

Semlear v Albert Marine Constr., Inc.
2012 NY Slip Op 33125(U)
December 11, 2012
Sup Ct, Suffolk County
Docket Number: 10-11287
Judge: Peter H. Mayer
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-13-12
ADJ. DATE 7-24-12
Mot. Seq. # 004 - MG; CASEDISP

-----X	CAHN & CAHN, LLP
JON S. SEMLEAR, FREDERICK C.	: Attorney for Plaintiffs
HAVEMYER, ERIC SCHULTZ, EDWARD J.	: 22 High Street, Suite 3
WARNER, JR., and WILLIAM PELL, as Trustees	: Huntington, New York 11743
of the Freeholders and Commonalty of the Town	:
of Southampton,	: ESSEKS, HEFTER & ANGEL
	: Attorney for Paul J. Napoli, Jeffrey Levine &
Plaintiffs,	: Randi Levine
	: 108 East Main Street, P.O. Box 279
-against-	: Riverhead, New York 11901
	:
ALBERT MARINE CONSTRUCTION, INC.,	:
PAUL J. NAPOLI, JEFFREY LEVINE and	:
RANDI LEVINE,	:
Defendants.	:
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated June 27, 2012, and supporting papers; (2) Affidavit in Opposition by the defendants, dated July 20, 2012, and supporting papers; (3) Reply Affidavit by the plaintiffs, dated July 23, 2012, and supporting papers; (4) Other Supplemental Affidavit by the defendants, dated July 26, 2012~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows:

Having considered the papers submitted in support of and in opposition to the within motion, the application for leave to reargue the motion which resulted in the Court's decision dated May 9, 2012 is granted, and upon reargument, it is

ORDERED that the motion by the defendants, Paul J. Napoli, Jeffrey Levine, and Randi Levine, for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff's claims in their entirety is granted; and, it is further

ORDERED that the complaint, as interposed against the remaining defendant, Albert Marine Construction, Inc., is dismissed.

Although plaintiffs failed to attach a complete copy of the papers filed with the Court in this motion for leave to reargue and, generally without a complete copy of the underlying motion papers, it is unclear what arguments were raised and what evidence was submitted by the parties with the prior motion for summary judgment (*see* CPLR 2221 [d]; CPLR 2214 [c]; *see generally Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 781 NYS2d 125 [2d Dept 2004]), the Court, in this instance, was able to access the necessary papers to make a determination. However, movants should be aware that this Court does not usually retain the papers following the disposition of a motion and the Court is not compelled to retrieve the clerk's file in connection with its consideration of subsequent motions (*see Sheedy v Pataki*, 236 AD2d 92, 663 NYS2d 934 [3d Dept 1997], *lv denied* 91 NY2d 805 [1998]; *see also* CPLR 2214 [c]).

Plaintiffs instituted this action for an injunction pursuant to CPLR Article 63, enjoining the defendant from placing hard or semi-hard structures, or moving, placing, depositing, or scraping sand in the ocean beach area within the Village of Quogue without a permit from or consent from the plaintiffs; enjoining the defendant from interfering with plaintiffs' easement over the ocean beach; and for a judgment declaring the "Trustees' Rules and Regulations" to be valid and binding upon the defendant. Plaintiffs, the duly elected members of the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, allege that as a result of a certain patent issued on December 6, 1686 (the Dongan Patent) by the King of England to the Governor of the Provinces of New York, and thereafter, through various legislative acts and court rulings, they have possessed an easement over the beaches and have exercised the power to regulate the use of the beaches within the Town of Southampton. As a result thereof, plaintiffs maintain that the Village of Quogue, the defendant herein, undertook a series of acts in violation of their Rules and Regulations and that the defendant refuses to acknowledge the plaintiffs' right to enforce regulations with respect to the portion of the ocean beach area that lies within its boundaries.

The defendant requests an order granting summary judgment dismissing plaintiffs' complaint on the ground that plaintiff trustees have no regulatory jurisdiction over ocean beaches in the Village of Quogue, that the State of New York and the Village of Quogue have been given the regulatory power over the ocean beach activities within the village (and that the town and its trustees have no regulatory power within the village's boundaries), and that the plaintiffs have failed to show that there has been an interference with the public's "easement".

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d

338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

The Town of Southampton, Suffolk County, New York, was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. “[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power” (*Knapp v Fasbender*, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see People v Lagana*, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied*, 8 NY3d 882, 832 NYS2d 494 [2007]). As case law has evolved in connection with the property within the jurisdiction of the trustees, we know that when bordering on navigable waters, the title of the adjoining property owner extends to the “high-water mark” (*The Trustees of Brookhaven v Strong*, 60 NY 56 [1875]). The land under the waters was owned by the town, and, along with the product of the waters, was managed and controlled solely by the trustees (*People v Jessup*, 160 NY 249 [1899]; *The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co.*, 116 NY 1 [1889]; *The Trustees of Brookhaven v Strong, supra*). Although Chapter 155 of the Laws of 1818 declared that the beach was part of the undivided land, over which the Town proprietors would manage, the act made a reservation with respect to public easements and privileges and understood that the plaintiffs' had a right to an easement (*The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts*, 163 NY 454, 460 [1900]; *see, Dolphin Lane Assoc v Town of Southampton*, 72 Misc2d, 868; 339 NYS2d 966 [1971]).

In *Allen v. Strough*, 301 AD2d 11, 752 NYS2d 339[2nd Dept. 2002], the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton were alleged to have exceeded their jurisdiction in denying an application by Susan Allen and her neighbor John Poster for permission to construct rock revetments the protection of which, they alleged, protected their houses from destruction. These claims were made in a hybrid Article 78, Declaratory Judgement proceeding. Determination of the issue revolved around the definition of ocean beach area. Pursuant to local law (Rules Art. I) the “ocean beach area” is the area bounded on the north by the crest of the primary dune and on the south by the high water mark of the Atlantic Ocean. Petitioner *Allen* had alleged that her proposed revetment was landward of the primary dune. Supreme Court accepted this proof and found that no permit was required and thus annulled the Board’s denial of the permit. The Appellate Division found that the record below in both the *Allen* and *Strough* cases were unclear as to where the northern limit of the “ocean beach area” was(Rules Art. I), and remanded the cases for a hearing to determine this northern limit and further decide the related question as to whether a permit from the plaintiffs would be required to construct the revetment.

Although the *Allen* case concerned the jurisdiction of the Trustees to issue permits that regulate activities taking place in the relevant areas of the ocean beaches, it is persuasive in the context of the

plaintiff's rights to enforce its easement. The definition of the ocean beach is the same in the instant case as in the *Allen* case. Under Town Law (Rules Art. I) the ocean beach area is that area "along the Atlantic Ocean bounded on the north by the crest of the primary dune,... on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees have the right to control the ocean beach for the protection of its easement area that is south of the crest of the primary dune and north of the high water mark of the ocean. The trustees retain the title to the lands under water and have the power to grant rights to erect structures on those submerged lands and to take shellfish from them (*Knapp v Fasbender, supra*). However, they do not have unfettered control of all of the shores and beaches along the Atlantic Ocean.(see, *The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts, supra*; *Allen v Strough, supra*).

The jurisdiction of the trustees is not limited by the authority of the State because Navigation Law §2 (4) specifically excluded "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" from the navigable waters of the state (the basis of the exemption being derived from the various patents and their progeny) (see *Rottenberg v Edwards*, 103 AD2d 138, 478 NYS2d 675 [2d Dept 1984]). Although the defendant Village would generally have jurisdiction of the areas within its territorial limits, because of the various colonial land grants which have been confirmed by the state and federal legislatures, the lands lying on or bordering the tidewaters are not under its jurisdiction as they remain under the jurisdiction of the town or its trustees (see *Inc. Village of Manorhaven v Ventura Yacht Services, Inc.*, 166 AD2d 685, 561 NYS2d 277 [2d Dept 1990]; compare *Malloy v Inc. Village of Sag Harbor*, 12 AD3d 107, 784 NYS2d 141 [2d Dept 2004]).

In the instant matter, plaintiffs' complaint makes no reference to the crest of the primary dune and the high-water mark but states in general that it has jurisdiction over the "Ocean Beach Area." Thus, that portion of plaintiffs' complaint which seeks a declaration that they possess the right to regulate the subject beaches to protect their easement over them cannot be granted, as it is clear that they possess only the right to regulate for the protection of their easement that portion of the beach which may be south of the crest of the primary dune and north of the high-water mark of the Atlantic Ocean.

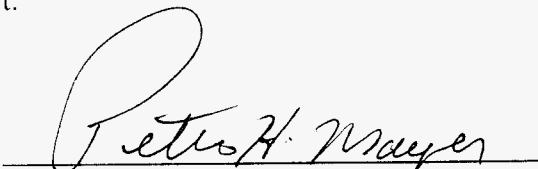
Similarly, in connection with their request for an injunction, plaintiffs fail to show that their "easement rights" have been or are in danger of being obstructed. Finally, although the Rules and Regulations of the Trustees may be valid and enforceable, as stated in the portion of the complaint which seeks a declaratory judgment, the plaintiffs have failed to set forth a valid cause of action against the defendant since no allegation is made that the actions of the defendant affected the land or waters below the crest of the primary dune. Accordingly, as plaintiffs are without jurisdiction to maintain any of the causes of action alleged in their complaint, defendant's motion for an order granting summary judgment dismissing the complaint is granted.

The Court declares that the plaintiffs have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark.

Semlear v Inc. Village of Quogue
Index No. 10-30131
Page No. 5

This constitutes the Order and Judgment of the Court.

Dated: 12/11/12


PETER H. MAYER, J.S.C.

[] FINAL DISPOSITION

[X] NON FINAL DISPOSITION