Glass v Del Duca
2015 NY Slip Op 31725(U)
September 3, 2015
Supreme Court, Suffolk County
Docket Number: 14-7699
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 14-7699

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MotD
004 - XMD

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PETER GLASS, LAURA GLASS, SANDRA WHEELER, WILLIAM WHEELER, and O'CONEE ASSOCIATION, INC.,

Plaintiffs,

- against -

DONALD P. DEL DUCA and DONALD DEL DUCA, ACKERSON AGENCY, INC., SOUTH SHORE ESTATE SALES, INC. and JOHN MALONEY,

Defendants.

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Upon the following papers numbered 1 to 104 read on this motion for dismissal and cross motion for, inter alia, leave to serve an amended complain: Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 69; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 70 - 75; 76 - 104; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order dismissing the complaint is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the motion by plaintiffs for an order granting leave to serve the proposed amended complaint and awarding summary judgment in their favor on the first and second causes of action is denied.

In January 2012, plaintiff Sandra Wheeler commenced an action against defendants Donald Del Duca and Donald P. Del Duca seeking damages and injunctive relief based on their alleged improper use

of a small parcel of waterfront property located on Manatuck Lane (hereinafter referred to as the Manatuck property) in Bay Shore, New York. At the time the lawsuit was brought, Sandra Wheeler was the owner of property located at the southeast corner of Manatuck Lane and Lawrence Lane known as 17 Lawrence Lane, which borders on its western boundary a navigable waterway known as both the Manatuck River and Lawrence Creek. The Manatuck property also is on the Manatuck River and abuts the northwestern boundary of the property at 17 Lawrence Lane. It was conveyed to Donald Del Duca by bargain and sale deed from Rivendel Enterprises, Ltd., dated June 27, 1985. Both the Manatuck property, an undersized lot that does not have a street address, and the 17 Lawrence Lane property, which was acquired by Sandra Wheeler in 2002, are within a residential area in Bay Shore known as O'Co-Nee. Bounded on the north by Montauk Highway and on the south by the Great South Bay, the O'Co-Nee area, also written as O-Co-Nee or O'Co'Nee, was developed by C.L. Lawrance Corp.

On June 13, 1985, shortly before the conveyance to Donald Del Duca, Rivendel Enterprises and defendant Ackerson Agency, Inc., in its capacity as successor to C.L. Lawrance Corp., executed an indenture amending the 1950 deed for the Manatuck property given by C.L. Lawrance Corp. to Horace Newins, who at the time owned 16 Lawrence Lane. As relevant to the instant action, the 1950 deed contains a restrictive covenant stating "[n]o boat other than a private pleasure craft owned by a resident of O-Co-Nee shall be moored alongside and adjacent to the within described premises." It also provides that the covenants "may be modified, altered or annulled at any time by written agreement by and between the owner of the first part [C.L. Lawrance Corp.], its successors and assigns, and the owner for the time being . . . without the consent of the owner or owners of any adjacent premises." The June 13, 1985 indenture amended the restrictive covenant regarding the mooring of a boat to read "[n]o boat other than a private pleasure craft owned by a resident of O'Co'Nee or Donald Del Duca (a present owner of a residential parcel in O'Co'Nee), or his spouse or a child of said Donald Del Duca, shall be moored alongside and adjacent to the within described premises." It also added a provision stating that "except for Rivindel Enterprises Ltd., Donald Del Duca and/or his spouse or a child of Donald Del Duca, the premises shall hereafter only be conveyed to and fee title held by a grantee who shall also be the contemporaneous owner of a residential building plot within the O'Co'Nee (Section 1 or 2) community."

The following year, on May 27, 1986, a quitclaim indenture was executed by Ackerson Agency in favor of O-Co-Nee Association. The indenture provides that Ackerson Agency, as party of the first part, "does hereby remise, release and quitclaim to O-Co-Nee, its successors and assigns . . . [a]ll remaining right, title, and interest . . . to exercise the rights of passing upon and approval of plans, designs and locations of buildings, the distribution of the expenses of maintenance of lanes, canal and creek, the making of rules and regulations and the consenting to of fences . . . or signs in and to the premises commonly known as O'Co-Nee . . . heretofore reserved to the party of the first part and its predecessors in interest and not specifically conveyed in deed of record to any of the grantees of parcels located in said premises." It also specifies five deeds that allegedly transferred "part of the same property, rights and interests" belonging to Ackerson Agency being conveyed to O-Co-Nee Association.

Thereafter, in May 2004, Donald Del Duca executed a deed transferring ownership of the Manatuck property to himself and his son, Donald P. Del Duca. It is undisputed that since Donald Del Duca acquired title in 1985, substantial improvements have been made to the Manatuck property. At present, the property is improved with a bulkhead, a dock, two finger piers, four boat berths, wood pile

moorings, parking spaces and a boat ramp.

The action commenced by Sandra Wheeler against the Del Duca defendants, assigned index number 000168/2012 (hereinafter referred to as the 2012 Wheeler action), asserted four causes of action. Alleging that Donald Del Duca and Donald P. Del Duca were illegally using the Manatuck property as a marina, renting out boat slips to third parties, particularly John Maloney, and that such use decreased the market value of the 17 Lawrence Lane property and adversely affected Sandra Wheeler's use and enjoyment of such property, the first and second causes of action sought damages for private nuisance. The third cause of action alleged Donald and Donald P. Del Duca were violating provisions of the Islip Town Code, as well as the covenant contained in the 1985 indenture restricting the use of Manatuck property for mooring pleasure boats owned by Donald Del Duca, his spouse or his child, and sought damages and injunctive relief. The fourth cause of action sought damages and injunctive relief for trespass.

As the 2012 Wheeler action was pending, Ackerson Agency and defendant South Shore Estates Sales, Inc., executed an indenture on October 26, 2012. The indenture states, in relevant part, that Ackerson Agency quitclaims "all remaining right, title and interest . . . to and in said premises commonly known as O'Co-Nee . . . [s]ubject to any easements or rights heretofore granted in deeds of record to any of the purchasers of the plots located in the aforesaid premises . . . [t]ogether with all the rights conferred . . . with the powers and authorities therein designated to enforce, amend, confirm and otherwise affect all covenants, agreements, conveyances, transfers and other rights of the respective grantors in said deed and their predecessors in title and interest." Such indenture specifically refers to deeds from June 1951, July 1962 and October 1962 that transferred property rights to Ackerson Agency.

Thereafter, an agreement was executed on December 21, 2012 by Donald Del Duca, Donald P. Del Duca, and South Shore Estate Sales. As relevant to the instant motion, the agreement states that the provision in the 1950 deed from C.L. Lawrance Corp. to Horace Newins regarding the mooring of a boat at the Manatuck property is amended as follows: "No boat shall be permitted to dock in any of the boat slips at the within described property other than private pleasure crafts owned by the owner of the within described premises or their quests [sic]. No commercial or party boat shall be permitted to dock in any of the boat slips at the property." The December 2012 agreement also annulled the provision of the 1985 indenture between Rivendel Enterprises and Ackerson Agency providing that, except for Rivendel, Donald Del Duca and his spouse or child, title to the Manatuck property shall only be conveyed to an owner of residential property within the O'Co-Nee community. In addition, such agreement states that the transfer of Donald Del Duca's fee ownership of the Manatuck property to a tenancy in common with his son and the use of premises "does not violate the restrictions heretofore made and/or as herein corrected, modified, altered or annulled."

In 2013, Donald Del Duca and Donald P. Del Duca made a pre-answer motion in the 2012 Wheeler action for an order dismissing the complaint based on documentary evidence, lack of standing, and failure to state a cause of action (see CPLR 3211 [a][1], [3], [7]). In April 2014, as the dismissal motion was pending, Sandra Wheeler, along with William Wheeler, her husband, Peter Glass, Laura Glass and O-Co-Nee Association, Inc., commenced the instant proceeding against Donald Del Duca, Donald P. Del Duca, Ackerson Agency, South Shore Estate Sales, and John Maloney. The first cause of

action seeks a judgment declaring that the indenture executed by Ackerson Agency and South Shore Estates in October 2012 is null and void. The second cause of action seeks a judgment declaring that an agreement executed by Donald Del Duca, Donald P. Del Duca and South Shore Estates "on November 21, 2012 [sic]" is null and void. The third cause of action alleges the use of the Manatuck property by the Del Duca defendants and defendant John Maloney violates certain provisions of the Town of Islip Code and the covenant regarding the docking of a boat alongside the bulkheading contained in the 1950 deed transferring ownership of such property from C.L. Lawrance Corp. to Horace Newins, and requests a preliminary injunction that, among other things, enjoins defendants from using the property to dock more than one boat and from using the boat ramp, parking lots and halogen lights on the property. The fourth cause of action does not assert a separate legal claim. Rather, based on the prior allegations in the complaint, it seeks a permanent injunction (1) prohibiting the mooring of a boat at the subject premises not owned by Donald Del Duca and/or Donald P. Del Duca; (2) prohibiting the Del Duca defendants from using the finger piers and mooring poles to dock more than one boat; (3) prohibiting the use of the boat ramp, parking lot and halogen lights at the premises until such time as permits are obtained from the Town of Islip; and (4) requiring that a boat docked at the property be moored alongside the bulkheading.

By order issued May 30, 2014, this Court granted the dismissal motion in the 2012 Wheeler action, determining that Sandra Wheeler, who sold 17 Lawrance Lane to plaintiffs Peter Glass and Laura Glass in March 2013, lacked standing to maintain the third and fourth causes of action, and that the allegations in the complaint were insufficient to make out a cause of action for private nuisance. As to the first and second causes of action, the Court also determined that documentary evidence showed the boats at issue were docked within the Manatuck property, that defendant Maloney did not pay rent to dock his boat there, and that a marina is operated across the river from 17 Lawrence Lane.

Defendants now move in this action for an order dismissing the complaint based on documentary evidence, lack of standing, res judicata, collateral estoppel, statute of limitations, and failure to state a cause of action (see CPLR 3211 [a] [1], [3], [5], [7]). Defendants argue, in part, that plaintiffs lack standing to bring an action for a declaration as to the validity of such instruments, since they are not parties to either the 2012 indenture between Ackerson Agency and South Shore Estate Sales or the 2012 agreement between the Del Duca defendants and South Shore Estates. Defendants also assert that documentary evidence shows the deeds referred to in the 1986 indenture between Ackerson Agency and O-Co-Nee Association do not include the 1950 and 1985 indentures concerning the Manatuck property. Further, defendants argue the 2012 Wheeler action determined that Sandra Wheeler lacked standing to enforce the restrictions contained in the 1985 indenture between Rivendel Enterprises and Ackerson Agency, she and the other plaintiffs, all of whom assert standing based on their ownership of property within the O'Co-Nee community, are barred by the doctrine of res judicata from seeing a judicial determination as to the validity of the October 26, 2012 indenture between Ackerson Agency and South Shore Estate Sales and of the December 21, 2012 agreement between South Shore Estate Sales and the Del Duca defendants. Defendants assert that the finding in the 2012 Wheeler action of no standing to enforce either the restrictive covenant in the 1985 indenture or the alleged Code violations bars all four of plaintiffs' causes of action. In addition, defendants assert that plaintiffs are collaterally estopped from litigating about the use of the Manatuck property or the location of the mooring piles and boats docked at the Manatuck property encroach onto the property of 17 Lawrence Lane, and that the complaint fails to

allege any special damages due to the Del Duca defendants's use of the property.

Plaintiffs oppose the motion and cross-move for an order granting them leave to serve the proposed amended complaint annexed to the cross-moving papers, which previously was served on and rejected by defendants, and for summary judgment in their favor on the first and second causes of action. In opposition to the dismissal motion, plaintiffs argue, among other things, that O'Co-Nee Association, by an indenture dated May 27, 1986, acquired all the rights, title and interest held by Ackerson Agency, the successor to the C.L. Lawrance Corp., and, therefore, the covenants contained in the original 1950 deed for the Manatuck property and the 1985 indenture between Rivendel Enterprises and Ackerson Realty could not be amended by an instrument executed in 2012 by Ackerson Agency and South Shore Estate Sales. They argue the dismissal of the 2012 Wheeler action does not bar Sandra Wheeler's instant claims, as it was not a dismissal on the merits. They further assert that the individual plaintiffs have standing as owners of property within the O'Co-Nee community to seek enforcement of the Town Code violations and the restrictive covenant in the 1985 indenture, that "most of the events alleged that are applicable to the third and fourth causes of action occurred during the prior three years," and that such claims "are for different time periods and separate violations than those asserted" in the 2012 Wheeler action. In reply, defendants submit an affidavit of Donald Del Duca, averring that he has moored four or more boats at the Manatuck property since he purchased it in 1985, that he has never operated a marina at the site, and that two marinas are operated on Manatuck River, one of which is operated by O'Co-Nee Association and is located directly east of the Glass and Wheeler properties.

As to the branch of the cross motion concerning the proposed amended complaint, plaintiffs allege the amended complaint was timely served, as the time for responding to the complaint was expanded by defendants' filing of the instant dismissal motion (see CPLR 302 [a]). Alternatively, they seek leave to serve the proposed amended complaint, which does not contain any new causes of action and corrects certain minor mistakes, including the date of the agreement between South Shore Estate Sales and the Del Duca defendants, arguing that such changes will not surprise or prejudice defendants. Finally, plaintiff seek an order granting summary judgment in their favor on the first and second causes of action. Plaintiffs' submissions in support of such application include an affidavit of Bartlett Ackerson, owner and President of Ackerson Agency. Mr. Ackerson avers that, after reviewing the indenture between Ackerson Agency and O-Co-Nee Association dated May 29, 1986 and the indenture between Ackerson Agency and South Shore Estate Sales dated October 26, 2012, "it is clear that I had previously assigned these rights to the O'Co-Nee Association, Inc., which I had forgotten. Obviously, I had no right or authority to then transfer the same rights to South Shore Estate Sales, Inc." He further states at the time of the 2012 indenture "I was under substantial pressure and I was unable to locate my records which have been in storage for many years."

Initially, the branch of plaintiffs' motion seeking leave to serve the proposed amended complaint is denied. Defendants' pre-answer motion under CPLR 3211 for an order dismissing the complaint extended both defendants' time to serve an answer (CPLR 3211 [f]) and plaintiffs' time to serve an amended complaint as of right (CPLR 3025 [a]; see Poly Mfg. Corp. v Dragonides, 109 AD3d 532; STS Mgt. Dev. v New York State Dept. of Taxation & Fin., 254 AD2d 409). The application for leave to serve the amended complaint, therefore, is unnecessary (see Terrano v Fine, 17 AD3d 449). Further,

though the amended complaint superseded the original complaint (see Poly Mfg. Corp. v Dragonides, 109 AD3d 532; Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, 71 AD3d 533), the Court will consider the dismissal motion as addressed to the amended complaint, as it is clear from subsequent filings that defendants seek a determination under CPLR 3211 as to the new pleading (see Sobel v Ansanelli, 98 AD3d 1020; Sage Realty Corp. v Proskauer Rose, 251 AD2d 35; EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr., 212 AD2d 570).

The branch of defendants' motion seeking dismissal of the causes of action for declaratory relief is granted. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (see CPLR 3001; Rockland Light & Power Co. v City of New York, 289 NY 45; Thome v Alexander & Louisa Calder Found., 70 AD3d 88). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations" (James v Alderton Dock Yards, 256 NY 298, 305). To constitute a justiciable controversy, there must be an actual dispute "involving substantial legal interests for which a declaration of rights will have some practical effect" (Chanos v MADAC, LLC, 74 AD3d 1007, 1008).

Also, under the doctrine of res judicata or claim preclusion, a final adjudication of a claim on the merits by a court of competent jurisdiction precludes relitigation of that claim by the parties and those in privity with them (see Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343; Matter of Hodes v Axelrod, 70 NY2d 364; Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481). The doctrine operates to preclude litigation of all other claims arising out of the same transaction or series of transactions that could have or should have been raised in the prior proceeding, even if such claims are based on different theories or seek a different remedy (see O'Brien v City of Syracuse, 54 NY2d 353; Smith v Russell Sage Coll., 54 NY2d 185; Lasky v City of New York, 281 Ad2d 598). The doctrine of res judicata does not apply, however, where the dismissal of an action does not involve a determination on the merits (see Maitland v Trojan Elec. & Mach. Co., 65 NY2d 614; Sclafani v Story Book Homes, 294 AD2d 559).

A corollary to the doctrine of res judicata, collateral estoppel "precludes a party from relitigating 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, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500). A party seeking to invoke the benefit of the collateral estoppel doctrine must demonstrate that the identical issue necessarily was decided in the prior action against the opposing party, or one in privity with such party, and is decisive of the present action (Buechel v Bain, 97 NY2d 295, 303-304; see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659; Kaufman v Eli Lilly & Co., 65 NY2d 449; Ryan v New York Tel. Co., 62 NY2d 494). The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (Buechel v Bain, 97 NY2d 295, 304; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664; Mahler v Campagna, 60 AD3d 1009, 1011).

Here, premised on allegations that the individual plaintiffs are aggrieved property owners living in close proximity to the Manatuck property and that O'Co-Nee Association is the successor to the C.L. Lawrance Corp., plaintiffs assert they are entitled to enforce the covenant contained in the 1985

indenture between Ackerson Agency and Rivendel Enterprises restricting the docking of boats at the Manatuck property, and seek judicial declarations as to the validity of the 2012 indenture between Ackerson Agency and South Shore Estates Sales and as to the validity the 2012 agreement between South Shore Estate Sales and the Del Duca defendants. However, the 1950 indenture concerning the Manatuck property demonstrates that the individual plaintiffs do not have a legally protected interest affected by the 2012 indentures. As discussed above, the 1950 deed transferring C.L. Lawrance Corp.'s property interest in the small, undeveloped waterfront lot to Horace Newins reserved the right to modify or annul the covenants by way of an agreement between the grantor and grantee, "without the consent of the owner or owners of any adjacent premises." The 1985 indenture by Ackerson Agency and Rivendel Enterprises, the successors of C.L. Lawrance Corp.'s and Horace Newins' interests in the property, modified the restrictive covenant in the 1950 deed so as to permit a private boat owned by a resident of the O'Co-Nee community, or by Donald Del Duca or his spouse or a child, to dock at the property. Such evidence was the basis for this Court's determination in the 2012 Wheeler action that even at the commencement of such lawsuit, when she still owned the adjacent property at 17 Lawrence Lane, Sandra Wheeler lacked standing to enforce the restrictive covenant at issue, since such covenant was not intended by the original grantor for the benefit of residential property owners within the O'Co-Nee community.

Defendants, therefore, have established that Sandra Wheeler is precluded under the doctrine of collateral estoppel from re-litigating the issue of whether she has standing based on her ownership of residential property within the O'Co-Nee community, as are those plaintiffs in privity with her, namely Peter Glass and Laura Glass (see Buechel v Bain, 97 NY2d 295; Matter of Juan C. v Cortines, 89 NY2d 659). As the Glass plaintiffs have not shown, or even argued, in opposition to the dismissal motion the absence of a prior opportunity to fully litigate whether Sandra Wheeler had a legally protected interest under the 1985 indenture, dismissal of the first and second causes of action as asserted by Peter Glass, Laura Glass, and Sandra Wheeler is granted (see CPLR 3211 [a][5]). Moreover, the individual plaintiffs have not alleged or shown that they possess a legally protected property interest affected by the 2012 indentures, which relate to Ackerson Agency's remaining property interests as successor to C.L. Lawrance Corp., to South Shore Estate Sales' property interests as an alleged successor to Ackerson Agency, and to the Del Duca defendants' property interests as the successors to Horace Newins. Rather, as in the 2012 Wheeler action, the individual plaintiffs assert standing based on their ownership interests in real property located within the O'Co-Nee community. Dismissal of the first and second causes of action asserted by the individual plaintiffs for lack of a justiciable controversy, therefore, is granted.

As to the portion of defendants' motion regarding O'Co-Nee Association's claims for declaratory relief, dismissal of a cause of action under CPLR 3211 (a)(1) requires documentary proof that "utterly refutes" the factual allegations in the complaint related to such claim, conclusively establishing a defense as a matter of law (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; see Melnicke v Brecher, 65 AD3d 1020; Mazur Bros. Realty, LLC v State of New York, 59 AD3d 401). Here, the indentures submitted by defendants establish O'Co-Nee Association lacks a legally enforceable property interest in the Manatuck property, as Ackerson Agency transferred its remaining property interests in the O'Co-Nee community, particularly those interests it acquired by certain deeds executed in 1951 and 1962, to South Shore Estates by the indenture executed by Bartlett Ackerson in October 2012 (see Crepin v Fogarty, 59

AD3d 837; Igarashi v Higashi, 289 AD2d 128). Although in opposition plaintiffs submit an affidavit of Bartlett Ackerson, President of Ackerson Agency, stating he previously transferred the same property interests to the O'Co-Nee Association, the May 1986 indenture between O'Co-Nee Association and Ackerson Agency included with the cross-moving papers states that the interest being transferred to such association is the right "to exercise the rights of passing upon and approval of plans, designs and locations of buildings, the distribution of the expenses of maintenance of lanes, canal and creek the making of rules and regulations and the consenting to of fences . . . or signs in and to the premises commonly known as O'Co-Nee." Such indenture further states "[b]eing intended to be *part* of the same property, rights and interests transferred to [Ackerson Agency]" by five specified deeds, including the deeds from 1962 transferring Francis Lawrance's interest to H. Ward Ackerson and from H. Ward Ackerson to Ackerson Agency. Significantly, the 1950 and 1985 indentures related to the Manatuck property, which contain the restrictive covenants relied upon by plaintiffs, are not referred to in the 1986 indenture. Thus, defendants conclusively established their defense that O'Co-Nee Association lacks standing to seek the requested declaratory relief (see 11 King Ctr. Corp. v City of Middletown, 115 AD3d 785).

In addition, defendant John Maloney is entitled to dismissal of the declaratory claims against him under CPLR 3211 (a)(7). On a motion to dismiss under CPLR 3211, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19; Leon v Martinez, 84 NY2d 83, 87-88; Basile v Wiggs, 98 AD3d 640, 641). When a party moves under CPLR 3211(a)(7) for dismissal based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (Guggenheimer v Ginzburg, 43 NY2d 268, 275; Sokol v Leader, 74 AD3d 1180, 1180-1181). However, if documentary proof is submitted by the moving party, the test applied by the Court is whether the plaintiff has a cause of action, not whether he or she has stated one in the complaint (Guggenheimer v Ginzburg, 43 NY2d 268, 275; Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530, 530; McGuire v Sterling Doubleday Enters., L.P., 19 AD3d 660, 661). When a moving party presents evidentiary material, bare legal conclusions and factual allegations in the complaint which are flatly contradicted by such evidence will not be presumed true on a motion to dismiss, and dismissal will be granted under CPLR 3211 (a)(7) if such evidence disproves an essential allegation of the complaint (see Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530; Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Doria v Masucci, 230 AD2d 764). Furthermore, when assessing a dismissal motion, a court may consider affidavits submitted to remedy pleading defects, thereby preserving "inartfully pleaded but potentially meritorious, claims" (Rovello v Orofino Realty Co., 40 NY2d 633, 635-636). Here, there are no factual allegations in the amended complaint evincing a justiciable controversy between plaintiffs and Maloney concerning the validity of the 2012 indentures, and the documentary evidence establishes Maloney is not a party to such indentures.

Having granted defendants' application for dismissal of the first and second causes of action, the branch of plaintiffs' cross motion for summary judgment in their favor on such causes of action is denied, as moot.

As to the third and fourth causes of action for injunctive relief, the law favors the free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them (Witter v Taggart, 78 NY2d 234, 237; Ford v Fink, 84 AD3d 725, 726; Breakers Motel v Sunbeach Montauk Two, 224 AD2d 473, 474). Restrictive covenants will be enforced only where their existence and scope is established by clear and convincing evidence presented by the party seeking their enforcement (see Witter v Taggart, 78 NY2d 234; Greek Peak v Grodner, 75 NY2d 981; Butler v Mathisson, 114 AD3d 894). They may be enforced by persons other than the grantor or the covenantee, and the owner of neighboring land for whose benefit a restrictive covenant is imposed by a grantor may enforce such covenant as a third-party beneficiary (Korn v Campbell, 192 NY 490, 495; Nature Conservancy v Congel, 253 AD2d 248, 251). Further, a restrictive covenant imposed by a grantor as part of a general plan or scheme for the benefit of all grantees in a real estate subdivision or development may be enforced by any of the grantees in such subdivision or development despite the lack of privity of estate between the grantor and the neighbor (Chesebo v Moers, 233 NY 75, 80; Korn v Campbell, 192 NY 490, 495; Nature Conservancy v Congel, 253 AD2d 248, 251; Graham v Beermunder, 93 AD2d 254, 258).

The evidence demonstrates plaintiffs lack standing to enforce the restrictive covenant contained in the 1950 indenture between C.L. Lawrance Corp. and Horace Newins. Significantly, as discussed earlier, the 1950 indenture states it can be annulled or modified by written agreement between the grantor, its successors and assigns and the owner of the Manatuck property "without the consent of the owner or owners of any adjacent properties," and plaintiffs do not allege they are third-party beneficiaries of such indenture. Moreover, as plaintiffs allege in the amended complaint, the restrictive covenant was modified by the 1985 indenture between Rivendel Enterprises and Ackerson Agency.

However, plaintiffs do have standing to seeking injunctive relief for an alleged zoning violation. Although town officials are tasked with enforcing zoning ordinances occurring within their town, a private property owner who suffers special damages may maintain an action to enjoin the continuing violation of ordinances and to recover damages to vindicate his or her own "discrete, separate identifiable interest" (Little Joseph Realty v Town of Babylon, 41 NY2d 738, 742). To maintain a private action to enjoin a zoning violation, a plaintiff must establish he or she has standing by demonstrating that special damages were sustained due to the defendant's activities (see Little Joseph Realty v Town of Babylon, 41 NY2d 738; Zupa v Paradise Point Assn., Inc., 22 AD2d 843; Williams v Hertzwig, 251 AD2d 655). To establish special damages, a plaintiff must show a depreciation in the value of his or her property arising from the forbidden use (see Zupa v Paradise Point Assn., Inc., 22 AD2d 843). However, a property owner in close proximity to premises allegedly in violation of zoning laws is presumptively affected by a loss of property value due to a change in the character of the immediate neighborhood, and does not need to submit proof of actual injury to maintain a private action for injunctive relief (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406; Williams v Hertzwig, 251 AD2d 655). Nevertheless, close proximity to the subject property is not, in and of itself, sufficient to establish standing (see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406; Zupa v Paradise Point Assn., Inc., 22 AD2d 843; Scannell v Town Bd. of Town of Smithtown, 250 AD2d 832). Hence, a plaintiff seeking to enjoin a zoning violation who is a close neighbor to the subject property and relies on

the presumption of injury must show the property interest allegedly affected by the violation is within the "zone of interest" of the ordinance at issue (see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406; East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton, 83 AD3d 935; Zupa v Paradise Point Assn., Inc., 22 AD2d 843). Zoning ordinances are enacted to protect the health, safety and welfare of the community (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406, 412).

Here, plaintiffs allege in the amended complaint, in relevant part, that the Del Duca defendants are using their property as a marina, regularly mooring four or more boats at the site and occasionally permitting people to stay overnight on such boats; that "numerous men have been observed sitting" on an unregistered boat docked at the property, "disrupting the privacy" of the individual plaintiffs; that certain boats moored at the Manatuck property are within 10 feet of the Glass property line; and that "significant substantive mechanical and other work has been performed on the boats while docked" at the property. The amended complaint further alleges defendants' use of the Manatuck property violates four zoning ordinances of the Town of Islip relating to docks and boat berths.

It is undisputed the individual plaintiffs live within close proximity to the Manatuck property, and O'Co-Nee Association allegedly owns a lot adjoining the eastern boundary of the Manatuck property, which is used for docking boats owned by residents of the O'Co-Nee community. All but one of the sections of the Code of the Town of Islip cited by plaintiffs in the amended complaint relate to the standards for a residential dock in a Residence AAA district (see Code of the Town of Islip § 68-48 A [1][c]) and, therefore, do not apply to the Manatuck property. However, the remaining zoning ordinance set forth in the amended complaint permits the Town Zoning Board, after conducting a public hearing, to grant special exceptions for boat berths in a Residence AAA District, "when not an accessory use to a one-family dwelling: one for every 35 feet of water frontage up to three" (see Code of the Town of Islip § 68-47 [H]).

As pointed out by defense counsel, plaintiffs do not allege that the Del Duca defendants have been cited by the Town of Islip for any of the four alleged violations of the Code of the Town of Islip (hereinafter Town Code) listed in the amended complaint, or that the Del Duca defendants' use of the property has caused an adverse change in the character of the neighborhood. They also do not allege the pecuniary value of their properties were materially damaged by the Del Duca defendants' use of more than two boat berths at the Manatuck property. Nevertheless, direct harm allegedly due to the alleged excessive number of boats docked at such property is presumed, and plaintiffs' interests as neighboring property owners in property values and aesthetics are within the zone of interest protected by Town Code § 68-47 (H) (see Zupa v Paradise Point Assn., Inc., 22 AD3d 843; Williams v Hertzwig, 251 AD2d 655).

Defendants' arguments that plaintiffs' claim for a permanent injunction is barred by the doctrines of res judicata or collateral estoppel are rejected. Contrary to defense counsel's assertion, the zoning violations at issue in the instant action were not specifically raised in the 2012 Wheeler action. The Court, however, notes the injunctive relief sought by plaintiffs is largely unrelated to the restrictions imposed by the ordinances alleged in the amended complaint. As discussed above, plaintiffs request that this Court issue a judgment prohibiting the Del Duca defendants "from utilizing the finger piers and

mooring poles to dock more than one boat at the subject premises which boat is to be moored alongside the bulkhead and to be owned by defendant Donald Del Duca and/or defendant Donald P. Del Duca," even though the ordinances cited do not impose such limitations on residential docks in the Residence AAA district. They further request that defendants be prohibited from using the boat ramp, parking lot and halogen lights at the premises until permits are obtained from the Town of Islip, even though there are no allegations in the amended complaint that the Del Duca defendants' use of the ramp, parking area and halogen lights at the Manatuck property violates Town zoning ordinances. Accepting for purposes of the instant dismissal motion the allegations that the Del Duca defendants' use of the Manatuck property violates the Town ordinance limiting the number of boat berths permissible in a Residence AAA District, the parties are reminded that a permanent injunction is an extraordinary remedy reserved to the discretion of the Court, and that, even when facts justify granting such relief, it does not necessarily follow that the plaintiff is entitled to the injunctive relief sought in the pleadings (see Kane v Walsh, 295 NY 198, 205; Clements v Schultz, 200 AD2d 11; 487 Elmwood v Hasset, 83 AD2d 409, 413).

Finally, as there is no separate cause of action for a preliminary injunction, the third cause of action is dismissed (see CPLR 6301; CPLR 3211 [a][7]). Further, Maloney is entitled under CPLR 3211 (a)(7) to dismissal of the claim against him for injunctive relief. The amended complaint does not contain any allegations that Maloney is in violation of a Town of Islip zoning ordinance, and no evidence was submitted by plaintiffs substantiating the conclusory allegations by their counsel that Maloney, who previously moored his boat at the Manatuck property, violated the Town of Islip zoning ordinances indicated in the amended complaint.

Dated: September 3, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

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