Plaintiff's motion for summary judgment must be denied.

There are several important issues of fact which are open and in question. These include proof as to exactly what structures or docks existed on the subject property as of April 9, 1957 and what has been done there by way of construction since. Also of importance is what permits have been issued by the appropriate municipal authorities to "The Association" and, whether or not and to what degree these, are, or were, necessary.

In order to adequately address and explore these and other related factual issues a full trial is required.

The Town of Southold
as a Necessary Party

C.P.L.R. 1001 provides as follows:

"(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants...."

In determining whether to allow the action to proceed, the court shall consider: ...

Whether an effective judgment may be rendered in the absence of the person who is not joined."

Since it is principally the applicable ordinances of the Town of Southold which are in dispute here it would seem that, in order to be effective, any judgment to be rendered in this matter should best come about after full participation by the Town of Southold. The principal source of enforcement of the Town's ordinances should be the Town. It is, therefore, logical and desirable that the Town should obtain full knowledge of the relevant facts and circumstances concerning this real property - zoning dispute. Also, some input is desirable from the Town of Southold as to what permits and/or approvals, if any, are or were necessary in order that The Association might get and keep the legal right to erect and maintain whatever structures and facilities it has on the property.

Accordingly, Plaintiff is directed within 30 days of the service of a copy of this decision and order with Notice of Entry to serve an amended complaint naming the Town of Southold as a party defendant in this action.

Order

It is ordered that Plaintiff's application for discovery is granted to the extent that Defendant shall serve an answer to Plaintiff's Demand for Interrogatories within 45 days after service upon Defendant's attorneys of a copy of this order with Notice of Entry ; and it is further

ORDERED, that Defendant's application for a protective order is granted, but only to the extent earlier described in this decision and order; and it is further

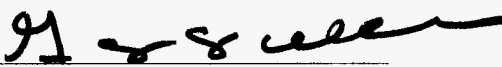
ORDERED, that Defendant's cross motion for partial summary judgment is in all respects denied; and it is further

ORDERED, that Plaintiff's motion for summary judgment is in all respects denied; and it is further

ORDERED, that Plaintiff shall join the Town of Southold as a defendant in these proceedings within 30 days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED, that either counsel shall serve a copy of this order with notice of entry on opposing counsel as soon as may be practical.

Dated: August 29, 2007



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

Non-Final Disposition, Scan