

Parrino v People of the State of New York

2019 NY Slip Op 31128(U)

April 22, 2019

Supreme Court, Suffolk County

Docket Number: 01929-2014

Judge: David T. Reilly

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SUPREME COURT OF THE STATE OF NEW YORK I.A.S. PART 30 SUFFOLK COUNTY

INDEX NO.: 01929-2014

PRESENT:

HON. DAVID T. REILLY, JSC

ROBERT PARRINO,

Plaintiff,

**For Judgment pursuant to the provisions of Article 15 of the
Real Property Actions and Proceedings Law, and pursuant to
Article 30 of the Civil Practice Law and Rules,**

-against-

**THE PEOPLE OF THE STATE OF NEW YORK; THE NEW
YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and the COUNTY OF SUFFOLK,**

Defendants.

x
J. Lee Snead, Esq.
Attorney for Plaintiff
144 South Country Road
P.O. Box 489
Bellport, NY 11713

Letitia James
New York State Attorney General
Attorney for Defendants
State of New York & New York State
Department of Environmental Conservation
120 Broadway, 26th Floor
New York, NY 10271

Dennis M. Brown
Suffolk County Attorney
Attorneys for Defendant County of Suffolk
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788

MOTION DATE:	<u>09/20/16</u>
SUBMITTED:	<u>09/21/18</u>
MOTION SEQ. NO.:	<u>1-3</u>
MOTION:	001 <u>MG</u>
	002 <u>MD</u>
	003 <u>MG</u>

Upon the reading and filing of the following papers in this matter: (1) Defendant County of Suffolk's Notice of Motion (001) dated August 8, 2016 and supporting papers; (2) Plaintiff's Affirmation in Opposition dated September 27, 2016 and supporting papers; (3) County of Suffolk's Affirmation in Reply dated October 7, 2016; (4) Plaintiff's Notice of Motion (002) dated August 19, 2016 and supporting papers; (5) County of Suffolk's Affirmation in Opposition dated September 16, 2016; (6) People of the State of New York and the New York State Department of Environmental Conservation's (New York State) Memorandum of Law in Opposition dated September 27, 2016; (7) Plaintiff's Affirmation in Reply dated October 24, 2016 and supporting papers; (8) New York State's Notice of Motion (003) dated August 19, 2016 and supporting papers; (9) Plaintiff's Affirmation in Opposition dated September 27, 2016 and supporting papers; (10) New York State's Memorandum of Law in Reply dated October 24, 2016 (and after hearing counsel in support and opposed to the motions) it is,

ORDERED that each of the parties' motions for summary judgment or partial summary judgment are consolidated for purposes of this determination; and it is

ORDERED that the application by the County of Suffolk for an Order granting it summary judgment pursuant to CPLR 3212 is granted; and it is

ORDERED that the plaintiff's application for an Order granting it partial summary judgment with respect to the first three causes of action asserted in the complaint pursuant to CPLR 3212 is denied; and it is

ORDERED that New York State's application for an Order granting it summary judgment pursuant to CPLR 3212 is granted and the complaint is dismissed.

Plaintiff commenced this action on January 28, 2014 by verified complaint asserting claims under Article 15 of the Real Property Actions and Proceedings Law (RPAPL) and Articles 30 and 86 of the Civil Practice Law and Rules (CPLR). By later filed amended complaint plaintiff set forth four causes of action seeking, *inter alia*, a determination pursuant to Article 15 of the RPAPL of his alleged "fee simple absolute ownership of two parcels of underwater real property" effectively barring the State of New York, the County of Suffolk and all other persons from all claims contrary to plaintiff's alleged ownership and contrary to plaintiff's right to take any and all shellfish from the underwater parcels by any means, including hydraulic dredging. Plaintiff also seeks a declaration pursuant to Article 30 of the CPLR that he may cultivate and harvest shellfish from the underwater lands by any method he deems necessary, including hydraulic dredging, without the need to apply for Department of Environmental Conservation permits or approvals and without the need to apply for a Suffolk County permit pursuant to the County's Shellfish Aquaculture Program. Both the State of New York and the County of Suffolk have, in their respective answers, denied the plaintiff's allegations with respect to his alleged fee simple ownership of the two underwater parcels (the subject parcels).

Plaintiff purchased or acquired the two subject parcels from plaintiff's predecessors in interest and engaged in the business of seeding and harvesting shellfish therefrom. According to the plaintiff, the chain of title to the subject parcels can be traced to two separate deeds dated December 1, 1897 and August 9, 1904 from the Board of Commissioners of Shell Fisheries of the County of Suffolk (the Shellfish Commissioners). The Shellfish Commissioners derived their power to execute the original deeds to the plaintiff's predecessors in interest from the New York State Laws of 1884, chapter 385 (the Laws of 1884). Section 1 of the 1884 Laws provides, in pertinent part,

1. All the right, title and interest which the people of the state of New York have in and to the lands under water of Gardiner's and Peconic Bays in the County of Suffolk, is hereby ceded to said county, for the purpose of oyster culture, to be managed and controlled by the board of supervisors thereof, provided that such lands shall revert to the state when they shall cease to be used for oyster culture, and provided that nothing in this act shall be held to interfere with the right of the commissioners of the land office to grant lands under water in said bays to owners of adjacent uplands for purpose of commerce or of beneficial enjoyment within the existing bulkhead line.

The Laws of 1884, established to foster the planting and harvesting of oysters in order to improve the economic base of Long Island, go on to provide for the appointment of three members, referenced herein as the Shellfish Commissioners, and describe their duties in addressing applications for the sale and conveyance of four acre parcels of underwater land "suitable for planting oysters thereon." The statute restricted the underwater land to be conveyed as limited to that land which was not suitable to the harvesting

of clams. As to the sale and conveyance of the underwater properties, the Shellfish Commissioners were to sell and convey "by warranty deed, all the right, title and interest which the said County of Suffolk shall have in and to said land." The deeds to be conveyed to the successful applicant "shall expressly provide and stipulate, that the grantee shall, within one year from the date of their execution, plant a specified quantity of oysters on said land, or otherwise the grant shall be void and the land so granted shall revert to the county." The Laws of 1884 have been amended several times, notably in 1906 (declaring the properties to be real property for purposes of taxation and for all other purposes), in 1923, 1969 and in 2004.

Plaintiff maintains that the subject properties were conveyed to his predecessors in interest "free and clear in the manner of their use" and "were made, in fee simple and with all rights of ownership being transferred" (*see* Affidavit of Robert Parrino, Plaintiff's Exhibits to Affirmation in Opposition, Paper 2, p. 2-3). As the fee simple owner of the subject parcels and paying the required taxes therefor to the County of Suffolk, plaintiff maintains that he owns "all right, title and interest in the real property comprising the Subject Parcel, inclusive of the unfettered right to harvest shellfish - whether hard clam, soft clam, razor clam, surf clam, ocean quahog, oyster, bay scallop, or otherwise - and to do so in whatever manner [I] determine" (*see Id.*, at p. 3). It is grounded upon these beliefs that plaintiff asserts his first three causes of action.

Indeed, in furtherance of his beliefs, plaintiff purchased a number of underwater properties in addition to the subject properties as long ago as 1993. From 1994 to 2004 he engaged in the business of actively seeding and harvesting shellfish from these underwater properties. In setting up his business in 1993 plaintiff sought guidance from the DEC as to what approvals and permits would be necessary in order to harvest shellfish from underwater properties. As a result of his inquiry plaintiff allegedly secured "Bed Permits," "On-Bottom Culture Permits" and other permits which purportedly allowed him to grow and mechanically harvest shellfish by use of a hydraulic dredge. In 2002 he acquired a portion of the subject properties from a bankruptcy trustee for Aquaculture Technologies, Inc. (ATI) after the County of Suffolk unsuccessfully tried to obtain the property as a result of a tax sale. Plaintiff continued his seeding and harvesting of shellfish, with DEC approval, through 2004.

When plaintiff sought a permit to allow him to seed and harvest shellfish from the ATI property in 2004 he was told by the DEC that the permits would be conditioned on the harvest of oysters only and that the use of a hydraulic dredge would not be authorized. Further, plaintiff was also told that the DEC had ceded its jurisdiction over the underwater lands to the County of Suffolk as part of a new County Aquaculture Lease Program and that the harvest of hard clams and bay scallops was not allowed, nor was the use of a hydraulic dredge. In order to harvest any shellfish other than oysters, plaintiff was told, he would have to lease the underwater properties from the County of Suffolk. The County of Suffolk and the DEC have maintained this position to the present date, thereby giving rise to this litigation.

The State of New York and the County of Suffolk each contend that, other than the plaintiff's complaint asserting untimely causes of action which sound in challenges to the determinations made by the DEC and the County of Suffolk, the plaintiff is not a fee title absolute owner of the subject properties, but holds a conditional grant only and is, therefore, subject to state and county regulation.

Each of the parties have now moved for summary judgment. With respect to the plaintiff's motion, he seeks summary judgment with respect to his first three causes of action leaving alone for now his cause of action for attorney's fees asserted pursuant to CPLR 8604(d). Plaintiff has submitted in support of his application, *inter alia*, a copy of the pleadings, copies of the applicable statutes and legislative histories,

abstracts of chains of title for the subject properties and an affirmation of attorney Rudolph de Winter. The County of Suffolk has submitted, among other things, copies of the pleadings, copies of communications sent to the plaintiff, copies of deed transfers and copies of permit applications purportedly submitted by the plaintiff. The State of New York has also submitted copies of the pleadings, copies of some of the applicable laws and statutes applicable to this determination, copies of the original deeds to plaintiff's predecessors in interest and copies of deed transfers.

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 Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Upon such a showing, the burden shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of 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]).

Here, the primary issue before the Court is a determination as to the quality of the plaintiff's ownership in the subject parcels. Plaintiff maintains that he owns fee title absolute with all of the rights attendant thereto including, but not limited to, an exemption from the DEC and County of Suffolk's shell fishing and related environmental regulations. The State of New York and the County of Suffolk, however, argue that plaintiff's ownership of the subject parcels as derived from the Laws of 1884, was a conditional grant of the underwater lands, specifically granted for the purposes of oyster culture and that any construction of the law to the contrary would run afoul of well settled law that provides that in New York the grant of public lands are construed most favorably upon the sovereign and against the grantee.

The Court first looks to the language of the Laws of 1884, as it must, to determine the plain meaning of the statute and its import (*see People v Owusu*, 93 NY2d 398, 690 NYS2d 863 [1999]). As noted earlier the statute, specifically Chapter 385 of the Laws of 1884, provides that all the right, title and interest held by the State of New York to the lands under the waters of Peconic and Gardiner's Bays is ceded to the County of Suffolk "for the purpose of oyster culture, to be managed and controlled by the board of supervisors thereof, provided that such lands shall revert to the state when they shall cease to be used for oyster culture..." After establishing the authority of the Shellfish Commissioners, the statute further states that the commissioners shall cause a survey to be undertaken to determine lands suitable for the planting of oysters and specifically exempted from consideration those lands where there was "any natural growth of clams such that one person in one day could take three bushels..." If it was determined that such growth was not naturally occurring on such land then the commissioners would be required to "sell and convey to said applicant, by warranty deed, all the right, title and interest which the said County of Suffolk shall have in and to said land." In addition to the foregoing, the statute provided that the deed to the grantee shall stipulate that the grantee shall, within one year from the date of the execution of the deed, plant a specified number of oysters or the grant shall be void and the land would revert to the county.

Later laws amending the Laws of 1884 do little to alter the plain meaning of the original statute. Chapter 640 of the Laws of 1906 amended the Laws of 1884 to the extent that, *inter alia*, a civil engineer was tasked with mapping the underwater lands deeded by the county for purposes of oyster culture and that the lands so granted were to be considered real property for purposes of taxation and other purposes. Perhaps

most importantly, for reasons that will be discussed later, Chapter 640 of the Laws of 1906 provided that “all provisions of the forest, fish and game law, of the penal code or of any other general statute of this state for the purpose of protecting oysters, oyster grounds or the oyster industry, shall be applicable to the lands and waters hereinbefore described as if the said provisions were herein set forth at length.” The Forest, Fish and Game Law, enacted in 1908, was replaced by the Conservation Law, which was adopted in 1911. The Conservation Law was replaced by the Environmental Conservation Law in 1972 (*see generally* New York Environmental Conservation Law §13-0302).

Chapter 191 of the Laws of 1923, a copy of which was not provided in the parties’ submissions, similarly notes that the underwater properties deeded to successful applicants are considered real property for purposes of taxation. Chapter 990 of the Laws of 1969 amended Chapter 385 of the Laws of 1884 to the extent that the New York State Legislature recognized the decline in the seeding and harvesting of oysters resulted in the forfeiture of the lands previously deeded by operation of the original legislation. Chapter 990 attempted to establish a methodology for the surveying and management of those previously deeded properties. That law included a section which ratified the sale of those lands by the Shellfish Commissioners where all taxes and assessments had been paid by the original grantees and their successors in interest. All other lands applicable hereto, including those which reverted to the state, were ceded to the county for the purpose of the cultivation of shellfish, to be portioned to qualified residents by leases. The legislative history of the statute notes that the bill ratifies and confirms all sales of lands made by the Shellfish Commissioners, but also authorizes the Department of Conservation to regulate and control the use of vessels and equipment for harvesting and re-seeding shellfish and to enforce all laws relating to oyster beds or shellfish grounds (*see* Plaintiff’s Affirmation in Opposition, Paper No. 9, Exhibit 8, letter of Louis J. Lefkowitz).

Finally, Chapter 425 of the Laws of 2004 repealed Chapter 990 of the Laws of 1969 and, among things, granted authority to the County of Suffolk to adopt a Suffolk County Aquaculture lease program in Peconic Bay and Gardiner’s Bay.

What each of the amendments to Chapter 385 of the Laws of 1884 have in common are two important principles. First, each of the amendments ratified the ownership rights of those individuals in the under water properties obtained by deeds from the Shellfish Commissioners where it can be proven that all taxes and assessments had been paid by the original grantees and their successors in interest. Second, these amendments recognized that the legislature was confirming and ratifying the grant of lands that were made “in accordance with the provision of Chapter 385 of the laws of 1884, as amended.” The importance of confirming and ratifying the grant of lands that were made in accordance with the Laws of 1884 is that the quality of the ownership rights derived from the original grantees did not change with the amendments to the law. Stated otherwise, the grant of lands were made, and remain, “for the purpose of oyster culture” (*see* Chapter 385, laws of 1884).

Fee simple absolute, which the plaintiff claims to have over the subject parcels, “is the greatest interest that can be given away; it includes title, the right of possession and the right to use for any purpose” (*see* Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 17B, EPTL §6-1.1 [citations omitted]). “The fee on condition of subparagraph (a)(2) is an interest in property that is either contingent (subject to a condition precedent) or defeasible (subject to condition subsequent)(*see Id.*).

Here, the grants enjoyed by the plaintiff and his predecessors in interest were and are, according to the plain meaning of the statutes, conditional grants “for the purpose of oyster culture.” The original statute

included a reversionary clause should the grantee fail to plant an established number of oysters within one year after the execution of the original deeds. Inclusion of this type of language within the statute is further evidence that the original grantees did not hold the lands granted in fee simple absolute, but rather in another form, likely fee on condition. That distinction is not an issue before the Court as the plaintiff seeks a declaration that his ownership of the subject parcels is in fee simple absolute and, based on the sum of the foregoing, the Court finds that he does not. Rather, his ownership rights of the subject parcels, as originally deeded, are conditioned upon the harvesting and planting of oysters. And, as case law allows, “it is also to be observed that the act of 1884, if considered as a grant, is to be construed strictly, in favor of the state, and that it was explicitly ‘for the purpose of oyster culture’ alone. For all other purposes, such as those mentioned in the law of 1884, or that added by the law of 1906, the state retained full title” (*County of Suffolk v Edwards*, 86 Misc. 283, 148 NYS 305 [Sup Ct, Suffolk Cty, 1914]). This determination becomes more evident when considering the language included in later amendments to the statute which provide that the lands granted were to be considered real property for purposes of taxation. To hold that the grant of lands were in fee simple absolute, which of course would be subject to taxation, would render such amendment superfluous and this Court will not reject the amendments as such (*see Feinman v County of Nassau*, 154 AD3d 739, 63 NYS3d 395 [2d Dept 2017]).

As to plaintiff’s claims that he acquired fee simple absolute when he purchased the parcel best described as the “Aquaculture Technologies, Corp. Property” (ATC Property) from the bankruptcy trustee, that assertion is simply not true. While that property was taken by the County of Suffolk due to the non-payment of taxes and subsequently granted to the plaintiff by quitclaim deed pursuant to an Order of the Court dated October 27, 2003 [Mullen, J. (Ret.)], “title acquired by tax deed is no better than the title of the person who allegedly lost the title for the nonpayment of taxes” (*O’Brien v Town of Huntington*, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009]). Further, a quitclaim deed passes only such right, title, and interest as the grantor has at the time of making the deed and which is capable of being transferred by deed (*see Wilhelm v Wilken*, 149 NY 447 [1896]).

To conclude that the County of Suffolk, by quitclaim deed, transferred fee simple absolute to the plaintiff would lend judicial approval to an abridgement of the State of New York’s rights under Public Lands Law §19 which provides that all “sales of state lands for unpaid taxes or assessments for local improvements or purposes are void.” This Court will not give its imprimatur to such a violation, giving due deference to the proposition that “abdication of the general authority by the State over lands under the navigable waters ... is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public” (*see Smith v State*, 153 AD2d 737, 545 NYS2d 203 [2d Dept 1989], quoting *Ill. C. R. Co. v Ill.*, 146 US 387, 13 S.Ct. 110 [1892]). Accordingly, the plaintiff’s first cause of action for a determination pursuant to RPAPL Article 15 of his fee simple ownership in the subject parcels is dismissed.

In rejecting plaintiff’s claims to fee simple absolute in the subject parcels the Court must accord the state and county the right to regulate the plaintiff’s use of these lands (*see generally* Environmental Conservation Law §13-0302(6)). That statute provides,

6. Department authority. Notwithstanding any of the provisions of this section:
 - a. any person engaging in the cultivation or harvesting of shellfish in a shellfish cultivation zone pursuant to this section shall obtain a permit in accordance with section 13-0316 of this title; and
 - b. the department shall regulate and control the use of certain types of vessels

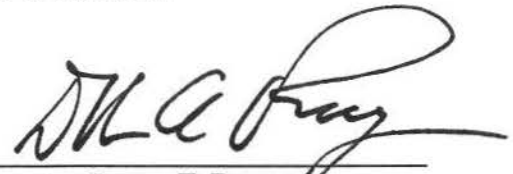
and equipment for harvesting shellfish...

Based upon a fair reading of the statute and despite the ratification of plaintiff's rights to subject parcels as secured from the original grantees, this provision of the Environmental Conservation Law provides the authority of the Department of Environmental Conservation to regulate the manner in which plaintiff harvests shellfish. That would, of course, include the lawful prohibition against plaintiff's use of a hydraulic dredging machine and the harvesting of "any type" of shellfish without the proper permit. Accordingly, the defendants' respective motions for summary judgment as to plaintiff's second and third causes of action are granted and they are dismissed.

Inasmuch as the Court has dismissed the plaintiff's first three causes of action, that claim made for an award of attorney's fees, costs and disbursements, pursuant to CPLR 8601, must similarly be dismissed (see generally *McCrimmon v Dowling*, 247 AD2d 620, 669 NYS2d 607 [2d Dept 1998]).

The foregoing shall constitute the decision and Order of the Court.

Dated: April 22, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 X FINAL DISPOSITION

_____ NON-FINAL DISPOSITION