

FM Dune View Designs, LLC v Strough

2007 NY Slip Op 33464(U)

October 2, 2007

Supreme Court, Suffolk County

Docket Number: 0003343/2007

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-23-07
ADJ. DATE 6-22-07
Mot. Seq. # 001 - MG; CASEDISP

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 FM DUNE VIEW DESIGNS, LLC, FRAN MOSS, :
 ALDONA McCARTHY, V.L.L., LLC, ARIANNE :
 AMSZ and ALEXANDRE N. AMSZ, NATALIE :
 ROSE, FUSCO, EMILY J. RUSSO and :
 FRANCINE MAIORANA, GENE STREIM and :
 ILENE STREIM, HARVEY GESSIN and :
 MARILYN TUNE GESSIN, CLAIRE :
 VEGLIANTE, ETTORE MANCINI, LAURA :
 FABRIZIO, STUART and MICHELLE :
 SCHECTER, ROBERT and MICHELLE :
 CERVONI, MICHAEL and BERNICE ROSSI, 690 :
 DUNE ROAD, LLC, 682 DUNE ROAD, LLC, 684 :
 DUNE ROAD ROP, SALVATORE MATTOLI and :
 TERESA MATTOLI, STANLEY VICKERS and :
 DIANCE VICKERS, PETER BASELICE and :
 GLORIA BASELICE and CAROLYN :
 MEINWALD, :
 :
 :
 Plaintiffs, :
 :
 :
 - against - :
 :
 :
 SCOTT STROUGH, JON S. SEMLEAR, FRED :
 HAVEMEYER, ERIC J. SHULTZ and EDWARD :
 J. WARNER, JR., :
 Defendants. :
 -----X

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Upon the following papers numbered 1 to 8 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4 - 6; Replying Affidavits and supporting papers 7 - 8; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendants' motion (001) for summary judgment dismissing the action as against them is granted.

Plaintiffs, several landowners in the Village of West Hampton Dunes (hereinafter referred to as “the Village”), commenced the instant action alleging that defendants, Scott Strough, Jon S. Semlear, Fred Havemeyer, Eric J. Shultz and Edward J. Warner, Jr. (hereinafter referred to as “the Trustees”) have erroneously claimed title ownership to certain beachfront property located within the Village, along the shoreline of Moriches Bay by the commencement of a prior action, captioned Strough, Semlear, Havemeyer, Shultz and Warner, individually and as Trustees of the Freeholders and Commonalty of the Town of Southampton and the Town of Southampton v Incorporated Village of Westhampton Dunes, et al (hereinafter “the Strough Action”), Index No. 29678/06. Plaintiffs further allege that the Trustees knowingly commenced the action against them after the Appellate Division, Second Department ruled in favor of a homeowner who also lives in the Village and has property along Moriches Bay by order dated March 17, 2003 in the action captioned, Board of Trustees of the Freeholders and Commonalty of the Town of Southampton and The Town Board of the Town of Southampton v Buoninfante. In so doing, they allege, defendants have falsely cast doubt upon the validity of plaintiffs’ titles and are liable for slander of title.

The Trustees claim title to all the lands lying beneath the waters of Moriches Bay and surrounding lands up to the high-water mark thereof based upon an ancient patent, the Dongan Patent, which conveyed the above lands to the Trustees in 1686. They allege that a disruption of the high-water mark occurred in the winter of 1992 and spring of 1993 when severe storms dumped sand onto the shoreline north of plaintiffs’ properties, thereby causing a dispute of ownership to the additional land. The Trustees allege that the sudden deposit of sand had no effect upon the boundary line of the Trustee lands, contrary to defendants’ contentions that the added land now belongs to the Village and defendant landowners. In 2004, the Trustees allege, the Mayor of the Village represented to them that he would take steps to enact legislation precluding development by any Village resident of lands within 100 feet of the new high-water mark of Moriches Bay. However, notwithstanding this representation, the Village has taken no steps to enact any such legislation, and, to the contrary, has entertained applications from some or all of the individual defendants to subdivide and develop the disputed lands, including lands within 100 feet of the new high-water mark. Subsequently, the Trustees commenced the Strough Action.

Procedurally, shortly after the commencement of the instant action, the complaint in the Strough action was amended to reflect the deletion of plaintiffs Strough, Semlear, Havemeyer, Shultz and Warner in their individual capacities and was filed with the County Clerk on March 2, 2007. The amended complaint is captioned as follows: Scott Strough, Jon S. Semlear, Fred Havemeyer, Eric L. Shultz and Edward J. Warner, Jr., as Trustees of the Freeholders and Commonalty of the Town of Southampton and The Town of Southampton v Incorporated Village of West Hampton Dunes, et al. Currently before the court is a motion for summary judgment by defendants Strough, Semlear, Havemeyer, Shultz and Warner in their favor on ground that they acted solely in their official capacities by the commencement of the Strough Action. Therefore, they contend that their acts are absolutely privileged and immune from liability.

In support of the motion, defendants submit, among other things, the pleadings and the personal affidavit of Scott Strough, President of the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton. He avers that the Trustees claim ownership of the disputed property by virtue of the Dongan patent of 1686. He states that the action was not initiated with malice or any intent to harm

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anyone, but was commenced as part of the Trustees' obligations as stewards of the waters and lands conveyed by ancient patents. As such, the Trustees' actions are immune from liability and the allegations in the quiet title action are privileged. He states that the Trustees have a legitimate claim to the property and plaintiffs' action was instituted solely in retaliation for the Trustees' decision to commence the action to quiet title. In reply, Richard Cahn, counsel for the Trustees in the action against Mr. Buoninfante, avers in his personal affidavit that a settlement was reached with Mr. Buoninfante only regarding his boundary line, and not with any of the other landowners or the Village.

In opposition, plaintiffs submit, among other things, their counsel's affirmation, and personal affidavits of Claire Vegliante and Gary Vegliante. Initially, counsel affirms that there are disputed issues of fact as to the grounds of defendants' actions as well as the applicability of the claims of privilege and immunity relied upon by defendants and thus, discovery is necessary. Mrs. Vegliante avers that she is a defendant in the Strough action, a record owner of property located in the Village of West Hampton Dunes and the wife of the Mayor. Ms. Vegliante states that the Trustees' slanderous statements in their complaint have interfered with her plans to develop a portion of her property which is subject to the Trustees' claim of ownership and have caused questions from potential buyers regarding whether she holds good title to that land. Ms. Vegliante further states that the instant action was brought against the Trustees solely to the extent that they themselves claim to have been acting in their individual, as distinct from their official, capacities.

Gary Vegliante avers that he is the Mayor of the Village of West Hampton Dunes and a defendant in the Strough Action. The Court notes that the affidavit was submitted originally in a motion to dismiss the Strough Action. He states that the Trustees have wrongly commenced an action as against the homeowners of the Village. He states that since there were no objections to the legal sufficiency of the Incorporation Petition or the description of the boundaries in 1993, that the Trustees can not now object.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 AD2d 607, 467 NYS2d 944 [1983], *app den* 65 NY2d 741 [1985]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The elements of slander of title are "(1) a communication falsely casting doubt on the validity of [the] complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224, 525 NYS2d 978 [1988]; *39 College Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 810 NYS2d 520 [2006]). However, any statement made by an elected official, within his competence and in the performance of his official duties is entitled to an absolute privilege (*Cosme v Town of Islip*, 102 AD2d 717, 476 NYS2d 857 [1984], *aff'd* 63 NY2d 908). Even if the statements were not absolutely privileged, they would be protected by a qualified privilege on the ground that the statements were "fairly made by a person in the discharge of some

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public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." (*Toker v Pollak*, 44 NY2d 211, 219, 405 NYS2d 1 [1978]; *see, Kasachkoff v City of New York*, 107 AD2d 130, 134, 485 NYS2d 992 [1985], *affd* 68 NY2 654 [1986]). A qualified privilege may be defeated, however, by proof that the statements were made in malice, either under the constitutional or common-law malice standard (*Lieberman v Gelstein*, 80 NY2d 429, 438, 590 NYS2d 857 [1992]).

It is also well settled that a statement made in the course of a judicial proceeding "is absolutely privileged if, by any view or under any circumstances, it may be considered pertinent to the litigation" (*Martirano v Frost*, 25 NY2d 505, 507, 307 NYS2d 425 [1969]); *Impallomeni v Meiselman, Farber, Packman & Eberz, P. C.*, 272 AD2d 579, 708 NYS2d 459 [2000], *lv den* 95 NY2d 764), irrespective of the motive with which they are used" (*see, Marsh v Ellsworth*, 50 NY 309, 311-312; *Allan and Allan Arts Ltd. v Rosenblum*, 201 AD2d 136, 615 NYS2d 410 [1994], *writ of cert den* 516 US 914 [1995]).

Here, the court finds that defendants' submissions have demonstrated their entitlement to judgment as a matter of law (*see, Cosme v Town of Islip, supra; Zuckerman v New York, supra*) in that the Trustees' allegations in the Strough action were made in their official status (*Cosme v Town of Islip, supra*) and are pertinent to the litigation (*see, Star v Simonelli*, 76 AD2d 861, 428 NYS2d 617 [1980]). Plaintiffs fail to raise an issue of fact inasmuch as there is no evidence that the Trustees uttered any communications outside their official capacities which would withdraw the absolute privilege. Assuming, however, that a qualified privilege applies here, the court finds that the submitted affidavits did not present any evidentiary facts, as distinguished from mere conclusory allegations, in support of a claim of malice (*see, Shapiro v. Health Ins. Plan of Greater N. Y.*, 7 NY 2d 56, 194 NYS2d 509 [1959]).

Moreover, plaintiffs have not submitted admissible evidence that the allegations in the Strough complaint are not pertinent to the litigation (*Kahane v Murdoch*, 218 AD 591, 218 NYS 641 [1926]), inasmuch as the Trustees commenced the action in reliance upon the Village Mayor's assurances that legislation would be enacted regarding land within 100 feet of the high water mark. Therefore, the absolute privilege to which defendants are entitled is a complete bar to the instant action in slander of title as a matter of law. In any event, the Trustees' allegations did not render title unmarketable in the legal sense (*Hirschhorn v Town of Harrison*, 210 AD2d 587, 619 NYS2d 810 [1994]; *cf., Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 606 NYS2d 132 [1993]), a necessary component of the cause of action. Consequently, plaintiffs' request for discovery is denied inasmuch as they did not make the required showing that further discovery may raise a triable issue of fact (*Lascala v D'Angelo*, 104 AD2d 930, 480 NYS2d 546 [1984]; CPLR 3212[f]).

Accordingly, the motion for summary judgment is granted.

Dated: _____

10/2/05



 J.S.C.

NEW YORK COUNTY CLERK
 COUNTY OF WESTCHESTER