SHORT FORM ORDER

INDEX NO. 05-00262

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 36 - SUFFOLK COUNTY

PRESENT:

Hon. PAUL J. BAISLEY, JR.
Justice of the Supreme Court

MOTION DATE 2-10-05
ADJ. DATE 2-24-05
Mot. Seq. # 001 - Continued
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - XMD
Mot. Seq. # 004 - MG

In the Matter of the Application of PECONIC BAYKEEPER, INC., KEVIN McALLISTER, and ALFRED CHIOFOLO, Petitioners, For a Judgment pursuant to Article 78 of the Civil Practice Laws and Rules – against – SUFFOLK COUNTY, SUFFOLK COUNTY LEGISLATURE, SUFFOLK COUNTY COUNCIL ON ENVIRONMENTAL QUALITY, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, DOMINICK NINIVAGGI, Superintendent of the Suffolk County Division of Vector Control, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ERIN CROTTY, Commissioner of the New York State Department of Environmental Conservation, Respondents.	PACE ENVIRONMENTAL LITIGATION CLINIC Attorneys for Petitioner 78 North Broadway White Plains, NY 10603 CHRISTINE MALAFI, ESQ. Suffolk County Attorney Attorney for County Respondents 100 Veterans Memorial Highway Hauppauge, NY 11788 ELIOT SPITZER, ESQ. Attorney General of the State of New York Attorney for Respondent DEC 120 Broadway, 26th Floor New York, NY 10271-0332

Upon the following papers numbered 1 to 99 read on this motion for preliminary injunctive relief; motion for dismissal ; Notice of Petition and Petition 1 - 45 ; Notice of Motion/ Order to Show Cause and supporting papers 46 - 55; 87 - 90 ; Notice of Cross Motion and supporting papers 68 - 81 ; Answering Affidavits and supporting papers 56 - 64; 82 - 84; 91 - 97 ; Replying Affidavits and supporting papers 65 - 67; 85 - 86; 98 - 99 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#002) by the petitioners for preliminary injunctive relief, the cross-motion (#003) by the County respondents for imposition of monetary sanctions, and the motion (#004) by the respondent New York State Department of Environmental Conservation for an order dismissing the cause of action against it are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the petitioners for an order (1) preliminarily enjoining the Suffolk County respondents from performing any ditching activities in the tidal wetlands of the Peconic and South Shore Estuaries and from spraying pesticides for mosquito control in Suffolk County, and (2) preliminarily enjoining the respondent Department of Environmental Conservation from issuing a tidal wetlands permit for ditching activities is denied; and it is further

ORDERED that the cross-motion by the County respondents for an order imposing sanctions against petitioners and petitioners' counsel is denied; and it is further

ORDERED that the motion by the respondents Department of Environmental Conservation and Erin Crotty for an order dismissing the claim against them is granted; and it is further

ORDERED that the return date for this hybrid action and Article 78 proceeding is adjourned to May 19, 2005.

This hybrid Article 78 proceeding and action for declaratory and injunctive relief was brought by the petitioners Peconic Baykeeper, Inc., Kevin McAllister, and Alfred Chiofolo to nullify the negative declaration issued by the respondent Suffolk County Legislature for this year's annual mosquito management project, known as the 2005 Plan of Work, proposed by the respondent Department of Public Works' Division of Vector Control. Alleging that the County's environmental review process and issuance of a negative declaration for the 2005 Plan violated the procedural and substantive mandates of the State Environmental Quality Review Act (SEQRA), the petitioners also seek a judgment declaring that a positive declaration should be issued for the project and that any general permit issued by the respondent New York State Department of Environmental Conservation (DEC) for ditching in Suffolk County tidal wetlands is null and void. In addition, the petitioners request an order directing the preparation of a full environmental impact statement for the 2005 Plan of Work and enjoining the Division of Public Works from commencing any work under such plan.

The petitioners now seek a preliminary injunction enjoining the County respondents from ditching 400,000 linear feet of mosquito control ditches in the Peconic and South Shore Estuaries, and from spraying pesticides for mosquito control purposes, until a complete SEQRA review of the 2005 Plan has been conducted by respondents. They further seek an order preliminarily enjoining the DEC from issuing any tidal wetlands permits to Suffolk County for

mosquito ditching activities. The County respondents oppose the motion, arguing that the petitioners have no likelihood of succeeding on the merits, and cross-move for an order imposing monetary sanctions against the petitioners and the petitioners' counsel. Further, the respondents DEC and its former Commissioner, Erin Crotty, move for an order pursuant to CPLR 3211 (a)(7) dismissing the cause of action against them on the ground that no justiciable controversy exists between the petitioners and the DEC. The petitioners oppose this motion, arguing, among other things, that dismissal of their claim against the DEC may foreclose them from seeking judicial review of any tidal wetlands permits subsequently issued to Suffolk County for the 2005 Plan.

The petitioners' motion for preliminary injunctive relief is denied. A preliminary injunction is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (***Blueberries Gourmet v Aris Realty Corp.***, 255 AD2d 348, 349-350, 680 NYS2d 557 [2d Dept 1998]; *see*, ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2003]; ***William M. Blake Agency v Leon***, 283 AD2d 423, 723 NYS2d 871 [2d Dept 2001]). To prevail on a motion for a preliminary injunction, a movant must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in favor of the movant (CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]; ***Reuschenberg v Town of Huntington***, __ AD3d __, 791 NYS2d 652 [2d Dept 2005]; ***First Franklin Sq. Assocs. v Franklin Sq. Prop. Account***, 15 AD3d 529, 790 NYS2d 527 [2d Dept 2005]). The decision to grant or deny a preliminary injunction is a matter ordinarily committed to the sound discretion of the court determining the motion (*see*, ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]; ***First Franklin Sq. Assocs. v Franklin Sq. Prop. Account***, *supra*; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]).

The conclusory, unsubstantiated allegations made in the affidavits submitted in support of the petitioners' motion are insufficient to establish that the petitioners will suffer irreparable harm if the County respondents are not preliminarily enjoined from performing ditching activities and spraying pesticides as provided in the Division of Vector Control's 2005 Plan of Work (*see*, ***Neos v Lacey***, 291 AD2d 434, 737 NYS2d 394 [2d Dept 2002]; ***J.S. Anand Corp. v Aviel Enters.***, 148 AD2d 496, 538 NYS2d 840 [2d Dept 1989]; ***Kaufman v International Bus. Machs.***, 97 AD2d 925, 470 NYS2d 720 [3d Dept 1983], *affd* 61 NY2d 930, 474 NYS2d 721 [1984]). Further, the affidavits submitted on the motion show that issues of fact exist as to whether the County respondents complied with the SEQRA review process, particularly whether the Legislature took the requisite "hard look" at the impact of the project, before it issued the negative declaration for the 2005 Plan. The petitioners, therefore, failed to sufficiently demonstrate that they are likely to succeed on their claim that the County Legislature's determination that the proposed 2005 Plan of Work would not have a significant impact on the environment was arbitrary, capricious and an abuse of discretion (*see*, ***Neos v Lacey***, *supra*; ***Rosa Hair Stylists v Jaber Food Corp.***, 218 AD2d 793, 631 NYS2d 167 [2d Dept 1995]; ***Schneider Leasing Plus v Stallone***, 172 AD2d 739, 569 NYS2d 126 [2d Dept 1991]).

The DEC's motion to dismiss the cause of action against it on the ground that there is no justiciable controversy between petitioners and the DEC is granted. On a motion to dismiss a

cause of action pursuant to CPLR 3211, a court must accept the facts alleged in the complaint as true and determine only whether the facts as alleged fit into a cognizable legal theory (*see*, ***511 W. 232nd Owners Corp. v Jennifer Realty Co.***, 98 NY2d 144, 746 NYS2d 131 [2002]; ***Sokoloff v Harriman Estates Dev. Corp.***, 96 NY2d 409, 729 NYS2d 425 [2001]; ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions and factual allegations that are inherently incredible or flatly contradicted by evidence in the record, however, are not entitled to such consideration (*see*, ***Mohan v Hollander***, 303 AD2d 473, 756 NYS2d 615 [2d Dept 2003]; ***Mayer v Sanders***, 264 AD2d 827, 695 NYS2d 593 [2d Dept 1999]). When determining a motion made under CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see*, ***State of New York v Grecco***, 13 AD3d 350, 786 NYS2d 197 [2d Dept 2004]).

To maintain an action for a declaratory judgment, a party must demonstrate a concrete, actual controversy for adjudication (*see*, CPLR 3001; ***Cuomo v Long Is. Lighting Co.***, 71 NY2d 349, 525 NYS2d 828 [1988]; ***Matter of United Water New Rochelle v City of New York***, 275 AD2d 464, 712 NYS2d 637 [2d Dept 2000]; ***Fragoso v Romano***, 268 AD2d 457, 702 NYS2d 333 [2d Dept 2000]). The only question raised on a motion to dismiss a declaratory judgment action is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment (***Hallock v State of New York***, 32 NY2d 599, 603, 347 NYS2d 60 [1973]; *see*, ***Nasa Auto Supplies v 319 Main St. Corp.***, 133 AD2d 265, 519 NYS2d 54 [2d Dept 1987]). The test applied on a motion seeking dismissal of a declaratory judgment action for failure to state a claim, then, is not whether a party will succeed in getting a declaration of rights in accordance with a theory or contention advanced, but whether the plaintiff is entitled to a declaration of rights at all (*see*, ***Metropolitan Package Store Assn. v Koch***, 89 AD2d 317, 457 NYS2d 481 [3d Dept 1982], *appeal dismissed* 58 NY2d 1112, 462 NYS2d 1030, *appeal dismissed* 464 US 802, 104 S Ct 47, *reh denied* 464 US 1003, 104 S Ct 513 [1983]). If the allegations in the complaint demonstrate the existence of a bona fide controversy affecting the parties' rights, a cause of action for a declaratory judgment is stated (*see*, ***Matter of Schulz v New York State Legislature***, 230 AD2d 578, 660 NYS2d 155 [3d Dept 1997], *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000]; ***Sysco Corp. v Town of Hempstead***, 133 AD2d 751, 520 NYS2d 40 [2d Dept 1987]; *cf.*, ***Nasa Auto Supplies v 319 Main St. Corp.***, *supra*). However, courts may not issue judicial decisions that "can have no immediate effect and may never resolve anything" (***New York Pub. Interest Research Group v Carey***, 42 NY2d 527, 531, 399 NYS2d 621 [1977]; *see*, ***Matter of United Water New Rochelle v City of New York***, *supra*).

Here, the petitioners' request for declaratory relief against the DEC is premised on the occurrence of a future event, namely the granting of a tidal wetlands permit for mosquito ditching activities in Suffolk County's tidal wetlands, which may or may not occur. Thus, contrary to the conclusory assertions by the petitioners' counsel, the claim against the DEC

involves a hypothetical issue, the determination of which would not presently affect the rights of the parties (*see*, ***Cuomo v Long Is. Lighting Co.***, *supra*; ***Village of Mount Kisco Police Benevolent Assn. v Village of Mount Kisco***, 280 AD2d 469, 720 NYS2d 374 [2d Dept 2001]; ***Matter of United Water New Rochelle v City of New York***, *supra*; ***Bachety v Kinsella***, 146 AD2d 725, 537 NYS2d 209 [2d Dept 1989]; *see generally*, ***Matter of New York State Inspection, Sec. & Law Enforcement Employees v Cuomo***, 64 NY2d 233, 485 NYS2d 719 [1984]). The declaratory judgment action against the DEC, therefore, is dismissed as premature (*see*, ***Cuomo v Long Is. Lighting Co.***, *supra*; ***Federation of Mental Health Ctrs. v De Buono***, 275 AD2d 557, 712 NYS2d 667 [3d Dept 2000]; ***Employers' Fire Ins. Co. v Klemons***, 229 AD2d 513, 645 NYS2d 849 [2d Dept 1996]; ***Bachety v Kinsella***, *supra*).

Finally, the cross-motion by the County respondents for an order imposing monetary sanctions against the petitioners and the petitioners' counsel for bringing a frivolous lawsuit is denied. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR §130-1.1). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR §130-1.1[c]). When determining whether conduct is frivolous and, therefore, sanctionable, a court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent (22 NYCRR §130-1.1[c]). Here, the County respondents failed to establish that the instant proceeding is completely without merit or that it was instituted to harass the County (*see*, ***Broich v Nabisco, Inc.***, 2 AD3d 474, 768 NYS2d 489 [2d Dept 2003]; ***Retina Assocs. of Long Is. v Rosberger***, 299 AD2d 533, 751 NYS2d 50 [2d Dept 2002], *appeal dismissed, lv denied* 99 NY2d 624, 760 NYS2d 89 [2003]; *cf.*, ***Ferraro v Gordon***, 1 AD3d 595, 768 NYS2d 483 [2d Dept 2003]; ***Hirschfeld v Friedman***, 307 AD2d 856, 763 NYS2d 580 [1st Dept 2003]; ***Curcio v J.P. Hogan Coring & Sawing Corp.***, 303 AD2d 357, 756 NYS2d 269 [2d Dept 2003]; ***Matter of Gordon v Marrone***, 202 AD2d 104, 616 NYS2d 98 [2d Dept 1994]).

Dated: May 2, 2005

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**