Matter of Protect the Adirondacks! Inc. v New York State Dept. of Envtl. Conservation
2015 NY Slip Op 33006(U)
October 20, 2015
Supreme Court, Albany County
Docket Number: Index No. 2137-13
Judge: Gerald W. Connolly

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of PROTECT THE ADIRONDACKS! INC.,
Plaintiff-Petitioner,

For a Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution, and CPLR Article 78,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,
Defendants-Respondents.

DECISION AND ORDER
Index No. 2137-13

(Supreme Court, Albany County)

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Connolly, J:

Before the Court in this (remaining) plenary action brought by the plaintiffs seeking a declaratory judgment and permanent injunction to prevent alleged damage to, and illegal use of, the Adirondack Forest Preserve, is the motion of the plaintiff for, in pertinent part, the following relief: an order: (i) requiring defendant New York State Department of Environmental Conservation ("DEC") to produce its employee Kenneth Hamm for deposition; (ii) requiring

defendant Adirondack Park Agency ("APA") to produce its employee Walter Linck for deposition; (iii) requiring both defendants to supplement their document production with all discoverable documents created, written, acquired, or adopted after the date of the Discovery Order of October 15, 2014; (iv) requiring DEC to produce all documents showing its plans for future Class II Community Connector snowmobile construction in the Adirondack Forest Preserve; (v) requiring defendants to produce all discoverable documents that were incorrectly withheld; (vi) extending the deadline for the filing of a Note of Issue until the date that is 10 days after the completion of the discovery set forth in the above items; and, (vii) awarding plaintiff the costs and disbursements of the motion. Defendants oppose the motion in its entirety.

The relevant facts and allegations of the underlying plenary matter herein are fully set forth in the extensive Decision/Order of the Court (Ceresia, J.) of October 15, 2014 ("Ceresia Decision"), which decision is herewith incorporated by reference in its entirety into the within decision, and will accordingly not be repeated.

Hamm Deposition

Plaintiff, who has been afforded depositions in this action (for declaratory judgment seeking a declaration that the trails are in violation of Article XIV, §1 of the New York State Constitution) of seven DEC employees (and declined proffers of three other employees), requests an Order directing the deposition of Mr. Hamm, on the grounds that Mr. Hamm, who verified the DEC answer in this matter and was allegedly the primary forest service attorney throughout the time frames at issue in this action, was primarily responsible for determinations regarding compliance with the aforementioned constitutional provision. Plaintiff argues that "Mr. Hamm's testimony is essential to providing the Court with an understanding of how, if at all, those

internal policies and processes [regarding compliance with Article XIV] are implemented, and such determinations are made" (Caffry Affidavit, ¶25). Defendants object to such deposition on the grounds, *inter alia*, that the plaintiff is requesting to question Hamm on his interpretation of Article XIV, and such testimony should be denied as irrelevant to the Court determination of this ultimate issue of the (remaining) action.

The Court is in agreement with the defendants and accordingly denies plaintiff's request for an Order directing such deposition. In its Memorandum of Law in support of the instant motion, plaintiff argues: "[s]ince DEC's counsel's office apparently makes all of DEC's determinations as to the constitutionality of the construction of the Class II Community Connector snowmobile trails that are at issue herein, Plaintiff should be allowed to depose the decision-maker so that the Court may determine if, how, when and why these determinations were or are made by DEC" (MOL pg. 8). As set forth in the Ceresia Decision, such discovery seeking defendants' rationale for determining that their actions comply with the Constitution improperly seeks legal conclusions and/or theory (*see* Ceresia Decision, pp. 16-17 [Demands 15 and 16]; pp. 23-24 [Demands 43-45].

Linck Deposition

Plaintiff seeks the deposition of Mr. Linck, who it alleges is an APA employee who is most knowledgeable of the facts relative to the instant action. In particular, plaintiff argues that the proffered APA deponent, Mr. McNamara, has had no involvement with APA's review of DEC's planning and construction of snowmobile trails. Plaintiff alleges, (an allegation that the defense does not substantively contradict) that McNamara was proffered due solely to his knowledge of and involvement in an investigation of alleged violations of the Freshwater

Wetlands Act during the construction of the Seventh Lake Mountain Trail. Plaintiff alleges that Mr. Linck, an APA Associate Natural Resource Planner, played an important role in the creation, routing and planning of the trails at issue herein, and worked and continues to work on such snowmobile trail planning and construction.

Defendants acknowledge that Mr. McNamara's involvement was with regard to the aforementioned investigation and that Mr. Linck is the APA "contact person" for a number of the Class II trails herein. Defendants request that the Court reject the proposed deposition as unduly burdensome and unnecessary, on the effective grounds that DEC and not APA constructed the relevant trails and that APA's role was to determine compliance with appropriate policies or to investigate violations of the aforementioned Wetlands Act.

As APA remains a defendant in this Declaratory Judgment action, the plaintiff is entitled to a deposition of Mr. Linck upon the issues immediately relevant to the remaining cause of action, grounds upon which Mr. McNamara did not, pursuant to the submissions, possess knowledge. To be clear, the instant ruling does not serve to amend or expand the law of the case as set forth in the Ceresia Decision, that being that "...the review process leading up to the development and adoption of final plans of construction...is collateral to the main issues here. The Court finds that discovery should be limited to physical destruction of the Forest Preserve which has occurred in the past, and which will occur in the future, in connection with construction and maintenance of Class II Community Connector Snowmobile Trails".

Supplementation of Discovery as to items (iii) and (iv)

The plaintiff, citing to CPLR §3101(h), also requests an order requiring supplementation of discovery for all documents generated since the date of the Ceresia Decision, arguing that

defendants have interpreted such Decision (which, at certain points, directs production for specified dates until "the date hereof" and "to the present") to mean that they do not have to produce documents generated after the date of the Ceresia Decision, and that such phrases in the Ceresia Decision do not obviate the requirements of §3101(h). Defendants assert that such phrases do have such effect.

Discovery in the within declaratory judgment action has been ongoing since at least October of 2013, and it must be noted that, both at the time of the Ceresia Decision and at the present, construction of the disputed trails was/is an ongoing process which expected to last years in the future. Fully aware of such uncompleted status, and aware of the sole claim remaining upon the within declaratory judgment action, Judge Ceresia set an "end date" for discovery and the filing of a Note of Issue by the plaintiffs herein. In particular, the Court notes the prior statement of the Court: "[i]n determining what documents are material and necessary to plaintiff's first cause of action... the Court...has limited discovery to that which it deems to be proportionate to the needs of the case..." (Ceresia Decision, pg. 5), and specifically noted (pg. 7): "Plaintiff also maintains that any limitation of disclosure time frames would bar disclosure with regard to additional trails yet to be constructed, and preclude discovery with regard to future destruction of thousands of trees". The Court then went on to specifically hold that, in regard to "those Class II Community Connector Snowmobile Trails for which construction has been completed or is currently under way, the Court will limit document discovery to final plans, approvals and policies in effect as of January 1, 2012 and going forward, together with those records and reports which document actual construction and/or maintenance of the trails" (emphasis added). Such order clearly does not except the defendants from the requirements of

CPLR §3101(h) for purposes of such trails existing and "under construction" as of October 15, 2014. Discovery with regard to future trails, however, was specifically "...limited to plans, policies and approvals as they exist as of the date of this decision-order" (i.e. October 15, 2014) (Ceresia Decision, p. 8). In addition, in ruling on specific discovery demands, the Court (Ceresia Decision pp. 10-25) was very specific in limiting certain discovery to documentation "in effect as of the date hereof" or "to present".

Accordingly, the Court holds as follows: the "continuing obligation" requirements of CPLR §3101(h) are in effect with respect to demands concerning responsive, non-privileged documents which existed at the time of the October 15, 2014 Ceresia Decision with respect to Class II trails for which construction had been completed or was currently under way as of such date; as to discovery regarding future (as of the date of the Ceresia Decision) trails, such Ceresia Decision continues to control. To the extent the plaintiff has requested that the Court amend the Ceresia Decision, the request is denied in its entirety.

Documents Withheld on Claims of Privilege

Plaintiffs further argue that, with regard to all documents withheld by defendants as privileged (upon assertions that such documentation was generated pursuant to "Attorney Trial Prep" and/or is subject to the "Deliberative Process Privilege") "the Court should require the Defendants to provide the Plaintiff all of the documents that were incorrectly withheld" (Pl.'s MOL. p. 19).

Defendants have provided a privilege log and a supplemental privilege log to the

defendants in purported conformity with their responsibilities pursuant to CPLR §3122(b)[1]. Such logs identify hundreds of documents and specifies, as privileges, that such individual documents were "Attorney-client, Attorney trial prep, and "DP" [presumably Deliberative Process] drafts and DP inter-agency or intra-agency.

Both parties have, essentially, consented to the submission of the "disputed" documents (which, per the plaintiffs, are all of the withheld documents) to the Court for review. Initially, however, based upon the Ceresia Decision, plaintiff is not entitled to certain documents, irrespective of any asserted privilege. The Ceresia Decision is clear that "the review process leading up to the development and adoption of final plans for construction of completed Class II Community Connector Snowmobile Trails is, again, collateral to the main issues here." (Ceresia Decision, pg. 8). The Ceresia Decision, as discussed above, limited discovery with respect to trails for which construction has been completed or was currently under way as of October 15, 2014, to ***final*** plans, approvals and policies in effect as of January 1, 2012, and going forward; and, with respect to future trails, discovery was limited to plans, policies and approvals, as they existed as of October 15, 2014. As argued by defendants, the Ceresia Decision determined that policies, memoranda, plans or other documents or communications within or between any entity

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[1] Which provides, regarding such assertions of privilege in response to document demands, that: "...such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

regarding the location, routes, or mileage of future snowmobile trails to be constructed from January 1, 2001 to date were not material or necessary, (except that plaintiff was entitled to documents regarding scheduling concerning future Class II Community Connector Snowmobile trails), and also denied, as irrelevant and immaterial, documents regarding DEC's schedule or plans for the preparation of UMPs and their amendments, which does, or would, include Class II Community Connector Snowmobile Trails, from January 1, 2009 to date.

Accordingly, to the extent plaintiff seeks, "for any future Class II Community Connector Snowmobile Trails" ... "draft 'plans, policies and approvals' if final plans do not exist", plaintiff is not entitled to such documents that post-date October 15, 2014. Additionally, however, the Court finds that any non-final versions (drafts) of plans, policies and approvals (i.e. draft Unit Management Plans ("UMPs")), are not discoverable[2], as they are irrelevant in this declaratory judgment action. Accordingly, plaintiff is not entitled to any draft plans, policies and approvals, irrespective of any privilege being asserted.

With respect to any remaining documents as set forth in the defendants' privilege log, the Court will require defendants to provide (i) an updated privilege log, in conformity with the above ruling, on notice, and, (ii) all such asserted privileged documents, *in camera*, within thirty (30) days of the date of this Decision/Order, with appropriate affidavits/affirmations, also *in camera*, demonstrating the specific basis for each asserted privilege with respect to each document.

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[2]Defendants represent that multiple "pre-public" drafts of a UMP are developed before a draft is issued for public comment.

Note of Issue

The Court hereby extends the date upon which plaintiff must file its note of issue until review by the Court of defendants' *in camera* submissions. Further, plaintiff's request for the cost and disbursements of the motion is denied.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that the portion of plaintiff's motion seeking an order requiring the production of Mr. Hamm for deposition is denied; and it is further

ORDERED that the portion of plaintiff's motion seeking an order requiring APA to produce Mr. Linck for deposition is granted, such deposition is to occur within thirty (30) days of the date of this Decision and Order, and such deposition is limited by the law of the case as set forth in the Ceresia Decision; and it is further

ORDERED that the portion of plaintiff's motion seeking an order requiring defendants to supplement their document production and for DEC to produce documents showing its plans for future Class II Community Connector snowmobile construction is granted in part and denied in part as follows:

With respect to Class II Community Connector Snowmobile Trails for which construction had been completed or was underway as of October 15, 2014, defendants are required to continue to provide those documents constituting "final plans, approvals and policies in effect" for such trails; and with regard to future Class II Community Connector Snowmobile Trails, defendants are only required to provide the final plans, policies and approvals in existence on the date of the Ceresia Decision; and it is further

ORDERED that with respect to the portion of plaintiff's motion seeking an order requiring defendants to produce all discoverable documents that were allegedly incorrectly withheld, to the extent such documents at issue constitute non-final versions (drafts) of plans, policies and approvals, they are not discoverable; and, it is further ordered that with respect to the remainder of the documents identified in defendants' privilege log, defendants are directed to provide (i) an updated privilege log, on notice, and, (ii) all such asserted privileged documents, *in camera*, within thirty (30) days of the date of this Decision and Order, with appropriate affidavits/affirmations demonstrating the specific basis for each asserted privilege with respect to each document; and it is further

ORDERED that plaintiff's application to extend the deadline for the filing of a Note of Issue is granted and will be addressed by the Court in its determination addressing the *in camera* submissions by defendants: and it is further

ORDERED that plaintiff's application for the costs and disbursements of the motion is denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. The below referenced original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

SO ORDERED.
ENTER.

Dated: October 23, 2015
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice