

<b>State of New York v Stevens</b>
2015 NY Slip Op 32925(U)
December 15, 2015
Supreme Court, Cortland County
Docket Number: EF14-553
Judge: Phillip R. Rumsey
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Cortland County Courthouse, in the City of Cortland, New York on the 13<sup>th</sup> day of October, 2015 [Final Submission: October 27, 2015].

PRESENT: HON. PHILLIP R. RUMSEY  
JUSTICE PRESIDING.

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF CORTLAND

STATE OF NEW YORK and the NEW YORK  
STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION,

Plaintiffs,

-against-

JAMES C. STEVENS, III,

Defendant.

**DECISION AND ORDER**

Index No. EF14-553  
RJI No. 2014-0356-M

APPEARANCES:

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL OF THE  
STATE OF NEW YORK  
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**PHILLIP R. RUMSEY, J. S. C.**

Defendant owns a parcel of land in the Town of Cortlandville comprised of approximately 113 acres of agricultural land (the property), which is bounded on the south by St. Mary's Cemetery. In the summer of 2012, defendant completed construction of the following-described project intended to improve drainage on the property, disturbing approximately two acres in the process. The project included: (1) enlargement of an existing pond to serve as a retention pond; (2) enhancement or construction of a swale to direct surface flow into the pond; (3) installation of outlets from the pond, consisting of a twelve-inch outlet pipe from the bottom and two twenty-four inch culverts four feet above the bottom; (4) construction of a stone apron outfall and drainage swale that directed all outflow into an existing ditch along the north side of the Cemetery property; and (5) construction of a by-pass to allow surface water from large storms to run around the pond to the outflow apron and swale (see Affidavit of Scott Cook, sworn to September 9, 2015 [Cook Affidavit], ¶¶ 5 - 9; Affidavit of Timothy C. Buhl, sworn to September 30, 2015 [Buhl Affidavit], Exhibit B [Buhl's December 2014 Report], p. 3). Significant post-construction stormwater discharge from the project located on the property has caused extensive damage to St. Mary's Cemetery and flooding within New York State Route 281. On November 18, 2014, plaintiffs commenced this action which asserts two causes of action against defendant, the first alleging that the project was constructed, and stormwater discharged, in violation of various provisions of the Environmental Conservation Law, and the second for public nuisance.<sup>1</sup>

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<sup>1</sup> Catholic Cemeteries of the Roman Catholic Diocese of Syracuse, Inc. (the Diocese), which owns and operates St Mary's Cemetery, commenced an action against defendant on September 17, 2013, alleging that discharges from the property during a significant rainstorm on July 1, 2013 extensively damaged its property (Sup Ct, Cortland County, Index No. 13-452; herein the related action). At commencement, the Diocese moved for a preliminary injunction

Plaintiffs' motion for a preliminary injunction was resolved by a consent order dated December 23, 2014 (the consent order), which ordered: (1) defendant to cease discharging stormwater from the project "unless and until he obtains a permit from the Department of Environmental Conservation (DEC) and implements a DEC approved stormwater protection plan;" (2) defendant to submit, within 20 days of the date of the order, to the State for DEC review and approval, a proposed engineering plan for restoring the site to pre-project conditions and implementing appropriate stormwater controls; (3) that the DEC complete its review and approve the proposed plan, with or without conditions, within 14 days of receipt; (4) defendant to implement the plan within 20 days of approval; and (4) that the plan include, at a minimum, four specified design criteria. The order remains in effect. A conference was held on August 14, 2015, at which plaintiffs' counsel represented that defendant had failed to comply with the provisions of the consent order. Defendant's counsel stated that his client believed that he had substantially complied with the plan approved pursuant to the consent order, argued that the plan would not result in surface water flowing away from the Cemetery property, as intended by plaintiffs, and, therefore, that further compliance with the plan would be fruitless. Plaintiffs thereafter moved for summary judgment as to liability on both causes of action, including dismissal of defendant's affirmative defenses, and for an order directing defendant to pay \$15,600 to fund an engineering report to evaluate permanent solutions. Defendant cross-moved

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barring defendant from discharging water onto its property during the pendency of the action. By decision and order dated December 16, 2013 (decision and order in the related action), the application for a preliminary injunction was denied, without prejudice, based on the Diocese's failure to provide proof that it was likely to sustain irreparable **future** injury or proof concerning the burden that would be imposed on defendant if the preliminary injunction were granted. No subsequent application for a preliminary injunction has been made, and the Diocese has not actively prosecuted its action.

for summary judgment granting his affirmative defense to the first cause of action, that the project is an agricultural activity exempt from the regulatory provisions of the Environmental Conservation Law. Oral argument was heard on October 13, 2015, and the final written submission was made on October 27, 2015.

### **FIRST CAUSE OF ACTION - WATER POLLUTION CONTROL VIOLATIONS**

The complaint alleges that defendant committed several statutory and regulatory violations by constructing the project, namely: (1) making or using a point source without a State Pollutant Discharge Elimination System (SPDES) permit (see e.g. complaint, ¶ 59); (2) making unlawful discharges from a point source (id., ¶¶ 55 - 56); and (3) failing to implement a stormwater pollution prevention plan (SWPPP) (id., ¶¶ 51 - 52). Following oral argument, plaintiffs abandoned their claim that defendant is making unlawful discharges from a point source by advising the court that they are now seeking summary judgment on the first cause of action based only upon defendant's failures to obtain a permit for construction of the project and to implement a SWPPP (see Letter from Joseph M. Kowalczyk to the court dated and filed October 20, 2015, with enclosure).<sup>2</sup>

SPDES permits must be obtained for discharges of stormwater that are not to groundwater when required by 40 CFR 122.26 (see 6 NYCRR 750-1.4[b]; see also 6 NYCRR

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<sup>2</sup> At oral argument, the court noted that ECL 17-0803 prohibits the discharge of pollutants without a SPDES permit and that there did not appear to be any proof in the record before the court that the stormwater discharged from the project contained any pollutant. Kowalczyk's letter was submitted in response to the court's directive that he make further submissions citing the specific statutory or regulatory provisions forming the basis of plaintiff's assertions that defendant is making an unlawful discharge from a point source, and that he is required to provide a SWPPP and obtain a SPDES permit. Defendant was afforded the opportunity to respond, and did so by letter dated October 27, 2015 emphasizing that there is no evidence showing that the stormwater contains any pollutant.

750-1.5[a][10] [discharges composed entirely of stormwater to which no pollutant has been added do not require a SPDES permit unless they are regulated by 40 CFR Part 122]). CFR 122 requires a SPDES permit for discharges of stormwater associated with a small construction activity, which is defined as construction activities including clearing, grading and excavating that result in land disturbance of at least one, but less than five, acres of land (see CFR 122.26[a][9][B] [permit required for small construction activities]; CFR 122.26[b][15] [small construction activity defined]).<sup>3</sup> It is undisputed that the project involved disturbance of over one acre of land and that defendant never obtained a SPDES permit.

Stormwater discharges from construction activities disturbing at least one, but less than five, acres of land must be covered by either the SPDES General Permit for Stormwater Discharges from Construction Activity or by an individual, site-specific SPDES permit issued pursuant to 6 NYCRR 750-1.21. The procedure for obtaining a General Permit is intended to be expedited when compared to the process for obtaining an individual permit.<sup>4</sup> General Permit Number GP-0-10-001 (the 2010 General Permit) was in effect from January 29, 2010 through

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<sup>3</sup> The plain language of the regulations require a SPDES permit for all construction activities even if pollutants are not discharged as a result of the work (see also Matter of Vadney, Decision and Order of the Acting Commissioner of the Department of Environmental Conservation dated September 2, 2015, DEC File No. R4-2009-0603-94, pp. 4 - 5).

<sup>4</sup> See Cook Affidavit, ¶ 10 (“To obtain coverage under the General Permit, a discharger merely needs to send DEC a written Notice of Intent (NOI) to be covered in advance of commencing construction, as well as develop and implement a [SWPPP]”). Cf. 2010 General Permit, Part II(B)(3)(a)(i) (permit is effective five days after DEC receives a complete NOI with a SWPPP prepared in conformity with the specified standards) with 6 NYCRR 750-1.6(c), 750-1.7 and 6 NYCRR Part 621 (DEC must issue a determination as to whether an application is complete in 60 days [6 NYCRR 621.6(c)], may require a hearing [6 NYCRR 621.8], and must make its decision within 45 days after a minor application is deemed complete, within 90 days after a major application is deemed complete and no hearing is held, or when a hearing is held, within 60 days after it receives the complete hearing record [6 NYCRR 621.10]).

January 28, 2015, the time during which the project was constructed. It specifically requires that an applicant provide a SWPPP prepared in conformity with specified technical standards (see 2010 General Permit, Part II[B][3][a], Part III[A][1], [2]). The regulations applicable to applications for individual SPDES permits do not specifically require that a SWPPP be submitted. However, they require that the applicant submit any relevant information that the DEC deems necessary (see 6 NYCRR 621[f][1]; 6 NYCRR 750-1.7[a][17], [b][16]). Thus, it must be inferred that the DEC would require that a SWPPP be submitted with an application seeking an individual permit for construction activity, inasmuch as one would be required if the applicant were to seek expedited coverage under the General Permit. It is undisputed that defendant has not submitted a SWPPP to the DEC.

It bears noting that preparation of a SWPPP is more than a procedural regulatory hurdle. All SWPPPs must include erosion and sediment control practices designed in conformity with the most current version of the technical standard, New York State Standards and Specifications for Erosion and Sediment Control (id., Part III[B][1]). The most current version of the New York State Standards and Specifications for Erosion and Sediment Control was enacted in August 2005. As relevant to the project, it provides standards and specifications for rock outlet protection for the purpose of “reduc[ing] the depth, velocity and energy of water, such that the flow will not erode the receiving downstream reach” (at p. 5B.21). In other words, a conforming SWPPP would have provided for design of the project in a manner intended to prevent the significant downstream erosion that has occurred since the project was constructed. Indeed, defendant’s own expert states that “[t]he lower portion of the drainage ditch needs to be reshaped and stabilized with heavy rip-rap stone to reduce velocities” (Buhl Affidavit, ¶ 29; see also

Buhl's December 2014 Report, p. 10 [{"A} larger, rip rap lined channel down along the common Stevens/Cemetery boarder [sic] is highly recommended to reduce erosive velocities"}]).

Accordingly, plaintiffs have satisfied their burden of establishing prima facie entitlement to summary judgment by showing that the project involved disturbance of more than one acre of land, thereby requiring that a SWPPP be submitted and a SPDES permit obtained, and that defendant has admitted that he constructed the project without submitting a SWPPP or obtaining a SPDES permit.

As noted, defendant has admitted the material elements of plaintiff's first cause of action; however, he asserts that he has an affirmative defense, namely, that the project is an agricultural activity exempt from the regulatory provisions of the Environmental Conservation Law. A Memorandum of Understanding between DEC, New York State Department of Agriculture and Markets, and New York State Soil and Water Conservation Committee exempts certain specified agricultural best management practices from the requirement that they be covered by the General Permit for Stormwater Discharges from Construction Activity (the MOU; a copy is attached as Exhibit I to the Cook Affidavit). As relevant to the project, certain practices identified as structural in an attached Table II are exempt from the General Permit requirements provided that they meet five additional specified criteria. To be exempt, a structural practice must: (1) improve water quality or reduce soil erosion; (2) not degrade water quality; (3) be planned and designed to USDA/NRCS standards and specifications; (4) be constructed in a manner consistent with the current version of the New York State Standards and Specifications for Erosion and Sediment Control; and (5) disturb less than five acres.



Defendant has failed to meet his prima facie burden of establishing the applicability of the affirmative defense because he did not submit proof showing that the project met each of the criteria. It is undisputed that the project disturbed less than five acres, and Buhl alleges that there is no evidence that the project degraded water quality (see Buhl Affidavit, ¶ 8). However, defendant did not submit proof that the project met each of the three remaining requirements. Buhl's statement that the project reduced erosion on the property does not establish that the project reduced erosion, in light of the uncontroverted proof that the Cemetery property suffered from significant erosion following completion of the project (see Buhl's December 2014 Report, p. 2 [acknowledging that significant flooding and additional new erosion to the cemetery property occurred following construction of the project]), and there is no proof that it improved water quality. The opinion of Buhl, who was not involved in designing the project, that it was "constructed in substantial compliance with the USDA/NRCS and New York sediment control standards" (Buhl Affidavit, ¶ 8 [emphasis supplied]) is insufficient to show that the project was both planned and constructed in complete compliance with the USDA/NRCS standards. Defendant does not identify the applicable USDA/NRCS standards, nor is there any proof that a specific design was prepared by a qualified professional in compliance with the applicable standards prior to construction. In fact, defendant concedes that the project was planned and completed with assistance from only a contractor, Lawrence Hill, allegedly experienced in excavation and water control systems (see Affidavit of James C. Stevens, III, sworn to September 30, 2015, ¶¶ 11 - 12; Defendant's Memorandum of Law, p. 1). There is no allegation that either defendant or Mr. Hill were familiar with the applicable standards when they constructed the project, or that the project was actually planned in compliance with such standards. Notably,

defendant avers that the design considerations were aimed at reclaiming three acres of land on the property; there is no allegation that any consideration was given during planning or construction to whether discharge from the planned swale outlet would have any effect on properties located downstream (see Stevens Affidavit, ¶¶ 12 - 13). Moreover, Buhl's conclusory assertion that the project was "constructed in substantial compliance with the USDA/NRCS and New York sediment control standards" (Buhl Affidavit, ¶ 8) is insufficient to show that the project was eligible for an exemption under the MOU, which requires that an exempt practice be constructed in "compliance" with the listed standards, not "substantial compliance." His conclusory assertion does not refer to the New York State Standards and Specifications for Erosion and Sediment Control, which are specifically identified in the MOU, and, in any event, he alleges compliance only with New York's sediment control standard, without reference to the erosion control standards that are implicated in this case. Inasmuch as defendant failed to meet his burden of establishing the applicability of his affirmative defense, plaintiffs' motion seeking summary judgment on their first cause must be granted.

#### **SECOND CAUSE OF ACTION - PUBLIC NUISANCE**

"A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."

Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 (1977) (citations omitted);

see also 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 292 - 293 (2001)

(unlawful obstruction of a public street is a public nuisance). Plaintiffs have satisfied their prima facie burden of establishing entitlement to summary judgment on their second cause of action by alleging that discharges from the project have interfered with public use of a public place by entering a public highway, New York State Route 281, and overwhelming its stormwater collection system, thereby causing flooding and unsafe driving conditions (see complaint, ¶¶ 24, 35, 41, 49; Cook Affidavit, ¶¶ 17, 19).<sup>5</sup>

Defendant does not dispute the elements of plaintiffs' prima facie case for public nuisance. However, he asserts two defenses to that cause of action: (1) that St. Mary's Cemetery was comparatively negligent by filling a wetland on its property that caused water to collect on his property, compelling him to address the circumstances by constructing the project; and (2) that the storm that occurred on July 1, 2013 was an act of God. Defendant has submitted no legal authority supporting his argument that the alleged comparative fault of St. Mary's Cemetery, which is not a party to this action, can serve as a defense, in whole or in part, to a public nuisance cause of action. Thus, defendant's affirmative defense of comparative fault must be dismissed.

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<sup>5</sup> Plaintiffs also argue that the project is a public nuisance because it has caused significant erosion-related damage to St. Mary's Cemetery, including: (1) erosion requiring that 14 bodies be disinterred and re-buried; and (2) desecration of numerous grave sites by the deposit of debris (see complaint, ¶¶ 36, 41 - 47, 63 - 65; Affirmation of Joseph M. Kowalczyk dated September 16, 2015, ¶¶ 16 - 19; Cook Affidavit, ¶¶ November 25, 2015). The court has previously noted that "such dramatic damage to grave sites is traumatic for those concerned about the condition of the cemetery, especially family members and friends of people buried there" (decision and order in the related action, p. 6). However, although it is used by many people, the cemetery is private property and not a public place; therefore, harm caused solely to the cemetery is not interference with rights belonging to the general public as required to state a cause of action for public nuisance (see Haire v Bonelli, 57 AD3d 1354, 1358 [2008] [though open to the public, a shopping mall was private property]; see also Reid v Kawasaki Motors Corp., U.S.A., 189 AD2d 954 [1993]; Andersen v University of Rochester, 91 AD2d 851, 852 [1982], appeal dismissed 59 NY2d 968 [1983]).

To prevail on an act of God defense requires proof that the injury complained of resulted solely from an act of God; “human activities cannot have contributed to it in any degree” (Sawicki v GameStop Corp., 106 AD3d 979, 980 [2013]; see also Abarca v Clarks Shoes, 81 AD3d 675, 676 [2011]; Tel Oil Co. v City of Schenectady, 303 AD2d 868, 873 [2003]). This affirmative defense is limited to the second cause of action for public nuisance, which, as noted, applies only to injuries sustained by the public and not by St. Mary’s Cemetery. Defendant’s expert opines that nearly three inches of rain fell in a three-hour period during the storm of July 2, 2013, and that a storm of that intensity and duration occurs only once in approximately 125 years (see Buhl Affidavit, Exhibit C [Buhl’s January 2015 Report], p. 2). Buhl also opines that, although the project undeniably directs water through the cemetery property to New York State Route 281, the retention pond constructed as part of the project attenuated the flow, thereby lessening the damage that would have otherwise been caused by such an extreme storm event. His opinion is a minimally sufficient showing that the project – a human activity – did not contribute to the damages caused on that date. Thus, defendant’s proof would have been sufficient to establish a prima facie case that the act of God defense was applicable if plaintiffs’ allegations regarding public nuisance were restricted to July 2, 2013, when the storm alleged to be an act of God took place. However, plaintiffs have alleged that the public nuisance existed on at least one other date, May 16, 2014, when stormwater from the project covered New York State Route 281 to a depth of two to four inches and created unsafe driving conditions (see Cook Affidavit, p. 17). Thus, defendant failed to establish the applicability of the act of God defense to

public nuisance cause of action.<sup>6</sup>

Plaintiffs' notice of motion seeks summary judgment on liability only, including dismissal of defendant's affirmative defenses; it does not seek any affirmative relief. The only affirmative relief requested in a supporting affirmation asks the court to order defendant to pay \$15,600 to fund an engineering report to evaluate permanent solutions (see Kowalczyk Affirmation, ¶ 25). Defendant opposes this request, on the basis that it is premature. Plaintiffs have not shown the necessity of the study, in light of the requirement that defendant submit a permit application and SWPPP for DEC review.<sup>7</sup> Thus, their request for an order compelling defendant to pay for the proposed engineering study is denied, without prejudice.

It bears emphasizing that plaintiffs did not seek any interim relief in addition to the request that defendant fund an engineering study and the relief that is already provided by the consent order. The only reference in plaintiffs' moving papers to additional interim relief was made in the preliminary statement section of their initial Memorandum of Law, where they

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<sup>6</sup> Had defendant established prima facie entitlement to the act of God affirmative defense, issues of fact would have remained. There is an issue of fact regarding the duration and, therefore, severity, of the storm. Plaintiffs have submitted proof showing that 2.48 inches of rain fell during the relevant 24-hour period and that such storms occur on a less than five-year basis (see P1). However, plaintiffs have not submitted any evidence regarding the duration over which the total precipitation fell, and their proof shows that if it fell within three hours, as claimed by defendant's expert, that such events occur only once in every one hundred years (*id.*). There is also an issue of fact regarding whether the project ameliorated damage from the storm of July 2, 2013, as claimed by defendant, or was solely responsible for all resulting damage, as claimed by plaintiffs.

<sup>7</sup> Plaintiffs have not cited compelling authority in support of this request. The sole authority cited is a case involving private parties who owned adjoining parcels of land in which one was ordered to excavate a ditch to protect the other's property from further erosion after trial (see Memorandum of Law dated September 16, 2015, p. 11, citing Osgood v Buckley, 202 AD2d 920, 921 [1994]).

indicated an intent to request an order: (1) authorizing the State and its representatives to have unrestricted access to the property; (2) directing defendant to submit and implement an approved SWPPP; and (3) directing defendant to apply for a SPDES permit (see Memorandum of Law dated September 16, 2015, p. 3). The consent order effectively provides the additional interim relief mentioned by plaintiffs, inasmuch as it orders defendant to cease discharging water from the project “until he obtains a DEC permit and implements a DEC approved stormwater pollution prevention plan” (consent order, p. 2).

Based on the foregoing: (1) plaintiffs’ motion is granted to the extent of dismissing defendant’s affirmative defenses and granting plaintiffs partial summary judgment establishing defendant’s liability on both causes of action, and is otherwise denied, without prejudice; and (2) defendant’s cross-motion is denied.

On October 30, 2015, defendant’s counsel requested a conference to schedule discovery. In light of the present decision, it does not appear that a conference is necessary; however, counsel may request a conference in the future if necessary to establish deadlines for completion of discovery related to any remaining issues.

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry (see CPLR 5513).

Dated: December 15, 2015  
Cortland, New York

Phillip R.  
Rumsey

Digitally signed by Phillip R.  
Rumsey  
DN: cn=Phillip R. Rumsey, o=CLJ,  
email=PRumsey@NYCourts.gov,  
c=US  
Date: 2015.12.15 15:49:02 -0500

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HON. PHILLIP R. RUMSEY  
Supreme Court Justice

ENTER

The following documents were filed with the Clerk of the County of Cortland:

- Notice of motion dated September 16, 2015.
- Amended notice of motion dated September 17, 2015.
- Affirmation of Joseph M. Kowalczyk dated September 16, 2015, with Exhibits 1 – 6.
- Affidavit of Scott Cook, sworn to September 9, 2015, with Exhibits 1 – 4.
- Affidavit of Maricio Roma-Hernandez, sworn to September 14, 2015, with Exhibits 1 – 4.
- Reply Affirmation of Joseph M. Kowalczyk dated October 8, 2015, with Exhibits 1 – 4.
- Reply Affidavit of Donald W. Lake Jr., sworn to December 14, 2014, with Exhibits 1 – 2.
- Notice of cross-motion dated September 30, 2015.
- Affidavit of Robert M. Shafer, sworn to September 30, 2015, with Exhibit A.
- Affidavit of Timothy C. Buhl, P.E., sworn to September 30, 2015, with Exhibits A – E.
- Affidavit of James C. Stevens, II, sworn to September 30, 2015, with Exhibits A – B.
- Letter from Joseph M. Kowalczyk to the court dated and filed October 20, 2015, with enclosure.
- Letter from Robert M. Shafer, Esq. to the court dated October 27, 2015.
- Exhibits P1 and P3 submitted by plaintiff at oral argument, with subsequent consent from defendant, and filed by the court on November 19, 2015.
- Original Decision and Order dated December 15, 2015.