STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

DEC Case No. CO3-20070201-9

- by -

ROBERT BERGER, KAREN BERGER, DAVID COOK and JODY COOK,

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Robert and Karen Berger ("Berger respondents"), and David and Jody Cook ("Cook respondents"), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law ("ECL").

This matter first came before the Office of Hearings and Mediation Services upon the filing of a Notice of Motion for Summary Judgment and Ancillary Relief ("first motion for summary judgment"), dated July 25, 2007, by the Berger respondents. By ruling ("2007 ruling") dated September 19, 2007, I denied the Berger respondents' first motion for summary judgment in its entirety. The Berger respondents filed a motion for leave to appeal the 2007 ruling with the Commissioner and, by letter dated November 21, 2007, the Commissioner denied that motion.

Now before me is the Berger respondents' Notice of Motion for Summary Judgment and Ancillary Relief ("second motion for summary judgment"), dated July 7, 2008. Attached to the motion are (i) an affidavit ("Berger affidavit") of Robert Berger; (ii) an affirmation ("Berger affirmation") of Carl G. Dworkin, Esq., counsel for the Berger respondents; (iii) a memorandum of law ("Berger memorandum"); and various supporting documents.

The Cook respondents and Department staff sought extensions of time to file their respective responses to the second motion for summary judgment. In my absence, Chief Administrative Law Judge James T. McClymonds held a conference call

with the parties on July 28, 2008 to discuss scheduling matters. As a result of that conference call, the Cook respondents and staff were directed to file their respective responses to the second motion for summary judgment on or before September 19, 2008. Additionally, the Cook respondents were directed to answer the complaint on or before August 25, 2008.

Under cover letter dated September 19, 2008, Department staff submitted the following in reply ("staff reply") to the second motion for summary judgment: (i) an affidavit ("Canestrari affidavit") of Donald E. Canestrari, Environmental Engineer 2, Department of Environmental Conservation; (ii) an affidavit ("Burgher affidavit") of Robert A. Burgher, Land Surveyor, Department of Environmental Conservation; (iii) an affirmation ("staff affirmation") of Robyn M. Adair, Esq., counsel for staff; (iv) a memorandum of law ("staff memorandum"); and (v) thirty-seven exhibits.

Under cover letter dated August 18, 2008, the Cook respondents filed an answer, in which they generally deny Department staff's allegations or deny having sufficient knowledge or information to form a belief as to the truth of the allegations. Under cover letter dated September 19, 2008, the Cook respondents submitted an affirmation ("Cook affirmation") of J. Benjamin Gailey, Esq., counsel for the Cook respondents, and supporting documents in reply ("Cook reply") to the second motion for summary judgment.

By letter dated September 23, 2008, the Berger respondents requested an opportunity to respond to aspects of both the staff reply and the Cook reply. In accordance with 6 NYCRR 622.6(c)(3), I granted permission for the Berger respondents to file a response, but only with regard to that portion of the staff reply that alleges that the Berger respondents are owners of the Honk Falls Dam by virtue of their "beneficial use" of the dam. I also granted permission to the Cook respondents to file a response in relation to the beneficial use issue.

Under cover letter dated October 20, 2008, the Berger respondents filed a memorandum of law ("Berger reply memorandum") in response to the staff reply. The Cook respondents did not respond to the staff reply.

For the reasons set forth below, the Berger respondents' second motion for summary judgment is denied in its entirety.

POSITIONS OF THE PARTIES

The Berger respondents assert that, in order to prevail in this enforcement proceeding, Department staff must demonstrate that the Berger respondents own the Honk Falls Dam either by title or by action. The Berger respondents admit that they own Ulster County tax map parcel 83.6-1-11 ("parcel 83.6-1-11"), which is proximate to the Honk Falls Dam, but deny that the parcel includes any portion of the dam itself (Berger affidavit, at ¶¶ 1 and 6). Moreover, the Berger respondents argue, staff has now

"admitted that Mr. and Mrs. Berger did not own the Dam as a matter of title" (Berger affirmation, at ¶ 12).

With regard to ownership by action, the Berger respondents assert that Department staff has never "produced, or even suggested that it had, evidence that Mr. and Mrs. Berger are owners by action" (Berger affirmation, at ¶ 4). Additionally, the Berger respondents note that the 2007 ruling "found . . . no evidence had been offered by Staff to support its assertion of the Bergers' ownership by action as defined by ECL §15-0507 [i.e., that the Berger respondents erected, reconstructed, repaired, maintained, or used the dam]" (id. at ¶ 5).[1] In support of their assertion that they are not owners of the dam by action, the Berger respondents proffer the affidavit of respondent Robert Berger. The Berger respondents aver that they are not owners of the Honk Falls Dam "as a matter of action," and further aver that they have not "erected," "reconstructed," "repaired," "maintained," or "used" the dam (Berger affidavit, at ¶¶ 7-12). Accordingly, the Berger respondents have now expressly denied engaging in any of the activities that give rise to ownership by action, as enumerated under ECL 15-0507(1).

As they did in their prior motion for summary judgment, the Berger respondents again seek sanctions against Department staff. The Berger respondents argue that sanctions are warranted because staff has continued this enforcement action after being advised that the Berger respondents do not own the dam by title or by action. The Berger respondents conclude that "[s]ince there is clearly no basis whatsoever in law or fact for this enforcement action, it must be dismissed, and Mr. and Mrs. Berger deserve to be compensated for being compelled to contest this baseless action by Staff" (Berger affirmation, at ¶ 20).

Department staff acknowledges that its surveyor, Robert A. Burgher, concluded that the Berger respondents "do not appear to hold fee title to the Honk Falls Dam" (staff memorandum, at ¶ 10). Nevertheless, staff maintains that the Berger respondents "possess an ownership interest in title, as part owners of the [dam]" (id. at ¶ 7). Staff engineer Canestrari reviewed documents relating to the title ownership of parcel 83.6-1-11 (see Canestrari affidavit, at ¶¶ 7, 12, 14 and 15), familiarized himself with surveyor Burgher's conclusions regarding title (id. at ¶ 19), and "continue[s] to conclude that the Bergers are property owners of the dam" (id. at ¶ 16). Additionally, Department staff notes that the Berger respondents have admitted ownership of parcel 83.6-1-11. Moreover, staff argues, the Berger respondents' ownership interest in parcel 83.6-1-11 is

[1] As noted earlier, the 2007 ruling addressed the Berger respondent's first motion for summary judgment. That motion challenged Department staff's assertion that the Berger respondents are title owners of the dam. At the time of the first motion for summary judgment, neither party established a prima facie case with respect to the issue of ownership by action. By affidavit, the Berger respondents denied that they own the dam by title, but did not address the issue of ownership by action (see amended affidavit of Robert Berger, dated August 7, 2007). Staff's affidavit in opposition to the first motion states that the Berger respondents are "not only titled owners, but also owners as specifically defined in ECL §15-0507.1" (affidavit of Donald E. Canestrari, dated August 17, 2007, at ¶ 19). However, staff did not set forth facts in support of this statement.

demonstrated by the fact that they have "held[] themselves out as owners of . . . paid taxes on . . . [and] even mortgaged tax map parcel 83.6-1-11" (staff memorandum, at ¶ 10).

Department staff also argues, for the first time in this proceeding, that the Berger respondents are "beneficial users" of the Honk Falls Dam and, therefore, owners of the dam under ECL 15-0507(1) (staff memorandum, at ¶ 13). In support of this argument, staff avers that the Berger respondents' beneficial use of the dam is demonstrated by the fact that parcel 83.6-1-11 is waterfront property, adjacent to both Honk Lake and the dam, and thereby affords the Berger respondents the beneficial use of a recreational lake (Canestrari affidavit, at ¶ 21). Staff further avers that there is "an apparent foot trail" that extends from just north of the Bergers' residence to a point immediately adjacent to the dam (id. at ¶ 22), there is access to the lake near where the foot trail ends (id.), and the Berger respondents have an "apparent seasonal view" of the lake and dam (id. at ¶ 23).

With regard to the Berger respondents' request for sanctions, Department staff argues that its actions in furtherance of this enforcement proceeding have always been and remain entirely proper. Staff asserts that there is a "glaring absence of evidence to refute Staff['s] *prima facie* case" and maintains that the Berger respondents' claims of misconduct are unsubstantiated (staff memorandum, at ¶ 32).

The Cook respondents oppose the second motion for summary judgment. The Cook respondents note that the Berger respondents have the burden of proof on their motion and argue that the Bergers have failed to meet that burden. Specifically, the Cook respondents assert that surveyor Burgher is not a title expert and, with regard to the title to parcel 83.6-1-11, surveyor Burgher states only that the Berger respondents "do not appear" to hold fee title (Cook affirmation, at ¶ 5). This statement, the Cook respondents argue, does not constitute a statement of fact. Moreover, the Cook respondents note that the Bergers have maintained that they are title owners of parcel 83.6-1-11 and have not disavowed that position (Cook affirmation, at ¶¶ 6-8). The Cook respondents also cite various documents in the record, including the deed and the official government tax maps, in support of the conclusion that the Berger respondents own the parcel and at least a portion of the dam.

The Cook respondents conclude by asserting that the Berger respondents have failed to submit any evidence with the second motion for summary judgment to controvert the evidence that was before this office at the time of the 2007 ruling on the first motion for summary judgment. Therefore, the Cook respondents argue, facts remain in dispute regarding the title ownership of the dam and the second motion for summary judgment must be denied (Cook affirmation, at ¶ 15).

In response to staff's beneficial use argument, the Berger respondents assert that Department staff has "not proffered even an intimation, much less evidence, that Mr. and Mrs. Berger erected, reconstructed, repaired, maintained or used the Dam" (Berger reply memorandum, at 2). The Berger respondents further argue that the

beneficial use argument advanced by staff is contrary to the plain language of the statute which, according to the Berger respondents, is limited to use of the dam structure itself, and does not extend to use of the waters impounded by the dam (id. at 4). The Berger respondents contend that the statutory phrase "uses a dam" cannot be read to reach those who are beneficial users of the waters impounded by the dam. This, the Berger respondents argue, is demonstrated by the fact that the other activities enumerated under ECL 15-0507(1) (i.e., erecting, reconstructing, repairing, or maintaining a dam) are all activities done to the dam itself, while, in contrast, the beneficial use argument advanced by staff concerns not use of the dam, but rather use of the impounded waters.

The Berger respondents raise two additional challenges to Department staff's beneficial use argument. The Berger respondents argue that staff's beneficial use argument violates their right to equal protection, under both the United States Constitution and the New York State Constitution, because staff is selectively enforcing the law against the Berger respondents. In this regard, the Berger respondents assert that staff has failed to pursue enforcement against other similarly situated owners of waterfront property along Honk Lake (Berger reply memorandum, at 6-7). Additionally, the Berger respondents assert that staff's beneficial use argument "eviscerates the Cooks' property rights" (id. at 1) because it assumes upland property owners have "the right to use a water body irrespective of deeds or easements and irrespective of the wishes of the owner of the water body" (id. at 8).

DISCUSSION

Section 622.12(d) of 6 NYCRR establishes the standard for granting a contested motion for order without hearing, the functional equivalent of a motion for summary judgment in this proceeding. Specifically, if "the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party" the motion will be granted (id.).

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. An attorney's affidavit "has no probative force" unless the attorney has first hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed][citation omitted]). Accordingly, the documentary evidence and affidavits submitted by the parties form the basis for my determination of the motion.

In 2003, the Commissioner elaborated on the standard for granting summary judgment:

> "The moving party on a summary judgment motion has the burden of establishing his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor. The moving party carries this burden by submitting evidence sufficient to demonstrate the

> absence of any material issues of fact. [A supporting] affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof. The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact"

(Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted]).

Applying this standard to the Berger respondents' second motion for summary judgment, it is clear that this motion, like the first, must be denied. The Berger respondents have repeatedly admitted under oath that they own parcel 83.6-1-11 (see affidavit of Robert Berger, dated July 23, 2007, at ¶ 1; amended affidavit of Robert Berger, dated August 7, 2007, at ¶ 1; and Berger affidavit, at ¶ 1). This admission has not been recanted by the Berger respondents. Nor has Department staff, despite its apparent intramural debate on this point, withdrawn the allegation that the Berger respondents own the parcel. Given this, the Berger respondents cannot prevail on a motion for summary judgment that is premised upon the assumption that they do not own parcel 83.6-1-11.

Although the Berger respondents admit that they own parcel 83.6-1-11, they adamantly contend that the parcel does not include any portion of the dam. This contention, however, was addressed and rejected as a basis for summary judgment in the 2007 ruling (see 2007 ruling, at 7-9). Because no party has introduced new evidence on this point, the question of whether parcel 83.6-1-11 encompasses a portion of the dam will not be addressed again here.

With regard to the issue of ownership by action, ECL 15-0507(1) provides that an "owner" includes any person who "erects, reconstructs, repairs, maintains or uses a dam or other structure that impounds waters [emphasis supplied]." This definition of owner is unique under the ECL and no party has offered, nor have I identified, a Commissioner or court determination that examines the meaning of the term "owner" or, more particularly, the phrase "uses a dam" under ECL 15-0507(1). The Berger respondents and Department staff offer divergent interpretations of the meaning of the statutory phrase "uses a dam." The Berger respondents argue the phrase should be construed to include only users of the dam structure itself. Department staff argues that the phrase should be construed to include users of the waters impounded by the dam. As discussed below, I conclude that use of the waters impounded by a dam may constitute ownership under ECL 15-0507(1).

Department staff's assertion that use of waters impounded by a dam may create ownership liability under ECL 15-0507(1), is better aligned with the purpose and text of the statute (see Fleming v Graham, 10 NY3d 296, 300 ["In construing the statute we follow two fundamental principles: first, we implement the intent of the Legislature.

Second, we construe statutory words in light of their plain meaning without resort to forced or unnatural interpretations" (internal quotation marks and citations omitted)]). Section 15-0507 of the ECL imposes obligations on dam owners that are intended to ensure that dams in this State are operated and maintained safely. Moreover, ECL 15-0507(1) defines the term "owner" broadly, to include persons who engage in certain activities that, standing alone, generally are not viewed as engendering ownership. By defining the term "owner" broadly, to include those who erect, reconstruct, repair, maintain, or use a dam, the Legislature has clearly indicated its intention to impose ownership liability on a broad range of persons.

Precisely what actions would constitute use of a dam under the Berger respondents' construction of the phrase is difficult to discern, and the Berger respondents provide no examples. If, as the Berger respondents suggest, the statutory phrase "uses a dam" is limited to only the physical use of the dam structure itself, then perhaps walking upon or fishing from the dam would constitute such use. But these activities are rather inconsequential acts upon which to impose ownership liability. Therefore, to construe the phrase "uses a dam" in the manner urged by the Berger respondents would render the phrase largely meaningless.

Additionally, the Berger respondents' construction of the statute severs a dam from its purpose. Dams are used to achieve some purpose, such as impounding waters or power generation. The Legislature has determined that not only title owners, but also those who use a dam should be held liable for the dam's safe operation and maintenance. It is entirely consistent with that legislative determination to impose liability on those persons who receive the greatest benefit from the use of a dam for its intended purpose. Where the purpose of a dam is to impound waters for recreation, persons who use those impounded waters may be held to be users of the dam and, accordingly, owners under the statute.

Where, as here, the meaning of a statute may be determined from its text, there is no need to consider the statute's legislative history. Nevertheless, I have reviewed the legislative history of the 1999 amendments to title 5 of ECL article 15 to ascertain whether it provides additional insight into the meaning of the statue (see Riley v County of Broome, 95 NY2d 455, 463 [noting that the Court reviewed the legislative history of a statute and that the legislative history confirmed the Court's plain language reading of the statute]; People v Garson, 6 NY3d 604, 611 [stating that, even where the meaning of a statute is clear from its text, the statute's "legislative history can be useful to aid in interpreting statutory language" (citations omitted)]).

Although the legislative history of the 1999 amendments is limited, particularly in relation to the addition of the definition of "owner," it provides further support for the construction urged by Department staff. The Senate Memorandum in Support of the legislation makes clear that one purpose of the amendments is to ensure that dam owners, as broadly defined under the amended statute, bear the expense of safely operating and maintaining dams (see Senate Mem in Support, Bill Jacket, L 1999, ch 364 [stating that ECL 15-0507 is amended to, inter alia, require a person "who owns,

erects, reconstructs, repairs, maintains or uses a dam . . . to operate and maintain such structure[] . . . in a safe condition" and further stating that "[i]t is reasonable to expect dam owners to bear the responsibility and cost for performing initial [safety] studies when their dam is determined to be structurally unsafe"]). Accordingly, the Legislature indicated its intention to hold persons affiliated with a dam, rather than State taxpayers, liable for the dam's safe operation and maintenance.

Department staff's factual assertions and those of the Berger respondents speak to their respective interpretations of the statutory phrase "uses a dam." In effect, the Berger respondents argue that staff's factual assertions concerning use of, or benefit from, the waters impounded by the dam are not relevant because the statutory language relates solely to the use of the dam structure itself. Accordingly, the evidence proffered by the respective parties does not present a factual dispute, but rather underscores the parties' differing interpretations of the statute.[2]

Given my conclusion regarding the meaning of the phrase "uses a dam," it is clear that the Berger respondents' second motion for summary judgment must be denied. The Berger respondents reject Department staff's construction of the statute and proffered no evidence in relation to whether they may be deemed users of the Honk Falls Dam under staff's construct. Having proffered no evidence on this issue, the Berger respondents cannot prevail on a motion for summary judgment (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 ["As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (internal citations omitted)]).

I make no determination with regard to whether Department staff has established that the Berger respondents are owners of the Honk Falls Dam by action. Staff has proffered evidence in proper form in support of its allegation that the Berger respondents are owners of the dam by action and the Berger respondents have not rebutted staff's proffer. However, the extent of the Berger respondents' use of and benefit from the dam, and whether that use is of sufficient nature to warrant imposing ownership liability on them under the statute, are questions appropriately addressed at hearing.[3]

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[2] As previously noted, the Berger respondents deny that they have "used the Honk Falls Dam" (Berger affidavit, at ¶ 12), but this denial is in the context of their interpretation of the statute. The Berger respondents do not deny that they have used the dam in the manner alleged by staff. For example, the Berger respondents have not denied that parcel 83.6-1-11 is waterfront property or that there is a trail from their residence to the shoreline of Honk Lake.

[3] Clearly, persons who engage in only minor or trivial activities that fall within the broad scope of the definition of "owner" under ECL 15-0507(1) should not be held liable as owners of the dam. For example, a passerby who replaces a few stones dislodged from a dam structure may be viewed as having "repaired" the dam, but this action alone would not provide a basis for imposing ownership liability on that individual. Similarly, a passerby who skips a few stones on the waters impounded by a dam, may be viewed as having "used" the dam, but this action alone

I will briefly address two other issues raised in the Berger reply memorandum. First, the Berger respondents argue that Department staff is engaging in selective prosecution and, thereby, is violating the Berger respondents' constitutional right to equal protection under the law. To prevail on a claim of selective enforcement, the Berger respondents must show that staff has acted with an "evil eye . . . there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification" (Matter of 303 West 42nd Street Corp. v Klein, 46 NY2d 686, 693 [internal quotation marks and citations omitted]). Moreover, "the claim of unequal protection is treated not as an affirmative defense to . . . the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action" (id.) and is "properly brought only before a judicial tribunal" (id. at n 5).

Additionally, the Berger respondents claim that Department staff's beneficial use argument, in effect, eviscerates the Cook respondents' property rights. This, the Berger respondents argue, is because staff's beneficial use argument "invites all upland owners to enter upon Honk Lake and use it to their full 'benefit,' irrespective of the Cooks' wishes" (Berger reply memorandum, at 8). Notably, the Cook respondents, whose rights are, according to the Bergers, being trampled upon, have not raised the issue. Moreover, staff has averred that Honk Lake is a recreational lake, available for boating, swimming and other activities[4] (Canestrari affidavit, at ¶ 21), and no party has proffered evidence to rebut staff's representation. Accordingly, there is no evidence before me to support the conclusion that the Cook respondents' property rights are being adversely affected.

On the basis of the affidavits and documents submitted by the parties, the Berger respondents have failed to establish that no material facts are in dispute and this matter is not amenable to resolution as a matter of law. Accordingly, the Berger respondents' second motion for summary judgment must be denied.

Lastly, with regard to the Berger respondents' request for sanctions against Department staff, that request is wholly without merit. As with the first motion for summary judgment, my ruling on the instant motion belies the Berger respondents' claim that Department staff has engaged in prosecutorial misconduct. Accordingly, the Berger respondents' demand for ancillary relief is, again, summarily rejected.

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would not provide a basis for imposing ownership liability on that individual. The possible fact patterns are endless and Department staff, in exercising its prosecutorial discretion, must be the first to consider whether ownership liability is appropriate on the basis of a person's actions in relation to a dam. Where staff's determination to impose ownership liability is challenged by a respondent at hearing, the parties will be afforded a full opportunity to present facts and argument relevant to the liability determination.

[4] On the Department's website, Honk Lake appears on the list of "popular ice fishing waters in Ulster County" (see http://www.dec.ny.gov/outdoor/31156.html).

CONCLUSION

For the reasons set forth herein, the Berger Respondents' second motion for summary judgment and ancillary relief is denied in its entirety.

Upon staff's filing of a statement of readiness, this matter will be scheduled for hearing.

/s/

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Richard A. Sherman
Administrative Law Judge

Dated: February 17, 2009
Albany, New York