

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law (ECL), and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by

Ruling on Respondents'
Motion to Dismiss

DEC Case No. 3-20030718-97

Richard Steinberg and Barbara Steinberg,
Respondents.

May 31, 2006

Proceedings

Staff from the Region 3 Office of the Department of Environmental Conservation (Department staff) commenced the referenced enforcement action with service of a notice of hearing, and complaint both dated February 2, 2006 upon Richard and Barbara Steinberg (Respondents) by certified mail return receipt requested. The complaint asserts that Respondents own a parcel of property identified as Lot #97 (Tax Map No. 52K/3/18) on a map entitled "Plan of Subdivision #11, Emerald Green," filed on April 27, 1971 in the Town of Thompson, Sullivan County. The complaint asserts further that the Steinberg's property abuts Treasure Lake, which Staff contends is a navigable water of the State. According to the complaint, Respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 when they allegedly placed fill in Treasure Lake without first obtaining a permit from the Department. Department staff requests a civil penalty of \$5,000, and an order from the Commissioner directing Respondents to remove the fill from Treasure Lake.

By their attorney, Donald S. Tracy, Esq. (New City, New York), Respondents timely filed an answer dated February 21, 2006. Subsequently, with a cover letter dated March 24, 2006, Respondents filed an amended answer of the same date. In the March 24, 2006 amended answer, Respondents deny that they placed any fill in Treasure Lake, and argue that they did not violate the ECL or its implementing regulations. Respondents contend that any work done in Treasure Lake was undertaken as far back as 1969. In the amended answer, Respondents assert that although small recreational boaters may navigate Treasure Lake, the lake is not a navigable water of the State as that term is defined in the regulations. Respondents request that the charges in the complaint be dismissed.

Respondents' Motion

With a cover letter dated March 27, 2006, Respondents' filed a notice of motion and an affirmation by Respondents' counsel, Mr. Tracy. The notice of motion and the affirmation are both dated March 27, 2006. Four exhibits, identified as Exhibit A, Exhibit B, Exhibit B-1, and Exhibit C were attached to Mr. Tracy's March 27, 2006 affirmation. Exhibit A are copies of Department staff's February 2, 2006 notice of motion, and complaint. Exhibit B is a copy of

Respondents' February 21, 2006 answer. Exhibit B-1 is a copy of Respondents' March 24, 2006 amended answer. Exhibit C is a copy of the chain of title and deed for Treasure Lake.

In his affirmation, Mr. Tracy argues that the February 2, 2006 complaint fails as a matter of law. Mr. Tracy states that his clients were charged with violating ECL Article 24 (Freshwater Wetlands Act) on November 7, 2003. Mr. Tracy advised Department staff that Respondents' lot on subdivision map, "Plan of Subdivision No. 11 Emerald Green," was exempt from regulation pursuant to ECL 24-1305. Subsequently, Department staff charged Respondents with violating ECL 15-0505 and 6 NYCRR 608.5.

Referring to the definition at 6 NYCRR 608.1(l), Respondents argue that Treasure Lake is not a navigable water of the State because the lake is privately owned. To support the claim, Respondents offer Exhibit C which, as noted above, is a copy of the chain of title and deed for Treasure Lake.

With a cover letter dated April 14, 2006, Respondents subsequently filed a reply affirmation by Mr. Tracy with two attachments.¹ Exhibit A is copy of a title insurance policy (Policy No. 5312-997336, Title No. CRC-09465). The Appendix to the April 14, 2006 affirmation is a copy of an offering plan to the membership of the Emerald Green Home Owners Association, Inc.

Respondents dispute Department staff's assertion concerning the meaning of the term "navigable waters of the State," and the exclusion of certain waters that are surrounded by land held in single, private ownership (*see* 6 NYCRR 608.1(l)). Respondents claim that they did not acquire ownership to any lands upon which water flowed, and that the Emerald Green Property Owners Association has retained ownership of portions of properties surrounding Treasure Lake. To demonstrate this claim, Respondents reference the restrictive covenants in the offering plan appended to Mr. Tracy's reply affirmation, and argue that the covenants in the plan exclude from the conveyance the land around the lake upon which water flows. Furthermore, the title policy (Exhibit A) conveys the property subject to those recorded covenants.

Based on the information outlined in the attachments to the reply affirmation, Respondents contend that the lands bordering Treasure Lake remain, by virtue of the covenant, in single, separate ownership of the Emerald Green Property Owners Association. Respondents

¹ By letter dated April 19, 2006, I advised the parties that additional responsive pleadings, such as Respondents' reply affirmation, are authorized only with the ALJ's permission (*see* 6 NYCRR 622.6[c][3]). Because Respondents had not obtained leave from me prior to filing the reply affirmation, I provided Department staff with the opportunity to respond to it. In an e-mail message dated May 1, 2006, Mr. Goverman advised that Staff would not be filing a response to Respondents' reply affirmation. In deciding this motion, I have considered Respondents' reply affirmation and attachments.

request that the charges in the complaint be dismissed because Treasure Lake is not a navigable water of the State as defined at 6 NYCRR 608.1(1).

Department Staff's Response

With a cover letter dated April 11, 2006, Department staff filed an affirmation by Steven Goverman, Esq., Assistant Regional Attorney, opposing Respondents' motion to dismiss. Referring to the terms "navigable waters of the State," and "single private ownership," which are defined in the regulations at 6 NYCRR 608.1(l) and 608.1(s), respectively, and the deed provided with Respondents' motion, Staff acknowledges that the land under Treasure Lake appears to be held in fee by one entity known as the Emerald Green Property Owners Association, Inc.

Staff contends, however, that various separate owners, among them the Treasure Lake Associates and Emerald Green Section II, own the property around Treasure Lake. According to Staff, the Emerald Green subdivision was subdivided further into smaller lakefront lots, which were then conveyed to individual purchasers. Staff asserts that Respondents were one of those purchasers. Staff concludes that Respondents have not established that Treasure Lake is surrounded by land held in single, private ownership at every point in its total area, and maintains that Treasure Lake is a navigable water of the State, in which Respondents placed fill without a permit from the Department. Staff argues that Respondents' motion should be denied.

Ruling

Though not expressly stated, Respondents are moving for summary judgment based on their claim that the complaint fails as a matter of law. Department staff may move for an order without hearing (*see* 6 NYCRR 622.12), which is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules (CPLR) § 3212. Nevertheless, any party may make motions and requests (*see* 6 NYCRR 622.6[c]), and the ALJ has authority to rule upon such requests including those that decide the ultimate merits of the proceeding (*see* 6 NYCRR 622.10[b][1][i]), such as the instant motion by Respondents.

On a motion for summary judgment pursuant to the CPLR, "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [citations omitted] [quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]). Therefore, Respondents bear the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to their claim that the land surrounding Treasure Lake is held in single, private ownership at every point (*see Cheeseman v Inserra Supermarkets, Inc.*, 174 AD2d 956, 957-958 [3d Dept 1991]). After Respondents have

done so, “it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs” in admissible form (*id.*). Facts appearing in the movant’s papers that the opposing party fails to controvert may be deemed to be admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

The parties dispute whether Treasure Lake is a navigable water of the State, as that term is defined at 6 NYCRR 608.1(1), which is based on the factual dispute about whether the property surrounding Treasure Lake is held in single, private ownership (*see* 6 NYCRR 608.1[s]). Respondents, as movant, bear the initial burden of making a prima facie showing concerning the single, private ownership of the land surrounding Treasure Lake. Respondents’ submissions do not establish their entitlement to judgment as a matter of law, however. As Department staff points out, Respondents’ submissions raise a triable issue of fact concerning the ownership of the property surrounding Treasure Lake. Accordingly, Respondents’ motion is denied.

Further Proceedings

Upon receipt of this ruling, counsel shall confer with their respective witnesses and then with each other to schedule the adjudicatory hearing. I am available on June 19, 21 and 22, as well as the weeks of July 10 and 17. Counsel shall advise me of the hearing date by June 9, 2006.

/s/

Daniel P. O’Connell
Administrative Law Judge

Dated: Albany, New York
May 31, 2006

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