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SHORT FORM ORDER

COPY

INDEX NO. 17139/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

NASSAU POINT LAGOON, INC., 1663 BRIDGE LLC, JAMES D. WEEDEN, JUSTINE K. WEEDEN, JOHN WOLLEBEN, PATRICIA WOLLEBEN, JOYCE A. SAMPIERI, NORA FLOTTERON, JOSEPH FLOTTERON, III, DENNIS J. HICKEY, KATHLEEN A. HICKEY, RICHARD W. CORAZZINI, CHERYL ANN CORAZZINI, ROBERT A. LOVE, JR., JOAN E. LOVE, KATHERINE F. PERRETTA, JANET E. DOWNING, RICHARD DOWNING, PHILIP BUFFA, MARIA BUFFA, and JANE A. NELSON,

Plaintiffs,

-against-

JENNIFER J. BURRELL, JONATHAN PERRY, and JOHN CRONIN, as EXECUTOR OF THE ESTATE OF ROBERTA G. SINNOTT,

Defendants.

ROBERT H. STURDY, BARRY SMALL, and COLLEEN FRENCH,

Additional Defendants.

MOTION DATE: SEPTEMBER 30, 2016
FINAL SUBMISSION DATE: FEBRUARY 16, 2017
MTN. SEQ. #: 001
MOTION: MD

MOTION DATE: JANUARY 5, 2017
FINAL SUBMISSION DATE: FEBRUARY 16, 2017
MTN. SEQ. #: 002
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 16 read on this motion FOR SUMMARY JUDGMENT AND CROSS-MOTION TO AMEND ANSWER. Notice of Motion and supporting papers 1-3; Affidavit in Support of Motion for Summary Judgment and supporting papers 4, 5; Memorandum of Law in Support of Motion for Summary Judgment 6; Memorandum of Law in Opposition to Motion for Summary Judgment and supporting papers 7, 8; Notice of Cross-motion and supporting papers 9, 10;

Affidavit in Opposition to Motion and in Support of Cross-motion and supporting papers 11, 12; Memorandum of Law in Opposition to Motion for Summary Judgment and in Support of Cross-motion 13; Affirmation in Further Support of Motion and supporting papers 14, 15; Memorandum of Law in Further Support of Motion for Summary Judgment 16; it is,

ORDERED that this motion (seq. #001) by plaintiffs for an Order, pursuant to CPLR 3212, granting plaintiffs summary judgment as follows:

(1) on plaintiffs' first cause of action, the first and second counterclaims of defendants JENNIFER J. BURRELL and JONATHAN PERRY ("Burrell" or "Perry" and collectively the "Burrell-Perry Defendants") and the counterclaim of Additional Defendant ROBERT H. STURDY ("Sturdy"), awarding summary judgment to plaintiffs and the additional defendants (and/or their successors) to be the owners in fee to the center line of the Lagoon with respect to the portion of the Lagoon that abuts each of their respective properties, dismissing the Burrell-Perry Defendants' first and second counterclaims, dismissing Sturdy's counterclaim, and appointing a referee to determine the exact location of the property lines for each of the plaintiffs' bottomlands to the center of the Lagoon;

(2) on plaintiffs' second cause of action, granting plaintiffs a declaration that they (and/or their successors) have, with respect to the Lagoon, all of the rights of riparian owners, including the right to dredge the Lagoon to preserve reasonable access to Peconic Bay; and

(3) on plaintiffs' third cause of action, granting plaintiffs (and/or their successors) injunctive relief prohibiting the Burrell-Perry Defendants from any further interference with plaintiffs' (and/or their successors) attempts to dredge the Lagoon, including the portion of the Lagoon constituting the inlet to Peconic Bay in its entirety,

is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this application from the Burrell-Perry Defendants, as well as from Sturdy; and it is further

ORDERED that this cross-motion (seq. #002) by the Burrell-Perry Defendants for an Order, pursuant to CPLR 3025 (b), granting the Burrell-Perry Defendants leave to amend their answer, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this cross-motion from plaintiffs.

I. The Pleadings

(A) The Complaint

In sum and substance, plaintiffs' first cause of action seeks a judgment, pursuant to Article 15 of the RPAPL, declaring the rights and legal relations between the parties as to ownership of the land under the waters of the Lagoon. Plaintiffs seek to have the Court declare each of them the owners of the underwater lands adjacent to their properties to the midpoint of the Lagoon. There is a further request that the Court fix the exact property lines by appointing a referee for that purpose.

The second cause of action seeks a declaration, pursuant to CPLR 3001, that the underwater lands within the Lagoon and Inlet (presumably the Channel) are burdened by a navigational servitude or other limitation upon their use that provides plaintiffs the right to use the waters of the Lagoon and to take any reasonable and necessary action to ensure reasonable access to Peconic Bay.

The third cause of action seeks a permanent injunction enjoining defendants from unreasonably interfering or infringing on plaintiffs' right to use and access the waters of the Lagoon.

Plaintiffs fail to assert any allegations as to the nature of the defendants' interference with their rights. The pleadings themselves hint at conflicts without stating non-hearsay allegations of any type amounting to interference sufficient to justify the invocation of the Court's powers. It is questionable as to whether the matters presented rise to the level of a justiciable controversy.

It does not appear that any other individual or entity is making an adverse claim to title to the underwater lands of the Lagoon and Channel. However, there is appellate support for the proposition that another entity could assert such a position.

> The State contends that there is no justiciable controversy as to it because it has not claimed any right or interest in Stewart Pond. According to the State, the proper defendants are those members of the public who have actually asserted the common-law right of public entry on navigable waters by fishing on Stewart Pond.

> The anglers would clearly be proper defendants in a trespass action (*see, e.g., Adirondack League Club v Sierra Club*, 201 AD2d 225, *appeal dismissed* 84 NY2d 978), but that does not necessarily preclude plaintiffs from pursuing the remedy provided by RPAPL article 15 against the State. Regardless of whether the State has formally asserted a claim that Stewart Pond is navigable and open to public use, this action against the State is proper if it appears from the public records, or from the allegations of the complaint, that the State might make such a claim (*see*, RPAPL 1501 [1])

(*Hanigan v State*, 213 AD2d 80, 82-83 [3d Dept 1995]).

Neither the State of New York nor the Town of Southold have been made a party to this action by the litigants. The Court is concerned with the characterization by the defendants of the municipal entities as somehow disinterested in these proceedings. Unlike the *Hanigan* matter, there are no indicia of a claim by the State of any interest in the underwater lands of the Lagoon or Channel. As it pertains to the Town of Southold, the recent representatives of the Town have sought not to contradict or challenge the assertion of private ownership. Under these circumstances, a controversy, ripe for adjudication, is at the least illusive.

Plaintiffs do claim, however, that they possess certain rights due to an alleged unbroken chain of title dating back to the year 1665. They further claim that there has never been an exclusion of the underwater lands in any of the conveyances through which they claim their respective interests. Plaintiffs assert that they, as a matter of law, possess ownership interests to the center line of the Lagoon and Channel to the extent that their properties are adjacent to those bodies of water. It is apparently agreed and conceded that plaintiff 1663 Bridge LLC is the upland owner adjacent to the north side of the Channel, and that the Burrell-Perry Defendants are the upland owners adjacent to the south side of the Channel. The remainder of the plaintiffs and the additional defendants are upland owners adjacent to the Lagoon.

(B) First Counterclaim

The Burrell-Perry Defendants likewise allege a controversy concerning the ownership interest in and to the land under the waters of the subject Lagoon and Channel.

(C) Second Counterclaim

The Burrell-Perry Defendants allege that dredging undertaken by or on behalf of the plaintiffs has undermined the lateral support of the Burrell-Perry Defendants' bulkhead and caused erosion of their upland parcel into the Channel, all to their detriment.

II. Burrell-Perry Defendants' Cross-Motion to Amend

The Burrell-Perry Defendants by cross-motion seek to amend their counterclaims and assert an additional claim of ownership by adverse possession. While leave to amend pleadings may be freely given upon a motion to amend or supplement pleadings, it is required that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025 [b]). The affidavit in opposition to plaintiffs' motion for summary judgment and in support of the Burrell-Perry Defendants' cross-motion to amend makes no reference to the proposed new pleading by exhibit designation or otherwise. There is a document labeled as an Amended Verified Answer annexed to the affidavit as Exhibit "H"; however it is in no manner verified nor are any amendments referenced by the affiants. Therefore, the cross-motion to amend is hereby **DENIED** for failure to comply with the necessary requirement (*see* CPLR 3025 [b]; *BBM Constr. Corp. v Hersko*, 2014 NY Slip Op 32284[U] [Sup Ct, Kings County 2014]; *Musachio v Musachio*, 2013 NY Slip Op 32088[U] [Sup Ct, Suffolk County 2013]; *Karl's Plumbing & Heating Co. Inc. v Yevool, Inc.*, 41 Misc 3d 1223[A] [Sup Ct, Queens County 2012]).

III. Factual/Procedural History and Plaintiffs' Motion for Summary Judgment

Perry asserts that this litigation arises from the Town of Southold's grant of a dredging permit for the north side of the Channel adjacent to the 1663 Bridge LLC property. There was at the time of the motion and cross-motion a pending appeal of the Order of Justice Santorelli, which dismissed Perry's Article 78 challenge to the dredging permit. Justice Santorelli's denial of the Article 78 proceeding and dismissal of the action has been affirmed by Order of the Appellate Division, Second Department dated August 2, 2017 (*see Matter of Perry v Patricia A. Brennan Qualified Personal Residence Trust*, 153 AD3d 522 [2d Dept 2017]). The Second Department did not reach the issue of ownership of the underwater lands within the Channel. The dredging permit issued by the

Board of Trustees of the Town of Southold authorized dredging of the northern half of the Channel adjacent to the 1663 Bridge LLC upland. Also, it would seem from the record that the current Channel as created in 1933 was brought into being as a result of the dredging of a portion of the upland owned without question by the predecessor to 1663 Bridge LLC. It is worth noting that the most recent dredging controversy concerned the Channel and not the Lagoon. It is not clear what the position of the Trustees of the Town of Southold would be with respect to the Lagoon.

Perry asserts the existence of triable issues of fact. Perry asserts a certified chain of title of all the lands under the water of the Channel based upon a certified search by Fidelity National Title Insurance Company (Exhibit "B" to Perry's Affidavit). Plaintiffs oppose this assertion by the Burrell-Perry Defendants in that prior conveyances to plaintiffs' predecessors undermines the deed upon which the Burrell-Perry Defendants rely. Plaintiffs contend the land went into private ownership before New York State took title to the public lands, and plaintiffs further contend that New York State did not take title to the land beneath the Lagoon. Neither New York State nor the Town of Southold is a party to this action. Perry further claims title to all the underwater lands of the Lagoon based upon the assertion of the payment of taxes for a period of ten years. The uncertified Property Record Card of the Town of Southold indicates upland acreage of 5.25 acres and an entry for the Lagoon of 7 acres for which Perry has paid real property taxes.

The ownership interests of the Town of Southold devolve from the Andros Patent, and there is no legitimate claim beyond that patent with respect to underwater lands. The placement of lands in private ownership is not bourne out by the record. In a similar case concerning underwater lands within the Town of Southampton, the Court of Appeals held:

> As to the lands under water none were ever allotted or sold or made the subject of individual ownership. The absolute control and management thereof has been exercised by the trustees from the Dongan charter to the present time

(*Trustees, etc. of Southampton v Mecox Bay Oyster Co.*, 116 NY 1, 12 [1889]).

It is recognized that long-standing control and ownership of underwater lands by the sovereign cannot and should not be undermined by

untenable private assertions of title derived from imprecise assertions of prior conveyance.

> In the construction of a public charter granted for the purpose of creating a civil community, the practical interpretation it has received from and which has been acquiesced in by those interested therein for a long series of years, is the most important evidence in the determination of rights existing thereunder, and the strict letter of the instrument becomes of little importance. As to the lands under water embraced within said patents, the title remains in the town

(*Id.* at 5).

Perry further asserts that the Town of Southold recognizes and acknowledges Perry as the owner of the underwater lands of the Lagoon. The Exhibits attached do not acknowledge Perry as the owner but indicate that as of June 22, 2011, the Town did not intend to challenge the assertion that the underwater lands of the Lagoon were held in private ownership. In addition, Perry simultaneously asserts deeded rights, as well as an adverse possession claim to the underwater lands of the Lagoon. While Perry's motion to amend his counterclaims to include a cause of action for adverse possession has been denied as set forth above, Perry's assertion of actions taken by him or on his behalf are instructive as to the nature of the relationship between and among these parties, and the current tenor of the environment spawning this latest installment of litigation.

The Burrell-Perry Defendants caused shellfish harvesting complaints to be lodged against third-parties with both Town and State law enforcement authorities. Perry admits to posting no trespassing signs, and claims no dredging has ever taken place within the Lagoon and Channel without his consent. Perry makes it a point to explain that in the past there has been contribution by the Association to the cost of maintaining the bulkhead on the northern side of his upland abutting the south side of the Channel.

Although Perry alleges that dredging causes a loss of lateral support to his adjacent bulkhead that results in erosion to the upland Perry property south of the bulkhead, he makes no allegation that any such dredging has ever occurred, let alone resulted in damage as he speculates. This theoretical concern is not the stuff of which justiciable controversy is made.

Obviously, dredging below the depth of the bulkhead vertical sheets or planks may very well result in a loss of property behind the bulkhead. This can also be caused by gaps between the planks and general deterioration of the bulkhead due to age. In the process of opining about the possible effects of dredging, Perry explains that the upland bulkhead has not been replaced in over thirty years. He goes on to claim that it is entirely inequitable for plaintiffs to have the benefit of the Perry bulkhead to help keep the Channel open without contributing to its required maintenance by reason of dredging and other damage. The fact is there is no proof in this record that dredging has caused any damage to the Burrell-Perry Defendants' upland or even that any dredging immediately adjacent to the Burrell-Perry Defendants' property has ever occurred.

The Burrell-Perry Defendants oppose the plaintiffs' summary judgment motion in two respects: (a) lack of specific description in the instrument of conveyance into the plaintiffs; and (b) lack of title by reason of ownership of abutting property.

Perry claims that none of the deeds into the plaintiffs contains a specific grant of the underwater lands adjacent to their properties. The affidavit of plaintiffs' expert, Lance Pomerantz, is silent as to the deeds to the property adjacent to the Channel. Pomerantz testified at the hearing regarding the dredging permit that the underwater lands of the Channel were not deeded to the adjacent property owners (*see* Exhibit "G" to Perry's Affidavit). Perry concedes or more aptly takes the position that 1663 Bridge LLC has title to underwater lands of one-half the Channel due to the fact that it is an abutting landowner. Perry contradicts himself by claiming that there was no center line ownership at common law. Perry fails to place that statement into context as to whether the discussion includes man-made or natural waterways, navigable or non-navigable waterways, or tidal or non-tidal waterways.

Perry further seeks to undermine 1663 Bridge LLC's claim of title by asserting that the deed into his predecessors only includes the lands under the waters of the Peconic Bay, not the Channel. He alleges that waters under the Channel are excluded by implication. This is somewhat tortured logic at best.

There is an additional complication of the analysis pertaining to the Lagoon and the Channel, in that the Coastal Survey of 1838 shows the Lagoon as completely landlocked without any indication of a channel. Perry avoids any mention of the fact that the original pond appears to have been totally landlocked, and therefore if a single owner owned the entirety of the land around the waters that owner would have complete title to the land under those waters. If there

were multiple owners adjacent to the completely landlocked body of water they would then own to the center line of the body of water adjacent to their respective upland. The same holds true if the body of water is non-tidal and/or man-made rather than naturally occurring.

The surface usage of the water is a separate and distinct issue from ownership of the land underwater. Riparian owners have the right to maintain the waterway for the purpose of the reasonable use for which it was intended. This maintenance includes the right to dredge while balancing the rights of all adjacent and upland riparian owners.

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation

(*Lewis Blue Point Oyster Cultivation Co. v Briggs*, 229 US 82, 89 [1913], quoting *Scranton v Wheeler*, 179 US 141, 163 [1900]).

Perry's position as to the ownership of the underwater lands of the Lagoon other than the Channel is somewhat puzzling. He summarily claims they are his; this assumption seems to be based on his purported claim by adverse possession. This claim does not find any support in the record. Perry further misunderstands the riparian rights of the plaintiffs as to the Channel and Lagoon.

Perry claims that there is no authority cited by the plaintiffs for the general assertion that the lands under the water of the Lagoon and Channel are held for the public trust. These arguments are somewhat disingenuous. The overarching issue is the desire of the Burrell-Perry Defendants to have the Association and its members contribute to the cost of rebuilding the Burrell-Perry Defendants' bulkhead. Under the circumstances presented herein, the Court is unaware of any legal mechanism to compel contribution by the plaintiffs or the additional defendants.

The Court is aware of a previous holding by Justice Paul Baisley, Sr. in a Memorandum Decision dated December 3, 1991, under Index No. 25110/1987, that contribution could not be compelled between and among these parties and their predecessors. The 1987 action was commenced at or around the time the Burrell-Perry Defendants' bulkhead was completed. Perry is no doubt aware of this prior holding given that his predecessors-in-interest, including members of the Burrell (his wife's) family, were included among the plaintiffs in that case.

The first undertaking is the characterization of the waters as they exist at the present time. As described by all parties, the Lagoon and Channel are both subject to tidal flow. There was at one time a natural inlet which was the sole means of access to the Lagoon. The new Channel was man-made and transverses Lot 108 of the subdivision, which is owned by 1663 Bridge LLC. The Lagoon itself is a public waterway open to use by all (*see Lagoon Association of Nassau Point v Sturdy*, Sup Ct, Suffolk County, Dec. 3, 1991, Baisley, J., Index No. 25110/1987).

The law is clear that the right to dredge exists for upland riparian owners and that courts will intervene only to the extent of balancing the rights of other riparian and adjacent upland owners. Those seeking to reasonably maintain the waterway are required to act reasonably taking into consideration the riparian and property rights of affected upland riparian owners. There is a prohibition against undermining an adjacent bulkhead or causing damage to adjacent or other upland riparian property rights. Given the nature of marine bulkhead and dredging contracting, it is doubtful that any reputable marine bulkhead or dredging contractor would undertake their activities in a manner that would undermine the integrity of an adjacent property owner's fast land. No credible allegations to the contrary have been made by any party herein. The hypothetical concerns of the parties do not constitute a justiciable controversy.

The Burrell-Perry Defendants' Memorandum of Law asserts that the plaintiffs fail to demonstrate *prima facie* ownership of the lands under the Channel in the absence of any common-law rights, and that the deeds into plaintiffs preclude the ownership. It is unclear from the Burrell-Perry Defendants' argument whether their contentions are based upon the facts herein concerning the nature and character of the Lagoon. The Lagoon was once a landlocked body of water with no appreciable navigable access to the Peconic Bay according to the 1838 Coastal Survey. The centerline ownership argument could then be made if the body of water is or was fully enclosed and unaffected by the tidal waters of Peconic Bay. None of the parties have addressed that issue sufficiently and in all likelihood with good reason. The Court has not been provided with any

sufficient non-hearsay allegations of fact concerning the 180-year-old coastal survey.

The deed-into-grantee argument is also problematic. It is well-settled that a grantee can not receive what the grantor did not possess to convey. There is an additional wrinkle in that the Channel at least anecdotally was originally formed by nature. There was a later man-made expansion of the Channel; the parties do not address the issue of a man-made channel versus its natural occurrence.

To further complicate matters, it would appear that the Lagoon has always been a tidal body of water subject to the ebb and flow of Peconic Bay. It would seem that at low tide in or around the early 1800's the Lagoon and Peconic Bay would be separated by a spit of land, but that at high tide the Lagoon and Peconic Bay would be connected. The Lagoon, by definition, was therefore subject to the tidal influence of Peconic Bay, and was and is neither a landlocked nor man-made body of water.

The deed into plaintiff 1663 Bridge LLC conveys lands under the Peconic Bay by its terms. The deed is silent as to a specific conveyance of lands under either the Channel or the Lagoon. The interpretation of the language of deeds as it pertains to the conveyance of underwater lands as either riparian or littoral in nature requires an analysis of the predecessor deeds and the language dating back to the original conveyance and each successive conveyance in the chain of title. Self-serving insertions of a grantor not supported by the prior conveyances is of no consequence.

According to Perry, since plaintiffs failed to demonstrate *prima facie* the existence of riparian rights, the motion for summary judgment should be denied. This argument is without basis in law or fact. Riparian rights exist herein as a matter of law in favor of plaintiffs, the Burrell-Perry Defendants, and the additional defendants, as well as their predecessors- and successors-in-interest. This case is solely about access and navigation and the right to reasonably dredge to maintain the quality and nature of the Channel and the Lagoon for the purpose of preserving the customary uses of the waterway.

> [T]he Supreme Court properly determined that the plaintiffs, as owners of property bounded by a navigable waterway, possess riparian rights, which include the right of access to the navigable water, and the right to make this access a practical reality by building a pier, or "wharfing out"

(*Klein v Aronshtein*, 116 AD3d 670, 671 [2d Dept 2014] [citations omitted]). However, at the present time, the Court is unaware that any party is being denied the right to dredge or the right to navigate either within the Channel or the Lagoon.

In addition, Perry contends that Sturdy's claims are without merit. There is by Perry's argument no current issue in controversy. Perry misses the point that riparian rights as a general concept exist. Any specific assertion of the rights for a particular purpose such as dredging is subject to a balancing of the rights of all riparian owners and the adjoining property owner whose property must be protected and preserved from being structurally undermined or damaged. Despite the assertion by the Burrell-Perry Defendants, financial contribution to bulkhead costs is not an issue within this action. No pleading is made on behalf of the Association seeking contribution or participation by the members of the Association or any other riparian owners not members of the Association.

Perry further claims that no governmental entity has an interest in these waters. The Court is not of that opinion. The United States, the State of New York, and the Town of Southold all have an ongoing and continued interest in the Channel and Lagoon. The Army Corps of Engineers, the New York State Department of Environmental Conservation, and the Town of Southold all have an interest in the Channel and Lagoon. There is no evidence in this record that any governmental entity has waived its respective interest, nor could they. No municipal, state or federal sovereign may be bound or estopped based upon the alleged agreement or acquiescence of an individual purporting to represent that entity. A single representative or member of government cannot bind future assertions of governmental interest in the nature of collateral estoppel (*see Karedes v Colella*, 100 NY2d 45 [2003]; *Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460 [4th Dept 2013]; *Matter of Newburgh v McGrane*, 82 AD3d 1225 [2d Dept 2011]). The Town's expressed intention not to oppose the assertion of private ownership without more in no way binds or hinders the Town or any other branch of government from asserting its interests, regulatory or otherwise.

There is no current controversy of which the Court is aware as between and among the riparian owners. This action is born of frustration in an understandable but misguided attempt to have this Court issue an advisory opinion concerning a controversy that may or may not occur in the future. Such a finding would not only be inappropriate but would serve no purpose for any actual future controversy would be subject to the assertion of the rights of the parties

then affected and to be balanced by the court. That issue does not currently exist.

> The plaintiffs failed to establish, *prima facie*, their entitlement to summary judgment on the complaint insofar as asserted against the PPA since the evidence proffered was insufficient to demonstrate, as a matter of law, an unreasonable interference with their riparian rights (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 264, 328 NYS2d 894 [1972], *affd* 32 NY2d 859, 299 NE2d 895, 346 NYS2d 529 [1973]). In any event, we note that the PPA raised issues of fact, *inter alia*, as to the level of interference, if any, with the plaintiffs' right of access to navigable waters (*see Town of Hempstead v Oceanside Yacht Harbor, supra*)

(*Zupa v Paradise Point Assn., Inc.*, 31 AD3d 538, 538 [2d Dept 2006]).

The Burrell-Perry Defendants' and the plaintiffs' assertions are contradicted by Sturdy as to the meaning and efficacy of the earliest transfers as between the Indian grantors, the Colonial grantees, the State of New York, the Trustees of the Town of Southold, and any successor grantees.

The title search submitted by the Burrell-Perry Defendants pertains only to the dredged canal (the Channel), and by its terms is subject to:

> Rights of the United States Government to establish harbor, bulkhead or pierhead lines or to change or alter any such existing lines and to remove or compel the removal of fill and improvements thereon including buildings or other structures, from land now or formerly lying below the high water mark of Great Peconic Bay, the Lagoon and the Canal without compensation.
>
> Riparian rights and easements of others over the Great Peconic Bay, the Lagoon and the Canal, however, this search does not insure any riparian rights or easements in favor of the owner of the premises herein.

> Rights of the United States Government, The State of New York and County of Suffolk, Town of Southold, or any of their departments or agencies to regulate and control the use of the piers, bulkheads, land under water and land adjacent thereto

(*see* Exhibit "B"). There is no similar analysis shown for the underwater lands of the Lagoon.

IV. Sturdy's Submission

Sturdy submits a Memorandum of Law in opposition to plaintiffs' motion for summary judgment and in support of Sturdy's "motion" for summary judgment. Sturdy requests summary judgment in his favor in the body of his submission but fails to properly notice a cross-motion for summary judgment. Sturdy's papers are accepted by the Court as opposition to the present motions of the other parties herein.

Sturdy requests summary judgment in his memorandum as follows:

(1) on Sturdy's counterclaim, plaintiffs' first cause of action, and the first and second counterclaims of the Burrell-Perry Defendants, awarding summary judgment to Sturdy declaring the lands under the Lagoon and the Natural Inlet to the high water mark (as shown on the 1919 Van Tuyl Survey, submitted as Exhibit "C" to the Pomerantz affidavit) to be owned by the sovereign held in trust for the public, and not any private landowner, whether that sovereign be the State of New York or the Town of Southold, dismissing plaintiffs' first cause of action and the Burrell-Perry Defendants' first and second counterclaims;

(2) on plaintiffs' second cause of action, granting plaintiffs (and presumably the defendants too) a declaration that they (and their successors) have, with respect to the Lagoon, all of the rights of riparian owners, including the right to dredge the Lagoon to preserve reasonable access to Peconic Bay; and

(3) on plaintiffs' third cause of action, granting plaintiffs (and their successors) (and presumably the other defendants and their successors) injunctive relief prohibiting the Burrell-Perry Defendants from any further interference with plaintiffs' (and their successors) attempts to dredge the Lagoon, including the portion of the Lagoon constituting the inlet to Peconic Bay in its entirety.

The Second Department has clearly stated that:

> Since [defendant] failed to serve the plaintiffs with a notice of cross motion (*see*, CPLR 2215), it was not entitled to the affirmative relief requested in its September 7, 1993, affirmation in opposition to the plaintiffs' cross motion (*see*, *Matter of Barquet v Rojas-Castillo*, 216 AD2d 463; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1, at 124)

(*Thomas v Drifters, Inc.*, 219 AD2d 639, 640 [2d Dept 1995]).

Sturdy's requests for summary judgment are therefore **DENIED** in the absence of a properly noticed cross-motion.

Sturdy's submission while observational in tone does impact upon the Court's legal analysis. In reference to the inlet or Channel, it is asserted that a portion of the Channel is upon lands owned by 1663 Bridge LLC as having been conveyed into private ownership before the Andros Patent. It is further alleged that since April 1, 1994, the Town of Southold has taken the position (precisely how that legal position has been taken is unclear) that the Lagoon and entrance are privately owned.

In or about June 22, 2011, the Town stated that it would not challenge private ownership of the Channel and Lagoon. Sturdy alleges that regardless of the fact that the Town conveyed title to William Wells in 1667, the Town had no ownership interest for the purpose of conveyance from a public to a private entity until the Andros Patent, which did not issue until 1676, nine years later.

While certainly an interesting historic note, the more important issue according to Sturdy concerns what in fact was conveyed. Did the Andros Patent convey lands under the waters to the Town of Southold? The New York State Attorney General in a similar case within the confines of the Town of Southold has taken the legal position that the Andros Patent did in fact convey the underwater lands to the Town of Southold:

> Plaintiffs assert that there is no evidence supporting the Tuthill estate's claim that School House Creek is a man-made body of water. They assert that School

> House Creek, in fact, is a tidal body of water; that ownership of land under tidal waters must be traced back to when the English Crown claimed ownership of all land in the early colonies; and that, under a land grant known as the Southold Patent, issued in 1676 by the Duke of York's appointed agent, Governor Edmund Andros, title to tidal bodies of water and marshes located within the area of Southold was granted to the Town's Trustees

(*Schultheis v Estate of Tuthill*, 2012 NY Slip Op 30556[U], at **3 [Sup Ct, Suffolk County 2012]).

While the evolution and devolution of the competing claims and rights is certainly interesting from a historical perspective, the Court herein is concerned with the fundamental principle that riparian rights do not impact upon title. As noted, regardless of title to the underwater lands there are certain rights which are not dependent upon title to the underwater lands for the purpose of asserting riparian protections by upland owners.

The logical progression of that concept leads the Court to conclude that for the purpose of resolving certain riparian controversies, the determination of title to the underwater lands is unnecessary and may in fact be irrelevant to the determination of riparian rights in a particular controversy. Here, the Court is faced with competing RPAPL Article 15 requests for determination for no real issue in controversy. The determination of title to the underwater lands in no way diminishes or increases the assertable rights of upland riparian land owners at least as to the issues set forth by the parties herein. The parties and indeed the sovereign non-parties, namely the State of New York and the Town of Southold, are not contesting title to the underwater land. It is as if the plaintiffs and the Burrell-Perry Defendants are attempting to manufacture a controversy where none currently exists.

> I think that if the grant had been intended to include lands under water language appropriate to effect that purpose would have been employed, as in many of the colonial grants and charters which have been brought before the courts for construction. In *De Lancey v. Piepgras*, 138 N.Y. 26, 33 N.E. 822, it was held that a patent from the crown of Great Britain issued in 1666 creating the Manor of Pelham and conveying a tract of

> land upon the mainland bounded by Long Island Sound, with all the islands in the sound not previously granted or disposed of, lying before the tract upon the mainland, did not pass title to the land under water adjoining the islands referred to. Nor does the reference in the Symes grant to the "Pooles Ponds Waters Watercourse Rivers Rivoletts Runns & Streams of Water Brooks ffishing," etc., operate to enlarge the grant so as to include the lands under water here in question, inasmuch as all of the words quoted are limited and qualified by the phrase "within the Bounds and Limitts aforesaid." *Sage v. Mayor*, 154 N.Y. 61, 47 N.E. 1096. The case of *Starke-Belknap v. N. Y. Central R. R. Co.*, *supra*, is distinguishable in that the royal grant there under consideration by its express terms included "ferries" and "the fishing in Hudson's River, so far as the bounds of the said lands extend upon the same." It was held in that case that the use in the grant of the terms quoted warranted the lower court in finding that the grant included the coves and bays which were appurtenant to the upland. I have considered with care the arguments advanced and authorities cited in the briefs submitted by counsel for the Symes Foundation and the Victory Dry Dock Company, but am unable to agree with their conclusion that the grant here in question included lands under water. The question whether the Symes grant included lands under water was not so involved in *Smith v. Staten Island Land Co.*, 175 A.D. 588, 162 N.Y.S. 681, or in the unreported case of *Crown Lands Corporation of Staten Island v. Corbin Land Co.* as to make the decisions in those cases controlling in the instant case

(*In re City of NY*, 116 Misc 179, 183-184 [Sup Ct, Kings County 1921].

There are different methods of analysis employed by the courts with respect to the conveyance of underwater lands. There are general principles applied. When reference was made within the grant to a body of water, the conveyance was valid only to the high water mark and any conveyance of the foreshore was deemed void, even where a specific grant of the foreshore was attempted. The courts recognized that certain lands were incapable of transfer to

private interests in the absence of some public purpose. In this case, an express transfer was voided.

> The general rule is that where the boundary of a Crown grant is a body of navigable water, it runs from the high water mark. It was said in *Matter of Mayor, etc., of New York* (182 N.Y. 361, 365): "While the king had the power to convey the tideway on the shores of the high seas and navigable rivers, he will not be presumed to have done so by merely bounding the conveyance upon the sea or the river; such conveyance will carry title only to high-water mark. Other words must be employed in the conveyance which would clearly indicate his purpose and intent to convey the lands under water in order to pass the title thereto"

(*In re CITY OF NY*, 281 AD 315, 328 [1st Dept 1953]).

The Second Department in *N. Hempstead v Eldridge*, 111 AD 789 (2d Dept 1906), after a thorough examination of the history of the boundaries between what are now Jamaica, Flushing and Hempstead, found that in the absence of any specific grant of underwater lands, the application of concepts of interpretation and construction including lines to be drawn by direction (i.e., south, north) were interpreted to mean along the coast and not truly straight, unwavering, as the crow flies lines. If the waters and the lands were not mentioned or specifically conveyed, the court reached its result as follows:

> My conclusion is that the land under water described in the complaint is not included within the boundaries of either of the Colonial patents to the town of Hempstead, and is not shown to be the property of the plaintiff, and for this reason the complaint should be dismissed

(*N. Hempstead*, 111 AD at 801).

As to the issue of Indian deeds, the courts have held that it was the grant of the Crown that was controlling, and that the various Indian transfers were subject to more formal grants of the Crown and the sovereign:

> But Indians could, by themselves alone, create no lawful claim. (*Town of Southampton v. Mecox Bay Oyster Co.*,

116 N. Y. 1, where the same proviso was in the patent; *Clarke Estate v. City of New York*, 165 App. Div. 873.) The Duke of York's Laws (March 1, 1665) (1 Colonial Laws [Comp. Stat. Rev. Comm.], 40) provide: "No Purchase of lands from Indians After the first day of March, 1664, shall be Esteemed a good Title without leave first had and obtained from the Governour and after leave so obtained, The Purchasers shall bring the Sachem and right owner of such Lands before the Governoure to acknowledge satisfaction and payment for the said Lands whereupon they shall have a grant from the Governoure And the Purchase so made and prosecuted is to be entered upon record in the Office & from that time to be valid to all intents and purposes." The Colonial Laws (Vol. 1 [Comp. Stat. Rev. Comm.], p. 149, chap. 9), October 23, 1684, also provide: "noe Purchase of Lands from the Indians shall bee esteemed a good Title without Leave first had and obtaineid from the Governour signified by a Warrant under his hand and Seale and entered on Record in the Secritaries office att New Yorke and Satisfaction for the said Purchase acknowliged by the Indians from whome the Purchase was made which is to bee Recorded likewise which purchase soe made and prosecuted and entered on Record in the office aforesaid shall from that time be Vallid to all intents and purpoases." The parties have introduced many Indian deeds and none of them covers the locus in quo. It is not presumable that Indian deeds covering the place have been discovered and withheld from the court. If any Indian deed known to exist includes the parcel, the court, in the absence of overruling adverse evidence, could infer from the record of it title in one claiming under it. But if none of the deeds covers the locality, it should not be imagined that the Indians made other grants that did, and base on that fancy a presumption of confirmation, to the end that the plaintiff be compelled to show affirmatively that such is not the fact. That would be piling a supposition upon a hypothesis and requiring the plaintiff to prove its non-existence. There must be, as regards the proviso, some point of at least momentary rest for the town of

> Oyster Bay and those claiming under it. Otherwise, no one could ever trace title to the Andros patent. The person in possession in such case could always object that the claimant had not looked far enough, and that further search would discover that, before 1677, the date of the patent, there had been a prior conveyance of the beach falling within the proviso. So search would never be definite, although in reason nothing discoverable could be expected. Two Indian deeds are invoked to show title out of the plaintiff

(*Oyster Bay v Stehli*, 169 AD 257, 259-261 [2d Dept 1915], *affd* 221 NY 515 [1917]).

The case law contains references to the recording of Indian deeds not for the purpose of conveying title for the completeness of chains of title, but often as confirmatory documents as to what was intended to be transferred. The descriptions of the contents of the Indian deeds was used by subsequent grantors and grantees as evidence of the extent of future conveyances and was looked to assist in the resolution of disputes as to ownership often in the context of actions for ejectment or trespass. "The said John Palmer also obtained a deed from the Indians, covering the same property as described in this patent, which deed is dated October 6, 1685, acknowledged October 9, 1685, and recorded at the request of Captain Palmer on the 27th day of October, 1685. This Indian deed was executed by the marks of two Indians named Pamon and Tackpousha" (*Jamieson & Bond Co. v Reynolds*, 174 AD 78, 83 [2d Dept 1916]). Where there are conflicts between deeds and patents, the courts have interpreted the intentions of the grantor and grantee in certain circumstances. The courts have considered antecedent conveyances to identify the point at which a grantor may have taken liberties in conveying that which had not been previously conveyed (*see Oyster Bay*, 169 AD 257).

Moreover, the New York State Constitution as it existed in 1777 placed limitations upon the ability to contract for the purchase of land from Indian tribes. However, as to existing transactions with Indian tribes there was a saving clause, to wit: Section 36, to preserve prior dealings, and Section 37, a prohibition against future purchases. There was no federal constitution in effect to prohibit the impairment of contracts until March 4, 1789, the effective date of the United States Constitution (*see Pharaoh v Benson*, 69 Misc 241 [Sup Ct, Queens County 1910]).

There has been proffered a general proposition that the Towns derived their title to lands from the Andros and Dongan Patents, the respective governors at the time of the issuance of the patents.

> However, both the Andros and the Dongan patents purport to be confirmatory of existing rights, and the Andros patent contained the recital: "Whereas there is a certain Towne in the East Riding of Yorkshire upon Long Island commonly called and known by the name of South Hampton," etc. That charter was evidently granted to secure from the town recognition of the authority of the Duke of York. It appears that an order was made by the General Court of Assizes under Governor Nicolls in 1670, requiring the towns of Southampton, Southold and Oysterbay to give their reasons why they had delayed having their grants or patents renewed or confirmed. The rights of the original settlers were recognized and confirmed by the Andros and Dongan charters, and any divisions of the common lands made prior thereto do not appear thereafter to have been questioned. However, in view of the fact that under the Andros and Dongan charters the legal title vested in the body corporate and not in the equitable owners, it would seem that partition could not be made as among tenants in common, but that a transfer by the holder of the legal title was necessary to vest title in the allottees (*See Sanger v. Merritt*, 120 N.Y. 109, 24 N.E. 386), and it may well be doubted whether land could be transferred by parol after the Andros charter

(*Shinnecock Hills & Peconic Bay Realty Co. v Aldrich*, 132 AD 118, 122-123 [2d Dept 1909]).

Where there is conflict as to what was intended by a prior grantor and grantee, the courts have always been mindful of the inexactitude of prior dealings. In the words of Justice Humphrey of the Nassau County Supreme Court, "[i]t is not easy to find out what was running in the minds of men more than two hundred years dead. The best we can do is to review what they said; what they put into writing, and give some reliance on what the historians say of them" (*People v Foote*, 141 Misc 409, 410-411 [Sup Ct, Nassau County 1931]).

V. Conclusion

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

Given the labyrinth of Indian, Colonial, State, Local and Federal legal concepts and analysis, this Court concludes that no party herein has sufficiently asserted any current infringement of a justiciable right or any immediate likelihood of the infringement of any such right. Furthermore, this action is rife with unanswered questions of fact. Summary judgment is clearly not warranted in the circumstances.

Accordingly, plaintiffs' motion for summary judgment is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 12, 2017

HON. JOSEPH FARNETI
Acting Justice Supreme Court

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION