

Capruso v Village of Kings Point

2011 NY Slip Op 34097(U)

June 7, 2011

Sup Ct, Nassau County

Docket Number: 5006/09

Judge: Thomas Feinman

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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

Present:

Hon. Thomas Feinman
Justice

DANIEL CAPRUSO, ALAN BERKOWER, and
ELIZABETH ALLEN,

Plaintiffs,

- against -

VILLAGE OF KINGS POINT, MICHAEL C. KALNICK,
in his Official Capacity as Mayor of the Village of Kings
Point, and BOARD OF TRUSTEES OF THE VILLAGE
OF KINGS POINT,

Defendants.

THE STATE OF NEW YORK,

Plaintiff,

- against -

VILLAGE OF KINGS POINT,

Defendant.

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 5006/09

X X X

MOTION SUBMISSION
DATE: 4/15/11

MOTION SEQUENCE
NO. 4

ACTION #1

INDEX NO. 17908/09

ACTION #2

The following papers read on this motion:

Notice of Motions and Affidavits.....	<u> X </u>
Memorandum of Law in Support of Motion.....	<u> X </u>
Affirmation in Partial Opposition.....	<u> X </u>
Reply Affirmations.....	<u> X </u>

The plaintiffs in Action #1 and #2 each move separately for an order pursuant to CPLR §3212 granting summary judgment in favor of the plaintiffs as to all plaintiffs' causes of action and all defendants' affirmative defenses. The defendants, the Village of Kings Point, Michael C. Kalnick, in his official capacity as Mayor of the Village of Kings Point, and Board of Trustees of the Village of Kings Point, (hereinafter referred to as the "Village"), submit partial opposition. The plaintiffs submit reply affirmations.

PROCEDURAL HISTORY

This Court, by way of Short Form Order dated July 29, 2009, granted the plaintiffs', Daniel Capruso, Alan Berkower and Elizabeth Allen, (hereinafter referred to as "Capruso"), motion for a preliminary injunction, and denied the Village's cross-motion.

This Court, by way of Short Form Order dated November 19, 2009, granted the plaintiff, State of New York's, prior motion, denied the Village's cross-motion, and issued a preliminary injunction, which continues in force.

The Village filed notices of appeal in both cases. The Second Department consolidated the appeals and issued a decision and order dated November 16, 2010, affirming this Court's orders in both cases. (*Capruso v. Village of Kings Point*, 78 AD3d 877). The Second Department held that the "municipality's current and ongoing use of dedicated parkland without the approval of the State Legislature in violation of the public trust doctrine is a continuing wrong that the municipality has the ability to control and abate." (*Capruso v. Kings Point, supra*). The Second Department held that plaintiffs' claims were not time-barred, and ruled that this Court properly denied the Village's laches argument and affirmed the preliminary injunction. (*Id*).

The depositions have been held, discovery has been exchanged, and both actions are certified.

DISCUSSION

The plaintiffs have demonstrated *prima facie* entitlement to summary judgment. The subject 5.455-acre Wester Corner is dedicated municipal parkland, and as so, cannot be used for non-park purposes absent specific and explicit authorization from the New York State Legislature. The defendants' statute of limitations and laches defenses have been rejected, not only by this Court, but by the Appellate Division. Additionally, the plaintiffs have standing to bring the above actions.

The Village submits partial opposition and acknowledges that "[a]s a result of the Appellate Decision, the Village defendants cannot presently assert their statute of limitations and laches defenses." However, the Village asserts that plaintiffs should not be entitled to permanently enjoining the Village for all non-park uses of Kings Park, and preclude the Village from erecting a fence around the perimeter of the Wester Corner, for example, to protect egress and ingress. This Court rejects the Village's limited opposition to the plaintiff's motion's herein as the injunction requires the Village to remove the non-park materials and structures, unless and until State Legislation approval is obtained, or the Village can demonstrate such structures have legitimately been converted to proper park use. Additionally, the subject parkland should not be further obstructed by the erection of a fence without explicit and specific approval from the State Legislature.

CONCLUSION

In light of the foregoing, the motions for summary judgment by Capruso and the State of New York are granted in their entirety.

It is hereby,

ORDERED that the 5.455-acre "Western Corner" of Kings Point Park is dedicated municipal parkland and impressed with a public trust requiring specific and explicit authorization from the New York State Legislature before it can be used for any non-park purposes, and it is hereby further

ORDERED that defendants and all of their agents and assigns, and any other person working on their behalf or in concert with them, are hereby permanently enjoined from:

- a. proceeding with the Village's Department of Public Works ("DPW") facility project;
- b. issuing any permits authorizing work on the future DPW facility or granting any approvals or authorizations for the project;
- c. soliciting any bids or entering into any contracts for the construction of the DPW facility;
- d. engaging in any physical destruction, site preparation and/or construction, including but not limited to the removal of trees and earthmoving, clearing, grading, altering, or any other activities in the Western Corner of Kings Point Park that in any way relate to the future DPW project; or
- e. denying or obstructing existing access to the Park (whether through the erection of fences on the boundary of the Western Corner or by any other means), unless and until explicit and specific approval is obtained from the State Legislature, and it is hereby further

ORDERED that defendants are directed to remove from the 5.455-acre "Western Corner" of Kings Point Park all materials, equipment, and physical alterations, including buildings and other structures, under the control of the Village of Kings Point, within ninety (90) days of service upon defendants of a copy of this order, with notice of entry, and it is hereby further

ORDERED that plaintiffs, Capruso, recover from defendants costs and disbursements in an amount taxed by the Clerk of the Court upon submission of a bill of costs, and it is hereby further

ORDERED that plaintiffs, Daniel Capruso, Alan Berkower and Elizabeth Allen, shall be awarded further costs from defendants in the form of reasonably attorneys' fees and other expenses, together with interest, and it is hereby further

ORDERED that the issue of the amount of such reasonable attorneys' fees on behalf of the plaintiffs, Daniel Capruso, Allen Berkower and Elizabeth Allen, is referred to the Calendar Control Part, (CCP), and it is hereby further

ORDERED that subject to the approval of the Justice there presiding, and **provided a note of issue has been filed at least ten (10) days prior thereto**, this matter shall appear on the calendar of CCP for the **17th day of August, 2011 at 9:30 a.m.**, and it is hereby further

ORDERED that a copy of this order shall be served on the Calendar Clerk and accompany the notice of issue when filed. **The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing**, and it is hereby further

ORDERED that the directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, or a Court Attorney/Referee, as he or she deems appropriate. In the event that the matter is referred to a Court Attorney/Referee, such Court Attorney/Referee is given the jurisdiction to hear and determine and resolve the issue of the amount of plaintiff, Capruso's, attorneys' fees and other expenses, and it is hereby further

ORDERED that notwithstanding anything to the contrary, attorneys for the movants shall serve a copy of this order, with notice of entry, on the **respective defendants by regular and certified mail.**

ENTER:



J.S.C.

Dated: June 7, 2011

cc: Albert K. Butzel Law Offices
Super Law Group, LLC
Ackerman, Levine, Cullen, Brickman & Limmer, LLP

ENTERED

JUN 14 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**