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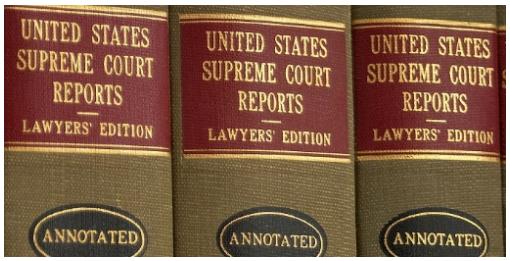


# BEACH OWNERSHIP, USAGE AND RIGHTS

**FACULTY**

**Timothy F. Hill, Esq.**

**Moderator: Christopher Minardi, Esq., New York Title**

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**August 18, 2021**
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**Timothy Hill**'s commercial litigation practice encompasses a broad range of corporate, contract, construction, and property disputes.

Mr. Hill has represented many of Long Island's municipal governments in complex cases involving constitutional and civil rights, as well as in matters concerning land use and regulatory issues. Mr. Hill also represents individuals appearing before such governmental boards or otherwise litigating claims to protect and enforce their rights and interests.

Mr. Hill practices in the state and federal courts in all phases of litigation from inception through trial and appeal. He has successfully written and argued numerous appeals, including in the New York Court of Appeals (New York's highest court) and the United States Court of Appeals for the Second Circuit. These appeals, as well as favorable results secured at the trial level, have resulted in published opinions and have been featured in the *New York Law Journal*.

Mr. Hill graduated with honors from St. John's University School of Law, where he served as Notes and Comments Editor of the St. John's Journal of Legal Commentary. His article, *Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism*, was selected for publication in the peer-reviewed *Journal of the Copyright Society*. Tim has also been published in the *Suffolk Lawyer* and the *New York Real Estate Law Reporter*. Mr. Hill is a graduate of Skidmore College and holds a Master's Degree in Literature.

He is a member of the Suffolk County Bar where he has been appointed to serve as a member of the Commercial Division Committee.

# The Law of the Beach – Ownership, Rights, Boundaries, and Claims

A. Ownership
- Deed Language
- Deed Interpretation

B. Riparian (Littoral) Rights
- Usage Rights
- Ownership Rights

C. The Rights of Others
- Foreshore
- Jus Publicum
- Easements

D. Boundaries
- Doctrine of Accretion vs. Avulsion
- Other Bases for Boundaries

E. Claims
- Quiet Title Actions
- Nuisance (public and private)
- Trespass

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And so castles made of sand
Fall into the sea eventually

- Jimi Hendrix

*Dover Beach*, Matthew Arnold

The sea is calm tonight.
The tide is full, the moon lies fair
Upon the straits; on the French coast the light
Gleams and is gone; the cliffs of England
stand,
Glimmering and vast, out in the tranquil bay.
Come to the window, sweet is the night-air!
Only, from the long line of spray
Where the sea meets the moon-blanched land,
Listen! you hear the grating roar
Of pebbles which the waves draw back, and
fling,
At their return, up the high strand,
Begin, and cease, and then again begin,
With tremulous cadence slow, and bring
The eternal note of sadness in.

Sophocles long ago
Heard it on the Ægean, and it brought
Into his mind the turbid ebb and flow
Of human misery; we
Find also in the sound a thought,
Hearing it by this distant northern sea.

The Sea of Faith
Was once, too, at the full, and round earth's
shore
Lay like the folds of a bright girdle furled.
But now I only hear
Its melancholy, long, withdrawing roar,
Retreating, to the breath
Of the night-wind, down the vast edges drear
And naked shingles of the world.

Ah, love, let us be true
To one another! for the world, which seems
To lie before us like a land of dreams,
So various, so beautiful, so new,
Hath really neither joy, nor love, nor light,
Nor certitude, nor peace, nor help for pain;
And we are here as on a darkling plain
Swept with confused alarms of struggle and
flight,
Where ignorant armies clash by night

McKinney's Consolidated Laws of New York Annotated
Navigation Law (Refs & Annos)
Chapter 37. Of the Consolidated Laws (Refs & Annos)
Article 1. Short Title and Definitions (Refs & Annos)

# McKinney's Navigation Law § 2

## § 2. Definitions

Effective: July 20, 2011
Currentness

The following terms when used in this chapter unless otherwise expressly stated, or unless the context of the language or subject matter indicates a different meaning or application was intended, shall be deemed to mean and include: 1. "Office" shall mean the state office of parks, recreation and historic preservation.

2. "Commissioner" shall mean the commissioner of parks, recreation and historic preservation, unless otherwise indicated, except that for purposes of the administration of articles three and eleven of this chapter within the sixth park region, the boundaries of which are described in subdivision six of section 7.01 of the parks, recreation and historic preservation law, "commissioner" shall mean the commissioner of environmental conservation.

*3. Repealed by L.1989, c. 650, § 2, eff. July 21, 1989.*

4. "Navigable waters of the state" shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties.

5. "Navigable in fact" shall mean navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.

6. "Vessel" shall mean any floating craft and all vessels shall belong to one of the following classes:

(a) "Public Vessel" shall mean and include every vessel which is propelled in whole or in part by mechanical power and is used or operated for commercial purposes on the navigable waters of the state; that is either carrying passengers, carrying freight, towing, or for any other use; for which a compensation is received, either directly or where provided as an accommodation, advantage, facility or privilege at any place of public accommodation, resort or amusement.

(b) "Residential vessel" shall mean and include every vessel which is used primarily as a residence.

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(c) "Pleasure vessel" shall mean and include every vessel not within the classification of public vessel or residential vessel. However, the provisions of this chapter shall not apply to rowboats, canoes and kayaks except as otherwise expressly provided.

(d) The term "vessel" as used in this chapter shall not include a crew racing shell. "Crew racing shell" shall mean any shell, gig, barge or other boat designed primarily for practice or racing, propelled by oars or sweeps, in the sport of crew or scull racing conducted by a private or public educational institution, school, academy, college, university or association of any of the preceding, or by an amateur sports club or association or by the United States or International Olympics Committee and shall not include canoes, rowboats or lifeboats.

The boat or launch accompanying a crew racing shell shall have sufficient safety devices to aid members of the crew should the need arise.

7. "Owner" shall mean the person actually holding title to a vessel, except a public vessel chartered unmanned for a period of more than thirty consecutive days, in which case "owner" shall include the person chartering the vessel.

8. "Person" shall mean an individual, partnership, corporation or association.

9. "Master" shall include every individual having for the time the charge, control or direction of a vessel.

10. "Pilot" shall mean an individual licensed to take charge of the course of a vessel through or upon specific waters.

11. "Engineer" shall mean an individual licensed to operate a vessel's main engines and auxiliaries.

12. "Joint pilot and engineer" shall mean an individual licensed to act as both pilot and engineer for a public vessel which in the judgment of the inspector can be safely navigated by one individual.

13. "Operator" shall mean an individual who operates or navigates a pleasure vessel.

14. "License" shall mean a certificate furnished by the inspector.

15. "Inspector" shall mean the individual, or individuals, provided for in article two, section twelve, of this chapter.

16. "Under way" shall mean that the vessel is not at anchor, or made fast to the shore, or aground.

17. "Visibility" as applied to lights shall mean discernibility on a dark night with a clear atmosphere.

18. "Starboard" shall mean the right hand side, facing the bow of the vessel.

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19. "Port" shall mean the left hand side, facing the bow of the vessel.

20. "Wharf" shall mean and include any structure built or maintained for the purpose of providing a berthing place for vessels.

21. "Dock" shall mean a wharf, or portion of a wharf, extending along the shore line and generally connected with the uplands throughout its length.

22. "Pier" shall mean a wharf or portion of a wharf extending from the shore line with water on both sides.

23. "Jetty" shall mean a structure located within the shore lines of a body of water for the purpose of controlling currents usually to prevent filling in a channel.

24. "Breakwater" shall mean a structure located within the shore line of a body of water for the purpose of providing protection from wind and wave action.

25. "Undocumented vessel" shall mean any vessel which is not required to have, and does not have, a valid marine document issued by the federal bureau of customs.

26. "Open construction" shall mean that a vessel is so constructed as to be void of any decking or enclosure which inhibits the continuous and free circulation of air within the vessel when under way.

27. "Aids to Navigation" shall mean buoys, beacons or other fixed objects in the water which are used to mark obstructions to navigation or to direct navigation through safe channels.

28. "Floating Objects" shall mean any anchored marker or platform floating on the surface of the water other than aids to navigation and shall include but not be limited to, bathing beach markers, speed zone markers, information markers, swimming or diving floats, mooring buoys, fishing buoys, and ski jumps.

29. "Gray water" shall mean waste water generated by water using fixtures other than toilets; including but not limited to baths, sinks and laundry facilities used on residential vessels.

30. "Personal watercraft" shall mean a vessel which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on, or being towed behind the vessel rather than in the conventional manner of sitting or standing inside the vessel.

30-a. "Personal flotation device" shall mean a wearable flotation device, classified and approved by the United States Coast Guard which is in such a condition that it is fit for its intended purpose, bears a legibly marked United States Coast Guard approval number and is of an appropriate size for the person who intends to use it.

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31. "Specialty prop-craft" shall mean a vessel which is powered by an outboard motor or a propeller driven motor and which is designed to be operated by a person sitting, standing or kneeling on or being towed behind the vessel rather than in the conventional manner of sitting or standing inside the vessel.

32. "Effective muffler" or "underwater exhaust system" shall mean a sound suppression device or system designed and installed to abate the sound of exhaust gases emitted from an internal combustion engine and which prevents excessive or unusual noise, as set forth in section forty-four of this chapter.

33. "Abandoned historic shipwreck" shall mean wrecks situated on or under lands owned by the state, in which the state holds title pursuant to the Abandoned Shipwrecks Act of 1987 (43 U.S.C. 2101) or which, by reason of their antiquity, history, architecture, archaeology or cultural value, have state or national importance and are eligible for inclusion on the state register of historic places, and which have been abandoned by the owner of record. The term shall include the wreck, its cargo and contents and the situs.

34. "Wreck" shall mean any wrecked property, other than an abandoned historic shipwreck.

**Credits**

(L.1941, c. 941. Amended L.1956, c. 596; L.1958, c. 170; L.1959, c. 840; L.1960, c. 802, §§ 1, 2; L.1962, c. 186, § 1; L.1962, c. 224; L.1962, c. 431, § 4; L.1965, c. 168, § 1; L.1971, c. 309; L.1984, c. 842, §§ 1 to 4; L.1989, c. 650, §§ 1, 2; L.1990, c. 455, § 1; L.1990, c. 830, § 1; L.1992, c. 768, § 1; L.1995, c. 322, § 2; L.2005, c. 484, § 1, eff. Aug. 9, 2005; L.2011, c. 151, § 2, eff. July 20, 2011.)

Notes of Decisions (30)

McKinney's Navigation Law § 2, NY NAVIG § 2

Current through L.2021, chapters 1 to 320. Some statute sections may be more current, see credits for details.

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303 A.D.2d 579
Supreme Court, Appellate Division,
Second Department, New York.

TRUSTEES OF FREEHOLDERS
AND COMMONALITY OF TOWN OF
SOUTHAMPTON, et al., Respondents,
v.
Louis **BUONINFANTE**, Appellant.

March 17, 2003.

**Synopsis**

Defendant appealed from an order of the Supreme Court, Suffolk County, Jones, J., which denied his motion for partial summary judgment for a judgment declaring the ambulatory nature of the northern boundary of the real property at issue. The Supreme Court, Appellate Division, held that defendant was entitled to a judgment declaring that the northern boundary of his property was ambulatory and based on the high water mark of bay.

Reversed and remitted.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

**Attorneys and Law Firms**

**629 Sinnreich & Safar, LLP, Central Islip, N.Y. (Jonathan Sinnreich of counsel), for appellant.

David V. Falkner, Westhampton Beach, NY, for respondents.

ANITA R. FLORIO, J.P., SANDRA J. FEUERSTEIN, LEO F. McGINITY and ROBERT W. SCHMIDT, JJ.

**Opinion**

*579 In an action, inter alia, for a judgment declaring that the plaintiffs are the sole **630 lawful owners and vested with absolute and unencumbered title in fee in certain real property, the defendant appeals from an order of the Supreme Court, Suffolk County (Jones, J.), dated March 21, 2002, which denied his motion for partial summary judgment for a judgment declaring the ambulatory nature of the northern boundary of the real property at issue.

ORDERED that the order is reversed, on the law, with costs, the defendant's motion for partial summary judgment is granted to the extent that the defendant is entitled to a judgment declaring that the northern boundary of the property in dispute is ambulatory and based on the high water mark of Moriches Bay, and the matter is remitted to the Supreme Court, Suffolk County for further proceedings consistent herewith.

In late 1999 the defendant was shown a parcel of vacant waterfront property located in the Village of West Hampton Dunes, Southampton, on the shore of Moriches Bay known as 770 Dune Road. Desiring to build a house on the parcel, the defendant purchased the property on April 4, 2000. The defendant received a bargain and sale deed which described the property, *inter alia,* as running north from Dune Road "766.89 feet to the high water line of Moriches Bay; thence * * * along the high water line of Moriches Bay." The defendant's predecessor-in-interest acquired title to the property under a deed which described the property, *inter alia,* as running north from Dune Road, "190.20 feet to the mean high water mark of Moriches Bay; thence along said mean high water mark of Moriches Bay."

After obtaining a building permit from the Village of West Hampton Dunes to construct a two-story dwelling on the northern portion of the property, and a construction loan, and *580 after pile-driving had begun, the plaintiffs commenced the instant action claiming title, in essence, to that strip of land along Moriches Bay created by the discrepancy between the linear distances mentioned in the two deeds set forth above. The complaint alleged that the Town was the owner of all undivided lands in the Town, which would include the bottom of Moriches Bay, that it traced its estate to ancient land grants, and that the defendant's predecessor-in-interest could not convey more title than she owned.

The defendant is entitled to a limited summary judgment. Where there is a discrepancy in deed calls, the rules of construction require that resort be had first to natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances, and last to quantity (*see Thomas v. Brown,* 145 A.D.2d 849, 535 N.Y.S.2d 836; *Pauquette v. Ray,* 58 A.D.2d 950, 397 N.Y.S.2d 442; *1 N.Y. Jur 2d. Adjoining Landowners* §§ 66–70, 115, 117; *see also Henry v. Malen,* 263 A.D.2d 698, 701, 692 N.Y.S.2d 841; *Morgan v. McLoughlin,* 6 Misc.2d 434, 163 N.Y.S.2d 51, *affd. sub nom Morgan v. City of Glen Cove,* 6 A.D.2d 704, 174 N.Y.S.2d 890, *affd.* 5 N.Y.2d 1041, 185 N.Y.S.2d 801, 158 N.E.2d 498). Here, there is a discrepancy internally in the deeds by using both linear distances and the water line of Moriches Bay, and between the two linear distances

mentioned in the two deeds. Nevertheless, both deeds clearly refer to the mean high water mark of Moriches Bay, or the high water line of Moriches Bay. The water line of Moriches Bay is obviously a natural object, and as such it should take precedence over either of the linear distances in the two deeds. In addition, deeds further back in the chain of title indicate that the property at issue had traditionally been described in one way or another as extending to the shore of Moriches Bay or to the high water line of Moriches Bay and running along the ****631** shore. It was not until 1973 that linear distances were added. But even after this, the property was still described as extending to the mean high water mark of Moriches Bay. Thus, there is nothing in the chain of title to suggest that it was the intention of any grantor to bound the property along the north side in any way other than by reference to the shoreline of Moriches Bay.

Furthermore, the record indicates that the extension of the shoreline further out into Moriches Bay has been caused by the natural process of accretion. It has long been the law of this State that a riparian owner of upland property is entitled to any increase in his land due to accretion, and on the other hand is subject to any loss of land due to erosion (*see Mulry v. Norton,* 100 N.Y. 424, 3 N.E. 581; *State of New York v. Bishop,* 46 A.D.2d 654, 359 N.Y.S.2d 817; *Matter of Board of Educ., Union Free School* ***581** *Dist. No. 11, Town of Hempstead v. Nyquist,* 28 A.D.2d 936, 281 N.Y.S.2d 486). Thus, the defendant, as the riparian owner of upland property, is entitled to that portion of land which has been naturally added to the predecessor in interest's title.

Accordingly, under these circumstances, the defendant is entitled to a judgment declaring that the northern boundary of his property is ambulatory and based on the high water mark of Moriches Bay. The matter is remitted to the Supreme Court, Suffolk County for a trial to determine the actual present location of that ambulatory boundary line.

**All Citations**

303 A.D.2d 579, 756 N.Y.S.2d 629, 2003 N.Y. Slip Op. 12117

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42 Misc.3d 1221(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Suffolk County, New York.

INCORPORATED VILLAGE OF WEST HAMPTON DUNES, Individually and in parens patriae on behalf of its Residents, Plaintiff/, Petitioner,

v.

Jon S. SEMLEAR, Frederick K. Havemeyer, Eric Shultz, Edward J. Warner, Jr., and William Pell, as Trustees of the Freeholders and Commonalty of the Town of Southampton, and Town of Southampton, Town Board of the Town of Southampton, Defendants/, Respondents.

No. 10–39304.
|
Feb. 6, 2014.

**Attorneys and Law Firms**

Sinnreich Kosakoff & Messina LLP, Central Islip, Attorney for Plaintiff.

Cahn & Cahn, LLP, Huntington, Attorney for Defendants Semlear, Havemeyer, Shultz, Warner and Pell.

Office of the Town Attorney by Joseph Lombardo, Sr. Asst. Town Attorney Southampton, Attorney for Defendant Southampton.

**Opinion**

PETER H. MAYER, J.

***1** Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated August 28, 2012, and supporting papers 1–10; (2) Affirmation in Opposition by the Trustees, dated March 6, 2013, and supporting papers 11–17 (including Supplemental Memorandum of Law dated March 6, 2013); (3) Notice of Cross Motion/Order to Show Cause by the Trustees, dated September 27, 2012, and supporting papers 18–34 (including Memorandum of Law dated September 27, 2012); (4) Affirmation in Opposition by the plaintiff, dated March 6, 2013, and supporting papers 35–36; (5) Notice of Cross Motion/Order to Show Cause by the Town and Town Board, dated October 15, 2012, and supporting papers 37–40 (including Memorandum of Law dated October 15, 2012); (6) Notice of Motion/Order to Show Cause by the Trustees, dated February 5, 2013, and supporting papers 41–48; (7) Memorandum of Law of the plaintiff, dated March 6, 2013, and supporting papers 49–50; (8) Notice of Motion/Order to Show Cause by the plaintiff, dated February 5, 2013, and supporting papers 51–61 (including Memorandum of Law dated February 5, 2013); (9) Reply Memorandum of Law by the plaintiff, dated March 25, 2013, and supporting papers 62–63; (10) Reply Affidavit by the Trustees, dated March 25, 2013, and supporting papers 64–65; (11) Other(and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions and cross motions are decided as follows: it is

*ORDERED* that the motions and cross motions are hereby consolidated for the purposes of this determination; and it is further

*ORDERED* that the motion (010) by the Village for summary judgment on the first and second causes of action of its complaint based on the collateral estoppel effect of this Court's decisions in related actions is denied; and it is further

*ORDERED* that the cross motion (011) by the Trustees to dismiss the action as moot, as the outstanding issues have been determined, there is no actual controversy and the Village lacks standing, is denied; and it is further

*ORDERED* that the cross motion (012) by the Town and the Town Board to dismiss the action as against them on the ground that no controversy exists between the Town and the Village is denied; and it is further

*ORDERED* that the motion (013) by the Trustees to vacate the prior order of this Court to the extent that said order denied their motion to dismiss the first three causes of action and ordered that this action be joined for trial with the related actions is denied; and it is further

*ORDERED* that the motion (014) by the Village for summary judgment on the first three causes of action in the complaint, and for leave to renew pursuant to CPLR 2221 the prior motion of the Trustees to dismiss the fourth and fifth causes of action as well as the CPLR article 78 petition, which was

granted by this Court's order dated January 12, 2012, and upon renewal, for an order granting the Village summary judgment is determined herein.

***2** This is a hybrid action/proceeding commenced on November 16, 2010 by the Incorporated Village of West Hampton Dunes (Village), individually and in *parens patriae* on behalf of its residents, against the Trustees of the Freeholders and Commonalty of the Town of Southampton (Trustees), the Town of Southampton (Town), and the Town Board of the Town of Southampton (Town Board) for a determination of the scope of the powers and duties of the Trustees within the Village's ocean beaches and with respect to the management and control of monies coming into the Trustees' hands as a result of Trustee activities, and the retention and compensation of private counsel by the Trustees.

The Trustees "are the successors to the original Trustees of the Freeholders and Commonalty of the Town of Southampton whose proprietary rights to certain lands and waters of the Town of Southampton and their right to legislate and control the same as a body politic is derived from antique, royal land grants and patents which have been repeatedly confirmed and upheld throughout the history of this State for over 300 years by both the framers of the State Constitution and the Legislature despite various specific attacks upon such authority ..." (*State v. Trustees of Freeholders and Commonalty of Town of Southampton,* 99 A.D.2d 804, 805, 472 N.Y.S.2d 394 [2d Dept 1984] [*internal citations omitted* ] ). "The town of Southampton, Suffolk county, NY, was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. The Dongan patent, after vesting all the undivided land within the town limits in twelve trustees, provides as follows: And that they and their Successors by the name of Trustees of the freeholders and commonalty of the town of Southampton be and shall be forever in future times, persons able and Capable in law to have perceive receive and possess not only all and singular the premises but other messuages lands Tenements Privileges Jurisdictions franchises and hereditaments of whatsoever kind or species ... to plead and be impleaded answer and to be answered unto defend and be defended they are and may be Capable in whatsoever place and places and before whatsoever Judges and Justices' " (*People v. Lister,* 106 App.Div. 61, 62–65, 93 NYS 830 [2d Dept 1905] ).

"The **act of 1818** ... created a body of trustees for the proprietors of the undivided lands and meadows in the town of Southampton, and there were conferred upon them all rights of management of the undivided lands, meadows, and mill streams' of the town, and the power to sell, lease, and partition' the same, while there was reserved to the trustees of the town [the Trustees] the right of management of the waters within the town, and of the fisheries, seaweed, and productions of the waters,' for the benefit of the town, and to its inhabitants was reserved the privilege of taking seaweed from the shores of any of the common lands of the town.' " (*Trustees of Freeholders, etc., of Town of Southampton v. Betts,* 163 N.Y. 454, 458 [1900] ). Chapter 239 of the Laws of 1831 further delineated the rights and powers of the Trustees indicating that the "Trustees shall have the sole control over all the fisheries, fowling, sea-weed, waters, and the productions of the waters within the said Town not the property of individuals, and all the property, commodities, privileges and franchises granted to them by [the Dongan Patent] except so far as are abrogated, changed and altered by the laws of this state, passed in conformity to the Constitution and not now belonging to individuals, nor to the proprietors by virtue of [Chapter 155 of the Laws of 1818]; and they shall have power to make rules, orders, and bylaws for the management thereof and the regulation of their affairs." The Appellate Division, Second Department has held that the Trustees hold an easement, which extends along the beach, for the benefit of the inhabitants of the Town of Southampton (*see Burch v. Trustees of Freeholders and Commonalty of Town of Southampton,* 47 AD3d 654, 849 N.Y.S.2d 622 [2d Dept 2008]; *see also* Town Code, article VII, § 111–31).

***3** By its first and second causes of action against the Trustees, the Village seeks a declaration that the Trustees have no lawful governmental or regulatory power, duties or authority over (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance and use of structures and lands located anywhere within the Village's ocean beaches *including management* of any of the activities or uses reserved to the Town's inhabitants by Chapter 155 of the Laws of 1818 *except management* of the specific activities and uses reserved to the Town's inhabitants under the Laws of 1818, such as "taking seaweed from the shores of any of the common lands of the town, or carting or transporting to or from, *or landing property on said shores* [emphasis added], in the manner heretofore practiced" (Art. IV of the Laws of 1818). The Village seeks a further declaration that any attempt by the Trustees to exercise or extend such power or authority over ocean beaches within the Village's boundaries, including

enforcement of any provisions of the "Trustee Blue Book," a set of Rules and Regulations for the Management and Products of the Waters of the Town enacted by the Trustees, is unlawful, unenforceable and null and void.

By its third cause of action against the Town and its Town Board, the Village seeks a declaration that the Town and Town Board have no lawful governmental or regulatory power, duties or authority over (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance and use of structures and lands located anywhere within the Village's ocean beaches, and that the Town's purported extension of its municipal zoning powers and authority through its incorporation and enforcement of the "Trustee Blue Book" by adopting and enforcing Chapter 111 of the Town Code of the Town of Southampton (Town Code), specifically Town Code §§ 111–30(A) and 37, to areas of ocean beaches located wholly within the Village's boundaries is unlawful, unenforceable and null and void.

The fourth cause of action for declaratory judgment against the Town, the Town Board and the Trustees seeks a declaration that (i) the Town and Town Board have the sole lawful power, authority, duty and obligation to manage and control all the monies that come into the Trustees' hands and to secure and deposit said monies into duly designated Town accounts, (ii) the Town may neither delegate such management and control to the Trustees nor exempt the Trustees from Town's management and control of such monies, and (iii) the Trustees may not retain, deposit, control, manage or expend any monies coming into their hands, regardless of source, but must instead direct and relinquish all such monies to the Town to be deposited into duly designated Town accounts under the authority and control of the Town and Town Board. The fifth cause of action for declaratory judgment against the Trustees seeks a declaration that (i) the Trustees may not retain or compensate private counsel or otherwise cause the Town or the Trustees to become indebted to private counsel for legal services rendered except by authority of the Town Board or Town Attorney, and (ii) the Trustees may not commence or prosecute litigation without the authorization of the Town Board and without being subject to the authority of the Town Attorney.

***4** The portion of the petition of the CPLR article 78 proceeding concerning maintenance and control of accounts seeks to compel the Town and the Town Board pursuant to CPLR 7803(1) to (i) assume and exercise independent management, dominion and control over all monies coming into the Trustees' hands regardless of source, (ii) subject said monies to all lawful controls, policies and procedures regarding the maintenance, accounting, budgeting, use or expenditure of same in full compliance with the Town Code and State law, (iii) restrict and prohibit the Trustees from continuing the unlawful maintenance of independent accounts into which public monies are deposited or expending such monies and to take all necessary measures for enforcement, and (iv) require the Trustees to identify, relinquish and deliver to the Town all monies presently deposited or otherwise secured under their separate independent dominion or control.

The portion of the petition of the CPLR article 78 proceeding concerning retention and compensation of private counsel seeks to compel the Town, the Town Board and the Town attorney to (i) exercise exclusive control over the retention and compensation of private counsel in connection with the prosecution or defense of any action or lawsuit on behalf of the Town or the Trustees pursuant to Town Law § 65 and the Town Code, (ii) require that the retention and/or compensation of private counsel to provide services in connection with the prosecution or defense of any action comply with Town Law § 65 and the Town Code, (iii) restrict and prohibit the Trustees from the unlawful and unauthorized retention of counsel and from expenditure of public monies for counsel's compensation in violation of Town Law § 65 and the Town Code, and to take all necessary measures for enforcement, and (iv) to restrict and prohibit the Trustees from independently commencing or prosecuting litigation without the authority of the Town Board.

By order dated January 12, 2012, this Court granted the dismissal motions of the Trustees and the Town and Town Board solely to the extent of dismissing the fourth and fifth causes of action as well as the CPLR article 78 proceeding, and granted the Village's motion to consolidate for joint trial the instant action with the related actions then pending in Suffolk County Supreme Court entitled *Semlear, et al. v. Albert Marine Construction, Inc., et al.* under Index No. 10–11287 and *Semlear, et al. v. Incorporated Village of Quogue* under Index No. 10–30131.

The Court initially addresses that portion of the cross motion (011) of the Trustees for an order dismissing the action in its entirety for lack of standing of the Village, which brings the action as *parens patriae* on behalf of its residents, or for an order dismissing as moot this action as against the Trustees for lack of an actual or concrete controversy between the

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Trustees and the Village. The Trustees argue that the Village lacks standing because it does not own the portion of the ocean beaches subject to the Trustees' regulation based on the stipulation of settlement in the federal action entitled *Maurice Rapf and Carl Hansen v. Suffolk County of New York* (U.S. Dist Ct, ED N.Y.1985, 84 Civ. 1478), in which the Village was an intervenor and agreed to the execution of a boundary line agreement granting New York State title to all land between the southerly toe of the primary dune and the high water mark of the Atlantic Ocean on which the Trustees' easement rights are impressed. The Trustees assert that the agreement was recorded against each of the ocean-facing properties within the Village. The Trustees also argue that no statute confers upon the Village standing to challenge the Trustees' regulation of use of the beach easement, that Village residents also lack standing because they cannot show how the Trustees' beach regulation caused them an "injury in fact", and that the Village has a conflict of interest with its citizens who have an interest in having their easement privileges protected by the Trustees.

***5** The Trustees further argue that there is no actual, concrete, justiciable controversy. The current President of the Board of Trustees, Eric Shultz, asserts by affidavit dated September 13, 2012 that he knows of no attempt by the Village to challenge the Trustees' easement rights over the ocean beaches within the Town or to interfere with the rights of the Town's inhabitants to use said beaches or to obstruct any effort by the Trustees to protect the inhabitants' rights to use the ocean beaches located within the Incorporated Village of West Hampton Dunes. Mr. Shultz states in his affidavit that "based upon the historical records, including the Dongan Patent, Chapter 155 of the Laws of 1818; Chapter 283 of the Laws of 1831; and the plenitude of court decisions, the Trustees for more than three centuries have preserved and protected the rights of Southampton's inhabitants to use the ocean beaches for bathing, fishing, and other traditional purposes, that they have done so by requiring permits for activities that threaten to obstruct or interfere with the rights of the Town's inhabitants."

The Village contends in opposition that the Trustees' motion to dismiss violates the single-motion rule of CPLR 3211(e) and the doctrine of law of the case inasmuch as the Trustees already made a pre-answer motion to dismiss (002) in this action and did not seek leave to reargue the resulting order dated January 12, 2012, nor did they appeal from said order. The Village adds that any new arguments raised by the instant motion were waived by not having been raised in the original CPLR 3211 motion. According to the Village, the Trustees' attempted imposition of an onerous successive layer of regulatory control over the use of ocean beaches within the Village's boundaries in addition to the existing regulation by the Village and the New York State Department of Environmental Conservation imposes an undue and unnecessary burden on the residents of the Village and violates the Village's home rule powers. It is the Village's position that a justiciable controversy does exist as to the scope of the Trustees' regulatory powers and jurisdiction as to where and what they may regulate, and that the Trustees relied on said justiciable controversy in commencing the action of *Semlear, et al. v. Incorporated Village of Quogue.* The Village argues that it was a necessary party to, and unsuccessfully sought intervention in, the related action entitled *Semlear, et al. v. Albert Marine Construction, Inc., et al.* involving the justiciable controversy of the installation of "Geotubes" by defendant property owners on the beach fronting the Atlantic Ocean in the Village of Quogue without a permit or consent from the Trustees. The Village emphasizes that its jurisdictional and geographic boundary is the mean high water mark of the Atlantic Ocean. The Village further contends that the stipulation of settlement and resulting boundary line agreement in *Maurice Rapf and Carl Hansen v. Suffolk County of New York* are irrelevant inasmuch as the Trustees were not a party to said litigation and were referenced fleetingly in the stipulation, and the documents do not contain any recognition by the Village that the Trustees' regulatory powers apply within the Village's boundaries.

***6** The Court initially notes that *Maurice Rapf and Carl Hansen v. Suffolk County of New York* involved storm damage protection construction in an area of the Village of West Hampton Dunes bounded on the south by the Atlantic Ocean, on the north by Moriches Bay, on the west by the boundary between the Towns of Southampton and Brookhaven, and on the east by a line running north/south through the western most of a series of groins. Pursuant to the terms of said stipulation, the plaintiffs, who were owners in fee simple of lands in the Village, were to execute a boundary line agreement together with the County and/or New York State which agreement was to be "subject to any property interest in favor of the Trustees of the Freeholders and Commonalty of the Town of Southampton under the Dongan Patent." The resulting Boundary Agreement dated March 20, 1996 was not executed by a representative of the Village or the Trustees and the agreement deeded lands owned by private property owners in the Village "lying south of the boundary line so established."

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Here, the Trustees have failed to demonstrate that the entire ocean beach area within the Incorporated Village of West Hampton Dunes was deeded to the State and, in any event, the Village has a sovereign or quasi-sovereign interest in the management or regulation of lands within its boundaries and thus has standing to assert the first three causes of action (*see The Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts,* 163 N.Y. 454, 460 [1900]; *Incorporated Village of Northport v. Town of Huntington,* 199 A.D.2d 242, 604 N.Y.S.2d 587 [2d Dept 1993] ). Moreover, to the extent that there was a justiciable controversy between the Trustees and the Incorporated Village of Quogue in *Semlear, et al. v. Incorporated Village of Quogue* which involved similar issues, there is a justiciable controversy between the Trustees and the Village in this matter. Therefore, that portion of the Trustees' cross motion (011) to dismiss for lack of standing or a justiciable controversy is denied.

The Town and its Town Board cross-move (012) to dismiss the action as against them on the ground that no controversy exists between the Town and the Village inasmuch as the Town and its Town Board have no power to regulate the ocean beaches situated within the incorporated villages located within the Town of Southampton, noting that Town Code § 111–31 specifically excludes the incorporated villages from the definition of "Ocean Beach Area." They argue that the sole reason for inclusion in this action is the requirement in the Town Code that all persons shall comply with the Rules and Regulations of the Trustees for the Management and Products of the Waters of the Town of Southampton commonly referred to as the "Trustee Blue Book."

Town Code, article VI, § 111–30(A) provides that "[n]o dock, spile, bulkhead, jetty, retaining wall, revetment, catwalk, walkway, stairs, steps, artificial beach nourishment or fill, upland retaining wall or any other structure shall be constructed or placed within the bay beach area or ocean beach area, as defined in this chapter, without first obtaining a permit from the Town Trustees." Town Code, article VIII, § 111–37 requires that "[e]very person shall comply with the regulations as provided in the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton promulgated by the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton in all matters ."

*7 "Ocean Beach Area" is defined in the Town Code as "[t]hose premises along the Atlantic Ocean bounded on the north by the crest of the primary dune, on the east by the easterly Town line, on the south by the high-water mark of the Atlantic Ocean and on the west by the westerly Town line, excluding incorporated villages, and the Suffolk County Beach known as Shinnecock Inlet East.' This area is a right-of-way controlled by the Town Trustees." (Town Code, article VII, § 111–31).

The Trustee Blue Book definition of "Ocean Beach Area" is "all those premises along the Atlantic Ocean bounded on the *north by the crest of the primary dune,* on the east by the East Hampton town line, on the south by the *high-water mark of the Atlantic Ocean* and on the west by the Brookhaven town line, including those areas within incorporated villages. Said area shall be the easement held in favor of the Freeholders and Commonalty of the Town of Southampton." (Rules, article I).

Inasmuch as the Village is alleging that the Town is extending its municipal zoning powers and authority to areas of ocean beaches within the Village's boundaries through its incorporation of the "Trustee Blue Book" into its Town Code and its enforcement of the "Trustee Blue Book" provisions, there is a justiciable controversy as against the Town and Town Board (*see* CPLR 3001) such that the cross motion (012) of the Town and Town Board to dismiss the action as against them must be denied.

The Village moves (010) for summary judgment on its first and second causes of action based on collateral estoppel, arguing that the Court's decisions in the related actions involving the Incorporated Village of Quogue entitled *Semlear, et al. v. Albert Marine Construction, Inc., et al.* and *Semlear, et al v. Incorporated Village of Quogue* determined that the Trustees do not have any power to govern or regulate ocean beaches inside the Incorporated Village of Quogue, including but not limited to regulation by the Trustee Blue Book. The Village also moves (014) for summary judgment in its favor on the first three causes of action in the complaint.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.,* 46 N.Y.2d 1065, 416 N.Y.S.2d 790 [1979] ). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med.*

*Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985] ). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, citing to *Zuckerman v. City of New York*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595).

***8** Under the doctrine of collateral estoppel, a narrower form of res judicata, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue (*see Luscher v. Arrua*, 21 AD3d 1005, 1007, 801 N.Y.S.2d 379 [2d Dept 2005]; *see also Buechel v. Bain*, 97 N.Y.2d 295, 303–304, 740 N.Y.S.2d 252 [2001]; *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823 [1984] ). The two elements which must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (*see id.*). The party seeking to invoke the doctrine of collateral estoppel "bears the burden of establishing that the identical issue was necessarily decided in the prior action, and the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination' " (*Leung v. Suffolk Plate Glass Co., Inc .*, 78 AD3d 663, 663–664, 911 N.Y.S.2d 376 [2d Dept 2010], *quoting Mahler v. Campagna*, 60 AD3d 1009, 1011, 876 N.Y.S.2d 143 [2d Dept 2009] ).

The Court notes that contrary to the assertions of the Village, the orders dated December 11, 2012 in both of the related actions declared that the Trustees do have the right to regulate activities to protect their easement area on ocean beaches south of the crest of the primary dune and north of the high water mark of the ocean (*see The Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts*, 163 N.Y. 454, 460; *Knapp v. Fasbender*, 1 N.Y.2d 212, 228, 151 N.Y.S.2d 668 [1956]; *Matter of Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 [2d Dept 2002]; *Matter of Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 [2d Dept 2002] ). However, said orders in the prior related actions did not render a decision or declaration concerning the Trustees' right to regulate specifically within the boundaries of a village. Instead, the orders granted summary judgment to the defendants based on deficiencies in the pleadings. Therefore, the Village's motion (010) for summary judgment on its first and second causes of action based on collateral estoppel is denied.

Permits are required from the Trustees by Town Code and the Trustee Blue Book for certain projects, including the construction of a jetty, revetment, retaining wall, or the placement of artificial fill, in the "ocean beach area" (*see* Town Code, article VI, § 111–30[A]; Rules, article VII, § 1[A][3]; *Matter of Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339; *Matter of Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326). Said local laws were enacted by the Trustees and the Town pursuant to the police powers delegated to the Town by the State (*Matter of Poster v. Strough*, 299 A.D.2d 127, 139, 752 N.Y.S.2d 326). The Appellate Division, Second Department has held that "it was not improper for the Town Board, in passing Local Law 21, to incorporate the Trustees' Rules and Regulations [the Trustee Blue Book] by reference" (*see Brookhaven Baymen's Assn., Inc. v. Town of Southampton*, 85 AD3d 1074, 1078, 926 N.Y.S.2d 594 [2d Dept 2011]; Town Code, article VIII, § 111–37).

***9** Municipal Home Rule Law § 11(3) provides "[n]otwithstanding any provision of this chapter, any local law adopted by a town board shall be effective and operative only in that portion of such town outside of any village or villages therein except in a case where the power of such town board extends to and includes the area of the town within any such village or villages." Pursuant to Town Law § 132, "[a] rule, regulation or ordinance of a town shall be effective and operative only in that portion of such town outside of any incorporated village or city therein, except as otherwise specifically provided by statute."

Town Law § 261 provides:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or

> other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city;

The Village argues that based upon the aforementioned statutes, the Trustees as an agency of the Town lack authority to regulate activities on ocean beaches within an incorporated village.

The Trustees are an entity of the Town, as evidenced by their being subject to Town Law § 64 entitled "Control of town finances." Thus, the rules and regulations of the Trustees are tantamount to Town rules and regulations. In view of the foregoing statutory authority, the Trustee Blue Book provisions are ineffective, and cannot operate, within the boundaries of an incorporated village except with respect to the management of the specific activities and uses reserved to the Town's inhabitants under the Laws of 1818, such as "taking seaweed from the shores of any of the common lands of the town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced" (Art. IV of the Laws of 1818). Notably, the issue of whether the Trustees have jurisdiction within an incorporated village was not addressed in either *Matter of Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dept 2002) or *Matter of Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dept 2002). Based on the foregoing, the Court grants summary judgment to the Village on its first three causes of action.

The Trustees move (013) to vacate the order dated January 12, 2012 in this action to the extent that said order denied their motion to dismiss the first three causes of action. The Trustees also cross-move (011) for an order pursuant to CPLR 3001 "declining" jurisdiction over the first three causes of action and dismissing them as moot. Both motions are based on the final determinations in the related actions entitled *Semlear, et al. v. Albert Marine Construction, Inc., et al.* and *Semlear, et al. v. Incorporated Village of Quogue*. Said motions are denied as moot for the reasons stated hereinabove. The Court also denies that portion of the Trustees' motion (013) seeking to vacate the order dated January 12, 2012 in this action to the extent that said order directed the joinder of the instant action with said related actions merely because the joinder is now rendered moot by the disposition of said related actions.

***10** The Village also moves (014) for leave to renew the prior motion of the Trustees to dismiss the fourth and fifth causes of action as well as the CPLR article 78 proceeding, which was granted by order dated January 12, 2012, and then for summary judgment on said claims. The Village seeks renewal based on new evidence concerning the budgetary issues in the fourth and fifth causes of action and the CPLR article 78 proceeding which were raised in the related Suffolk County Supreme Court action entitled *Gessin et al. v. Throne–Holst et al.* under Index No. 41686–2010. The Village's request for leave to renew is considered under CPLR 2221, and is granted. However, based on the Village's lack of standing to assert claims akin to a taxpayers' action on behalf of its citizens (*see Incorporated Village of Northport v. Town of Huntington*, 199 A.D.2d 242, 604 N.Y.S.2d 587), the Village's request for summary judgment is denied.

In light of the foregoing, the Village is entitled to the entry of judgment declaring, pursuant to statutory law, that the Trustees have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance and use of structures and lands located anywhere within the Village's ocean beaches including management of any of the activities or uses reserved to the Town's inhabitants by Chapter 155 of the Laws of 1818 except management of the specific activities and uses reserved to the Town's inhabitants under the Laws of 1818, such as "taking seaweed from the shores of any of the common lands of the town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced" (Art. IV of the Laws of 1818), and, in addition, that any attempt by the Trustees to exercise or extend such power or authority over ocean beaches within the Village's boundaries, including enforcement of any provisions of the "Trustee Blue Book," a set of Rules and Regulations for the Management and Products of the Waters of the Town enacted by the Trustees, except in the management of the specific activities and uses reserved to the Town's inhabitants under the Laws of 1818, is unlawful, unenforceable and null and void. The Village is also entitled to entry of judgment declaring, pursuant to statutory law, that the Town and Town Board have no lawful governmental or regulatory power, duties or authority over (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance and use of structures and lands located anywhere within the Village's ocean beaches, and that the Town's purported extension of its municipal zoning powers and authority through its incorporation and enforcement of the

"Trustee Blue Book" by adopting and enforcing Chapter 111 of the Town Code of the Town of Southampton (Town Code), specifically Town Code §§ 111–30(A) and 37, to areas of ocean beaches located wholly within the Village's boundaries, except in the management of the specific activities and uses reserved to the Town's inhabitants under the Laws of 1818, is unlawful, unenforceable and null and void.

***11** Submit judgment.

**All Citations**

42 Misc.3d 1221(A), 986 N.Y.S.2d 866 (Table), 2014 WL 501484, 2014 N.Y. Slip Op. 50137(U)

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KeyCite Yellow Flag - Negative Treatment
Distinguished by O'Brien v. Town of Huntington, N.Y.A.D. 2 Dept., August 11, 2009

276 A.D.2d 529
Supreme Court, Appellate Division,
Second Department, New York.

Anthony LaSALA, Plaintiff–Respondent,
v.
Hilde TERSTIEGE, etc., et al.,
Defendants–Respondents,
and
Town of Babylon, Appellant.

Oct. 10, 2000.

**Synopsis**

Purported landowner brought action against a town to quiet title to real property. Town counterclaimed for judgment declaring that it was owner of the land at issue. The Supreme Court, Suffolk County, Dunn, J., granted purported landowner's motion for summary judgment, denied town's motion for summary judgment on its counterclaim and entered judgment as well as resettled judgment adjudging the purported landowner to be the owner. Town appealed. The Supreme Court, Appellate Division, held that: (1) town's right of direct appeal from intermediate order terminated with the entry of resettled judgment, and (2) landowner established title.

Appeal dismissed in part; affirmed.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

**Attorneys and Law Firms**

****767** John J. Burke, Jr., Lindenhurst, N.Y. (Janice A. Stamm of counsel), for appellant.

Dollinger Gonski & Grossman, Carle Place, N.Y. (Matthew Dollinger and Floyd G. Grossman of counsel; Mindy Wallach on the brief), and Donna J. Villanova, Islandia, N.Y., for plaintiff-respondent (one brief filed).

Costantino & Costantino, Copiague, N.Y. (Steven A. Costantino of counsel), for defendant-respondent Hilde Terstiege.

ANITA R. FLORIO, J.P., DANIEL F. LUCIANO, SANDRA J. FEUERSTEIN and ROBERT W. SCHMIDT, JJ.

**Opinion**

MEMORANDUM BY THE COURT.

***529** In an action pursuant to RPAPL article 15 to quiet title to real property, the defendant Town of Babylon appeals, as limited ****768** by its brief, (1) from so much of an order of the Supreme Court, Suffolk County (Dunn, J.), dated December 18, 1998, as granted the plaintiff's motion for summary judgment against it and to dismiss its counterclaim, and denied its motion for summary judgment on its counterclaim, (2) from stated portions of a judgment of the same court dated February 25, 1999, and (3) from stated portions of a resettled judgment of the same court dated April 22, 1999, which, *inter alia,* adjudged the plaintiff to be the owner of the subject property.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the appeal from the judgment is dismissed as the judgment was superseded by the resettled judgment; and it is further,

ORDERED that the resettled judgment is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the resettled judgment in the action (*see, Matter of Aho,* 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on appeal from the ***530** order are brought up for review and have been considered on the appeal from the resettled judgment (*see,* CPLR 5501[a][1] ).

The defendant Town of Babylon (hereinafter the Town), counterclaimed for a judgment, in effect, declaring that it was the owner of land situated under the water of Great Neck Creek in the Town of Babylon. To prevail in a proceeding pursuant to RPAPL article 15, a party must demonstrate good title in itself; it may not rely on the weakness of its adversary's title (*see,* RPAPL 1519[3]; *Best Renting Co. v. City of New York,* 248 N.Y. 491, 162 N.E. 497; *Town of*

*North Hempstead v. Bonner,* 77 A.D.2d 567, 429 N.Y.S.2d 739; *Town of Smithtown v. Brooklyn Gun Club,* 58 Misc.2d 708, 296 N.Y.S.2d 633). Here, the Town, as plaintiff on the counterclaim, laid claim to title of this property. Therefore, the burden of establishing ownership applied equally to it and the plaintiff, Anthony LaSala.

The Town contended that it possessed superior title to LaSala. It based its claim of title on grants issued in 1666, 1688, and 1694, by Colonial governors and the fact that there is no record of the Town conveying the subject property to individual owners. However, since the grants relied on by the Town expressly conveyed title to all land lying under tidewaters, the Town was required to show that Great Neck Creek was indeed tidewater at the time of conveyance. This it failed to do, but rather, continued to rely on infirmities in LaSala's title. Therefore, it failed to meet its burden of establishing good title in itself. Accordingly, the Supreme Court properly denied its cross motion for summary judgment, and properly granted that branch of LaSala's motion which was to dismiss its counterclaim.

LaSala, however, established an unbroken chain of title dating back to Jacob M. Conklin in 1831. Additionally, each deed in this chain expressly conveyed title to land "bounded on the east by Great Neck Creek", or indicated that the conveyance was made "with title running to center of Great Neck Creek". It has been held that in the absence of express reservation or language from which such a reservation may be implied, there is a presumption that a grant of land on a nontidal stream extends to the center of the stream (*see, People v. System Props.,* 2 N.Y.2d 330, 342, 160 N.Y.S.2d 859, 141 N.E.2d 429; *Meadvin v. State of New York,* 22 A.D.2d 326, 327, 255 N.Y.S.2d 357). Thus, in weighing all the documentary evidence such as the deeds, maps, and surveys, the Supreme Court properly determined that LaSala established title to the subject ****769** property and granted his motion for partial summary judgment.

The Town's remaining contentions are without merit.

**All Citations**

276 A.D.2d 529, 713 N.Y.S.2d 767, 2000 N.Y. Slip Op. 08582

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New York
Official Reports

96 N.Y.2d 566, 759 N.E.2d 1233, 734 N.Y.S.2d 108,
32 Envtl. L. Rep. 20,295, 2001 N.Y. Slip Op. 07882

Town of Oyster Bay, Respondent,
v.
Commander Oil Corporation, Doing Business as Commander Terminals, Appellant, et al., Defendant.

Court of Appeals of New York
122
Argued September 5, 2001;
Decided October 18, 2001

CITE TITLE AS: Town of Oyster Bay v Commander Oil Corp.

## SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 13, 1999, which (1) reversed, on the law, an order of the Supreme Court (Geoffrey J. O'Connell, J.; opn 177 Misc 2d 1025), entered in Nassau County, denying plaintiff's motion for a permanent injunction, (2) granted the motion, and (3) remitted the matter to Supreme Court for entry of an appropriate judgment.

Town of Oyster Bay v Commander Oil Corp., 267 AD2d 303, reversed.

## HEADNOTE

Waters and Watercourses
Riparian Rights
Maintenance Dredging of Public Underwater Lands

A riparian owner has the right to conduct "maintenance" dredging of public underwater lands if dredging is necessary to preserve reasonable access to navigable water and does not unreasonably interfere with the rights of the underwater owner. Riparian owners, i.e., those whose lands are bounded by water, are entitled to access to water and enjoy property rights distinct from and not subordinate to those of the owner of the underwater land. Neither the owner of the underwater land nor the riparian owner may exercise its rights in a manner unreasonably intrusive upon the other's rights. Moreover, a riparian owner may dredge deposited underwater land that blocks access, especially where the soil or silt has been deposited by the underwater landowner. However, a riparian owner does not have a general right to dredge, or a particular right to dredge to maintain either the prior depth of the water or the underwater land in the precise condition that existed when the riparian owner acquired its property or built its facility for docking. Because the riparian right is limited to reasonable access, the right must be exercised in a manner that does not unreasonably interfere with the rights of the public owner. The Appellate Division should have remitted to Supreme Court to strike that balance.

## TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Waters, §§ 260-262, 274-276, 279.

NY Jur 2d, Water, §§ 6, 20, 26, 88, 96, 98, 105, 107, 108.

## ANNOTATION REFERENCES

See ALR Index under Riparian and Littoral Ownership and Rights. ***567**

## POINTS OF COUNSEL

*Nicholas J. Damadeo, P. C.*, Smithtown (*Nicholas J. Damadeo* of counsel), for appellant.
I. Commander's riparian rights to Oyster Bay Harbor include the right to do routine maintenance dredging reasonably necessary for the operation of its petroleum storage terminal. (*Hedges v West Shore R. R. Co.*, 150 NY 150; *White v Nassau Trust Co.*, 168 NY 149; *Nance v Town of Oyster Bay*, 23 AD2d 9; *DiCanio v Incorporated Vil. of Nissequogue*, 189 AD2d 223; *Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263; *People ex rel. Palmer v Travis*, 223 NY 150; *Lewis Blue Point Oyster Cultivation Co. v Briggs*, 198 NY 287; *Trustees of Town of Brookhaven v Smith*, 188 NY 74.) II. Commander's routine maintenance dredging is necessary to preserve its right to access to Oyster Bay Harbor. III. The court below erred in holding that the Town may first require Commander to make an application to the Town for permission to dredge. (*Hedges v West Shore R. R. Co.*, 150 NY 150; *Cochran v Taylor*, 273 NY 172.) IV. The Town's alleged environmental concerns are barred by collateral estoppel. V. The Town is preempted from regulating dredging in Oyster Bay Harbor.

(*People v Gibson & Cushman,* 64 Misc 2d 138; *People v Anton,* 105 Misc 2d 124.)

*Gregory J. Giammalvo, Town Attorney* of Town of Oyster Bay (*Anthony J. Sabino* and *Marilyn L. Olshansky* of counsel), for respondent.

I. The riparian rights of an upland owner do not include the right to dredge underwater lands without first obtaining the permission of the public underwater landowner. (*DiCanio v Incorporated Vil. of Nissequogue,* 189 AD2d 223; *Hedges v West Shore R. R. Co.,* 150 NY 150; *White v Nassau Trust Co.,* 168 NY 149; *Trustees of Town of Brookhaven v Smith,* 168 NY 74.) II. Neither State nor Federal regulation of dredging preempts the right of an underwater owner to decline to permit dredging. (*Matter of Haher's Sodus Point Bait Shop v Wigle,* 139 AD2d 950, 73 NY2d 701.) III. The court below's determination in granting the Town a permanent injunction was altogether correct, in accordance with judicial precedent and consistent with its prior decision and order. (*Aetna Ins. Co. v Capasso,* 75 NY2d 860.)

*Eliot Spitzer, Attorney General,* New York City (*Andrew J. Gershon, Peter G. Crary* and *Peter Lehner* of counsel), and *William L. Sharp* for State of New York, *amicus curiae.*

Ariparian owner does not and should not have the right to dredge ***568** underwater lands without the permission of the public underwater landowner. (*Tiffany v Town of Oyster Bay,* 234 NY 15; *Coxe v State of New York,* 144 NY 396; *Friends of Van Cortlandt Park v City of New York,* 95 NY2d 623; *Adirondack League Club v Sierra Club,* 92 NY2d 591; *People v Steeplechase Park Co.,* 218 NY 459; *Shively v Bowlby,* 152 US 1; *Sage v Mayor of City of N. Y.,* 154 NY 61; *Matter of Long Sault Dev. Co. v Kennedy,* 212 NY 1; *Marba Sea Bay Corp. v Clinton St. Realty Corp.,* 272 NY 292; *Illinois Cent. R. R. Co. v Illinois,* 146 US 387.)

## OPINION OF THE COURT

Chief Judge Kaye.

Does a riparian owner have the right to conduct "maintenance" dredging of public underwater lands? We conclude that a riparian owner may dredge if dredging is necessary to preserve reasonable access to navigable water and does not unreasonably interfere with the rights of the underwater owner. Because the courts below did not apply this standard, we reverse the Appellate Division order permanently enjoining the dredging, and remit the matter to Supreme Court for proceedings consistent with this opinion.

### I.

Since 1929, defendant Commander Oil Corporation has owned and operated a petroleum storage facility on land adjacent to Oyster Bay Harbor in Nassau County. Commander stores gasoline, diesel fuel and home heating oil at the facility. Plaintiff Town owns the underwater land in the harbor. In 1952, replacing a previous pier, Commander built the pier that currently extends from its land into the harbor. Barges dock at this pier while the oil they carry is pumped through pipes to storage tanks.

Barges have mainly docked at the "west basin," the larger and deeper of the two basins adjoining the pier. Both the east and west basins become shallower as they accumulate silt deposited by a creek that borders Commander's property to the south, and a sand spit to the south and west. Storm water runoff systems maintained by the Town and by the State of New York contribute to the silt deposits from these sources.

In 1966, owing to the accumulation of silt, Commander felt it necessary to dredge both basins in order to maintain adequate depth for its barges. Commander performed this dredging with ***569** the Town's permission, under a lease effective between 1960 and 1985. Commander also had the permission of the United States Army Corps of Engineers, as set forth in a letter in 1966 and permits issued in 1970 and 1975, authorizing it to dredge ultimately to a depth of 14 feet below mean low water. The letter, and the permits, made clear that they conveyed no property rights and authorized no impairment to private property rights.

After the last permit and the lease expired in 1985, Commander did not seek to dredge for a decade. By 1995, the east basin was as shallow as one foot deep in places, while the west basin ranged from 4 to 14 feet. Nevertheless, Commander was still docking well over 100 barges a year at the facility, and traffic continued at this rate at least into 1998.

When Commander sought to dredge, it did not ask the Town for permission, but applied to State and Federal agencies. Granting Commander's application, the State Department of Environmental Conservation issued a permit effective March 20, 1995. The permit authorized Commander to "maintenance dredge" to a depth of 14 feet, subject to various conditions calculated to minimize the effect of the dredging on vegetated tidal wetlands, spawning shellfish and other environmental concerns. The permit stated that it did not "authorize the impairment of any rights, title, or interest in real or personal property held or vested in a person not a party to the permit."

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One month later, the State Department of State issued a Consistency Certification Concurrence, concurring in Commander's certification that maintenance dredging was consistent with the Long Island Sound Coastal Management Program. The DOS concurrence contained three conditions. The first reduced the square footage of dredging of the east basin, in order to avoid affecting a neighboring sand spit. The second required installation of a silt curtain during dredging, in order to avoid silting the open water of Oyster Bay. "Because of questions regarding the need for using the east basin," the third condition was that Commander "receive permission from the owner of the underwater lands, which may be the Town of Oyster Bay, to occupy and use the underwater lands." The Army Corps of Engineers has not ruled on Commander's application.

In 1995, the Town brought two CPLR article 78 proceedings in Supreme Court, challenging the DEC and DOS permits. Supreme Court dismissed both proceedings, holding that the ***570** DOS had not abused its discretion and that the challenge to the DEC permit was time-barred. The Town took no appeal.

In September 1996 the Town sued Commander, again in Supreme Court, seeking to enjoin Commander from dredging, and Commander cross-moved for summary judgment. Supreme Court denied the Town's application for a preliminary injunction, concluding that the Town's ownership did not entitle it "to deny the upland owner the right to such reasonable dredging as may be necessary to access the navigable part of the body of water using an existing dock or pier." The court further opined that the Town's asserted environmental concerns had already been addressed by the appropriate State authorities through the permitting process.

On the Town's appeal, the Appellate Division reversed. While acknowledging Commander's right of access to navigable waters, the court held that this right may not interfere with the Town's ownership of the underwater land, and that Commander, in its cross motion, had not demonstrated that the harbor conditions made dredging necessary to preserve access. The court remitted the matter to Supreme Court with instructions to determine whether the Town was entitled to temporary injunctive relief.

Supreme Court thereafter denied the Town's application for a permanent injunction, finding that "in its natural condition prior to dredging and the augmented deposit of silt attributable to the Town and State storm water runoff systems both basins of the dock were usable for tying up barges and offloading oil" (177 Misc 2d 1025, 1031 [1998]). Further, noting that the DOS "related its recommendation for Town approval to the issue of the necessity for Commander Oil to utilize the east basin" (*id.*, at 1032), the court found that dredging the east basin, within the limits stated by the DOS, was also necessary. This finding reflected evidence that a viable east basin might diminish the risk of oil spills during storms, and that the DEC and DOS permits had already imposed conditions calculated to mitigate the environmental impact of east basin dredging. The Town introduced evidence tending to show that dredging could cause waves to hit the shore with greater energy, increasing the potential for flood damage. The court noted, however, that the Town had made no claim relating to its Flood Damage Prevention Ordinance, so that determinations based on the wave-related evidence would amount to declaratory relief outside the pleadings. ***571**

On the Town's appeal, the Appellate Division again reversed and this time granted the Town a permanent injunction. The court did not question Supreme Court's key factual finding, which the Appellate Division paraphrased as a finding that dredging was "*reasonably necessary to restore the basins to their natural condition and to maintain a level of access to navigation similar to that which existed when Commander originally constructed its dock*" (267 AD2d 303, 304 [emphasis added]). The Appellate Division held, however, that an upland owner "has no riparian right to dredge public underwater lands in the absence of the public owner's permission" (*id.*). The court further noted that granting such a "right would limit the Town's ability, as public trustee of the underwater lands, to balance the many diverse and competing interests in the coastal resource for the benefit of the public" (*id.*).

We granted Commander's application for leave to appeal, and now reverse.

## II.

We begin analysis by reviewing settled principles of law. First, Commander has the rights of a riparian owner. Strictly speaking, Commander is a littoral owner, one whose land is bounded by the seashore. A true riparian owner owns land along a river (Dellapenna, *Riparianism,* in 1 Beck, ed, Waters and Water Rights § 6.01, at 88 [Michie 1991 & Supp 2000]). But this distinction is vestigial; we have long used "riparian" to describe owners like Commander (*see, e.g., Tiffany v Town of Oyster Bay,* 234 NY 15 [1922]).

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Riparian owners generally are entitled to access to water for navigation, fishing and other such uses. Although *Tiffany* and several other authorities most pertinent to this appeal are comparatively old cases, as we have recently suggested riparian owners still enjoy "their full panoply of rights" (*Adirondack League Club v Sierra Club,* 92 NY2d 591, 604 [1998]). Accordingly, Commander, like any riparian owner, has the right of access to navigable water, and the right to make this access a practical reality by building a pier, or "wharfing out" (*see, Trustees of Town of Brookhaven v Smith,* 188 NY 74, 85 [1907]).

Second, the Town owns the underwater land beneath Oyster Bay by virtue of a colonial patent.[1] The Town holds the land in "trust for the public good," and, as such, has long enjoyed rights ***572** "general in their character, as yet not defined with accuracy beyond the ownership and regulation of oyster beds and some general aid to commerce, navigation, fishing or bathing" (*Tiffany, supra,* 234 NY, at 21; *see also, Friends of Van Cortlandt Park v City of New York,* 95 NY2d 623, 630 [2001]). In keeping with this public trust, legislation authorizes the Town Board to lease the Town's common lands, including the foreshore, for oyster culture and other uses, and requires the Town Board to hold a hearing when it receives applications from prospective lessees (Nassau County Civil Divisions Act, L 1939, ch 273, §§ 320.0--323.0). Commander does not approach the Town, however, as a prospective lessee, but as a riparian owner enjoying property rights distinct from and not subordinate to those of the Town (*see,* 7 Warren's Weed, New York Real Property, Land Under Water, § 6.05 [4], at 87 [4th ed] [citing *Matter of Town of Hempstead v Little,* 22 NY2d 432 (1968)]).

Finally, as a logical implication of the foregoing, neither the Town nor Commander may exercise its rights in a manner unreasonably intrusive upon the other's rights. The Town's rights "are at all times subject to the public rights and to the right of the riparian owner to access to the water" (*Tiffany, supra,* 234 NY, at 21; *see also, Brookhaven, supra,* 188 NY, at 79). Conversely, the riparian owner's right of access is not "absolute, but qualified by other rights in the owner" of the submerged land; the riparian owner's rights "cannot be enlarged at will or according to his convenience or necessity" (*Hedges v West Shore R. R. Co.,* 150 NY 150, 158 [1896]).

Thus, neither the riparian owner nor the underwater landowner has an unfettered veto over reasonable land uses necessary to the other's acknowledged rights, and where the rights conflict the courts must strike the correct balance.

In contending that dredging is simply impermissible, the Town relies heavily on *Hedges,* where we concluded that the riparian owners' right of access to navigable water did not encompass the right to dig a canal from their brickyard out across submerged lands owned by a railroad (under a grant from the public owner) and into the Hudson River. The Town urges that the right to dredge therefore is distinct from the right of access to navigable water and, if granted to Commander, would represent an unprecedented expansion of the rights of a riparian owner.

We do not believe, however, that *Hedges* requires dredging to be treated differently from other means of exercising riparian ***573** rights of access. *Hedges* holds that a riparian owner has no unqualified right to expand its access by dredging in a manner that would seriously impair the underwater landowner's rights. In other words, the riparian owner may not adopt "an artificial mode of navigating ... destructive" of the public owner's rights (*id.,* at 159; *cf., Rumsey v New York & New England R. R. Co.,* 133 NY 79 [1892]). Under *Hedges,* then, the Town would be entitled to an injunction only if it could demonstrate that Commander's dredging would destroy, or seriously impair, its rights as owner of the underwater land.

Commander contends that it would dredge merely to preserve reasonable access, and that it may do so even under *Hedges.* While we assumed in *Hedges* that the riparian owner could not complain while "the natural condition of things is left practically unchanged" (*supra,* 150 NY, at 158), Commander contends that here it is the Town, with its storm water runoff system, that has changed the foreshore from its "natural condition." Several other cases suggest that when the public owner itself causes a diminution of the riparian owner's access, the *Hedges* calculus changes.

For instance, as we have noted, the right to wharf out upheld in *Brookhaven* seems to imply "that the town could not fill in and reclaim such [underwater] land and so deprive" theriparian owner of its use (*see, People ex rel. Palmer v Travis,* 223 NY 150, 165 [1918]). In *Tiffany,* similarly, we observed that the public owner could not "fill in, occupy and obstruct with buildings the foreshore under the pretext of providing for the public enjoyment, so as to interfere with the rights of owners of the upland, although they may still be able to reach the water" (*Tiffany, supra,* 234 NY, at 23). If a public owner cannot actively fill the foreshore in order to

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construct buildings, it would seem equally improper for the Town passively to fill Commander's basins with runoff while prohibiting dredging.

Additionally, we have held that a riparian owner's rights include title to accreted land--land previously underwater, which had emerged due to soil deposits--because this was the only way to preserve the right of access (*see, Hempstead, supra,* 22 NY2d, at 437 [citing *Matter of City of Buffalo,* 206 NY 319, 325 (1912)]). If a riparian owner may take title to previously underwater land that is fully accreted in order to maintain access, it would seem to follow that the same owner could dredge deposited underwater land that blocks access, especially where ***574** the soil or silt has been deposited by the underwater landowner. [2]

In sum, well over a century of common law adjudication has established the riparian owner's right to reasonable access, and nothing in these cases would preclude Commander from dredging to preserve such access, if the court was satisfied that dredging was necessary and did not unreasonably interfere with the rights of the Town. Because this standard was not applied below, we reverse and remit the matter to Supreme Court to strike the appropriate balance.

We underscore that in reversing, we do not hold that, as a riparian owner, Commander has a general right to dredge or a particular right to dredge to maintain the prior depth of the basins. [3]

The State of New York, as *amicus curiae,* argues that shorelines are inherently mutable, owing to geological forces as well as human activity, and that Commander cannot assert a right to dredge in order to maintain the level of access that it had in 1952, for there is no evidence that the depth of the basins in any particular year reflects the "natural condition" of the harbor. We agree that a riparian owner does not have the right to maintain the foreshore in the precise condition that existed when the riparian owner acquired the land or built a facility for docking. Despite references to the "natural condition" of the land (*see, e.g., Hedges, supra,* 150 NY, at 158), our jurisprudence has primarily balanced the public owner's rights against the riparian owner's right of reasonable access, rather than against the level of access that existed at any purported historical benchmark. [4] The riparian owner's right is not to ***575** maintain the foreshore in any fixed condition, but rather to enjoy reasonable access to navigable water.

By the same token, as the Appellate Division correctly observed, declaring a "right to dredge" could hinder courts from weighing the duty of public owners like the Town to consider the diverse interests of users of the foreshore, such as recreational users, oyster farmers and commercial navigators of the harbor. A public owner could present such interests as factors relevant to the courts' balance of riparian and public rights. Although the permitting process before Federal and State agencies may preempt a local government's attempt to create its own regulatory scheme (*see, e.g.,* 1969 Ops St Comp No. 69-112), such preemption would not necessarily impair the public owner's ability to argue to the court that dredging would harm distinctly local interests not within the purview of the permitting agencies.

Here, however, the Town said little before Supreme Court about local concerns not represented in prior proceedings, relying instead on a more sweeping property right purportedly enunciated in *Hedges.* Such environmental concerns as the Town did raise either diverged from the pleadings (as Supreme Court noted regarding the Town's "wave energy" argument), or duplicated issues disposed of in the article 78 proceedings, or both. [5] In the context of the present matter, the Town cannot now plausibly raise such concerns as factors for consideration on remittal.

As the Appellate Division observed, "Supreme Court improperly held that a private riparian owner has a right to dredge public lands for commercial purposes to the extent reasonably necessary to maintain the same access to navigability as was originally attained by wharfing out" (267 AD2d, at 304). Supreme Court's standard was incorrect. The issue was not whether Commander was entitled to preserve its original level ***576** of access to navigable water, but whether Commander needed to dredge in order to assure reasonable access. Moreover, it is not apparent that any feasible alternative to dredging was suggested or considered. Because the riparian right is limited to reasonable access, the right must be exercised in a manner that does not unreasonably interfere with the rights of the public owner. The Appellate Division should have remitted to Supreme Court to strike that balance.

Finally, we note that this matter has been before the courts for six years. In remitting, we do not contemplate further proceedings extending the litigation years into the future. For a business like Commander, a determination indefinitely postponed may well be worse than an adverse decision. While we will not direct that Supreme Court make its determination

based solely on the existing record, we strongly suggest that it do so insofar as it can.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings consistent with this opinion.

Judges Smith, Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.
Order reversed, etc. *577

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## Footnotes

1 Such underwater land is also referred to as the "foreshore," while the adjoining land is sometimes called the "upland."

2 Where the matter to be dredged is valuable, the underwater landowner might be entitled to compensation. The State is entitled to collect rents for sand and gravel dredged from its underwater land (*see,* Public Lands Law § 22), and some courts have assumed that local governments enjoy similar rights (*see, Nance v Town of Oyster Bay,* 23 AD2d 9, 23-24 [1965]). That issue is not before us on this appeal.

3 The term "maintenance dredging" has worked its way into the fabric of the case, having been used, for instance, in the DEC and DOS permits. We do not need, for now, to reach the case of another riparian owner who seeks to dredge in order to obtain a level of access it never before had.

4 Even in *Hedges,* where the result favoring the owner of the underwater land, a railroad, was bolstered by evidence that the "easement of access to the river by the owner of the lands on the shore ... could still be enjoyed ... in practically the same way that it had been enjoyed before or was capable of enjoyment in its natural state" (*supra,* 150 NY, at 157), we observed that the same result would obtain "so long as the sovereign or its grantees provide for a reasonable and suitable mode of access under all the circumstances" (*id.,* at 161-162).

5 We note, however, that the Town's article 78 proceeding against the DEC, having been dismissed on statute of limitations grounds, did not result in an adjudication of any environmental issues on the merits, and thus could not collaterally estop the Town from raising such issues in this action (*see, Ryan v New York Tel. Co.,* 62 NY2d 494, 500 [1984]). To that extent, Commander's reliance on the doctrine of collateral estoppel is misplaced. The Town's environmental arguments remain unsupported, but, in another action, better local environmental arguments with better evidence, distinct from those squarely addressed in article 78 proceedings, would not necessarily be precluded.

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84 Misc.2d 318
Supreme Court, Suffolk County, New York,
Special Term.

The TRUSTEES OF the FREEHOLDERS AND COMMONALTY OF the TOWN OF SOUTHAMPTON, Plaintiffs,

v.

Raquel Romero HEILNER and Authority DeMarco, Defendants.

Oct. 16, 1975.

**Synopsis**

Action was brought to enjoin builder, who entered into contract with owner to purchase certain land, and owner from filling in land below traditional high-water mark at edge of land allegedly owned by plaintiffs or from trespassing on such land, for declaratory judgment describing boundaries of plaintiffs' lands abutting shoreline of land in question, for declaration of existing easement in favor of public over land allegedly owned by plaintiffs, and for injunction prohibiting further waste and damage. The Supreme Court, Suffolk County, Special Term, George F. X. McInerney, J., held that owner had title to furthest seaward line of 1919 survey, except for such portions as had been lost by erosion or gained by accretion, and subject to right of public for navigation and connected uses up to present high-water mark; that owner had right to reclaim portion of land which had become suddenly submerged, but not portion lost through erosion; that plaintiffs, who held title to bottom of bay, owned no land above water abutting land in question; and that line formed by growth of spartina alternaflora, commonly known as cord grass, did not determine high-water mark.

Injunctions denied and complaint dismissed.

**Attorneys and Law Firms**

***319** ****763** Mudge, Rose, Guthrie & Alexander, New York City, for plaintiffs.

Edward J. Ledogar, Melville, for Raquel R. Heilner.

David H. Gilmartin, Southampton, for Anthony DeMarco.

**Opinion**

GEORGE F. X. McINERNEY, Justice.

This very involved and exhaustively prosecuted and defended action arose out of the efforts of the defendant DeMarco to buy a plot of land in Shinnecock Bay from Defendant Heilner and erect a motel on it.

The plaintiffs sought (1) a permanent injunction against the ***320** defendants filling in land below the traditional high water mark at the edge of the land which they alleged was theirs, or against trespassing upon it; (2) a declaratory judgment describing the boundaries of the plaintiffs' lands abutting the shore line of defendant's property; (3) a declaration of an existing easement in favor of the public over plaintiffs' land, and (4) an injunction prohibiting further waste and damage to the described property.

The pleadings are voluminous, and complicated, and a scholastic's delight. Every effort of the defendants to complete a motel on the property has been countered by the actions of the trustees.

The defendant DeMarco is a builder. He entered into a contract of sale of the premises with the owner, Heilner, on 10 May 1972. The property is about 5 acres and is on the eastern side of Tiana Bay, an ****764** arm of Shinnecock Bay. It was then zoned 'M' (motel zone). At the time of the signing of the contract the parties were aware that the Town Board of Southampton was changing the zoning to one-acre residential as of 22 May 1972. The contract contained the following clause:

'This sale is contingent upon purchaser commencing construction of a motel on the premises within two weeks of the date of this contract. If purchaser does not start construction within such time, down payment will be returned, and neither party shall have any further rights as against the other.'

DeMarco thus had 10 days within which to commence construction of the motel as far as his contractual rights were concerned and twelve days within which to establish a vested non-conforming use prior to the effective date of change of zone.

DeMarco, aware of the deadline, had already applied for and had been issued the approval of the Suffolk County Department of Health on his building plans showing the proposed construction of 108 living units in 24 separate

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structures. A building permit was subsequently issued by the Town on 11 May 1972 and DeMarco started construction and had met the time period stated in the contract of sale, and by the 22nd of May he had completed the foundations of three of the proposed structures.

Thus he had presumably overcome the obstacles of the new zoning classification, and his building permit was by ordinance valid as long as he had started construction of the buildings ***321** and diligently prosecuted it within three months from the date of issuance.

Assiduous though DeMarco was, he had engaged a worthy opponent. By letter dated 14 June 1972 the building permit was conditionally revoked by the Town building inspector because of need of the approval of certain modifications by the Suffolk County Department of Health. It was reinstated on 16 June. On 21 June an information was filed against DeMarco in the local Justice Court charging him with trespassing at the water's edge upon public and private property, a violation of a local ordinance. This was dismissed by Justice Berkerey, Town Justice, on 1 November 1973, as was another one for the same charge filed on 16 July 1973. The dismissal was appealed by the Trustees to the Appellate Term which in its opinion dated 22 March 1974 affirmed the dismissal.

In addition, plaintiff sought an injunction preventing DeMarco (as Todem Homes) from continuing with the construction. A temporary injunction was denied and the complaint dismissed (13 July 1972). This order was appealed and the Appellate Division reversed Special Term and remitted the matter for determination of whether the defendant had acquired a vested interest.

****765** Upon the hearing the Court found that a vested interest had been established and authorized the continued construction of 32 units. Town of Southampton v. Todem Homes, Inc., Bracken, J., Special Term, 17 December 1974.

In the meantime, on 23 June 1972 DeMarco was served with the original summons and complaint in the instant action by order to show cause returnable 26 June. A stay was issued. The complaint sought a temporary injunction as well as a permanent one prohibiting the defendants from filling in or trespassing on certain peripheral marine edges of the premises now alleged to be the property of the Trustees. The Court set a hearing on a motion (order 28 June 1972) and at the conclusion of the hearing the Court denied the request for a temporary injunction, vacated the stay and gave a preference for immediate trial, (order, DeLuca, J., 27 September 1972).

Applications followed for leave to amend, etc., and the matter finally came to trial before this Court on 6 November 1974, and was, with some pauses, completed in late January 1975.

One fact first to be determined is whether Shinnecock Bay is or was navigable in law, for if it was navigable in law, ***322** ownership of the upland would run to high water mark (Tiffany v. Town of Oyster Bay, 209 N.Y. 1, 102 N.E. 585) and if it was non-navigable in law, it ran at least to low water mark as the defendants contend. Fulton Light, Heat & Power Co. v. State, 200 N.Y. 400, 94 N.E. 199; White v. Knickerbocker Ice Co., 254 N.Y. 152, 172 N.E. 452.

The early English rule was that all waters which had a change of tide were navigable and all others were non-navigable. People ex rel. Howell v. Jessup, 160 N.Y. 249, 260, 54 N.E. 682, 685—686. In Morgan v. King, 35 N.Y. 454, this rule is so stated, but the Court is careful to point out that whether the king or private persons owned the land under tidal waters, the public had a right to use the waters for the purpose of transportation or passage paramount to the rights of the riparian owners, as well as where the waters were navigable in fact. It added that navigable in fact, generally speaking, was meant to connote streams on which boats, lighters, or rafts might be floated to market. This definition has been continually broadened, Roberts v. Baumgarten, 110 N.Y. 380; White v. Knickerbocker Ice Co., supra, and a fairly recent case has stated:

'However, in determining whether the creek was navigable in fact, the circumstance that the tide ebbed and flowed therein is not, under the modern and majority rule which prevails in this country and in this State, controlling. Under said rule, a waterway is navigable in fact only when it is used, or susceptible of being used, in its natural and ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water (The ****766** Daniel Ball, 10 Wall. 557, 563, 77 U.S. 557, 563, 19 L.Ed. 999; Harrison v. Fite, 8 Cir., 148 F. 781, 783; Van Cortlandt v. New York Cent. R.R. Co., 139 Misc. 892, 250 N.Y.S. 298, reversed 238 App.Div. 132, 263 N.Y.S. 842, reversed 265 N.Y. 249, 192 N.E. 401; 56 Am.Jur., Waters, ss 178, 179, pp. 642, 645; cf. Navigation Law, s 2, subd. 5). Under the correct test of navigability, the paramount factor to be considered is not the actual use to which a stream has been put, or the purpose of its use that is important, but rather its capacity for use and its susceptibility for use (in its original state or condition) for trade, commerce or travel. The fact that a stream has been used for pleasure

boating may be considered on the subject of the stream's capacity and the use of which it is susceptible.' Fairchild v. Kraemer, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 825.

Earlier surveys indicate that as recently as 1919 the high-water line was substantially seaward of the present one and ***323** the defendants maintain that at least this should be the correct line of property ownership. (Actually they maintain that they own further than that.) The argument is that the change in the water line was not due to erosion but to the intentional acts of the governmental agencies in opening up Shinnecock Bay to the effects of Peconic Bay and the Atlantic Ocean, and that since this event Shinnecock Bay has experienced tides, a situation previously unknown, and a resultant elevation of water leval in Shinnecock Bay and submergence of upland.

Shinnecock Bay was a land-locked body of water of uncertain dimensions at some time in the obscured past, bounded on the south by the narrow barrier beach separating it from the waters of the Atlantic Ocean; on the west by a swampy wetlands through which a canal was dug giving access to the bays further to the west; on the north and east by land. There came times when the inhabitants tried to dig an inlet to the south to the ocean, and did prior to 1919 dig Shinnecock Canal through the narrow land barrier to the north to the tidal waters of Peconic Bay, a tributary of the Atlantic Ocean.

Long Island, mainly a glacial terminal moraine, extends into the ocean for about 120 miles and on its low south shore is a number of bays of varying sizes and depths, sometime separated from each other by wetlands but now cut through. The barrier beach is merely a sand bar protecting these bays from the direct assault of the ocean. It is impermanent and the unfortunate fact that many people have erected substantial homes on it does not stop the action of the indifferent sea. Every year the autumnal storms threaten its very existence and strident calls are made to have the various governmental agencies devise a method of stopping the ever-present erosion and avulsion.

The history of the barrier beach discloses that inlets were opened and closed by natural forces from time to time as they still are. Due to a constant westward drift of material from the east end of Long Island at Montauk Point the inlets generally move to the west. Major storms cause breaks through the sane barrier which usually are filled ****767** in by the normal drift. Some remain open for a substantial period, but unless they are stabilized by man's efforts they are transient.

The fact of a submergence has been well established by the testimony. Stumps of trees were found well into the Bay, some of hundreds of years of age and some of thousands. It was ***324** stated by expert testimony that these trees could not have grown in salt water. Testimony also disclosed that the strata under the present water are all marine, and that there was no known source of salt in the area which could make the Bay saline except the ocean. The opinion was expressed that the sea level had substantially increased over the years, inundating at least some ground which had been in the form of islands. The actual increase of the tide between 1898 and 1972 was about three and a half feet according to the testimony and was caused by two factors. One was the original opening and subsequent improving of the Shinnecock Canal to Peconic Bay. The other was the natural break in the Barrier Beach in 1938 and its attempted stabilization to date, necessitating breakwaters and the creating of sand deposits. The proportion contributed by each of these inlets is uncertain from the proof adduced.

Defendants argue that obviously the Bay was not subject to tides in the past because it was landlocked and therefore the rules of nontidal waters should be applied, and that the rights of the owners having been vested, a man-made incursion of ocean water could not change these rights, and that in any event, the land now covered by water due to the construction of Shinnecock Canal, and its later improvement, together with the stabilization of a fortuitous storm-caused temporary break in the beach cannot deprive upland owners of title to land previously above water.

Unarguably, the Bay varied in salinity through the years as the barrier beach opened and closed, and it must have been made saltier in recent years by the action of man. Some of the plant and animal forms found in the Bay are capable of survival in either brackish or salt water.

Assuming the validity of defendants' asserted facts, the argument seems persuasive.

It is futile to go back in time to 'the beginning' to ascertain the original status of the Bay for at one time there was no water on the earth at all and then later present mountains were thousands of feet below sea level, and in the future may be again. So it must suffice to say that in 1898 the determination was made that Shinnecock Bay was nontidal and treat the subsequent changes on an ad hoc basis.

In People ex rel. Howell v. Jessup, 160 N.Y. 249, 260, 54 N.E. 682, 685—686, the Court, pointing out that the common

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law rule defined navigability in terms of tidality, affirmed the holding of the ***325** lower ****768** court that the waters leading into Shinnecock Bay from the west had no ebb and flow, and that there was no continuous highway through the waters and various bays by natural channels east of the point which would include Shinnecock Bay.

The Court also pointed out that the lower court had found that the waters were then navigable in fact at that point, but held that this had no bearing on the legal issues in the case because it felt that the status of the Bay at the time of the granting of the early patents would also control its current status. Under the common law of tidality, it then resulted in a finding of non-navigability in law because of non-tidality. Finally, the Court mentioned that there had been some modification of the rule in this country, citing Roberts v. Baumgarten, 110 N.Y. 380, already discussed.

The defendants argue that since the Bay was determined to have been non-tidal and thus non-navigable in law when the patents were issued, the upland owner had title to low water mark, the usual line of demarcation in non-navigable waters where someone else owned the water bottom. (Gouverneur et al. v. N.I. Co., 134 N.Y. 355, 31 N.E. 865.) The Trustees in the present case have title to the bay bottom and the defendants make no claim to this property.

They then argue that if some of their land was submerged due to the action of the Trustees in opening Shinnecock Canal or any inlet, title to the submerged land was not affected. This is true.

A case directly on point with the matter at bar as alleged by defendants, is Wheeler v. Spinola, 54 N.Y. 377. A fresh water pond was connected to sea water without the upland owner's consent, resulting in a rise and fall of tide.

The Court stated at p. 384:

'Those who owned the bed of the pond, as well as the riparian owners, must have had the same rights afterward as before. The owners of the bed of a fresh-water pond certainly cannot, by letting into it the water of the ocean, extend their right of ownership to the high-water mark of flood tide. The boundaries between them and the riparian owners must remain the same. The proprietors of land bordering upon streams and waters in which the tide ebbs and flows, own only to high-water mark, and the land below that belongs, in this country, to the people. But this rule of ownership cannot apply to this pond. It must be treated for all the purposes of this case as if it had remained a ***326** fresh-water pond. Neither can the rule as to riparian ownership be applied to this pond which is applied to ordinary freshwater streams. A boundary upon it does not carry title to its center but only to low-water mark. Such is the rule as to boundaries upon natural ponds and lakes.'

Assuming then, that the defendants could establish the water boundary of their upland when Shinnecock Canal was opened, which ****769** they have not done, their rights would be unaffected by the conversion of either fresh or salt water of Shinnecock Bay into tidal Shinnecock Bay.

In City of New York v. Realty Associates, 256 N.Y. 217, 176 N.E. 171, the Court states that a private owner is not divested of title by avulsion, and that the right to regain land rests on the principle that the title to it remains in the riparian owner.

The Court goes further, and holds that title is not presumed to have been lost by abandonment even when the land has been submerged for more than thirty years, pointing out that when one acquires title by deed it will not be affected by non-user.

If natural avulsion causing submergence does not cause a change in title, certainly submergences caused by man's actions would not either.

The question as to whether the Trustees would be held on damages for raising the water level without the consent of the owners, if this be so (Fulton Light, Heat & Power Company et al. v. State of New York, 200 N.Y. 400, 94 N.E. 199) need not now be determined.

In any event, as mentioned, there was a substantial natural break in the barrier beach in 1938, creating an inlet still open today and whatever had been the status of the Bay before this, it now became tidal and the changes are controlled by the rules outlined in Mulry v. Norton et al., 100 N.Y. 424, 3 N.E. 581. It should be noted that the Court talks of land which has been submerged as well as land washed away.

The Court says at page 434, 3 N.E. at page 585:

'It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance ***327** by erosion may be returned by

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accretion, upon which the ownership temporarily lost will be regained.

'When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. (Angell on Tide Waters, 76, 77; Houck on Rivers, **770 s 258.) Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. (Angell on Tide Waters, 77—80, and cases cited.) It is said in Hargraves' Law Tracts (Sir Matthew Hale's De Jure Maris), 36, 37: 'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity, and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property, and accordingly it was held by Cooke and Foster, M. (7 Jac.C.B.), though the inundation continue forty years."

See also City of New York v. Realty Associates, 256 N.Y. 217, 176 N.E. 171.

When Shinnecock Bay became tidal the right of the public to use its surface for navigation and associated purposes did not change in any way. In Fulton Light, Heat and Power Company et al. v. State of New York, 200 N.Y. 400, at page 412, 94 N.E. 199, at page 202, the Court says:

'The common law of England fixed, as an unalterable rule, the title to the bed of tidal streams in the sovereign and to the bed of fresh water streams in the owners of the adjacent banks, the owner of each side taking to the center, or usque ad filum aquae, but made no distinction against the public right of passage and transportation. The navigability, in fact, of the stream had no relevancy to the question of the title to its bed; it was relevant solely to the public right to pass, or to transport, upon it, as upon a highway. A stream, to be exclusively owned by the riparian owner, must be too small to *328 be navigable, in fact.'

See also Morgan v. King, 35 N.Y. 454, 458.

The Bay, as noted, is not very deep, and certainly not adapted to large commercial ships. But as society developed, uses undreamed of in earlier years became commonplace and as noted in Roberts v. Baumgarten, 110 N.Y. 380, and Fairchild v. Kraemer, 11 A.D.2d 232, 204 N.Y.S.2d 823, a more liberal standard of navigability became the test.

As the years went by, there was a great increase in the use of shallow water for shoal-draft pleasure craft as our industrialized economy provided the affluence and spare time needed for recreational uses. The waters of Shinnecock Bay are used constantly for this type of navigation, and in today's life it cannot be said that this use is less important to society than commercial uses such as logging or transporting produce across the water. Indeed the Court takes judicial notice that due to the relative shallow depth of this and similar bays on Long Island center board sail boats were constructed to avoid **771 the disadvantage of a keel and to this day most sail boats on the north shore of Long Island and on Peconic Bay are keel boats, and many on the south shore are center board boats. Furthermore, most outboard motor boats can be used in quite shallow water, and many fairly large inboard cruising boats with a planing type hull also are used in water of the depth of the Bay. Millions of dollars are invested in these uses. Fairchild v. Kraemer, supra.

On tidal waters the public has the right to use the strand between high and low water for passage and other purposes, Tucci v. Salzhauer, 40 A.D.2d 712, 336 N.Y.S.2d 721, and this must assume that the user of the surface of the water can beach his boat there, even though perhaps he must use the familiar row boat, or perhaps even walk.

A relevant statement is found in People v. Steeplechase Park Co., 82 Misc. 247, 253, 143 N.Y.S. 503, 509:

'It is not necessary, however, to determine whether the high-water mark was forced back from where it was in 1900 to its position in 1913 by avulsion or erosion. **Although, where the shore recedes as the result of avulsion, the boundary of the littoral proprietor may not change**, the public has the same right of passage over the new foreshore as it had over the old—else an avulsion might cut off the public right of passage altogether. This will be yet more evident, when we consider that this public right of passage is of the same nature as the public right of navigation *329 in navigable waters, which, all will agree, would not be lost by any change in the

shore line or lines, however sudden. The practical result of the doctrine that title is not lost by avulsion so far as beach lands are concerned is that should the land reappear within the limits of the former boundaries the littoral proprietor may reclaim it. As authority for these propositions, see Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581, 53 Am.Rep. 206.'

Consequently it appears that all of Shinnecock Bay is now navigable, either in law or in fact; in law because it is now tidal, and in fact because the Court of Appeals so found in 1898 under a more stringent test than needed today.

Under either classification, the public has an easement of navigation and use over its waters.

When the general principles are considered here the result is the conclusion that the defendants have title to the farthest seaward boundaries of their deeds except such portions as have been lost by erosion or gained by accretion, subject to a right of the public for navigation and connected uses up to the present high-water mark.

Some part of the original land in the deeds has increased to the seaward due to accretion. Accretion will alter the ownership of the underlying bottom land. Thus although the Trustees could not increase their title by raising the water level of the Bay, they could ****772** decrease it if accretion resulted on defendants' land. Accretion is the increase of the upland by a change so gradual as not to be perceived in any one moment of time. Halsey v. McCormick, 18 N.Y. 147. The riparian owner increases title by that amount, at the cost of the diminution of title of the owner of the land previously under water (here the Trustees) but now covered by the accretion.

In the case last cited, the Court was careful to point out that this result would not follow in the case of avulsion. The defendant there had diverted the water in his boundary stream so that bottom across the stream at the plaintiff's boundary line became exposed. The plaintiff then claimed it as accretion. The Court held that since the defendant's action caused avulsion, no title changed. The Court also stated that had accretion rather than avulsion been caused by the wrongful act of a contiguous owner, it would be improbable that the wrongful actor could defeat title in the owner of the land accreted. This case is thus cited for the proposition that there is no distinction between accretion formed by natural or artificial means. To the same effect is ***330** County of St. Clair v. Lovingston, 23 Wall. 46, 90 U.S. 46, 23 L.Ed. 59. The Court says at page 68:

'Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future avulsion is a vested right. It is an inherent and essential attribute of the original property.'

The Appellate Division endorses this statement in State of New York v. Bishop, 46 A.D.2d 654, 359 N.Y.S.2d 817, 820. Thus in our case the Trustees cannot be heard to dispute any accretion to defendants' property due to their own act of opening up Shinnecock Canal, or anyone elses'.

The defendants, of course, are also subject to loss of their upland due to erosion, but not avulsion. However, since they already owned the land under water abutting their upland at the time of the submergences, any subsequent erosion would not alter their title.

In the case of avulsion, the language in Halsey v. McCormick, supra, is possibly relevant, 18 N.Y. page 149:

'McCormick deepened the bed of the stream on the south side, and placed stones along the centre so as to confine the water in the channel thus deepened, and by this means the land in question was left bare. He may have been guilty, by these acts, of a violation of the riparian rights of the plaintiff or his grantors, but I know of no rule of law which would constitute an illegal act of the kind a transfer of the title.'

See also Reese v. State, 190 Misc. 316, 72 N.Y.S.2d 209.

This Court again points out that neither side adduced sufficient evidence to fix the water lines prior to the opening of Shinnecock Canal.

****773** The argument that a man-induced higher tide would not result in compensable damages is highly questionable. Many areas on the south side of Long Island have been developed upon the water's edge. Many homes are just slightly above the high water plane. In areas such as Jamaica Bay, Great South Bay, Bellport Bay, Moriches Bay, Westhampton Bay, and Shinnecock Bay, an artificially-induced inlet from the sea resulting in as little as several feet of additional tide would destroy many millions of dollars of home and commercial construction and require mass evacuation of people. It is doubtful that a Town could cause such a disaster with impunity. This is a far different situation than where nature breaks through the beach. If an unimpressed ocean cavalierly disregards the rules imposed by man upon real estate, man ***331** must magnanimously

conform his rules to the actualities or sound a reprise of King Canute's lament.

The question next arises as to the rights, if any, of the defendants to fill in or reclaim their submerged land. A very interesting fact situation which includes almost all of the permutations of accretion and avulsion connected with an inlet is found in Town of Hempstead v. Lawrence, 70 Misc. 52, 127 N.Y.S. 949, rev. 147 App.Div. 624, 132 N.Y.S. 615, which cites Mulry v. Norton, supra (100 N.Y. 424, 434, 3 N.E. 581, 585). These cases do not set a time limit upon the owner's right to reclaim land lost by avulsion provided that the original boundaries can be located or identified. The decisive criterion is whether the loss was due to erosion or avulsion. If one equates avulsion with sudden submergence, as this Court does, the defendants have the right to reclaim their land which became submerged, but not that part of their land which was lost through erosion, Schwartzstein v. B. B. Bathing Park, 203 App.Div. 700, 197 N.Y.S. 490, unless they also owned the contiguous under-water land.

It is pointed out that defendants could identify the prior land, were it to emerge, with no difficulty within a foreseeable future, and the evidence indicates that upon its drying surface would be found ancient and not-so-ancient plants, indicating an absence of asportation of the soil.

Following the above reasoning, the Court holds that the Trustees do not own any land above water abutting the defendants' property as it now exists, since they have gained no further title through accretion and in fact have lost some.

The Court will now consider the rights of the public to the shore line of the premises. As stated above, the public has an easement for navigation and use over all of Shinnecock Bay and its waters. This easement includes the strand, the area between high and low water. The question now arises—where is high water?

The plaintiffs argue that high water mark should be determined where possible, by the line formed by the growth of spartina **774 alternaflora, commonly known as cord grass, because this grass requires a diurnal flooding of salt water in order to grow vigorously. Therefore, it is maintained, high water line can readily be determined by observing the line of growth. The argument is an interesting one and probably does indicate the average location of mathematical high water to a rough degree, but it has one great defect—it doesn't make societal sense. Words and laws should serve man; not the converse.

*332 Undoubtedly the original owners of Shinnecock Bay lands were unaware of the unique requirement of daily inundation for survival of spartina alternaflora. It would have caused more than mild shock to them to be informed by a botanist that the landowner did not own at least to the obvious water line, and that perhaps several hundred feet of vegetated sand, mud and bog separated him from low water mark. In short, the test of high water mark was not where it was as a matter of logic and scientific proof, but where they thought it was and, even more persuasively, where they by custom agreed it was. If in fact what they called a horse was really a cow, their scientific error would not convert the cow into a horse. Could it be imagined that if a mute colonist were to sell his waterfront land to a purchaser he would walk over to the line of spartina alternaflora and indicate that the boundary stopped there? It may well be that the existence of spartina alternaflora may logically indicate the limit of the daily fluctuation of the tides, but it has been wisely observed that logic alone may destroy mankind. The early settlers and their predecessors in England, less interested in logic and scientific abstractions than practicalities, evolved a rule of boundary definition that worked well; and if it worked well it was good law.

The very concept of the average high water line shows the occasional impracticability of pure logic. Evidence was introduced to show that to arrive at this datum an average should be taken of all the tides over a period of 18.6 years. Having accepted this definition, one realizes that the resultant datum may be a line never actually marked by the water itself. Testimony showed that for hundreds of years there had been little argument about the location of the customary high water mark in usage; it was considered the line of vegetation, or the best estimate on the sandy beach, usually shown as the line of driftwood left by high water. Inevitably, some actual error was introduced, but it was minimal compared to the utility of the practice. It is difficult to perceive what practical difference a few feet of sand or bog would make in this case for in any event the upland owner would be a riparian owner with a right of access to the water. Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665. Once a riparian owner, always a riparian owner. In fact this is probably the basic reason for the rules of accretion. Lamprey v. Minn., 52 Minn. 181, 53 N.W. 1139. **775 See Town of Hempstead v. Lawrence, 147 App.Div. 624, 132 N.Y.S. 615.

The Trustees' sudden evangelical zeal to preserve the wetlands *333 and shore fronts of their Town is

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commendable, but the upland owners should not be forced to bear the brunt of the shift in governmental policy. The inconsistency of the Trustees' position is obvious to one who inspects the area and is confronted by the existence of bulkheading on the waterfront properties of other owners in the same area. The failure of the Trustees to make a similar claim for hundreds of years indicates that they themselves were unaware of the significance of spartina alternaflora. If in the future it should be established that through some now unknown process the daily tide went many feet further inland, would they renew their claim?

The State has been most properly concerned with the irreplaceable wetland areas of the State, and has enacted an Environmental Conservation Law to protect them. Obviously the local municipalities should aid in the proper administration of these principles. But they should not seize this current interest as an excuse to change the time-hallowed laws of private ownership. For instance, in this case the testimony of the plaintiffs disclosed that this new method of high water determination would indicate that many acres and at least one island in the Bay which had been assessed to private ownership for many years now were to be claimed as the land of the Trustees. This stands as a threat to every riparian owner on the periphery of Shinnecock Bay upon whose land spartina alternaflora may be growing or once grew. Town of North Hempstead v. D. G. S. Ventures, et al., Special Term, Index #12337/73, Nassau County, 28 June 1974 (McCaffrey, J.). There are also several inherent inaccuracies in this method. For one, where is the line when the alternaflora consists of a wide band? Is it the inland edge, the seaward edge or the easy compromise of the middle which is practical but illogical? Furthermore, this line when applied to the premises here does not describe a plane; a startling anomaly indeed.

The Court will not continue the argument further, but refers to the decision in Trustees of the Freeholders and Commonalty of the Town of Southampton v. Heilner and DeMarco, DeLuca, J. (Suffolk County), 27 September 1975, and the case of Dolphin Lane Associates, Ltd. v. Town of Southampton, 72 Misc.2d 868, 339 N.Y.S.2d 966, affirmed, 43 A.D.2d 727, 351 N.Y.S.2d 364, and modified by the Court of Appeals, 37 N.Y.2d 292, 372 N.Y.S.2d 52, 333 N.E.2d 358 (decision July 2, 1975). The opinion answered the main contention of the plaintiffs adversely.

The Court finds that the plaintiffs have not established the present high water mark by survey, although it would appear ***334** to be as depicted on plaintiffs' exhibit 6A, represented by the inshore edge of the wide blue peripheral band.

****776** The argument that such part of the premises as was registered title cannot be lost by erosion is answered by State v. Bishop, 46 A.D.2d 654, 359 N.Y.S.2d 817, in which the Court held that the owner of land registered in 1950 did not have the right to fill in that part of his land which had eroded by 1972. The Court states, at page 654, 359 N.Y.S.2d at page 820:

'Nor did the 1950 title registration judgment bind plaintiff to the location of the mean high water mark described therein, for, notwithstanding that judgment, defendant, as did his predecessor, holds a title diminishable in extent by erosion and the consequent influx of the tide (Real Property Law, s 391; Matter of City of Buffalo, 206 N.Y. 319, 99 N.E. 850; Lawkins v. City of New York, 272 App.Div. 920, 71 N.Y.S.2d 112).'

In view of the Court's analysis of the legal principles discussed, the following dispositions are made of the plaintiffs' requests:

1. A permanent injunction against the defendants filling in any land below the present discernible high water line up to the furthest seaward line of the 1919 survey is denied.

2. The boundaries of the defendants' property are as shown in the earliest survey of this property in 1919.

3. There is an easement in favor of the public over all land and water seaward of the average high water line as it now exists.

4. An injunction prohibiting further waste and damage to the defendants' property lying inland of their boundary line in 1919 is denied.

5. The complaint is dismissed.

As for the defendants' claims, the following dispositions are made:

1. The defendant DeMarco is ordered to close title pursuant to the contract with defendant Heilner within 30 days of the date of the entry of the order dismissing the complaint.

2. The counter-claims of the defendants will be tried upon 30 days notice from the date of the entry of the order dismissing the complaint.

The Court would like to express its appreciation for the thoroughness of the research involved, the cooperation shown by the attorneys to each other and the Court during the long

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*335 trial, and the lucid synthesis by all of the complex and esoteric matters pursued.

**All Citations**

84 Misc.2d 318, 375 N.Y.S.2d 761

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234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267

LOUIS C. TIFFANY, Respondent,
v.
TOWN OF OYSTER BAY et al., Appellants.

Court of Appeals of New York.
Argued May 10, 1922.
Decided July 12, 1922.

CITE TITLE AS: Tiffany v Town of Oyster Bay

***15 Riparian rights**

**Lands under water -- Respective rights therein of the public, the owner thereof and the owner of the upland -- Filling in of land under water by owner of upland acting under grant by state afterward held invalid -- Filled-in land retains its character as land under water -- Where ownership is in town it may properly be restrained from erecting large structure paralleling shore line of upland proprietor -- Town may be permitted to have fill removed at upland owner's expense**

1. Land under the waters of the sea and its arms, between high-and low-water mark, is subject, *first,* to the *jus publicum,* the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident. Such land is also subject, *secondly,* to the *jus privatum,* the rights of the owner of the foreshore, which rights are at all times subject to the public rights and to the rights of the riparian owner to access to the water; *thirdly,* the rights of the riparian owner, the owner of the upland fronting on navigable tide waters, over the foreshore are rights of reasonable, safe and convenient access to the water for navigation, fishing and such other uses as commonly belong to riparian ownership. Each right, the right of the public, of the owner of the foreshore and of the riparian owner, must be exercised in a reasonable way.

2. Where the owner of uplands bordering upon an arm of the sea has filled in land under water adjacent thereto, title to which had been granted to him by the state, but thereafter it is determined in an action that title to the land under water is in the town and the grant thereof to the upland proprietor invalid, the title of the town is, nevertheless, subject to the rights of said proprietor as riparian owner.

3. The filled-in land retains its character as land under water and the owner of the adjacent upland has the same rights and no greater rights in and across the same as if no filling had been done, or as if the filling had been done lawfully by the town. His rights as riparian owner continue and he has not become an inland owner to the extent of the fill.

4. The fact that he was technically a trespasser when he made the fill does not now estop or bar him from asserting his rights as riparian ***16** owner, and the town may properly be restrained from interfering with his suitable and reasonable access to the ocean by appropriating the fill to the erection of a large bath-house structure paralleling his shore line.

5. The action being in equity the town may properly be permitted, at its option, to have the fill removed at the upland owner's expense.

*Tiffany v. Town of Oyster Bay,* 192 App. Div. 126, modified.

APPEAL from a judgment entered July 10, 1920, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff.

*Henry A. Uterhart* and *George B. Stoddart* for appellants. The plaintiff having filled in the land below high-water mark in front of his upland, such land has lost its character of foreshore and become upland, and the plaintiff's easements as riparian owner have been extinguished with respect to such filled-in land. (*First Construction Co. v. State of New York,* 221 N. Y. 295; *People v. Steeplechase Park Co.,* 218 N. Y. 459; *Barnes v. Midland R. R. T. Co.,* 193 N. Y. 378; *Town of Brookhaven v. Smith,* 188 N. Y. 74; *Murphy v. City of Brooklyn,* 98 N. Y. 642; *Wetmore v. Brooklyn Gas Light Co.,* 42 N. Y. 384; *Saunders v. N. Y. C. & H. R. R. R. Co.,* 144 N. Y. 75; *Halsey v. McCormick,* 18 N. Y. 147; Gould on Waters, 314, § 158.) Assuming, as claimed by the plaintiff, that the filled-in land retains its character as foreshore, and still remains subject to plaintiff's easement as riparian owner, the bath-houses to be erected by the defendant do not constitute an interference with the plaintiff's easement of access. (*Saunders v. N. Y. C. & H. R. R. R. Co.,* 144 N. Y. 75; *Hedges v. W. S. R. R. R. Co.,* 150 N. Y. 150; *Oelsner v. Nassau Light & Power Co.,* 134 App.

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Div. 281; *Murphy v. City of Brooklyn,* 98 N. Y. 642; ***17** *Hynes v. N. Y. C. R. R. Co.,* 231 N. Y. 229.) The plaintiff is not entitled to remove the fill, and there is no basis for relief on the ground of mistake. (*Rogers v. Jones,* 1 Wend. 237; *Loundes v. Huntington,* 153 U. S. 1; *Pettes v. Bank,* 17 Vt. 445; *Marble v. Whitney,* 28 N. Y. 297; *Weed v. Weed,* 94 N. Y. 243; *Haviland v. Willets,* 141 N. Y. 35; *Flynn v. Hurd,* 118 N. Y. 19; *Green v. Smith,* 160 N. Y. 533; *Newburgh Sav. Bank v. Town of Woodbury,* 173 N. Y. 55; *Terry v. Moore,* 12 Misc. Rep. 641.) Plaintiff committed a trespass in filling in defendant's property and, therefore, has no standing in a court of equity for relief. (*Pettes v. Bank of Whitehall,* 17 Vt. 435; *Warner v. Fountain,* 28 Wis. 405; *Putnam v. Ritchie,* 6 Paige, 390; *K. P. R. R. Co. v. Mihlman,* 17 Kans. 224.)

*Frederic R. Coudert, Rowland Miles* and *Wilmot T. Cox* for respondent. The plaintiff is a riparian owner on Cold Spring Harbor. (*Yates v. Milwaukee,* 10 Wall. 417; *Matter of City of New York,* 168 N. Y. 140; *Mulry v. Norton,* 100 N. Y. 437.) The town had no right either to fill in or maintain the land in Cold Spring Harbor in front of the plaintiff's property, because this destroys his riparian ownership *pro tanto.* (*Matter of City of New York,* 168 N. Y. 134; *Sage v. Mayor, etc.,* 154 N. Y. 70; *Buccleugh v. Met. Bd. of Works,* L. R. [3 Exch.] 306; *Rumsey v. N. Y. & N. E. R. R. Co.,* 133 N. Y. 79; *Kane v. N. Y. & N. E. R. R. Co.,* 125 N. Y. 176.) The sovereign state, or the federal government alone, has the power to destroy the riparian character of land. But such destruction must be to promote commerce and navigation. The town has no such right. Its interest in the foreshore is purely private and proprietary. (*People ex rel. Howell v. Jessup,* 160 N. Y. 249; *People v. N. Y. & S. I. Ferry Co.,* 68 N. Y. 71.) Plaintiff is entitled to equitable relief. (*Hoebler v. Myers,* 132 N. Y. 366; *Coxe v. State,* 144 N. Y. 396; ***18** *Champlin v. Layton,* 18 Wend. 425; *Stone v. Hall,* 17 Ala. 434; *Goodspeed v. I. S. R. Co.,* 184 N. Y. 351; *Freeman v. Curtis,* 51 Me. 140; *Bingham v. Bingham,* 1 Ves. Sr. 126; *Pusey v. Desbouvrie,* 3 P. Wms. 315; *Broughton v. Hunt,* 3 D. & J. 501.) The fact that the fill--which is maintained by the town, contrary to law--was made by the plaintiff in the first instance, does not destroy the plaintiff's standing in equity, and does not give the town rights that it did not originally possess to cut down the length of his frontage on the water. (*Ledyard v. Ten Eyck,* 36 Barb. 102; *Langdon v. Mayor, etc.,* 93 N. Y. 129; *Mulry v. Norton,* 100 N. Y. 424; Gould on Waters, §§ 123, 124, 128, 148, 158; Angell on Tide Waters, 249; *Steers v. City of Brooklyn,* 101 N. Y. 51.)

POUND, J.

Plaintiff had asserted rights to lands below high-water mark, adjacent to his spacious residential estate on Oyster Bay along the westerly shore of Cold Spring Harbor, under a grant from the state of New York made to him by the commissioners of the land office. The validity of this grant was challenged by the town, and was in a former action sustained in the trial court and by the Appellate Division. (*Tiffany v. Town of Oyster Bay,* 141 App. Div. 720.) On appeal the judgment in his favor was reversed on a holding that the waters of Cold Spring Harbor were included in the Governor Andros Colonial grant or patent of 1677 to the town of Oyster Bay and that plaintiff had acquired no title thereto. (209 N. Y. 1.) Plaintiff has a shore frontage of about 3,670 feet. Upon the foreshore a wrecked hull of a vessel lay partly embedded in sand, projecting at about right angles with the shore front. In the month of May, 1913, before the adverse decision of the appeal, but while the case was in this court pending decision, plaintiff took up sand and material which he deposited to the westward of the hull. Aided by the natural wash along the shore, which the wreck tended to ***19** arrest, he thus covered the foreshore with a sloping embankment, its front about a foot above high water, triangular in shape, with its landward base occupying about one-third of plaintiff's frontage. The area is not accurately defined, but was estimated on the argument to be upward of an acre.

After the decision of this court, plaintiff offered to restore the foreshore by removing the fill, thus putting the shore back in the condition it had been. This proposal the town declined, and in June, 1916, it took possession of the filled-in land and employed defendant Kunz to build thereon a structure to contain thirty-three public bath houses of about fifty feet by ten or fifteen feet each; height not indicated. Plaintiff thereupon began this action in which he asks leave to restore the foreshore to its original condition and also asks that defendants be enjoined from building bath houses or any structures whatever thereon and that he be restored to his rights as a riparian owner of the lands belonging to him.

The trial court held that the filling in of the foreshore was a trespass; that the title of the town, derived from the Andros charter, authorized it to put up the projected bath houses, and that the filled-in land could be used generally for purposes of public recreation. (*Tiffany v. Oyster Bay,* 104 Misc. Rep. 445.) The Appellate Division, one of the justices dissenting, reversed the judgment of the trial court, made new findings and held that the plaintiff was entitled to final judgment enjoining and restraining the defendants from erecting bath houses or *any other structures whatever* on the filled-in land and decreeing to the plaintiff his riparian rights, unless the defendant town of Oyster Bay should elect to have the fill removed and the shore restored at plaintiff's expense; in case

the defendant town should so elect, the plaintiff to restore the foreshore to its former condition at his expense. (Ibid. 192 App. Div. 126.)

The only new findings material to the issue made by the ***20** Appellate Division are a finding to the effect that the erection of the bath house structure interferes with plaintiff's riparian rights as owner of the upland and a finding to the effect that the maintenance of the fill transforms the plaintiff into an inland owner by cutting off actual contact with the waters of Cold Spring Harbor to the extent of the fill.

If plaintiff had succeeded in establishing his title to lands under water, below high-water mark, the filled-in lands in front of his upland would have lost their character of foreshore and would have become upland, stripped of all public easements, and his own easement as riparian owner would have been merged in his superior title. When the sovereign grants to the owner of the adjacent upland the title to lands under navigable waters, such owner may, subject to the limitations imposed by the United States Constitution (*Lewis B. P. O. C. Co. v. Briggs,* 198 N. Y. 287), fill in such lands, make upland out of them, and extinguish the *jus publicum.* (*Wetmore v. Brooklyn Gas Light Co.,* 42 N. Y. 384; *People v. Steeplechase Park Co.,* 218 N. Y. 459, 476.)

The question is what are the present rights of the parties in relation thereto. The answer requires a consideration (a) of the *jus publicum,* (b) the *jus privatum,* and (c) the right of the owner of the adjacent upland. The law on the subject is rather indefinite. Judges have decided cases and indulged in safe generalities, but have refrained from forming explicit rules unnecessary to the decision. The English cases in point are not wholly applicable to our conditions.

The foreshore or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first,* to the *jus publicum*--the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident. (*Barnes v. Midland R. R. T. Co.,* 193 N. Y. 378, 384.) ***21** Such land is also subject, *secondly,* to the *jus privatum,* the rights of the owner of the foreshore, the town of Oyster Bay in this case, which holds the land in its corporate political capacity, in trust for the public good. Its rights are general in their character, as yet not defined with accuracy beyond the ownership and regulation of oyster beds and some general aid to commerce, navigation, fishing or bathing. Such rights are at all times subject to the public rights and to the right of the riparian owner to access to the water as indicated. (*Town of Brookhaven v. Smith,* 188 N. Y. 74, 78.) The plaintiff's contention is that the right of the town is limited to the improvement of the foreshore for public navigation, the same as if the town grant stopped at high-water mark (*Matter of City of New York,* 168 N. Y. 134) and left the town a riparian owner on navigable tide water; but the town holds title for the use of the public as well as for commerce, whatever that may imply. (*Matter of Mayor, etc., of New York,* 182 N. Y. 361.) *Thirdly,* the rights of the riparian owner, the owner of the upland fronting on naviable tide waters, over the foreshore are rights of reasonable, safe and convenient access to the water for navigation, fishing and such other uses as commonly belong to riparian ownership. (*Town of Brookhaven v. Smith, supra.*) Each right, the right of the public, of the owner of the foreshore and of the riparian owner, must be exercised in a reasonable way. (*Hedges v. W. S. R. R. Co.,* 150 N. Y. 150, 156.)

On the facts as they appear in this case, our conclusion is that the title to the plaintiff's upland and to the fill made by him on the foreshore without authority having been severed by the decision in the former case, the town of Oyster Bay holds title to the latter, subject to the rights of Tiffany as riparian owner; that the filled-in land retains its character as land under water and the plaintiff, as owner of the adjacent upland, has the same rights and no greater rights in and across the same as if no filling had been done, or as if the filling had been done lawfully by the ***22** town; and that plaintiff's rights as a riparian owner continue and he has not become an inland owner to the extent of the fill.

The town of Oyster Bay asserts the right to make such public use of the filled-in land as it deems proper, free from any easement on the part of the plaintiff as owner of the upland; to devote the same, *e. g.,* to the exclusive use of the public as an amusement park. (*Oelsner v. Nassau L. & P. Co.,* 134 App. Div. 281, 287.) The trial court held, *first,* that plaintiff's rights as riparian owner were terminated by the construction of the fill and by the consequent unity of ownership of foreshore and upland in the town; that the fill belongs to the town as upland by virtue of plaintiff's wrongful act in cutting himself off from access to the water; and *secondly,* that, if plaintiff retains any such rights as owner of the upland, the purposed use of the land by the town does not interfere therewith. The result first contended for may be possible as a naked legal proposition, *i. e.,* plaintiff made upland out of the town's land under water; therefore it retains its character as upland. But justice mitigates and corrects the harshness of strict law and permits plaintiff's natural rights as owner of the upland to be kept alive. (*Paterson v. East Jersey Water Co.,* 74 N. J.

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Eq. 49, 64; affd., on opinion below, 77 id. 588.) When he made the fill, he acted under color of title and by authority of the court and he should not be unduly and unnecessarily prejudiced by the adverse decision of this court in the first litigation between the parties. Because it now appears that plaintiff was technically a trespasser when he made the fill, he is not thereby estopped or barred from asserting his rights as riparian owner. He stands on his own title. Justice does not require and equity will not permit the permanent union of his interest with that of the town as a result of his mistake. In equity the union of ownership of dominant and servient riparian rights in the same person does not ***23** effect a merger unless such was the intention of the parties and justice and equity require it. (*Asche v. Asche,* 113 N. Y. 232, 235, 236.) The second claim is equally untenable. The town may not fill in, occupy and obstruct with buildings the foreshore under the pretext of providing for the public enjoyment, so as to interfere with the rights of owners of the upland, although they may still be able to reach the water. Their rights pass along the whole frontage of their property.

The Appellate Division, on its finding of fact, was right in restraining the defendant from interfering with plaintiff's suitable and reasonable means of access to the ocean by appropriating the fill to the erection of a permanent public bath house structure fifty feet in length, paralleling plaintiff's shore line. Such an erection would not have been permitted on the foreshore. The fill does not enlarge the rights of the town in this regard. What is a reasonable use of the foreshore by the proprietary is to some extent a question of time, degree and circumstance. Doubtless the town has large beneficial rights and privileges therein, but we should not undertake by premature assertion to decide their nature and extent in detail. The question of conflicting rights is not as well settled as it might be. The case of *Sage v. Mayor, etc., of N. Y.* (154 N. Y. 61, 70), followed in *Matter of City of New York (supra),* dealt with the rights of a riparian owner merely and is not wholly applicable to this situation.

By the judgment of the court below, the town at its option is permitted to have the fill removed at plaintiff's expense. Equity may thus permit the parties to do what they have a legal right to agree to do. When one litigation over *bona fide* claims of title to property has terminated and another is pending, the parties need not stand on their legal rights. They may adjust their differences by mutual consent and concessions. The court should encourage and facilitate such settlements. Even ***24** the present decision does not define the *jus privatum* with sufficient comprehensiveness to prevent further differences as to the rights of the proprietary and the riparian owner. The town may prefer the open water if it may not assert its claim as an owner of the upland.

The judgment appealed from should be modified by striking therefrom the words 'or any other structures whatever,' and as so modified affirmed, without costs.

HISCOCK, Ch. J., HOGAN, CARDOZO, MCLAUGHLIN and ANDREWS, JJ., concur; CRANE, J., dissents
Judgment accordingly.

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KeyCite Yellow Flag - Negative Treatment
Affirmed as Modified by Tiffany v. Town of Oyster Bay, N.Y., July 12, 1922

192 A.D. 126
Supreme Court, Appellate Division,
Second Department, New York.

TIFFANY
v.
TOWN OF OYSTER BAY et al.

May 21, 1920.

**Synopsis**
Appeal from Special Term, Nassau County.

Suit by Louis C. Tiffany against the Town of Oyster Bay and another. Judgment of dismissal (104 Misc. Rep. 445, 172 N. Y. Supp. 356), and plaintiff appeals. Reversed, with directions.

Judgment was entered in the Nassau county clerk's office December 3, 1918, upon the findings and decision of the Special Term of the Supreme Court, dismissing the complaint on the merits, with $133 costs. Plaintiff, as a riparian owner, sued in equity. He prayed for leave to restore the foreshore adjacent to his estate in Oyster Bay, along the westerly shore of Cold Spring Harbor. He also asked that defendants be enjoined from building public bathhouses upon this filled-in frontage of his shore.

Originally plaintiff had asserted rights to lands below high-water mark, under and by virtue of a formal grant of March 30, 1895, from the state of New York by the commissioners of the land office. The validity of such grant was at first sustained (Tiffany v. Town of Oyster Bay, 141 App. Div. 721, 126 N. Y. Supp. 910). This, however, was reversed, with a determination that the waters of Cold Spring Harbor had been included in the Andros colonial grant. 209 N. Y. 1, 102 N. E. 585. Plaintiff has a shore frontage of about 3,670 feet. Out upon the foreshore there had long been a wrecked hull, partly imbedded in sand. It projected out at about a right angle with the shore front. Behind it at high water was a masonry wall, which (except where Laurel Hollow road came down to the beach) extended along plaintiff's upland. The defendant down does not question the right to maintain this wall.

In the month of May, 1913, before the adverse decision of the appeal, a hydraulic dredge working eastward of this wreck took up sand and material which by its pipes were deposited to the westward. This, aided by the natural wash along the shore, which the wreck tended to arrest, formed a covering over shore boulders and shingle. It raised this foreshore in a sloping embankment, with its front about a foot above high water. Such newly made land projected out into the harbor in a curved salient, with this hulk near its apex; the fill receding in both directions to the former shore lines.

After the Court of Appeals had made nugatory the grant which the state of New York had undertaken to make plaintiff, he offered, by letter and otherwise, to restore the foreshore, and to remove this fill therefrom, and to undo his action by putting the shore back in the condition it had been before any changes had been made therein, which proposal the town declined. In June, 1916, the town took possession of this filled-in land, and employed defendant Kunz to build thereon a structure to contain 33 public bathhouses on an area of about 50 feet by 10 or 15 feet.

Plaintiff then brought this second suit for an injunction against erecting such buildings or other structures. His complaint repeated the offer to restore the foreshore to its original condition. He asked that plaintiff be adjudged his riparian rights in such lands. After a trial, it was held that such filling in of the foreshore was a trespass; that the title of the town, derived from the Andros charter, authorized it to put up such projected bathhouses; and that such filled-in land could be devoted to a use for public recreation. 104 Misc. Rep. 445, 172 N. Y. Supp. 356. From the judgment of dismissal, plaintiff took this appeal.

Jaycox, J., dissenting.

**Attorneys and Law Firms**

***128** ****740** Frederic R. Coudert, of New York City (Rowland Miles, of North Port, and Wilmot T. Cox, of New York City, on the brief), for appellant.

Henry A. Uterhart, of New York City, for respondents.

****739** Argued before MILLS, RICH, PUTNAM, KELLY, and JAYCOX, JJ.

**Opinion**

***129** PUTNAM, J.

The prior decision (Tiffany v. Town of Oyster Bay, 209 N. Y. 1, 102 N. E. 585) held that the prior Andros patent took away from the state the power to grant to upland owners on this harbor any rights in lands below high-water mark. But it did not settle what were the town's rights and powers in the soil beneath Cold Spring Harbor. Such town title is subject to public rights of navigation and to the rights of access by riparian owners. Town of Brookhaven v. Smith, 188 N. Y. 74, 78, 80 N. E. 665. As patentee of the grant including this harbor, has the town the right to erect bathhouses upon this filled-in foreshore? Can it thus use the raised beach to the prejudice of the upland owner? The town's rights were public in this estuary; such, for example, as ownership and regulation over oyster or other shell fish beds (Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493), with a general authority to preserve the harbor facilities, including the power (under the federal government) to deepen, improve, and protect them.

But, except for some aid to commerce, fishing, or navigation, I find no power to fill in the harbor, or to maintain parks or establish recreation grounds upon lands reclaimed from lands under the waters of this harbor. Here the town proposes to erect an opus manufactum, such as a permanent building, on this outer shore fronting plaintiff's uplands. Whether the extending shore surface be from gradual accretion, as alluvion, or by more violent means, there is no authority for such a building in front of a littoral owner, to cover and encroach upon made ground where formerly were public rights to navigate at high water, and at low water a right or servitude for a highway for public passage. It is not found that this fill has obstructed the public right of passage along this shore. In discussing public rights on the seashore, an acknowledged authority has declared:

'Quays, wharves, and embankments in general, below high-water mark, convert that which was shore into terra firma, being, in fact, so much land gained from the sea, and therefore no longer shore. If any ground be left on the other side, towards the sea, that may be shore, and subject as before; but no one can suppose that an embankment by which the soil is rescued from the sea by the owner of the ***130** shore, would be abatable as a nuisance, in favour of bathing or fishing, whilst the shore, beyond and around, is still open to the public, and these rights may be enjoyed as easily as before. Now was it ever contended that the supposed owner of the soil of the shore has not a right to convert it into terra firma, at his own risk and expense, unless in so doing he created a public or local nuisance.' Hall, on Rights of the Crown in the Seashores of the Realm (2d Ed., 1875) pp. 179, 180.

Plaintiff's action in May, 1913, in placing material along the foreshore, was in no sense a trespass. He exercised a legal right, subject, possibly, on reversal of his judgment, to the obligation to make restitution. Manning's Case, 4 Coke, 94; Freeman on Judgments, § 482. Indeed, the old form of a decree of reversal directed:

****741** 'That the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.' Haebler v. Myers, 132 N. Y. 363, 366, 30 N. E. 963, 964 (15 L. R. A. 588, 28 Am. St. Rep. 589).

This duty plaintiff recognized in his prompt offer to restore the status quo. But even if the solemn grant from the state as sovereign, and its confirmation by a divided court, be ignored, and plaintiff's act in improving his front be tested by the final outcome of his litigation, it was not unlike the instance of a wharf owner extending his structure beyond harbor lines. The part going beyond the limits could be removed as a nuisance (People v. Vanderbilt, 38 Barb. 282, aff'd 28 N. Y. 396, 84 Am. Dec. 351), but not used for municipal purposes. In such circumstances lands in front of a riparian owner are not building sites, save for structures in aid of navigation; and no supervening right over any part of such place can be exercised or maintained to the prejudice of the riparian owner. Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1740; Matter of City of Buffalo, 206 N. Y. 319, 329, 99 N. E. 850; Morgan v. Livingston, 6 Mart. O. S. (La.) 19.

I cannot agree that, if plaintiff still has a means of access over 'a considerable portion of his original shore line,' the town could take away such approach over his remaining frontage. Riparian rights include accretions to the shore, so that the boundary may go outwards with the extension of the shore line. Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206.

The town itself cannot lawfully iterfere with, much less obstruct by buildings, public rights of passage along such ***131** foreshore. At one stage of the tide, such buildings are over lands that have been in the path of navigation of small vessels. At the ebb, such structures violate the jus publicum, and could be abated as a purpresture or a nuisance. So they are against public rights, as well as in derogation of those of

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the littoral owner. Johnson v. May, 189 App. Div. 196, 203, 178 N. Y. Supp. 742.

A public bathhouse incidentally raises another question. The public have no right to pass over the foreshore in England to bathe in the sea. Brinckman v. Matley, [1904] L. R. 2 Chan. 313. The public right to bathe, save at designated places, is doubtful in this country. Hunt v. Graham, 15 Pa. Super. Ct. 42.

As land held by towns under colonial patent is proprietary, so that its disposition and control do not require legislative sanction (Town of Islip v. Estates of Havemeyer Point, 224 N. Y. 449, 121 N. E. 351), special scrutiny should be given to such rights over bays, harbors, and waters, to see that, by novel assertion thereof, the rights of upland owners be not sacrificed.

I advise that the judgment be reversed, and that defendants be restrained from erecting bathhouses, or other permanent structures, upon this filled-in land, with, however, a provision that the officials of Oyster Bay, notwithstanding their former refusal, may within 30 days elect to have this fill removed, and the shore restored at the plaintiff's expense; that the finding of fact numbered 2 be modified by striking out the words 'in front of his entire upland'; findings of fact numbered 8, 9, 10, and 13, and the conclusions of law numbered **742 3, 4, 5, 7, and 8 be severally reversed and rescinded. This reversal to be without costs of this appeal.

Settle order with findings upon five days' notice.

MILLS, RICH, and KELLY, JJ., concur.

JAYCOX, J. (dissenting).

The questions involved in this case necessarily are only those arising between the plaintiff, as an upland owner, and the town of Oyster Bay, as the owner of the land under water in Cold Spring Harbor adjoining the plaintiff's upland. The question of the rights of navigation, or as to whether the land which the plaintiff seeks to remove constitute a purpresture *132 or not, is not involved in this action. Those questions can be determined only in an action instituted by the sovereign power having control of navigation. The right of the town to establish a part or to build bathhouses for the accommodation of the public cannot be determined in this action, as such an action is brought by a taxpayer against a public officer. Code Civ. Proc. § 1925; General Municipal Law (Consol. Laws, c. 24) § 51. Any discussion, therefore, of questions which might be involved in actions of that character, is not germane to the questions here presented.

The plaintiff is the owner of a large tract of upland on the westerly side of Cold Spring Harbor, at or near the head of the harbor. He applied to the commissioners of the land office of the state of New York for a grant of land under the waters of said harbor in front of his upland. This application was opposed by the town, but was granted by the said commissioners, and a grant was made to the plaintiff on the 30th of March, 1905, of something over 21 acres of land under the waters of said harbor. As soon as the plaintiff started to make improvements upon the land thus granted, he was notified by the authorities of the town of Oyster Bay that it claimed title to the lands under the water of said harbor, and, the plaintiff having refused to remove the structures placed upon the premises by him, the town commenced to remove the same. Thereafter, and on or about April 28, 1908, the plaintiff commenced an action in the Supreme Court against the town of Oyster Bay and the then highway commissioner of the town, seeking to restrain the defendants from removing or attempting to remove any jetty, wall, or structure erected by the plaintiff on the premises below high-water mark. This action was brought to trial at Special Term, and a decision rendered in favor of the plaintiff, granting the injunction as prayed for. The judgment was entered January 7, 1909. An appeal was then taken to the Appellate Division, where the judgment was affirmed by a divided court. 141 App. Div. 720, 126 N. Y. Supp. 910. Upon an appeal by the defendants to the Court of Appeals, the judgment in favor of the plaintiff was reversed. 209 N. Y. 1, 102 N. E. 585. Upon a new trial the complaint was dismissed upon the merits by a judgment entered February 7, 1914.

In the meantime, and while the *133 case was pending in the Court of Appeals, the plaintiff filled in the land below high-water mark, creating **743 a strip of filled-in land between has upland and the waters of Cold Spring Harbor, which is the subject of this controversy. This land was accessible to the people of the town by means of a highway which runs through the plaintiff's lands to the waters of Cold Spring Harbor. By the decision last above cited (209 N. Y. 1, 102 N. E. 585) it was finally determined that the town was the owner of the lands under water in Cold Spring Harbor. Under the doctrine of the common law the line of high-water mark divided the lands owned by the plaintiff from those owned by the defendants. 3 Kent's Commentaries, 427; Howard v. Ingersoll, 13 How. 381–421, 14 L. Ed. 189; U. S. v. Pacheco, 2 Wall. 587, 17 L. Ed. 865. The filling in by the plaintiff, as above mentioned, raised the land upon which such fill was

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made, so that the surface of the land was above the high-water mark. Since the entry of the final judgment herein the plaintiff has offered to remove the fill and restore the premises to their original condition. This offer has been declined by the town. Thereafter, and in June, 1916, the defendant town employed the defendant Kunz to erect bathhouses upon this filled-in land. These bathhouses are to be about 50 feet by 10 or 15 feet in size. This action is brought to restrain the erection of the bathhouses in question and for an adjudication that the plaintiff is still the riparian or littoral landowner and has the same rights across the property in question as if no filling in had been done, and that the plaintiff may be permitted to restore the foreshore in front of his premises to the condition in which it was before any improvements or changes were made by him. There is no claim by either party that the filling in done by the plaintiff changed the boundary line between the lands owned by the plaintiff and the defendant.

I think the determination of this action can be based upon the solution of one question only, and that is: Has the plaintiff shown himself entitled to equitable relief? The claim of the town to the ownership of the lands under water of this harbor is not a modern conception of its rights under the charter or patent granted by Gov. Andros to it on the 29th day of September, 1677. In Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493, it was held that the town of Oyster Bay had an exclusive ***134** right of the shellfishing in Oyster Bay, by which name Cold Spring Harbor is also known. That action was to recover a penalty prescribed in the by-laws of the town of Oyster Bay, passed at a town meeting April 5, 1825, by which it was provided that——

> 'No person, not being an inhabitant of Oyster Bay, shall be allowed to rake, or assist in taking or raking, or employ another to take or rake any oysters in the creeks or harbors of the town of Oyster Bay, under the penalty of twelve dollars and fifty cents for each offense.'

It was held in that action that the town of Oyster Bay had an exclusive right of the fishing in these waters under its colonial charter, and the judgment in favor of the supervisors of the town was affirmed. In its discussion of the case the court assumed that the town of Oyster Bay acquired title to the land under the waters of Oyster Bay under the Andros patent. In Lowndes v. Huntington, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615, a similar question arose, and the ****744** court held, in regard to a patent immediately adjoining the patent to the town of Oyster Bay and with the same northern boundary line, that the waters of Huntington Harbor were included within the bounds of the patent, and cited Rogers v. Jones, supra, as being in point. These two precedents are clearly in point, and both indicated that the town was the owner of the lands under the waters of Cold Spring Harbor. I think there were also other cases which supported this contention in that respect. Trustees of Brookhaven v. Strong, 60 N. Y. 56; Town of Southampton v. Mecox Bay Oyster Co., 116 N. Y. 1, 22 N. E. 387.

This was the condition of the law when the plaintiff made his application to the commissioners of the land office. The defendant was guilty of no laches; it did not sleep upon its rights; it asserted them promptly, with insistence and pertinacity. The situation is, therefore, that the plaintiff, against the defendants' protest, has changed the defendants' property from land under water to upland, in which condition he manifestly wished to use it for bathhouses and other kindred purposes, and now, when the defendant wishes to make use of it for the same purpose, the plaintiff seeks to restrain the town from such use of the land, and desires to be permitted to restore the property to its former condition. When the plaintiff did the filling in in question, he was a trespasser, and he now ***135** wants permission to go again upon this land and attempt to restore it to its former condition. Against the defendant's will he filled the property in, and still against the defendant's will he wishes to change the property back to its original condition. The advice of counsel, I think, does not justify the invasion of another's rights. The plaintiff, having invaded the defendant's property, cannot under any rule of law to which my attention has been called be permitted to again invade the defendant's property for the purpose of removing the structure erected during the first trespass. Putnam v. Ritchie, 6 Paige, Ch. 390–405; Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224, 233; Pettes v. Bank of Whitehall, 17 Vt. 435, 445; Warner v. Fountain, 28 Wis. 405. In Putnam v. Ritchie, supra, Chancellor Walworth said:

> 'I have not, however, been able to find any case, either in this country or in England, wherein the Court of Chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after

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> he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the Legislature, which principle in its application to future cases might be productive of more injury than benefit.'

In Kansas Pacific R. R. Co. v. Mihlman, supra, the facts are closely analogous to the facts involved in this case. In that case a trespasser had dug a ditch upon the property of another, and it was held that he had no right to re-enter for the purpose of filling up the ditch and restoring it to its original condition, even if the defendant originally dug the ditch in the belief that he had a right to do so. Justice Brewer said:

****745** 'And what right does the first trespass give the trespasser to re-enter and commit a second trespass? True, in this case'—i. e., Holmes v. Wilson, 37 Eng. C. L. 273—'the plaintiff had requested the trustee to remove the buttresses, and that might be considered a license to enter, and a waiver of the trespass. But where there is no such request, as in the case before us, how is it? If the railway company had entered to fill up the ditches, could not Mihlman have maintained his action for that as a trespass? Was he not at liberty to appropriate the ***136** benefit of the company's work in digging the ditches, and prevent any person from interfering therewith, and recover damages from any one that did interfere? It seems so to us, unquestionably.'

In Warner v. Fountain, supra, it was held that, where one person by mistake builds a house upon the lands of another, the house belongs to the latter and cannot be removed by the former. See, also, Village of St. Johnsville v. Smith, 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, 6 Ann. Cas. 379.

These authorities, I think, are conclusive. The plaintiff has not shown himself entitled to relief in equity. I am not unmindful of the fact that there are authorities to the effect that the owner of land upon which a structure has been erected by mistake, upon going into equity for relief in some respect, may be compelled to pay the value of the structure erected upon his premises. Those cases, however, are not in point here, and I see no benefit to be derived from their discussion. If I am correct in holding that the plaintiff is not entitled to equitable relief, then I think the conclusion necessarily follows that the land upon which the defendant seeks to erect bathhouses is upland, and it is entitled to make such use of this upland as it sees fit. The defendant's land was land under water. Some portion of it was covered with water at all tides, as I understand the situation, and some portion of it was submerged at high tide and laid bare at low tide. The plaintiff converted all of it into upland. He desired to use it himself as upland, but, now that his title to it has failed, he desires to prevent the defendant from making such use of it. It is true that under this situation the waters of the bay would no longer lap the shores of the plaintiff's property, but that is a situation of his own creation. If in time the action of the waters washes this fill away, the plaintiff will be restored to his original position. I think he must rest content with the situation as he created it.

My Brother PUTNAM in his opinion says:

> 'The town itself cannot lawfully interfere with, much less obstruct by buildings, public rights of passage along such foreshore. At one stage of the tide such buildings are over lands that have been in the path of navigation of small vessels. At the ebb, such structures violate the jus publicum, and could be abated as a purpresture ***137** or a nuisance. So they are against public rights, as well as in derogation of those of the littoral owner.'

The foreshore, as this quotation would indicate, is the space between high and low water mark. Stillman v. Burfeind, 21 App. Div. 13, 47 N. Y. Supp. 280. The buildings complained of here are not upon the foreshore. They may be where the foreshore was before the plaintiff changed the contour of the shore. Now, however, they are above high-water mark upon the land filled in by the plaintiff, and do not in any way obstruct the passage of the public along the foreshore. ****746** I agree with the conclusion of my Associate that the defendant was entitled to restitution, if it desired it, and Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589, and the other cases cited, are authority for this proposition; but no case is cited, and I have seen none, in which it is held that the successful party may have restitution forced upon him whether he desires it or not.

It is now proposed to reverse the judgment in this case upon the curious theory that the upland created by the plaintiff in this action is a nuisance, because it obstructs navigation. The answers to this are numerous and complete. First, the

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action is not based upon any such theory. The plaintiff seeks to enjoin the erection of the bathhouses and to be permitted to remove the fill made by him, because it interferes with his approach to the water, and not because it in any wise interferes with navigation. Second, as an interference with navigation it causes no special injury to the plaintiff, and the plaintiff would not, therefore, be entitled to maintain an action to have the same abated. Third, when the plaintiff made this fill and created this upland, it was done to improve navigation and for the benefit of commerce, and I am sure the change of ownership will not convert the benefit or improvement into a nuisance. Real estate is not endowed with any such chameleonlike characteristics. If this upland did not interfere with navigation when the plaintiff owned it, it is quite certain it does not interfere with navigation now. The right of the public to pass along the foreshore for the purpose of bathing is not involved in this action. The public right of passage upon the foreshore is not interfered with by these buildings.

For these reasons I recommend that the judgment appealed from be affirmed, with costs.

**All Citations**

192 A.D. 126, 182 N.Y.S. 738

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Tiffany v. Town of Oyster Bay, N.Y.Sup., October 1, 1918

55 Sickels 424
Court of Appeals of New York.

MULRY
v.
NORTON. [1]

Filed November 24, 1885.

**Attorneys and Law Firms**

*427 *Wm. H. Dykman*, for appellant.

*428 *John E. Parsons*, for respondent.

**Opinion**

*429 RUGER, C. J.

This action involves the title to certain beach lands on the ocean shore at Far Rockaway. No dispute arises over the boundaries of the plat, or the location of the beach as being included within the description in the deeds under which plaintiff's grantors formerly occupied the premises; but it is claimed that the earth or sand composing the beach has been *430 so affected by the storms and tides of the ocean that its ownership was lost by the plaintiff's grantors, and subsequent deposits made within the same boundaries have been acquired by the owners of Long Beach, an island belonging to the town of Hempstead. This result is attempted to be supported by the application of the rule governing the acquisition of real property by alluvion or accretion. The evidence tends to establish the following facts: That the beach in question is within the same boundaries, and, with the exception of a narrow lagoon running crosswise through it, is of the same form and shape now as it existed from the year 1685, when it was conveyed to the plaintiff's remote grantors by its Indian owners, to about the year 1835. Between 1835 and 1869, the changes in the surface of the ground took place which it is claimed worked the transfer of the ownership. At the commencement of the process of change Long Beach consisted of a small island lying southward of Hempstead bay, separated on the west from the beach in dispute by a navigable inlet called indifferently 'Hog Island,' or 'East Rockaway Inlet,' or 'Brockle Face Gut.' This inlet was about half a mile broad, and communicated directly with the westerly end of Hempstead bay. To the west of the inlet, a bar or beach known as 'Coot's Bar' extended from the main-land south to a point opposite to Long Beach, and from thence to the west, a distance of about three miles, until it reached the westerly line of the town of Hempstead. The beach to the westward of the inlet, during the period from 1835 to 1869, underwent a succession of changes which it is quite unimportant to follow in detail, but usually consisted of a line or group of bars, shoals, islands, and channels, extending from the inlet to the shore of the main-land beyond the premises in dispute, but which were constantly undergoing physical changes by the operation of the winds, storms, and tides of the ocean. These bars, shoals, and islands were, from the operation of the tides and wind **583 in filling the channels, separating them occasionally, joined together, and at one time, by the removal *431 of the inlet in question to the westward, formed a continuous bar from Long Beach to a point west of the premises in dispute, and remained in that position for about three years. The removal of the inlet to the west was not uniformally effected by gradual progression, but frequently advanced in 'jumps' of a quarter to half a mile in distance, and frequently added or took away from the lands to which they were joined sections of beach covering half a mile or less in extent, as the result of a single storm. During the period of time in question various inlets, at different points upon this bar, were broken through from time to time and were used by vessels trading in Hempstead bay until they were closed up by the action of the tide and wind, when other channels, by the operation of natural causes, would be opened in new places, and these openings would in turn become the channels through which vessels bound to and from Hempstead bay would pass.

About the year 1869 the inlets to the westward became closed up, and the original inlet adjoining Long Beach was reopened and has since become the sole channel of navigation for vessels entering the bay from the east. The process described finally resulted in attaching the beach in question to the main-land on the west and forming a continuous beach about 1,000 feet broad from such main-land to the inlet at Long Beach, being a distance of about four miles. This process also left a shallow and narrow lagoon or cove, running inside of the beach in question, from Hempstead bay to a point a little to the westward of the premises in dispute, and separating the ocean beach proper from the main-land, lying directly behind it. In 1725 the formation of Coots' bar was of so permanent a character that it became the subject of a grant from its owner, the town of Hempstead, to one Hicks, and from that time to the present the said Hicks and his heirs and grantees have occupied and enjoyed the beach lying between

the original Hog island inlet and the west line of the town of Hempstead, and reaching within about 1,800 feet of the premises in dispute. Portions of this beach have at times been submerged or washed away, and it has at times been cut ***432** into by the formation of new inlets to Hempstead bay, but at all times there has been some beach lying above the ocean tides, but outside the line of high-water mark, capable of occupation and enjoyment by its owners. Under these circumstances the trial court refused to find that the extension of Long Beach to the westward was made by the process of accretion, and held as a question of law that the defendant's lessors, the town of Hempstead, did not acquire title to the land in dispute by that process, and we concur in the conclusion reached by it.

There seems to be but little conflict in the authorities, or even between counsel in this case, as to what constitutes alluvion or accretion. It was held in *Rex* v. *Lord Yarborough*, 3 Barn. & C. 91, that 'accretion is an increase by imperceptible degrees.' 'The lord of the manor claims when there is a gradual accession to land adjacent.' Washb. Real Prop. 58. 'The test of what is gradual, as distinguished from what is sudden, seems ****584** to be that though witnesses are able to perceive, from time to time, that the land has encroached on the sea line, it is enough if it was done so that they could not perceive the progress at the time it was made.' Ang. Tide-waters, (1st Ed.,) p. 71. It was said in *Emans* v. *Turnbull*, 2 Johns. 314, 'that if the marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign;' citing 2 Bl. Comm. 261; Harg. Law Tr. 28. 'To acquire title by alluvion, it is necessary that its increase should be imperceptible.' *Halsey* v. *McCormick*, 18 N. Y. 147. It would seem from these definitions that two insuperable objections exist to the claim of the appellant: one being that a large part of the formation of which the beach in question now consists was created anterior to the junction thereof with Long Beach, and constituted property subject to acquisition and ownership by others prior to plaintiff's claim; and, *secondly*, that the mode of progress of Long Beach to the westward was frequently by sudden removals of the inlet, and the consequent junction of larger and perceptible sections of beach to the easterly ***433** lands, as the result of a sudden and violent operation of the tides. We therefore think the court below correctly held that the defendant did not acquire a legal right to the possession of the lands in question by his lease from the town of Hempstead.

It is also claimed by the appellant that even if he has failed to establish title in himself to the premises that the plaintiff still is not entitled to maintain his action because of defects in his own title. It is argued that the beach in question, having been once cut off from the main-land, and surrounded by navigable water, thereby became an island which like other formations of land in tide-water, was the property of the state. The evidence establishes a continuous chain of title to the premises in dispute, from its native Indian owners down to the plaintiff, covering a period of 200 years, and each conveyance bounding its grantee upon the Atlantic ocean. Under the law of this state such a description makes the line of high-water mark the boundary of the granted premises, but it also carries with it the liability of such a line fluctuating by the action of the water. These lines of description, for a period of 150 years, included the *locus* of the beach in dispute, and the same, with the uplands, was occupied and enjoyed by the plaintiff's grantors, and now remains the property of the plaintiff unless the title thereto has been lost to his grantors through the cause referred to. It is, undoubtedly, true that the proprietorship of lands may be lost by erosion or submergence; the one consisting of a gradual eating away of the soil by the operation of currents or tides, and the other of its disappearance under the water and the formation of a navigable body over it.

The plaintiff's grantors have, at all times since 1684, remained the owners and occupants of the main-land in front of which the beach in dispute now is, and as such owners have been entitled to the rights which attend the title of littoral or riparian owner. 'They would be entitled to whatever should be gained from the sea by alluvion or dereliction, and their title was liable to be lost by the advance of high-water mark ****585** bringing their lands within the ebb ***434** and flow of the tide.' *East Hampton* v. *Kirk*, 84 N. Y. 218; 2 Bl. Comm. 262; *In re Hull & Selby Ry. Co.*, 5 Mees. & W. 327. It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or suffices to enable another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main-land have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty, having authority over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by **avulsion** or **accretion**, or

even the exclusion of the water by artificial means, that its proprietorship returns to the original riparian owners. Ang. Tide-waters, 76, 77; Houck, Riv. § 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Ang. Tide-waters, 77–80, and cases cited. It is said in Harg. Law Tr. (Hale, De Jur. 36, 37:)

'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet, if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property, and accordingly it was held by COOKE and FOSTER, (No. 7, Jac. C. B.,) though the inundation continue forty years.' 'But if it be freely ***435** left again by the reflex and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues.'

And again:

'As touching islands arising in the sea, or in the arms of creeks or havens thereof, the same rule holds, which is before observed touching acquests, by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie*, it is true, they belong to the crown, but where the interests of such *districtus maris*, or arm of the sea or creek or haven, doth in point of property belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety.' See, also, Gould, Waters, § 166.

A case quite in point is referred to by the respondent's counsel as arising in Delaware in 1815, and decided by the court of common pleas upon a learned opinion by Judge WILSON, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. That case arose over the ownership of an island called 'Wilson's Bar,' which had been created by alluvion upon the land formerly contained ****586** within the boundaries of an island called 'Little Tinnican,' but which at some time had been worn away by the ocean. The court say:

'The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principles, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnican was destroyed by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water if it was regained either by external or artificial means; it continued to the original proprietors.' 'The earth deposited on it became his by the right of alluvion, and, of course, this island formed on it by such deposit became his. And though it probably has extended ***436** beyond the limits of the old island, the addition is plainly alluvion.'

It would seem also to follow, as the necessary consequence of these rules, that the existence of the lagoon between the plaintiff's hotel property and the beach constitutes no obstruction to his proprietorship of the beach formation, however created, within the original boundaries of his possession. *Deerfield* v. *Arms*, 17 Pick. 43. It was held in the case of *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, that a sand-bar in the Mississippi river, divided from the main-land by a slough 28 feet wide, and which, at high water, was entirely submerged, belonged to the riparian owner, although the acts of congress made the river a public highway at the place in question. It is also said that 'rocks and shoals lying along the margin of navigable fresh rivers, belong to the riparian owners.' Gould, Waters, § 77.

The evidence in the case and the findings of the trial court concur in establishing the fact that during the period of change hereinbefore mentioned portions of the beach in front of plaintiff's premises became submerged, but at all times there existed upon or near such premises shoals, bars, or islands, which afterwards became the nucleus around which gathered the deposits now composing the land which is the subject of litigation. It seems to us clear that the owners of this property did not lose their title thereto by reason of the changes described, and that the state has not acquired any property therein. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tide-ways outside of the boundaries of property which has been the subject of individual ownership. We are also of the opinion that the principles applicable to the apportionment of lands formed by accretion among the owners of contiguous uplands is quite controlling as to the rights of the respective parties in this case. Such owners are entitled to lands made by accretion or reliction in front of their property and contiguous thereto in certain proportions, according to the formation of their respective shore lines. Houck, Riv. § 162; 3 Washb. Real Prop. 58; Ang. ***437** Tide-waters, 171. However such formations may be commenced

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or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes the line of his coterminous neighbors. 'A littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purposes of using the right of navigation. This right is his only, and exists by virtue and in respect of his **587 riparian proprietorship.' Gould, Waters, § 149; *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.

The principles upon which the rights of littoral proprietors to lands reclaimed from the sea are determined has been frequently discussed in cases arising in our sister states, but those discussions are not important here, and the cases are referred to only for the purpose of showing that such reclamations are apportionable among the littoral owners, according to the lateral lines of upland possessed by them. Gould, Waters, §§ 162–165; *Deerfield* v. *Arms*, 17 Pick. 41; *Wonson* v. *Wonson*, 14 Allen, 85; *Thornton* v. *Grant*, 10 R. I. 477; *Emerson* v. *Taylor*, 9 Greenl. 44. These authorities were cited and approved in *O'Donnell* v. *Kelsey*, 4 Sandf. 202, affirmed in this court, (10 N. Y. 412.) See, also, Ang. Tide-waters, 258. It would seem to follow from the principles referred to that the owner of Long Beach could not, even if the process of its enlargement and extension was effected by accretion, claim beyond the point where such accession began to be made upon the property of adjoining owners, and as the line of each successive owner of uplands was reached in the process of extension, a new obstacle to the appellant's claim would seem to arise. This result would occur, undoubtedly, after passing Hog island inlet, as the land westerly thereof was originally solid beach land, and occupied by the grantees of Hempstead before the extension of Long Beach.

Aside from those discussed no material objection was made *438 to the judgment appealed from, except that concerning the jurisdiction of a court of equity over actions of this character. The circumstances of the case are peculiar, and, we think, within established principles, entitle the plaintiff to the relief sought for. The plaintiff was the owner of a hotel upon the ocean beach, greatly resorted to by visitors in the summer for the benefit of surf bathing and sea air, and which could be extended to them advantageously only by the undisputed control of the beach in question by the owner of such hotel. The use and character of the property was such that intruders thereon could not be excluded by any substantial barriers, and a remedy against them by an action of trespass would necessarily be of doubtful success and afford an inadequate indemnity for the injuries inflicted. During a long period of time successive efforts have been made by the defendant and his lessors to obtain possession of the premises in dispute and occupy them to the exclusion of the plaintiff. Actions have been threatened against him, and claims of title made which constitute a serious annoyance to the owner and impairment of his ability to derive an adequate compensation for the use and rental of such property. The defendant Norton had transferred an interest in his lease to the other defendant, Levy, in order to multiply the claimants to the beach and the prospect of successive litigations in connection therewith. The annoyance had continued for a series of years, and occasioned serious damage to the plaintiff's right of property, which could not be easily ascertained or adequately compensated for in an action at law. The evidence also tended to show that the defendant Levy was a person of little pecuniary responsibility, and presumably unable to respond in **588 damages for the injury his conduct was liable to inflict upon the plaintiff's rights of property. Under similar circumstances the jurisdiction of a court of equity to interfere in order to quiet the title and prevent an injury for which no adequate remedy existed at law, has been frequently exercised and approved by the courts. Hil. Inj. *c.* 10, § 1; *Watson* v. *Sutherland*, 5 Wall. 74; *439 *Livingston* v. *Livingston*, 6 Johns. Ch. 497; *Lacustrine Fertilizer Co.* v. *Lake Guano & F. Co.*, 82 N. Y. 476; *Hart* v. *Mayor of Albany*, 3 Paige, 213.

We think this a case where the remedy by injunction was proper, and within the principles laid down in the cases cited. The judgment should, therefore, be affirmed.

(All concur.)

NOTE.

*Accretion.*

The doctrine of alluvion and its consequences may be said to have been long well settled. See Ingraham v. Wilkinson, 4 Pick. 268. Sir MATTHEW (afterwards Lord) HALE says: 'If a fresh river between the lands of two lords do insensibly gain on one side or the other, it is held that the propriety continues as before in the river, [see King v. Yarborough, 3 Barn. & C. 91;] but if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds; as, if the river running between the lands of A. and B. leaves his course, and sensibly makes his channel entirely in the lands of A., the whole river belongs to A. *Aqua cedit solo.* And so it is, though if the alteration be by insensible degrees, but there be other known boundaries, as stakes or extent of land. 22 Ass. pl. 93. And though the books make a question whether it hold the same law in the case of the sea or the arms

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of it; yet, certainly, the law will be all one, as we shall have occasion to show in the ensuing discourse.' De Jur. Mar. pt. 1, c. 1.

**All Citations**

55 Sickels 424, 100 N.Y. 424, 3 N.E. 581

## Footnotes

1 Affirming 29 Hun, 660.
See note at end of case.

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266 A.D.2d 277, 698 N.Y.S.2d
258, 1999 N.Y. Slip Op. 09554

Donald Stanton et al., Appellants,
v.
Town of Southold, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
1998-07787, 1998-07788
(November 8, 1999)

CITE TITLE AS: Stanton v Town of Southold

In an action to enjoin a nuisance and for compensation for an unconstitutional taking of property, the plaintiffs appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Henry, J.), dated July 6, 1998, as granted the defendant's cross motion to dismiss the complaint, and (2) from a judgment of the same court, entered August 3, 1998, which dismissed the complaint.

**HEADNOTE**

CONSTITUTIONAL LAW
TAKING OF PROPERTY

(1) In action to enjoin nuisance and for compensation for unconstitutional taking of property, judgment which dismissed complaint reversed--plaintiffs, who own beachfront property in Town, allege that stone jetty constructed in 1964 is causing erosion of beach by blocking natural coastal process of sand replenishment; in first and second causes of action, plaintiffs claim Town's failure to abate erosion has rendered their land unusable so as to constitute taking for which they are entitled to just compensation under Fifth and Fourteenth Amendments of United States Constitution, and article I, § 7 of New York State Constitution; in third cause of action plaintiffs seek permanent injunction directing Town to eliminate harmful effects of continuing nuisance on their property--compliance with General Municipal Law § 50-e is not required where plaintiffs seek equitable relief to abate or enjoin nuisance and demand for money damages is incidental and subordinate to requested injunctive relief; moreover, plaintiffs have stated equitable claim based on continuing nuisance for which cause of action accrues anew each day; accordingly, action is not time-barred.

Ordered that the appeal from the order is dismissed, without costs or disbursements; and it is further, ***278**

Ordered that the judgment is reversed, without costs or disbursements, the cross motion to dismiss the complaint is denied, and the order dated July 6, 1998, is modified accordingly.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see, Matter of Aho,* 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see,* CPLR 5501 [a] [1]).

The plaintiffs, who own beachfront property in the Town of Southold, allege that a stone jetty constructed in 1964 in the Goldsmith Inlet of the Long Island Sound is causing the erosion of the beach by blocking the natural coastal process of sand replenishment. In the first and second causes of action, the plaintiffs claim that the Town of Southold's failure to abate the erosion has rendered their land unusable so as to constitute a taking for which they are entitled to just compensation under the Fifth and Fourteenth Amendments of the United States Constitution, and article I, § 7 of the New York State Constitution. In the third cause of action the plaintiffs seek a permanent injunction directing the Town of Southold, *inter alia,* to eliminate the harmful effects of the continuing nuisance on their property.

The present case is legally and factually distinguishable from *Lockman v Town of Southold* (108 AD2d 900), where this Court affirmed the dismissal of an action involving the same jetty on the ground that the plaintiffs therein failed to file a timely notice of claim as required by General Municipal Law § 50-e. In Lockman the plaintiffs primarily sought to recover damages for injury to their property caused by a storm on January 5, 1979. In contrast, the plaintiffs here seek a permanent injunction to prevent further beach erosion, and

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they request compensation for an unconstitutional taking of their property.

It is well established that compliance with General Municipal Law § 50-e is not required where the plaintiffs seek equitable relief to abate or enjoin a nuisance and the demand for money damages is incidental and subordinate to the requested injunctive relief (*see, Baumler v Town of Newstead,* 198 AD2d 777; *Dutcher v Town of Shandaken,* 97 AD2d 922; *Malloy v Town of Niskayuna,* 64 Misc 2d 676). Moreover, the plaintiffs in the present action have stated an equitable claim based on continuing nuisance "for which a cause of action accrues anew each day" (*Rapf v Suffolk County,* 755 F2d 282, 292; *see also,* ***279** *Kennedy v United States,* 643 F Supp 1072; *Sova v Glasier,* 192 AD2d 1069; *State of New York v Schenectady Chems.,* 103 AD2d 33; *Kearney v Atlantic Cement Co.,* 33 AD2d 848; *Amax, Inc. v Sohio Indus. Prods. Co.,* 121 Misc 2d 814). Accordingly, the present action is not time-barred.

Furthermore, since the substantively different claims asserted in Lockman were not disposed of on the merits, but on a procedural ground which is not applicable to the present causes of action, the plaintiff Zefar Fatimi, the current owner of the property at issue in Lockman, is not precluded from participating in this action (*see generally, De Ronda v Greater Amsterdam School Dist.,* 91 AD2d 1088; *McNaughton v Hudson,* 50 AD2d 863).

Mangano, P. J., Bracken, S. Miller and Sullivan, JJ., concur.

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Superseded by Statute as Stated in Syms v. Olin Corp., 2nd Cir.(N.Y.), May 18, 2005

755 F.2d 282
United States Court of Appeals,
Second Circuit.

Maurice RAPF and Carl Hansen, Plaintiffs-Appellants,
v.
SUFFOLK COUNTY OF NEW YORK, Defendant-Appellee.

No. 376, Docket 84–7659.
|
Argued Nov. 27, 1984.
|
Decided Feb. 15, 1985.

**Synopsis**

Homeowners brought action against county alleging that county constructed or caused to be constructed groins along beach and that county's failure to maintain groins constituted continuing nuisance that threatened to destroy their homes and those of their neighbors. County moved to dismiss. The United States District Court for the Eastern District of New York, John R. Bartels, J., granted county's motion and homeowners appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) substantial issue of material fact existed as to whether county had duty to maintain groins, violation of which would state claim for continuing nuisance, precluding summary judgment; (2) damages allegedly suffered by county due to homeowners' failure to bring action earlier were not sufficient to sustain defense of laches; and (3) dismissal was not warranted on ground that homeowners' rights would be protected in different pending litigation and that relief would be meaningless without joinder of New York State and the United States as parties.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

**Attorneys and Law Firms**

***283** John J. O'Connell, New York City (Adam C. Barker, Webster & Shefield, New York City, Richard D. Friedman, New York City, of counsel), for plaintiffs-appellants.

Michael V. Corrigan, Simpson Thacher & Bartlett, New York City, for defendant-appellee.

Before TIMBERS, VAN GRAAFEILAND, and PIERCE, Circuit Judges.

**Opinion**

PIERCE, Circuit Judge:

Appeal from a judgment of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* ***284** entered July 10, 1984, granting appellee Suffolk County's motion to dismiss appellants' complaint, pursuant to Fed.R.Civ.P. 12(b), as being barred by the applicable statute of limitations and by laches. Appellants allege that Suffolk County "constructed or caused to be constructed" groins along Barrier Beach in Southampton, Long Island, and that the County's failure to maintain the groins constitutes a continuing nuisance that threatens to destroy their homes and those of their neighbors. Appellee alleges that appellants' action is untimely according to N.Y.Gen.Mun. Law §§ 50–e and 50–i, governing tort claims against a municipality. Arguing that the cause of action for a continuing tort accrues anew each day, appellants contend that their action is not barred by the statute of limitations. Moreover, appellants contend that since no prejudice has resulted, their action is also not barred by laches.

We agree with the district court that the limitations period herein should be measured, pursuant to N.Y.Gen.Mun. Law § 50–e, from the date of the event upon which the claim is based. We conclude, however, that because a material issue of fact is in dispute and because appellee's motion should be treated as one for summary judgment, at this juncture in this case, the district court erred in granting appellee's motion to dismiss.

For the reasons stated below, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

This action is part of an ongoing dispute between the parties which began in 1960 with a project designed to control beach erosion on the south shore of Long Island. Appellants, Maurice Rapf and Carl Hansen, individual homeowners of oceanfront property on "Barrier Beach" in Southampton, [1] bring this action on behalf of themselves and on behalf of a putative class of over 200 of their neighbors, to enjoin Suffolk County from continuing to maintain what appellants allege is a nuisance that threatens to destroy their homes and those of their neighbors.

In 1955, the United States Congress authorized a survey of hurricanes and hurricane damage in the eastern and southern United States, including the area involved in this action, and an examination of methods for minimizing the damage caused by erosion and storms. Pub.L. No. 84–71, 69 Stat. 132 (1955). As a result of this legislation, in 1960, the United States Army Corps of Engineers (the "Corps") submitted to Congress a report and general plan which concluded that one of the primary ill-effects of such storms has been the destruction of beaches and dunes. [2] The Corps recommended that a project be undertaken jointly by the United States, New York State, and Suffolk County to attempt to ameliorate some of these destructive consequences. The proposed project recommended providing beach and dune fill, raising the level of the sand dunes, planting dune grass, and building drainage structures.

To interrupt the flow of sand and inhibit erosion even further, the Corps also suggested the possibility of constructing a series of protective jetties along the beach, technically known as "groins." [3] The function of a groin is to trap sand deposited by ***285** the current on the updrift side of the groin, i.e., on the side facing the current. According to appellants, however, as a result of trapping sand on the updrift side of the groin, the stretch of beach on the downdrift side facing away from the flow of the current, since it has a reduced flow of sand, becomes vulnerable to erosion by the current. Appellants contend that if the erosion becomes severe enough, a subsequent groin may be necessary to protect the affected downdrift side, thereby causing further erosion and requiring construction of yet another groin. Construction of the initial groin might therefore conceivably lead to a situation in which the entire coastline must be protected by groins. [4]

Although the precise construction method to be employed and the number of groins to be erected was to be left within the discretion of the Army Corps of Engineers, to be determined based on experience, H.Doc. No. 425 at 9, 10, 63, 777, according to appellants, the Corps clearly recognized the dangers inherent in the proposed project and therefore advised that, if groins were used, one of two alternative methods of construction should be followed. H.Doc. No. 425 at 61. Proceeding on the basis that the current, on the south shore of Long Island, flows from east to west, the first method consisted of constructing the initial groin at the west end of the Barrier Beach and then constructing the other groins in an easterly direction. This method of construction could not cause any erosion west of the last groin because there is no beach at that point. The second recommended method, to be used if construction of groins began at the east end, consisted of placing beach fill between the groins as they were erected. This method would prevent erosion in that the groin would trap very little sand as it flowed from east to west because the area in between the groins already was filled with sand. Contrary to appellants' argument, appellee Suffolk County contends that the report of the Corps sets forth no precise recommendations relating to the construction of, or number of, groins, although the County does admit that the report recognized that "some limited groin construction might be found warranted initially in the most vulnerable locations." H.Doc. No. 425 at 59.

The project, as set out in H.Doc. No. 425, was authorized by Congress and approved on July 14, 1960. River and Harbor Act of 1960, Pub.L. No. 86–645, 74 Stat. 480 (1960). The project required three-party participation by the federal, state, and county governments. The contemplated role of Suffolk County was limited to contributing a portion of the funding required for the project, obtaining easements from landowners, and maintaining the project after completion. *Id.* at 484–86; Exec. Resolution No. 365–1963, Aug. 12, 1963. The State of New York was to submit specific assurances of local cooperation and also was obligated to provide funding. *Id.*

According to appellants, on August 20, 1963, New York State furnished the Corps with Assurance of Local Cooperation for a portion of the project. The plans provided for the construction of thirteen groins starting at the east end of Barrier Beach and extensive sand fill in between the groins. In the Assurance, the State agreed, among other things, to maintain all the works, to undertake periodic beach nourishment, and to adopt laws to preserve and restore beaches and dunes.

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The Board of Supervisors of Suffolk County, however, refused to participate in the project as defined by the Assurance, objecting to the placement of the sand fill in between the groins. On February 3, 1964, the Board of Supervisors passed a ***286** resolution approving only a limited project which included construction of eleven groins beginning at the east end of Barrier Beach without the placement of sand fill in between the groins.[5] Eventually, the federal and state governments acquiesced in Suffolk County's decision, despite the recommendations contained in the Corps' report, and construction of the first set of groins, beginning at the east, was completed in 1966.

Because of the subsequent depletion of sand from the western beach, the Corps, in a letter dated June 1, 1967, wrote to the State and urged that the "critically required dune and sand fill" be placed in between the groins. The State in turn, by a letter dated June 16, 1967, wrote to Suffolk County requesting the placement of beach fill in the existing eleven groin fields and the construction of four additional groins. Once again, Suffolk County objected to the placement of sand fill, however, beginning in 1968, a second field of four groins was authorized by the County and the State along the 6,000 feet of beach immediately to the west of the original eleven, with construction completed in 1970. To date, no further construction of groins on the Barrier Beach has taken place.

Appellants herein allege that, as a result of the improper design, construction, and maintenance of the fifteen groins presently in place and the failure of Suffolk County to complete the beach erosion and hurricane project in this area, Barrier Beach to the west of the fifteen groins, the area owned by appellants and other members of the putative class, has suffered catastrophic damage. It is asserted that, prior to the beginning of groin construction, erosion along the reach of Barrier Beach between Shinnecock and Moriches Inlets was about seven to nine feet per year. According to appellants, within eighteen months of completion of the first eleven groins, the area to their west eroded by approximately eighty feet, and, since completion of the second increment of four groins, further erosion has taken place to their immediate west, in contrast to the easterly side of the last groin, where the beach is three hundred or more feet deep.

Appellants further allege that, as a consequence of this erosion numerous houses have been swept into the ocean, including six or more in the last year alone, approximately fifty homes are on the verge of tumbling into the ocean, other property of putative class members has been rendered unusable and its value greatly depreciated, and there has been damage to the multi-million dollar investment in public beaches made by the Town of Southampton and Suffolk County. Moreover, appellants contend that there has been destruction of the delicate ecological balance of Moriches Bay.

Based on the above, appellants alleged in their complaint five grounds for relief: 1) that appellee negligently constructed the groins between 1960 and November, 1970 by not beginning construction at the downdrift end of the beach and by failing to complete the project; 2) that the improper design and maintenance of the incomplete project [by appellees] constitute a continuing nuisance that has caused, and will cause, irreparable harm to appellants for which there is no adequate remedy at law; 3) that appellee has taken appellants' land in violation of the Fifth and Fourteenth Amendments; 4) that there has been a taking by appellee under the New York Constitution; and 5) that Suffolk County has acted in violation of § 119 of its Charter by failing to protect the shoreline. Appellants seek an injunction prohibiting continuation of the nuisance, including, but not limited to, the construction of additional groins as are necessary to complete the downdrift segment of the reach, or, in the alternative, the removal of the fifteen previously constructed groins, and an injunction ***287** directing Suffolk County to repair the harmful effects of the nuisance upon the property of appellants and other members of the putative class. In addition, appellants seek damages in the amount of $70 million.

In support of its motion to dismiss appellants' complaint, Suffolk County alleges that the increased erosion is a result of natural forces. According to the County, two basic processes are responsible for this erosion—the natural offshore-onshore movement of sand caused by long, low waves, and the alongshore movement of sand, known as "littoral drift." Moreover, Suffolk County claims that it was the Army Corps of Engineers which, by law, was given the discretion and authority to implement the project, and it was the Corps which conducted the actual construction pursuant to a plan which it developed. Under the Congressional scheme, it asserts, the County's responsibilities were limited to obtaining the easements from local property owners upon which the groins were constructed (once the Corps had chosen the site), maintaining the project once completed, and providing the local share of the funds for construction. As to its duty to maintain the groins, Suffolk County alleges that its obligation will not mature until the federal project is completed. It contends that, since further studies regarding the desirability of building additional groins on or removing the groins

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from Barrier Beach are presently underway as a joint effort among several federal agencies, with a scheduled completion date of 1986–87, at present it has no duty to maintain the groins. The County therefore moved for dismissal, pursuant to Fed.R.Civ.P. 12(b) or, alternatively, for summary judgment, pursuant to Fed.R.Civ.P. 56.

Finally, Suffolk County claims that, since the complaint herein is similar to that in litigation already pending in the Eastern District, *O'Grady et al. v. United States et al.*, 73 Civ. 1182, the *Rapf* complaint should be dismissed. According to the County, because of the similarity between the instant action and *O'Grady,* if the property owners herein are entitled to judicial relief, they can obtain such relief in the *O'Grady* action. [6]

***288** The district court herein treated Suffolk County's motion as one for dismissal and concluded that, since Suffolk County had not done anything to the groin field since 1970, appellants' allegations were insufficient to state a claim for relief from a continuing tort. According to the district court, the erosion merely amounted to consequential damage flowing from the original construction of the groin fields. The court thus held that appellants' action was time-barred by virtue of their failure to file a notice of claim until 1984 and by their failure to commence the action within the time period set forth in New York Gen.Mun. Law § 50–i(1). In addition, the district court concluded that the equitable doctrine of laches barred appellants from bringing the action.

On appeal, appellants do not press their constitutional claims but assert that the district court erred in finding the complaint insufficient to state a cause of action in continuing tort and that, therefore, the statute of limitations has not run. Furthermore, appellants urge that the defense of laches in inapplicable.

## DISCUSSION

New York County Law § 52, which in turn incorporates the provisions of §§ 50–e and 50–i of the N.Y.Gen.Mun. Law, governs the instant action. It states:

> Any claim or notice of claim against a County for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

N.Y. County Law § 52(1) (McKinney 1972).

Section 50–i of the General Municipal Law specifies that such an action against a county "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." N.Y.Gen.Mun. Law § 50–i(1)(c) (McKinney 1977). Section 50–e requires, as a condition precedent to any action against a county, the filing of a notice of claim within ninety days after the claim arises. N.Y.Gen.Mun. Law § 50–e(1)(a) (McKinney 1977).

Appellee Suffolk County maintains that given the clear language of 50–i(1)(c) governing commencement of a suit against a municipality, i.e., that the time should be computed from the happening of the event, upon which the claim is based, and the different language governing commencement of a civil suit between private parties, i.e., that the time should be computed from "accrual of the cause of action," N.Y.Civ.Prac. Law § 203(a) (McKinney 1972), the point from which the statutory period should be measured in a suit against a municipality is not meant to be equivalent to the accrual of a cause of action. Thus, Suffolk County alleges that the statute of limitations herein should be measured from the date of the event upon which the claim is based. Since, according to Suffolk County, the claim herein is based upon construction of the groins, and since the County has not taken any action following authorization of funds for construction of the last groin in 1970, appellee asserts that the limitations period should be computed from 1970.

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Suffolk County cites two main cases in support of its argument. In *Klein v. City of Yonkers,* 53 N.Y.2d 1011, 425 N.E.2d 865, 442 N.Y.S.2d 477 (1981), nine years after a certificate of occupancy was issued by the municipality, the plaintiff brought an action for fire damage to his building. Stating that the statutory time period is to be measured from "the happening of the event upon which the claim is based" rather ***289** than from the time of accrual, even if, under the accrual rule, the action would be timely, the New York Court of Appeals held that the action was time-barred since the suit was commenced nine years from the issuance of the certificate of occupancy. The *Klein* court evidently construed issuance of the certificate of occupancy, rather than the fire, as the event upon which the claim was based.

In *Nebbia v. County of Monroe,* 92 A.D.2d 724, 461 N.Y.S.2d 127 (4th Dept.1983), the plaintiff brought an action in 1982 for the presence of sewage on his property as of that date. Plaintiff alleged that the sewage resulted from the municipality's severance of a sewage line in 1979. As in *Klein,* the court in *Nebbia* held that the limitations period should be measured from "the happening of the event upon which the claim [was] based," identified therein as the date of severance, not from accrual of the cause of action, i.e., not from the date sewage went on to plaintiff's property. The *Nebbia* court thus held the action to be time-barred.

Although appellee is correct in contending that, based upon *Klein* and *Nebbia,* the limitations period in the instant action should be computed from the "happening of the event upon which the claim is based," we conclude that, even under *Klein* and *Nebbia,* appellants' action herein should not have been dismissed as untimely at this juncture. In the present suit, Suffolk County moved, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss appellants' action for failure to state a claim upon which relief can be granted. In such a case, as appellee concedes, if matters outside the pleadings are considered, the motion for dismissal should be treated as one for summary judgment. Fed.R.Civ.P. 12(b)(6) Advisory Comm. Note. Herein, affidavits are available, and in the absence of a disclaimer, we assume that they were considered. Thus, appellee's motion should have been treated as one for summary judgment, and the motion should not have been granted unless the district court found, after drawing all reasonable inferences in favor of the party opposing the motion, i.e., appellants, *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Poller v. CBS,* 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); 6 J. Moore, Federal Practice ¶ 56.15[3] (2d ed. 1966) that there are no material issues of fact in dispute. *United States v. Pent-R-Books, Inc.,* 538 F.2d 519, 529 (2d Cir.1976), *cert. denied,* 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977). We find that a material issue of fact is in dispute between appellants and Suffolk County, namely, the issue of who presently has the duty to maintain the groins. Consequently, we conclude that the district court erred in dismissing appellants' complaint.

According to appellee, the County is not the owner of the groins, and also, its duty to maintain the groins does not mature until the project is complete. Since a study of the area and of the need for groins is still being undertaken, the County contends that, at present, it has no duty of maintenance, and therefore, given that the County has taken no action subsequent to 1970, construction of the last groin in 1970 constitutes the event upon which the claim is based and from which the limitations period should be measured. Appellants contend, on the other hand, that Suffolk County's duty to maintain the groin fields has already matured. Citing *Bloss v. The Village of Canastota,* 35 Misc.2d 829, 232 N.Y.S.2d 166 (Sup.Ct. Madison Co.1962), in which the court held that defendant municipality's continuous operation of a dump was the critical "event" from which the limitations period should be measured pursuant to Gen.Mun. Law § 50–i(1)(c), appellants assert that the critical event herein is Suffolk County's alleged failure to maintain the groins or to build additional groins. It is because of the existence of this material issue of fact that we believe appellee's motion to dismiss should not have been granted.

Moreover, even if appellee's motion were treated as one to dismiss for failure to state a claim for which relief can be granted and not as one for summary judgment, ***290** the motion for dismissal should still have been denied. To dismiss a complaint for failure to state a claim upon which relief can be granted, a court must accept plaintiff's allegations at face value, *Heit v. Weitzen,* 402 F.2d 909, 913 (2d Cir.1968), *cert. denied,* 395 U.S. 903, 89 S.Ct. 1740, 23 L.Ed.2d 217 (1969), must construe the allegations in the complaint in plaintiff's favor, *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), and must dismiss the complaint only if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). *See generally Wade v. Johnson Controls, Inc.,* 693 F.2d 19 (2d Cir.1982). Under this standard, since the complaint alleges that Suffolk County at present does have the duty to maintain the groin

fields, and, since appellants' action would be timely if the limitations period were measured, as appellants contend, from the County's failure to satisfy a continuing duty, the district court improperly dismissed appellants' complaint.

Furthermore, even if the time from which the limitations period should be measured pursuant to Gen.Mun.Law § 50–i(1)(c), i.e., "the happening of the event upon which the claim is based," were to be considered equivalent to the accrual date of the cause of action, appellants' complaint would still not be time-barred. Since appellants' complaint states a claim in continuing nuisance for which the cause of action accrues anew each day, *Hackensack Water Co. v. Village of Nyack,* 289 F.Supp. 671, 681 (S.D.N.Y.1968), appellants' complaint is timely.

According to appellee Suffolk County, for a finding of a continuous tort, a defendant must have been actively committing a tort each day. Since the last "action" taken by Suffolk County occurred in 1970 with construction of the last groin, appellee contends that, even if authorizing construction of the groins constituted a wrongful act, the present erosion is merely a consequential damage of the original construction and not the result of a continuing tort. Moreover, Suffolk County asserts that its duty to maintain the groins has not yet matured. Consequently, according to Suffolk County, appellants' action would be barred by the statute of limitations, even if the statute started to run from accrual of the cause of action.

Appellants contend, to the contrary, that a continuing nuisance can result not only from continuous active wrongdoing, but also from present inaction. Therefore, since the erosion is alleged to be a result of the County's present failure to maintain the groins or to complete construction, the County may be guilty of creating a continuing nuisance which accrues anew each day. Based on this interpretation, which we accept on the present state of the record, appellants' action is not barred by the statute of limitations.

Appellants cite several cases in support of their argument. In *State v. Schenectady Chemicals, Inc.,* 117 Misc.2d 960, 459 N.Y.S.2d 971 (Rensselaer Co.1983), *modified,* 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dept.1984), a dumpsite created by defendant contaminated plaintiff's property. Many years later, the plaintiff brought suit to have defendant pay for cleaning up the site. Although the defendant's last "active" wrongdoing with respect to the site (i.e., the dumping of chemicals) had taken place more than fifteen years prior to commencement of the suit, the *Schenectady* court held that the migration of toxic chemicals through ground water supplies due to natural forces constituted a continuing public nuisance.

Suffolk County attempts to distinguish *Schenectady* by stating that the case involved a public rather than a private nuisance. This distinction, however, is without merit in that the *Schenectady* court itself based its holding on a prior case involving a private nuisance. *Kearney v. Atlantic Cement Co.,* 33 A.D.2d 848, 306 N.Y.S. 45 (3d Dept.1969). Furthermore, the instant case is even stronger than *Schenectady* in that defendant therein no longer had control over the instrumentality ***291** causing the damage, whereas in the present action, Suffolk County allegedly has control over the groins.

Similarly, in *Amax, Inc. v. Sohio Industrial Products Co.,* 121 Misc.2d 814, 469 N.Y.S.2d 282 (N.Y.Co.1983), approximately nine years after discovering radioactive contamination on land which he had purchased from defendant, the plaintiff commenced his suit. Even though defendant's last "active" wrongdoing occurred almost twenty years prior to commencement of the action, the *Amax* court held that defendant's dumping of radioactive waste constituted a continuing nuisance and was, therefore, not barred by an accrual statute of limitations.

Suffolk County attempts to distinguish *Amax* on two grounds. First, appellee argues that the *Amax* court's finding of a continuous tort was based upon its analogizing the radioactive contamination of plaintiff's property to damage from an encroaching structure, which historically has been regarded as a recurring trespass to land. The *Amax* court's reference to an encroaching structure, however, was provided merely as "an example" of a continuing tort, not as a necessary element. Second, Suffolk County places weight upon the distinction between a continuing trespass and a continuing nuisance. Whereas the *Amax* court held that defendant's conduct constituted a continuing trespass, appellants herein allege that Suffolk County has created a continuing nuisance. The distinction between trespass and nuisance, however, is irrelevant in the context of determining whether an action is continuing. As the court stated in *Kearney v. Atlantic Cement Co.,* 33 A.D.2d 848, 306 N.Y.S. 45 (3d Dept.1969), "[i]n instances of continuous trespass or nuisance, the wrong is continuous or recurring and a cause of action accrues for each injury, the wrong being not referable exclusively to the day when the original tort was committed." *Id.* at 849, 306 N.Y.S.2d at 46–47; *Gregory v. City of New York,*

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346 F.Supp. 140 (S.D.N.Y.1972) (damage resulting from diversion of water by construction of dam is continuing tort). Furthermore, since appellants herein, as in *Schenectady* and *Amax,* would be required either to bring more than one action to recover their full damages or to institute an action before the potential extent of the injury is known, this is a classic case of a continuing nuisance. *Hackensack Water Co. v. Village of Nyack,* 289 F.Supp. 671, 681–2 (S.D.N.Y.1968). *See United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). Moreover, the defendant in *Amax,* as in *Schenectady,* no longer had control over the instrumentality causing the damage to plaintiffs—the contrary allegedly exists herein.

In support of its argument that appellants have failed to assert a cause of action for continuing nuisance, Suffolk County relies on two cases, also relied on by the district court. Both cases are inapposite.

In *Macrose Realty Corp. v. City of New York,* 49 A.D.2d 847, 373 N.Y.S.2d 611 (1st Dept.1975), plaintiffs sued the city in 1968 for damage to the foundations of several of their buildings, resulting from the negligent construction of a public school in 1939. The *Macrose* court held the action to be time-barred. In *Macrose,* however, plaintiffs' claims were based on wrongful acts committed and damages suffered years before litigation was commenced. At the time the *Macrose* suit was instituted, the city was no longer either engaging in active wrongdoing or failing to perform any obligation. Herein, on the other hand, as well as in *Schenectady* and *Amax,* appellants' claims are based on appellee's alleged wrongful acts occurring and damages suffered daily, failing to fulfill a current duty to maintain the groin fields and to complete construction of additional groins, thereby causing daily erosion.

In *Steinberg v. Rosenblum,* 205 Misc. 760, 130 N.Y.S.2d 129 (New York Co.1954), *aff'd,* 284 A.D. 871, 134 N.Y.S.2d 591 (1st Dept.1954), also relied on by Suffolk County, plaintiff's garage was damaged by a pile driving operation at a nearby housing project. Since plaintiff failed to initiate suit within three years of the pile-driving ***292** operation, the court held the action to be time-barred. As in *Macrose,* however, at the time the *Steinberg* suit was commenced, defendant was not obligated to take any actions with regard to the project. "What the defendant did was to complete the performance of its work and leave nothing which it continued to do or to maintain." 205 Misc. at 764, 130 N.Y.S.2d at 133. Furthermore, as in *Macrose,* and contrary to the instant case, both the injury and the wrongful acts in *Steinberg* were suffered long before suit was commenced.

In sum, in the four cases primarily relied upon by Suffolk County, *Klein, Nebbia, Macrose,* and *Steinberg,* defendants' wrongful conduct consisted of alleged negligent isolated acts occurring prior to commencement of suit, e.g., issuance of a certificate of occupancy, severance of a sewage line, construction of a building, and pile driving. Herein, to the contrary, the event upon which appellants' claim is based is not the isolated act of authorizing the construction of groins prior to 1970. Rather, the tortious conduct in question is Suffolk County's alleged present failure to maintain the groins or to authorize funding for construction of additional groins. Since this failure occurs each day that appellee does not act, the County's alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day. Therefore, even if the time from which the limitations period should be measured pursuant to Gen.Mun. Law § 50–i(1)(c), i.e., "the happening of the event upon which the claim is based," were to be considered equivalent to the accrual date of the cause of action, appellants' complaint would still not be time-barred. Furthermore, given that appellants' complaint sufficiently states a cause of action for a continuing tort for which the cause of action accrues anew each day, by filing a notice of claim even in 1984, appellants have satisfied the General Municipal Law's requirement for filing such a notice within ninety days of the time the claim arises. Gen.Mun. Law § 50–e. Based on the foregoing, we conclude that appellants' claims are not barred by the applicable statute of limitations. [7]

Appellee Suffolk County further alleges, and the district court held, that appellants' claims are barred by laches. An equitable action is barred by laches under New York law where the following exist: (1) proof of delay in asserting a claim despite the opportunity to do so; (2) lack of knowledge on the defendant's part that a claim would be asserted; and (3) prejudice to the defendant by the allowance of the claim. *In re Diaz-Albertini's Estate,* 141 N.Y.S.2d 149, 154 (N.Y. County, 1955). Moreover, "[i]n order to show that he has been prejudiced, a defendant must show reliance and change of position resulting from the delay." *Airco Alloys Div. v. Niagara Mohawk Power,* 76 A.D.2d 68, 82, 430 N.Y.S.2d 179, 187 (4th Dept.1980).

Herein, the prejudice alleged by Suffolk County arises from appellants' failure to bring an action in 1966, subsequent to the erection of the first eleven groins (and the observation of some damage) but prior to construction of the second series of

four groins. According to the County, the damage it suffered was the cost of subsidizing the erection of the last four groins.

We believe that appellee's allegation of damage is insufficient to support a laches defense. After construction of the first set of groins, appellants had no reason to know whether Suffolk County intended to complete the groin field, which would have ***293** allegedly prevented the extensive erosion that later occurred. Moreover, Suffolk County was on notice from the Corps' report in 1960 that failure to complete the groins might lead to damage. H.Doc. No. 425 at 54, 55. Thus, Suffolk County's attempt to show any change in its position in reliance on appellants' actions is unpersuasive. Furthermore, even if the doctrine of laches were applicable, it would bar only appellants' claims for equitable relief, not their claims for monetary damages. We therefore conclude that appellants' claims are barred neither by the applicable statute of limitations nor by laches.

At oral argument, Suffolk County asserted that the instant suit should be dismissed not only because the *O'Grady* litigation would protect the rights of appellants herein, but also because the relief which appellants seek would be meaningless unless New York State and the United States were joined as parties.

With regard to the *O'Grady* action, plaintiffs therein have failed to file a notice of claim as required by Gen.Mun. Law § 50–e. Furthermore, appellants assert that the timeliness issue is more easily addressed in the instant suit because of the absence of additional causes of action and defendants. With regard to the need for New York State and the United States to be joined as parties, according to appellants, assuming Suffolk County owns and is bound to maintain the groins, an injunction which seeks to abate the nuisance will not necessarily require New York or the United States to "do an act or spend money." Therefore, appellants assert that they can obtain relief fully and completely from Suffolk County. *Picard v. Wall Street Discount Corp.*, 526 F.Supp. 1248 (S.D.N.Y.1981). We are not persuaded to the contrary with regard to either of these arguments.

For the above reasons, we reverse and remand for further proceedings consistent with this opinion.

**All Citations**

755 F.2d 282

## Footnotes

1 Appellants are individual homeowners on the west end of Dune Road in the Town of Southampton, Suffolk County, New York. The property bordering Dune Road, which runs in an east-west direction, is a strip of beach known technically as a barrier beach. The Barrier Beach, which in reality is a small island, is approximately 15 miles long and is bordered on the south side by the Atlantic Ocean and on the north side by Moriches and Shinnecock Bays. On the east end is Shinnecock Inlet and on the west end is Moriches Inlet.

2 *Cooperative Beach Erosion Control and Interim Hurricane Study, Atlantic Coast of Long Island, New York, Fire Island Inlet to Montauk Point,* House Document No. 425, 86th Cong., 2d Sess. (1960).

3 Groins are solid structures, often made out of stone, which are erected on a beach and extend out into a body of water in a direction perpendicular to the beach.

4 As appellants contend:

> The real 'need' for a second or third structure may have been only temporary .... However, if additional structures are built, the down coast erosion becomes more severe with each succeeding structure, until finally a "point of no return" is reached where the need for additional protection from erosion becomes so urgent that the only choices are (1) to continue to build protective works, (2) to find a new source of beach sand, or (3) possibly a combination of both.

Imman, D.L. and Brush, B.M., *The Coastal Challenge,* 181 SCIENCE 29 (1973).

5 According to appellants, Suffolk County's plan resulted from economic and political concerns, namely, since the County was to be responsible for maintenance of the groins, it would have the burden of maintaining any sand fill which was added; and the County showed preference for the wealthier and more politically influential homeowners in the East end.

6 Prior to the suit herein, on August 7, 1973, in an attempt to remedy the damage caused by the groins, two plaintiffs named O'Grady and Patton did commence an action on behalf of themselves and purportedly on behalf of the class of individuals constituting the "Barrier Beach Association" against the federal, state, and county governments. *Id.* Plaintiffs in *O'Grady* asserted that they were entitled to relief under common law principles of negligence, contract, and nuisance, the Federal Tort Claims Act, the Fifth and Fourteenth Amendments to the United States Constitution, the National Environmental Protection Act, the Environmental Quality Improvement Act of 1970, the Administrative Procedure Act, the Environmental Conservation Law of the State of New York, Article I, Section 7, of the New York State Constitution, and the County Charter of Suffolk County.

After their motion for a preliminary injunction was denied in June, 1982, in the Fall of 1983, the *O'Grady* plaintiffs requested an immediate trial on their claim for a permanent injunction. At a hearing on Nov. 7, 1983, the district court denied this application. Subsequently, on March 13, 1984, the parties entered into a stipulation of facts in which they agreed that plaintiff O'Grady had died, and plaintiff Patton no longer owned property on Dune Road. They also stipulated that neither putative class representative had ever filed a notice of claim with the County.

On May 23, 1984, the district court dismissed the *O'Grady* action for failure to timely substitute a proper party plaintiff under Fed.R.Civ.P. 25. A motion was made for reconsideration, and, on June 26, 1984, the district court reinstated the action and granted permission to substitute O'Grady's widow as the new plaintiff.

According to Suffolk County, the differences between the complaint herein and that in *O'Grady* are minimal. It asserts that, first, in the instant suit, plaintiffs omitted claims based on federal and state environmental statutes, the Federal Administrative Procedure Act, and on breach of contract. Second, appellants herein sued only Suffolk County, whereas the *O'Grady* plaintiffs included the United States and the State of New York as defendants. Third, the *O'Grady* plaintiffs failed to ever file a notice of claim as a condition precedent to commencement of their action, whereas the appellants herein filed a notice of claim in 1984. Fourth, whereas the *O'Grady* suit was brought on behalf of members of the Barrier Beach Association, the putative class herein does not consist only of members of the Association but is defined simply as those persons similarly situated to the two named plaintiffs.

7 A notice of claim need not be filed if an action is brought in equity to restrain a continuing tort even if the plaintiff also seeks money damages, provided the demand for monetary relief is subordinate and incidental to the claim for equitable relief. *Grant v. Town of Kirkland,* 10 A.D.2d 474, 200 N.Y.S.2d 594, 595 (4th Dept.1960); *Fontana v. Town of Hempstead,* 18 A.D.2d 1084, 239 N.Y.S.2d 512, 513 (2d Dept.1963). This appears to be the situation in the present case, where the thrust of the action is to obtain an injunction ordering Suffolk County to abate the nuisance. In any event, according to appellants, over 115 residents of Barrier Beach in the affected area have filed notices of claim under Section 50 of the General Municipal Law.

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Joslyn Mfg. Co. v. T.L. James & Co., Inc., 5th Cir. (La.), January 29, 1990

759 F.2d 1032
United States Court of Appeals,
Second Circuit.

The STATE OF NEW YORK, Appellee,
v.
SHORE REALTY CORP. and
Donald LeoGrande, Appellants.

No. 606, Docket 84–7925.
|
Argued Dec. 5, 1984.
|
Decided April 4, 1985.

**Synopsis**

Owner of property and its officer and stockholder appealed from order entered by the United States District Court for the Eastern District of New York, Henry Bramwell, J., granting State's motion for partial summary judgment finding defendants liable for State's response costs under the Comprehensive Environmental Response, Compensation, and Liability Act, and enjoining defendants to clean up hazardous waste storage site. The Court of Appeals, Oakes, Circuit Judge, held that: (1) owner of property was responsible for State's response costs; (2) injunctive relief under CERCLA was not available to the State; (3) injunction could issue against defendants based upon New York public nuisance law; and (4) stockholder and officer of property owner was liable as an operator under CERCLA.

Judgment affirmed.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

**Attorneys and Law Firms**

***1036** David H. Peirez, Garden City, NY (Reisman, Peirez & Reisman, William R. Ginsberg, Charles A. Singer, Garden City, N.Y., of counsel), for appellants.

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(F. Henry Habicht II, Asst. Atty. Gen., Washington, D.C., Raymond J. Dearie, U.S. Atty., for the E.D. of New York, Janice Siegel, Asst. U.S. Atty., Brooklyn, N.Y., Nancy B. Firestone, Diane Donley, Donald ***1037** T. Hornstein, Dept. of Justice, Washington, D.C., of counsel), for amicus curiae U.S.

Before FEINBERG, Chief Judge, OAKES and NEWMAN, Circuit Judges.

**Opinion**

OAKES, Circuit Judge:

This case involves several novel questions about the scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9657 (1982) ("CERCLA"), and the interplay between that statute and New York public nuisance law. CERCLA—adopted in the waning hours of the Ninety-sixth Congress, and signed by President Carter on December 11, 1980—was intended to provide means for cleaning up hazardous waste sites and spills, and may generally be known to the public as authorizing the so-called Superfund, the $1.6 billion Hazardous Substances Response Trust Fund, 42 U.S.C. §§ 9631–9633.

On February 29, 1984, the State of New York brought suit against Shore Realty Corp. ("Shore") and Donald LeoGrande, its officer and stockholder, to clean up a hazardous waste disposal site at One Shore Road, Glenwood Landing, New York, which Shore had acquired for land development purposes. At the time of the acquisition, LeoGrande knew that hazardous waste was stored on the site and that cleanup would be expensive, though neither Shore nor LeoGrande had participated in the generation or transportation of the nearly 700,000 gallons of hazardous waste now on the premises. The State's suit under CERCLA for an injunction and damages was brought in the United States District Court for the Eastern District of New York, Henry Bramwell, Judge. The complaint also contained pendent state law nuisance claims, based on both common law and N.Y.Real Prop.Acts.Law § 841 (McKinney 1979). On October 15, 1984, the district court granted the State's motion for partial summary judgment. Apparently relying at least in part on CERCLA, it directed by permanent injunction that Shore and LeoGrande remove the hazardous waste stored on the property, subject to monitoring by the State, and held them liable for the State's "response costs," *see* 42 U.S.C. § 9607(a)(4)(A). In the alternative the

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court based the injunction on a finding that the Shore Road site was a public nuisance. Following a remand by this court on December 14, 1984, the district court on January 11, 1985, stated with more particularity the undisputed material facts underlying its decision finding defendants liable for the State's response costs and clarifying its earlier decision by basing the injunction solely on state public nuisance law. The court also modified its earlier decision by suggesting that CERCLA does not authorize injunctive relief in this case. [1]

We affirm, concluding that Shore is liable under CERCLA for the State's response costs. We hold that Shore properly was found to be a covered person under 42 U.S.C. § 9607(a); that the nonlisting by the Environmental Protection Agency ("EPA") [2] of the site on the National Priorities List ("NPL"), 42 U.S.C. § 9605(8)(B), is irrelevant to Shore's liability; that Shore cannot rely on any of CERCLA's affirmative defenses; but that, as suggested in the amicus brief filed for the United States and the district court's supplemental memorandum, injunctive relief under CERCLA is not available to the State. We nevertheless hold that the district court, exercising its pendent jurisdiction, properly granted the permanent injunction based on New York public nuisance law. Moreover, we hold LeoGrande jointly and severally liable under both CERCLA and New York law.

## FACTS

Some of the most heated arguments on this appeal involve whether certain material ***1038** facts are undisputed. After careful scrutiny of the record and the district court's supplemental memorandum, we base our decision on the following facts.

LeoGrande incorporated Shore solely for the purpose of purchasing the Shore Road property. All corporate decisions and actions were made, directed, and controlled by him. By contract dated July 14, 1983, Shore agreed to purchase the 3.2 acre site, a small peninsula surrounded on three sides by the waters of Hempstead Harbor and Mott Cove, for condominium development. Five large tanks in a field in the center of the site hold most of some 700,000 gallons of hazardous chemicals located there, though there are six smaller tanks both above and below ground containing hazardous waste, as well as some empty tanks, on the property. The tanks are connected by pipe to a tank truck loading rack and dockage facilities for loading by barge. Four roll-on/roll-off containers and one tank truck trailer hold additional waste. And before June 15, 1984, one of the two dilapidated masonry warehouses on the site contained over 400 drums of chemicals and contaminated solids, many of which were corroded and leaking. [3]

It is beyond dispute that the tanks and drums contain "hazardous substances" within the meaning of CERCLA. 42 U.S.C. § 9601(14). The substances involved —including benzene, dichlorobenzenes, ethyl benzene, tetrachloroethylene, trichloroethylene, 1,1,1-trichloroethene, chlordane, polychlorinated biphenyls (commonly known as PCBs), and bis (2-ethylhexyl) phthalate—are toxic, in some cases carcinogenic, and dangerous by way of contact, inhalation, or ingestion. These substances are present at the site in various combinations, some of which may cause the toxic effect to be synergistic.

The purchase agreement provided that it could be voided by Shore without penalty if after conducting an environmental study Shore had decided not to proceed. LeoGrande was fully aware that the tenants, Applied Environmental Services, Inc., and Hazardous Waste Disposal, Inc., were then operating —illegally, it may be noted—a hazardous waste storage facility on the site. Shore's environmental consultant, WTM Management Corporation ("WTM"), prepared a detailed report in July, 1983, incorporated in the record and relied on by the district court for its findings. The report concluded that over the past several decades "the facility ha[d] received little if any preventive maintenance, the tanks (above ground and below ground), pipeline, loading rack, fire extinguishing system, and warehouse have deteriorated." WTM found that there had been several spills of hazardous waste at the site, including at least one large spill in 1978. Though there had been some attempts at cleanup, the WTM testing revealed that hazardous substances, such as benzene, were still leaching into the groundwater and the waters of the bay immediately adjacent to the bulkhead abutting Hempstead Harbor. [4] After a site visit on July 18, 1983, WTM reported firsthand on the sorry state of the facility, observing, among other things, "seepage from the bulkhead," "corrosion" on all the ***1039** tanks, signs of possible leakage from some of the tanks, deterioration of the pipeline and loading rack, and fifty to one hundred fifty-five gallon drums containing contaminated earth in one of the warehouses. The report concluded that if the current tenants "close up the operation and leave the material at the site," the owners would be left with a "potential time bomb." WTM estimated that the cost of environmental cleanup and monitoring would range from $650,000 to over $1 million before development could begin.

After receiving this report Shore sought a waiver from the State Department of Environmental Conservation ("DEC") of liability as landowners for the disposal of the hazardous waste stored at the site. Although the DEC denied the waiver, Shore took title on October 13, 1983, and obtained certain rights over against the tenants, whom it subsequently evicted on January 5, 1984.

Nevertheless, between October 13, 1983, and January 5, 1984, nearly 90,000 gallons of hazardous chemicals were added to the tanks. And during a state inspection on January 3, 1984, it became evident that the deteriorating and leaking drums of chemicals referred to above had also been brought onto the site. Needless to say, the tenants did not clean up the site before they left. Thus, conditions when Shore employees first entered the site were as bad as or worse than those described in the WTM report. As LeoGrande admitted by affidavit, "the various storage tanks, pipe lines and connections between these storage facilities were in a bad state of repair." While Shore claims to have made some improvements, such as sealing all the pipes and valves and continuing the cleanup of the damage from earlier spills, Shore did nothing about the hundreds of thousands of gallons of hazardous waste standing in deteriorating tanks. In addition, although a growing number of drums were leaking hazardous substances, Shore essentially ignored the problem until June, 1984. *See supra* note 3.

On September 19, 1984, a DEC inspector observed one of the large tanks, which held over 300,000 gallons of hazardous materials, with rusting floor plates and tank walls, a pinhole leak, and a four-foot line of corrosion along one of the weld lines. On three other tanks, flakes of corroded metal "up to the size and thickness of a dime" were visible at the floorplate level. [5] While defendants now claim that the large tank was not leaking, their denial is untimely; they did not formally dispute the fact before the district court rendered its October 15, 1984, order. Moreover, defendants' claim that the pinhole has been patched hardly makes the existence of the pinhole leak a triable issue of fact. In addition, defendants do not contest that Shore employees lack the knowledge to maintain safely the quantity of hazardous chemicals on the site. And, because LeoGrande has no intention of operating a hazardous waste storage facility, Shore has not and will not apply for a permit to do so. Nor do defendants contest that the State incurred certain costs in assessing the conditions at the site and supervising the removal of the drums of hazardous waste.

CERCLA

CERCLA's history reveals as much about the nature of the legislative process as about the nature of the legislation. In 1980, while the Senate considered one early version of CERCLA, the House considered and passed another. *See* H.R. 7020, 96th Cong., 2d Sess. (1980), *reprinted in* 2 *Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)* 391–463 (Comm.Print 1983) [hereinafter cited ***1040** as *CERCLA Legislative History* ]; *see also* 126 Cong.Rec. 26,757–99 (1980) (debate and passage of H.R. 7020), *reprinted in* 2 *CERCLA Legislative History, supra,* at 294–389. The version passed by both Houses, however, was an eleventh hour compromise put together primarily by Senate leaders and sponsors of the earlier Senate version. Unfortunately, we are without the benefit of committee reports concerning this compromise. *But see infra* note 12. Nevertheless, the evolution of the legislation provides useful guidance to Congress's intentions. The compromise contains many provisions closely resembling those from earlier versions of the legislation, and the House and Senate sponsors sought to articulate the differences between the compromise and earlier versions. One of the sponsors claimed that the version passed "embodie[d] those features of the Senate and House bills where there has been positive consensus" while "eliminat[ing] those provisions which were controversial." 126 Cong.Rec. 30,932 (statement of Sen. Randolph), *reprinted in* 1 *CERCLA Legislative History, supra,* at 685.

As explained in F. Anderson, D. Mandelker, & A. Tarlock, *Environmental Protection: Law and Policy* 568 (1984), CERCLA was designed "to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws." [6] It applies "primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills." *Id.* And it distinguishes between two kinds of response: remedial actions—generally long-term or permanent containment or disposal programs [7] —and removal efforts—typically short-term cleanup arrangements. [8]

***1041** CERCLA authorizes the federal government to respond in several ways. EPA can use Superfund resources to clean up hazardous waste sites and spills. 42 U.S.C. § 9611. [9] The National Contingency Plan ("NCP"), prepared by EPA

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pursuant to CERCLA, *id.* § 9605, governs cleanup efforts by "establish[ing] procedures and standards for responding to releases of hazardous substances." At the same time, EPA can sue for reimbursement of cleanup costs from any responsible parties it can locate, *id.* § 9607, allowing the federal government to respond immediately while later trying to shift financial responsibility to others. Thus, Superfund covers cleanup costs if the site has been abandoned, if the responsible parties elude detection, or if private resources are inadequate. *See* F. Anderson, D. Mandelker, & A. Tarlock, *supra,* at 573. In addition, CERCLA authorizes EPA to seek an injunction in federal district court to force a responsible party to clean up any site or spill that presents an imminent and substantial danger to public health or welfare or the environment. 42 U.S.C. § 9606(a). In sum, CERCLA is not a regulatory standard-setting statute such as the Clean Air Act. *Id.* §§ 7401–7642. Rather, the government generally undertakes pollution abatement, and polluters pay for such abatement through tax and reimbursement liability. *See* F. Anderson, D. Mandelker, & A. Tarlock, *supra,* at 569. [10]

Congress clearly did not intend, however, to leave clean up under CERCLA solely in the hands of the federal government. A state or political subdivision may enter into a contract or cooperative agreement with EPA, whereby both may take action on a cost-sharing basis. 42 U.S.C. § 9604(c), (d). And states, like EPA, can sue responsible parties for remedial and removal costs if such efforts are "not inconsistent with" the NCP. *Id.* § 9607(a)(4)(A). While CERCLA expressly does not preempt state law, *id.* § 9614(a), it precludes "recovering compensation for the same removal costs or damages or claims" under both CERCLA and state or other federal laws, *id.* § 9614(b), and prohibits states from requiring contributions to any fund "the purpose of which is to pay compensation for claims ... which may be compensated under" CERCLA, *id.* § 9614(c). [11] Moreover, "any ... person" ***1042** who is acting consistently with the requirements of the NCP may recover "necessary costs of response." *Id.* § 9607(a)(4)(B); *see also City of Philadelphia v. Stepan Chemical Co.,* 544 F.Supp. 1135, 1142–43 (D.C.E.D.Pa.1982) (allowing a landowner to maintain a CERCLA action against a hazardous waste generator under section 9607(a)(4)(B)). Finally, responsible parties are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C).

Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that "liability" under CERCLA "shall be construed to be the standard of liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability, *see, e.g., Steuart Transportation Co. v. Allied Towing Corp.,* 596 F.2d 609, 613 (4th Cir.1979), and which Congress understood to impose such liability, *see* S.Rep. No. 848, 96th Cong., 2d Sess. 34 (1980) [hereinafter cited as Senate Report], *reprinted in* 1 *CERCLA Legislative History, supra,* at 308, 341. [12] Moreover, the sponsors of the compromise expressly stated that section 9607 provides for strict liability. [13] *See* 126 Cong.Rec. 30,932 (statement of Sen. Randolph), *reprinted in* 1 *CERCLA Legislative History, supra,* at 685; *id.* at 31,964 (statement of Rep. Florio), *reprinted in* 1 *CERCLA Legislative History, supra,* at 777; *see also id.* at 31,966 (Department of Justice view of Senate compromise discussing strict liability), *reprinted in* 1 *CERCLA Legislative History, supra,* at 780–81. Strict liability under CERCLA, however, is not absolute; there are defenses for causation solely by an act of God, an act of war, or acts or omissions of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship with the defendant. 42 U.S.C. § 9607(b).

## DISCUSSION

### A. *Liability for Response Costs Under CERCLA*

We hold that the district court properly awarded the State response costs under section 9607(a)(4)(A). [14] The State's ***1043** costs in assessing the conditions of the site and supervising the removal of the drums of hazardous waste squarely fall within CERCLA's definition of response costs, even though the State is not undertaking to do the removal. *See id.* §§ 9601(23), (24), (25). Contrary to Shore's claims, the State's motion for summary judgment sought such costs, and Shore had ample opportunity for discovery. That a detailed accounting was submitted only at this court's request for supplemental findings is immaterial; Shore had an opportunity to contest the accounting but failed to make anything more than a perfunctory objection.

1. *Covered Persons.* CERCLA holds liable four classes of persons:

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(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility, [15]

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person.

42 U.S.C. § 9607(a). As noted above, section 9607 makes these persons liable, if "there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance" from the facility, [16] for, among other things, "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan."

Shore argues that it is not covered by section 9607(a)(1) because it neither owned the site at the time of disposal nor caused the presence or the release of the hazardous waste at the facility. While section 9607(a)(1) appears to cover Shore, Shore attempts to infuse ambiguity into the statutory scheme, claiming that section 9607(a)(1) could not have been intended to include all owners, because the word "owned" in section 9607(a)(2) would be unnecessary since an owner "at the time of disposal" would necessarily be included in section 9607(a)(1). Shore claims that Congress intended that the scope of section 9607(a)(1) be no greater than that of section 9607(a)(2) and that both should be limited by the "at the time of disposal" language. ***1044** By extension, Shore argues that both provisions should be interpreted as requiring a showing of causation. We agree with the State, however, that section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation. [17]

Shore's claims of ambiguity are illusory; section 9607(a)'s structure is clear. Congress intended to cover different classes of persons differently. Section 9607(a)(1) applies to all current owners and operators, while section 9607(a)(2) primarily covers prior owners and operators. Moreover, section 9607(a)(2)'s scope is more limited than that of section 9607(a)(1). Prior owners and operators are liable only if they owned or operated the facility "at the time of disposal of any hazardous substance"; this limitation does not apply to current owners, like Shore. Thus, Shore's reliance on the holding of the district court in *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 14 Envtl.L.Rep. (Envtl.L.Inst.) 20,376 (C.D.Cal. Mar. 5, 1984), is inappropriate The *Cadillac Fairview* court was concerned with a prior owner and predicated its holding solely upon the words of section 9607(a)(2). *Id.* at 20,378.

Shore's causation argument is also at odds with the structure of the statute. Interpreting section 9607(a)(1) as including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b), each of which carves out from liability an exception based on causation. Without a clear congressional command otherwise, we will not construe a statute in any way that makes some of its provisions surplusage. *See, e.g., United States v. Mehrmanesh,* 689 F.2d 822, 829 (9th Cir.1982); *National Insulation Transportation Committee v. ICC,* 683 F.2d 533, 537 (D.C.Cir.1982). [18] Moreover, Shore again improperly relies on *Cadillac Fairview.* There, the court did not interpret section 9607(a) to require causation, as defendants claim, but simply ownership "at the time of disposal." 14 Envtl.L.Rep. (Envtl.L.Inst.) at 20,378. Several other district courts explicitly have declined to read a causation requirement into section 9607(a). *See, e.g., United States v. Cauffman,* No. CV 83–6318–KN(Bx), slip op. at 2–3 (C.D.Cal. Oct. 23, 1984) (citing other cases).

Our interpretation draws further support from the legislative history. Congress specifically rejected including a causation requirement in section 9607(a). The early House version imposed liability only upon "any person who caused or contributed to the release or threatened release." H.R.7020, 96th Cong., 2d Sess. § 3071(a), 126 Cong.Rec. 26,779, *reprinted in* 2 *CERCLA Legislative History, supra,* at 438. The compromise version, to which the House later agreed, *see* 126 Cong.Rec. 31,981–82, *reprinted in* 1 *CERCLA Legislative History, supra,* at 821–24, imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release. *See also* S.1480, 96th Cong., 2d Sess. § 4(a), 126 Cong.Rec. 30,900 (Senate version of legislation changed from imposing liability on an "owner or operator" and "any other person who caused or contributed ... to such discharge, release, or disposal" to

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imposing ***1045** liability on four classes of persons, the scheme adopted in the compromise version), *reprinted in* 1 *CERCLA Legislative History, supra,* at 485–86. Thus, the remarks of Representatives Stockman and Gore describing the House version containing the causation language, *see* 126 Cong.Rec. 26,786–87, *reprinted in* 2 *CERCLA Legislative History, supra,* at 359–61, on which Shore relies, are inapposite. [19]

Furthermore, as the State points out, accepting Shore's arguments would open a huge loophole in CERCLA's coverage. It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof. *See, e.g.,* Senate Report, *supra,* at 16, *reprinted in* 1 *CERCLA Legislative History, supra,* at 323. We will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise. *See Capitano v. Secretary of Health and Human Services,* 732 F.2d 1066, 1076 (2d Cir.1984); *Bartok v. Boosey & Hawkes, Inc.,* 523 F.2d 941, 947 (2d Cir.1975).

Finally, we need not address whether Shore is also subject to liability under section 9607(a)(2) because some 90,000 gallons of waste were disposed of, apparently by unauthorized tenants, after Shore took title on October 13, 1983. Nor need we decide whether hazardous substances have been "disposed of" after Shore employees entered the property in January, 1984.

2. *Release or Threat of Release.* We reject Shore's repeated claims that it has put in dispute whether there has been a release or threat of release at the Shore Road site. The State has established that it was responding to "a release, or a threatened release" when it incurred its response costs. We hold that the leaking tanks and pipelines, the continuing leaching and seepage from the earlier spills, and the leaking drums all constitute "releases." 42 U.S.C. § 9601(22). Moreover, the corroding and deteriorating tanks, Shore's lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to a threat of release.

In addition, Shore's suggestion that CERCLA does not impose liability for threatened releases is simply frivolous. Section 9607(a)(4)(A) imposes liability for "all costs of removal or remedial action." The definitions of "removal" and "remedial" explicitly refer to actions "taken in the event of the threat of release of hazardous substances." *See supra* notes 7, 8; *see also,* Senate Report, *supra,* at 54, *reprinted in* 1 *CERCLA Legislative History, supra,* at 361.

3. *The NPL and Consistency with the NCP.* Shore also argues that, because the Shore Road site is not on the NPL, the State's action is inconsistent with the NCP and thus Shore cannot be found liable under section 9607(a). This argument is not frivolous. Section 9607(a)(4)(A) states that polluters are liable for response costs "not inconsistent with the national contingency plan." And section 9605, which directs EPA to outline the NCP, includes a provision that requires EPA to publish the NPL. Nevertheless, we hold ***1046** that inclusion on the NPL is not a requirement for the State to recover its response costs. [20]

The State claims that, while NPL listing may be a requirement for the use of Superfund money, it is not a requisite to liability under section 9607. *See New York v. General Electric Co.,* 592 F.Supp. 291, 303–04 (N.D.N.Y.1984). The State relies on the reasoning of several district courts that have held that liability under section 9607 is independent of the scope of section 9611, which governs the expenditure of Superfund monies, and by extension, section 9604, which governs federal cleanup efforts. *See, e.g., id.; United States v. Northeastern Pharmaceutical & Chemical Co.,* 579 F.Supp. 823, 850–51 (W.D.Mo.1984) (*"NEPACCO"*); *United States v. Wade,* 577 F.Supp. 1326, 1334–36 (E.D.Pa.1983). These courts have reasoned that CERCLA authorizes a bifurcated approach to the problem of hazardous waste cleanup, by distinguishing between the scope of direct federal action with Superfund resources and the liability of polluters under section 9607. While implicitly accepting that Superfund monies can be spent only on sites included on the NPL, they conclude that this limitation does not apply to section 9607. And it is true that the relevant limitation on Superfund spending is that it be "consistent with" the NCP, 42 U.S.C. § 9604(a), while under section 9607(a)(4)(A), liability is limited to response costs "not inconsistent with" the NCP. This analysis, however, is not so compelling as might be; the distinction between section 9604 and section 9607 blurs for two reasons. First, as we noted above, Congress envisioned section 9607 as a means of reimbursement of monies spent by government on cleanup pursuant to section 9604. The money that the federal government presumably would be spending is Superfund money. That is to say, Congress may

have seen section 9607 as equal in scope to sections 9604 and 9611. Second, it is difficult to accept the State's argument that section 9607's statement "[n]otwithstanding any other provision or rule of law" supports the distinction. Shore's argument is not based on implying limitations on the scope of section 9604 into section 9607 but on an interpretation of "not inconsistent with" the NCP under section 9607 itself.

Still, we reject Shore's argument. Instead of distinguishing between the scope of section 9607 and the scope of section 9604, we hold that NPL listing is not a general requirement under the NCP. We see the NPL as a limitation on remedial, or long-term, actions—as opposed to removal, or short-term, actions—particularly federally funded remedial actions. The provisions requiring the establishment of NPL criteria and listing appear to limit their own application to remedial actions. Section 9605(8)(A) requires EPA to include in the NCP "criteria for determining priorities among releases or threatened releases ... for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." And section 9605(8)(B), which requires EPA to draw up the NPL, refers to "priorities for remedial action." *Accord* 126 Cong.Rec. 30,933 (statement of Sen. Randolph), *reprinted in* 1 *CERCLA Legislative History, supra,* at 689; 40 C.F.R. § 300.68(a) (1984). And section 9604, which authorizes and governs federal response actions, reveals the special role of the NPL for federally sponsored remedial actions. Section 9604(c)(3) states that federal remedial actions can be taken only if "the State in which the release occurs first enters into a contract or cooperative agreement" ***1047** with the federal government, thus setting up a joint federal-state cost-sharing and cleanup effort. At the same time, section 9604(d)(1) states that such joint efforts must be taken "in accordance with criteria and priorities established pursuant to section 9605(8)"—the NPL provision. If the NPL criteria and listing were a general requirement for action "consistent with" the NCP, this language would be surplusage. *See supra* text accompanying note 18.

CERCLA's legislative history also supports our conclusion. Congress did not intend listing on the NPL to be a requisite to all response actions. Neither the earlier House nor Senate version included the NPL in the NCP, *see* S.1480, 96th Cong., 2d Sess. §§ 3(c)(5), 6(a)(2)(B), 126 Cong.Rec. 30,908, 30,913, *reprinted in* 1 *CERCLA Legislative History, supra,* at 482–84, 529–30; H.R.7020, 96th Cong., 2d Sess. §§ 3032(b), 3042, 126 Cong.Rec. 26,775, 26,777, *reprinted in* 2 *CERCLA Legislative History, supra,* at 404, 420–23, although the Senate version limited joint federal-state responses to sites on the NPL, *see* S.1480, 96th Cong., 2d Sess. § 6(a)(2)(B), 126 Cong.Rec. 30,913, *reprinted in* 1 *CERCLA Legislative History, supra,* at 529–30; *see also* Senate Report, *supra,* at 60 ("To receive reimbursement from the Fund, [joint federal-state] response actions may be undertaken only at facilities or sites which are in accordance with the national priority list...."), *reprinted in* 1 *CERCLA Legislative History, supra,* at 367. It is also instructive to note that the Senate Report described the NPL as serving "primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant *remedial actions.*" *Id.* (emphasis added). In reviewing the changes made by the compromise, no one mentioned that NPL listing would be a requirement for removal action or even a general requirement under the NCP.

Moreover, limiting the scope of NPL listing as a requirement for response action is consistent with the purpose of CERCLA. The NPL is a relatively short list when compared with the huge number of hazardous waste facilities Congress sought to clean up. *See* 126 Cong.Rec. 30,931 (statement of Sen. Randolph), *reprinted in* 1 *CERCLA Legislative History, supra,* at 683–84; *id.* at 31,964 (statement of Rep. Florio), *reprinted in* 1 *CERCLA Legislative History, supra,* at 776. And it makes sense for the federal government to limit only those long-term—remedial—efforts that are federally funded. We hold that Congress intended that, while federally funded remedial efforts be focused solely on those sites on the NPL, states have more flexibility when acting on their own. *See Pinole Point Properties, Inc. v. Bethlehem Steel Corp.,* 596 F.Supp. 283, 290 (N.D.Cal.1984).

Finally, we reject Shore's argument that the State's response costs are not recoverable because the State has failed to comply with the NCP by not obtaining EPA authorization, nor making a firm commitment to provide further funding for remedial implementation nor submitting an estimate of costs. *See* 40 C.F.R. § 300.62 (1984) (describing the states' role in joint federal-state response actions). EPA designed the regulatory scheme—the NCP—focusing on federal and joint federal-state efforts. *See, e.g., id.* § 300.6 (defining "lead agency"). Shore apparently is arguing that EPA has ruled that the State cannot act on its own and seek liability under CERCLA. We disagree. Congress envisioned states' using their own resources for cleanup and recovering those costs from polluters under section 9607(a)(4)(A). We read section 9607(a)(4)(A)'s requirement of consistency with the NCP to

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mean that states cannot recover costs inconsistent with the response methods ***1048** outlined in the NCP.[21] *Cf.* 126 Cong.Rec. 30,933 (statement of Sen. Randolph) (suggesting that the primary purpose of the NCP was "guidance on cost-effectiveness"), *reprinted in* 1 *CERCLA Legislative History, supra,* at 689. Moreover, the NCP itself recognizes a role for states in compelling "potentially responsible parties" to undertake response actions independent of EPA and without seeking reimbursement from Superfund. 40 C.F.R. § 300.24(c);[22] *accord* 47 Fed.Reg. 31,195 (1982). Thus, the NCP's requirements concerning collaboration in a joint federal-state cleanup effort are inapplicable where the State is acting on its own. *Cf. Pinole Point,* 596 F.Supp. at 289–90 (holding that supervision by EPA is not a requisite for an action under section 9607(a)(4)(B)). *But cf. Artesian Water Co. v. New Castle County,* No. 83–854–WKS, slip op. at 19–30 (D.Del. Feb. 14, 1985) (distinguishing between remedial and removal costs and holding that the NCP validly requires governmental approval of remedial actions by private parties seeking recovery under section 9607(a)(4)(B)); *Wickland Oil Terminals v. Asarco, Inc.,* 590 F.Supp. 72, 77–78 (N.D.Cal.1984) (holding that response costs by private party under section 9607(a)(4)(B) cannot be recovered absent supervision by EPA or by a state agency that has entered into a cooperative agreement under section 9604(d), pursuant to the NCP as promulgated by EPA, without distinguishing between remedial and removal actions); *Bulk Distribution Centers, Inc. v. Monsanto Co.,* 589 F.Supp. 1437, 1446–48 (S.D.Fla.1984) (same). Indeed, the kind of action taken here is precisely that envisioned by the regulations. *See supra* note 22.

4. *Affirmative defense.* Shore also claims that it can assert an affirmative defense under CERCLA, which provides a limited exception to liability for a release or threat of release caused solely by

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3). We disagree. Shore argues that it had nothing to do with the transportation of the hazardous substances and that it has exercised due care since taking control of the site. Who the "third part(ies)" Shore claims were responsible is difficult to fathom. It is doubtful that a prior owner could be such, especially the prior owner here, since the acts or omissions referred to in the statute are doubtless those occurring during the ownership or operation of the defendant.[23] Similarly, many of the acts and omissions of the prior tenants/operators fall outside the scope of section 9607(b)(3), because they occurred before Shore owned the ***1049** property. In addition, we find that Shore cannot rely on the affirmative defense even with respect to the tenants' conduct during the period after Shore closed on the property and when Shore evicted the tenants. Shore was aware of the nature of the tenants' activities before the closing and could readily have foreseen that they would continue to dump hazardous waste at the site. In light of this knowledge, we cannot say that the releases and threats of release resulting of these activities were "caused solely" by the tenants or that Shore "took precautions against" these "foreseeable acts or omissions."

B. *Injunctive Relief Under CERCLA*

Having held Shore liable under CERCLA for the State's response costs, we nevertheless are required to hold that injunctive relief under CERCLA is not available to the State. *See supra* note 1. Essentially, the State urges us to interpret the right of action under section 9607 broadly, claiming that "limiting district court relief [under section 9607] to reimbursement could have a drastic effect upon the implementation of Congress's desire that waste sites be cleaned." Conceding that section 9607 does not explicitly provide for injunctive relief, the State suggests that the court

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has the inherent power to grant such equitable relief, citing *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 591, 88 L.Ed. 754 (1944).

The statutory scheme, however, shows that Congress did not intend to authorize such relief. Section 9606 expressly authorizes EPA to seek injunctive relief to abate "an actual or threatened release of a hazardous substance from a facility." Implying the authority to seek injunctions under section 9607 would make the express injunctive authority granted in section 9606 surplusage. *See supra* text accompanying note 18; *see also Minnesota v. Northern Securities Co.,* 194 U.S. 48, 71, 24 S.Ct. 598, 604, 48 L.Ed. 870 (1904) (denying private persons a right to injunctive relief under the Sherman Act because it expressly authorized only the federal government to seek relief); *cf. Paine Lumber Co. v. Neal,* 244 U.S. 459, 471, 37 S.Ct. 718, 719, 61 L.Ed. 1256 (1917) (holding that section 4 of the Clayton Act provides a right of action for damages but not injunctions); *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482, 489 n. 20 (2d Cir.1984) (stating that no private right to an injunction may be implied from the government's right), *cert. granted,* 469 U.S. 1157, 105 S.Ct. 901, 83 L.Ed.2d 917 (1985). In addition, the scope of injunctive relief under section 9607 would conflict with the express scope of section 9606. The standard for seeking abatement under section 9606 is more narrow than the standard of liability under section 9607. Section 9606 authorizes injunctive relief only where EPA "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment." Section 9607 contains no such limitation. Finally, we recognize that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979).

If there were any doubt about the statutory language, the legislative history would compel us to reject the State's argument. Congress specifically declined to provide states with a right to injunctive relief. The early Senate version empowered either EPA "or the State" to seek injunctive relief, *see* S.1480, 96th Cong., 2d Sess. § 3(d), 126 Cong.Rec. 30,908, *reprinted in* 1 *CERCLA Legislative History, supra,* at 484–85, yet the compromise limited that power to EPA alone, *see* 42 U.S.C. § 9606(a). Moreover, the House version, which authorized EPA to order cleanup, *see* H.R.7020, 96th Cong., 2d Sess. § 3041(a), 126 Cong.Rec. 26,775–76, *reprinted in* 2 *CERCLA Legislative History, supra,* at 406–12—rather than to seek an injunction in federal court—did not give states that authority, even though the National Association of Attorneys General urged Congress to extend the same powers to the states as ***1050** it gave to the federal government. *See* 126 Cong.Rec. 26,761–62, *reprinted in* 2 *CERCLA Legislative History, supra,* at 307.

C. *Common Law of Public Nuisance*

As a preliminary matter, we cannot accept Shore's suggestion that the district court's reliance on New York public nuisance law as an alternative basis for the injunction rested on an improper exercise of pendent jurisdiction. The district court had the power to hear the state law claims. The public nuisance claim for abatement and the CERCLA claims clearly "derive from a common nucleus of operative fact" and the State "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138; *accord Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10,* 605 F.2d 1228, 1247 (2d Cir.1979), *cert. denied,* 446 U.S. 919, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1980). And we cannot say that the district court abused its discretion in reaching the public nuisance claim. The state law issues do not predominate—particularly if the State's argument that CERCLA grants injunctive relief is seen as we see it to be colorable[24]—there is no likelihood of confusion; and "interests of judicial economy clearly weighed in favor of trying them together." *Id. See generally* 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3567.1 (1984). Moreover, it is irrelevant that the scope of relief under state law differs from that under federal law. *See Gibbs,* 383 U.S. at 728, 86 S.Ct. at 1140; *Rosario,* 605 F.2d at 1251.

In challenging the decision below, Shore fails to distinguish between a public nuisance and a private nuisance. The former "is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency" and "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to ... endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Industries, Inc. v. Consolidated Edison Co.,* 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977) (citations omitted); *see also State v. Schenectady Chemicals, Inc.,* 117 Misc.2d 960, 965–67, 459 N.Y.S.2d 971, 976–77 (Sup.Ct.1983) (upholding State cause of action to compel cleanup of a chemical waste site under public nuisance law), *modified,* 103 A.D.2d 33, 479 N.Y.S.2d

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1010 (1984). The latter, however, "threatens one person or a relatively few ..., an essential feature being an interference with the use or enjoyment of land .... It is actionable by the individual person or persons whose rights have been disturbed." *Copart Industries,* 41 N.Y.2d at 568, 362 N.E.2d at 971, 394 N.Y.S.2d at 172. Public and private nuisance bear little relationship to each other. Although some rules apply to both, other rules apply to one but not the other.

Under New York law, Shore, as a landowner, is subject to liability for either a public or private nuisance on its property upon learning of the nuisance and having a reasonable opportunity to abate it.[25] *See Pharm v. Lituchy,* 283 N.Y. 130, 132, 27 N.E.2d 811, 812 (1940); *Conhocton Stone Road v. Buffalo, New York & Erie* ***1051** *Railroad Co.,* 51 N.Y. 573 (1873); *New York Telephone Co. v. Mobil Oil Corp.,* 99 A.D.2d 185, 188–89, 473 N.Y.S.2d 172, 174 (1984). As noted in the *Restatement (Second) of Torts* § 839 comment d (1979) [hereinafter cited as *Restatement* ]:

> [L]iability [of a possessor of land] is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee ... of land upon which a harmful physical condition exists may be liable under the rule here stated for failing to abate it after he takes possession, even though it was created by his vendor, lessor or other person and even though he had no part in its creation.

It is immaterial therefore that other parties placed the chemicals on this site; Shore purchased it with knowledge of its condition—indeed of the approximate cost of cleaning it up—and with an opportunity to clean up the site. LeoGrande knew that the hazardous waste was present without the consent of the State or its DEC, but failed to take reasonable steps to abate the condition. Moreover, Shore is liable for maintenance of a *public* nuisance irrespective of negligence or fault. *See McFarlane v. City of Niagara Falls,* 247 N.Y. 340, 343, 160 N.E. 391, 391–92 (1928); *Schenectady Chemicals,* 117 Misc.2d at 965, 970, 459 N.Y.S.2d at 976, 979. Nor is there any requirement that the State prove actual, as opposed to threatened, harm from the nuisance in order to obtain abatement. *See Southern Leasing Co. v. Ludwig,* 217 N.Y. 100, 104, 111 N.E. 470, 472 (1916); *City of Rochester v. Gutberlett,* 211 N.Y. 309, 316, 105 N.E. 548, 550 (1914); *Wall Street Transcript Corp. v. 343 East 43rd Street Holding Corp.,* 81 A.D.2d 783, 439 N.Y.S.2d 23 (1981); *Buchanan v. Cardozo,* 24 A.D.2d 620, 621, 262 N.Y.S.2d 247, 249 (1965); W. Prosser, *Handbook of the Law of Torts* § 90, at 603 (1971). Finally, the State has standing to bring suit to abate such a nuisance "in its role as guardian of the environment." *Schenectady Chemicals,* 117 Misc.2d at 968, 459 N.Y.S.2d at 978; *accord State v. Monarch Chemicals, Inc.,* 90 A.D.2d 907, 907, 456 N.Y.S.2d 867, 869 (1982).

We also reject Shore's argument that its maintenance of the Shore Road site does not constitute a public nuisance. We have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law, *see Schenectady Chemicals,* 103 A.D.2d at 37, 479 N.Y.S.2d at 1013; *Monarch Chemicals,* 90 A.D.2d at 907, 456 N.Y.S.2d at 868–69, particularly in light of Title 13 of Article 27 of the New York Environmental Conservation Law, *see Restatement* § 821B comment c (statutes can indicate that conduct is an "unreasonable interference with a public right"). Shore challenges the existence of the releases or threatened releases claimed by the State. We have found, however, that several crucial facts are undisputed: the tanks have leaked and are corroding; the groundwater has been contaminated; and Shore is unwilling and unable to transform the site into a stable, licensed storage facility. It makes no difference that Shore has begun a cleanup. We simply hold that under New York law it is required to finish that cleanup.

The district court could have also found that Shore is maintaining a public nuisance under two alternative theories. Shore's continuing violations of N.Y.Envtl.Conserv.Law § 27–0913(1) (not having a permit to store or dispose of hazardous waste), and of *id.* § 27–0914(1) (possessing hazardous waste without authorization), if not of *id.* § 27–0914(2) (disposing of hazardous waste without authorization), constitute a nuisance per se. *See Delaney v. Philhern Realty Holding Corp.,* 280 N.Y. 461, 465, 21 N.E.2d 507, 509 (1939); *Driscoll v. New York City Transit Authority,* 53 A.D.2d 391, 395, 385 N.Y.S.2d 540, 543 (1976). And while we recognize that determining whether an activity is abnormally ***1052** dangerous depends on the circumstances, a review of the undisputed facts under the guidelines stated in *Doundoulakis v. Town of Hempstead,* 42 N.Y.2d 440, 448, 368 N.E.2d 24, 27, 398 N.Y.S.2d 401, 404 (1977), convinces us that a New York court would find as a matter of law that Shore's maintenance of the site —for example, allowing corroding tanks to hold hundreds of thousands of gallons of hazardous waste—constitutes

abnormally dangerous activity and thus constitutes a public nuisance. *See Schenectady Chemicals,* 103 A.D.2d at 37, 479 N.Y.S.2d at 1013; *see also State v. Ventron Corp.,* 94 N.J. 473, 492, 468 A.2d 150, 160 (1983) (holding that "simply dumping [a hazardous substance] onto land or into water" is an abnormally dangerous activity). [26]

D. *LeoGrande's Personal Liability*

We hold LeoGrande liable as an "operator" under CERCLA, 42 U.S.C. § 9607, for the State's response costs. Under CERCLA "owner or operator" is defined to mean "any person owning or operating" an onshore facility, *id.* § 9601(20)(A), and "person" includes individuals as well as corporations, *id.* § 9601(21). More important, the definition of "owner or operator" excludes "a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the facility." *Id.* § 9601(20)(A). The use of this exception implies that an owning stockholder who manages the corporation, such as LeoGrande, is liable under CERCLA as an "owner or operator." That conclusion is consistent with that of other courts that have addressed the issue. *See, e.g., United States v. Carolawn Co.,* 14 Envtl.L.Rep. (Envtl.L.Inst.) 20,699, 20,700 (D.S.C. June 15, 1984); *NEPACCO,* 579 F.Supp. at 847–48. In any event, LeoGrande is in charge of the operation of the facility in question, and as such is an "operator" within the meaning of CERCLA.

Turning to liability for abatement, it is debatable whether a New York court would hold LeoGrande personally liable by piercing the corporate veil. New York courts disregard the corporate form "reluctantly," *see Gartner v. Snyder,* 607 F.2d 582, 586 (2d Cir.1979), and while the State claims that LeoGrande dominated Shore and that Shore was undercapitalized, these allegations are probably insufficiently particularized. *See Walkovszky v. Carlton,* 18 N.Y.2d 414, 420, 223 N.E.2d 6, 10, 276 N.Y.S.2d 585, 590 (1966). Both the New York Court of Appeals and this court have been quite insistent that the corporate form will not be disregarded unless the opposing party shows that the corporate form is being used fraudulently or as a means of carrying on business for personal rather than corporate ends. *See Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 903 (2d Cir.1981); *Walkovszky,* 18 N.Y.2d at 418, 420, 223 N.E.2d at 8, 10, 276 N.Y.S.2d at 588–90. The State's claim has not at this stage risen to that level.

Nevertheless, we hold LeoGrande liable for the abatement of the nuisance without piercing the corporate veil. New York courts have held that a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation. *See State v. Ole Olsen, Ltd.,* 35 N.Y.2d 979, 324 N.E.2d 886, 365 N.Y.S.2d 528 (1975); *LaLumia v. Schwartz,* 23 A.D.2d 668, 669, 257 N.Y.S.2d 348, 350 (1965). We need not address whether he is liable merely as an officer of Shore, for it is beyond dispute that LeoGrande specifically directs, sanctions, and actively participates in Shore's maintenance of the nuisance. *See also Escude Cruz v. Ortho Pharmaceutical Corp.,* 619 F.2d 902, 907 (1st Cir.1980) (citing federal cases pronouncing this rule of liability for corporate officers). This general rule is particularly appropriate in the public nuisance context ***1053** where " 'everyone who ... participates in the ... maintenance ... of a nuisance are liable jointly and severally.' " *Schenectady Chemicals,* 117 Misc.2d at 966, 459 N.Y.S.2d at 976 (quoting 17 Carmody-Wait 2d *Actions for Waste, Nuisance and Trespass* § 107:59, at 334 (1979); *accord Caso v. District Council 37, American Federation of State, County & Municipal Employees,* 43 A.D.2d 159, 163, 350 N.Y.S.2d 173, 178 (1973).

As a final note however, the district court should take into account one additional factor in supervising its injunction, a principle limiting perhaps to some extent, LeoGrande's liability for the future costs of abatement. The injunctive remedy is an equitable one; that abatement expenses may become prohibitive and disproportionate therefore may be taken into consideration. *See Restatement, supra,* § 839 comment f; *id.* § 936.

Appellants' application for a stay pending appeal which we have held in abeyance has been dealt with in connection with their appeal, Docket No. 85–7241, from an order of contempt.

Judgment affirmed.

**All Citations**

759 F.2d 1032, 22 ERC 1625, 15 Envtl. L. Rep. 20,358

## Footnotes

1 Because the State has sought to uphold the injunction under CERCLA, we do discuss the issue at pages 3093–95.

2 Although CERCLA expressly delegates authority to the President, *see, e.g.,* 42 U.S.C. § 9604(a), the President has transferred most of that authority to EPA, *see* Exec.Order No. 12,316, 46 Fed.Reg. 42,237 (1981); Exec.Order No. 12,286, 46 Fed.Reg. 9901 (1981). Hereinafter we use EPA to refer to any kind of executive authority under CERCLA.

3 When these drums concededly were "bursting and leaking," Shore employees asked the State to enter the site, inspect it, and take steps to mitigate the "life-threatening crisis situation." Pursuant to stipulation and order entered on June 15, 1984, Shore began removing the drums. Some may still remain at the site.

4 Defendants now assert that there are triable issues of fact whether there was groundwater contamination, contamination in the harbor water near the bulkhead, or public toxicological risk associated with the chemicals in the soil or at the bulkhead. But Shore's own testing by WTM in August, 1984, shows significant concentrations of benzene, toluene, and xylene in the groundwater. And WTM's conclusion that there was no threat to drinking supplies was based on the observation that the groundwater flowed toward the harbor. Even assuming WTM's claim to be true, there was nevertheless groundwater contamination. Such a release poses a potential threat, it may be supposed, to local Long Island aquifers, a threat that defendants themselves brought to the attention of the bankruptcy court in seeking to evict the previous tenants. Moreover, defendants concede in their statement filed pursuant to Local Rule 3(g) that chemicals were leaching from the bulkhead into the harbor, at least in "trace quantities."

5 This testimony about leakage together with the unchallenged corrosion of several tanks certainly permitted the district court to disregard the conclusion of defendant's expert based primarily on 1980 ultrasonic tests that the tanks were safe. In addition, as noted above, WTM's report to defendants before purchase had pointed out, in July of 1983: "The tanks in the tank area on the hill demonstrated the greatest lack of maintenance. Upon inspection corrosion and lack of paint [were] obvious on both tanks that were in service and on those that were out of service."

6 In defining the term "hazardous substance" in 42 U.S.C. § 9601(14), CERCLA incorporates by reference the substances designated as hazardous or toxic under the Clean Air Act, 42 U.S.C. § 7412, the Clean Water Act, 33 U.S.C. §§ 1317(a), 1321(b)(2)(A) (1982), the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6921, the Toxic Substances Control Act, 15 U.S.C. § 2606 (1982), while authorizing EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment," 42 U.S.C. § 9602(a).

7 42 U.S.C. § 9601(24) provides:

> "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or

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secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6291 *et seq.*], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials.

8 42 U.S.C. § 9601(23) provides:

"remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C. 5121 *et seq.*].

9 CERCLA also establishes a Post-closure Liability Trust Fund, 42 U.S.C. § 9641, which assumes the liability of owners or operators of facilities that have received permits under RCRA, *id.* § 9607(k)(1).

10 The funds for Superfund come from taxes collected over a five-year period on petroleum products and certain inorganic chemicals, as well as from general federal revenues. *See* 42 U.S.C. § 9631.

11 New York State has established a mini-Superfund. Title 13 of the Environmental Conservation Law, N.Y.Envtl.Conserv.Law §§ 27–1301 to 27–1321 (McKinney 1984), represents the State's effort to fund and implement a program for cleaning up inactive hazardous waste disposal sites. Under Title 13, a state superfund management board administers the state fund, created by N.Y.State Fin.Law § 97–b (McKinney Supp.1984), known as the hazardous waste remedial fund. The state fund, paid for by assessments on a hazardous waste generators pursuant to N.Y.Envtl.Conserv.Law § 27–0923, is available for cleanup and remedial programs pursuant to *id.* § 27–1313, but may not reimburse for costs covered by CERCLA, *see* Weinberg, *Practice Commentary,* following N.Y.Envtl.Conserv.Law § 27–1301. Moreover, state law expressly provides that no actions taken pursuant to it "shall duplicate federal actions for funding removal costs, damages or claims with respect to the release of hazardous substances within the state" and that "[n]o payments to the hazardous waste remedial fund ... shall be used for compensation of claims, costs of response or damage which may be funded under federal law." 1982 N.Y.Laws ch. 857, § 19. Thus it would appear that the New York law is not preempted by CERCLA.

The State has recently enacted two other statutes dealing with hazardous wastes. N.Y.Envtl.Conserv.Law §§ 27–0900 to 27–0923 regulates the management of hazardous waste from its generation, storage, transportation, and treatment, to its disposal through a system of permits and manifests, consonant with RCRA, 42 U.S.C. §§ 6901–6987. And N.Y.Envtl.Conserv.Law §§ 27–1101 to 27–1107 governs the siting of future industrial waste facilities.

12 While the Senate Report concerns a pre-compromise version of the legislation, we nevertheless find it a useful guide to congressional intent, particularly about those matters receiving little or no change as part of the compromise.

13 Both the earlier House and Senate versions contained language providing for strict, joint and several liability. *See* S.1480, 96th Cong., 2d Sess. § 4(a), 126 Cong.Rec. 30,908, *reprinted in* 1 *CERCLA Legislative History, supra,* at 486; H.R.7020, 96th Cong., 2d Sess. § 3071(a)(1)(D), 126 Cong.Rec. 26,779, *reprinted in* 2 *CERCLA Legislative History, supra,* at 438–39. As part of the compromise, the sponsors removed this language, inserted the reference to liability under the Clean Water Act and indicated that the joint and several liability question should be addressed by the courts and interpreted in light of the common law. *See* 126 Cong.Rec. 30,932 (statement of Sen. Randolph), *reprinted in* 1 *CERCLA Legislative History, supra,* at 685.

Moreover, while we need not address the question, commentators have noted that joint and several liability is consistent with the contribution language of 42 U.S.C. § 9607(e)(2). *See* F. Anderson, D. Mandelker, & A. Tarlock, *supra,* at 576.

14 We pause to note that, while the district court order granting the State response costs under CERCLA is neither a final order nor an appealable interlocutory order, it is appropriate to review the order based on pendent appellate jurisdiction. The response cost issues surely "are related to the primary appealable" injunction issues, *Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc.,* 754 F.2d 457, 466 (2d Cir.1985), and "review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order," *General Motors Corp. v. City of New York,* 501 F.2d 639, 648 (2d Cir.1974).
In light of our analysis, we do not address the State's argument that its costs are recoverable as "damages for injury to ... natural resources," under 42 U.S.C. § 9607(a)(4)(C).
In addition, while the State does not make the argument, we note that New York law appears to provide the State with restitution costs in a public nuisance action. *See State v. Schenectady Chemicals Co.,* 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1014 (1984). This remedy may closely resemble response cost liability under CERCLA.

15 CERCLA defines the term "facility" broadly to include any property at which hazardous substances have come to be located. *See* 42 U.S.C. § 9601(9).

16 The phrase "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance" is incorporated in and seems to flow as if it were a part only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)–(3) inclusive. When the Senate's compromise bill was printed in the Congressional Record at the start of the debate, 126 Cong.Rec. 30,916–30, the predecessor of § 9607, *id.* at 30,921, followed the printing format of the Senate version as reported at *id.* at 30,908; *see also* 1 *CERCLA Legislative History, supra,* at 486; in each case subparagraph (4) ended with the words "selected by such person," and the commencing clause "from which there is a release" was printed as a new line, supporting the reading we give it above. The latter clause evidently slipped into subparagraph (4), as sometimes happens in the waning days of a session, when the entire Senate compromise was reprinted prior to the final vote. 126 Cong.Rec. 30,961; *see also* 1 *CERCLA Legislative History, supra,* at 602–03. The change thus appears to have been simply a printer's error.

17 We pause to note the distinction between whether § 9607(a) imposes strict liability and whether it requires a showing of causation. That is to say, finding that § 9607(a) imposes strict liability does not rebut Shore's causation argument. Traditional tort law has often imposed strict liability while recognizing a causation defense. *See* W. Prosser, *Handbook of the Law of Torts* § 79, at 517 (1971); *see also supra* note 13 and accompanying text (discussing strict liability).

18 The phrase "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance" also limits the scope of § 9607(a)(1). *See supra* note 16. It is, however, clumsy grammatically, and ambiguous since the absence of a comma after the words "threatened release" and the use of the words "which causes," as opposed to "that causes," leave it uncertain whether there is liability from a release without the incurrence of "response costs." Since response costs were incurred here, the ambiguity is academic for our purposes.

19 Indeed, an opponent of the bill, Representative Broyhill, argued that one of the defects of the bill was that the owner of a facility could be held "strictly liable ... entirely on the basis of having been found to be an owner .... There is no language requiring any causal conviction [*sic:* connection] with a release of a hazardous substance." 126 Cong.Rec. 31,969 (1980), *reprinted in* 1 *CERCLA Legislative History, supra,* at 786. There is, to be sure, a contrary statement from Senator Helms: "The Government can sue a defendant under the bill only for those costs and damages that it can prove were caused by the defendant's conduct." *Id.* at 30,972, *reprinted in* 1 *CERCLA Legislative History, supra,* at 760. Senator Helms, who opposed the legislation, appears to have been fighting a rear-guard action by that remark, or, more likely, he may have been referring to the causation defenses in § 9607(b).

20 Shore also argues that the NPL's exclusion of the Shore Road site deprived the district court of "subject matter jurisdiction" under § 9607. As a consequence, according to Shore, the federal issues disappear as does the basis for addressing the pendent public nuisance issues, under *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), and progeny. In light of our holding, we do not address whether § 9607 states jurisdictional requirements, *cf.* 42 U.S.C. § 9613(b) (providing for exclusive jurisdiction over all controversies arising out of this chapter in the district courts), or whether pendent jurisdiction would lie even if inclusion on the NPL were a requirement for recovery under § 9607(a).

21 Shore does not argue that the State's costs are "inconsistent with" the cost-effective response methods outlined in the NCP. In any event, it appears that the State's costs in fact are consistent with those response methods. *See* 40 C.F.R. § 300.65(b) (immediate removal actions); *id.* § 300.66(c) (inspections and testing for removal actions); *id.* § 300.68(f) (sampling and monitoring for remedial actions); *id.* § 300.71 (worker protection and compliance with "[safety] requirements deemed necessary by the lead agency").

22 Section 300.24(c) provides: "States are encouraged to use State authorities to compel potentially responsible parties to undertake response actions, or to themselves undertake response actions which are not eligible for Federal funding."

23 While we need not reach the issue, Shore appears to have a contractual relationship with the previous owners that also blocks the defense. The purchase agreement includes a provision by which Shore assumed at least some of the environmental liability of the previous owners.

24 We need not decide whether in the future a state's claim for response costs under CERCLA will be sufficient to support the exercise of pendent jurisdiction to seek injunctive relief. *See generally People v. 11 Cornwell Co.,* 695 F.2d 34, 40 (2d Cir.1982), *vacated in part on other grounds and remanded,* 718 F.2d 22 (2d Cir.1983) (en banc).

25 We cannot agree with Shore's claim that the trend toward limiting the liability of successor landowners for the cost of abating a nuisance supports reversal. *See Apportionment of Damages and Landowner Liability in Hazardous Waste Cases,* 12 Envtl.L.Rep. (Envtl.L.Inst.) 30,031, 30,034 (1982). The trend toward limited liability clearly does not extend to successor owners who knew about the condition of the land before purchasing it. *See id.* In any event, Shore provides no evidence that the New York courts have recognized or would recognize the "trend."

26 Neither of the parties cites any New York law concerning the permissible scope of an abatement order. Nevertheless, we presume that a New York court would order removal and cleanup here where the owner and operator concede that they do not intend to make the site into a safe facility.

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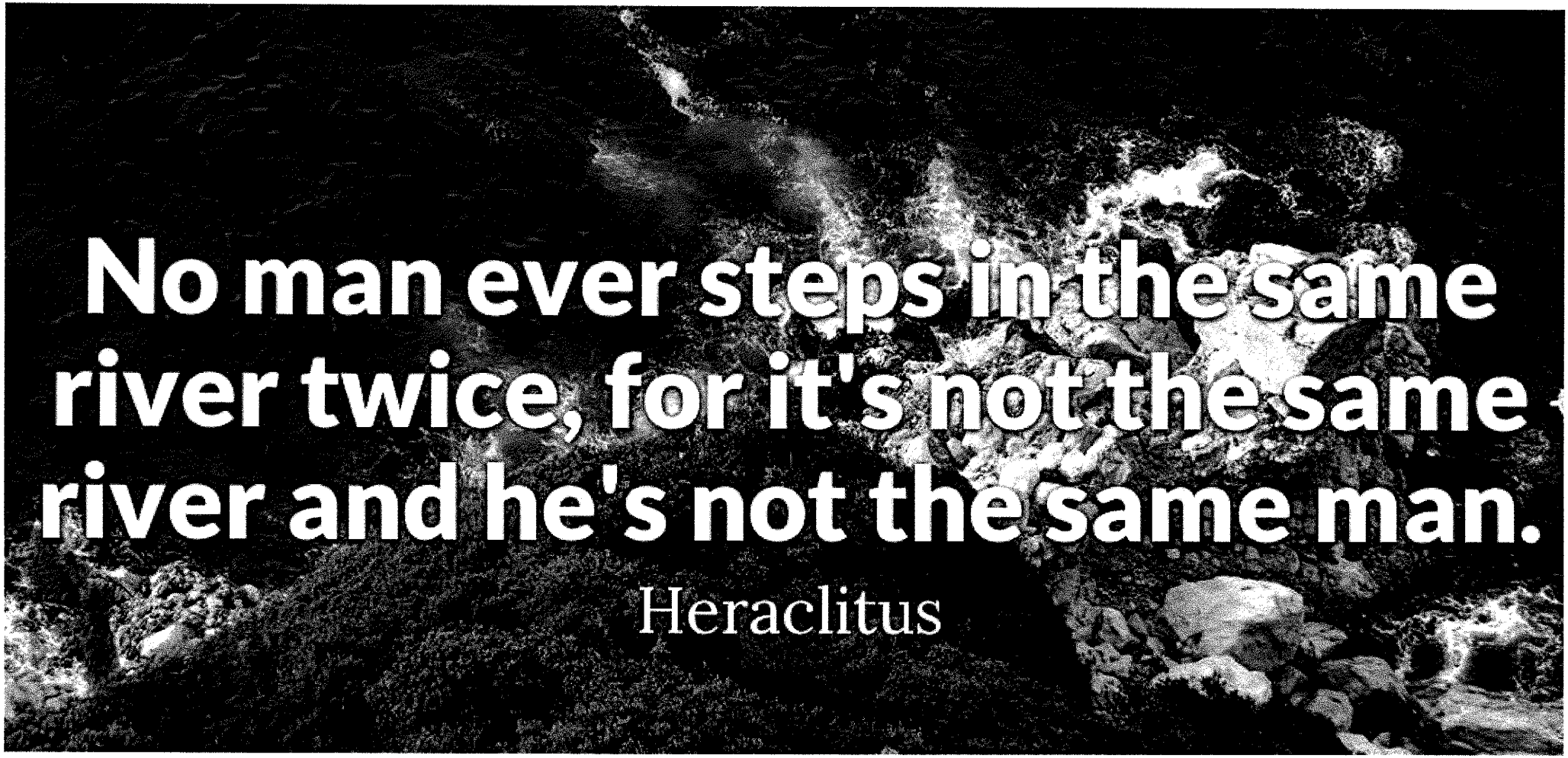
No man ever steps in the same river twice, for it's not the same river and he's not the same man.
Heraclitus

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