

Schultheis v Estate of Tuthill
2012 NY Slip Op 30556(U)
March 5, 2012
Supreme Court, Suffolk County
Docket Number: 19824/2004
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X
GERARD SCHULTHEIS and CAROLYN
SCHULTHEIS,

Plaintiffs,

-against-

ESTATE OF LAWRENCE M. TUTHILL and
BOARD OF TRUSTEES OF THE TOWN OF
SOUTHOLD,

Defendants.

-----X

INDEX NO.: 19824/2004

CALENDAR NO.: 200702645OT

MOTION DATE: 8/26/2011

MOTION SEQ. NO.: 001 MD; 002 XMD

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Upon the following papers numbered 1 to 83 read on this motion and cross-motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30 ; Notice of Cross Motion and supporting papers 31 - 74 ; ~~Answering Affidavits and supporting papers~~ ; Replying Affidavits and supporting papers 72 - 74; 75 - 83 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the Court, sua sponte, hereby recalls and vacates its order, dated October 17, 2011, which denied the motion of defendant Estate of Lawrence M. Tuthill and the cross motion of plaintiffs Gerard Schultheis and Carolyn Schultheis, and issues the following order in its place and stead:

ORDERED that the motion by defendant Estate of Lawrence M. Tuthill for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by plaintiffs Gerard Schultheis and Carolyn Schultheis for summary judgment in their favor on the complaint is denied.

This action arises out of a dispute between neighboring landowners over riparian rights to a navigable waterway in the hamlet of New Suffolk in the Town of Southold. Running east and west, the waterway, known as School House Creek, flows into Cutchogue Harbor of the Peconic Estuary. Plaintiffs Gerard Schultheis and Carolyn Schultheis are the owners of a parcel of real property that abuts School House Creek on its northern boundary and Cutchogue Harbor on its eastern boundary. A portion of the western boundary of Schultheis's property is bounded by School House Creek, and the remaining portion of the western boundary is bounded by the eastern portion of a 2-acre parcel of property owned by defendant Estate of Lawrence M. Tuthill.

Prior to his death in 2007, Lawrence M. Tuthill operated a commercial marina on his property that provided docking services. It is undisputed that various members of the Tuthill family have possessed ownership interests in real property in the School House Creek area for more than 150 years, and that Lawrence M. Tuthill (hereinafter Tuthill) and his relatives have operated the marina for more than 70 years.

Plaintiffs purchased their property in May 1987 from Leon Krementz and Pauline Krementz, who had acquired the property in 1977 from Tuthill's sister, Marjorie H. Tuthill. The deed transferring ownership to plaintiffs states that in addition to the property described therein, plaintiffs are granted "all of the right, title and interest of [Leon and Pauline Krementz], if any, of, in and to the waters of School House Creek adjacent to the herein conveyed premises, to the center line thereof," as well as a right of way over the road granting access to such property. In November 1987, defendant Board of Trustees of the Town of Southold granted Gerard Schultheis a wetlands permit to reconstruct 245 feet of bulkhead and to construct a ramp and floating dock on the western boundary of his property. Subsequently, Tuthill, claiming ownership of the land under School House Creek, sought permission from the Town Trustees to construct additional bulkhead on School House Creek, to install a floating dock alongside the bulkhead on the Schultheis property, and to erect a retaining wall fronting Cutchogue Harbor. Tuthill failed to submit documentary proof substantiating his claim to the land under School House Creek, and in June 1990 the Town Trustees passed a resolution tabling his requests to place a float alongside the Schultheis property and to build a retaining wall.

Plaintiffs commenced the instant action after learning in 2003 that the Town Trustees, without notice, had revoked the wetlands permit it issued in 1987 to construct the bulkhead and floating dock, and after Tuthill allegedly threatened to place floating docks which would block their access to the navigable portion of School House Creek. The first cause of action in the complaint seeks a judgment, inter alia, declaring that plaintiffs "have certain riparian rights . . . to dock a boat or boats in the water next to the bulkhead of the aforesaid property and to have direct access from said bulkhead to the School House Creek," and enjoining Tuthill from placing or maintaining floating docks or other objects upon the tidal navigable water abutting plaintiffs' upland property "north of a line which begins at a point on the bulkhead where plaintiffs' property and has a bearing of North 64° 26' 40" West." The second cause of action is to quiet title to the land under the water of the School House Creek. Defendants' answers deny the allegations in the complaint.

The estate of Lawrence M. Tuthill now moves for summary judgment determining that "the dock and pier proposed by Tuthill does not interfere with plaintiff Schultheis' littoral rights," and that the floating dock constructed by the Schultheis plaintiffs "interferes with the littoral rights of the Tuthill Estate as an upland property owner." Additionally, the Tuthill estate seeks a judgment declaring that plaintiffs have "no right, title or interest to the land under School House Creek," and that "the right, title or interest to the land under School House Creek rests in the estates of Lawrence M. Tuthill and Marjorie H. Tuthill." Counsel for the Tuthill estate argues the land under School House Creek is owned by the estates of Lawrence M. Tuthill and Marjorie H. Tuthill, and that plaintiffs are interfering with the riparian rights of the estate of Lawrence M. Tuthill by docking their boat on the western boundary of their property in front of the estate's property. In support of the motion, the Tuthill estate submits copies of the pleadings,

transcripts of the deposition testimony of Tuthill and Gerard Schultheis, and various deeds and survey maps of the subject area. It also submits an affidavit of Tuthill's son, Lawrence M. Tuthill, Jr., who is the administrator of his father's estate, and an affidavit of Mickey St. John, a title examiner.

The affidavit of Lawrence M. Tuthill, Jr., alleges, in part, that School House Creek is a man-made waterway, and that prior to its creation the land underneath the water was a private roadway known as Creek Street. It alleges that the roadway had been dedicated to the Town of Southold in the 1800s by his great, great, great grandfather, Ira B. Tuthill, and then reverted back to his family when the road was abandoned by the Town. It alleges that the Schultheis property had previously been owned by his paternal aunt, Marjorie H. Tuthill, who had inherited it from her father, Harrington H. Tuthill, and that Lawrence Tuthill, Jr. and his sisters are her legal heirs. Further, the affidavit asserts that plaintiffs constructed two floating docks on the western side of their property, and that such docks "are nearly completely within the littoral area of the Tuthill property."

The affidavit of St. John asserts, among other things, that the deed transferring ownership of the subject property from Leon and Pauline Kremetz to plaintiffs did not transfer any rights, title or interest in the land under School House Creek, as the deed transferring ownership of the land from Marjorie H. Tuthill to the Kremetzs did not transfer such rights to them. It also avers that a review of the records of Suffolk County and the Town of Southold show that the land now known as School House Creek had been dedicated to the Town by various landowners in New Suffolk in 1838 for use as a public road; that such dedication did not transfer ownership "but merely an easement to use the property as a public highway"; and that the road was abandoned by the Town in 1976. St. John asserts that at the time of his death Harrington Tuthill owned all of the land now constituting School House Creek, and that he transferred his interest in such land by deeds to his children, Lawrence M. and Marjorie H. Tuthill. He concludes that as such interest was not included in the deed transferring ownership of the subject property from Marjorie Tuthill to the Kremetzs, the rights in the land under School House Creek remains in the heirs of Lawrence M. and Marjorie H. Tuthill.

Plaintiffs oppose the motion and cross-move for an order granting summary judgment in their favor. Plaintiffs assert that there is no evidence supporting the Tuthill estate's claim that School House Creek is a man-made body of water. They assert that School House Creek, in fact, is a tidal body of water; that ownership of land under tidal waters must be traced back to when the English Crown claimed ownership of all land in the early colonies; and that, under a land grant known as the Southold Patent, issued in 1676 by the Duke of York's appointed agent, Governor Edmund Andros, title to tidal bodies of water and marshes located within the area of Southold was granted to the Town's Trustees. Plaintiffs also argue that in view of the shape and frontage of the properties at issue, and the line of navigability of School House Creek, there should be an equitable division of riparian rights that would allow the Schultheis' to continue their use of the existing dock on the western boundary of their property. In addition, plaintiffs contend that a review of the chain of title for their property demonstrates an intent by prior owners to transfer all interest in such property, including rights to the land under the water of School House Creek. Plaintiffs' submissions in support of their cross motion include various surveys and deeds, photographs of the School House Creek area and of the subject property, correspondence from the Town to Tuthill, a copy of the Southold Patent, and an affidavit of

Kenneth Zahler, a title examiner. Zahler asserts that under the Crown's 1676 land grant, title to land under tidal waters was transferred to the Trustees of the Town of Southold, and that a search of County records and other sources revealed no conveyances of tidal lands by the Trustees. He also avers that a search of ancient maps shows the land dedicated to the Town back in 1838 was a "paper street" located north of the School House Creek, and that a deed from 1866 evidences the location of School House Creek "where it lies today."

A reply affirmation by the Tuthill estate's counsel argues that the Trustees have not asserted an ownership interest in the land under the water of School House Creek, and that plaintiffs are not entitled to "share" the estate's riparian rights. In opposition to the estate's motion and in further support of their cross motion, plaintiffs submit affidavits of Pauline Krementz and Kenneth Zahler, as well as an affidavit of Gerard Schultheis and an affirmation of Abigail Wickham, Esq. The Trustees of the Town of Southold did not submit papers in opposition to the motion or the cross motion.

Initially, it is noted that both the motion and cross motion were made more than 120 days after the filing of the note of issue (*see* CPLR 3212 [a]). However, based on information obtained during conferences with the parties' attorneys, the Court finds good cause exists for the delay in making such motions. Accordingly, the motions for summary judgment shall be determined on the merits.

It is well settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

The Tuthill estate's motion is denied. The applications for determinations that "the dock and pier proposed by Tuthill does not interfere with plaintiff Schultheis' littoral rights," that the floating dock constructed on the western boundary of the Schultheis property "interferes with the littoral rights of the Tuthill estate as an upland property owner," and that the estates of Lawrence M. Tuthill and Marjorie H. Tuthill own the land under the School House Creek improperly seek declaratory relief on matters not pleaded in the complaint or Tuthill's answer (*see* CPLR 3017 [b]; *McHugh v Weissman*, 46 AD3d 369, 847 NYS2d 566 [1st Dept 2007]).

Plaintiffs' cross motion also is denied. As to the branch of the motion seeking summary judgment on the second cause of action, Subdivision (1) of RPAPL 1501 provides, in relevant part, that when a person claims an estate or interest in real property, such person may maintain an action against any other person "to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public record . . . the defendant might make." An action to quiet title also may be brought by or against a corporation, as if it was

natural person (*see* RPAPL 1541). A party claiming title to real property bears the burden of establishing his or her title, and must rely “on the strength of [his or her] title and not upon the weakness” of the opposing party’s title (*Best Renting Co. v City of New York*, 248 NY 491, 496, 162 NE 497 [1928]; *see LaSala v Terstiege*, 276 AD2d 529, 713 NYS2d 767 [2d Dept 2000]; *Town of N. Hempstead v Bonner*, 77 AD2d 567, 429 NYS2d 739 [2d Dept], *appeal denied* 51 NY2d 707, 433 NYS2d 1027, *rearg denied* 52 NY2d 829, 437 NYS2d 1030[1980]).

Here, the cross-moving papers do not argue in the first instance that plaintiffs hold legal title to land under School House Creek. Instead, plaintiffs present evidence, particularly the affidavit of Kenneth Zalher, purportedly demonstrating their claim that the land situated under the creek water in front of their property is owned not by the Tuthill estate, but by the Trustees of the Town of Southold under the grant issued in 1676 by Governor Andros. And while they argue in the alternative that, if the Trustees do not hold title to the land under the water of School House Creek title to such land in front of their property passed to them by deed, they fail to submit proof establishing such claim. Plaintiffs, therefore, failed to meet their burden on the cause of action under RPAPL article 15 to establish good title in the property under School House Creek at issue in this action (*see LaSala v Terstiege*, 276 AD2d 529, 713 NYS2d 767; *Town of N. Hempstead v Bonner*, 77 AD2d 567, 429 NYS2d 739; *cf. O’Brien v Town of Huntington*, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009], *lv dismissed* 14 NY3d 935, 905 NYS2d 557 [2010]).

As to the branch of plaintiffs’ motion for summary judgment in their favor on the cause of action for declaratory and injunctive relief, a riparian owner has the right to access a navigable river or other body of water which abuts his or her property for navigation, fishing and other such uses (*see Town of Oyster Bay v Commander Oil Co.*, 96 NY2d 566, 734 NYS2d 108 [2001]; *Kearns v Thilburg*, 76 AD3d 705, 907 NYS2d 310 [2d Dept 2010], *lv denied* __ NY3d __, 2011 NY Slip Op. 92163 [Dec. 13, 2011]; *Mascolo v Romaz Props., Ltd.*, 28 AD3d 617, 813 NYS2d 765 [2d Dept 2006]), and such right follows the entire frontage of the property (*Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 264, 328 NYS2d 894 [2d Dept 1972], *affd* 32 NY2d 859, 346 NYS2d 529 [1973]). The right of access to navigable water includes the right of passage to and from the waterway with reasonable safety and convenience (*see Mascolo v Romaz Props., Ltd.*, 28 AD3d 617, 813 NYS2d 765; *627 Smith St. Corp. v Bureau of Waste Disposal of the Dept. of Sanitation of City of N.Y.*, 289 AD2d 472, 735 NYS2d 555 [2d Dept 2001], *lv denied* 98 NY2d 611, 749 NYS2d 3 [2002]; *Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 328 NYS2d 894). Consequently, a riparian owner has the right to make his or her access a “practical reality” by building a pier, dock or wharf (*Town of Oyster Bay v Commander Oil Co.*, 96 NY2d 566, 571, 734 NYS2d 108; *see Kearns v Thilburg*, 76 AD3d 705, 907 NYS2d 310; *Schuss v Palmisano*, 51 AD3d 766, 857 NYS2d 709 [2d Dept 2008]). Further, an owner of land abutting a navigable tidal waterway “has the right to use the area over the underwater land fronting on his [or her] property for access to navigable water, even if title to the underwater land is held by another” (*Bravo v Terstiege*, 196 AD2d 473, 475, 601 NYS2d 129 [2d Dept 1993]; *see Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 328 NYS2d 894).

A riparian owner’s right of access, however, is not absolute. Rather, it is qualified by the rights of the owner of the submerged land over which the riparian landowner must cross (*Town of Oyster Bay v Commander Oil Co.*, 96 NY2d 566, 572, 734 NYS2d 108, *citing Hedges v West*

Shore R.R. Co., 150 NY 150, 158, 44 NE 691 [1896]; see *Mascolo v Romaz Props., Ltd.*, 28 AD3d 617, 813 NYS2d 765). When the rights of the riparian owner and the underwater landowner conflict, a court must “strike the correct balance” between such rights (*Town of Oyster Bay v Commander Oil Co.*, 96 NY2d 566, 572, 734 NYS2d 108; see *Mascolo v Romaz Props., Ltd.*, 28 AD3d 617, 813 NYS2d 765). Moreover, a right of access “may be shared with others intent on crossing the land under water,” even for purposes unrelated to the use of the upland (*Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 265, 328 NYS2d 894, citing *City of New York v Third Ave. Ry. Co.*, 294 NY 238, 62 NE2d 52 [1945]).

The conflicting affidavits of Zehler and St. John, together with the various deeds and survey maps submitted on the motion and cross motion, demonstrate a triable issue of fact as to whether the colonial land grant, the Southold Patent, conferred ownership of the subject land under School House Creek to the Trustees of the Town of Southold. While plaintiffs’ submissions demonstrate they have riparian rights to access the navigable portion of School House Creek (see *City of New York v Gowanus Indus. Park, Inc.*, 65 AD3d 1071, 886 NYS2d 427 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 315 [2010]; *Mascolo v Romaz Props., Ltd.*, 28 AD3d 617, 813 NYS2d 765), including a right to access from the western boundary of their property (see *Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 265, 328 NYS2d 894), issues exist as to whether the floating docks constructed by plaintiffs interfere with and diminish the riparian rights of the adjoining property owned by the Tuthill estate. The reasonableness of the Schultheis’s use of the floating docks and the impact of such use of the Tuthill estate’s property rights, therefore, are issues for the trier of fact. Finally, plaintiffs have failed at this time to demonstrate a legal basis for enjoining the Tuthill estate from erecting or maintaining docks or other objects on the creek “north of a line which begins at a point on the bulkhead where plaintiffs’ property and has a bearing of North 64° 26’ 40” West.”

Dated: March 5, 2012

PAUL J. BAISLEY, JR.
J.S.C.