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SHORT FORM ORDER

Index No: 027216 / 1996

SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : **05/19/04**
Adj. Date : **06/09/04**
Mot Seq # : **010 MOTD**
011 MOTD

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KINGS PARK YACHT CLUB, INC.,

DENNIS P. AHERN, ESQ.
Attorney for Plaintiff
One Main Street

STATE OF NEW YORK,

Defendant(s).

ELIOT SPITZER, ESQ.
Attorney General of the State of New York
Attorney for Defendant STATE OF NEW YORK
The Capitol
Albany, New York 12224

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Upon the following papers numbered 1 to — read on this motion by defendant and cross-motion by plaintiff for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 to 3 ; Notice of Cross Motion and supporting papers 4 to 5 ; Answering Affidavits and supporting papers 6 to 7 ; Replying Affidavits and supporting papers _____, Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#010) by defendant for summary judgment and the cross-motion (#011) by plaintiff for summary judgment and other alternative relief are decided as follows:

The within action was commenced by the plaintiff for declaratory and other relief quieting title in fee or by easement to land used by the plaintiff as a yacht club. Said action was commenced in 1996 by the plaintiff subsequent to the defendant's commencement a summary proceeding against the plaintiff in 1994 in the Fourth District Court of Suffolk County to recover possession of the disputed land. That action was thereafter removed to this court for determination by order dated March 28, 1997 (Berler, J.).

Plaintiffs claim of title to the subject property in fee is predicated upon the common law doctrine of adverse possession. Since plaintiffs claims do not include claims founded upon any written instrument, the common law elements of a claim of adverse possession and the requirements imposed by RPAPL §522 must be met. The defendant's claims of title to the disputed lands are predicated upon an October 1, 1895 deed executed by the Supervisor of Kings County pursuant to legislation enacted in May of 1895 ***(see,*** Laws 1895, Ch. 628). By such legislation and conveyance in writing, the defendant State of New York became the owner of the land and the institutions thereon known as the Kings County Lunatic Asylums located in Kings Park, New York and later known as the Kings Park Psychiatric Center. The defendant, State of New York, operated a

psychiatric hospital and other mental health facilities on the subject premises until 1997, when the Kings Park Psychiatric Hospital was closed by legislative fiat. Subsequent thereto, portions of the land originally conveyed to the State in 1895 were abandoned pursuant to Article 3 of the Public Lands Law and by special acts of the state legislature. Other portions of land, including a 155 acre tract, on which, the plaintiff yacht club sits, were transferred to state agencies, administratively, pursuant to Article 3, §(3)(4) of the Public Lands Law. According to the defendant's submissions, the land occupied by the plaintiff is now known as the Nissequogue State Park and is under the jurisdiction of the New York State Office of Parks, Recreation and Historic Preservation.

The land claimed by the plaintiff is bounded by the confluence of the two (2) canals cut from the Nissequogue River and plaintiffs claim includes use of the waterfront for the mooring and docking of boats. The plaintiff was incorporated in 1949 and its claim of continued use of the land at issue dates from the 1940's. Today, the land occupied by the plaintiff is improved with a large barge secured to the shoreline **and** a large access ramp thereto. Plaintiff also houses a generator in a wooden enclosure on the subject premises. Bulkhead, docks and/or wharfs, together with poles and other secured floats on the shore or in the waterways contiguous to the land, have been erected for use of access to the Nissequogue River by plaintiffs club members. A gate, erected in 1985, dissects the road used by plaintiffs club members to access its facilities. Utilities of the type described in Justice Berler's March 28, 1997 order are powered and/or provided from facilities erected by the State for its mental health hospital and supporting facilities.

The court first considers those portions of the plaintiffs cross-motion (#011) wherein it seeks summary judgment against the defendant on plaintiffs complaint and for dismissal of the defendant's summary proceeding to dispossess. The motion is predicated,. in large part, upon the plaintiffs unpleaded and newly asserted claim that the defendant, State of New York, is not now the owner of the disputed land nor the surrounding acreage because, under the terms of its 1895 deed and the legislation pursuant to which it was executed, the land conveyed to the State reverted to Kings County and/or the City of New York, in or about 1997, when the State of New York stopped using the land and the buildings as a state hospital for the insane. In support of the plaintiffs contentions, it cites Chapter 28 of the Laws of 1895 which state, in relevant part, that "The said deed shall be approved by the Attorney General **as** to its form and legal effect and "*shall provide* that the property convey shall be used solely *for* the purpose *of a* state hospital *for* the insane" (emphasis added). Plaintiff, while disputing that the 1895 deed conveying the land subject to the legislation of 1895 included the property to which plaintiff claims title by adverse possession, nevertheless relies thereon to support its claim of reverter due to the inclusion of the following language in the habendum clause of the deed: "...to have and to hold the above granted, bargained and described premises and persona property in the party of the second part, its successors and assigns forever solely ***for*** the use *of* a state hospital *for* the *insane*" (emphasis added).

The law is well settled that a plaintiff who moves for summary judgment on a claim or cause of action that is not pleaded will not generally succeed (***Cohen v City County of New York*** 283 NY 112, 27 NE2d 803; ***Gustavsson v County of Westchester,*** 264 NYS2d 408, 693 NYS2d 241). Nor **may** the plaintiff defend a motion for summary judgment on an unpleaded theory of liability (***Harrington v City of New York,*** 6 AD3d 662, 776 NYS2d 592; ***Carminati v Roman Catholic Dioceses of Rockville Centre, 6*** AD3d 481, 774 NYS2d 413; ***Gustavsson v County of Westchester, supra,*** and the cases cited therein). Here, the plaintiffs claim of reverter is not asserted in any pleading.

In any event, this court finds that the plaintiffs claim that the defendant State of New York is not the owner of the disputed acreage by reason of reverter is, as a matter of law, without merit. The granting clause of the 1895 deed conveys to the State an absolute fee as it contains no conditions or limitation. The expression of purpose and/or use contained in the *habendum* clause of the deed stands alone and, without more, does not create a condition giving rise to a reverter ***(Allen v Trustees of Great Neck Free Church,*** 240 AD 206, 269 *N Y S* 341, *and the cases cited therein).* Thus the non-continuance of the stated purpose, *to wit:* solely for use as a state hospital for the insane, will not defeat the estate in fee granted to the defendant State of New York under the 1895 deed ***(Allen v Trustees of Great Neck Free Church,*** *supra,* 240 *AD* 206, 269 *N Y S* 341, *and the cases cited therein).* Plaintiffs demands for summary judgment to the extent predicated upon its claim of the absence of title in the defendant by reason of a reverter are thus rejected as unmeritorious.

Nor did the plaintiffs submissions demonstrate plaintiffs entitlement to summary judgment based upon its claim that the 1895 deed does not establish that title to the disputed property did not pass to the State of New York under the 1895 deed. Plaintiff's reliance upon the affidavit of Michael Hildebrand, a surveyor, is unavailing as said affidavit fails to establish the plaintiffs claim of non-ownership by reason of non-inclusion of the subject acreage in the 1895 conveyance to the State. In any event, it is well settled that a party claiming title to land by adverse possession must establish the existence of each of the several factors applicable thereto by clear and convincing evidence and that such party may not rely on the absence of title in the adversary or any defect in the title of the adverse party (RPAPL 1519[3]; ***Best Renting Co. v City of New York,*** 248 ***NY*** 491, 162 **NE** 497; ***Town of North Hempstead v Bonner***, 77 AD2d 567, 429 NYS2d 739). Here, the plaintiffs cross-moving papers failed to establish each of the requisite common law and statutory elements of its claim of adverse possession, particularly, the common law elements of hostility under claim or right and the statutory requirements of a usual cultivation and improvement or protection by a substantial enclosure (RPAPL 522; ***Seisser v Elgin***, __AD3d__, 776 NYS2d 314; ***Rowland v Crystal Bay Construction, Inc.***, 301 AD2d 585, 754 NYS2d 53, *and the cases cited therein; **Weinstein Enterprises, Inc. v Cappelletti,*** 217 AD2d 616, 629 NYS2d 476).

Nor did the plaintiff's moving papers establish plaintiffs entitlement to summary judgment on its pleaded claims for a declaration that the plaintiff is the owner of a prescriptive or other easement over the disputed lands ***(Forsythe v Clauss,*** 242 AD2d 364, 661 NYS2d 1004; ***Glennon v Mayo***, 221 AD2d 504, 633 NYS2d 400; ***2239 Hylan Boulevard Corp. v Saccheri,*** 188 AD2d 524, 591 NYS2d 427).

Plaintiffs further application for an order striking the defendant's answer and for the imposition of monetary sanctions by reason of the defendant's purported failures to provide disclosure in accordance with schedules previously stipulated to is denied. The moving papers failed to establish that any default or defalcation on the part of the defendant State of New York was willful and contumacious or that the defendant State engaged in frivolous conduct within the contemplation of 22 NYCRR 130.1-1, *et seq.* What is apparent is that neither party has been diligent in prosecuting the claims and defenses asserted in this consolidated action which has been unduly protracted. Plaintiffs remaining demands for an order compelling the defendant to provide discovery in accordance with a schedule of discovery, which has long since expired, is denied.

Plaintiffs cross-motion for summary judgment (#011) is, thus, denied.

Left for consideration is the defendant's motion-in-chief (#010) wherein it demands summary judgment dismissing the plaintiffs complaint and awarding the defendant summary judgment on its petition in the summary proceeding to dispossess and an order setting this matter down for a hearing on damages. By its moving papers, the State established the following material facts, none of which were controverted by plaintiff.

By legislation enacted 1895 and by subsequent conveyance executed pursuant to such legislation, the State of New York became the owner in fee of a large tract of land in Smithtown, New York in 1895 on which it operated a state hospital for the insane. Running through the State's land are portions of the Nissequogue River and certain canals cut therefrom. On July 11, 1949, the plaintiff incorporated under the name of the Kings Park Boat Club, Inc. Prior thereto, the plaintiff commenced usage of certain acreage situated on the land bounded by the waterways of the Nissequogue River which had been conveyed to the defendant State under the 1895 conveyance.

The plaintiffs boat club initially occupied certain acreage of the State's land on or near a canal cut in 1896 from the Nissequogue River to service the state hospital. Plaintiff used the land for the mooring and usage of boats owned by its members and their recreational use of the waterfront. Said acreage was at or near the boat basin used by state hospital employees (see, affidavit of Alan M. Weinstock, Exhibits "E" and "F"). In or about May of 1962, state hospital officials granted the plaintiff "permission to move your float up to the point where the old canal joins the new one" *(see,* Exhibit "J" attached the affidavit of Alan M. Weinstock). The defendant's submissions further established that, pursuant to the permission granted by the defendant's hospital officers, the plaintiff did move its installation to the confluence of the two (2) canals in the summer of 1962 and has continued to occupy same since that date *(see,* Exhibit "K' attached to affidavit of Alan M. Weinstock and the deposition testimony of A. Newill). Plaintiffs claim that it occupied the land where its club facilities now sit since the 1940's is rejected as unmeritorious since the proof adduced on the instant motion by the defendant clearly established that the plaintiffs club moved to its present location in or about 1962.

The defendant's submissions included due proof that in 1966 the plaintiff purchased a barge from the Grumman Air Craft Company and floated it up the river to the location of its other floats where it anchored the barge to the shore for use by the members of its club (see, Affidavit of Alan M. Weinstock, Exhibit "U"). In 1971, the plaintiff sought and was granted permission by state hospital officials to permanently secure the barge with chains and by backfilling the land between the barge and the shore and to improve the barge with electricity and toilet facilities for use by club members (see, Affidavit of Alan M. Weinstock, Exhibits "V", "W" and "X"). In 1985, the plaintiff asked for and was granted permission from state hospital officials to put a gate up across the road leading to the property occupied by the plaintiff. In 1993, state hospital officials demanded that the plaintiff enter into a written lease agreement for its continued occupation of the state's land *(see,* Exhibit "B" of the state's petition).

The defendant's other submissions further established that by several writings officials of the plaintiffs yacht club acknowledged that the State was the owner of the land which the plaintiff occupied. Several certificates of insurance for the years May 1986-1987 and May of 1988 to May

of 1993, reflecting general liability insurance coverages which were issued on applications submitted by the plaintiffs officers, list the certificate holder as the Kings Park Psychiatric Center (see, Affirmation of Martin Rowley, Esq., dated May 5, 2004, Exhibits "L" and "M"). In a 1991 application for renewal of its liquor license, the plaintiff listed the State of New York as the owner of the premises on which the license was issued (see, Exhibit "N" of the affirmation by Martin Rowley, Esq.).

The defendant's submissions included proof that in 1955, the plaintiff purchased a parcel of land in the San Remo section of the Town of Smithtown, which is several miles east of the lands at issue in this action *(see,* Affidavit of Alan M. Weinstock, Exhibit "B"). In a 1966 letter signed by Arthur Newill, a long time member who served as commodore and in other official capacities at the plaintiffs club, and other officers of the plaintiffs club, the authors indicated that "the ultimate goal is to settle on our own property as soon as this becomes possible" (see, Affidavit of Alan M. Weinstock, Exhibit "U").

Upon the foregoing facts, the defendant claims that it is entitled to summary judgment dismissing the plaintiffs complaint because said facts establish that the plaintiffs claims of entitlement to the subject land by adverse possession are, as a matter of law, without merit. For the reason set forth below, this court grants defendant's motion to the extent hereinafter set forth.

As indicated above, the plaintiffs claims of title are predicated upon the doctrine of adverse possession and such claims are not dependent upon any written instrument. Accordingly, the plaintiff must show that the parcel was either usually cultivated or improved or protected by a substantial enclosure (RPAPL 522; ***Samter v Maggiore***, 309 AD2d 741, 765 NYS2d 256). In addition, the plaintiff must satisfy the common law requirements demonstrating, by clear and convincing evidence, that its possession of the disputed parcel was hostile, under claim of right, open and notorious, exclusive and continuous for the applicable statutory period' ***(Ray v Beacon Hudson Mtn Corp.,*** 88 NY2d 154, 643 NYS2d 939; ***Rowland v Crystal Bay Construction, Inc.,*** 301 AD2d 585, 754 NYS2d 53). Reduced to their essentials, the required common law elements of a claim of adverse possession means "nothing more than that there must be possession, in fact, of the type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" ***(Seisser v Elgin***, __AD3d__, 776 NYS2d 314, ***citing Brand v Prince,*** 35 NY2d 634, 364 NYS2d 826).

Adverse use or possession by a claimant cannot be established absent proof that such use or possession was hostile and made under a claim of right since the mere possession of land without any claim of right, no matter how long it may be continued, give no title (***Schoenfeld v Chapman, 280*** AD 464, 115 NYS2d 1; ***Rusy-Bohm Post 411, American Legion Hall of Islip v Islip Enterprises, Inc.***, 5 AD2d 774, 170 NYS2d 23; ***Meerhoff v Rouse,*** 4 AD2d 740, 163 NYS2d 746; ***Garrett v Holcomb,*** 215 AD2d 884, 627 NYS2d 113). While a presumption of hostility will arise from clear and convincing evidence of the actual, open notorious and exclusive possession and improvement of the

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[1] The prescriptive period for claims by those such as the plaintiff here, whose possession commenced prior to September 1, 1963, is fifteen (15) years *(West Center Congregational Church v. Efstathiou*, 215 AD2d 753, 627 NYS2d 727).

disputed property for the prescriptive period in a manner commensurate with a true owner's possession and improvement, the presumption disappears upon proof that the possession and use thereof by the claimant was subservient to the title of another ***(Barnes v Light,*** 116 NY 34, 22 NE 441).

The subservience of the claimant's possession to the title of another may be directly or inferentially established by evidence of the conduct of the claimant ***(Guariglia v Blima Homes, Inc.,*** 224 AD2d 388, 637 NYS2d 769, *aff'd* 89 NY2d 851, 652 NYS2d 731). A showing that the possessor expressly recognized title in another or disavowed title in himself or herself during the prescriptive period will defeat his or her claim for title by adverse possession ***(City of Tonawanda v Ellicott Creek Homeowners Assoc.***, 86 AD2d 118, 449 NYS2d 116). Evidence of such conduct on the part of a possessor after the prescriptive period has run, though not dispositive of a claim, is admissible to show claimant's intent at the time of entry and/or the character of his or her subsequent possession ***(Van Valkenburgh v Lutz***, 304 NY 95, 106 NE2d 28). Acknowledgment of title in another can be inferred from the possessor's conduct, such as his or her offer to purchase ***(Manhattan School of Music v Solow***, 175 AD2d 106, 571 NYS2d 958); or from his or her knowledge that title lies with another ***(Oistacher v Rosenblatt,*** 220 AD2d 493, 631 NYS2d 935); or from his or her act of requesting the owner's permission to use or possess the property any time during the prescriptive period ***(Stauffer Chemical Company v Constantini,*** 38 AD 863, 330 NYS2d 90; ***Campano v Scherer***, 49 AD2d 642, 370 NYS2d 237.)

In addition to showing the subservience of the claimant's possession by evidence of such claimant's own conduct, evidence that a possessor's use or possession of the disputed property was undertaken with the permission of the owner will also negate the element of hostility under claim of right and defeat the adverse possession claim ***(Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,*** 192 AD2d 501, 596 NYS2d 435; ***Colnes v Colligan,*** 183 AD2d 693, 583 NYS2d 281, and the cases cited therein). Permissive use may arise by implication from proof the original possessor entered the land without hostility under any claim of right because the relationship between such possessor and the true owner, was one of cooperation and neighborly accommodation ***(Bookchin v Maraconda,*** 162 AD2d 313, 557 NYS2d 46; ***Boumis v Caetano,*** 140 AD2d 401, 528 NYS2d 104; ***Susquehanna Realty Corp. v Barth,*** 108 AD2d 909, 485 NYS2d 795). Even where the initial entry was openly hostile under claim of right, the running of the prescriptive period is extinguished where the owner unilaterally extends to the adverse possessor permission to use and possess the occupied lands of the owner ***(Long Shore v Hoel Pond Landing, Inc.,*** 284 AD2d 815, 727 NYS2d 518; ***Avraham v Lake Shore Yacht & Country Club, Inc.***, 278 AD2d 842, 719 NYS2d 424; ***Bookchin v Maraconda,*** 162 AD2d 313, 557 NYS2d 46). Where possession or use is permissive, a claim of title by adverse possession will not accrue until a distinct assertion of a right hostile to the owner is asserted by the possessor ***(Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,*** 192 AD2d 501, 596 NYS2d 435, supra; and the cases cited therein; ***Bookchin v Maraconda,*** 162 AD2d 313, 557 NYS2d 46, supra; ***City of Tonawanda v Ellicott Creek Homeowners Assoc.,*** 86 AD2d 118, 449 NYS2d 116, ***supra).***

Here, the proof adduced by the defendant established, *prima facie*, its entitlement to summary judgment dismissing so much of the plaintiffs complaint that seeks a declaration that the plaintiff is the owner of the disputed acreage by reason of adverse possession ***(Rowland v Crystal Bay***

Construction, Inc., 301 AD2d 585, 754 NYS2d 53, supra). It is apparent from such proof, that the plaintiffs possession of the acreage it currently occupies, was not hostile to the State nor under a claim of right but, instead, was permissive as state hospital officials initially and throughout the period of the plaintiffs claimed adverse possession, granted the plaintiffs requests for use of the subject acreage ***(City of New York v Sarnelli Bros.,*** Inc., 280 AD2d 513, 720 NYS2d 555; ***Avraham v Lake Shore Yacht & Country Club, Inc.***, 278 AD2d 842, 719 NYS2d 424, supra; ***(Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,*** 192 AD2d 501, 596 NYS2d 435, *supra*). Moreover, the plaintiffs repeated acknowledgments that ownership in the subject property rested in the titled owner, the defendant State, defeats its claim of title by adverse possession ***(Guariglia v Blima Homes, Inc.***, 89 NY2d 851, 652 NYS2d 731; ***Stauffer Chemical Company v Constantini,*** 38 AD 863, 330 NYS2d 90, supra). The defendant's submissions also established that the plaintiff did not usually cultivate nor improve or protect by substantial enclosure, the land to which plaintiff now claims title by adverse possession (RPAPL 522, et. seq.; ***Weinstein Enterprises, Inc. v Cappelletti,*** 217 AD2d 616, 629 NYS2d 476, supra; ***City of Tonawanda v Ellicott Creek Homeowners Assoc.***, 86 AD2d 118, 449 NYS2d 116, supra).

The defendant's moving papers further established, prima *facie*, that, as a matter of law, plaintiffs claim of adverse possession against the defendant are without merit under the rule that lands held by a municipality in its public or governmental capacity may not be lost by adverse possession (***City of New York v Sarnelli Bros.,*** Inc., 280 AD2d 513, 720 NYS2d 555, *supra*; ***Starner Tree Service Company, Inc. v City of New Rochelle,*** 271 AD2d 681, 707 NYS2d 867). The proof adduced by the defendant State clearly established that the disputed acreage was held by the defendant in its public or governmental capacity ***(West Center Congregational Church v. Efstathiou,*** 215 AD2d 753, 627 NYS2d 727; ***Litwin v Huntington***, 208 AD2d 905, 617 NYS2d 888, *cf.*; ***Walsh's, Inc. v County of Oswego,*** 9 AD2d 393, 194 NYS2d 149, and the cases cited therein).

The defendant's moving papers also established, *prima facie*, that the plaintiffs claims to an easement by prescription, implication or otherwise are without merit (***DiLeo v Pecksto Holding Corp.,*** 304 NY 505, 109 NE2d 600; ***Casey v Bazan***, 253 AD2d 838, 678 NYS2d 371; ***Forsythe v Clauss,*** 242 AD2d 364, 661 NYS2d 1004, supra; ***2239 Hylan Boulevard Corp. v Saccheri,*** 188 AD2d 524, 591 NYS2d 427; ***Boumis v Caetano,*** 140 AD2d 401, 528 NYS2d 104, supra; ***City of Tonawanda v Ellicott Creek Homeowners Assoc.***, 86 AD2d 118, 449 NYS2d 116, supra).

Finally, the defendant's moving papers established that the plaintiffs claims for money damages are not properly interposed in this Supreme Court action, as the State may not be held liable in damages except in an action duly commenced in the Court of Claims.

Plaintiff opposes the defendant's motion on several grounds. Plaintiff first contends that this court's determination of the defendant's motion is precluded by the "law of the case" doctrine. Plaintiffs contentions are predicated upon the denial of the defendant's prior motion for dismissal of plaintiffs complaint in the March 28, 1997 by short form order by Justice Berler. Plaintiffs contentions are, however, without merit. It is well established that the doctrine of "law of the case" applies only to legal determinations that were necessarily resolved on the merits in a prior decision of the court or a court of coordinate jurisdiction ***(Gay v Farella***, 5 AD3d 540, 772 NYS2d 871, and

the cases cited therein). Review of Justice Berler's March 28, 1997 decision reveals, however, that the same did not address the merits of the defendant's claims and, thus, defendant's claims were not "necessarily resolved" ***(Baldasano v Bank of New York,*** 199 AD2d 184, 605 NYS2d 293).

Plaintiff next argues that the doctrine of collateral estoppel warrants a denial of the defendant's motion for summary judgment since the Appellate Term, in a decision dated July 7, 1995, issued in this action rejected the defendant's claim that, as a matter of law, the plaintiff may not assert an adverse possession claim against the State. The plaintiffs reliance upon the doctrine of collateral estoppel is, however, misplaced. The doctrine of collateral estoppel precludes a **party** from re-litigating *in a subsequent action* ***or*** *proceeding* an issue clearly raised in a *prior action* ***or*** *proceeding* and decided against that party or those in privity (***O'Gorman v Journal News Westchester,*** 2 AD3d 815, 770 NYS2d 121, *and the cases cited therein).* The doctrine of collateral estoppel thus has no application to the prior order rendered in this action and relied upon by the plaintiff. In any event, the Appellate Term merely found that the defendant was not entitled to the dismissal of the plaintiffs complaint pursuant to CPLR 3211 because issues of fact were not eliminated with respect to whether the defendant held the land at issue herein in its proprietary or governmental capacity. Such a finding does not preclude re-consideration of the issue based upon additional evidence such as that adduced here by the defendant ***(Gay v Farella,*** 5 AD3d 540, 772 NYS2d 871, *supra;* ***Baldasano v Bank of New York,*** 199 AD2d 184, 605 NYS2d 293, *supra).*

Plaintiff next argues that the State's sale of various acres of the land conveyed to the State for use as the Kings Park Psychiatric Hospital in 1895 demonstrates that the State held the land occupied by the plaintiff in a proprietary capacity rather than a governmental capacity which warrants a finding that plaintiffs claims of adverse possession are viable and thus determinable by the trier of fact. The court finds otherwise, however, since the defendant's proof demonstrated, *prima facie,* that none of the lands occupied by the plaintiff were held by the defendant State in anything but a governmental capacity. None of the plaintiffs submissions established by proof in admissible form that genuine questions of fact exist with respect to the issue of whether the defendant's held its title to the acreage at issue in a proprietary capacity. In any event, the plaintiffs submissions failed to controvert the defendant's *prima facie* showing that the plaintiff's common law claims of title by adverse possession are without merit since plaintiffs occupation of the subject acreage was neither hostile nor under a claim of right for the requisite prescriptive period.

Plaintiff further argues that the defendant State's motion-in-chief must be denied because the defendant failed to adduce any proof of the plaintiffs permissive use of the Nissequogue River or that the State acquired title to the Nissequogue River and/or the lands beneath same, which the plaintiff has been purportedly using, continuously, since its arrival on the land contiguous thereto. Plaintiff arguments are, however, rejected inasmuch as New York State succeeded to all of the rights of the British Crown and Parliament in lands under tidal waters and the owner of land bounded by tidal waterways has no private title to or right in the shore (***Shively v Bowlby***, 152 **US** 1, 14 Sct 548; ***Phillips Petroleum Co. v Mississippi,*** 484 US 469, 108 Sct 791). Here, the plaintiff is not the owner of any land bounded by the Nissequogue River, its canals or subsidiary waterways. It, thus, has no riparian rights nor any viable claim to an easement by prescription nor any actionable claim of title by adverse possession to the Nissequogue River or the canals cut therefrom by the State for the purpose of accessing the state hospital facilities *(see,* ***Romeo v Sherry***, 308 FSupp 128, *and the cases cited therein).*

Plaintiffs further contentions that questions of fact exist regarding the state's ownership of the subject land pursuant to the 1895 conveyance and/or the recent administrative transfers are rejected as unmeritorious. The affidavits of plaintiffs experts are vague and conclusory and are insufficient to demonstrate that material questions of fact exist on the issue of the state's entitlement to the summary judgment requested by it. Moreover, the plaintiff may not succeed on its claims by demonstrating the absence of title to the defendant or some defect in the title of the defendant state ***(BestRenting Co. v City of New York***, 248 ***NY*** 491,162 NE 497, *supra; **Town of North Hempstead v Bonner,*** 77 AD2d 567,429 NYS2d 739, *supra).*

In sum, the submissions of the plaintiff failed to demonstrate that genuine questions of fact exist which preclude the granting of the defendant's demand for summary judgment dismissing the plaintiffs complaint and for partial summary judgment on its petition to dispossess the plaintiff from the defendant's land.

In view of the foregoing, the defendant's motion (#010) for summary judgment dismissing the plaintiffs complaint is granted to the extent that plaintiffs demands for money damages from the defendant State are dismissed and the court declares that the plaintiff is without title to the subject land by adverse possession or otherwise and that the plaintiff is not the owner of any easement entitling the plaintiff to the continued use of said land. Defendant's further application for summary judgment on its petition to dispossess the plaintiff is granted to the extent that the plaintiff must vacate the premises not later than September 30,2004. Defendant's further application for summary judgment on its demand to recover monies by reason of the plaintiffs use and occupancy of the premises is granted only to the extent that partial summary judgment on the issue of the plaintiffs liability for the use and occupancy of the subject land is hereby granted. The amount of damages recoverable by the defendant from the plaintiff, if any, must be determined at a trial on the issue of such damages, which trial shall take place subsequent to the filing of a note of issue by the defendant pursuant to the issuance of a further order of this court certifying this action ready for the trial on the defendant's damages.

Dated: July 21 **,2004.**

EDWARD D. BURKE, A.J.S.C.