The Seaview at Amagansett, Ltd. v Trustees of the Freeholders and Commonalty of the Town of E. Hampton
2014 NY Slip Op 32386(U)
September 3, 2014
Supreme Court, Suffolk County
Docket Number: 09-34714
Judge: Jerry Garguilo
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-34714
CAL No. 13-01367OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-11-13
ADJ. DATE 4-23-14
Mot. Seq. # 004 - MotD
005 - MotD

THE SEAVIEW AT AMAGANSETT, LTD., DUNES AT NAPEAGUE PROPERTY OWNERS ASSOCIATION, INC., THE TIDES HOMEOWNERS ASSOCIATION, INC., WHALERS LANE HOMEOWNERS ASSOCIATION, INC., THE OCEAN ESTATES PROPERTY OWNERS ASSOCIATION, INC., ROBERT HIGGINS, MARC HELIE, ROBERT CRISTOFARO and ROBERT COOPERMAN, ,

Plaintiff,

- against -

TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF EAST HAMPTON AND THE TOWN OF EAST HAMPTON,

- and -

JAY H. BAKER, PATTY C. BAKER, DAVID STUART TYSON, STEPHANIE BITTERMAN, JUNE MERTON, NAPEAGUE ASSOCIATES, DAVID ROSS, GRACE ROSS, IRVING C. MARCUS and HARRIET MARCUS,

Defendants.

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Upon the following papers numbered 1 to 361 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 54 (004); 55 - 99 (005) ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 102 - 353 ; Replying Affidavits and supporting papers 354-355; 356-359; 360-361 (sur-reply) ___; Other 100 -101 (additional defendant Merton's answer) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by defendant Trustees of the Freeholders and Commonalty of the Town of East Hampton and this motion (005) by defendant Town of East Hampton for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (004) by defendant Trustees of the Freeholders and Commonalty of the Town of East Hampton for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is determined herein; and it is further

ORDERED that this motion (005) by defendant Town of East Hampton for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is determined herein.

Plaintiffs commenced this action on September 2, 2009 to quiet title pursuant to RPAPL article 15, for permanent injunctions, and for a declaratory judgment concerning disputed beachfront land[1]. The property consisting of approximately 4000 feet of the Atlantic Ocean beachfront in Amagansett, runs easterly from Napeague Lane to the westerly border of Napeague State Park and runs southerly to the mean high water line of the Atlantic Ocean in the Town of East Hampton. Plaintiffs claim ownership interest in the subject property based on a deed dated March 15, 1882 (Benson deed) from the Trustees of the Freeholders and Commonalty of the Town of East Hampton (Trustees) to Arthur W. Benson conveying full fee title to approximately 1,000 acres which included the subject property. Said deed contained the following language:

> And also except and reserved to the inhabitants of the Town of East Hampton the right to land fish boats and netts [sic] to spread the netts [sic] on the adjacent sands and care for the fish and material as has been customary heretofore on the South Shore of the Town lying Westerly of these conveyed premises.

Defendant Town of East Hampton (Town) enacted Local Law No. 21 on September 24, 1991 which was codified as Chapter 91 of the Town Code to regulate beach areas within the boundaries of the Town. Based on the definitions contained therein, the subject property is a Trustee beach, owned and managed by the Trustees (*see* Town Code § 91-3). Chapter 91 authorizes the Town to issue beach vehicle permits to Town residents free of charge and to non-residents for a fee of $275 (non-resident permits expire yearly on December 31), allowing the operation of vehicles on ocean beaches, including the subject property (*see* Town Code §§ 91-2, 91-5). It also contains regulations for vehicular beach use (*see* Town Code § 91-5). Notably, beach vehicles are required to maintain a distance of no less than 50 feet seaward of the beach grass line, if possible, and are prohibited from operating over or upon any dune, bluff or vegetation (*see* Town Code § 91-5 [C], [1], [2]).

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[1] This action was joined for trial with a related action entitled ***White Sands Motel Holding Corp. v Trustees of the Freeholders and Commonalty of the Town of East Hampton and the Town of East Hampton*** with Index number 34713-2009 by order of this Court (Tanenbaum, J.) dated December 7, 2011.

Plaintiffs claim that prior to the enactment of Chapter 91 of the Town Code, net fisherman used the subject beach area and that it was not accessed by vehicles and used by the public for recreational purposes in its current nature and intensity. They also claim that defendants Trustees and Town grant to beach vehicle permit holders rights to use the subject property to park and drive their vehicles and to congregate thereon during "summer season" daytime hours resulting often in more than 200 vehicles being parked at any one time by members of the public who then erect tents, picnic, cook food, let their dogs run free, and bathe in the ocean waters without any lifeguards. They argue that the vehicular use of the beach area is dangerous as the vehicles often speed, placing plaintiffs and other pedestrians in danger; the vehicles are often driven or parked on the beach grass in environmentally sensitive areas within and adjacent to the beach area thereby destabilizing the sand dunes that provide protection to plaintiffs' property against upland flooding; and members of the public frequently light bonfires and set off fireworks creating the risk of, or resulting in, beach grass fires that endanger the upland property and houses including those owned by plaintiffs. Plaintiffs also argue that such use constitutes a nuisance in the form of loud truck and car motor noise and trash and debris from members of the public and their animals polluting the beach, dunes, water and air, thereby substantially and unreasonably interfering with plaintiffs' quiet enjoyment of their homes and beaches. They further argue that defendants, through their Town Code provisions and "Beach Driving Ordinances," have created a defacto parking lot and bathing beach on the subject property and are allowing activities unauthorized by the Benson deed.

Plaintiffs allege that vehicles access said beach area through a natural gap in the dune of less than ten feet in width located at the eastern end of Marine Boulevard. According to plaintiffs, on certain summer weekends, said access point has 600 or more entries and exits by vehicles. Plaintiffs also allege that the right to use said access point was granted to the Trustees by the predecessor in title to plaintiff Dunes at Napeague Property Owners Association, Inc. (Dunes at Napeague) by a document entitled "Dune Associates Declaration of Covenants and Restrictions" (Covenants and Restrictions) dated June 26, 1981 and filed in the Suffolk County Clerk's Office on June 30, 1981, and by a document dated in 1996 between additional defendants Irving C. Marcus and Harriet Marcus (Marcus) and the Trustees. The Covenants and Restrictions limited the use of the access point to the use in existence in 1981 and prohibited lot owners like the Marcuses from using lots on the map of Dunes at Napeague to access adjoining property. Plaintiffs argue that the current use of the access point by public vehicles for recreational use of the beach is different from, and substantially greater and denser (particularly during piping plover season), than the use by net fishermen in 1981.

By their first cause of action, plaintiffs seek a determination that plaintiffs and the additional defendants, except additional defendants Marcus, are the lawful owners of a portion of the subject beach area and are vested with absolute and unencumbered title in fee to said property subject to an easement for the benefit of plaintiff Robert Higgins and non-party Judith Higgins. The second cause of action alleges that the reservation in the Benson deed does not inure to the benefit of current Town inhabitants, has been terminated or is terminable by the fee owner, and the Trustees and Town have no right or authority pursuant to said reservation to issue beach vehicle permits or to grant anyone permission to use the subject property to drive and park their vehicles. The third cause of action sounds in trespass and plaintiffs seek a permanent injunction against the Trustees and Town enjoining them and any persons acting under them, or pursuant to their authority, from entering into or interfering with plaintiffs' property.

By their fourth, fifth and sixth causes of action, plaintiffs seek a determination of the parties' rights and obligations with respect to the access point to the beach area and a permanent injunction against the

Trustees and Town from using the access point in a manner inconsistent with the Marcus documents. The eighth and ninth causes of action allege that the Trustees and Town have created a private and public nuisance and plaintiffs seek a permanent injunction against the Trustees and Town to abate the nuisances and to restrain them from issuing beach vehicle permits. By their tenth and eleventh causes of action, plaintiffs seek a declaration that Chapter 91of the Town Code violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution by discriminating against plaintiffs in favor of beachfront owners in other areas of the Town and vehicular beach users and bears no rational relationship to any legitimate interest of the Trustees and the Town. The twelfth cause of action alleges that the Trustees have breached their fiduciary duty to plaintiffs.

Defendants Trustees and Town assert as affirmative defenses in their amended answers that plaintiffs' action sounding in inverse condemnation is time-barred by the three-year statute of limitations of CPLR 214 (4) and laches.

Defendants Trustees and Town seek summary judgment dismissing the complaint based on the defenses of statute of limitations, laches and lack of ownership of the disputed beach area. They agree for the purposes of their motions that plaintiffs derive title through mesne conveyances from the Benson deed. They assert that said title was never full fee title but was limited by an exception for public use of the beach, that the Trustees' rights to sell lands in East Hampton, including the subject property, derive from the Dongan Patent, and that the Trustees hold the fee of the land and certain beaches granted by the Dongan Patent in public trust for use by the Town's inhabitants. In addition, they assert that plaintiffs' claims sound in inverse condemnation and are barred by the three-year statute of limitations of CPLR 214 (4) inasmuch as the proffered proof reveals that following confrontations, residents were effectively ousted by vehicle drivers from use of the beach, the beach became a de facto parking lot, and use of the beach was conspicuously offensive and aggravating, all amounting to a de facto taking. They add that the action is barred by the equitable doctrine of laches inasmuch as these conditions have existed and have been observed, known and the subject of complaints to the Town or Trustees by plaintiffs for at least 13 years.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form 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]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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]). "Once this showing has been made, however, 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" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Defendants Trustees and Town argue that plaintiffs' deeds lack any indication of ownership of the beach and that each of the filed subdivision maps expressly disclaim any title to the beach. Plaintiffs contend that defendants conceded in their responses to plaintiffs' interrogatories that they do not own the subject beaches, that defendants cannot rely on inscriptions contained in the subdivision maps, and that defendants offer no title expert testimony, title abstracts or other title instruments demonstrating that the subject beach area is not owned by plaintiffs.

Initially, the Court notes that the introduction of the Journal of the Trustees for the years 1870 to 1897 submitted herein indicates that "Arthur W. Benson bought all of the common land on Napeague below the highlands between a strip of land left for a road eight rods wide starting at the foot of highland on the Montauk road and running to the Ocean at right angle with Montauk road and Montauk for $1,375." A review of the proffered deeds in the chains of title of each of the plaintiffs from the Benson deed onward reveals that the early deeds granted title that extended southward to the high water mark of the Atlantic Ocean. However, the following language describing the inclusion of beach area which appeared in the deeds in approximately the early 1900's: "TOGETHER with all the right, title and interest of the parties of the first part in and to the beach lying between the foot of the beach banks and the mean high water line of the Atlantic Ocean, between lines drawn in continuation of the easterly and westerly lines above described." disappeared from subsequent deeds by approximately the late 1960's.

The subdivision map of Seaview at Amagansett approved by the Town in 1967 indicates the southern boundaries of the lots closest to the Atlantic Ocean to be the "Foot of Beach Banks." The subdivision map of Dunes at Napeague approved by the Town in 1981 indicates that the southern map limit line follows the "Edge of Beach Grass" and that "The Developer does not purport to hold or to convey title to lands south of map limit line." The subdivision map of Mitchell Dunes (The Tides) approved by the Town in 1982 indicates the southern boundary to be beach grass. The subdivision map of Whaler's Cove at East Hampton approved by the Town in 1985 indicates the southernmost boundary to be north of the "Approx Line of Beach Grass" and that "The Developer does not purport to hold or to convey title to lands south of Beach Grass Line." The subdivision map of Ocean Estates approved by the Town in 1981 indicates the southernmost map limit line to be slightly north of the "Line of Beach Grass" with the qualification that "The Developer does not purport to hold or to convey title to lands south of the map limit line." In addition, the deed to plaintiff Marc Helie clearly indicates that his property boundary is "to the approximate edge of beach grass along the Atlantic Ocean."

Plaintiff Robert Cristofaro testified at his deposition that he is treasurer of the Dunes at Napeague Property Owners Association and is the owner of Lot 14 on the map of Dunes at Napeague. Plaintiff Robert Cooperman testified at his deposition that he is an officer of The Tides Homeowners Association and that he owns a lot depicted on the subdivision map of Mitchell Dunes (The Tides). At his deposition, plaintiff Marc Helie testified that he is an officer of the Whalers Lane Homeowners Association, that he owns a lot on the map of Whaler's Cove, and that additional defendant David Stuart Tyson is his adjacent neighbor. Plaintiff Robert Higgins testified at his deposition that he owns 32 Marine Boulevard, which is immediately west of The Seaview subdivision but is not located within a subdivision, and that he does not claim any ownership interest in the beach area seaward of the dune on the Atlantic Ocean other than an easement of five feet for walking to the water.

The contents of the proffered deeds as supported by the notations on the submitted subdivision maps reveal that plaintiffs do not own fee title to the beach area lying between the southern edge or line of beach grass (foot of the beach banks) to the mean high water line of the Atlantic Ocean. Said determination comports with the holding of ***Macklowe v Trustees of Freeholders and Commonality of Town of East Hampton***, 110 AD3d 964, 973 NYS2d 569 [2d Dept 2013]["plaintiffs hold title to the disputed lands north of an ambulatory line defined by the location of the average southerly line of beach grass on the beach of the Atlantic Ocean"], *lv denied* 22 NY3d 861, 982 NYS2d 443 [2014]). Notably, the color photographs submitted by plaintiffs as depicting the disputed beach area and conditions show that the area used by the public encroaches on the southern edge of beach grass and continues south to the ocean's edge. Based on

the foregoing, defendants Trustees and Town are granted summary judgment dismissing the first cause of action to quiet title to the disputed beach area as to the plaintiffs. As for the third cause of action for trespass, to the extent that plaintiffs' claims involve the beach area lying south of the southern edge or line of beach grass (foot of the beach banks), defendants Trustees and Town are granted summary judgment dismissing said claims. Plaintiffs' other causes of action survive to the extent that they relate to interference by the public's use of the subject beach area in plaintiffs' right to use and enjoy their own properties located adjacent to said beach area and to the endangerment of their properties, health, safety and comfort (*see* ***Behar v Quaker Ridge Golf Club, Inc.***, 118 AD3d 833, 988 NYS2d 633 [2d Dept 2014]; ***Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]).

However, the deeds of additional defendants David Stuart Tyson, Stephanie Bitterman and June Merton expressly indicate that their properties extend south to the mean high water mark of the Atlantic Ocean. Therefore, defendants Trustees and Town are denied summary judgment dismissing the first cause of action to quiet title to the disputed beach area as to said additional defendants.

With respect to the additional defendants Jay H. Baker and Patty C. Baker, their deed grants title "South 11 degrees 00 minutes 00 seconds East along last mentioned land 321 feet more or less to a point on the shore line of the Atlantic Ocean; Thence in a westerly direction along the shore line of the Atlantic Ocean, as of 9/14/93, 200 feet more or less to a point on the easterly boundary line of Map of Seaview at Amagansett filed November 3rd, 1967 as Map No. 498;" Also, the deed by which additional defendants David Ross and Grace Ross claim title indicates "Beginning at a point approximately 2000 feet east of the Easterly junction of Montauk Highway and Napeague Lane and running Southerly along the property formerly of Robert Kurmier approximately [illegible] feet to the beach of the Atlantic Ocean; thence easterly along the beach of the Atlantic Ocean 200 feet to the property of Tyson;" As to said additional defendants, the Court cannot ascertain from the metes and bounds descriptions contained in their deeds whether their property includes the disputed beach area. Therefore, defendants Trustees and Town are denied summary judgment dismissing the first cause of action to quiet title to the disputed beach area as to said additional defendants.

Inasmuch as plaintiffs do not own the disputed beach area, inverse condemnation is not a defense. Inverse condemnation, or a de facto taking "is a permanent ouster of the owner or a permanent physical or legal interference with the owner's physical use, possession, and enjoyment of the property by one having condemnation powers" (***Matter of Ward v Bennett***, 214 AD2d 741, 743, 625 NYS2d 609 [2d Dept 1995]; ***Village of Tarrytown v Woodland Lake Estates***, 97 AD2d 338, 343, 468 NYS2d 513 [2d Dept 1983]). Regarding the additional defendants, the proffered affidavits and deposition testimony reveal that the beachfront residents have not been permanently denied access to or use of the beach inasmuch as the disapproved public activity occurs primarily during the summer months (*see* ***Feder v Village of Monroe***, 283 AD2d 548, 725 NYS2d 75 [2d Dept 2001]; ***Clempner v Southold***, 154 AD2d 421, 546 NYS2d 101 [2d Dept 1989]; *compare* ***Sarnelli v City of New York***, *supra* [property fenced off denying plaintiffs access]). The Court notes that in any event, the Appellate Division, Second Department held in the action entitled ***Katz v Village of Southampton***, 244 AD2d 461, 664 NYS2d 457 [2d Dept 1997], *lv denied* 95 NY2d 753, 711 NYS2d 155 (2000) that "regulation of motor vehicle traffic on the ocean beach in connection with the easement held by the Freehold Trusteeship is not a taking" (***Katz v Village of Southampton***, *supra* at 462-463). Therefore, the request by defendants Town and Trustees for summary judgment based on the three-year statute of limitations of CPLR 214 (4) is denied.

The Court also notes from its review of the submitted deeds that they contained the following general appurtenance clause concerning easements of the inhabitants of the Town of East Hampton:

> SUBJECT to any and all rights and easements of the inhabitants of the Town of East Hampton (if any such they have) to land fish, boats and nets, to spread nets on the sand adjoining the Atlantic Ocean and care for fish and material as customary on the South Shore.

Said easement was appurtenant and passed to all subsequent purchasers of the dominant estate through the general appurtenance clauses until approximately the late 1960's when the clause disappeared from the deeds (*see* ***Strnad v Brudnicki***, 200 AD2d 735, 606 NYS2d 913 [2d Dept 1994]). "Once created, the easement would continue to pass with the dominant estate unless it was extinguished by abandonment, conveyance, condemnation or adverse possession" (***Gerbig v Zumpano***, 7 NY2d 327, 330, 197 NYS2d 161 [1960]; ***Will v Gates***, 89 NY2d 778, 784, 658 NYS2d 900 [1997]). Owners of the servient estate are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property's direct chain of title (*see* ***Witter v Taggart***, 78 NY2d 234, 239, 573 NYS2d 146 [1991]; ***Corrarino v Byrnes***, 43 AD3d 421, 423, 841 NYS2d 122 [2d Dept 2007]; ***Farrell v Sitaras***, 22 AD3d 518, 519-520, 803 NYS2d 659 [2d Dept 2005]).

As the beach area south of the southern edge or line of beach grass (foot of the beach banks) was not conveyed to plaintiffs' predecessors in title, their properties are not burdened by the subject easement. However, the properties of the additional defendants may continue to be burdened by said easement. The nature and extent of use of an easement may be enlarged or changed (*see* ***Tamburo v Murphy***, 72 Misc 2d 120, 339 NYS2d 693 [Sup Ct, Cayuga County 1970], *affd* 40 AD2d 947, 340 NYS2d 881 [4th Dept 1972]). Nevertheless, the subject easement may not be enlarged to include uses completely foreign to the grant, such as recreational purposes, including picnicking, sunbathing, boating and bathing (*see* ***H.H. Apartments, Inc. v Beachcliff Realty Corp.***, 8 AD2d 966, 190 NYS2d 861 [2d Dept 1959], *affd* 8 NY2d 760, 201 NYS2d 777 [1960]). Notably, this Court determined by order dated October13, 2011(Tanenbaum, J.) in the related action upon consideration of plaintiff's motion for partial summary judgment that the affidavit of an East Hampton resident who had resided therein since 1915 and who claimed that the recreational use of the beach by the public had been continuous since the 1920's raised substantial issues of fact as to whether a prescriptive easement of the inhabitants of the Town of East Hampton currently exists (*see* ***Weiszberger v Husarsky***, 114 AD3d 731, 979 NYS2d 851 [2d Dept 2014] ["To acquire a prescriptive easement, a party must establish by clear and convincing evidence that the use of the property was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years"]). Based on the foregoing, issues of fact remain concerning the nature of the easement, if any, on the disputed beach area.

Moreover, the doctrine of laches has no application when plaintiffs allege a continuing wrong as they do herein with respect to the ongoing use of the subject beach area by members of the public with "beach vehicle permits" (*see* ***Capruso v Village of Kings Point***, ___ NY3d ___, 2014 NY Slip Op 04228 [2014]). Similarly, plaintiffs' claims of private and public nuisance, based on a continuing nuisance are timely (*see* ***Bloomingdales, Inc. v New York City Transit Auth.***, 13 NY3d 61, 886 NYS2d 663 [2009]; ***Pilatich v Town of New Baltimore***, 100 AD3d 1248, 954 NYS2d 663 [3d Dept 2012]; ***Agoglia v Benepe***, *supra*; ***Burch v Trustees of Freeholders and Commonalty of Town of Southampton***, 47 AD3d 654, 849 NYS2d 622 [2d Dept 2008]), as are plaintiffs' claims based on continuing violations of their equal protection rights (*see* ***Summit at Pomona, Ltd. v Village of Pomona***, 72 AD3d 797, 898 NYS2d 650 [2d Dept 2010]). Therefore,

the request of defendants Trustees and Town for summary judgment dismissing the complaint based on laches and statute of limitations is denied.

Dated: 9/3/14

J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION