

Golden v Town Bd. of the Town of Oyster Bay
2021 NY Slip Op 34314(U)
September 21, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602569/2021
Judge: Helen Voutsinas
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19**

Present: Hon. Helen Voutsinas, J.S.C.

-----X
GEORGE GOLDEN AND KRISTINA GOLDEN,

Petitioners-Plaintiffs,

-against-

**TOWN BOARD OF THE TOWN OF OYSTER BAY and
TOWN OF OYSTER BAY,**

Respondents,

FRANK MARINO AND SUSAN MARINO,

Defendants.
-----X

Index No.: 602569/2021

**Motion Seq. Nos.: 001, 002
& 003**

Short Form Order

The following papers were read in this proceeding:

Motion Seq. Nos. 001 & 003

Notice of Petition, Verified Petition and Complaint, Exhibits.....	1
Verified Answer with Counterclaims.....	2
Notice of Motion to Dismiss, Affirmation and Affidavit in Support, Exhibits.....	3
Affirmation in Opposition, Exhibits.....	4
Affirmation in Reply, Exhibit.....	5

Motion Seq. No. 002

Order to Show Cause, Affidavit and Affirmation in Support, Exhibits and Memorandum of Law.....	1
Affidavit in Opposition, Exhibits and Memorandum of Law in Opposition.....	2
Affirmation in Partial Opposition.....	3

Plaintiffs-Petitioners, George Golden and Kristina Golden (collectively “plaintiffs” or “Goldens”) bring this hybrid proceeding pursuant to CPLR Article 78 and CPLR Article 63. Plaintiffs seek a judgment pursuant to CPLR Article 78 against the Town Board of Oyster Bay and the Town of Oyster Bay (collectively “Town”) vacating the Town’s October 6, 2020 resolution 471-2020 (“Resolution”) which granted defendants Frank Marino and Susan Marino (collectively “defendants” or “Marinos”) a permit to perform certain work on a dock and groin, which groin Plaintiffs allege is on their property (motion seq. 001). As against the Marinos, plaintiffs seek a permanent injunction under CPLR Article 63 enjoining defendants from performing any work on plaintiff’s property.

Plaintiffs move, by order to show cause, for an Order granting a preliminary injunction enjoining and restraining defendants, their agents, representatives, and assigns, from engaging in any construction, remediation or any other work related activity on the property of plaintiffs located at 290 East Shore Drive, Massapequa, New York 11758 and construction, remediation or any other related activity which would affect the dock and groin located thereon (motion seq. 002). The Town moves for an Order pursuant to CPLR §3211 and CPLR Article 78 granting judgment dismissing plaintiffs' Article 78 petition and complaint on the grounds that no issues of law or fact exist and that plaintiffs cannot, as a matter of law, meet their burden under CPLR §7803[3] (motion seq. 003). The motions are decided as hereinafter provided.

Factual and Procedural Background

Plaintiffs filed their verified petition and complaint in this hybrid proceeding on March 3, 2021. Plaintiffs are the owners of a parcel of real property located at 290 East Shore Drive, Massapequa, New York, designated on the Nassau County Land and Tax Map ("Tax Map") as Section 66, Block 64, Lot 67 ("Golden Property"). The Golden Property is waterfront property improved with a single-family residence in which plaintiffs reside. There is also a dock ("Golden Dock") located on the Golden Property, near its southern boundary line, which extends seaward into the Carmen River located in the Great South Bay. The foregoing is undisputed. However, there is also a groin (a barrier built out into the sea to abate erosion, drifting and movement of sediment) that runs along the Golden Dock on its southern side ("Disputed Groin"). Plaintiffs claim that the Disputed Groin is located on the Golden Property.

Defendants are the owners of a parcel of real property located at 294 East Shore Drive, Massapequa, New York 11758, designated on the Tax Map as Section 66, Block 64, Lot 61-66 ("Marino Property"). The Marino property is located adjacent to and immediately south of the Golden Property. A dock is located on the Marino Property at its southerly boundary line. Defendants claim that the Disputed Groin is on the Marino Property. Defendants have been issued permits by the Town, the Army Corps of Engineers ("Army Corps") and the New York State Department of Environmental Conservation ("DEC"), permitting them to rebuild the Disputed Groin in place. Defendants state that the Disputed Groin, which serves the purpose of maintaining the sand on the Marino Property as well as the Golden Property has eroded, is in dilapidated condition and must be replaced.

Plaintiff's first cause of action is asserted against the Town, pursuant to CPLR Article 78. Plaintiff asserts that the Resolution grants defendants a permit to perform work, including replacement of the Disputed Groin. Plaintiffs allege that they objected to the Town's consideration of the Marino's application based on the fact that the Disputed Groin is located on their property, but the Town passed the Resolution without considering plaintiffs' objections. Plaintiffs allege that the Town's action in passing the Resolution is arbitrary, capricious and an abuse of its discretion.

Plaintiffs' remaining causes of action are asserted against the Marinos. The second cause of action is for a permanent injunction preventing the Marinos from performing any work on the Golden Property, including the Golden Dock and Dispute Groin. Plaintiffs allege that any such work would constitute a trespass on their property. The third cause of action is for damages

plaintiffs might incur if the Marinos perform work on the Golden Dock and Dispute Groin and plaintiffs have to restore the dock and groin to their previous condition.

The Marinos filed a verified answer to the petition and complaint on April 16, 2021. In the answer, defendants assert numerous affirmative defenses and several counterclaims against plaintiffs. In their counterclaims, defendants allege that the Disputed Groin is located on the Marino Property.

The Marino's first counterclaim seeks a declaratory judgment pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 15, declaring that the Disputed Groin is located on the Marino Property and that the Marinos are the sole and exclusive legal and equitable title owners of the Disputed Groin. In their second counterclaim, the Marinos seek a declaratory judgment pursuant to RPAPL Article 15 declaring that the Marinos acquired legal and equitable title to the Disputed Groin by virtue of adverse possession. In their third counterclaim, the Marinos seek a judgment declaring that the Disputed Groin and any proposed construction or maintenance does not trespass on the Golden Property; or in the event the Disputed Groin is located in whole or in part on the Golden Property, any trespass is de minimis, unintentional and the result of good faith reliance on surveys and plans indicating that the Disputed Groin was on the Marino Property and does not warrant injunctive relief or damages. The fourth counterclaim seeks damages for the Goldens' alleged trespass and interference with the Marino's riparian rights. The fifth counterclaim seeks damages for the Goldens' alleged tortious interference with contractual relations with the Marinos' marine contractor. The sixth counterclaim is for a permanent injunction against the Goldens challenging title of the Disputed Groin and against the Goldens' obstructing, hindering or interfering with the Marinos from accessing and using the Disputed Groin.

Plaintiffs' Motion for a Preliminary Injunction (Motion Seq. No. 002)

Shortly after commencing this proceeding, plaintiffs filed an order to show cause in connection with their motion for a preliminary injunction enjoining and restraining defendants "from engaging in any construction, remediation or any other work related activity on the property of plaintiffs located at 290 East Shore Drive, Massapequa, New York 11758 and construction, remediation or any other related activity which would affect the dock and groin located thereon." On March 10, 2021, after hearing argument from the parties, this Court signed the order to show cause, granting a temporary restraining order ("TRO") which provides that "Defendants, their representatives, agents and assigns are hereby enjoined and restrained from engaging in any construction, remediation or any other related activity on the property of Plaintiffs-Petitioners located at 290 East Shore Drive, Massapequa, New York 11758 and construction, remediation or any other related activity which would affect the dock and groin located thereon"

In support of their motion, plaintiffs submit the affidavit of plaintiff Kristina Golden, copies of various photographs of the Golden Property and of the Marino Property, an aerial photograph showing both properties and part of a survey of Golden Property. Plaintiffs assert that on March 6, 2021, they observed work being performed by the Marinos' contractors in close proximity to the Golden Dock. Mrs. Golden states that plaintiffs tried to speak with the Marinos to gain assurance that they would not trespass on the Golden Property to perform work on the Golden Dock or the Disputed Groin, but the Marinos refused to discuss the matter.

In opposition to the motion, defendants submit the affidavit of Frank Marino and copies of numerous documents, including deeds in the respective chains of title of both properties, surveys of both properties, applications, permits and related correspondence pertaining to both properties and various governmental agencies including the Army Corps of Engineers ("Army Corps"), the New York Department of Environmental Conservation ("DEC") and the Town of Oyster Bay, and dating as far back as the 1950's.

Among the surveys submitted by defendants was a new survey of their property, obtained on April 16, 2021, the very same day that their opposition papers were due, and were filed. The new survey, dated April 12, 2021 and prepared by Paul Bolton, indicates that most of the Disputed Groin is in fact located on the Goldens' side of the property line. Mr. Marino states that the surveyor explained that an existing memorial on East Shore Drive at the property line between the properties was off by 1.2". As a result, the surveyor found that approximately 1.25" of the 10" wide Disputed Groin is on the Marino's side of the property line, and approximately 8.75" inches of the Disputed Groin is on the Goldens' side of the property line.

Nevertheless, the Marinos argue that the documentary evidence reveals that the Disputed Groin was built by the Marinos' predecessors in title, and not the Goldens' predecessors in title. The Marinos further contend that they will ultimately establish that the land under the Disputed Groin belongs to them by virtue of adverse possession.

Based upon the new survey and the revelation that the Disputed Groin lies mostly on the Goldens' side of the common boundary line, the Marinos concede in their opposition papers that so much of the TRO that bars the Marinos from rebuilding the Disputed Groin in place should continue until the Court determines the Marinos' counterclaim for declaratory judgment that they own the land under the Disputed Groin by adverse possession.

The Marinos also argue that even if the Court rules against them on the adverse possession counterclaim, there is no question that the Disputed Groin was built by a prior owner of what is now the Marinos property. Accordingly, the Marinos argue that they should still be entitled to remove the resulting inadvertent trespass onto the Goldens' property by removing the groin. They contend that because their predecessor in title inadvertently trespassed on the property at 290 when he built the groin does not mean he did not own the groin, or that his interest in the groin did not pass to his successors in interest, including the Marinos. If they are not the owners of the Disputed Groin by adverse possession, the Marinos state that they must be able to remove the trespass by removing the dilapidated groin, because if the groin breaks up in a storm, the Marinos may have personal liability if portions of the structure cause injury to the property or person of their neighbors.

On June 7, 2021, counsel for the Marinos filed an additional "Affirmation in Partial Opposition to Preliminary Injunction." Through their attorney's affirmation, the Marinos advise that they have elected to apply for new permits from the Army Corps and DEC for permission to construct a new groin on the Marinos' side of the property line, leaving the existing groin where it is untouched pending the outcome of the litigation. Counsel states that if the Marinos receive these permits, they will seek a new permit from the Town to build the new groin on their side of the

property line. Based on the foregoing, and the Marinos' earlier concession that so much of the TRO that bars the Marinos from rebuilding the Disputed Groin in place should continue until the Court determines the Marinos' counterclaim for declaratory judgment that they own the land under the Disputed Groin by adverse possession, the Marinos request the Court to limit the Preliminary Injunction to provide as follows:

Defendants, their representatives, agents and assigns are hereby enjoined and restrained from engaging in any construction, remediation or any other related activity on the property of Plaintiffs located at 290 East Shore Drive, Massapequa, New York 11758 pending the determination by the Court of ownership of the disputed groin and whether Plaintiffs may bar Defendants from removing the groin."

Plaintiffs have not submitted any papers in reply.

After careful review and consideration of the papers submitted by the parties, and in light of defendants' concession that the Disputed Groin lies at least in part on the Golden Property, and in order to maintain the status quo during the pendency of this action, plaintiff's motion for a preliminary injunction (motion seq. no. 002) is **GRANTED**; and it is

ORDERED, that defendants Frank Marino and Susan Marino, their agents, representatives and assigns are hereby enjoined and restrained from engaging in any construction, remediation or any other related activity on the property of plaintiffs located at 290 East Shore Drive, Massapequa, New York 11758 pending the determination by the Court of ownership of the Disputed Groin and whether plaintiffs may bar defendants from removing the Disputed Groin; and it is further

ORDERED, that the temporary restraining order granted by this Court in the order to show cause dated March 10, 2021, is vacated.

Respondent Town's Motion to Dismiss -- Motion Seq. No. 003

As discussed above, only the first cause of action set forth in plaintiffs' verified petition and complaint pertains to the Town. Plaintiffs allege therein that the Town's passing of Resolution 471-2020, which grants the Marinos a permit to perform certain work at 294 East Shore Drive, Massapequa, New York, including replacement of the Disputed Groin, was arbitrary, capricious and an abuse of its discretion. Plaintiffs seek an Order vacating and annulling the Resolution.

The Town moves for an Order pursuant to CPLR §3211 and Article 78 dismissing plaintiffs' Article 78 petition and complaint, as against the Town, on the grounds that no issues of law or fact exist and that plaintiffs cannot, as a matter of law, meet their burden under CPLR §7803[3].

The Town argues that the Marinos' application for the work at issue was properly approved by the Town, and had also been previously reviewed and approved by the Army Corps and the DEC. In support of the motion, the Town submits its attorney's affirmation and copies of permits

issued by the Army Corps, the DEC and the Town, and related applications and correspondence, and the affidavit of Elizabeth L. Maccarone, the Commissioner of the Department of Planning and Development for the Town.

In opposition, plaintiffs first argue that the Town's motion is procedurally defective because the Town has failed to file a certified transcript of the record of the proceedings under consideration as required by CPLR §7084[e]. Plaintiffs repeat the assertions of their petition that they objected to the Town's consideration of the Marinos' application on the grounds that the work was to be performed on their property, and that the Town failed to consider their objections. Plaintiffs further assert that the validity of their objections is confirmed by the recent survey obtained by the Marinos, showing that the Disputed Groin is located on the Golden Property, and thus, the Resolution improperly permits the Marinos to perform work on the Golden Property.

The Town moves pursuant to CPLR §3211, but does not specify in its motion papers any particular grounds. Presumably, its motion is based upon CPLR §3211[a][1] and [7]. A motion to dismiss a claim pursuant to CPLR §3211[a][1] may be granted only if the documentary evidence submitted by the movant utterly refute the factual allegations of the complaint and conclusively establish a defense to the claims as a matter of law (*Goshen v Mutual Life Insurance Co. of NY*, 98 NY2d 314, 326 [2002]; *Basalel v Youni Gems Corporation*, 95 AD3d 914, 915 [2d Dept 2012]; *First Keystone Consultants, Inc. v DDR Construction Services*, 74 AD3d 1135 [2d Dept 2010]). Where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence", they are not presumed to be true or accorded every favorable inference. (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]).

In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable and may include documents reflecting out-of-court transactions, such as contracts (*Fontanetta v John Doe I*, 73 A.D.3d 78, 84-86 [2d Dept 2010]; See also *Attias v Costiera*, 120 A.D.3d 1281, 1282 [2d Dept 2014]).

When deciding a motion to dismiss pursuant to CPLR §3211[a][7], the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiff the benefit of every favorable inference (see *Marcantonio v Picozzi III*, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 A.D.3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "CPLR 3211[a][7] dismissals merely address the adequacy of the pleading, and do not reach the substantive merits of a [party's] cause of action . . ." (*Hendrickson v. Philbor Motors, Inc.*, 102 AD3d 251, 255 [2d Dept 2012]).

After reviewing defendants' documentary evidence and the parties' respective submissions on this motion, the Court determines that the documentary evidence presented by defendants is not such that "utterly refute the factual allegations of the complaint and conclusively establish a

defense to the claims as a matter of law" (See, *Goshen v Mutual Life Insurance Co. of NY*, supra, 98 NY2d at 326; *Basalel v Youni Gems Corporation*, supra, 95 AD3d at 915).

Pursuant to CPLR 7803[3], the standard of review in this CPLR Article 78 proceeding is whether the determination under review was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*Matter of Kascharow v. Board of Examiners of Sex Offenders of State of N.Y.*, 106 AD3d 915 [2d Dept 2013] *aff'd* 25 NY3d 1039 [2015]; *Matter of Rosenberg v. New York State Off. of Parks, Recreation, & Historic Preserv.*, 94 AD3d 1006, 1007 [2d Dept 2012]). "'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts'" (*Matter of Naranjo v. Commr. of Dept. of Motor Vehs., State of N.Y.*, 116 AD3d 859, 861 [2d Dept 2014] quoting *Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230 [1974]). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (see *Matter of Pell*, supra at 231).

The Court finds that plaintiffs' allegations are sufficient to survive the Town's pre-answer motion to dismiss. The plaintiffs allege that the Town passed the Resolution without considering plaintiffs' objections that the Disputed Groin is located on their property, and such action was arbitrary, capricious and an abuse of its discretion.

The Town's submissions show that the Marinos obtained a permit from the Army Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899. The permit was issued on January 4, 2016. The Marinos thereafter obtained a permit for the work from the DEC pursuant to Article 70 of the New York Environmental Conservation Law. That permit was issued on November 4, 2019. The final step was obtaining a permit from the Town, pursuant to Town Code §241-9. The Marino's application was approved by the Town after the matter appeared on the Board's calendar on September 15, 2020, and again on October 6, 2020.

The Town states that it relied upon land surveys and site plan documentation previously reviewed, vetted and approved by the Army Corps and the DEC, and that the matter was fully reviewed by the Town Department of Planning and Development. The Town contends that, upon objection by plaintiffs at the Board meeting of September 15, 2020, the matter was tabled for further consideration, and the application was thereafter approved at the subsequent Board meeting on October 6, 2020. The Town argues that, based upon all of the foregoing, any claim that the action of the Town was arbitrary and capricious is wholly untenable.

The Town presents two (2) surveys of 294 East Shore Drive which were relied upon in the passing of the Resolution. One is a survey prepared by Vito Valenti, dated February 20, 1998, and the other is a survey prepared by Homestead Land Surveying, P.C., dated January 7, 2014. The copy of the 2014 survey that is provided is barely legible, and does not appear to be signed by the surveyor. The boundary line at issue, and the structures at issue, are totally illegible. The copy of the 1998 survey is more legible. The survey shows two (2) separate structures along the common boundary line - a "WOOD PIER" that appears to be on the Goldens' side of the boundary line and "R.R. TIES" that appear to be on the Marinos' side of the property line. The Court cannot discern,

on this record, whether these structures appearing on the 1998 survey are the Golden Dock and the Disputed Groin that exist today.

In addition, the papers submitted by the Town do not appear to have any specific reference or details as to the objections raised by the plaintiffs. The Town's attorney, Jeffrey Lesser, states in his affirmation in support at that "[i]t is your affiant's understanding that Petitioners objected to the issuance of a permit. Due to this objection, the matter was tabled by the Board for further consideration." He states further that the matter was tabled on the original calendar date of September 15, 2020 and then was passed at the next Board meeting date on October 6, 2020. However, the minutes of the September 15, 2020 meeting only mention the tabling of the application, with no further discussion. No minutes of the October 6, 2020 meeting have been provided.

Based upon all of the foregoing, the Court determines that it cannot properly assess the merits of plaintiffs' Article 78 claim against the Town on the record presented. Accordingly, the Town's motion to dismiss (motion seq. no. 003) is **DENIED**. It is further

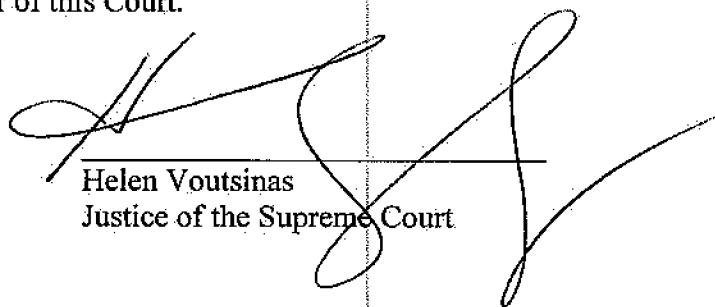
ORDERED, that the Town shall serve and file its verified answer and objections in point of law together with a certified transcript of the record of the proceedings under consideration, pursuant to CPLR §7804[e], on or before October 12, 2021. Plaintiffs shall serve and file a reply to same on or before October 21, 2021. The parties shall also deliver to the Court, by mail or overnight delivery, a hard copy of their respective papers, properly tabbed and bound. It is further

ORDERED, that a Preliminary Conference with respect to plaintiffs' plenary causes of action against the Marinos shall be held on **October 21, 2021 at 12:00 p.m.** via Microsoft Teams Virtual Meeting. Invitations have been sent to counsel. Any party that has not received the invitation should contact chambers via email judgevoutsinasremote@nycourts.gov. Prior to the scheduled conference date, counsel shall confer and complete a proposed Preliminary Conference Stipulation and Order, which is available on the Court's website together with instructions on how to complete it, at <http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>. Counsel are expected to appear for the conference prepared to discuss all matters relevant to this hybrid proceeding.

Any other relief sought herein but not specifically ruled upon is **DENIED**.

This constitutes the decision and Order of this Court.

Dated: September 21, 2021
Mineola, NY



Helen Voutsinas
Justice of the Supreme Court

ENTERED

Sep 29 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE