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| <b>Golden v Town Bd. of the Town of Oyster Bay</b>                                                                                                                                                                             |
| 2023 NY Slip Op 35324(U)                                                                                                                                                                                                       |
| November 9, 2023                                                                                                                                                                                                               |
| Supreme Court, Nassau County                                                                                                                                                                                                   |
| Docket Number: Index No. 602569/2021                                                                                                                                                                                           |
| Judge: Conrad D. Singer                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,  
Justice

TRIAL PART: 21

-----X  
GEORGE GOLDEN and KRISTINA GOLDEN,,

Index No.: 602569/2021  
Motion Seq. Nos.: 007 and 008  
Motion Submitted: 09/05/2023

Petitioners-Plaintiffs,

-against-

DECISION AND ORDER ON  
MOTIONS

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

Respondents,

-and-

FRANK MARINO and SUSAN MARINO,

Respondents-Defendants.

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The following papers have been read on these motions:

**Respondents-Defendants Marino's Motion for Summary Judgment [Seq. 007]**

Notice of Motion for Summary Judgment and Supporting Papers [007].....X  
Affirmation in Further Support of Motion and in Opposition to Petitioners-Plaintiffs'  
Cross-Motion and Supporting Papers [007].....X

**Petitioners-Plaintiff's Cross-Motion for Summary Judgment [Seq. 008]**

Notice of Cross-Motion for Summary Judgment and Supporting Papers [008].....X  
Affirmation in Further Support of Cross-Motion and in Opposition to Motion and  
Supporting Papers [008].....X

Upon the foregoing e-filed documents, the application interposed by the Respondents-Defendants, Frank Marino and Susan Marino, for [1] an order pursuant to CPLR § 3212 dismissing the within Verified Petition and Complaint [hereinafter the "Petition"], [2] an order pursuant to CPLR § 3212 granting summary judgment on their Fourth counterclaim, and [3] an order pursuant to CPLR § 3217(b) permitting them to voluntarily discontinue, without prejudice, those counterclaims denominated First, Second, Third and Sixth (Sequence #007), and the cross-motion

interposed by the Petitioners-Plaintiffs, George Golden and Kristina Golden, for [1] an order pursuant to CPLR § 3212 granting summary judgment in their favor on the Second cause of action set forth in the Petition, and [2] an order pursuant to CPLR § 3212 granting summary judgment dismissing the Second, Third, Fourth and Sixth counterclaims asserted by Frank Marino and Susan Marino (Sequence #008), are consolidated for disposition and determined as set forth hereinafter.

Petitioners-Plaintiffs, George Golden and Kristina Golden [hereinafter collectively, “the Goldens”] and the Respondents-Defendants, Frank Marino and Susan Marino [hereinafter collectively, “the Marinos”] are the owners of adjacent waterfront property respectively situated at 290 East Shore Drive [hereinafter the “Golden Property”] and 294 East Shore Drive [hereinafter the “Marino Property”] in Massapequa, New York (NYSCEF Doc No. 198 at ¶¶8,9). The Golden Property is located immediately north of the Marino Property (NYSCEF Doc No. 198 at ¶9). In or around November 2019, the Marinos intended, among other things, to “replace . . . a 65-foot long groin on the north side of the[ir] property” [hereinafter the “Disputed Groin”] (NYSCEF Docs No. 204, 210). In connection therewith, the Marinos obtained the requisite permits from the Army Corps of Engineers and the New York State Department of Environmental Conservation [hereinafter collectively the “Original Permits”] and, on October 6, 2020, the Town Board of the Town of Oyster Bay [hereinafter the “Town”] passed a resolution permitting the Marinos to proceed with the planned improvements (NYSCEF Doc Nos. 210,211, 212).

On or about March 21, 2021, the Goldens commenced the within hybrid proceeding alleging that in passing the Resolution, the Town permitted the Marinos “to perform work, including the replacement of the . . . [Disputed Groin]” which is located “entirely” on the Golden Property (NYSCEF Doc No. 198 at ¶¶12-16). As relevant here, of the three causes of action set

forth in the Petition<sup>1</sup>, those denominated Second and Third seek a permanent injunction, together with damages, and are particularly asserted against the Marinos (*id.* at ¶¶21-28). On or about April 16, 2021, the Marinos interposed a Verified Answer which asserted six counterclaims<sup>2</sup> (NYSCEF Doc No. 111).

Subsequently, in an attempt “[t]o avoid protracted litigation”, the Marinos sought modification of the Original Permits so as “to install a new 65-foot-long groin to the south of an existing pier and to not replace the existing 65-foot-long groin” [hereinafter the “Amended Permits”] (NYSCEF Doc No. 204 at ¶¶ 33-44; NYSCEF Doc Nos. 216, 217, 218). On March 1, 2022, the Town passed a second resolution allowing the construction of an entirely new groin (NYSCEF Doc No. 219). The parties now move for the relief recited above.

The Court initially addresses the application interposed by the Marinos. As to the first branch of their application, the Marinos assert that inasmuch as they have abandoned their plans to replace the Disputed Groin, the Second and Third causes of action asserted by the Goldens are moot and the Petition must accordingly be dismissed (NYSCEF Doc No. 227 at pp. 7-12; NYSCEF Doc No. 288 at pp. 3-4). The application is opposed by the Goldens, who cross-move for an award of summary judgment in their favor as to the Second cause of action for a permanent injunction “preventing . . . [the Marinos] from performing any work on the Golden Property including the Golden Dock” and the Disputed Groin (NYSCEF Doc Nos. 198, 232, 253, 261, 294).

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually

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<sup>1</sup> On August 24, 2023, the Goldens discontinued, with prejudice, the First cause of action asserted against the Town (NYSCEF Doc No. 297).

<sup>2</sup> The Fifth counterclaim originally asserted by the Marinos was previously withdrawn (NYSCEF Doc No. 227 at p. 6).

controverted in a particular case pending before the tribunal” (*Alvarez v Annucci*, 186 AD3d 704, 705 [2d Dept 2020], *affd* 38 NY3d 974 [2022], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). Further, “[t]he mootness doctrine precludes courts from considering questions which, although once active, have become academic by the passage of time or by a change in circumstances” (*Alvarez v Annucci*, *supra* at 705, quoting *Matter of Melinda D.*, 31 AD3d 24, 28 [2d Dept 2006]).

As noted, the underlying Petition is premised upon the Marinos’ plans to replace the Disputed Groin which is purportedly situated entirely on the Golden Property (NYSCEF Doc No. 198 at ¶¶12,13). Here, even if the allegations articulated in the Petition were unassailable, the Amended Permits unequivocally establish that the Marinos have affirmatively abandoned their intentions to repair the Disputed Groin thus rendering inoperative the constellation of facts upon which the Petition is based (*id.*). Accordingly, dismissal of the Petition is warranted [*id.*], and the portion of the Marinos’ application which seeks an order pursuant to CPLR § 3212 dismissing the Petition and the Complaint is **GRANTED**. In light of the foregoing, the portion of the Goldens’ cross-motion which seeks an order pursuant to CPLR § 3212 granting summary judgment in their favor on the Second cause of action set forth in the Petition is **DENIED** as moot.

The Court now addresses that branch of the Marinos’ application seeking summary judgment on their Fourth counterclaim which asserts that “[i]n or around October 2020, without any permits or . . . consent . . . , the Goldens modified their pier, floating docks, and mooring poles, and in so doing trespassed upon the . . . [Marino Property] and interfered” with the Marinos’ riparian rights (NYSCEF Doc No. 111 at ¶127).

A party moving for summary judgment bears the initial burden of demonstrating prima facie entitlement to judgment as a matter of law by proffering proof, in admissible form, which

establishes the absence of material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). However, once the proponent of the motion establishes a prima facie showing, the burden shifts to the opposing party to come forth with admissible proof to establish triable issues of fact, the existence of which precludes summary judgment and necessitates a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). “[A] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Chimbo v Bolivar*, 142 AD3d 944, 945 [2d Dept 2016], quoting *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotations marks omitted]). When entertaining a motion for summary judgment, the function of the court “is issue finding, not issue determination” (*Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

In moving herein, the Marinos submit the affidavit of their surveyor, Frank S. Ferrantello, who avers that the “two mooring poles are completely on the Marino Property” (NYSCEF Doc No. 222 at ¶14). In opposing the application and in support of that portion of their cross-motion to dismiss the Fourth counterclaim, the Goldens assert that the mooring poles, which they refer to as “dock pilings”, are not situated on the Marino Property and submit the affidavit of their surveyor, John A. Robinson, who specifically states that “the two dock pilings . . . are outside the metes and bounds description of the Marino Property” (NYSCEF Doc No. 244 at ¶17; NYSCEF Doc No. 261 at p. 7; NYSCEF Doc No. 269 at ¶5). Thus, given the conflicting opinions espoused by the parties’ respective experts, unresolved factual questions remain as to the precise location of the alleged encroachments thereby precluding summary judgment in favor of either the Goldens or the Marinos (*Chimbo v Bolivar*, *supra* at 945). Therefore, the branch of the Marinos’ application

which seeks an order pursuant to CPLR § 3212 granting summary judgment in their favor on their Fourth counterclaim is **DENIED**. Likewise, the portion of the Goldens' cross-motion which seeks an order pursuant to CPLR § 3212 granting summary judgment in their favor and dismissing the Marinos' Fourth counterclaim is also **DENIED**.

The Court now addresses that branch of the Marinos' application seeking to voluntarily discontinue those counterclaims denominated First, Second, Third and Sixth. "The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR 3217(b) rests within the sound discretion of the court" (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 883 [2d Dept 2013]). "In the absence of special circumstances, such as prejudice to a substantial right of . . . [a party], or other improper consequences, a motion for a voluntary discontinuance should be granted" (*Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 837 [2d Dept 2011], quoting *Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961, 961 [2d Dept 2009]).

As set forth in the Verified Answer, the First, Second, Third and Sixth counterclaims are predicated upon the ownership and precise location of the Disputed Groin and the implications thereof regarding the proposed work which the Marinos were planning to undertake. Here, inasmuch as the Marinos have clearly relinquished their plans to proceed with any work whatsoever referable to the Disputed Groin and given the absence of any prejudice to the Goldens, voluntary discontinuance is warranted (*id.*). Therefore, the portion of the Marinos' application which seeks an order pursuant to CPLR § 3217(b) permitting them to voluntarily discontinue, without prejudice, those counterclaims denominated First, Second, Third, and Sixth, is **GRANTED**.

Accordingly, it is hereby,

**ORDERED**, that the branch of the Marinos' application for an order pursuant to CPLR § 3212 dismissing the Petition and Complaint as against the Marinos is **GRANTED** (Sequence #007); and it is further

**ORDERED**, that the branch of the Marinos' application for an order pursuant to CPLR § 3212 granting summary judgment in their favor on the Fourth counterclaim, is **DENIED** (Sequence #007); and it is further

**ORDERED**, that the branch of the Marinos' application for an order pursuant to CPLR § 3217(b) permitting voluntary discontinuance, without prejudice, of those counterclaims denominated First, Second, Third and Sixth is **GRANTED** (Sequence #007); and it is further

**ORDERED**, that the branch of the Goldens' cross-motion for an order pursuant to CPLR § 3212 granting summary judgment in their favor on the Second cause of action set forth in the Petition is **DENIED** as moot (Sequence #008); and it is further

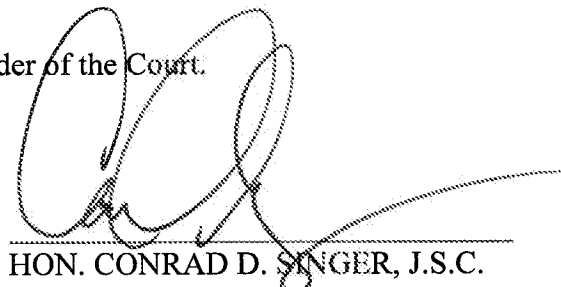
**ORDERED**, that the branch of the Goldens' cross-motion for an order pursuant to CPLR § 3212 granting summary judgment dismissing the Second, Third, and Sixth counterclaims asserted by the Marinos is **DENIED** as moot (Sequence #008); and it is further

**ORDERED**, that the branch of the Goldens' cross-motion for an order pursuant to CPLR § 3212 granting summary judgment dismissing the Fourth counterclaim asserted by the Marinos is **DENIED** (Sequence #008); and it is further,

**ORDERED**, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: November 9, 2023  
Mineola, NY



HON. CONRAD D. SINGER, J.S.C.

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**ENTERED**

**Nov 15 2023**