

Friends of Upper Nyack Waterfront v K. Graefe & Sons Corp.
2024 NY Slip Op 35291(U)
March 13, 2024
Supreme Court, Rockland County
Docket Number: Index No. 034490/2023
Judge: David Fried
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To commence the statutory time period for appeals as of right (CPLR §5513 [a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
FRIENDS OF UPPER NYACK WATERFRONT, an
unincorporated association, by and through its President,

Plaintiff,

-against-

K. GRAEFE AND SONS CORP., d/b/a NORTH
RIVER SHIPYARD, and VAN HOUTEN HOLDING
CORP.,

Defendants.

-----X
HON. DAVID FRIED, A.J.S.C.

DECISION & ORDER

Index No. 034490/2023
Motion Sequence Nos. 1 & 2

The papers filed electronically via NYSCEF numbered 1 through and including 87 were read and considered herein. Upon such reading and consideration, Motion Sequence Nos. 1 & 2 are disposed as follows:

BACKGROUND

This action is brought by Plaintiff Friends of Upper Nyack Waterfront ("Plaintiff"), an alleged unincorporated association of property owners, who allege that Defendants, for private use and profit, illegally installed three unauthorized moorings in the Hudson River ("moorings") without the required permit. Plaintiff brings this action to have the moorings removed, claiming said moorings are causing major harm to its members use and enjoyment of their properties, diminishing property values, impairing the public's view of the Hudson River, and causing a hazard to navigation, particularly for small recreational craft. Plaintiff also seeks a declaration that New York law allows any person to remove the moorings, and damages for the past harm purportedly caused to them.

On September 14, 2023, Plaintiff, via NYSCEF, filed its Summons and Complaint along with Motion Sequence No. 1, pursuant to CPLR §6301, seeking an Order for a preliminary injunction, enjoining Defendants from using the three moorings at issue herein. On October 10, 2023, Defendants brought Motion Sequence No. 2 for an Order, pursuant to CPLR §§3211(a)(1), (2) and (7), seeking dismissal of

Plaintiff's Complaint. The parties oppose each other's respective motions.

PRIVATE RIGHT OF ACTION / IMPLIED PREEMPTION ISSUE

Parties' Contentions

Defendants contend that the Complaint should be dismissed because Plaintiff lacks a private right of action since no private action exists under §10 of the Rivers and Harbors Appropriations Act (33 U.S.C. 403 et seq.) ("Rivers and Harbors Act"). Plaintiff contends that this action is not brought pursuant to the Rivers and Harbors Act, but rather it is brought under the New York declaratory judgment statute, New York Navigation Law §36, and common law nuisance.

In Reply, Defendants argue that Plaintiff's position is contradicted by its own Complaint, because the only basis upon which Plaintiff rests its claim that the moorings are illegal, is its argument that they require, but lack, a "federal permit" from the United States Army Corp of Engineers ("USACE"). Defendants argue further that Plaintiff was citing to the Rivers and Harbors Act, when it alleged at ¶18 of its Complaint, that "...general provisions of New York Navigation Law...require federal permits for mooring buoys..." Defendants contend that the New York Navigation Law does not provide a loophole to the federal bar on private claims for violations of the Rivers and Harbors Act and is preempted by said federal statute.

In a permitted Sur-Reply, Plaintiff further contends as follows: that the USACE has confirmed that Defendants have violated the Rivers and Harbors Act because they do not have a permit for their moorings; that pursuant to New York Navigation Law §36, the moorings are illegal and "[a]ny person finding such anchored object is authorized to remove the same," and that therefore, Plaintiff has no need for a private right of action under the Rivers and Harbors Act because New York Navigation Law's private right of action fills a gap in the federal statute; and that the statutes do not conflict and, therefore, preemption does not apply.

In their permitted Sur-Reply, Defendants contend as follows: that Plaintiff admits in its Complaint that the moorings are in an area subject to federal jurisdiction and "cannot be authorized by the State" (NYSCEF Doc. No. 2, ¶¶18-19); that Plaintiff has never challenged the moorings for lack of any necessary state permit; that Plaintiff's attempt to pursue state law claims constitutes an "impermissible end run" around the federal statute; and that an implied preemption due to an actual conflict applies here, because when enacting the Rivers and Harbors Act, Congress was concerned not with private rights, but with the federal government's ability to respond to obstructions on navigable waterways and, hence, that Plaintiff's interpretation that private citizens can respond to said obstructions interferes with federal enforcement methods.

Analysis of Private Right of Action / Implied Preemption Issue

“On a motion to dismiss pursuant to CPLR §3211(a)(7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference” (*Halliwel v. Gordon*, 61 A.D.3d 932, 933, 878 N.Y.S.2d 137; see, *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 842 N.E.2d 471; *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). The test to be applied is . . . whether the complaint “gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments” (*Moore v. Johnson*, 147 A.D.2d 621, 621, 538 N.Y.S.2d 28 quoting *Pace v. Perk*, 81 A.D.2d 444, 449, 440 N.Y.S.2d 710; see *Conroy v. Cadillac Fairview Shopping Ctr. Props. [Md.]*, 143 A.D.2d 726, 533 N.Y.S.2d 446).” See, *J.P. Morgan Chase v. J.H. of New York, Inc.*, 69 A.D.3d 802, 803, 893 N.Y.S.2d 237(2nd Dept 2010).

Here, Plaintiff did allege, among other things, that the moorings at issue violated both federal and state law. The issue before this Court, relating to the private right of action, which was narrowed by the Defendants, is whether New York Navigation Law §36 is **implicitly** preempted by the federal Rivers and Harbors Act.

New York Navigation Law §36 state as follows:

“No unattended floating object shall be anchored within the navigable waters of the state for any purpose, except as same may be authorized under the United States laws, rules and regulations or by section thirty-five and thirty-five-a of this chapter or by local ordinances as may be duly approved by the commissioner. Any person finding such anchored object is authorized to remove the same.”

The Rivers and Harbors Act states as follows:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United

States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.”

The Court notes that Defendants, who raise the issue of implied preemption, cite to no case directly on point, relative to the aforementioned issue. Notwithstanding, in a similar matter, in *Beveridge v. City of Santa Barbara*, 939 F.2d 859 (1992), said city enacted an ordinance which prohibited mooring or anchoring of vessels in specified area during winter months. Owners of boats moored or anchored within prohibited area sued the city for injunctive relief on grounds that ordinance was preempted. The United States Court of Appeals, Ninth Circuit, held that said ordinance was not preempted since the federal Ports and Waterways Safety Act did not implicitly prohibit said city ordinance, and it was not in actual conflict with any specific federal regulation, and held as follows:

“Appellants argue that the federal scheme of regulation of harbors and navigations, as embodied in the PWSA, is so vast that it should implicitly preempt local ordinances on this subject. They point to the statement of policy and general purposes behind the PWSA, codified at 33 U.S.C. §1221. However, just because Congress has intended to reduce the possibility of cargo and vessel loss, prevent damage to structures on or near navigable waters, ensure that vessels comply with certain standards, and just because it believes that “navigation and vessel safety and protection of the marine environment are matters of major national importance,” *id.*, does not necessarily mean that the city of Santa Barbara is completely trammelled in all regulatory efforts.

Just as Ray refused to find implicit preemption and proceeded to discuss the actual conflicts between Washington’s Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring. We cannot distinguish tanker (Ray) and pollution (Chevron) regulations from mooring restrictions. If both the Supreme Court and this circuit did not find Congress to have intended to preempt all local regulation by the PWSA in those areas, it is difficult to conceive how it could be found here. In fact, tanker and pollution concerns are far less embedded in local tradition and history than are navigation . . . and anchorage issues. The Supreme Court recognized this in *The James Gray v. The John Fraser*, 62 U.S. 184, 187, 16 L.Ed. 106 (1858):

And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there ..., where she may anchor in the harbor, and for what time; ... And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress ...

While federal regulation over the past century has greatly qualified this sweeping statement, there is no reason to believe that Congress

intended to occupy the field in the area of mooring any more than in tankers or marine pollution. It might even be said that localities retain greater autonomy in this area. Cf. *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3rd Cir.1984) (township's prohibition of "floating homes" not preempted by federal vessel licensing regulations).

It is undisputed that the Secretary of Transportation has extensive authority to regulate the anchoring, mooring, and movement of vessels, but this power is discretionary. See 33 U.S.C. §1223. The Secretary may act to affect all of these navigational issues, but he need not. As Ray noted, "Title I, however, merely authorizes and does not require the Secretary to issue regulations." *Id.* at 171, 98 S.Ct. at 1001. Where he has not acted, no preemption has taken place. We have stated that there is congressional intent that "there be joint federal/state regulation of ocean waters within three miles of shore." *Chevron*, 726 F.2d at 489. The activity here certainly occurs within that geographical zone. It should be remembered that "comprehensiveness alone is not enough to demonstrate a federal intent to occupy the entire field." *Id.* at 491. We hold that the federal regulations, though comprehensive, do not in this instance implicitly preempt Santa Barbara's ordinance."

In *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217 (1994), houseboat residents who alleged that the State of Florida was threatening to evict them brought action against state entities, challenging constitutionality of state statutes establishing procedure for state leasing of submerged lands and water columns above them. On defendants' motion to dismiss, the District Court, citing to the aforementioned holding of the United State Court of Appeals in *Beveridge, Id.*, held that state leasing statutes did not encroach upon authority reserved to the federal government by the Submerged Lands Act and were not otherwise preempted by federal action, as follows:

"The Federal Government has not occupied the field of anchorage through pervasive regulation. The argument that it has was rejected by the Ninth Circuit in *Beveridge*. *Id.* In *Beveridge*, the appellants sued to block a city ordinance which prohibited the mooring or anchoring of vessels in a specified area during the winter months. The appellants argued that "the federal scheme of regulation of harbors and navigations ... is so vast that it should implicitly preempt local ordinances on this subject." *Id.* at 863. The circuit court rejected this argument. While the court noted that the United States Secretary of Transportation has extensive authority to regulate the anchoring and mooring of vessels, "[w]here he has not acted, no preemption has taken place." *Id.* at 864. The court held that the Federal regulations in the area of anchorage and mooring, though comprehensive, do not implicitly preempt supplemental State regulation in the same area. *Id.* Noting that the Supreme Court and the Ninth Circuit had previously

upheld State regulation of tankers and pollution, the Beveridge court observed, “[T]here is no reason to believe that Congress intended to occupy the field in the area of mooring any more than in tankers or marine pollution. It might even be said that localities retain greater autonomy in this area.” *Id.* See also *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159 (3rd Cir.1984) (not specifically addressing the SLA but holding that a local prohibition of “floating homes” was not preempted by Federal vessel licensing or water pollution statutes). []”

In 1913, the New York Court of Appeals, in *Phenix Construction Co. v. Cornell Steamboat Co.*, 210 N.Y. 113, 103 N.E. 891, held that the intent of the Rivers and Harbors Act was against the construction of structures of a more, or less, permanent nature and of the description of those particularized, unless authorized as prescribed.

The United States Court of Appeals, Eighth Circuit, in *Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company*, 918 F.3d 967, 973 (2019), held that “[*California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981)] **simply** concluded that Section 10 of the Rivers and Harbors Appropriation Act, which prohibits the creation of any obstruction to navigable waters not authorized by Congress, did not establish a private right of action. See *id.* at 292–97, 101 S.Ct. 1775; and that said holding does not immunize a bridge from its own comparative fault when an allision occurs.” (emphasis added).

In *Rottenberg v. Edwards*, 103 Ad2d 138, 142, 478 NYS2d 675 (1984), the Appellate Division, Second Department, addressed the issue of preemption when it determined that a Zoning Board of Appeals had jurisdiction to determine if groins or other structures could be erected on or at waterfront properties, and held as follows:

“[W]hile permits were required from the Army Corps of Engineers (US Code, tit 33, § 403) and from the New York State Department of Environmental Conservation (ECL 15-0505), both of the permits issued by these agencies required compliance with local legislation. Plainly, there is neither Federal (*Cummings v. Chicago*, 188 US 410, 430; *Matter of Wasson*, 495 F2d 571, 582-583; *Hubbard v. Fort*, 188 F 987 [Federal permit merely a finding that structure would not interfere with or be detrimental to navigation; not equivalent to positive declaration by Congress that permittee could undertake construction absent local approvals]; *Wilson v. Hudson County Water Co.*, 76 NJ Eq 543) nor State (Navigation Law, §2, subd 4; §§ 30, 32; ECL 25-0401, subd 1; *Town of Huntington v. Albicocco*, 66 AD2d 886, 887; *Town of Islip v. Powell*, *supra.*) preemption, and the Zoning Board of Appeals possessed subject matter jurisdiction of the question before it.”

“[T]he party asserting that federal law preempts state law bears the burden of establishing preemption.

See *id.* at 569, 129 S.Ct. 1187; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).” See *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liability Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). At bar, Defendants have not met that burden. Based on the aforementioned holdings and reasoning therein, Defendants have not set forth sufficient evidence to demonstrate that Congress intended to occupy the entire field of obstructions to navigability.

Additionally, by way of Defendants’ President’s Affidavit, Defendants assert that they submitted drawings to the local village government, for its approval, which demonstrated the proposed location of numerous moorings. In the aforesaid Affidavit, Defendants also assert that the USACE advised them that no violation has occurred as the activity is not regulated by the USACE. Moreover, there is no conflict, as the Rivers and Harbors Act addresses the prohibition of obstructions while the New York Navigation Law addresses the removal thereof. As such, both accomplish the purpose of prohibition of unauthorized moorings.

STANDING ISSUE

Parties’ Contentions

Defendants contend the following: that Plaintiff fails to meet the requirements to establish its standing to sue as an association since Plaintiff did not plead, with specificity, that its members own property in vicinity to a project site, as Plaintiff failed to mention the actual address or place of residence of any of its members, including Mr. Budgor (a member of Plaintiff), nor does the Complaint mention any of the other members by name; that Plaintiff failed to allege that regulations will impede their ability to develop the property and will cause injury that is in some way different from that of the public at large, since their “gripe” about the mooring of barges are no different than those that could be shared by any member of the public who access, live, work, frequent or reside near the Hudson River; and that Plaintiff failed to plead that the injury is within the zone of interests protected by the New York Navigation Law. Defendants contend that the purpose of said statute is to protect those using the water and that Plaintiff’s members are only complaining about their view of said waters. As to Plaintiff’s complaint pertaining to children learning to sail, Defendants aver that said children are not members of Plaintiff.

As to standing, Plaintiff contends the following: that it is an organization comprised solely of the owners of property in close proximity to the Hudson River waterfront in Upper Nyack and that all members have properties with views of the Hudson River and its adjoining areas; that the presence of the moorings has caused its member, Mr. Budgor, to postpone a remodeling project; and that Plaintiff’s members are affected more severely than the general public because they own property with spectacular Hudson River views, and that their properties’ values are materially diminished by the presence and use of the moorings by over one million five hundred thousand dollars (\$1,500,000.00); and that their use and enjoyment of their homes is impaired.

In reply to the aforementioned contentions, Defendants contend that Plaintiffs members do not claim that the mooring buoys are offensive or unsightly; but even if they did, it is Defendants' position that nothing within the text or legislative history of Navigation Law §36 suggests that the statute is meant to protect a landowner's vantage point of the Hudson River from "floating objects." Defendants also contend that the only allegation of any "use" of the Hudson River by any of Plaintiff's members is limited to Mr. Budgor's assertion that he owns a jet ski that he uses on the Hudson River and has to "take extra care to avoid the moorings or the barges that are often tied to the moorings" and that same is not the type of unique injury-in-fact that would give rise to standing, as Plaintiff admits that "many others use the [Hudson] River for recreation."

Also in its Reply, for the first time, Defendants raise the following contentions: that the Plaintiff, as an organization, failed to plead facts establishing that the interest of the organization asserted within the lawsuit are germane to its associational purposes; and that Plaintiff's claims for monetary damages stemming from the alleged "monetary devaluation" of its members' homes must be dismissed because Plaintiff, as an association, is not the proper party to seek such relief, as individualized evidence from Plaintiff's members is required.

Analysis of Standing Issue

Standing to sue requires "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v. Nussbaum*, 36 A.D.3d 176, 182, 825 N.Y.S.2d 55; see *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772–773, 570 N.Y.S.2d 778, 573 N.E.2d 1034; *Jacob v. Conway*, 150 A.D.3d 973, 974, 56 N.Y.S.3d 138). Generally, "a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law (*Caprer v. Nussbaum*, 36 A.D.3d at 183, 825 N.Y.S.2d 55). To demonstrate an 'injury in fact,' a plaintiff must 'establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural' (*Id.*; see *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 778 N.Y.S.2d 123, 810 N.E.2d 405)." See *American Massage Therapy Association v. Town of Greenburgh*, 173 A.D.3d 1009, 1010, 102 N.Y.S.3d 673 (2nd Dept 2019).

"An association or organization has standing when 'one or more of its members would have standing to sue,' 'the interests it asserts are germane to its purposes,' and 'neither the asserted claim nor the appropriate relief requires the participation of the individual members' (*Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 775, 570 N.Y.S.2d 778, 573 N.E.2d 1034; see *Matter of Dental Socy. of State of N.Y. v. Carey*, 61 N.Y.2d 330, 333–334, 474 N.Y.S.2d 262, 462 N.E.2d 362)." See, *Schlemme v. Planning Board of City of Poughkeepsie*, 118 A.D.3d 893, 894–895, 988 N.Y.S.2d 640 (2nd Dept. 2014).

As more fully set forth above, the Court must afford the pleadings a liberal construction, accept the allegations of the Complaint as true, and provide the Plaintiff the benefit of every possible favorable inference. Here the Plaintiff has alleged the following: that the moorings at issue are without a permit;

that Plaintiff's members all own property that overlooks the waterfront and Hudson River in Upper Nyack; that its members are affected more severely than the general public because they own property with unique Hudson River views that they cannot fully enjoy as a result of the moorings and that their property values are materially diminished by the presence and use of the moorings by more than \$1,500,000.00; that one of its members is refraining from carrying out a remodeling project for which he has zoning variances because of the presence and use of the moorings; and that the moorings have made navigation from the waterfront of Plaintiff's members' properties more hazardous. Accordingly, Plaintiff association members have standing to sue, as their allegations, which are different than the general public's, include that their waterfront properties are adjacent to the Hudson River where the moorings are situated, they have suffered harm to the value of their properties, as well as visual harm, and that the moorings have made navigation from their waterfront properties hazardous.

As to Defendants' argument that Plaintiff does not have a valid claim for public nuisance, Plaintiff has failed to oppose same. Also, the general remedy for a public nuisance is an action by the government (see, *Copart Industries, Inc. v. Consolidated Edison Company of New York*, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 [1977]; and *Anderson v. City of Rochester*, 91 A.D.2d 851, 458 N.Y.S.2d 404[4th Dept 1982]). As such, Plaintiff's Second Cause of Action – for public nuisance – is dismissed.

RIPENESS ISSUE

Defendants contend that Plaintiff's claims are unripe because, while Plaintiff alleges that the moorings are unauthorized – since the USACE has not issued Defendants a permit for said moorings – Defendants purportedly applied for a permit approximately one month prior to Plaintiff filing the within action.

Plaintiff contends that there are multiple problems with the purported application, including but not limited to, that said purported application references a location other than what is at issue, it is not signed, and the box for the mooring permit is not checked off. Accordingly, the documentary evidence submitted by Defendants does not conclusively establishes a defense to the asserted claims as a matter of law (See, *Fontanetta v. John Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2nd Dept 2010]; and CPLR §3211[a][1]). Moreover and noteworthy, Defendants, who submitted a Reply and who were granted the opportunity for a Sur-Reply, stayed silent to said issues raised by Plaintiff relating to the purported application.

TIMELINESS ISSUE

Defendants contend that since Plaintiff's claims are based on the purportedly illegal and unpermitted installation of the moorings in the Hudson River in 2016, and that the statute of limitation for nuisance claims is three years, and the statute of limitations for declaratory judgment claim is six years, that said claims are time-barred.

Plaintiff contends that it is claiming a continuing harm resulting from the use of the moorings and that the maintenance of the moorings is an ongoing illegal act. Plaintiff also contends that a timeline of google earth images shows that the third mooring was actually installed in 2019 or 2020, thereby committing recent illegal acts renewing the statute of limitation for all claims.

As to the 2016 date, Plaintiff prefaced the allegation in the Complaint with the term, “upon information and belief,” while citing to a communication between an agent for the Defendants and the USACE. Plaintiff has also alleged in the Complaint that Defendants have made many alterations to the shipyard at issue herein. Affording the Complaint a liberal construction, accepting the allegations of the Complaint as true, and providing the Plaintiff the benefit of every possible favorable inference – all as required here, now – the allegations in the Complaint are not limited to 2016. Moreover, by way of their President’s Reply Affidavit, Defendants admit to detaching the mooring balls from anchors and then re-attaching them in 2023.

PRELIMINARY INJUNCTION ISSUE

“To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (see *306 Rutledge, LLC v. City of New York*, 90 A.D.3d 1026, 1028, 935 N.Y.S.2d 619). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual (see *Board of Mgrs. of the Britton Condominium v. C.H.P.Y. Realty Assoc.*, 101 A.D.3d 917, 918, 956 N.Y.S.2d 150; *Dixon v. Malouf*, 61 A.D.3d 630, 875 N.Y.S.2d 918). A movant must satisfy each requirement with “clear and convincing evidence” (*Apa Sec., Inc. v. Apa*, 37 A.D.3d 502, 503, 831 N.Y.S.2d 201). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone-Makinano v. Britton Prop., Inc.*, 83 A.D.3d 623, 625, 920 N.Y.S.2d 362; see *Blinds & Carpet Gallery, Inc. v. E.E.M. Realty, Inc.*, 82 A.D.3d 691, 692, 917 N.Y.S.2d 680; *Rowland v. Dushin*, 82 A.D.3d 738, 739, 917 N.Y.S.2d 702).” See, *County of Suffolk v. Givens*, 106 A.D.3d 943, 944, 967 N.Y.S.2d 387 (2nd Dept 2013).

Moreover, “[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (see *Moody v. Filipowski*, 146 A.D.2d 675, 678, 537 N.Y.S.2d 185; *Matter of 35 New York City Police Officers v. City of New York*, 34 A.D.3d 392, 393–394, 826 N.Y.S.2d 22) See, *Wheaton/TMW Fourth Avenue, LP v. New York City Department of Buildings*, 65 A.D.3d 1051, 1052, 886 N.Y.S.2d 41 (2nd Dept 2009).

In support of its Motion for a preliminary injunction, Plaintiff concedes that the Defendants have been parking barges for years. Additionally, issues exist: including whether permit(s) are necessary for the mooring(s) and whether a valid application is pending for same. As such, in the Court’s discretion, Plaintiff has not satisfied the requirements for a preliminary injunction.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's Motion (Motion Sequence No. 1) seeking a preliminary injunction is DENIED; and it is further

ORDERED, that Defendants' Motion (Motion Sequence No. 2) seeking dismissal of Plaintiff's Complaint is DENIED, except that Plaintiff's Second Cause of Action (Public Nuisance) is DISMISSED; and it is further

ORDERED, that Defendants shall Answer the Complaint, by NYSCEF filing and service, not later than April 19, 2024. Further pleadings, if any, shall be timely filed and served pursuant to the CPLR; and it is further

ORDERED, that appearances are required on May 9, 2024 at 9:15AM for purposes of a Preliminary Conference.

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
March 13, 2024

ENTER:

A handwritten signature in dark ink, appearing to read 'David Fried', with a long horizontal flourish extending to the right.

HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK
COUNTY OF ROCKLAND