

Nassau Point Lagoon, Inc. v Burrell
2021 NY Slip Op 30228(U)
January 26, 2021
Supreme Court, Suffolk County
Docket Number: 17139/2014
Judge: Joseph Farneti
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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 19, 2019
FINAL SUBMISSION DATE: NOVEMBER 14, 2019
MTN. SEQ. #: 003
MOTION: MD

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Affirmation in Opposition supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7.

Defendant ROBERT H. STURDY (hereinafter "Sturdy") moves for an Order, pursuant to CPLR 3212, dismissing the action, and in addition seeks a declaration that the land under the water in the "Lagoon" and the channel connecting the Lagoon to Peconic Bay are public lands belonging to the Town of Southold and that the property abutting same is vested with riparian rights for property abutting navigable waters.

The defendants' fundamental position is that no private party has any ownership interest in the bottomlands of the Lagoon and Channel and the Court should make that specific declaration herein. Sturdy, by counsel, argues that all relevant parties, but for Perretta and Cronin, were and are bound by the judicial findings as contained in a 1987 action involving the issues herein.

While counsel for Sturdy claims only to be serving a limited purpose, the Court is not aware of any, nor does this Court recognize, such limitation upon participation by counsel. Counsel may seek to define their relationship with their client by limitation; this Court does not. Sturdy's counsel cites no statute, rule or case law to support this theory of "limited appearance." Counsel is not contesting jurisdiction. CPLR 320 only provides for a "limited appearance" by a party, not counsel, where a defendant is contesting the court's jurisdiction based upon failure of service; there is no other form of "limited appearance" provided for in that rule or CPLR 321.

Sturdy also argues that Indian or Crown deeds could not as a matter of law convey a publicly-owned tidal body of water into private hands. It is the navigability coupled with the tidal nature of the waters in question that Sturdy claims insulates these bottomlands from private ownership. Sturdy acknowledges that there may be a specific conveyance into private hands by grant of the sovereign. Sturdy argues that to award bottomland rights to abutting landowners would contradict legal decisional precedent, the express terms of the various deeds, and the broader policy considerations as may collaterally impact others similarly situated but not parties to this action.

Sturdy prays that all manner of private possessory rights be rejected and forever foreclosed regardless of purported method of obtainment. Sturdy's broad view is that the bottomlands of the Lagoon and Channel are owned by the State of New York in trust for the public. Sturdy does, however, recognize the rights of the Town of Southold. An anomaly has developed in that both the State of New York and the Town of Southold have each suffered situational ambivalence as evidenced by their actions or lack thereof as to their own rights and obligations related to such waters. Sturdy apparently takes the position that

the bottomlands are owned by either the State of New York or the Town of Southold, and he does not proffer any argument in favor of one or the other. His position seems to be that the bottomlands are owned by either one or the other of the governmental entities.

This Court does not speculate upon the governmental entities' reasons for non-participation. This Court's prior Order of December 12, 2017 discussed the law in this regard.

Sturdy takes the position that all deeds purporting to convey title or other rights, including his own quitclaim deed as grantee, are without force or effect as to the ownership of such bottomlands. Sturdy characterizes the Lagoon as tidal and avers that a natural inlet exists at the present time allowing for the ebb and flow of waters with the tide. Sturdy further suggests that but for intervention, nature provided a naturally occurring inlet for the movement of water into and out of the lagoon.

Sturdy seeks to begin the discussion of the historical survey record with the 1883 "marketing brochure" for Peconic Park and the 1919 Van Tuyl survey. The argument is that the 1838 U.S. Coastal Survey, which Sturdy characterizes as "an interesting artifact," should be disregarded as not detailed enough for the purpose of relying upon it. Sturdy's belief concerning the efficacy of the 1919 Van Tuyl Survey is not controlling and certainly is insufficient to carry the day in the context of a summary judgment motion. The further description of the 1919 document as modern and detailed does not erase the historical documents which may inform this Court's ultimate decision. Sturdy argues that defendant Burrell's deed purporting to convey title to underwater bottomlands is likewise without such legal significance.

While Sturdy dismisses the 1838 Coastal Survey map as an interesting artifact, the map itself shows the body of water in question as landlocked. Whether or not tidal influences were in existence at the time the government survey was completed, whether the body of water was made subject to tidal influence after man-made dredging or it occurred naturally or some combination thereof, the evolution of the character of this body of water over time and the efficacy of the proofs available for the purpose of this Court's fact-finding preclude a grant of summary judgment at this stage of the proceedings.

In a case involving a railroad survey where the existence of a route map concerning the railway which route abutted certain waterways, the court was faced with a somewhat similar issue:

The experts offer vastly different opinions with regard to what the drafters/illustrators of the maps intended to depict and the purposes for which the maps were drawn. The conflicting opinions of the parties' experts on genuine issues of material fact preclude the Court from deciding the issue on summary judgment. *See Regent Ins. Co. v. Storm King Contracting, Inc.*, 2008 U.S. Dist. LEXIS 16513, 2008 WL 563465, at *13 (S.D.N.Y. 2008). The issue of whether there was land to the west of the 40-foot strip in 1872 must be reserved to the fact-finder

(*Koepp v Holland*, 688 F Supp 2d 65, 79 [NDNY 2010]). Similarly, the facts, significance and purposes of the Coastal Survey map in this record cannot be resolved by summary judgment at this stage of the proceedings.

Here, the map itself has not been challenged by experts but it is no less a part of this record which one party seeks to dismiss as an interesting artifact and another has proffered as proof of the earliest documented character of the waterway.

The plaintiffs' position is that each adjoining landowner owns the bottomlands to the center of the Lagoon given the documents conveying their properties did not exclude or limit the adjacent underwater lands in any respect.

The Burrell and Perry defendants claim ownership to the entirety of the bottomlands of the lagoon to the exclusion of all others, including the State of New York and the Town of Southold. The plaintiffs argue that is an impossibility given the transfer of the bottomlands long before the Burrell and Perry defendants received their grant of title. One can only convey what one has to convey and one can only receive that which the purported grantor has to grant.

This Court had previously analyzed these very arguments and refers the reader to this Court's prior Order of December 12, 2017. While Sturdy now apparently has retained shadow counsel to assist in the formatting and presentation of his arguments, all but for the *res judicata* and collateral estoppel claims had been previously raised and considered by the Court in its 2017 decision and Order.

Justice Paul J. Baisley, Sr., in his 1987 decision, was faced with an action by a homeowner's association to compel contribution of adjoining property owners for the purpose of dredging and the maintenance of bulkheads. Here, the

RPAPL Article 15 action is focused on the title issue and the succession of title dating back centuries.

The significance and extent of any prior declaration of a "public waterway" as it pertains to the use and enjoyment of the navigable waters does not preclude this Court in any way from an examination of the chain of title, ancient as it may be, for the purpose of characterizing and determining title to the bottomlands and the other issues which may be in conflict herein.

The parties have certainly had multiple opportunities to present their theories and arguments, none of which is dispositive as a matter of law given the factual issues that exist and the burdens of proof upon those making these assertions. This Court's analysis and restatement of the law as contained in the December 12, 2017 Order is controlling herein; the arguments currently proffered do not alter the Court's prior analysis or opinion. The parties should be guided thereby and be mindful of the necessity of a justiciable controversy.

This matter will only be resolved by a trial of the issues and the Court's ultimate determinations of the issues of proof. While the Court considers the arguments offered to be made in good faith at this juncture, those arguments and opinions are just that.

Therefore, Sturdy's motion for summary judgment is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: January 26, 2021


HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION