

Errico v Weinstein

2008 NY Slip Op 32518(U)

September 8, 2008

Supreme Court, Nassua County

Docket Number: 8048-04/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**PAUL J. ERRICO, JR. and SALLIE ERRICO,
Plaintiffs-Petitioners,**

**Motion Sequence # 6, # 7
Submitted June 36, 2008**

-against-

INDEX NO: 18048/04

**ALLEN WEINSTEIN, LESLIE WEINSTEIN, THE
TOWN OF HEMPSTEAD, RONALD W. MASTERS,
AS COMMISSIONER OF THE TOWN OF
HEMPSTEAD'S DEPARTMENT OF CONSERVATION
& WATERWAYS, and ERIN M. CROTTY, AS
COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,**

Defendants-Respondents,

-and-

**GERI RUSSO, SCOTT RUSSO, JANE FACCHINI,
CLAUDIO FACCHINI, KEVIN McAULIFFE,
KATHLEEN McAULIFFE, USHA ARAMALIA, and
PURNACHANDRA ARAMALLA,**

Additional Defendants.

The following papers were read on these motions:

Plaintiffs' Notice of Motion.....1
WEINSTEIN Affirmation in Opposition.....2
RUSSO, McAULIFFE and ARAMALLA Affirmation in Opposition.....3
Reply Affirmation.....4
Defendant WEINSTEIN Notice of Motion.....5

ERRICO Affirmation in Opposition.....6
Reply Affirmation.....7

Plaintiffs, PAUL J. ERRICO and SALLIE ERRICO, move for an order, *inter alia*, precluding the defendants from introducing evidence at trial regarding: (1) any and all permits granted by certain governmental authorities, as well as the methods employed by those governmental authorities for issuing permits; and (2) a further order quashing various judicial subpoenas prepared by the WEINSTEIN defendants.

Additionally, defendants, ALLEN WEINSTEIN and LESLIE WEINSTEIN, move for an order, pursuant to CPLR §2307, granting their application for a subpoena *duces tecum* addressed to Robert Wenegenofsky of the TOWN OF HEMPSTEAD DEPARTMENT OF CONSERVATION AND WATERWAYS, and Mario S. Bove, Esq., Town Attorney of the TOWN OF HEMPSTEAD. The motions are determined as follows:

The within hybrid proceeding and action is a contentiously litigated dispute between two homeowners – the plaintiff ERRICOS and the defendant WEINSTEINS – who own adjoining properties fronting on the circular, cove-shaped head of the so-called “Mandalay Waterway”– a canal located in Seaford, New York.

In 2004, and upon acquiring certain permits from the TOWN OF HEMPSTEAD DEPARTMENT OF CONSERVATION AND WATERWAYS (hereinafter referred to as the “TOWN”), and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ET AL (hereinafter referred to as the “DEC”), the WEINSTEINS installed a float/dock structure, which, according to the ERRICOS, impinged upon and interfered with their riparian right of access to the canal and the navigable waters beyond.

By prior Short Form Order, dated September 9, 2005 (Davis, J.), the Court, dismissed, as untimely, the ERRICOS' Article 78 causes of action, which claims challenged and sought to annul the DEC and TOWN permits issued to the WEINSTEINS. On appeal, the Appellate Division, Second Department, summarily rejected the ERRICOS' claims of error and affirmed the September 9, 2005 order of the Lower Court in a brief, one-sentence memorandum decision, dated October, 2007 (*see, Errico v Weinstein*, 44 AD3d 657, 841 NYS2d 889 [2nd Dept. 2007]).

After he had dismissed the ERRICOS' Article 78 claims, by Short Form Order, dated June 20, 2006, Justice Davis extensively analyzed the remaining legal claims interposed by the ERRICOS. Insofar as relevant herein, Justice Davis concluded that questions of fact existed with respect to the ERRICOS' allegations that the WEINSTEINS' dock interfered with their riparian rights. Specifically, the Court held that, "[w]ether the claimed impairment or difficulty allegedly experienced by the Erricos in exiting their frontage constitutes an actionable inconvenience and/or interference with their riparian rights of reasonable access, represents a question of fact which cannot be summarily resolved on the record before the Court".

The Court also held that the issuance of the underlying municipal permits, and the dismissal of the ERRICOS' Article 78 claims relating thereto, did not preclude the ERRICOS from interposing claims based upon an alleged violation of their legally distinct, common law riparian rights, *i.e.*, claims relating to: "(1)the precise scope and delineation of the parties' respective riparian and/or property rights on the subject waterway; and (2) the extent to which, if at all, the Weinsteins' dock impermissibly impinges upon the plaintiffs' alleged riparian right of reasonable access" . The Court also emphasized that

“neither the DEC nor the Town – as their own permits suggest – purported to resolve the competing riparian rights of the involved landowners – a legal issue which properly falls within the Court’ s power to declare and resolve the conflicting property claims at issue”.

Thereafter, the matter proceeded toward trial and, by notice dated January 2008, the WEINSTEINS responded to the ERRICOS’ demand for expert information by disclosing, *inter alia*, that they intended to call one, Charles Bowman, as a trial expert. It was asserted that Bowman was expected to testify generally as to the allocation of the parties’ riparian rights, but also more particularly, as “to the method used by the DEC to allocate the riparian rights of the parties to this action”.

In April of 2008, and pursuant to CPLR §2307, the WEINSTEINS issued several subpoenas addressed to: (1) various employees of the DEC, (2) Robert Wenegenofsky of the TOWN OF HEMPSTEAD DEPARTMENT OF CONSERVATION AND WATERWAYS, and (3) Mario S. Bove, Esq., Town Attorney of the TOWN. In sum, the subpoenas requested that the identified individuals appear and offer testimony at trial (originally scheduled for May 2008, but since adjourned) and that they produce, *inter alia*, permits issued to the ERRICOS, the WEINSTEINS, and certain surrounding landowners, whose joinder was directed by Justice Davis in his June 20, 2006 order. According to the WEINSTEINS, the DEC had agreed to voluntarily provide the requested documents and, therefore, “to waive the requirement that the Subpoena * * * be ‘So Ordered’ pursuant to CPLR 2307” .

The ERRICO plaintiffs now move for certain *in limine* relief, *i.e.*, for an order precluding the WEINSTEINS from introducing evidence at trial relating to the permits issued, including the permits to themselves, as well as testimony relating to the methods

and procedures underlying the issuance of the permits. The plaintiffs further move for an order quashing the subpoenas served by the WEINSTEINS. The WEINSTEINS move for a subpoena *duces tecum* pursuant to CPLR §2307.

In support of their application, the ERRICOS contend that evidence relating to the methods used by the governmental issuing authorities in considering individual permit applications, to the extent offered as proof of the proper riparian allocation, is irrelevant and immaterial, inasmuch as the granting of permits has no bearing on the legally separate riparian declaration/allocation to be made in the case at bar. The ERRICOS' claims are persuasive.

Although proof demonstrating that, as a matter of fact, the permits were actually issued may be relevant if required to provide meaningful context, narrative and background for the trier of fact, the Court has previously made clear, in Justice Davis' June 20, 2006 order, that the issuance of the individual permits constitutes a distinct and legally dissimilar transaction from the collective allocation of riparian rights which must be made in this matter. In substance, the Court observed that the issuing agencies were merely granting individual permits and that the DEC and the TOWN were not attempting to allocate the competing, riparian rights of adjoining landowners, a distinct analytical inquiry to be made solely by the Court (*see generally, Town of Oyster Bay v Commander Oil Corp.*, 96 NY2d 566, 734 NYS2d 108, 759 NE2d 1233 (C.A. 2001); *Mascolo v Romaz Properties, Ltd.*, 28 AD3d 617, 813 NYS2d 765 (2nd Dept. 2006); *Muraca v Meyerowitz*, 13 Misc.3d 348, 818 NYS2d 450 (Supreme Nassau Co. 2006).

To be sure, the parties are free to submit evidence supportive of what they respectively contend are the proper surveying methodologies, and to show how those

methods should be applied to the facts presented at trial. However, the procedures and reasoning employed by governmental agencies in issuing individual permits are not material to the Court's essentially *de novo* analysis relating to the proper allocation of the parties' common law riparian rights. Indeed, it appears that the admission of an additional layer of extraneous evidence detailing why and how individual permits were issued would create prolixity, potential confusion and ultimately serve to blunt, rather sharpen and narrow, the relevant issues to be resolved at trial.

In sum, and as Justice Davis' June 2006 order indicates, the ultimate allocation is to be founded on, *inter alia*, controlling law, applicable surveying principles, and the collectively assessed physical attributes of the surrounding environment – not the reasoning which may have been utilized by third-party agencies considering individual permit applications.

The Court has considered the remaining arguments interposed in opposition to the ERRICOS' application and concludes that they are lacking in merit. Lastly, and in light of the Court's determination with respect to the ERRICOS' application, the WEINSTEINS' motion for a "So Ordered" subpoena is denied. It is therefore,

ORDERED, that the motion by the plaintiff ERRICOS for an order, *inter alia*, precluding the defendants from introducing evidence at trial regarding (1) any and all permits granted by stated governmental authorities, as well as the methods employed by those governmental authorities for issuing permits; and (2) a further order quashing various judicial subpoenas prepared by the WEINSTEIN defendants, which subpoenas allegedly seek evidence relating to the aforesaid permits, together with the methodologies and procedures employed in the issuance of said permits, is granted to the extent consistent

herewith, and it is further

ORDERED, that the motion by the WEINSTEIN defendants, pursuant to CPLR §2307, for an order granting their application for a subpoena *duces tecum* addressed to Robert Wenegenofsky of the TOWN, and Mario S. Bove, Esq., Town Attorney of the TOWN, is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 8, 2008


WILLIAM P. LAMARCA, J.S.C.
ENTERED

TO: Rosenberg Calica & Birney, LLP
Attorneys for Plaintiffs
100 Garden City Plaza
Garden City, NY 11530

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Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP
Attorneys for Defendants Allen Weinstein and Leslie Weinstein
330 Old Country Road
Mineola, NY 11501

Kroll, Moss & Kroll, LLP
Attorneys for Additional Defendants Geri Russo, Kevin McAuliffe and Usha Aramalla and
Purnachandra Aramalla
400 Garden City Plaza
Garden City, NY 11530

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