People v Om
2013 NY Slip Op 33556(U)
December 23, 2013
City Court, Westchester County
Docket Number: 13-243
Judge: Joseph L. Latwin

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
No. 13-243

SONNY OM,

Defendant.

Appearances:
The People by *Janet DiFiore, District Attorney (Valerie A. Livingston, Assistant District Attorney)*
Defendant by *Agnes H. Fidelibus, Esq., Rye Brook, NY*

The defendant is charged by a misdemeanor information with Trespass in the Third degree, PL § 140.10(a) and Disorderly Conduct PL 240.20(7). Defendant now moves to dismiss each charge as facially insufficient pursuant to CPL Art. 170.

An information is facially sufficient when it substantially conforms to the requirements of CPL § 100.15 and the factual allegations provide reasonable cause to believe that the defendant committed the offense charged. CPL § 100.40(1)(a) & (b). The informations here satisfy CPL § 100.15(1) since they: specify the name of the court and the title of the action; are subscribed and verified by the complainant; & contain an accusatory part and a factual part. CPL § 100.15(1). We are left to decide if the factual allegations, if true, establish every element of the offense charged. CPL § 100.40 (1)(c). In reviewing the informations, the Court must consider the facts viewed in the light most favorable to the People. *People v. Barona*, 19 Misc3d 1122, 862 NYS2d 816 [New York County Crim Ct 2008]

The basis for the charges stem from the allegation that defendant

climbed a fence on the pier at Playland Park and, in response to a dare [1], jumped into the water, to wit, Long Island Sound.

Penal Law § 140.10(a) says "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders . . .

A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. Penal Law § 140.00(5). Here, the defendant is alleged to have entered the waters of Long Island Sound. Who owns Long Island Sound?

This case does not involve entering or remaining in a building, but

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[1] The People refer to this incident as a "double dog dare." There is apparently a protocol and etiquette in making dares. This protocol was enshrined in the movie, "A Christmas Story" based on Jean Shepherd's "In God we trust, all others pay cash" with the following colloquy:

Flick: Are you kidding? Stick my tongue to that stupid pole? That's dumb!

Schwartz: That's 'cause you know it'll stick!

Flick: You're full of it!

Schwartz: Oh yeah?

Flick: Yeah!

Schwartz: Well I double-DOG-dare ya!

Ralphie as Adult: [narrating] NOW it was serious. A double-dog-dare. What else was there but a "triple dare you"? And then, the coup de grace of all dares, the sinister triple-dog-dare.

Schwartz: I TRIPLE-dog-dare ya!

Ralphie as Adult: [narrating] Schwartz created a slight breach of etiquette by skipping the triple dare and going right for the throat!

rather going from a pier (Navigation Law § 2(22)) into the water. Navigation Law § 2(4) says "Navigable waters of the state" shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties." Tidal salt waters are deemed navigable as a matter of law. *Town of Brookhaven v. Smith*, 98 AD 212, 90 NYS 646 [2nd Dept 1904], *rev'd on other grounds*, 188 NY 74 [1907].

The waters off the pier at Playland are salt waters within the State of New York. They are navigable in fact and by usage as vessels enter the area to dock and are water-taxied to the pier by the restaurant operated at the foot of the pier.

There is no allegation that these waters of Long Island Sound are privately owned. Before July 4, 1776, title to all lands under tidal and navigable waters not duly granted, belonged to the King. Title could only be divested by royal grant or charter directly by the King, by special act or charter from the royal governor or by prescription. On March 24, 1664, King Charles II granted to the Duke of York all of New Netherlands including Long Island from the Delaware River to Cape Cod. After July 4, 1776, the State of New York succeeded to the title of the King. Thus, land outshore of the high water mark vested in the State. *See generally*, J. Pedowitz, Real Estate Titles 537 (1984). The title held in the King's individual capacity were capable of private ownership, but title held by the King for his subjects – *jus publicum* – was transferred to the State and surrendered to the United States upon adoption of the Constitution. *Town of Brookhaven v. Smith*, 188 NY 74 [1907]. The owner of the adjacent upland owns only to the mean high water mark. *Shively v. Bowlby*, 152 US 1, 14 SCt 548 [1894].

The foreshore of navigable waters is the "land under the waters of the sea and its arms, between high and low water mark". The foreshore is subject to the right of the public ('*jus publicum*'), of which defendant is a member, to use it for fishing, bathing, boating and other lawful purposes and, when the tide is out, the right of the public of access to the water for fishing, bathing, boating and other lawful purposes, to which the right of access over the beach may be a necessary incident. *Tiffany v. Town of Oyster Bay,* 234 NY 15, 20 [1922].

Thus, defendant as a member of the public, had a right to enter Long Island Sound and traverse the adjoining shoreline up to the mean high water mark without committing a trespass. Having such a right, defendant's entry into Long

Island Sound could not be a trespass. Defendant did not enter or remain in Long Island Sound unlawfully. Long Island Sound is not fenced or otherwise enclosed in a manner designed to exclude intruders. The fence on the pier appears to be more of a safety feature to prevent accidental falls into the water than a means of excluding people from the water. Indeed, the pier has a ramp leading to a float from which people may return to their vessels by water taxi. If the fence's purpose was to keep people out of Long Island Sound, there would be no ramp or float. Of course, the fence on the pier does not enclose all of Long Island Sound, but merely encloses the pier. If the defendant had emerged from Long Island Sound and climbed over the fence on the pier, that might have been a trespass, but not by going the other way.

There is no allegation that the State of New York or the U.S., as the lawful owner of Long Island Sound, personally communicated to defendant any lawful order not to enter or remain in the water. Thus, defendant did not unlawfully enter or remain in Long Island Sound.

Accordingly, while the defendant's action may have been stupid[2], he is not charged with stupidity, he is charged with trespass and that charge cannot be sustained as defendant had the right to enter Long Island Sound.

The People argue that would lead to Westchester County being unable to exclude People from County property and expose the County to liability to reckless persons. As stated above, Long Island Sound is not County property, thus the State, not the county would be the responsible landowner. Furthermore, under current law, a property owner can be liable to trespassers. Starting with *Basso v. Miller,* 40 NY2d 233, 241, 386 NYS2d 564, the Court of Appeals, abolished the distinctions in a landowners responsibility among trespassers, licensees and invitees; New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition. See, *Tagle v. Jakob,* 97 NY2d 165, 737 NYS2d 331 [2001]. Westchester County's duty to trespassers is measured by where it took reasonable care under the circumstances and its liability commensurate by its meeting that duty.

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[2] At least he didn't lick a frozen flagpole necessitating a police and fire department response.

Penal Law § 240.20(7) says "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. The information asserts that by jumping into the water, the defendant created a hazard to boaters. This is facially sufficient to sustain the disorderly conduct charge.

The pretrial conference shall take place at the Courthouse on January 21, 2014 at 900 a.m. The trial shall be held on March 5, 2014 at 900 a.m.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: Rye, NY
December 23, 2013

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Joseph L. Latwin, J.C.C.

Papers:
Affirmation of Agnes H. Fidelibus dated October 14, 2013; and
Affirmation of Valerie A. Livingston dated December 17, 2013.