

**Matter of 55 Wainscott Hollow, LLC v Planning Bd.  
of the Town of E. Hampton**

2018 NY Slip Op 32873(U)

October 30, 2018

Supreme Court, Suffolk County

Docket Number: 010237/2015

Judge: James Hudson

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Supreme Court of the County of Suffolk  
State of New York - Part XL *VI* **COPY**

**PRESENT:**

**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*

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In the Matter of the Application of

55 WAINSCOTT HOLLOW, LLC,  
  
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

-against-

THE PLANNING BOARD OF THE TOWN OF  
EAST HAMPTON,  
  
Respondent,

-and-

ALAN COHEN, BRIAN RAEMAKERS,  
JOSEPH NEUHAUS, 11 HAMPTON REAL  
ESTATE, LLC, JOHN BUTTRIC and FIONA  
DUFF,

Intervenors.

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**MOT. SEQ. NO.: 003- Mot D**

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Upon the following papers numbered 1 to 23 read on this Motion/Order to Show Cause for Other Reliefs; Notice of Motion/ Order to Show Cause and supporting papers 1-16; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 17-23; ~~Reply Affidavits and supporting papers 0~~; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (seq. no.:003) of Petitioner 55 Wainscott Hollow LLC, (“Petitioner”), requesting cancellation of the notice of pendency filed by Intervenors against property located at 55 Wainscott Hollow Road, Wainscott, New York 11975 pursuant to CPLR §§6501, 6514 (a) and/or 6514 (b), awarding costs and expenses, including Attorneys’ fees incurred by 55 Wainscott as a result of the filing and cancellation of the notice of pendency pursuant to CPLR §6514 (c) is granted and as to that portion of the motion requesting sanctions against Intervenors pursuant to 22 NYCRR §130-1.1, same is referred to a hearing before the Court to be held on **Tuesday, November 27<sup>th</sup>, 2018 at 10:00 am**, at the New York State Supreme Court of Suffolk County, Part XL, One Court Street, Riverhead, New York to determine whether sanctions are warranted.

“*Aedificare in tuo proprio solo non licet quod alteri noceat*” (3 *Inst.* [201]). This was the law under The Emperor Justinian: To build upon your own land what may injure another is not lawful. The case at bar demonstrates that the ancient quarrels which moved the pen of the learned Trebonian continue to vex us in the present day.

This matter comes before the Court following the June 20<sup>th</sup>, 2016 Order which granted Petitioner’s application and directed Respondent to grant final approval of the subdivision map, the failed appeal of the Intervenors, and the March 24<sup>th</sup>, 2017 Order which denied Intervenor’s motion for a corrected judgment to include the step of preliminary approval before granting final approval to Petitioner’s project.

The issue before the Court on this motion (seq. no.:003) is a narrow one, whether the notice of pendency filed by the Intervenors against the subject property should be canceled. For the reasons detailed below, the Court finds for the Petitioner. The filed notice of pendency is canceled, pursuant to CPLR §6514 (b).

### **Intervenors’ Notice of Pendency**

**CPLR §6501. Notice of Pendency; Constructive Notice** provides, in pertinent part:

“A notice of pendency may be filed in any action in a court of the state ...in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property...A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.” McKinney’s CPLR §6501 [2018].

“The notice of pendency procedure replaces the common law *lis pendens*, an age-old doctrine pursuant to which the very

existence of a suit asserting a right to defendant's real property was constructive notice of plaintiff's pre-existing rights...The notice of pendency statutes, which first appeared in New York in 1823, modified the common law by imposing on the plaintiff the burden of filing a notice of pendency in a central registry..." (McKinney's CPLR §6501 Practice Commentaries, Vincent C. Alexander [2018]; see *In re Sakow*, 97 NY2d 436, 440-41, 741 NYS2d 175, 178-79, 767 NE2d 666, 669-70 [2002]).

"The principle is as old as the court of chancery itself, that the commencement of a suit there, which is duly prosecuted in good faith and followed by a decree, is constructive notice to every person who acquires an interest from the defendant in the subject matter of the suit *pendente lite*, of the legal and equitable rights of the complainant as charged in the bill and established by the decree" (*Parks v. Jackson ex dem. Hendricks*, 11 Wend 442, 451, Lock Rev Cas 323, 25 AmDec 656 [Court for the Correction of Errors of New York January 1, 1833]).

"Despite the potentially broad reading that might be given to the terms 'use and enjoyment' of real property, the Court has confined the notice of pendency to cases in which the plaintiff claims an interest in the defendant's land." (McKinney's CPLR §6501 Practice Commentaries, Vincent C. Alexander [2018]).

"The cases hold that a notice of *lis pendens* cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment or wrong..." (*Braunston v. Anchorage Woods, Inc.*, 10 NY2d 302, 305, 222 NYS2d 316, 318, 178 NE2d 717, 718 [1961]; citing *Hailey v. Ano*, 91 Sickels 569, 136 NY569, 575-77, 32 NE 1068, 1069-70 [1893]; *O'Connor v. Long*, 283 AD 887, 129 NYS2d 905 [2d Dept 1954]; *Starkie v. Nib Const Corp*, 235 AD 699, 255 NYS 401 [2d Dept 1932]; *McManus v. Weinstein*, 108 AD 301, 95 NYS 724 [1st Dept 1905]; *Ackerman v. True*, 44 AD 106, 60 NYS 608 [1<sup>st</sup> Dept 1899]).

In the case at bar, Intervenor's do not assert a right, title or interest in or to Petitioner's real property. Intervenor's, by their Counsel, Christopher Kelly in paragraph 7 of his affirmation in opposition states: "Intervenor's were critical of the layout of Petitioner's subdivision application for the property."

Notably, Intervenor's fail to assert that they or any of them have any claim of right title or interest in or to the subject real property. Intervenor's opposition to Petitioner's instant motion for cancellation of the notice of pendency contains no such claim of ownership or dominion.

Although Intervenor's have filed an impressive opposition to the motion, same is fatally deficient in its lack of proper justification for the filing, maintenance and continuation of its notice of pendency.

Intervenor's filed notice of pendency is from its inception improper by law.

Intervenor's are seeking to invoke the ancient and repudiated "Doctrine of Ancient Lights." In principle, the Doctrine was pled by the landowner upon whose land the light had shone from time immemorial; in other words, "don't build near my place and disturb my vista."

English Courts later phrased it thus:

"A proprietor of land has no right to erect an edifice on his own ground, interfering with the due enjoyment of adjoining premises, as by overhanging them, or by throwing water from the roof and eaves upon them, or by obstructing ancient lights and windows" (Broom, *Max.* 369.).

"The doctrine of presumption of right by grant or otherwise as applied to the windows of one person overlooking the land of another, so that by an uninterrupted enjoyment for twenty years the owner acquires a right of action against his neighbor for stopping the lights by the erection of a building upon his own land, forms no part of our law; such a rule is not adapted to the circumstances or existing state of things in this country" (*Parker & Edgerton v. Foote*, 19 Wend. 309 [Supreme Court of Judicature of New York 1838]).

In the case at bar, the subdivision plans of Petitioner have been reviewed by this Court and approved by Respondent Town of East Hampton, New York, and the decisions have been served upon Intervenor's.

Intervenors' claims that they are attempting to prevent a misuse of neighboring land is disingenuous at best and without legal claim at worst. The Court finds that Intervenors have failed to file their notice of pendency in good faith; rather they filed to improperly delay the case.

Petitioner's request in the instant motion (seq. no.:003) pursuant to CPLR §6514 (b) that the notice of pendency be cancelled, and pursuant to CPLR § 6514 (c) that costs and expenses and Petitioners Attorneys' fees be awarded to Petitioner in prosecuting and defending this motion (seq. no.:003) is granted. Petitioner will submit an itemized statement of costs and a detailed affirmation of Attorneys' fees incurred in this motion (seq. no.:003) to the Court for consideration.

### **Sanctions**

"If the action is known to be one in which a notice of pendency may not properly be filed, counsel should also take note of Part 130 of the Rules of the Chief Administrator, which authorizes the imposition of monetary sanctions for frivolous litigation conduct." (McKinney's CPLR §6501Practice Commentaries, Vincent C. Alexander [2018]).

#### **22 NYCRR §130-1.1. Costs; Sanctions** provides, in pertinent part:

"(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court...costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part, in addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part...

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both...The award or sanctions may be imposed upon any attorney appearing in the action, or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

(d) An award of costs or the imposition of sanctions may be made either upon motion on compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case. (McKinney's 22 NYCRR §130-1.1 [2018]).

The imposition of sanctions must be sought by motion (*Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc.*, 145 Misc2d 282, 546 NYS2d 534 [Sup Ct Rensselaer County 1989]; see *Cerciello v. Admiral Insurance Brokerage Corp.*, 90 AD3d 967, 936 NYS2d 224 [2d Dept 2011]).

A court may award a party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct" (*Board of Mgrs. of Foundry at Washington Park Condominium v. Foundry Dev, Co., Inc.*, 142 AD3d 1124, 1125, 38 NYS3d 60 [2d Dept 2016]).

"In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct (22 NYCRR §130-1.1[a])" (*Id.*; see *Strunk v. New York State Bd. of Elections*, 126 AD3d 779, 781, 5 NYS3d 498 [2d Dept 2015]).

"Conduct of the Defendant's Attorney was frivolous within the meaning of 22 NYCRR §130-1.1(c) where he continued to advance his contention relating to the affidavit...which was completely without merit in law, in contravention of the Supreme Court's prior ruling. Moreover, that contention could

not be supported by a reasonable argument for an extension, modification, or reversal of existing law, and the conduct of the attorney appears to have been undertaken primarily to delay or prolong the resolution of the litigation” (*Tamburello v. Tamburello*, –NYS3d–, 2018 WL 5020051 [2d Dept 2018]; see *Weissman v. Weissman*, 103 AD3d 886, 961 NYS2d 472 [2d Dept 2013]; *Thames Realty, LLC v. Robinson*, 85 AD3d 851, 925 NYS2d 585 [2d Dept 2011]; *Mascia v. Maresco*, 39 AD3d 504, 833 NYS2d 207 [2d Dept 2007]).

Petitioner asserts in its motion that Intervenors, throughout their involvement in this case, have engaged in a pattern of malicious motion practice and frivolous legal delay which has caused significant financial damage to Petitioner.

Petitioner, in its instant motion (seq. no.:003) has requested:

“an award of additional costs and expenses, including attorney’s fees, and/or the imposition of sanctions against Intervenor’s counsel pursuant to 22 NYCRR §130-1.1...” in relation to the filing of the subject notice of pendency.

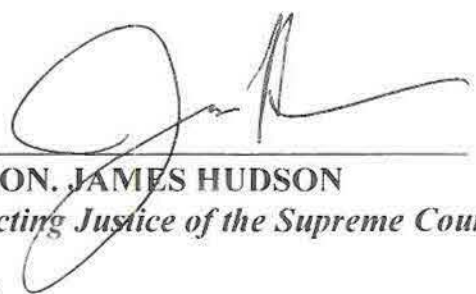
If proven, such conduct is subject to the imposition of costs and sanctions by this Court.

It is the Order of this Court that a hearing be held pursuant to 22 NYCRR §130-1.1 to determine the issue of costs and sanctions against Intervenors.

The request of Petitioner in its motion (seq. no.:003) for sanctions against Intervenor pursuant to 22 NYCRR §130-1.1 will be considered at a hearing on **Tuesday, November 27<sup>th</sup>, 2018 at 10:00 am.**

The foregoing decision constitutes the Order of the Court.

**DATED: OCTOBER 30<sup>th</sup>, 2018**  
**RIVERHEAD, NY**

  
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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*