

**Trustees of the Freeholders & Commonalty of Town
of E. Hampton v Zweig**

2014 NY Slip Op 30685(U)

March 3, 2014

Supreme Court, Suffolk County

Docket Number: 13-29760

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 11-27-13 (#001)
MOTION DATE 1-7-14 (#003)
MOTION DATE 1-21-2014 (#004)
MOTION DATE 1-21-2014 (005)
ADJ. DATE 12-10-13 (#001)
ADJ. DATE 2-27-14 (#003)
Mot. Seq. # 001 - MD
 # 003 - MG
 # 004-XMOTD
 # 005-XMOTD

-----X
THE TRUSTEES OF THE FREEHOLDERS
AND COMMONALTY OF THE TOWN OF
EAST HAMPTON.

 Plaintiff-Petitioner,

 - against -

MOLLIE ZWEIG, THE ZONING BOARD OF
APPEALS OF THE VILLAGE OF EAST
HAMPTON, THE VILLAGE OF EAST
HAMPTON, and THE DEPARTMENT OF
CODE ENFORCEMENT of the VILLAGE OF
EAST HAMPTON

 Defendants-Respondents.
-----X

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Upon the following papers numbered 1 to 88 read on these motions for a preliminary injunction, to vacate the temporary restraining order, and for leave to renew and reargue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 80 - 88; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 5 - 63; Replying Affidavits and supporting papers 64 - 79; Other _____; and after hearing counsel in support and opposed to the motions and cross motions, it is,

ORDERED that this motion (001) by plaintiff/petitioner The Trustees of the Freeholders and Commonalty of the Town of East Hampton for a preliminary injunction; the motion (003) by defendant/respondent Mollie Zweig to terminate the temporary restraining order; the cross motion (004) by plaintiff/petitioner The Trustees of the Freeholders and Commonalty of the Town of East Hampton to renew and reargue those portions of a December 11, 2013 Order requiring the Trustees to post a One Million Dollar (\$1,000,000.00) undertaking as part of the issuance of a temporary restraining order; and

the cross motion (005) by defendant/respondent Mollie Zweig to renew and reargue that portion of a December 11, 2013 Order requiring the plaintiff-petitioner to post a \$1 million undertaking rather than a \$10 million undertaking, are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (001) by plaintiff/petitioner The Trustees of the Freeholders and Commonalty of the Town of East Hampton for a preliminary injunction to stay, enjoin and/or restrain work on the proposed revetment project on or near the property located at 11 West End Road, East Hampton, New York is denied; and it is further

ORDERED that this motion (003) by defendant/respondent Mollie Zweig for an order declaring the temporary restraining order, set forth in the order to show cause signed by the Honorable Paul J. Baisley, Jr. on November 13, 2013 and extended by the order dated December 11, 2013 of the Honorable Hector D. LaSalle, to be terminated and no longer in effect is granted; and it is further

ORDERED that so much of the cross motion (004) by plaintiff/petitioner The Trustees of the Freeholders and Commonalty of the Town of East Hampton to renew and reargue those portions of a December 11, 2013 Order requiring the Trustees to post a One Million Dollar (\$1,000,000.00) undertaking as part of the issuance of a temporary restraining order is granted to the extent that the motion to reargue is granted and upon reargument, the relief sought is denied as academic in light of the Court's decision, and the cross motion is otherwise denied; and it is further

ORDERED that so much of the cross motion (005) by defendant/respondent Mollie Zweig to renew and reargue that portion of a December 11, 2013 Order requiring the petitioner to post a \$1 million undertaking rather than a \$10 million undertaking, is granted to the extent that the cross motion to reargue is granted and upon reargument, the relief sought is denied as academic in light of the Court's decision, and the cross motion is otherwise denied.

Defendant/respondent Mollie Zweig (hereinafter Zweig) owns the subject premises located at 11 West End Road, East Hampton, New York, which fronts the Atlantic Ocean. She successfully sought approval from the New York State Department of Environmental Conservation ("the State DEC") and the defendant/respondent Village of East Hampton ("the Village") for a proposed revetment project on the beach involving (i) the removal of an existing rock groin, (ii) the construction of a new rock revetment at the scarp line of the existing eroded dune, (iii) the restoration of the eroded dune with 4,000 cubic yards of compatible sand, (iv) the planting of beach grass on the restored dunes, and (v) the installation of sand fencing within 15 feet of the seaward toe of the restored dune. Zweig obtained a Tidal Wetlands permit from the State DEC on April 1, 2013 which authorized and required her to remove the existing stone groin and to construct a stone revetment. The permit expires on April 1, 2018. After a public hearing on her application, the defendant/respondent The Zoning Board of Appeals of the Village of East Hampton ("the Village Zoning Board") rendered its final determination dated October 11, 2013 approving and permitting Zweig's proposed revetment project. Then, on or about October 21, 2013, defendant/respondent the Department of Code Enforcement of the Village of East Hampton issued a building permit for the revetment project. Thereafter, work began on the project.

On November 7, 2013, plaintiff/petitioner The Trustees of the Freeholders and Commonalty of

the Town of East Hampton (“the Trustees”) commenced the instant hybrid CPLR article 78 proceeding and declaratory judgment action arguing, among other things, that the proposed revetment project is located on property owned and governed by the Trustees, and not owned by Zweig, and that Zweig had failed to obtain from them the necessary permits and approvals for the project. Then, the Trustees obtained by order to show cause on November 13, 2013 (Baisley, J.), a temporary restraining order, which was extended by the order dated December 11, 2013 (LaSalle, J.), to enjoin work on the proposed revetment project pending determination of the Trustees’ motion (001) for a preliminary injunction. The December 11, 2013 order also directed the Trustees to post an undertaking pursuant to CPLR 6312 (b) with the Suffolk County Clerk in the sum of one million dollars (\$1,000,000.00). Zweig moved by order to show cause (003) for an order declaring the temporary restraining order to be terminated and no longer in effect.

A hearing was held before this Court on February 27, 2014 with respect to the aforementioned pending motions as well as mutual cross motions to lower and raise, respectively, the monetary undertaking required of the Trustees for the duration of the stay of the revetment project. The additional defendant/respondent Town of East Hampton indicated that it was not taking any position with respect to the pending motions and cross motions. At the hearing, it was ascertained that the Trustees had not posted any undertaking; that the only part of the proposed revetment project completed prior to the effective date of the temporary restraining order was the removal of the existing rock groin and that currently there is a void in that area of the beach; that Zweig submitted an application for approval of the proposed revetment project, with reservation of rights, to the Trustees on February 24, 2014 for their consideration at their meeting held the following day but that there currently is no definitive date as to when the application will be processed and considered; that the Trustees recently approved the request of Zweig’s neighbor to the east to replenish the sand in the area of an existing rock revetment; that the Trustees have previously approved numerous other revetment and/or replenishment projects along the shoreline in addition to the recently approved project immediately adjacent to the Zweig property; and, that any future work on the Zweig revetment project may be at best constrained or at worst prevented by the impending onset of “piping plover season,” which begins on April 1st and continues until October.

“Pursuant to CPLR 6301, a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before the hearing can be held.” (*Crescentini v Slate Hill Biomass Energy, LLC*, 113 AD3d 806, 979 NYS2d 635, 637 [2d Dept 2014]). Once the court determines that the plaintiff has not shown that he or she would suffer irreparable injury, there is no basis to continue the temporary restraining order (*id.*).

“A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant’s favor” (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]; *see* CPLR 6301; *Shasho v Pruco Life Ins. Co. of N.J.*, 67 AD3d 663, 665, 888 NYS2d 557 [2d Dept 2009]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Ruiz v Meloney*, 26 AD3d 485, 486, 810 NYS2d 216

[2d Dept 2006]). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone–Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625, 920 NYS2d 362 [2d Dept 2011]).

In support of their request for a preliminary injunction, the Trustees argue that their Commonlands for the benefit of the general public will be irreparably harmed without said relief inasmuch as the revetment project is designed to interact with storm tides and waves so as to alter the natural processes of erosion and accretion as they relate to the subject property, and that Zweig has taken repeated steps to construct the proposed revetment project while ignoring the clear and well settled jurisdiction of the Trustees who seek to adequately protect the beach for the general public. Notably, at the hearing that took place before this Court on February 27, 2014, the attorney for the Trustees stressed that irreparable harm would result to the Trustees and ultimately the general public if the stay were not continued and the preliminary injunction granted. According to the Trustees’ attorney, continuation of the proposed revetment project without Trustee approval would undermine the long established requirement that beachfront residents apply to the Trustees for permission before undertaking such projects on land long considered by the Trustees to be within their jurisdiction and governance.

Initially, the Court reminds the parties that it is not rendering a determination at this juncture on the hybrid CPLR article 78 complaint/petition (002), which involves issues concerning title to and jurisdiction over the beach area where the proposed revetment project is located. While the Court recognizes the need to maintain or preserve the authority of recognized governing institutions such as the Trustees, there is no indication that Zweig’s failure to apply for permission to the Trustees for this proposed revetment project was done willfully or to undermine the authority or jurisdiction of the Trustees. In addition, any purported disrespect towards the Trustees in failing to obtain their approval cannot be characterized as irreparable injury. The Court notes that the Trustees have failed to demonstrate irreparable harm specifically with respect to the construction of the proposed revetment project particularly since they have already approved the replenishment of sand by Zweig’s neighbor to the east and by other property owners along the shoreline.

Further, the subject revetment is to be located underneath sand. The Trustees have recently indicated their willingness to give approval for a sand replenishment project (without the actual stone revetment) to the respondent homeowner. It is also noteworthy that the Trustees have no written criteria nor any environmental department to consider the application before them.

In contrast, Zweig has demonstrated irreparable injury if the preliminary injunction were granted as well as the balancing of equities in her favor inasmuch as she applied to the authorities whom she believed were the proper authorities, the State DEC and the Village, for permission to complete the proposed revetment project; for the past four months the beach area in front of her property has been vulnerable to potential storms and wave action without any security in the event of loss; and now there is the danger that construction may not be able to recommence until October due to the onset of “piping plover season” leaving the subject area vulnerable to the beginning of hurricane season. Therefore, the Court finds that the Trustees have failed to meet their burden of demonstrating their entitlement to a preliminary injunction and the motion (001) for that relief is denied.

Inasmuch as the order dated December 11, 2013 (LaSalle, J.) provided that the temporary restraining order would remain in effect pending the determination of the Trustees' motion for a preliminary injunction and the preliminary injunction motion has been decided herein, the temporary restraining order is no longer in effect (*see Crescentini v Slate Hill Biomass Energy, LLC*, 113 AD3d 806, 979 NYS2d 635, 638). Based on the foregoing, Zweig is entitled to the entry of judgment declaring the temporary restraining order, set forth in the order to show cause signed by the Honorable Paul J. Baisley, Jr. on November 13, 2013 and extended by the order dated December 11, 2013 of the Honorable Hector D. LaSalle, to be terminated and no longer in effect. Therefore, the motion (003) by Zweig for said relief is granted.

Notably, Zweig's attorney conceded at the hearing that if Zweig goes forward with the proposed revetment project and the Court ultimately renders a determination in favor of the Trustees on the hybrid CPLR article 78 complaint/petition (002), Zweig may well be required to undo and remove the effects of the project at her own cost, should the Trustees direct that she do so.

In light of the foregoing, so much of the cross motions (004, 005) to reargue the amount of the undertaking required of the Trustees in the event that the stay were continued has been considered and is rendered academic by the foregoing decision.

Submit judgment.

Dated: 3.3.2014



ANDREW G. TARANTINO, JR., C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION