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SHORT FORM ORDER

INDEX No. 11-2825

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-26-11
ADJ. DATE 11-3-11
Mot. Seq. # 003 - MG; CASEDISP

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THOMAS CANGEMI and JODI CANGEMI, MARIANN COLEMAN, FRANCIS J. DEVITO and LYNN R. DEVITO, LEON KIRCIK and ELIZABETH KIRCIK, CAROL C. LANG and TERRY S. BIENSTOCK, DANIEL LIVINGSTON and VICTORIA LIVINGSTON, PAMELA PETERSON, ROBIN RACANELLI, JAMES E. RITTERHOFF and GALE H. RITTERHOFF, JOHN TOMITZ, JOSEPH VON ZWEHL, and THELMA WEINBERG, TRUSTEE OF THE THELMA WEINBERG REVOCABLE LIVING TRUST,

Plaintiffs,

- against -

TOWN OF EAST HAMPTON, COUNTY OF SUFFOLK, STATE OF NEW YORK, JOE MARTENS, Acting Commissioner of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and RUTH NOEMI COLON, Acting Commissioner of the NEW YORK STATE DEPARTMENT OF STATE,

Defendants.

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Upon the following papers numbered 1 to 21 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 16 - 17 ; Replying Affidavits and supporting papers 18 - 19 ; Other 20 - 21 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Town of East Hampton for dismissal of the amended complaint is granted, and although no cross motions on behalf of the other defendants have been filed, the court, on its own motion, *sua sponte*, hereby dismisses the complaint as against all defendants.

Plaintiffs commenced this action to recover damages and obtain injunctive relief alleging that the actions as well as inaction of defendants deprived them of property rights and caused severe erosion to their properties. Plaintiffs are owners of properties located on Soundview Drive and Captain Kidd's Path fronting Block Island Sound in the Hamlet of Montauk, Town of East Hampton, New York. The properties are located west of two jetties, each extending from one side of the mouth of Lake Montauk Harbor out into Block Island Sound.

A Federal navigation project at Lake Montauk Harbor was authorized by the River and Harbor Act of March 1945. The May 1995 report of the Shallow Draft Navigation Study for Lake Montauk Harbor by the United States Army Corps of Engineers (Corps of Engineers), New York District, indicates that the existing project provides for the repair and shoreward extensions of the two jetties.

Plaintiffs allege that the jetties have been owned by defendant Town of East Hampton (Town) since 1941. According to plaintiffs, the Town's ownership and granting of a permanent easement to the Federal government in 1943, were required preconditions for obtaining approval of a project initiated and promoted by the Town for the restoration, enlargement and extension of the jetties by the Corps of Engineers to benefit the Town's favored private commercial interests. The jetties were extended by the Corps of Engineers from their original lengths of 700 feet for the west jetty and 750 feet for the east jetty to their present lengths of 981 feet for the west jetty and 1100 feet for the east jetty, and the height of the jetties was raised to a uniform design height of eight feet above mean low water.

Plaintiffs also allege that the jetties, as reconstructed and presently maintained, form a littoral barrier that interrupts the natural east to west littoral movement of sand along the beaches in the vicinity of the jetties. According to plaintiffs, this littoral barrier has caused beaches to the east of the jetties to retain sand and expand while the beaches to the west of the jetties, including plaintiffs' properties and adjacent public beaches, have undergone chronic scouring and catastrophic receding of the shoreline. Plaintiffs claim to have lost substantial portions of the upland areas of their properties and the value, use, possession and enjoyment of those areas. Plaintiffs further allege that defendants have failed, neglected and refused to take any effective action to remedy and abate the ongoing threat of imminent total loss and destruction of their homes and properties caused by the jetties, and that the damage reached a crisis point during the "nor'easter" storm of December 26, 2010.

By their amended complaint, plaintiffs allege causes of action for private and public nuisance, appropriation of resource and interference with property, trespass of waters onto plaintiffs' properties, and conversion of and unjust enrichment by, sand that rightfully belonged to plaintiffs with the natural littoral drift. In addition, plaintiffs allege denial of due process and equal protection by delaying or denying timely processing of permits for construction of structures to protect their properties from damage in violation of the Fourteenth Amendment of the United States Constitution, and taking of upland property without just compensation in violation of the Fifth Amendment of the United States Constitution and Article 1, section 7 of the New York State Constitution. They also seek mandatory injunctions requiring defendants to proceed with all necessary actions to abate, mitigate and permanently remedy and prevent the further destructive impact of the jetties on their properties and the public beaches.

The Town now moves for dismissal of the complaint as against it pursuant to CPLR 3211 (a) (1), (5), (7), and (10) and pursuant to CPLR 1001 (a). The Town argues that the complaint must be dismissed for failure to join the Corps of Engineers as a necessary party inasmuch as it, rather than the Town, operates, maintains and controls the subject area and the jetties. The Town emphasizes that plaintiffs fail to allege that the Town had any role in repairing, maintaining or extending the jetties; that it has no authority or involvement in the maintenance or control of the jetties pursuant to federal statute; and that the Federal government has maintained exclusive control over the jetties pursuant to Federal statutory authority since at least the 1940's. In addition, the Town asserts that plaintiffs' claims are barred by the one-year-and-90-day statute of limitations of General Municipal Law § 50-i for state law claims and the three year statute of limitations for Federal claims. With respect to the causes of action alleging public and private nuisance, appropriation of resource, conversion and trespass and taking, the Town asserts that they must be dismissed as plaintiffs do not have any property rights to accretions of sand to the east that never accumulated on their properties to the west of the jetties.

In opposition to the motion, plaintiffs contend that the Corps of Engineers is not a necessary party inasmuch as the injunctive and monetary relief sought by plaintiffs is available through judgment against the Town and other defendants and will not affect any protected interests of the Corps of Engineers or the Federal government, and the Town may implead the Corps of Engineers as a third-party defendant. Plaintiffs also contend that their claims are timely, that the Town's statute of limitations defense is barred by the doctrine of equitable estoppel, and that the Town does not have a laches defense.

In reply, the Town argues that the Corps of Engineers is indispensable inasmuch as plaintiffs' direct claims are against the Corp of Engineers, which maintains, constructs and operates the jetties, and are merely indemnification claims based on old hold harmless agreements as against the Town. In addition, the Town argues that plaintiff's equitable claims seriously impact the rights of the Federal government which has exclusive control over the jetties, and contrary to plaintiffs' assertions, the Corps of Engineers cannot be impleaded into this state court action. Among the town's other arguments are that the continuing violation doctrine is inapplicable inasmuch as plaintiffs concede that their damages flow from discrete storm events that caused independent avulsive losses of property.

A motion to dismiss a cause of action pursuant to CPLR 3211(a) (7) should not be granted "'if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law'" (***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 200, 887 NYS2d 145 [2d Dept 2009], quoting ***Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP***, 38 AD3d 34, 38, 827 NYS2d 231[2d Dept 2006]; *see* ***Dana v Shopping Time Corp.***, 76 AD3d 992, 993-994, 908 NYS2d 114 [2d Dept 2010]).

Here, a review of plaintiffs' amended complaint reveals that they have stated causes of action for continuing public and private nuisance (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 568-569, 394 NYS2d 169 [1977]; ***Incorporated Vil. of Asharoken v Long Is. Lighting Co.***, 57 AD3d 735, 736, 869 NYS2d 590 [2d Dept 2008]). The alleged acts of continuous nuisance give rise to successive causes of action under the continuous wrong doctrine (*see* ***Lucchesi v Perfetto***, 72 AD3d 909, 912, 899 NYS2d 341 [2d Dept 2010]). Plaintiffs have stated an equitable claim based on continuing nuisance "for

which a cause of action accrues anew each day" (***Rapf v Suffolk County of New York***, 755 F2d 282, 292 [2d Cir 1985]; *see* ***Stanton v Town of Southold***, 266 AD2d 277, 278, 698 NYS2d 258 [2d Dept 1999]; ***Kennedy v U.S.***, 643 F Supp 1072 [ED NY 1986]; ***Sova v Glasier***, 192 AD2d 1069, 596 NYS2d 228 [4th Dept 1993]; ***State of New York v Schenectady Chems.***, 103 AD2d 33, 479 NYS2d 1010 [3d Dept 1984]; *compare* ***Lockman v Town of Southold***, 108 AD2d 900, 485 NYS2d 784 [2d Dept 1985]). Only those acts of nuisance alleged to have occurred more than three years before the action was commenced would be time-barred (*see* ***Lucchesi v Perfetto***, *supra*).

A CPLR 3211 (a) (1) motion to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see* ***Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.***, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]). The May 1995 report of the Shallow Draft Navigation Study for Lake Montauk Harbor by the Corp of Engineers submitted by the Town and referred to by plaintiffs in their amended complaint clearly indicates that the Corps of Engineers is responsible pursuant to the Federal navigation project for the repair and shoreward extension of the subject jetties.

A party may move for dismissal on the ground that the court should not proceed in the absence of a person who should be a party (CPLR 3211 [a], [10]). CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The failure to join a necessary party under CPLR 1001 is a ground for dismissal of an action without prejudice pursuant to CPLR 1003 (*see* 1003).

Here, the entity that performed the repairs and extensions of the jetties pursuant to the Federal navigation project and would be involved in mitigation measures, the Corps of Engineers, is not a party to this action. To the extent that plaintiffs are arguing that the jetties have caused their damages, the Corp of Engineers is a necessary party to this action, and complete relief cannot be obtained amongst the current parties absent its joinder (*see generally* ***Incorporated Vil. of Atlantic Beach v Pebble Cove Homeowners' Assn.***, 139 AD2d 627, 527 NYS2d 429 [1988]). Also, contrary to plaintiffs' contentions, the Corps of Engineers cannot be impleaded. The United States and its agencies cannot be impleaded as third-party defendants in state court tort actions (***Keene Corp v United States***, 700 F 2d 836, 843 n 10 [2d Cir1983]; ***Harris v G.C. Servs. Corp.***, 651 F Supp 1417, 1418 [SD NY 1987]; *see* ***Singleton v Elrac, Inc.***, US Dist Ct, SD NY, 03 Civ 4979, Keenan, J., 2004; ***Matter of Schmoll, Inc. v Federal Reserve Bank of N.Y.***, 286 NY 503 [1941], *cert den* 315 US 818, 62 S Ct 905 [1942]). In such an event, this Court would not have jurisdiction over the Corps of Engineers (*see* ***Singleton v Elrac, Inc.***, *supra*).

Moreover, pursuant to the Federal Tort Claims Act ("FTCA"), 28 USC § 1346 (b), "[T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (*see* 28 USC § 1346 [b], [1]; *see*

also ***Reichhart v U.S.***, 408 Fed Appx 441 [2d Cir 2011]; ***Ireland v Suffolk County of New York***, 242 F Supp 2d 178 [ED NY 2003]; ***Devito v U.S.***, 12 F Supp 2d 269 [ED NY 1998]; ***Kennedy v U.S.***, *supra*). Therefore, dismissal of the action is warranted based upon plaintiffs' failure to join a necessary party to the action (*see* CPLR 1001 [a]; CPLR 3211 [a], [10]; ***Riback v Margulis***, 43 AD3d 1023, 842 NYS2d 54 [2d Dept 2007]).

Accordingly, the motion by the Town is granted and the complaint is dismissed in its entirety. By extension, since all co-defendants are similarly situated, the complaint is also dismissed as to them.

Dated: February 17, 2012

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION