

COPY

SHORT FORM ORDER

INDEX No. 09-34713

CAL No. 13-01367OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-11-13

ADJ. DATE 4-23-14

Mot. Seq. # 004 - MotD
005 - MotD

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WHITE SANDS MOTEL HOLDING CORP.,

Plaintiff.

ESSEKS, HEFTER & ANGEL, LLP
Attorney for Plaintiff
108 East Main Street, P.O. Box 279
Riverhead, New York 11901

- against -

ANTHONY B. TOHILL, P.C.
Attorney for Defendant Trustees of the
Freeholders
12 First Street, P.O. Box 1330
Riverhead, New York 11901

TRUSTEES OF THE FREEHOLDERS AND
COMMONALTY OF THE TOWN OF EAST
HAMPTON AND THE TOWN OF EAST
HAMPTON.

Defendants.

JOHN C. JILNICKI, ESQ.
Attorney for Defendant Town of East Hampton
159 Pantigo Road
East Hampton, New York 11937

GOLDSTEIN, RIKON & RIKON, P.C.
Attorney for Defendant Town of East Hampton
80 Pine Street, 32nd Floor
New York, New York 10003

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Upon the following papers numbered 1 to 120 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 (004); 21 - 51 (005); Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 52 - 111; Replying Affidavits and supporting papers 112 - 114; 115 - 118; Other 119 - 120 (sur-reply); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (004) by defendant Trustees of the Freeholders and Commonalty of the Town of East Hampton and this motion (005) by defendant Town of East Hampton for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (004) by defendant Trustees of the Freeholders and Commonalty of the Town of East Hampton for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is determined herein; and it is further

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ORDERED that this motion (005) by defendant Town of East Hampton for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is determined herein.

Plaintiff commenced this action on September 2, 2009 to quiet title pursuant to RPAPL article 15, for permanent injunctions, and for a declaratory judgment concerning disputed beachfront land¹. Plaintiff's property consists of three parcels which include property along approximately 220 feet of the Atlantic Ocean beachfront at Napeague in the Town of East Hampton. Plaintiff operates a 20-unit motel on said property. The property is located between the westerly boundary of the Town of East Hampton and the westerly boundary of Hither Hills State Park. Plaintiff claims ownership interest in the subject property based on a deed dated March 15, 1882 (Benson deed) from the Trustees of the Freeholders and Commonalty of the Town of East Hampton (Trustees) to Arthur W. Benson conveying full fee title to approximately 1,000 acres which included the subject property. Said deed contained the following language:

And also except and reserved to the inhabitants of the Town of East Hampton the right to land fish boats and netts [sic] to spread the netts [sic] on the adjacent sands and care for the fish and material as has been customary heretofore on the South Shore of the Town lying Westerly of these conveyed premises.

Defendant Town of East Hampton (Town) enacted Local Law No. 21 on September 24, 1991 which was codified as Chapter 91 of the Town Code to regulate beach areas within the boundaries of the Town. Based on the definitions contained therein, plaintiff's property is a Trustee beach, owned and managed by the Trustees (*see* Town Code § 91-3). Chapter 91 authorizes the Town to issue beach vehicle permits to Town residents free of charge and to non-residents for a fee of \$275 (non-resident permits expire yearly on December 31), allowing the operation of vehicles on ocean beaches, including the subject property (*see* Town Code §§ 91-2, 91-5). It also contains regulations for vehicular beach use (*see* Town Code § 91-5). Notably, beach vehicles are required to maintain a distance of no less than 50 feet seaward of the beach grass line, if possible, and are prohibited from operating over or upon any dune, bluff or vegetation (*see* Town Code § 91-5 [C], [1], [2]).

Plaintiff claims that after the enactment of Chapter 91 of the Town Code, the subject beach area was accessed by vehicles and used by the public for recreational purposes in greater intensity. Plaintiff also claims that defendants Trustees and Town grant to beach vehicle permit holders rights to use the subject property to park and drive their vehicles and to congregate thereon during "summer season" daytime hours resulting often in more than 200 vehicles being parked at any one time by members of the public who then erect tents, picnic, cook food, let their dogs run free, and bathe in the ocean waters without any lifeguards. Plaintiff argues that the vehicular use of the beach area is dangerous as the vehicles often speed, placing plaintiff's guests and employees and other pedestrians in danger; the vehicles are often driven or parked on the beach grass in environmentally sensitive areas within and adjacent to the beach area thereby destabilizing the sand dunes that provide protection to plaintiff's property against upland flooding; and members of the public frequently light bonfires and set off fireworks creating the risk of, or resulting in, beach grass fires that endanger the upland

¹ This action was joined for trial with a related action entitled *The Seaview at Amagansett, Ltd. et al. v Trustees of the Freeholders and Commonalty of the Town of East Hampton and the Town of East Hampton* with Index number 34714-2009 by order of this Court (Tanenbaum, J.) dated December 7, 2011 in said related action.

property and houses including plaintiff's motel. Plaintiff also argues that such use constitutes a nuisance in the form of loud truck and car motor noise and trash and debris from members of the public and their animals polluting the beach, dunes, water and air, thereby substantially and unreasonably interfering with the quiet enjoyment of the motel and beaches. Plaintiff further argues that defendants, through their Town Code provisions and "Beach Driving Ordinances," have created a defacto parking lot and bathing beach on the subject property and are allowing activities unauthorized by the Benson deed.

By its first cause of action, plaintiff seeks a determination that it owns the subject beach area. The second cause of action alleges that the reservation in the Benson deed does not inure to the benefit of current Town inhabitants, has been terminated or is terminable by the fee owner, and the Trustees and Town have no right or authority pursuant to said reservation to issue beach vehicle permits or to grant anyone permission to use the subject property to drive and park their vehicles. By its third cause of action, plaintiff seeks a permanent injunction against the Trustees and Town enjoining them from issuing beach vehicle permits.

The fourth cause of action sounds in trespass and plaintiff seeks a permanent injunction against the Trustees and Town enjoining them and any persons acting under them, or pursuant to their authority, from entering into or interfering with plaintiffs' property. The fifth and sixth causes of action allege, respectively, that the Trustees and Town have created a private and public nuisance and plaintiff seeks a permanent injunction against the Trustees and Town to abate the nuisances and to restrain them from issuing beach vehicle permits. By its seventh and eighth causes of action, plaintiff seeks a declaration that Chapter 91 of the Town Code violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution by discriminating against plaintiff in favor of beachfront owners in other areas of the Town and vehicular beach users and bears no rational relationship to any legitimate interest of the Trustees and the Town. The ninth cause of action alleges that the Trustees have breached their fiduciary duty to plaintiff.

Defendants Trustees and Town assert as affirmative defenses in their amended answers that plaintiff's action sounding in inverse condemnation is time-barred by the three-year statute of limitations of CPLR 214 (4) and laches.

Defendants Trustees and Town seek summary judgment dismissing the complaint based on the defenses of statute of limitations, laches and lack of ownership of the disputed beach area. They agree for the purposes of their motions that plaintiff derives title through mesne conveyances from the Benson deed. They assert that said title was never full fee title but was limited by an exception for public use of the beach, that the Trustees' rights to sell lands in East Hampton, including the subject property, derive from the Dongan Patent, and that the Trustees hold the land and certain beaches granted by the Dongan Patent in public trust and for use by the Town's inhabitants. In addition, they assert that plaintiff's claims sound in inverse condemnation and are barred by the three-year statute of limitations of CPLR 214 (4) inasmuch as the proffered proof reveals that following confrontations, residents were effectively ousted by vehicle drivers from use of the beach, the beach became a de facto parking lot, and use of the beach was conspicuously offensive and aggravating, all amounting to a de facto taking. They add that the action is barred by the equitable doctrine of laches inasmuch as the adduced evidence reveals that these conditions have existed and have been observed, known and the subject of complaints to the Town or Trustees by plaintiff for at least 13 years.

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 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 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 NY2d 851, 487 NYS2d 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 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Initially, the Court notes that the introduction of the Journal of the Trustees for the years 1870 to 1897 submitted herein indicates that “Arthur W. Benson bought all of the common land on Napeague below the highlands between a strip of land left for a road eight rods wide starting at the foot of highland on the Montauk road and running to the Ocean at right angle with Montauk road and Montauk for \$1,375.” A review of the proffered deeds in plaintiff’s chain of title from the Benson deed onward reveals that its deed expressly indicates that its property extends south to the approximate high water mark of the Atlantic Ocean. Therefore, defendants Town and Trustees are denied summary judgment dismissing the first cause of action to quiet title to the disputed beach area.

In addition, the proffered affidavits and deposition testimony reveal that the beachfront residents have not been permanently denied access to the beach to or use of the beach inasmuch as the disapproved public activity occurs primarily during the summer months (*see Feder v Village of Monroe*, 283 AD2d 548, 725 NYS2d 75 [2d Dept 2001]; *Clempner v Southold*, 154 AD2d 421, 546 NYS2d 101 [2d Dept 1989]; compare *Sarnelli v City of New York*, *supra* [property fenced off denying plaintiffs access]). The Court notes that in any event, the Appellate Division, Second Department held in the action entitled *Katz v Village of Southampton*, 244 AD2d 461, 664 NYS2d 457 [2d Dept 1997], *lv denied* 95 NY2d 753, 711 NYS2d 155 (2000) that “regulation of motor vehicle traffic on the ocean beach in connection with the easement held by the Freehold Trusteeship is not a taking” (*Katz v Village of Southampton*, *supra* at 462-463). Therefore, the request by defendants Trustees and Town for summary judgment based on the three-year statute of limitations of CPLR 214 (4) is denied.

The Court also notes from its review of the submitted deeds that they contained the following general appurtenance clause concerning easements of the inhabitants of the Town of East Hampton:

SUBJECT to any and all rights and easements of the inhabitants of the Town of East Hampton (if any such they have) to land fish, boats and nets, to spread nets on the sand adjoining the Atlantic Ocean and care for fish and material as customary on the South Shore.

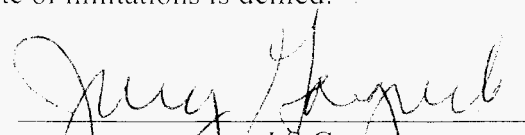
Said easement was appurtenant and passed to all subsequent purchasers of the dominant estate through the general appurtenance clauses until approximately 1927 when the clause disappeared from the deeds (*see Strnad v Brudnicki*, 200 AD2d 735, 606 NYS2d 913 [2d Dept 1994]). “Once created, the easement would continue

to pass with the dominant estate unless it was extinguished by abandonment, conveyance, condemnation or adverse possession” (*Gerbig v Zumpano*, 7 NY2d 327, 330, 197 NYS2d 161 [1960]; *Will v Gates*, 89 NY2d 778, 784, 658 NYS2d 900 [1997]). Owners of the servient estate are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property’s direct chain of title (see *Witter v Taggart*, 78 NY2d 234, 239, 573 NYS2d 146 [1991]; *Corrarino v Byrnes*, 43 AD3d 421, 423, 841 NYS2d 122 [2d Dept 2007]; *Farrell v Sitaras*, 22 AD3d 518, 519-520, 803 NYS2d 659 [2d Dept 2005]).

The nature and extent of use of an easement may be enlarged or changed (see *Tamburo v Murphy*, 72 Misc 2d 120, 339 NYS2d 693 [Sup Ct, Cayuga County 1970], *affd* 40 AD2d 947, 340 NYS2d 881 [4th Dept 1972]). Nevertheless, the subject easement may not be enlarged to include uses completely foreign to the grant, such as recreational purposes, including picnicking, sunbathing, boating and bathing (see *H.H. Apartments, Inc. v Beachcliff Realty Corp.*, 8 AD2d 966, 190 NYS2d 861 [2d Dept 1959], *affd* 8 NY2d 760, 201 NYS2d 777 [1960]). Defendants Trustees and Town assert that a map of East Hampton Beach filed on June 7, 1909 that appears to be part of plaintiff’s chain of title contains the inscription “Public Promenade” covering the entire disputed beach area, which map was subsequently abandoned as memorialized by a certificate of abandonment filed July 28, 1938. They argue that use of the beach along the Atlantic Ocean by the public as a highway was common in 1909 and that historic public use of the beach as evinced by the record shows that ownership of the beach area is burdened by public recreational activities. Notably, this Court determined by order dated October 13, 2011 (Tanenbaum, J.) in this action upon consideration of plaintiff’s motion for partial summary judgment that the affidavit of an East Hampton resident who has resided therein since 1915 and who claimed that the recreational use of the beach by the public has been continuous since the 1920’s raised substantial issues of fact as to whether a prescriptive easement of the inhabitants of the Town of East Hampton currently exists (see *Weiszberger v Husarsky*, 114 AD3d 731, 979 NYS2d 851 [2d Dept 2014] [“To acquire a prescriptive easement, a party must establish by clear and convincing evidence that the use of the property was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years”]). Based on the foregoing, issues of fact remain concerning the nature of the easement, if any, on the disputed beach area.

Moreover, the doctrine of laches has no application when plaintiff alleges a continuing wrong as it does herein with respect to the ongoing use of the subject property by members of the public with “beach vehicle permits” (see *Capruso v Village of Kings Point*, ___ NY3d ___, 2014 NY Slip Op 04228 [2014]). Similarly, plaintiff’s claims of private and public nuisance, based on a continuing nuisance are timely (see *Bloomington, Inc. v New York City Transit Auth.*, 13 NY3d 61, 886 NYS2d 663 [2009]; *Pilatich v Town of New Baltimore*, 100 AD3d 1248, 954 NYS2d 663 [3d Dept 2012]; *Agoglia v Benepe*, 84 AD3d 1072, 1077, 924 NYS2d 428 [2d Dept 2011]; *Burch v Trustees of Freeholders and Commonalty of Town of Southampton*, 47 AD3d 654, 849 NYS2d 622 [2d Dept 2008]), as are plaintiff’s claims based on continuing violations of their equal protection rights (see *Summit at Pomona, Ltd. v Village of Pomona*, 72 AD3d 797, 898 NYS2d 650 [2d Dept 2010]). Therefore, the request of defendants Town and Trustees for summary judgment dismissing the complaint based on laches and statute of limitations is denied.

Dated: 9/3/14



HON. JERRY GARGUILO

___ FINAL DISPOSITION ___ X NON-FINAL DISPOSITION