Trustees of the Freeholders & Commonalty of the Town of E. Hampton v Zweig
2017 NY Slip Op 31013(U)
April 6, 2017
Supreme Court, Suffolk County
Docket Number: 13-29760
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 13-29760
CAL. NO. 16-00075OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 6-15-16
ADJ. DATE 10-11-16
Mot. Seq. # 007 - MD

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

Plaintiff-Petitioner,

- against -

MOLLIE ZWEIG, THE ZONING BOARD OF APPEALS OF THE VILLAGE OF EAST HAMPTON, THE VILLAGE OF EAST HAMPTON, and THE DEPARTMENT OF CODE ENFORCEMENT of the VILLAGE OF EAST HAMPTON

Defendants-Respondents.

EAGAN & MATTHEWS, P.L.L.C.
Attorney for Plaintiff/Petitioner
241 Pantigo Road
East Hampton, New York 11937

ESSEKS, HEFTER & ANGEL, L.L.P.
Attorney for Defendant/Respondent Zweig
108 East Main Street
P.O. Box 279
Riverhead, New York 11901

JOHN C. JILNICKI, ESQ.,
Attorney for Defendants/Respondents
Village of East Hampton
159 Pantigo Road
East Hampton, New York 11937

Upon the following papers numbered 1 to 84 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 59 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 62 - 79 ; Replying Affidavits and supporting papers 80 - 82 ; Other memoranda of law 60 - 61, 83 - 84; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant/respondent Mollie Zweig for an order pursuant to CPLR 3212 granting summary judgment dismissing the first through fifth causes of action in the complaint is denied.

This action was commenced as a hybrid CPLR article 78 proceeding and declaratory judgment action, in which the plaintiff/petitioner The Trustees of the Freeholders and Commonalty of the Town of East Hampton (the Trustees) sought to annul a determination of the defendant/respondent The Zoning Board of Appeals of the Village of East Hampton (the Village Zoning Board) that approved a proposed

revetment project for the defendant/respondent Mollie Zweig (Zweig) on an area of ocean-front beach, and sought, among other things, a judgment that they own and govern said area.

Zweig owns a single-family dwelling located at 11 West End Road, East Hampton, New York, which fronts the Atlantic Ocean (the premises or Zweig property). Zweig successfully sought approval from the New York State Department of Environmental Conservation (DEC) and the defendant/respondent Village of East Hampton (the Village) for a proposed revetment project on the beach south of the premises involving, among other things, the removal of an existing stone spur groin, the construction of a new 166-foot long rock revetment at the scarp line of the existing eroded dune, the restoration of the eroded dune with 4,000 cubic yards of compatible sand, and the planting of beach grass on the restored dune.

Zweig also successfully sought approval from the Village Zoning Board for a coastal erosion permit variance pursuant to Village Code § 101-8, and an area variance permitting her to construct the revetment within 100 feet of the 15-foot contour line west of Old Beach Lane in contravention of Village Code § 124-1 (A)(1) and within 150 feet of the southerly edge of beach grass along the Atlantic Ocean in contravention of Village Code § 124-1 (A)(2)(c).

The Trustees commenced this action by the filing of a complaint/petition on November 7, 2013 (the complaint). In their complaint, the Trustees set forth ten causes of action, the sixth to tenth causes of action relating to the CPLR article 78 proceeding. The gravamen of all of the Trustees' claims is that they are the owners of the property located seaward of the premises up to the "line of beach grass," which is the southerly boundary of the premises, that the revetment is located, at least in part, on their property, and that the Village Zoning Board did not have jurisdiction to issue the subject approvals. By memorandum decision dated November 3, 2014, the Court (Tarantino, J.) decided the issues regarding the CPLR article 78 proceeding, and severed the first five causes of action of the complaint. The first cause of action seeks a judgment pursuant to RPAPL Article 15 "confirming that the line of demarcation between [the parties' properties is]" the southern line of beach grass. The second cause of action seeks a declaration that the Trustees have jurisdiction over the proposed project because of its location on property owned and governed by the Trustees. The third cause of action seeks a declaration that the Trustees have jurisdiction over the proposed project because the existing stone groin is located on property owned and governed by the Trustees. The fourth cause of action seeks a declaration that the Trustees have jurisdiction over the proposed project because it has the potential to impact the lands owned and governed by the Trustees. The fifth cause of action seeks a declaration that the jurisdictional boundaries of the Village and its boards and departments is the southern line of beach grass.

It is undisputed that the Trustees own and govern the "commonlands" running from the western border of the Town of East Hampton to the eastern edge of Napeague pursuant to the Dongan Patent dated December 9, 1686. The commonlands include the bottomlands, beaches and intertidal zones in the designated area. It is further undisputed that the Trustees' property lies to the south/southeast of the Zweig property and along the Atlantic Ocean. The question is whether the northerly boundary line of the

Trustees property ends at the high water mark of the subject beach, some other location, or the southerly line of beach grass thereon, and whether, if the latter is the case, where the line of beach grass is or was located at certain periods of time.

After commencement of this action, the parties litigated the Trustees' requests for a temporary restraining order and a preliminary injunction restraining Zweig from constructing the proposed revetment. By order dated March 3, 2014, the Court (Tarantino, J.) denied the Trustees' motion for a preliminary injunction and granted Zweig's motion for an order terminating the temporary restraining order previously issued in this matter. It appears that the construction of the subject revetment has been completed in the period between said order and the making of the instant motion.

Zweig now moves, in effect, for summary judgment in her favor as to the first five causes of action in the complaint on the grounds that she owns title to the premises to the "deeded property line," and that the Trustees have no interest in the property where the revetment is located. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of her motion, Zweig submits, among other things, the pleadings, the affidavits of three expert witnesses, and a survey of the premises dated January 10, 1990. In his affidavit dated November 26, 2013, Lance R. Pomerantz, Esq. (Pomerantz) swears that he has been engaged in the practice of land title examination since 1979, and that he has examined the claims of the Trustees and Zweig in the portion of the premises "that extends seaward of the presently existing line of beach grass ('the Disputed Area')." After examining the deeds in Zweig's chain of title to the premises from 1882 to the deed conveying the premises to Zweig dated June 11, 1997, Pomerantz opines that "the ownership of the beach land seaward of [the premises] and landward of the mean high water line of the Atlantic Ocean, may remain in [third-parties not named herein]," that the disputed area is "significantly landward of the seaward boundary" in the metes and bounds description in the deed to Zweig, and that the Trustees "can claim no title" to the disputed area.

A review of the deeds submitted with Pomerantz's affidavit reveals that there are issues of fact which preclude the grant of summary judgment as to the Trustees' first cause of action pursuant to RPAPL Article 15 seeking to quiet title to the disputed area and establish that the boundary line between the subject premises and the land owned by the Trustee is the southern line of beach grass. Pomerantz begins his analysis of the chain of title of the Zweig property by stating that "[p]rior to 1882, Abraham

D. Candy owned the Zweig property and surrounding area." By deed dated August 12, 1882, recorded on August 15, 1882 in Liber 266 at page 449, Candy's executors conveyed a parcel of land including the Zweig property to Helen A. Laforest and Thomas J. Smith, described as bounded "southeasterly by the Atlantic Ocean." Helen A. Laforest subsequently conveyed said parcel to Thomas J. Smith by deed dated January 14, 1885, recorded on December 12, 1885 in Liber 292 at page 383, described as bounded "southeasterly by the Atlantic Ocean." By deed dated January 14, 1885, recorded on December 12, 1885 in Liber 292 at page 383, Thomas J. Smith conveyed a portion of said parcel containing the Zweig property to Helen A. Laforest and Edward Laforest described as bounded "southeasterly by land of the United States Government and to the south beach of Long Island or the Atlantic Ocean."

Pomerantz notes that the Trustees passed resolutions on March 17, 1900 and March 14, 1902 authorizing the issuance of quitclaim deeds to any owner of property who may apply "in order to correct any misunderstanding concerning the title to property along and adjoining South Beach ... and perfect title for those who may wish to use the Banks or Dunes for residential purposes," and that the boundary line of any such deed shall "conform to the general line of grass growing along the South-east side of said Banks or Dunes." In 1902, Helen A. Laforest conveyed a parcel of land containing the Zweig property to Martha B. Phillips by deed dated April 4, 1902, recorded on April 12, 1902 in Liber 517 at page 101. Said deed does not include a description of the southeasterly boundary line of the parcel. However, it explicitly conveys all of the grantor's rights "in and to the beach or banks in front of said conveyed tract and adjoining the Atlantic Ocean." By quitclaim deed dated June 30, 1902, recorded on July 2, 1902 in Liber 520 at page 455, the Trustees released any interest in the "strip of beach or bank lying southeasterly of [Phillips' property] ... bounded northwesterly by [Phillips' property] ... southeasterly by the general line of grass growing along the southeasterly side of said banks."

Thereafter, Phillips conveyed two parcels of property to owners allegedly outside Zweig's chain of title which include the description that they are bounded "to the line of the edge of the Beach Grass referred to in deed by [the Trustees], to Martha B. Phillips dated June 30th 1902, and recorded July 2d 1902 in Liber 520 of Conveyances at page 455." In addition, the next two conveyances of property which Pomerantz asserts are within Zweig's chain of title include similar language. By deed dated July 28, 1916, recorded on August 2, 1916 in Liber 934 at page 232, Phillips conveyed her interest in the Zweig property to Thomas W. Lamont, described as bounded "to the line of the edge of the beach grass referred to in deed by [the Trustees] to Martha B. Phillips dated June 30, 1902, and recorded July 2, 1902 ... in Liber 520 of Deeds, at page 455." Thomas W. Lamont and his wife then conveyed the premises to Paul A. Salembier by deed dated April 3, 1926, recorded on April 12, 1926 in Liber 1182 at page 385, described as bounded "to the line of the edge of the Beach Grass referred to in deed by [the Trustees], to Martha B. Phillips dated June 30, 1902, and recorded July 2, 1902 in Liber 520 of Conveyances at page 455."

The next conveyance in title to the Zweig property contains the first "modern" description of the premises. By deed dated August 25, 1927, recorded on September 14, 1927 in Liber 1294 at page 172, Paul A. Salembier conveyed the subject parcel to Grantland H. Rice, described as running 781.85 feet deep "to a post on the Beach of the Atlantic Ocean; thence ... along the Beach of the Atlantic Ocean ..."

The next five conveyances of the Zweig property, including the sixth conveyance to Zweig, contain the aforementioned 781.85 course, with or without reference to the subject beach or the Atlantic Ocean.

Zweig contends that she has "made a prima facie case that ... she owns the Zweig property to the deeded boundaries ... the Trustees did not own the area between Zweig's property and the high water line ... even if the Trustees could prove they owned south of the 'beach grass line' as they claim, the average beach grass line pre-dating ... Hurricane Irene and Superstorm Sandy was well south ... of the area where the revetment was constructed." The latter contention, to the extent it addresses the second through fifth causes of action herein and the question of the Trustees' jurisdiction in this matter, will be discussed below.

It is well settled that a deed conveying real property described as "bounded southerly by the Atlantic Ocean," or a southerly Long Island "beach," grants title to the high water mark of the Atlantic Ocean (***Marba Sea Bay Corp. v Clinton St. Realty Corp.***, 272 NY 292 [1936]; *see also* ***Trustees of Freeholders & Commonalty of Town of E. Hampton v Kirk***, 23 Sickels 459, 68 NY 459 [1877]; ***Dolphin Lane Assoc. v Town of Southampton***, 72 Misc 2d 868, 339 NYS2d 966 [Sup Ct, Suffolk County 1971], *affd* 43 AD2d 727, 351 NYS2d 364 [2d Dept 1973], *mod on other grounds* 37 NY2d 293, 372 NYS2d 52 [1975]). It is not clear whether Zweig contends that the 781.85 foot course contained in the deeds of certain of her predecessors in title conforms to the high water mark at the time said course was established.

As mentioned previously, there are issues of fact regarding the boundary line between the Zweig property and the Trustees' property. Zweig has not submitted evidence regarding the boundaries of the property conveyed to Abraham D. Candy, and the ability of the executors of his estate to convey title to the Atlantic Ocean after his death. "A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed" (Real Property Law § 245). Pomerantz raises an additional issue of fact when he indicates that title to the area between the high water mark and the "deeded" description of the southerly boundary line of the Zweig property may be held by nonparties to this action.

In addition, Zweig has failed to submit any evidence as to the intent of the parties with regard to the 1902 quitclaim deed. The construction of a deed is generally a question of law for the court (see Real Property Law § 240 [3]; ***Blangiardo v Horstmann***, 32 AD3d 876, 822 NYS2d 545 [2d Dept 2006]; ***Spencer v Connolly***, 25 AD3d 832, 808 NYS2d 789 [3d Dept 2006]; ***Iulucci v James H. Maloy, Inc.***, 199 AD2d 720, 606 NYS2d 59 [3d Dept 1993]), subject to ordinary rules of construction applicable to other instruments (***Loch Sheldrake Assoc. v Evans***, 306 NY 297, 118 NE2d 444 [1954]; ***People v Call***, 129 Misc 862, 223 NYS 257 [Sup Ct, Hamilton County 1927]). The paramount rule of construction is that the intention of the parties governs (Real Property Law § 240 [3]; ***De Paulis Holding Corp. v Vitale***, 66 AD3d 816, 889 NYS2d 191 [2d Dept 2009]; ***Universal Broadcasting Corp. v Incorporated Vil. of Mineola***, 192 AD2d 518, 596 NYS2d 111 [2d Dept 1993]). However, the rule applies only to the extent that the parties' intent can be gathered from the whole instrument and is

consistent with the rules of law (Real Property Law § 240 [3]; ***Schwab v Schwab***, 280 AD 139, 112 NYS2d 354 [4th Dept 1952]; ***Van De Carr v Schloss***, 277 AD 475, 101 NYS2d 48 [3d Dept 1950]).

Pomerantz contends that the 1902 deed should be read to indicate that the Trustees quitclaimed any interest in the uplands, not that said deed established Zweig's southerly boundary line to be the line of beach grass. Without evidence of the intention of the parties to said deed the undersigned is not able to determine the import of the 1902 deed. Despite the conclusory statements of Pomerantz, there is a question whether the 1902 quitclaim deed resolved any and all disputes between the parties thereto regarding the boundary line between the respective properties.

Where both the plaintiff and the defendant assert conflicting claims of title to the same land, the burden rests upon each of them to establish such claims other than by relying on defects in the title of their adversary (*see* ***O'Brien v Town of Huntington***, 66 AD3d 160, 884 NYS2d 446 [2d Dept 2009]; ***LaSala v Terstiege***, 276 AD2d 529, 713 NYS2d 76 [2d Dept 2000]). As the moving party, Zweig bears the initial burden of presenting competent admissible evidence demonstrating the absence of any triable issue of fact as to the location of the northerly boundary line of the Trustees property (*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, Zweig has failed to establish that the southern boundary of her property is established by the description in the deed that conveyed title to her, or that said boundary extends to the high water mark along the Atlantic Ocean. The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Matinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, that branch of Zweig's motion which seeks summary judgment dismissing the Trustees first cause of action is denied.

The Court now turns to those branches of Zweig's motion addressing the Trustees' second through fifth causes of action. The enumerated causes of action essentially involve the single question whether the Trustees have jurisdiction regarding the construction of the subject revetment. The Trustees allege that they own the area of the subject beach to the southerly line of beach grass, and that they have jurisdiction over any property that they own. With the exception of their fourth cause of action, the Trustees further allege that the subject revetment is, or the prior stone groin was, located southerly of the line of beach grass giving them jurisdiction over its construction. In their fourth cause of action the Trustees allege that, even if the revetment is located northerly of the line of beach grass, the project "clearly has the potential to have a significant impact on the Commonlands owned and governed by the Trustees," and that, due to those potential impacts, they have jurisdiction in this matter. In light of the above, the undersigned will address Zweig's motion for summary judgment as to the second, third and fifth causes of action herein without regard to the differences in the factual allegations which support each cause of action.

Zweig contends that the revetment is located northerly, or upland, of the average line of beach grass that existed prior to Hurricane Irene and Superstorm Sandy, that "avulsion ... does not change title boundaries," and that, even if the Trustees could establish that they own the area to the line of beach grass, the Trustees would still lack jurisdiction over the construction of the revetment. In support of these contentions, Zweig submits the affidavits of two expert witnesses. In his affidavit, Michael J. Raynor (Raynor) swears that he is a New York State licensed land surveyor, and that his firm and its predecessor surveyed the Zweig property on several occasions beginning in the early 1990s. He states that he prepared a survey of the Zweig property dated November 25, 2013 which shows, among other things, the deeded boundary lines, the location of the proposed revetment, and the "setbacks from the proposed revetment to the average beach grass line." He indicates that he prepared said survey from surveys in his firm's "records" and from information supplied by Zweig's other expert, William Crawbuck. Raynor further swears that he determined the average beach grass line placed on the subject survey from the beach grass lines identified by Mr. Crawbuck on four "orthophotographs." He does not indicate how he calculated the "average" that he placed on the survey and that he refers to in his affidavit.

Raynor further swears that he relied on two surveys, one dated July 12, 2007 and the other dated May 30, 2013, "to determine the movement of the bottom of the bank of the dune (escarpment)" between said dates. Although he indicates that Zweig requested that he determine the extent of the loss of the dune on the Zweig property "from before Hurricane Irene in 2011 and Superstorm Sandy in October 2012," Raynor does not posit a specific opinion on that issue. Instead, Raynor indicates that said dune "moved landward 70± feet" between 2007 and December 7, 2012. He indicates that the latter date appears on the May 30, 2013 survey, but does not state, and said survey does not indicate, that any measurements or surveying was done on that earlier date.

The doctrine of avulsion involves the loss of land by the sudden or violent action of the elements perceptible while in progress (***Matter of City of Buffalo***, 206 NY 319 [1913]; ***Matter of Town of Hempstead [Point Lookout]***, 208 Misc 84, 144 NYS2d 440 [Sup Ct, Nassau County 1954], *affd in part* 2 AD2d 864, 156 NYS2d 219 [2d Dept 1956]). The title to land submerged by avulsion is not lost, and the boundaries between adjoining properties are not changed (***Matter of City of Buffalo***, *supra*; ***Matter of City of New York [West 10th St. Realty Corp.]***, 256 NY 222 [1931]; ***Matter of Town of Hempstead [Point Lookout]***, *supra*). Here, Zweig has failed to establish the amount, if any, of the perceived loss of dune on the Zweig property that occurred on or about the dates of the subject storms.

In any event, Zweig has not established that she is entitled to the benefit of the doctrine of avulsion as a matter of law. "Riparian rights do not constitute an independent estate. They are an incident to the estate in uplands abutting upon navigable waters" (***Matter of City of Buffalo***, *supra*). Generally, the doctrine of avulsion is applicable where the property is bounded by navigable waters and the owner enjoys riparian rights (*e.g.* ***Matter of City of New York [West 10th St. Realty Corp.]***, *supra* [property bound by Atlantic Ocean]; ***Matter of Town of Hempstead [Point Lookout]***, *supra* [property bound by Atlantic Ocean]; ***Trustees of Freeholders and Commonalty of Town of Southampton v Heilner***, 84 Misc 2d 318, 375 NYS2d 761 [Sup Ct, Suffolk County 1975] [defendant owned to high

water mark]). Here, Zweig's submission indicates that there is an issue of fact whether the Zweig property abuts the Atlantic Ocean, and raises the question whether the doctrine of avulsion is applicable under these circumstances.

In addition, Zweig has failed to establish the location of the average line of beach grass immediately before Hurricane Irene and/or Superstorm Sandy. Moreover, it appears that Zweig has replanted a line of beach grass pursuant to the DEC and municipal approvals without addressing the relevant issues should she be unsuccessful in establishing her right to benefit from the doctrine of avulsion. That is, what is the legal effect when a party "artificially" moves or creates a new line of beach grass by the planting of such a line, and said line is determined to be the boundary between adjoining properties.

In light of the issues of fact regarding the establishment of the boundary line between the subject parcels of real property, and the issues of fact as to the location of the line of beach grass should it be determined to be said boundary, Zweig has failed to establish her prima facie entitlement to summary judgment as to the Trustees' second, third and fifth causes of action. That is, Zweig has failed to establish her right to a declaratory judgment in her favor as to said causes of action. In a declaratory action, the rights of the parties must be determined and a "mere dismissal of the complaint is not an affirmative declaration of the parties' rights" (***Medical World Pub. Co. v Kaufman***, 29 AD2d 859, 859, 288 NYS2d 548, 548-49 [1st Dept 1968]; *see* ***Snyder v Voris, Martini & Moore, LLC***, 52 AD3d 811, 860 NYS2d 622 [2d Dept 2008]). Here, there are issues of fact which prevent the determination of the rights of the parties as a matter of law (*see e.g.* ***11 King Ctr. Corp. v City of Middletown***, 115 AD3d 785, 982 NYS2d 504 [2d Dept 2014]; ***Westchester Bldrs. Supply v City of Mount Vernon***, 104 AD2d 878, 480 NYS2d 249 [2d Dept 1984]). Finally, for the reasons set forth above, it is determined that Zweig has failed to establish her right to a declaratory judgment in her favor as to the Trustees' fourth cause of action. Accordingly, Zweig's motion for summary judgment is denied in its entirety.

Dated: April 6, 2017

Martha L. Luft
A.J.S.C.
HON. MARTHA L LUFT

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