Seaview at Amagansett, Ltd. v Trustees of the Freeholders
2015 NY Slip Op 31017(U)
June 2, 2015
Supreme Court, Suffolk County
Docket Number: 09-34714
Judge: Jerry Garguilo

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-34714
CAL No. 13-01367OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-19-14
ADJ. DATE
Mot. Seq. # 006 - MG

THE SEAVIEW AT AMAGANSETT, LTD., DUNES AT NAPEAGUE PROPERTY OWNERS ASSOCIATION, INC., THE TIDES HOMEOWNERS ASSOCIATION, INC., WHALERS LANE HOMEOWNERS ASSOCIATION, INC., THE OCEAN ESTATES PROPERTY OWNERS ASSOCIATION, INC., ROBERT HIGGINS, MARC HELIE, ROBERT CRISTOFARO and ROBERT COOPERMAN,

Plaintiffs,

- against -

TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF EAST HAMPTON AND THE TOWN OF EAST HAMPTON,

- and -

JAY H. BAKER, PATTY C. BAKER, DAVID STUART TYSON, STEPHANIE BITTERMAN, JUNE MERTON, NAPEAGUE ASSOCIATES, DAVID ROSS, GRACE ROSS, IRVING C. MARCUS and HARRIET MARCUS,

Defendants.

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RR

Upon the following papers numbered 1 to 35 read on this motion for leave to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 30 - 31; 32 - 33 ; Replying Affidavits and supporting papers 34 - 35 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (006) by plaintiff for an order granting leave to reargue those portions of defendants' motions (004, 005) for summary judgment, which were granted dismissing portions of the first and third causes of action of the complaint by order of this Court dated September 3, 2014, is considered under CPLR 2221 and is granted. Upon granting leave to reargue, the Court vacates its prior order and substitutes this order in its stead.

Plaintiffs commenced this action on September 2, 2009 to quiet title pursuant to RPAPL article 15, for permanent injunctions, and for a declaratory judgment concerning disputed beachfront land[1]. The property consisting of approximately 4000 feet of the Atlantic Ocean beachfront in Amagansett ("the subject beach area"), runs easterly from Napeague Lane to the westerly border of Napeague State Park and runs southerly to the mean high water line or mark of the Atlantic Ocean in the Town of East Hampton. Plaintiffs claim ownership interest in the subject property based on a deed dated March 15, 1882 ("Benson Deed") from the Trustees of the Freeholders and Commonalty of the Town of East Hampton ("Trustees") to Arthur W. Benson conveying full fee title to approximately 1,000 acres which included the subject property. Said deed contained the following language:

> And also except and reserved to the inhabitants of the Town of East Hampton the right to land fish boats and netts [sic] to spread the netts [sic] on the adjacent sands and care for the fish and material as has been customary heretofore on the South Shore of the Town lying Westerly of these conveyed premises.

Defendant Town of East Hampton ("Town") enacted Local Law No. 21 on September 24, 1991 which was codified as Chapter 91 of the Town Code to regulate beach areas within the boundaries of the Town. Based on the definitions contained therein, the subject property is a Trustee beach, owned and managed by the Trustees (*see* Town Code § 91-3). Chapter 91 authorizes the Town to issue beach vehicle permits to Town residents free of charge and to non-residents for a fee of $275 (non-resident permits expire yearly on December 31), allowing the operation of vehicles on ocean beaches, including the subject property (*see* Town Code §§ 91-2, 91-5). It also contains regulations for vehicular beach use (*see* Town Code § 91-5). Notably, beach vehicles are required to maintain a distance of no less than 50 feet seaward of the beach grass line, if possible, and are prohibited from operating over or upon any dune, bluff or vegetation (*see* Town Code § 91-5 [C], [1], [2]).

Plaintiffs claim that prior to the enactment of Chapter 91 of the Town Code, net fisherman used the subject beach area and that it was not accessed by vehicles and used by the public for recreational purposes in its current nature and intensity. They also claim that defendants Trustees and Town grant to beach vehicle permit holders rights to use the subject property to park and drive their vehicles and to congregate thereon during "summer season" daytime hours resulting often in more than 200 vehicles being parked at any one

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[1] This action was joined for trial with a related action entitled ***White Sands Motel Holding Corp. v Trustees of the Freeholders and Commonalty of the Town of East Hampton and the Town of East Hampton*** with Index number 34713-2009 by order of this Court (Tanenbaum, J.) dated December 7, 2011.

time by members of the public who then erect tents, picnic, cook food, let their dogs run free, and bathe in the ocean waters without any lifeguards. They argue that the vehicular use of the beach area is dangerous as the vehicles often speed, placing plaintiffs and other pedestrians in danger; the vehicles are often driven or parked on the beach grass in environmentally sensitive areas within and adjacent to the beach area thereby destabilizing the sand dunes that provide protection to plaintiffs' property against upland flooding; and members of the public frequently light bonfires and set off fireworks creating the risk of, or resulting in, beach grass fires that endanger the upland property and houses including those owned by plaintiffs. Plaintiffs also argue that such use constitutes a nuisance in the form of loud truck and car motor noise and trash and debris from members of the public and their animals polluting the beach, dunes, water and air, thereby substantially and unreasonably interfering with plaintiffs' quiet enjoyment of their homes and beaches. They further argue that defendants, through their Town Code provisions and "Beach Driving Ordinances," have created a defacto parking lot and bathing beach on the subject property and are allowing activities unauthorized by the Benson deed.

Plaintiffs allege that vehicles access said beach area through a natural gap in the dune of less than ten feet in width located at the eastern end of Marine Boulevard. According to plaintiffs, on certain summer weekends, said access point has 600 or more entries and exits by vehicles. Plaintiffs also allege that the right to use said access point was granted to the Trustees by the predecessor in title to plaintiff Dunes at Napeague Property Owners Association, Inc. by a document entitled "Dune Associates Declaration of Covenants and Restrictions" ("Covenants and Restrictions") dated June 26, 1981 and filed in the Suffolk County Clerk's Office on June 30, 1981, and by a document dated in 1996 between additional defendants Irving C. Marcus and Harriet Marcus ("Marcus") and the Trustees. The Covenants and Restrictions limited the use of the access point to the use in existence in 1981 and prohibited lot owners like the Marcuses from using lots on the map of Dunes at Napeague to access adjoining property. Plaintiffs argue that the current use of the access point by public vehicles for recreational use of the beach is different from, and substantially greater and denser (particularly during piping plover season), than the use by net fishermen in 1981.

By their first cause of action, plaintiffs The Seaview at Amagansett, Ltd. ("The Seaview"), Dunes at Napeague Property Owners Association, Inc. ("Dunes"), The Tides Homeowners Association, Inc. ("The Tides"), Whalers Lane Homeowners Association, Inc. ("Whalers Lane"), and The Ocean Estates Property Owners Association, Inc. ("Ocean Estates") seek a determination that they are the lawful owners of a portion of the subject beach area and are vested with absolute and unencumbered title in fee to said property subject to an easement for the benefit of plaintiff Robert Higgins and non-party Judith Higgins. The second cause of action alleges that the reservation in the Benson deed does not inure to the benefit of current Town inhabitants, has been terminated or is terminable by the fee owner, and the Trustees and Town have no right or authority pursuant to said reservation to issue beach vehicle permits or to grant anyone permission to use the subject property to drive and park their vehicles. The third cause of action sounds in trespass and plaintiffs seek a permanent injunction against the Trustees and Town enjoining them and any persons acting under them, or pursuant to their authority, from entering into or interfering with plaintiffs' property.

By their fourth, fifth and sixth causes of action, plaintiffs seek a determination of the parties' rights and obligations with respect to the access point to the beach area and a permanent injunction against the Trustees and Town from using the access point in a manner inconsistent with the Marcus documents. The eighth and ninth causes of action allege that the Trustees and Town have created a private and public nuisance and plaintiffs seek a permanent injunction against the Trustees and Town to abate the nuisances and to restrain them from issuing beach vehicle permits. By their tenth and eleventh causes of action,

plaintiffs seek a declaration that Chapter 91of the Town Code violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution by discriminating against plaintiffs in favor of beachfront owners in other areas of the Town and vehicular beach users and bears no rational relationship to any legitimate interest of the Trustees and the Town. The twelfth cause of action alleges that the Trustees have breached their fiduciary duty to plaintiffs.

Defendant Trustees now move (004), and defendant Town now moves (005), for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. They seek summary judgment based on, among other things, the defenses of laches and lack of ownership of the disputed beach area. They assert that the action seeks to disrupt 131 years of settled public use of the beach. They agree for the purposes of their motions that plaintiffs derive title through mesne conveyances from the Benson Deed. Defendants Trustees and Town also assert that said title was never full fee title but was limited by an exception for public use of the beach, that the Trustees' rights to sell lands in East Hampton, including the subject property, derive from the Dongan Patent, and that the Trustees hold the fee of the land and certain beaches granted by the Dongan Patent in public trust for use by the Town's inhabitants. They argue that each of the filed subdivision maps/plats from the 1960's onward contain inscriptions in which plaintiff's predecessors in title, the subdividers, expressly disclaimed any title to the beach presumably in return for approval of the subdivisions by the municipality, that said inscriptions constituted public acknowledgment of said disclaimer and acceptance of public use of the beach, and that plaintiffs cannot rely solely on the contents of the deeds recorded after the filing of the subdivision maps/plats to demonstrate ownership of the beach. Their submissions in support of their motion include deposition transcripts of the individual plaintiffs and officers of plaintiff homeowners or property owners associations, subdivision plats/maps of plaintiff homeowners or property owners associations, and deeds of the individual plaintiffs.

Plaintiffs contend that the subject property was lawfully conveyed by the Trustees to Arthur Benson in 1882 solely with a reservation in the deed for the extremely limited purpose of landing fishing boats and caring for the catch; and that the "public trust doctrine" is inapplicable inasmuch as the subject property is not located underwater and is not designated parkland or recreational property. They argue that defendants cannot rely on inscriptions contained in the subdivision maps, and that defendants offer no title expert testimony, title abstracts or other title instruments demonstrating that the subject beach area is not owned by plaintiffs. Plaintiffs assert that their submitted chains of title and certified deeds clearly establish that they are the owners in fee of the subject property and that the notations on some of the subdivision maps and language in certain deeds referred to by the Trustees and Town are not relevant. Plaintiffs' submissions include the affidavit of their real property title expert, Lance R. Pomerantz, Esq., who provided chains of title to the subject property from the Benson Deed onward, and chains of title containing certified copies of the deeds in said chains of title.

By his affidavit, Mr. Pomerantz avers that he has been actively engaged in land title examination since 1979 and has been examining land titles in Suffolk County, New York since 1986. He states that in 2005 and 2006 he personally searched the chains of title by identifying deeds and other title documents for all parcels forming the subject property starting with the Benson Deed while searching the records of the Suffolk County Clerk's Office and the Suffolk County Surrogate's Court. He informs that the Benson Deed is the source of title for all of the parcels comprising the subject property and that he provided plaintiffs' counsel with the prepared chains of title and deeds and related documents identified by him.

Initially, the Court notes that the introduction of the Journal of the Trustees for the years 1870 to 1897 submitted herein indicates that "Arthur W. Benson bought all of the common land on Napeague below the highlands between a strip of land left for a road eight rods wide starting at the foot of highland on the Montauk road and running to the Ocean at right angle with Montauk road and Montauk for $1,375."

Plaintiff Robert Cristofaro testified at his deposition that he is treasurer of Dunes and is the owner of Lot 14 on the map of Dunes at Napeague. Plaintiff Robert Cooperman testified at his deposition that he is an officer of The Tides and that he owns a lot depicted on the subdivision map of Mitchell Dunes. At his deposition, plaintiff Marc Helie testified that he is an officer of Whalers Lane, that he owns a lot on the map of Whaler's Cove, and that additional defendant David Stuart Tyson is his adjacent neighbor. Plaintiff Robert Higgins testified at his deposition that he owns 32 Marine Boulevard, which is immediately west of The Seaview subdivision but is not located within a subdivision, and that he does not claim any ownership interest in the beach area seaward of the dune on the Atlantic Ocean other than an easement of five feet for walking to the water.

The subdivision map of Seaview at Amagansett approved by the Town in 1967 indicates the southern boundaries of the lots closest to the Atlantic Ocean to be the "Foot of Beach Banks." The subdivision map of Dunes at Napeague approved by the Town in 1981 indicates that the southern map limit line follows the "Edge of Beach Grass" and that "The Developer does not purport to hold or to convey title to lands south of map limit line." The subdivision map of Mitchell Dunes (The Tides) approved by the Town in 1982 indicates the southern boundary to be beach grass. The subdivision map of Whaler's Cove at East Hampton approved by the Town in 1985 indicates the southernmost boundary to be north of the "Approx Line of Beach Grass" and that "The Developer does not purport to hold or to convey title to lands south of Beach Grass Line." The subdivision map of Ocean Estates approved by the Town in 1981 indicates the southernmost map limit line to be slightly north of the "Line of Beach Grass" with the qualification that "The Developer does not purport to hold or to convey title to lands south of the map limit line."

However, the deeds in the chains of title of plaintiffs The Seaview, Dunes, The Tides, Whaler's Lane, and Ocean Estates expressly indicate that their properties extend south to the mean high water mark or line of the Atlantic Ocean. The Court notes that the deeds of additional defendants David Stuart Tyson, Stephanie Bitterman and June Merton also clearly show that their properties extend south to the mean high water mark or line of the Atlantic Ocean.

"[A] purchaser takes with notice from the record only of incumbrances in his direct chain of title. In the absence of actual notice before or at the time of his purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to himself or his direct predecessors in title" (***Buffalo Academy of Sacred Heart v Boehm Bros.***, 267 NY 242, 250, 196 NE 42 [1935]; *see* ***Butler v Mathisson***, 114 AD3d 894, 895, 981 NYS2d 441 [2d Dept 2014], *lv denied* 23 NY3d 904, 990 NYS2d 162 [2014]). "A purchaser is not normally required to search outside the chain of title" (***Matter of Ioannou v Southold Town Planning Bd.***, 304 AD2d 578, 578, 758 NYS2d 358 [2d Dept 2003], *citing* ***Buffalo Academy of Sacred Heart v Boehm Bros.***, 267 NY 242, 196 NE 42 [1935]; *see* ***Butler v Mathisson***, *supra*). Deed restrictions are strictly construed against those seeking to enforce them and will be enforced only where their existence has been established by clear and convincing proof (*see* ***Matter of Ioannou v Southold Town Planning Bd.***, *supra*, *citing* ***Witter v Taggart***, 78 NY2d 234, 237-238, 573 NYS2d 146 [1991]; *see* ***Butler v Mathisson***, *supra*). A deed description is adequate so long as it allows the property to be located, even if an actual survey is required in order to do so (***Pope v Levy***, 54 AppDiv

495, 66 NYS 1028 [1st Dept 1900]; *see* ***Town of Brookhaven v Dinos***, 76 AD2d 555, 561, 431 NYS2d 567 [2d Dept 1980], *affd* 54 NY2d 911, 445 NYS2d 151 [1981]).

In determining the boundaries of described property, various descriptive elements such as monuments, courses and distances, adjacent lands, and area or quantity may be relied upon (1 Rasch, Real Property Law & Practice, s 1153; *see* ***Town of Brookhaven v Dinos***, 76 AD2d at 562). Property may also be described by reference to a map or plat on file in the register's office (***Johnson v Grenell***, 188 NY 407, 81 NE 161 [1907]; *see* ***Town of Brookhaven v Dinos***, 76 AD2d at 562; ***Fries v Clearview Gardens Sixth Corp.***, 285 App Div 568, 139 NYS2d 573 [2d Dept 1955]). When such resort is made, the filed map must be taken as part of the deed and explanatory notes contained on the map become part of the description (***Brainin v New York, New Haven & Hartford R.R. Co.***, 136 App Div 393, 120 NYS 1093 [2d Dept 1910]; *see* ***Town of Brookhaven v Dinos***, 76 AD2d at 562). Any combination of the mentioned elements or any other method which will clearly identify the property is sufficient (***Coleman v Manhattan Beach Imp. Co.***, 94 NY 229 [1883]; ***Evans v Beagell***, 276 App Div 883, 93 NYS2d 784 [3d Dept 1949]; *see* ***Town of Brookhaven v Dinos***, *supra*).

Real Property Law § 334 provides that no real property subdivided into separate lots can be offered for sale to the public without the filing of a map in the Office of the County Clerk or Register of Deeds where the property is located (*see* ***O'Mara v Town of Wappinger***, 9 NY3d 303, 309, 849 NYS2d 9 [2007]; Real Property Law § 334). "Generally, a plat is a map describing a piece of land and its features, such as boundaries, lots, roads, and easements" (*see* Black's Law Dictionary 1188–1189 [8th ed. 2004]; ***O'Mara v Town of Wappinger***, *supra* 9 NY3d at 307 FN1). In addition, no plat of a subdivision may be recorded (i.e., filed) with the County Clerk or Register until it is approved by a planning board and such approval is endorsed in writing on the plat in the manner designated by the planning board (*see* Town Law § 279 (1); § 276 [3]; ***O'Mara v Town of Wappinger***, 9 NY3d at 309). By virtue of its filing requirement, this statutory scheme affords notice to the public (*see* ***O'Mara v Town of Wappinger***, 9 NY3d at 310). Towns have the ability to impose reasonable conditions in the course of approving a subdivision, such as density and open space restrictions (*see* Town Law § 276; *see also* ***O'Mara v Town of Wappinger***, *supra* 9 NY3d at 310-311; ***Matter of Koncelik v Planning Bd. of Town of E. Hampton***, 188 AD2d 469, 471, 590 NYS2d 900 [2d Dept 1992]). Density and open space restrictions are the result of the zoning process, not property encumbrances that must be recorded in a chain of title (***Ellison Heights Homeowners Assn., Inc. v Ellison Heights LLC***, 112 AD3d at 1306). Moreover, there is no statutory requirement to record a plat in the chain of title and Real Property Law is inapplicable (*see id.* [town open space restrictions written on parcels of the plat]; ***Ellison Heights Homeowners Assn., Inc. v Ellison Heights LLC***, 112 AD3d 1302, 1305, 978 NYS2d 481 4th Dept 2013][town density and open space restrictions on parcels of the plat]; *cf.* ***Butler v Mathisson***, *supra* [setback lines drawn on subdivision map are not deed restrictions that run with the land]).

As the moving party, defendants Trustees and Town bear the initial burden of presenting competent admissible evidence demonstrating the absence of any triable issue of fact as to the location of the southerly boundary lines of the properties of plaintiffs The Seaview, Dunes, The Tides, Whaler's Lane, and Ocean Estates (*see* ***Kennedy v Nimons***, 121 AD3d 1229, 994 NYS2d 685 [3d Dept 2014]; ***Quinn v Depew***, 63 AD3d 1425, 881 NYS2d 536 [3d Dept 2009]).

Here, the movants, defendants Trustees and Town, failed to demonstrate that the notations or inscriptions concerning the southern boundaries on the submitted subdivision maps/plats are enforceable either as zoning restrictions or as deed restrictions that run with the land, and that plaintiffs The Seaview,

Dunes, The Tides, Whaler's Lane, and Ocean Estates do not hold title to the subject beach area based on said subdivision map/plat notations or inscriptions. Defendants failed to submit any expert evidence to support their assertions. Instead, the certified chains of title of the deeds submitted by plaintiffs indicate that plaintiffs The Seaview, Dunes, The Tides, Whaler's Lane, and Ocean Estates hold unbroken chains of title starting from the Benson Deed to the subject beach area, that is, to the high water mark or line of the Atlantic Ocean. Based on the foregoing, defendants Trustees and Town are denied summary judgment dismissing the first cause of action to quiet title to the disputed beach area. Plaintiffs' third cause of action for trespass through twelfth cause of action for breach of fiduciary duty also survive as they relate to interference in plaintiffs' right to use and enjoy their properties and to the endangerment of their properties, health, safety and comfort by the public's use of the subject beach area (*see* ***Behar v Quaker Ridge Golf Club, Inc.***, 118 AD3d 833, 988 NYS2d 633 [2d Dept 2014]; ***Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]).

Inverse condemnation, or a de facto taking "is a permanent ouster of the owner or a permanent physical or legal interference with the owner's physical use, possession, and enjoyment of the property by one having condemnation powers" (***Matter of Ward v Bennett***, 214 AD2d 741, 743, 625 NYS2d 609 [2d Dept 1995]; ***Village of Tarrytown v Woodland Lake Estates***, 97 AD2d 338, 343, 468 NYS2d 513 [2d Dept 1983]). The proffered affidavits and deposition testimony reveal that the beachfront residents have not been permanently denied access to or use of the beach inasmuch as the disapproved public activity occurs primarily during the summer months (*see* ***Feder v Village of Monroe***, 283 AD2d 548, 725 NYS2d 75 [2d Dept 2001]; ***Clempner v Southold***, 154 AD2d 421, 546 NYS2d 101 [2d Dept 1989]; *compare* ***Sarnelli v City of New York***, *supra* [property fenced off denying plaintiffs access]). The Court notes that in any event, the Appellate Division, Second Department held in the action entitled ***Katz v Village of Southampton***, 244 AD2d 461, 664 NYS2d 457 [2d Dept 1997], *lv denied* 95 NY2d 753, 711 NYS2d 155 (2000) that "regulation of motor vehicle traffic on the ocean beach in connection with the easement held by the Freehold Trusteeship is not a taking" (***Katz v Village of Southampton***, *supra* at 462-463). Therefore, the request by defendants Town and Trustees for summary judgment based on the three-year statute of limitations of CPLR 214 (4) is denied.

The Court also notes from its review of the submitted deeds that they contained the following general appurtenance clause concerning easements of the inhabitants of the Town of East Hampton:

> SUBJECT to any and all rights and easements of the inhabitants of the Town of East Hampton (if any such they have) to land fish, boats and nets, to spread nets on the sand adjoining the Atlantic Ocean and care for fish and material as customary on the South Shore.

Said easement was appurtenant and passed to all subsequent purchasers of the dominant estate through the general appurtenance clauses until approximately the late 1960's when the clause no longer appeared in the deeds (*see* ***Strnad v Brudnicki***, 200 AD2d 735, 606 NYS2d 913 [2d Dept 1994]). "Once created, the easement would continue to pass with the dominant estate unless it was extinguished by abandonment, conveyance, condemnation or adverse possession" (***Gerbig v Zumpano***, 7 NY2d 327, 330, 197 NYS2d 161 [1960]; ***Will v Gates***, 89 NY2d 778, 784, 658 NYS2d 900 [1997]). Owners of the servient estate are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property's direct chain of title (*see* ***Witter v Taggart***, 78 NY2d 234, 239, 573 NYS2d 146 [1991];

Corrarino v Byrnes, 43 AD3d 421, 423, 841 NYS2d 122 [2d Dept 2007]; ***Farrell v Sitaras***, 22 AD3d 518, 519-520, 803 NYS2d 659 [2d Dept 2005]).

The properties of plaintiffs The Seaview, Dunes, The Tides, Whaler's Lane, and Ocean Estates may continue to be burdened by said easement. The nature and extent of use of an easement may be enlarged or changed (*see* ***Tamburo v Murphy***, 72 Misc 2d 120, 339 NYS2d 693 [Sup Ct, Cayuga County 1970], *affd* 40 AD2d 947, 340 NYS2d 881 [4th Dept 1972]). Nevertheless, the subject easement may not be enlarged to include uses completely foreign to the grant, such as recreational purposes, including picnicking, sunbathing, boating and bathing (*see* ***H.H. Apartments, Inc. v Beachcliff Realty Corp.***, 8 AD2d 966, 190 NYS2d 861 [2d Dept 1959], *affd* 8 NY2d 760, 201 NYS2d 777 [1960]). Notably, this Court determined by order dated October 13, 2011 (Tanenbaum, J.) in the related action upon consideration of plaintiff's motion for partial summary judgment that the affidavit of an East Hampton resident who had resided therein since 1915 and who claimed that the recreational use of the beach by the public had been continuous since the 1920's raised substantial issues of fact as to whether a prescriptive easement of the inhabitants of the Town of East Hampton currently exists (*see* ***Weiszberger v Husarsky***, 114 AD3d 731, 979 NYS2d 851 [2d Dept 2014] ["To acquire a prescriptive easement, a party must establish by clear and convincing evidence that the use of the property was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years"]). Based on the foregoing, issues of fact remain concerning the nature of the easement, if any, on the disputed beach area and thus, with respect to the second cause of action as to whether the reservation in the Benson deed inures to the benefit of current Town inhabitants, has been terminated or is terminable by the fee owners, and whether the Trustees and Town have any right or authority pursuant to said reservation to issue beach vehicle permits or to grant anyone permission to use the subject property to drive and park their vehicles.

Moreover, the doctrine of laches has no application when plaintiffs allege a continuing wrong as they do herein with respect to the ongoing use of the subject beach area by members of the public with "beach vehicle permits" (*see* ***Capruso v Village of Kings Point***, 23 NY3d 631, 992 NYS2d 469 [2014]). Similarly, plaintiffs' claims of private and public nuisance, based on a continuing nuisance are timely (*see* ***Bloomingdales, Inc. v New York City Transit Auth.***, 13 NY3d 61, 886 NYS2d 663 [2009]; ***Pilatich v Town of New Baltimore***, 100 AD3d 1248, 954 NYS2d 663 [3d Dept 2012]; ***Agoglia v Benepe***, *supra*; ***Burch v Trustees of Freeholders and Commonalty of Town of Southampton***, 47 AD3d 654, 849 NYS2d 622 [2d Dept 2008]), as are plaintiffs' claims based on continuing violations of their equal protection rights (*see* ***Summit at Pomona, Ltd. v Village of Pomona***, 72 AD3d 797, 898 NYS2d 650 [2d Dept 2010]). Therefore, the request of defendants Trustees and Town for summary judgment dismissing the complaint based on laches and statute of limitations is denied.

Accordingly, the motions (004, 005) by defendant Trustees and Town, respectively, for summary judgment dismissing the complaint are denied.

Dated: June 2nd, 2015

HON. JERRY GARGUILO J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION