

**North Oyster Bay Baymen's Assoc. v Town of
Oyster Bay**

2013 NY Slip Op 31120(U)

January 17, 2013

Supreme Court, Nassau County

Docket Number: 009210/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

NORTH OYSTER BAY BAYMEN'S
ASSOCIATION, WILLIAM E. FETZER III,
CRAIG ODDO, WILLIAM B. PAINTER,
FREDERICK MENGES and JAMES J.
SCHULTZ,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 009210/11

MOTION DATE: Nov. 16, 2012
Motion Sequence # 001,002

Plaintiffs,

-against-

THE TOWN OF OYSTER BAY, FRANK M.
FLOWER & SONS, INC. and STATE OF
NEW YORK,

Defendants.

The following papers read on this motion:

- Notice of Motion..... XX
- Supplemental Affidavit in Opposition..... X
- Affidavit in Support..... X
- Affirmation in Further Support..... X
- Supplemental Affirmation/Affidavit in Support..... X
- Supplemental Affirmation in Further Support..... X
- Reply Affirmation..... X
- Supplemental Reply Affirmation in Further Support.... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

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Motion by defendant Frank M. Flowers & Sons, Inc. to dismiss the complaint is **granted** in part and **denied** in part. Motion by defendant Town of Oyster Bay to dismiss the complaint is **granted** in part and **denied** in part.

This is a proceeding challenging certain long term leases of underwater lands granted by the Town of Oyster Bay. Plaintiffs argue that the underwater leases are invalid under the State Environmental Quality Review Act and the Town's own regulations.

Pursuant to § 196-23 of the Town' Shellfish and Marine Life Ordinance, the Town may lease underwater lands owned by the Town and grant the lessee the exclusive right to harvest shellfish on the demised property. The term of such leases may not exceed 30 years. The letting of underwater lands owned by the Town shall be at public auction and to the highest qualified bidder pursuant to § 103 of the General Municipal Law. However, underwater land shall not be leased where there is "an indicated presence of shellfish in sufficient quantity and quality...as to support significant hand raking and/or tonging and harvesting."

Plaintiff North Oyster Bay Baymen's Association, Inc. is a trade association of diggers of hard clams in the waters around the Town of Oyster Bay. Plaintiffs William Fetzner, Craig Odo, William Painter, Frederick Menges, and James Schultz are hard clam diggers and possess permits issued by the Town. Defendant Frank M. Flowers & Sons, Inc. holds several underwater leases issued by the Town. The leases were renewed for a 30 year term on September 13, 1994.

Plaintiffs commenced a similar action seeking to void Flowers' leases in 1991 (North Oyster Bay Bayman's Ass'n v Oyster Bay, Index No. 10957/91). That action was discontinued on November 18, 1994 pursuant to a stipulation of settlement. According to plaintiffs, the stipulation required the Town to prepare a new map of leased shellfish land, showing an accurate depiction of the shoreline and straightened exterior lines.

This action was commenced on June 22, 2011. Plaintiffs seek a declaratory judgment that the underwater leases granted to Frank M. Flowers were illegally renewed because there is an indicated presence of shellfish to support hand raking or tonging. In the second cause of action, plaintiff seeks a preliminary injunction prohibiting defendant Flowers from employing any scrapes, suction dredges or other mechanical devices for the taking of shellfish pending compliance with the State Environmental Quality Review Act and the issuance of a permit by the Army Corp of Engineers. In the third cause of action, plaintiffs

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seek a declaration that the underwater leases held by Flowers are void due to material indefiniteness and mutual mistake. In the fourth cause of action, plaintiffs seek a declaratory judgment that the underwater lands belong to the State of New York. In the fifth cause of action, plaintiffs seek a preliminary injunction restraining the Town from hiring a surveyor to prepare a new map of the underwater lands, pending preparation of an environmental impact statement. In the sixth cause of action, plaintiffs seek a declaration that certain underwater leases assigned to Flowers by Pine Island Oyster Farm, Inc. are null and void. In the seventh cause of action, plaintiffs seek a declaration that the 30 year lease extension granted to Flowers on September 13, 1994 is illegal and void. In the eighth cause of action, plaintiffs seek an award of damages pursuant to § 340(5) of the General Business Law. In the ninth cause of action, plaintiffs seek access to certain records requested by plaintiff Painter pursuant to the Freedom of Information Law.

Defendant Frank M. Flowers moves to dismiss the complaint based upon res judicata, lack of standing, ripeness, laches, and statute of limitations. Defendant Town of Oyster Bay moves to dismiss the complaint for lack of standing, lack of capacity to sue, res judicata, failure to state a cause of action, laches, and statute of limitations.

Plaintiffs have styled their action as one for a declaratory judgment. However, as defendant Flowers notes, plaintiffs should have brought their action in the form of an Article 78 proceeding challenging the Town's action of granting renewal leases to Flowers for a term of 30 years. Accordingly, pursuant to CPLR 103(c), the court converts the action into an Article 78 proceeding. Plaintiffs shall hereafter be referred to as "petitioners," and defendants shall be referred to as "respondents." All subsequent papers filed in this action shall bear an appropriate caption reflecting that it is an Article 78 proceeding.

A person who can prove that he uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act, ECL 8-0101 et seq, to challenge government actions that threaten that resource (*Save the Pine Bush, Inc. v Common Council*, 13 NY3d 297 [2009]). The Environmental Conservation Law regulates the taking of clams (Environmental Conservation Law § 13-0309, 13-0311). As diggers of hard clams, petitioners use and enjoy this natural resource more than most other members of the public. Thus, petitioners have standing to bring the action to the extent that it is predicated on the Environmental Conservation Law and the Town's own regulations. However, because petitioners are not parties to the leases assigned by Pine Island, they do not have standing to challenge the assignments. Respondents' motion to dismiss the petition for lack of standing is **granted** as to the sixth cause of action and otherwise **denied**.

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Under the Town's own regulations, an underwater lease shall not be granted where there is "an indicated presence of shellfish in sufficient quantity and quality...as to support significant hand raking and/or tonging and harvesting." Presumably, there were insufficient shellfish to permit hand raking or tonging in 1994, when the renewal leases were executed. Nevertheless, because marine and environmental conditions change, during the lease term there may come a time when there are sufficient shellfish to permit hand raking or tonging. On the present motion to dismiss, the court must assume that there were sufficient shellfish to permit hand raking or tonging, within four months of the commencement of the proceeding. Thus, petitioners have stated a claim that the leases were invalid under the Town's own regulations. Additionally, on this motion to dismiss, the court must assume that Flowers' mechanical method of harvesting violated ECL § 13-0309, or is otherwise worse in terms of environmental conservation, than petitioners' method of digging clams. Thus, petitioners have stated a claim that the leases were invalid under the Environmental Conservation Law.

Accordingly, respondents' motion to dismiss the petition for failure to state a cause of action is **granted** as to the third, fourth, and fifth causes of action, which seek relief not available in an Article 78 proceeding. Respondents' motion to dismiss the petition for failure to state a cause of action is **denied** as to the first, second, and seventh causes of action. With respect to the second cause of action, petitioner may apply for a preliminary injunction by motion on proper notice to the extent that supplemental relief is necessary in this Article 78 proceeding (*Nassau Roofing & Sheet Metal v Facilities Dev Corp*, 70 AD2d 1021 [3d Dept 1979]).

General Business Law § 340 prohibits contracts or agreements for monopoly or in restraint of trade. Because there is no immunity for state action under General Business Law § 340, a municipality may be liable for a § 340 violation (*Electrical Inspectors, Inc. v Lynbrook*, 293 AD2d 537 [2d Dept 2002]). Relief is by way of an Article 78 petition, and petitioner must establish that there is no reasonable basis to support the municipality's decision to grant an exclusive franchise (Id). Nevertheless, on the present motion to dismiss, the court must assume that the Town's decision to grant Flowers an exclusive lease was irrational. Respondents' motion to dismiss the petition for failure to state a cause of action is **denied** as to the eighth cause of action.

Under § 87 of the Public Officers Law, petitioners may obtain access to agency records. On the present motion, the court must assume that the Town has denied petitioner Painter access to records relevant to clam harvesting in Oyster Bay, and petitioner has

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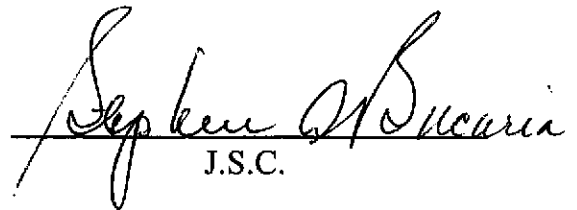
pursued available administrative remedies. Respondents' motion to dismiss the petition for failure to state a cause of action is **denied** as to the ninth cause of action.

Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*Landau v LaRossa, Mitchell*, 11 NY3d 8, 12 [2008]). As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction are barred, even if based upon different theories or if seeking a different remedy. Respondents argue that the 1994 discontinuance is a bar to the present action. Nevertheless, the 1994 settlement and stipulation of discontinuance were of necessity based upon marine conditions as they existed at that time. Accordingly, respondents' motion to dismiss the petition based upon res judicata is **denied**.

The statute of limitations on an Article 78 proceeding is four months (*Niagara Frontier v Love Canal*, 179 AD2d 261 [4th Dept 1992]). As noted above, petitioners may challenge the underwater leases based upon marine conditions prevailing within four months of the commencement of this proceeding. Respondents' motion to dismiss the petition based upon the statute of limitations is **denied**.

A Preliminary Conference has been scheduled for March 8, 2013 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JAN 17 2013


J.S.C.

ENTERED

JAN 23 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE