| **Matter of Protect the Adirondacks! Inc. v New York State Dept. of Envtl. Conservation** |
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| 2015 NY Slip Op 33005(U) |
| September 4, 2015 |
| Supreme Court, Albany County |
| Docket Number: Index No. 2137-13 |
| Judge: Gerald W. Connolly |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of PROTECT THE ADIRONDACKS! INC.,
Plaintiff-Petitioner,

For a Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution, and CPLR Article 78,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,
Defendants-Respondents.

**DECISION AND ORDER**
Index No. 2137-13

(Supreme Court, Albany County)

APPEARANCES: Claudia K. Braymer, Esq.
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Glens Falls, New York 12801

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Connolly, J.:

Plaintiff seeks an order: (i) restraining and enjoining defendants from cutting or otherwise destroying trees in the Adirondack Forest Preserve for the construction of Class II Community Connector snowmobile trails and other trails having similar characteristics, and from otherwise clearing, grading, scraping, excavating or filling the land for such trails or otherwise changing the terrain of the land on Class II Community Connector snowmobile trails, until the resolution of this action and (ii) awarding plaintiff-petitioner the costs and disbursements of the motion. Defendants

oppose the application.[1]

In this action, plaintiff seeks to enjoin defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve ("Preserve") and to obtain a declaratory ruling that the creation of certain new snowmobile trails in the Preserve, sometimes known as "Class II" and "Community Connector" trails, is a violation of Section 1 of Article 14 of the New York State Constitution. Plaintiff asserts that defendant New York State Department of Economic Conservation ("DEC") proposes to construct a community connector snowmobile trail network for the entire Adirondack Park. Plaintiff argues that the construction of such network requires the destruction of trees of 3" "dbh" (diameter at breast height) or larger in the Preserve which would violate Article 14, §1 of the New York State Constitution. Plaintiff acknowledges that two prior motions by plaintiff to enjoin the Defendants' actions have been denied (*see Protect the Adirondacks! Inc. v. NYS Dept. of Envtl. Conservation*, 42 Misc3d 1227(A) [Alb Cty., Nov. 19, 2013] (Ceresia, J.); *Protect the Adirondacks! Inc. v NYS Dept of Envtl. Conservation*, 2013 NY Misc LEXIS 3979 [Alb. Cty., Aug. 22, 2013] (Ceresia, J.).

Plaintiff argues that defendants DEC and Adirondack Park Agency ("APA") have now approved a plan to construct another trail in the snowmobile trail network, which is an approximately 40-mile long Class II Community Connector snowmobile trail that would begin in Minerva, New York and head north, where it will split into two branches, with one going west towards Newcomb, New York and the other heading east towards North Hudson, New York, with approximately 15 miles of such trail being located on Preserve lands. Plaintiff asserts, via affidavit of its counsel, that the construction of those 15 miles of trail will result in the cutting and destruction of nearly 4,000

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[1]The Court (O'Connor, J.) denied plaintiff's request for a temporary restraining order via the Order to Show Cause dated August 20, 2015.

trees in the Preserve and that, based upon a DEC Press Release of August 4, 2015, such trail construction will begin immediately.

In asserting that nearly 4,000 trees will be destroyed, plaintiff's counsel relies upon a response by a DEC staff person, submitted in opposition to plaintiff's last motion for an injunction with respect to a separate trail, averring that the trees that would be cut on such separate (existing) trail would amount to 1 tree for every 20 feet. Plaintiff asserts that the trail at issue herein (i.e. the Minerva-Newcomb-North Hudson Class II CC Trail) would create new trails on 14.72 miles of forested state land, so the cutting would likely be far more than 1 tree per 20 feet, and that, even using an estimate of 1 tree for every 20 feet, building this trail would result in the destruction of nearly 4,000 trees. Plaintiff argues that the cutting of more trees, as well as the other construction activities needed to create such trail, would constitute permanent harm and is grounds for the granting of a preliminary injunction. Plaintiff further argues that it is not inequitable to make DEC wait until resolution of this proceeding to construct more Class II Community Connector snowmobile trails, including the one at issue herein. The Court again notes, however, that the assertions of DEC staff relied upon by plaintiff in making its estimates of how many trees will be cut with respect to the Minerva-Newcomb-North Hudson Class II CC Trail (the "Minerva trail") related to the construction of a portion of a completely different trail (the Taylor Pond-Catamount Trail Community Connector Snowmobile Trail).

Plaintiff's counsel has further submitted a supplemental affidavit asserting that on August 19, 2015 defendant DEC published notice in the Environmental Notice Bulletin ("ENB") regarding

the second stage of construction[2] of the Minerva trail at issue which "involves the removal of 1,148 trees between Upper Hudson Woodlands Hyslop Conservation Easement and the Roosevelt Truck Trail in the Vanderwhacker Mountain Wild Forest, to allow for the construction of 3 miles" of the Minerva Trail. Plaintiff argues that, based upon the latest ENB notice, the number of trees remaining to be cut for the construction of what plaintiff identifies as "Sections 1 and 2" of the Minerva Trail may be as high as 4,592 trees or more.[3] At oral argument, plaintiff submitted a "Calculation of Trees to be Cut for the Construction of the Minerva-Newcomb-North Hudson Class II Community Connector Snowmobile Trail" which asserted that of the 14.72 miles of trail, 356 trees have already been cut for the 2.9 "Santanoni to Lake Harris Campground" portion of the Minerva trail, and 1,148 are proposed to be cut on the three miles referenced in DEC ENB Notice of August 19, 2015 with respect to the "Upper Hudson Woodlands Hyslop Conservation Easement to Roosevelt Truck Trail" portion of the Minerva trail (the "Hyslop portion"). Therefore, plaintiff's counsel, assuming a tree cutting rate of 1,148 trees for every three miles or 383 trees for each mile of trail, has estimated that 4,529 trees will be cut in the 11.82 miles of trail remaining to be constructed.

In opposition, defendants note that plaintiff's application (via the August 19, 2015 Order to Show Cause), for a temporary restraining order enjoining any further construction on the Minerva trail was denied and object to the subsequent filing by plaintiff of a Supplemental Affidavit that

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[2]Plaintiff's counsel notes that the initial stage of the Minerva Trail involves a 2.9 mile portion of trail and the second portion refers to a 3 mile portion.

[3]Plaintiff asserts that "[t]here are approximately 12 miles of trail remaining to be constructed on state lands for Sections 1 and 2 of the [Minerva trail]. Based on the numbers given in the ENB notice at Exhibit A, using a rate of 1,148 trees for every 3 miles, or 383 per mile, the number of trees that would be cut for the remaining 12 miles of the [Minerva trail] is 4,592 trees" (Supplemental Aff. Of C. Braymer, Esq. Fn. 3).

augmented the injunction application to include the 3-mile Hyslop portion of the Minerva trail. While defendants argue that plaintiff's counsel filed the supplemental affidavit without permission of Court to augment the injunction application to include the 3-mile Hyslop portion, the Court will consider such affidavit as defendant DEC issued the ENB concerning such portion on August 19, 2015, the date of plaintiff's Order to Show Cause, and asserts herein that work crews are ready immediately to begin work to clear trees with respect to such segment.

Defendants assert that the request for a preliminary injunction should be denied as plaintiff has failed to meet its burden of demonstrating a likelihood of success on the merits, irreparable harm or a balance of the equities in its favor. Further, defendants argue that plaintiff waited too long to challenge construction of the Santanoni to Lake Harris Campground portion of the Minerva trail, as demonstrated via the affidavit of Benjamin C. Thomas, a DEC employee, who avers that only 4 of the 356 trees remain to be cut (and, via the affidavit of Peter Frank, another DEC employee, the ENB issued with respect to such segment of the trail was published on July 9, 2014). Further, as to the supplemental portion of the motion, Mr. Thomas also avers that with respect to the 3-mile Hyslop portion of the Minerva trail, of the 1,148 trees that will be cut, 234 are dead trees and 212 are labeled "Ug", indicating that such trees are either diseased or otherwise unhealthy trees. Defendant DEC further asserts, via the affidavit of Mr. Frank, that plaintiff's allegation concerning the number of trees that will be cut for the 14.72 mile Minerva trail is purely speculative and unsupported by any objective evidence. Mr. Frank argues that plaintiff did not obtain its alleged estimate of trees to be cut from any actual work plans, tree tallies, or ENB notices, as these do not yet exist for most of the 14.72 trail miles.

Preliminary Injunction

"Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and

the burden of showing an undisputed right rests upon the movant" (*Peterson v. Corbin*, 275 AD2d 35, 37 [2nd Dept 2000]). In order to obtain a preliminary injunction, a party must show a likelihood of success on the merits, a balancing of the equities in its favor, and irreparable injury in the absence of the injunction (*Doe v. Axelrod*, 73 NY2d 748 [1988]). Further, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail" (*Scotto v Mei*, 219 AD2d 181, 182 [1st Dept 1996]). Based upon the record before the Court, plaintiff has not met its burden with respect to the instant application.

Initially, while plaintiff is seeking broad injunctive relief prohibiting defendants from "cutting or otherwise destroying trees in the [Preserve] for the construction of Class II Community Connector snowmobile trails and other trails having similar characteristics and from otherwise clearing, grading, scraping, excavating or filling the land for such trails or otherwise changing the terrain of the land on Class II Community Connector snowmobile trails" (Order to Show Cause ¶A), until the resolution of this action, plaintiff has failed to demonstrate a likelihood of success on the merits with respect to such broad general requests. The New York State Constitution, Article XIV, §1 provides, in relevant part, that "the lands of the state, now owned of hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed". The Court of Appeals has held that, rather than prohibiting *any* [emphasis added] cutting or removal of timber from the forest preserve, this provision must receive a reasonable interpretation, and accordingly such provision has been construed as "prohibiting [the] cutting or [the] removal of *** trees and timber to a substantial extent" (*Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]; *see also Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852 [3d Dept 1993]). To the extent plaintiff broadly seeks relief concerning

the construction of all "Class II Community Connector snowmobile trails and other trails having similar characteristics" and the "clearing, grading, scraping, excavating or filling" of the land for such trails or "otherwise changing the terrain of the land on Class II Community Connector snowmobile trails", such request must be denied as plaintiff has failed to address whether and to what extent any such activities will occur, except with respect to the Santanoni to Lake Harris Campground portion (2.9 mile) and the Hyslop portion (3 mile) of the Minerva trail. The Court does not find that there is any showing of a necessity to issue a broad preliminary injunction with respect to proposed snowmobile trails that have not yet been fully assessed and may never be constructed or actions/activities that may never be taken by defendants. Further, plaintiff has failed to demonstrate with any objective evidence that there is a likelihood of success on the merits that any and all such "generalized" construction or grooming and maintenance activities that may be taken will affect the forest preserve to a substantial extent, and accordingly, the Court will not issue such a generalized injunction (*see Id.*).

Plaintiff's particular allegations at this point specifically address the construction of Minerva trail and most specifically address the Santanoni to Lake Harris Campground portion and the Hyslop portion of the Minerva trail and, at oral argument, defendants' counsel represented that with respect to such alleged tree cutting activities, such activities are only contemplated for the remainder of the calendar year with respect to the Santanoni to Lake Harris Campground portion and the Hyslop portion of the Minerva trail. Accordingly, the Court will restrict its analysis to such two portions and will not enjoin, upon this application, any other actions based upon plaintiff's general and unsubstantiated requests for relief with respect to the remaining portions of the Minerva trail. Even if the Court were to consider the remaining 8-9 mile portion of the Minerva trail, plaintiff, however, has failed to provide objective evidence necessary to demonstrate a likelihood of success on the merits necessary to support the

imposition of such an injunction. Plaintiff asserts that the "number of trees remaining to be cut" with respect to the remaining 12 miles of the trail (not including the 2.9 Santanoni to Lake Harris Campground portion of the trail but including the 3 mile Hyslop portion) may be as high as 4,592 trees, or more. Plaintiff has reached such 4,592 estimate by utilizing the 1,148 number that DEC states in the ENB will be cut with respect to the Hyslop portion of the Minerva trail and thereby estimating that 383 trees will be cut for every 3 miles of the 12 miles of remaining trail. Such speculative extrapolation is not based, however, upon any affidavits of persons with any first-hand knowledge of the facts relating to the Preserve or the specific land in question. Such analysis is insufficient, particularly as it is not based upon any actual investigation of the land in question but is further questionable as plaintiff has not explained how a tree cutting rate of 1,148 for every three miles is an appropriate assumption for the remaining 12 miles of trail where plaintiff's counsel also notes in her "Calculation of Trees to be Cut for the Construction of the [Minerva Trail] that with respect to the 2.9 miles Santanoni to Lake Harris Campground portion of the Minerva trail only 356 (and not 1,148) trees were cut over 2.9 miles. Such speculative and factually baseless calculation is insufficient to demonstrate entitlement to the broad injunctive relief plaintiff seeks herein with respect to the non-Hyslop portions of the Minerva trail to be constructed. Further, as set forth above, the Court will also not issue an injunction with respect to speculative actions that may not occur. As noted by defendants, there are no immediate plans to complete the Minerva trail.

As to the 2.9 Santanoni to Lake Harris Campground portion of the Minerva trail, based upon the assertions of Mr. Thomas, a Forester employed by defendant DEC, only four trees remain to be cut. Such figure has not been controverted by plaintiff with any objective evidence. As "an injunction will not issue to prohibit a *fait acompli*" (*E.F.S. Ventures Corp. v. Foster*, 71 NY2d 359 [1988]), as almost all of the 356 trees have been removed, there is nothing to enjoin

with respect to such portion of the trail. Further, to the extent the Court analyzes the removal of such four trees, plaintiff has not demonstrated that they are likely to prevail on the issue of whether the removal of such four trees affects the Preserve to a substantial extent (*see Assoc. for the Protection of Adirondacks v MacDonald, supra*). Accordingly, as plaintiff has failed to demonstrate a likelihood of success on the merits on such issue with respect to the Santanoni to Lake Harris Campground portion of the Minerva trail, the Court will not issue injunctive relief with respect to such portion.

As to the Hyslop portion of the Minerva trail, as noted above, plaintiff must demonstrate, not only that trees will be cut down, but there is a likelihood that plaintiff will prevail on the issue of whether the cutting or removal of the trees along such portion of the trail destroys the Preserve to a substantial extent or in any material degree (*see Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]; *see also Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852 [3d Dept 1993]). Based upon the record, plaintiff has failed to make such demonstration with any objective evidence and plaintiff's counsel's conclusory allegations and averments are insufficient to meet such burden. Plaintiff has not submitted any objective evidence by anyone with actual knowledge of the facts concerning the Hyslop portion of the trail in support of its application. In opposition, defendants have averred, with employee affidavits, that the anticipated cutting of trees will be 1,148 for such Hyslop portion and that 446 of such trees are diseased or dead and that the majority of the healthy trees to be cut (approximately 68%) are six inches or less in diameter at breast height. Plaintiff has not controverted such contentions with any objective proof nor demonstrated that it is likely that the cutting of 446 dead and/or diseased trees nor the cutting of approximately 700 trees with respect to the Hyslop portion of the Minerva trail (approx. 68% of which are six inches or less in diameter at breast height) destroys the Preserve to a substantial extent or in any material degree. While the Court of Appeals in *Association for Protection of Adirondacks v MacDonald, supra*,

held that the cutting of 2500 trees for a toboggan slide or "perhaps for any other purpose" is prohibited (barring a constitutional amendment) it also held that the New York State Constitution does not prohibit the taking of any action in the Preserve but "to prohibit any cutting or any removal of the trees and timber to a substantial extent" (*Id.* at 238). Further, the Third Department subsequently held in *Balsam Lake Anglers Club v Dept of Envtl. Conservation, supra* at 796-798, that the construction of five parking lots, relocation of two trails, construction of a new hiking trail and of a cross-country ski trail loop on lands within the Catskill Forest Preserve, which construction called for the removal of 350 trees to accommodate the trail relocation and the removal of an unknown number of additional trees for the proposed new trail and parking lots, appeared compatible with the use of the forest preserve land and was not constitutionally prohibited.

While the Court is not constrained by this decision with respect to any future issues raised concerning the cutting down of trees in the Preserve and notes both the Court's prior decisions in the instant litigation in which concern was expressed as to mass tree cutting activities in the Preserve by defendants (*see Protect the Adirondacks! Inc. v. NYS Dept. of Envtl. Conservation*, 42 Misc3d 1227(A) [Alb Cty., Nov. 19, 2013] (Ceresia, J.); *Protect the Adirondacks! Inc. v NYS Dept of Envtl. Conservation*, 2013 NY Misc LEXIS 3979 [Alb. Cty., Aug. 22, 2013] (Ceresia, J.)) and the Court of Appeals' determination in *Association for the Protection of the Adirondacks v MacDonald, supra*, as plaintiff has failed to demonstrate with the conclusory affidavits of its counsel a likelihood of success on the merits concerning whether the cutting anticipated on the Hyslop portion of the Minerva trail destroys the Preserve to a substantial extent or in any material degree, nor any of the contentions of the defendants concerning the status of the trees at issue (i.e. dead or diseased), the Court will not issue such injunction. This is a burden that a plaintiff bears with respect to a request for an injunction, and as plaintiff has failed to meet its burden with respect to such prong, the Court need not address the remaining prongs concerning

irreparable harm or the balancing of the equities.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, based upon a review of the record, it is hereby

**ORDERED** that plaintiff's application is denied in its entirety.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. A copy of the decision and order and the supporting papers are being delivered to the County Clerk for placement in the file. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry.

Dated: Albany, New York
September 4, 2015

Gerald W. Connolly
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause dated August 19, 2015; Affidavit of Claudia K. Braymer, Esq. dated August 19, 2015 with accompanying exhibits A-I; Supplemental Affidavit of Claudia K. Braymer dated August 20, 2015 with accompanying exhibit A; Summon and Combined Complaint and Petition dated April 12, 2013;
2. Defendants-Respondents Memorandum of Law in Opposition to August 19, 2015 Motion for Preliminary Injunction dated August 24, 2015; Defendants-Respondents' Affidavits of Peter Frank, Benjamin Thomas and Stewart McCrea Burnham (dated August 20, 2015) in opposition to Plaintiff-Petitioner's Motion for Preliminary Injunction with accompanying exhibits A-D to the Frank Affidavit of August 21, 2015 and accompanying exhibits A-C to the Thomas Affidavit of August 21, 2015;
3. Community Connector Trail Plan Unit Management Plan- Trail Overview;
4. "Calculation of Trees to be Cut for the Construction of the Minerva-Newcomb-North Hudson Class II Community Connector Snowmobile Trail".