Strough v Incorporated Vil. of W. Hampton Dunes
2016 NY Slip Op 30176(U)
January 25, 2016
Supreme Court, Suffolk County
Docket Number: 06-29678
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX No. 06-29678

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 12-9-14 (#020)
MOTION DATE 2-17-15 (#021)
ADJ. DATE 5-5-15
Mot. Seq. # 020 - MG
021 - XMD

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SCOTT STROUGH, JON S. SEMLEAR, FRED HAVEMEYER, ERIC L. SCHULTZ and EDWARD J. WARNER, JR. as Trustees of the Freeholders and Commonalty of the Town of Southampton, and THE TOWN OF SOUTHAMPTON,

Plaintiffs,

- against -

INCORPORATED VILLAGE OF WEST HAMPTON DUNES, GARY VEGLIANTE, in his official capacity as Mayor of the Incorporated Village of West Hampton Dunes, FM DUNE VIEW DESIGNS, LLC. FRAN MOSS, ALDONA MCCARTHY, V.L.L., LLC, ARIANNE V. AMSZ and ALEXANDRE N. AMSZ, NATALIE ROSE FUSCO, EMILY J. RUSSO and FRANCINE MAIORANA, 780 DUNE LLC, GENE STREIM and ILENE STREIM, HARVEY GESSIN and MARILYN TUNE GESSIN, CLAIRE VEGLIANTE, ETTORE MANCINI, LAURA FABRIZIO, STUART SCHECTER and MICHELLE SCHECTER, ROBERT CERVONI and MICHELLE CERVONI, ROBERT A. NYHOLM, MICHAEL ROSSI and BERNICE ROSSI, PETER D. FENNER & NANCY R. FENNER LIVING TRUST, KEVIN NATHAN, SUZANNE HARRISON and DAPHNE SAPIANE, ERIC E. NATHAN, LYNN MACRONE, WALTER RAIZNER, JOSEPH SCOTTO, 690 DUNE ROAD LLC, DAVID BERKOWITZ and NADINE BERKOWITZ, SPENCER GLANZ and FLORENCE GLANZ, 584 DUNE ROAD CORP., 682 DUNE ROAD CORP., SALVATORE MATTOLI and THERESA MATTOLI, STANLEY VICKERS and DIANE VICKERS, and "JOHN DOE 1-10" and "JANE DOE 1-10", being and intended to be any other owners of real property affected by the storm events of 1992-1993,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated November 7, 2014, and supporting papers 1 - 27 (including Memorandum of Law dated November 7, 2014); (2) Notice of Cross Motion by the plaintiffs, dated January 13, 2015, and supporting papers 28 - 76 (including Memorandum of Law dated January 13, 2015) ; (3) Affirmation in Opposition by the defendant, dated March 10, 2015, and supporting papers 77 - 79; (4) Affirmation in Opposition by the defendants' expert Terchunian, dated March 10, 2015, and supporting papers 80 - 81; (5) Affirmation in Opposition by the defendants' expert Bokuniewicz, dated March 10, 2015, and supporting papers 82 - 84; (6) Affirmation in Opposition by the defendants' expert Pomerantz, dated March 10, 2015, and supporting papers 85 - 93; (7) Reply Affirmation by the attorney for the plaintiffs, dated 3/23/15, paper 94; (8) Reply Affirmation by plaintiff Schultz, dated 3/20/15, paper 95; (9) Reply Affirmation by plaintiff's expert Krimmer, dated 3/20/15, paper 96; (10) Reply Affirmation by plaintiff's expert Young, dated 3/20/15, paper 97; (11) Affidavit of Service for Reply papers 94 - 98, dated 3/23/15, paper 98; (12) Other Reply Memorandum of Law by the defendants dated 3/23/15 (papers 99 - 100) (~~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: it is

ORDERED that the motion by the defendants Arianne V. Amsz and Alexandre N. Amsz, 780 Dune LLC, Gene Streim and Ilene Streim, Harvey Gessin and Marilyn Tune Gessin, Claire Vegliante, and Laura Fabrizio for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; 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 as to all causes of action contained in the second amended complaint herein and dismissing the counterclaims in the named defendants' answer, and for an order pursuant to CPLR 3212(g) determining the southerly shoreline of Moriches Bay as depicted in certain aerial photographs is denied.

The plaintiffs commenced this action pursuant to RPAPL Article 15 on October 25, 2006 seeking to quiet title to certain real property (the disputed lands) located above the mean high water mark of the southerly shore of Moriches Bay in the Incorporated Village of West Hampton Dunes, New York (the Village). After issue was joined, the plaintiffs served and filed a supplemental and amended summons and complaint. After the defendants served their answer to the amended complaint, the plaintiffs served a second amended verified complaint on or about July 31, 2013 (the complaint). The complaint sets forth three causes of action against 11 of the multiple defendants originally named in this action. It is undisputed that only the six defendants named above remain in this action (the defendants), each of whom owns a parcel of property that abuts the southerly shoreline of Moriches Bay in the Village. The plaintiffs' first cause of action seeks a declaration that the named individual plaintiffs as Trustees of the Freeholders and Commonalty of the Town of Southampton (the Trustees) "exclusively own and hold the disputed lands to the exclusion of the individual defendants." The plaintiffs' second cause of action seeks a permanent injunction enjoining the defendants from subdividing, constructing or "conducting unauthorized activities" upon the disputed lands. The plaintiffs' third cause of action seeks to quiet title to the disputed lands pursuant to RPAPL Article 15.

It is undisputed that in December 1686, Thomas Dongan, Captain, General Governor in Chief and Vice-Admiral in and for the Provinces of New York, by the authority of King James II of England, issued a charter or patent (Dongan Patent) conveying to the Trustees the right, title and interest in all of the lands lying beneath the waters of Moriches Bay, and surrounding lands up to the high water mark

thereof. It is further undisputed that the Trustees "are the successors to the original Trustees of the Freeholders and Commonalty of the Town of Southampton whose proprietary rights to certain lands and waters of the Town of Southampton and their right to legislate and control the same as a body politic is derived from antique, royal land grants and patents which have been repeatedly confirmed and upheld throughout the history of this State for over 300 years by both the framers of the State Constitution and the Legislature despite various specific attacks upon such authority ..." (***State v Trustees of Freeholders and Commonalty of Town of Southampton***, 99 AD2d 804, 805, 472 NYS2d 394 [2d Dept 1984] [*internal citations omitted*]).

By way of context, the Village lies on a barrier island running east and west between the Atlantic Ocean and the south shore of Long Island. A single road, Dune Road, runs along the spine of the barrier island with residential homes lying north and south of the roadway, the latter generally abutting Moriches Bay and the former generally abutting the Atlantic Ocean. In the complaint, the plaintiffs allege that "between December, 1992 and March, 1993 and for several years prior thereto, a hurricane and series of unusually strong winter storms ... caused one or more dramatic breaches in the barrier beach that separates Moriches Bay from the Atlantic Ocean. Millions of tons of sand and earth were deposited into Moriches Bay upon the Trustee lands, immediately north of the properties which at that time were owned by the individual Defendants or their predecessors. As a result of the storms and breaches, dry land between Dune Road and Moriches Bay extended rapidly from what had previously been approximately 200-300 feet, to approximately 700-800 feet, and the high-water mark of Moriches Bay shifted accordingly northward ... The Defendants claim to own the disputed lands and intend to develop the disputed lands without regard to the ownership thereof by the Trustees."

In a prior appeal filed in this action, the Appellate Division framed the parties' competing claims of title to the lands in dispute in this action as follows: "Although the Trustees and the Town claim that the disputed land belongs to them because it was suddenly created by the natural act of avulsion, the [defendants] claim that the disputed land belongs to them because it was slowly created over a long period of time by the natural process of accretion" (***Strough v Incorporated Vil. of West Hampton Dunes***, 78 AD3d 1037, 1038, 912 NYS2d 82, 84 [2d Dept 2010]). Where both the plaintiff and the defendant assert conflicting claims of title to the same land, the burden rests upon each of them to establish such claims other than by relying on defects in the title of the other (*see* ***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009]; ***LaSala v Terstiege***, 276 AD2d 529, 713 NYS2d 76 [2d Dept 2000]).

The defendants now move for summary judgment dismissing the complaint on the grounds, among other things, that the plaintiffs' third cause of action seeking to quiet title is barred by the applicable statute of limitations and the doctrines of laches and equitable estoppel. In support of their motion, the defendants submit, among other things, the pleadings, affidavits from the individual defendants, excerpts of the deposition testimony of two of the individual trustees, real property tax bills for the properties owned by the individual defendants, and the plaintiffs' responses to interrogatories.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion

which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

The excerpts of the deposition transcripts of the two individual trustees submitted by the defendants are neither certified or signed, and the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Pevzner v 1397 E. 2nd, LLC***, 96 AD3d 921, 947 NYS2d 543 [2d Dept 2012]). In addition, deposition excerpts are generally deemed admissible in a motion for summary judgment (*see eg.* ***Bailey v Macy's East, Inc.***,78 AD3d 624, 913 NYS2d 105 [2d Dept 2010]; ***Byrne v Collins***,77 AD3d 782, 910 NYS2d 449 [2d Dept 2010]).

At his deposition, Trustee Eric L. Schultz (Schultz) testified that he walked the area of the disputed lands which is west of a "spit" of land that was created by the subject storms at or near Pike's Beach, and that he caused the Trustees to apply to the New York State Department of Environmental Conservation (DEC) for a permit to dredge a channel between the "spit" and the "immediately southerly adjoining land" in 1999. He stated that, to his knowledge, the Trustees did not take any action to assert possession of the disputed lands prior to 2001 and prior to the commencement of this action in 2006.

At his deposition, Trustee Scott Strough (Strough) testified he did not recall whether the Trustees ever installed fencing along the "northern beach boundary," or any boundary, or within, any of the properties owned by the defendants, and that he was "unsure" whether any "no trespassing signs" were installed anywhere in said parcels of property. He indicated that he had made multiple inspections of the area where the disputed lands are located, and that he never observed any "no trespassing" signs in that area.

An owner in sole possession of real property has the right to invoke the aid of a court in equity at any time to have an apparent, though in fact, not real encumbrance discharged from record, and such right is never barred by the statute of limitations; however, where a party is not in possession, such owner must assert an equitable claim within the time prescribed by statute or the owner will lose his or her right to maintain it (***Piedra v Vanover*** 174 AD2d 191, 579 NYS2d 675 [2 Dept 1992]). In other words, "[a] person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute" (*see* ***WPA Acquisition Corp. v Lynch***, 82 AD3d 1215, 1216, 920 NYS2d 223 [2d Dept 2011]; ***Downes v Peluso***, 115 AD2d 454, 495 NYS2d 691[2d Dept 1985]; ***Piedra v Vanover***, *supra).* In addition, CPLR 212 (a) provides that "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action" (CPLR 212[a]; *see* ***Elam v Altered Ego Realty Holding Corp.***, 114 AD3d 901, 981 NYS2d 124 [2d Dept 2014]; ***WPA Acquisition Corp. v Lynch***, *supra*).

Here, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiff's third cause of action to quiet title to the disputed lands. In addition to the testimony of Schultz and Strough, the complaint does not contain any allegation that the Trustees were in possession of the disputed lands during the ten years prior to the commencement of this action, or at any time following the storms described in the complaint. Moreover, as the first and second causes of action for a declaratory judgment and a permanent injunction are derivative of, and dependent upon, the Trustees third cause of action and their right and title to the disputed lands, the defendants have established their prima facie entitlement to summary judgment dismissing the complaint in its entirety.

The defendants having established their prima facie entitlement to summary judgment dismissing the complaint, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition, the plaintiff's cross-move for an order pursuant to CPLR 3212 granting them, among other things, summary judgment on the three causes of action in their complaint, and dismissing the counterclaims in the defendants' answer which seek to quiet title to the disputed lands in their favor and for adverse possession. In support of their cross motion, the plaintiffs submit, among other things, the affirmation of their attorney, an affidavit from Schultz, numerous affidavits, documents, and expert witness reports/depositions regarding the issue whether the disputed lands were created by accretion or avulsion, and excerpts of the defendants' deposition transcripts.

In his affirmation, counsel for the plaintiffs contends, among other things, that the defendants' motion should be denied on the grounds that it violates the rule against the filing of successive summary judgment motions, and that the statute of limitations and laches defenses in the answer are precluded by the law of the case.

It is well established that there is a "general proscription against successive summary judgment motions" (***Auffermann, v Distl***, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]; *see also* ***Central Equities Credit Corp. v B&N Props., LLC***, 66 AD3d 943, 888 NYS2d 107 [2d Dept 2009]). However, there are multiple exceptions to the general rule. A successive motion for summary judgment does not violate the general proscription when it is based on a showing of newly discovered evidence or sufficient cause (*see* ***Sutter v Wakefern Food Corp.***, 69 AD3d 844, 892 NYS2d 764 [2d Dept 2010]; ***Oppenheim v Village of Great Neck Plaza, Inc.***, 46 AD3d 527, 846 NYS2d 628 [2d Dept 2007]). A successive motion for summary judgment does not violate the general proscription when it is based on deposition testimony elicited after the prior order (***North Fork Preserve v Kaplan***, 68 AD3d 732, 890 NYS2d 93 [2d Dept 2009]; ***EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.***, 63 AD3d 665, 880 NYS2d 349 [2d Dept 2009]). In addition, a successive summary judgment motion may be properly entertained when its substantively valid and when the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts (*see* ***Fuller v Nesbitt***, 116 AD3d 999, 983 NYS2d 896 [2d Dept 2014]; ***Valley Natl. Bank v INI Holding, LLC***, 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]).

It is undisputed that the defendants' prior motion was made before the completion of discovery, and before the filing of the (second amended) complaint. Here, it is determined that the defendants' current motion for summary judgment is based on evidence that was obtained during discovery, that it is not repetitive of the previous motion, and that it is substantively valid and its consideration will further

the ends of justice. Thus, the undersigned may rule on its merits without running afoul of the rule against successive summary judgment motions.

Turning to the plaintiffs' contention that the defendants' affirmative defense of the statute of limitations is barred by the law of the case, it is determined that the contention is without merit. In their memorandum of law in support of their cross motion, the plaintiffs state that the Court "rejected [the defendants'] defenses [of] statute of limitations ..." in its order denying the defendants' previous motion for summary judgment dated February 6, 2011 (Whelan, J.). The plaintiffs note that the Supreme Court, Appellate Division, Second Department affirmed said decision on August 15, 2012. Justice Whelan's order provides in pertinent part:

> Nor did the defendants adduce proof in admissible form sufficient to establish, prima facie, the merits of any of their pleaded affirmative defenses.
>
> * * *
>
> In sum, this court finds that the moving defendants failed to establish their prima facie entitlement to the summary judgments demanded by them. Their reliance upon the purported gaps in the plaintiffs' case, ... rather than affirmatively demonstrating the merits of any of the defendants' asserted defenses, warrants a denial of the defendants' motion for summary judgment ...
>
> * * *
>
> The plaintiffs and the defendants, alike, are entitled to establish their claims and defenses by whatever means of admissible proof they have amassed by the time of trial.

The Appellate Division affirmed the subject order, stating "as the Cervoni defendants correctly contend, neither the law of the case doctrine nor the doctrine of governmental immunity precludes them from asserting their defenses at trial (citations omitted) (***Strough v Incorporated Vil. of W. Hampton Dunes***, 98 AD3d 607, 949 NYS2d 737 [2d Dept 2012]). Thus, the defendants' affirmative defense of the statute of limitations is not barred by the law of the case doctrine.

In his affidavit submitted in support of the plaintiffs' cross motion and in opposition to the defendants' motion, Schultz swears that the defendants' "laches defense should be rejected by the Court because Plaintiffs did not unduly "delay" the institution of this action." He indicates that he never saw any activity on any property that would support the defendants' additional counterclaim for adverse possession, and that the "shoreline changes came about through avulsion." The affidavit does indicate that the Trustees ever possessed the disputed lands, and it does not raise an issue of fact sufficient to preclude the granting of summary judgment to the defendants on their affirmative defense of the statute of limitations.

In their memorandum of law, the plaintiffs contend that the defendants are not entitled to summary judgment on the grounds of the statute of limitations because they have not established that they have met all of the elements of adverse possession for the "required period." In the Schultz

affidavit and in said memorandum, the plaintiffs have failed to address the contentions of the defendants regarding the issue of the Trustees possession of the disputed lands and their defense of the statute of limitations. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]).

The plaintiffs have failed to raise an issue of fact requiring a trial regarding that branch of the defendants' motion which seeks to dismiss the complaint on the grounds that it is barred by the statute of limitations. Accordingly, the defendants' motion is granted.

For the reason set forth above, the plaintiffs' cross motion for summary judgment in their favor on all causes of action in the complaint is denied. In addition, that branch of the plaintiffs' motion which seeks summary judgment dismissing the defendants' counterclaims is denied. The record reveals that there are issues of fact whether the defendants have title to, or have adversely possessed, the disputed lands. The expert opinions submitted on behalf of defendants regarding the issues of title and whether the disputed lands accumulated by virtue of accretion or avulsion conflict with the expert opinions submitted by plaintiffs on those issues. Conflicting expert opinions may not be resolved on a motion for summary judgment (***Crutchfield v Jones***, 132 AD3d 1311, 17 NYS3d 525 [4th Dept 2015]; *see also* ***I.B. & A. Scheiber v. Connolly***, 224 AD2d 588, 639 NYS2d 706 [2d Dept. 1996](conflicting expert opinions regarding the location of a boundary). In addition, the plaintiffs cannot succeed on their motion for summary judgment by merely by pointing to gaps in the defendants claim for adverse possession (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]).

The claims dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: January 25, 2016

PETER H. MAYER, J.S.C.