

**New York State Dept. of Env'tl. Conservation v  
Segreto**

2014 NY Slip Op 33226(U)

November 24, 2014

Supreme Court, Suffolk County

Docket Number: 11-3699

Judge: Peter H. Mayer

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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 6/10/14 (#005)  
MOTION DATE 8/12/14 (#006)  
ADJ. DATE 8/12/14  
Mot. Seq. #005 - MD  
Mot. Seq. #006 - XMotD

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THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and JOSEPH MARTENS, as Acting Commissioner of the New York State Department of Environmental Conservation,

Plaintiffs,

- against -

ANTHONY J. SEGRETO,

Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated May 20, 2014, and supporting papers; (2) Affirmation in Opposition by the plaintiffs, dated July 15, 2014, and supporting papers; (3) Affidavits in Support of Cross Motion by the plaintiffs, dated July 15, 2014, and supporting papers (including Memorandum of Law); (4) Affirmation and Affidavit in Further Support of Motion by the defendant, dated August 5, 2014, and supporting papers; (5) Affirmation in Further Support of Cross Motion by the plaintiffs, dated August 11, 2014, and supporting papers (including Memorandum of Law); (6) Letter dated October 24, 2014 from Patricia Byrne Blair, Esq. of Mazzei and Blair; (7) Letter dated October 29, 2014 from Isaac Cheng, Esq., Assistant Attorney General; and after hearing oral argument with respect to the motion and cross motion on November 6, 2014; and now

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

**ORDERED** that the motion by the defendant for an order (i) allowing him to secure, shore up, and defend his property located at 135 Blue Point Avenue, Oakdale, New York so that it is not further destroyed by any acts of nature or man-induced acts and to reinstate the property to its pre-Hurricane Sandy condition, (ii) allowing him to restore his home and property to its original state at the time of purchase in 2005, without being held in violation of New York State Department of Environmental Conservation (NYSDEC) regulations, (iii) enjoining and restraining NYSDEC, its agents and employees

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during the pendency of this action from preventing the defendant from shoring up, securing, protecting, and defending his property or from holding the defendant in violation of NYSDEC regulations for taking such actions as to shore up, secure, and protect his property, and abating any fines, (iv) allowing the defendant to secure, shore up, protect, and defend his property pending a decision on this application, (v) enjoining and restraining the plaintiffs, their employees, servants, attorneys, and all other persons acting on their behalf or in concert with the plaintiffs from prohibiting the defendant from securing, shoring up, protecting, and defending the property and restoring it to its pre-Hurricane Sandy condition, (vi) allowing renewal and reargument of this court's August 15, 2012 order (Rebolini, J.) and, upon renewal and reargument, reversing that order, (vii) pursuant to CPLR 3211 (b), allowing the defendant to amend his answer to include a counterclaim for damages to his property resulting from NYSDEC's removal of a surge block protection wall, (viii) quieting title to his property by permitting him to amend his deed to include the property known as "Deer Lake," which was for some unexplained reason removed from the description of the property prior to its purchase in 2005, and (ix) quieting title and recognizing the defendant as the owner of the entire 3.62-acre parcel known as Pepperidge Hall Lodge Estate, and restoring him to ownership of the entire parcel, is denied; and it is further

**ORDERED** that the cross motion by the plaintiffs for an order pursuant to CPLR 3212, granting summary judgment in their favor and against the defendant for the relief demanded in the complaint, is granted to the extent it is for summary judgment on their first and second causes of action, and is otherwise denied.

This is an action to enforce a February 1, 2008 administrative order issued by Alexander B. Grannis, former NYSDEC commissioner, which assessed a \$20,000.00 civil penalty against defendant Anthony J. Segreto for violations of ECL 25-0401 (1) and 6 NYCRR part 661 regarding clearing of vegetation and placement of fill, without required permits, on Segreto's property in the adjacent area to a regulated tidal wetland, and required the submission of a restoration plan for the property.<sup>1</sup>

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<sup>1</sup> ECL 25-0401 prohibits certain activities, unless otherwise permitted, with respect to any tidal wetland, including

any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.

A property may be subject to regulation by NYSDEC as either a tidal wetland or a tidal wetland adjacent area (ECL 25-0103, 25-0202). "Adjacent area" is defined under 6 NYCRR § 661.4, in part, as

any land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetlands

(continued...)

Segreto's property, which he purchased in February 2005, was at one time a portion of a larger parcel known as the Pepperidge Hall Estate. It is located at 135 Blue Point Avenue, Oakdale, New York, adjacent to a tidal inlet of the Great South Bay. Following his purchase of the property, Segreto applied to NYSDEC for a tidal wetlands permit to build bulkheads and a boat slip on the property. In November and December 2005, NYSDEC staff conducted inspections of the property in conjunction with the permit application, at which time it was discovered that Segreto had undertaken certain prohibited activities on the property without having obtained the required permit.

In or about December 2005, NYSDEC staff commenced an administrative proceeding against Segreto to enforce the provisions of the Tidal Wetlands Act (ECL art 25) and its implementing regulations (6 NYCRR part 661). The matter was submitted to an Administrative Law Judge by way of a motion for order without hearing (*see* 6 NYCRR § 622.12). After reviewing the parties' submissions, the ALJ, in a report dated January 11, 2008, recommended that the commissioner issue an order holding Segreto liable for two violations of ECL 25-0401 (1) and 6 NYCRR part 661—the first, for the clearing of vegetation in a regulated adjacent area to a regulated tidal wetland, and the second, for the placement of fill in a regulated adjacent area to a regulated tidal wetland—and granting the civil penalty requested by NYSDEC staff. Based on the documentary and photographic evidence submitted, including NYSDEC's 1974 Tidal Wetlands Inventory Map #656-510,<sup>2</sup> and on personal observations and inspections by NYSDEC staff in conjunction with Segreto's permit application, the ALJ concluded that the property contains tidal wetlands and tidal wetland adjacent areas regulated by and subject to the jurisdiction of the NYSDEC, and that clearing of vegetation and placement of fill had occurred in the regulated area adjacent to a regulated tidal wetland without a required permit. In rejecting so much of Segreto's claim as denied the presence of wetlands on his property, the ALJ noted both the inventory map and Segreto's own statements in the permit application, signed under the penalty of perjury, acknowledging the

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<sup>1</sup>(...continued)

boundary is shown on an inventory map \* \* \*

(i) 300 feet landward of said most landward boundary of a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet \* \* \*; or

(ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure (including, but not limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings \* \* \*.

<sup>2</sup> It appears, according to the ALJ's report, that the inventory map depicts an aerial view of Segreto's property, which is located adjacent to waterbodies known as Deer Lake and Brook Creek; that both Deer Lake and Brook Creek are designated "LZ" on the map for "littoral zone," a classification of tidal wetlands that includes all lands under tidal waters which are not included in any other category (6 NYCRR § 661.4 [hh] [4]); and that another portion of the property is designated "IM" on the map for "intertidal marsh," a vegetated wetland zone lying generally between average high and low level tidal elevation (6 NYCRR § 661.4 [hh] [2]).

existence of wetlands on the property. For each violation, the ALJ recommended a penalty of \$10,000.00 (see ECL 71-2503 [1] [a]), consistent with the request of NYSDEC staff, for a total penalty of \$20,000.00. The ALJ further recommended that the commissioner order Segreto to restore the property (see ECL 71-2503 [1] [c]).

By order dated February 1, 2008, the commissioner (i) adopted the ALJ's report, (ii) granted in its entirety the request for relief set forth in NYSDEC staff's motion for an order without hearing, (iii) adjudged Segreto to have caused or permitted to be caused the clearing of vegetation and the placement of fill in the adjacent area to a regulated tidal wetland at his property without a required permit in continuing violation of ECL 25-0401 (1) and 6 NYCRR part 661 from on or before December 2, 2005 through December 5, 2007, (iv) assessed a civil penalty in the amount of \$20,000.00, due and payable no later than 30 days after service of the order on Segreto, and (v) directed Segreto to submit a tidal wetland restoration plan, conforming to certain minimum requirements, to NYSDEC staff no later than 60 days after service of the order on Segreto. It is undisputed that Segreto has never remitted any portion of the civil penalty, nor has he submitted the required restoration plan.

Segreto subsequently initiated judicial proceedings challenging the February 1, 2008 order. By order dated July 22, 2008, the court (Weber, J.) denied Segreto's application for article 78 relief on the ground that he had "failed to identify any basis to disturb" the administrative determination (*Matter of Segreto v New York State Dept. of Env'tl. Conservation*, Sup Ct, Suffolk County, Index No. 08-4366). A second article 78 proceeding for the same relief was dismissed by order dated September 18, 2008, the court (Weber, J.) noting that the proper remedy was to take an appeal from the July 22, 2008 order (*Matter of Segreto v Grannis*, Sup Ct, Suffolk County, Index No. 08-25776). On February 2, 2010, the September 18, 2008 order was affirmed by decision and order (one paper) of the Appellate Division, Second Department, with that court likewise noting that "[i]f the petitioners were dissatisfied with the court's determination in the first proceeding, their remedy was to appeal from that judgment within the applicable time period, not to initiate another proceeding" (70 AD3d 704, 705, 892 NYS2d 872 [2010]). On October 19, 2010, the Court of Appeals dismissed Segreto's motion for leave to appeal as untimely (15 NY3d 869, 910 NYS2d 34 [2010]). It does not appear from the court file that an appeal was ever taken from the July 22, 2008 order.<sup>3</sup>

In 2009, Segreto commenced an action against the Town of Islip and the County of Suffolk to recover damages for injury to property, alleging that the defendants were negligent in constructing roads, sewer systems, and storm drains in such a manner as to artificially divert surface waters onto his property (*Segreto v Town of Islip*, Sup Ct, Suffolk County, Index No. 09-770). By orders dated March 14, 2011 and November 17, 2011, the court (Whelan, J.) granted the defendant's separate motions for summary judgment dismissing the complaint. As part of the March 14, 2011 order, the court also denied Segreto's motion for summary judgment declaring that he owns Deer Lake. Apart from the procedural defects in the motion, the court observed that Deer Lake "was not included in the residential real property"

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<sup>3</sup> To the extent, therefore, that Segreto continues to dispute the designation of his property as "wetlands" and claims that the property is not subject to the Tidal Wetlands Act (ECL art 25), it would appear that the issue has already been conclusively resolved against him.

purchased by Segreto in February 2005, a fact “actually known” to him prior to the closing.

This action, which is to enforce the February 1, 2008 order, was commenced on February 2, 2011. The plaintiffs plead four causes of action in their complaint. The first is to recover judgment against Segreto in the amount of \$20,000.00, plus statutory interest and other charges due under State Finance Law § 18, for failure to timely pay the civil penalty required by the February 1, 2008 order; the second, to direct Segreto to submit a proposed tidal wetlands restoration plan as required by the February 1, 2008 order; the third, to assess a civil penalty against Segreto pursuant to ECL 71-4003, based on his failure to comply with the terms of the February 1, 2008 order; and the fourth, to assess an additional civil penalty against Segreto based on his further violations of ECL 25-0401 subsequent to February 1, 2008, including the construction of a bulkhead along his shoreline, the clearing of wetland vegetation, and the erection of a fence.<sup>4</sup>

Following joinder of issue, and in response to the ongoing activities on the property, NYSDEC issued various notices of violation and, when those activities continued, the plaintiffs moved in this action for a preliminary injunction. By order dated August 15, 2012, the court (Rebolini, J.) granted the plaintiffs’ motion, awarding injunctive relief and enjoining Segreto, his employees, agents, and contractors

from conducting or continuing to conduct any land clearing, clearing of vegetation, dredging, filling, grading, or engaging in construction activities, including the construction, modification or expansion of bulkheads, pilings, fencing and any other structure on the subject property or any part thereof or in the waters abutting the property except to the extent that such activities are authorized by and in conformity with a DEC-issued tidal wetlands permit, pending further order of this Court \* \* \*.

In August 2012, NYSDEC entered Segreto’s property to remove what he refers to as a “concrete block surge protection wall” (and what *Newsday*, in a contemporaneous news article submitted by Segreto to the court, describes as “150 bags of concrete” stacked in a creek). Segreto claims that as a result of the removal of the “wall,” of NYSDEC’s refusal to permit him to secure his property, of the actions of the Town and the County artificially diverting surface waters onto his property, and of Hurricane Sandy in October 2012, his property has been “destroyed” by flooding and avulsion, causing him to sustain hundreds of thousands of dollars of loss of value and damage to his home.

Now, Segreto moves, *inter alia*, for a preliminary injunction authorizing him to undertake certain construction activities necessary to protect the property from sustaining damage from any future catastrophic weather events, and the plaintiffs cross-move for summary judgment in their favor and against the defendant for the relief demanded in the complaint.

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<sup>4</sup> Although the complaint, as amended, also purports to assert causes of action against Linda M. Segreto, it does not appear that the plaintiffs ever sought or obtained leave to add her as a party defendant, nor that she was ever served with a supplemental summons. Accordingly, the complaint as against her is a nullity.

Segreto's motion is denied in its entirety. The essence of the relief he seeks is to be permitted to undertake whatever construction and other activities he deems necessary or advisable to secure his property without running afoul of NYSDEC rules and regulations. This amounts to little more than an impermissible collateral attack on the court's August 15, 2012 order, which specifically enjoined him from conducting such activities on the property except pursuant to a duly authorized permit.<sup>5</sup> While Segreto also seeks leave to renew with respect to the August 15, 2012 order, he failed to demonstrate new facts or a change in the law that would change the prior determination (*see* CPLR 2221 [e] [2]). The only new "fact" tendered in support of the motion is the occurrence of Hurricane Sandy in October 2012. However, since Segreto clearly realized the potential for further harm to his property from acts of nature—as evidenced by his ongoing efforts to secure the property dating back to 2005—it cannot be said that the significance of this "fact" was not known to him at the time of the original motion.<sup>6</sup> As to Segreto's request for leave to amend his answer, it is noted simply that all claims for monetary damages against state agencies such as NYSDEC must be litigated in the Court of Claims, not in the Supreme Court (*see* NY Const, art VI, § 9; Court of Claims Act § 9 [2]; *Matter of Peterson v New York City Dept. of Env'tl. Protection*, 66 AD3d 1027, 887 NYS2d 269 [2009]). Since this court lacks subject matter jurisdiction over the proposed counterclaim, it is palpably improper (*D'Angelo v State Ins. Fund*, 48 AD3d 400, 852 NYS2d 192 [2008]). Finally, to the extent Segreto seeks to quiet title with respect to his claim of ownership to Deer Lake, it is evident that Segreto has neither pleaded a counterclaim to quiet title nor moved for leave to amend his answer to assert such a claim; in any event, even if Justice Whelan's March 11, 2011 order were without preclusive effect, the court would find no basis in this record to deviate from his finding that Segreto knew at the time of purchase that Deer Lake was not included in the deed.<sup>7</sup>

The plaintiffs' cross motion<sup>8</sup> is granted in part and denied in part. The plaintiffs established their prima facie entitlement to summary judgment in their favor and against Segreto on their first and second causes of action by demonstrating due service of the February 1, 2008 order and Segreto's failure to timely comply with its terms; Segreto, in opposition, failed to raise an issue of fact. As to the third cause of action, however, the plaintiffs failed to demonstrate as a legal matter that ECL 71-4003 authorizes a civil penalty to be assessed by the court (*cf.* ECL 71-2703 [1], 71-2705 [1], 71-2729 [1], 71-3303 [1], 71-4303[1]) or, if it does, that ECL 71-2503 does not provide the exclusive civil penalty

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<sup>5</sup> Based on representations by the parties' attorneys at oral argument, it is undisputed that since August 15, 2012, Segreto has not applied for a tidal wetlands permit, nor has he availed himself of the procedures for emergency authorizations set forth at 6 NYCRR § 621.12.

<sup>6</sup> Segreto's further request for leave to reargue, likewise based on the occurrence of Hurricane Sandy, is indistinct from his request for leave to renew and, in any event, would appear to be untimely (*see* CPLR 2221 [d] [3]).

<sup>7</sup> The court also notes Segreto's acknowledgment at oral argument that he was represented by an attorney at the closing and that a title search had been conducted.

<sup>8</sup> At oral argument, Segreto's attorney withdrew the argument that the cross motion was improperly noticed.

remedy for violation of an order promulgated under ECL article 25. Similarly, as to the fourth cause of action, the plaintiffs failed to demonstrate that ECL 71-2503 authorizes a civil penalty to be assessed other than by the commissioner.

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (see CPLR 3212 [e] [1]).

Dated: November 24, 2014

  
PETER H. MAYER, J.S.C.