SHORT FORM ORDER

INDEX No. 10-30131

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-20-11
ADJ. DATE 2-7-12
Mot. Seq. # 001 - MG; CASEDISP

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton, Plaintiffs, -against- INCORPORATED VILLAGE OF QUOGUE, Defendant.	CAHN & CAHN, LLP Attorney for Plaintiffs 22 High Street, Suite 3 Huntington, New York 11743 ESSEKS, HEFTER & ANGEL, LLP Attorney for Defendant 108 East Main Street P.O. Box 279 Riverhead, New York 11901

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated November 4, 2011, and supporting papers (including Memorandum of Law dated November 4, 2011); (2) Affidavit in Opposition by the plaintiffs, dated December 6, 2011, and supporting papers (including Memorandum of Law dated December 6, 2011); (3) Reply Memorandum of Law by the defendant, dated February 6, 2012; (4) 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 motion is decided as follows: it is

ORDERED that the motion by the defendant, Incorporated Village of Quogue, for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff's claims in their entirety is granted.

Plaintiff's instituted this action for an injunction pursuant to CPLR Article 63, enjoining the defendant from placing hard or semi-hard structures, or moving, placing, depositing, or scraping sand in the ocean beach area within the Village of Quogue without a permit from or consent from the plaintiffs; enjoining the defendants from interfering with plaintiffs' easement over the ocean beach; and for a judgment declaring the "Trustees' Rules and Regulations" to be valid and binding upon the defendant. Plaintiffs, the duly elected members of the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, allege that as a result of a certain patent issued on December 6, 1686 (the Dongan Patent) by the King of England to the Governor of the Provinces of New York, and thereafter,

through various legislative acts and court rulings, they have possessed an easement over the beaches and have exercised the power to regulate the use of the beaches within the Town of Southampton. As a result thereof, plaintiffs maintain that the Village of Quogue, the defendant herein, undertook a series of acts in violation of their Rules and Regulations and that the defendant refuses to acknowledge the plaintiffs' right to enforce regulations with respect to the portion of the ocean beach area that lies within its boundaries.

The defendant requests an order granting summary judgment dismissing plaintiffs' complaint on the ground that plaintiff trustees have no regulatory jurisdiction over ocean beaches in the Village of Quogue, that the State of New York and the Village of Quogue have been given the regulatory power over the ocean beach activities within the village (and that the town and its trustees have no regulatory power within the village's boundaries), and that the plaintiffs have failed to show that there has been an interference with the public's "easement".

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

The Town of Southampton, Suffolk County, New York, 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. "[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power" (***Knapp v Fasbender***, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see* ***People v Lagana***, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied,* 8 NY3d 882, 832 NYS2d 494 [2007]). As case law has evolved in connection with the property within the jurisdiction of the trustees, we know that when bordering on navigable waters, the title of the adjoining property owner extends to the "high-water mark" (***The Trustees of Brookhaven v Strong***, 60 NY 56 [1875]). The land under the waters was owned by the town, and, along with the product of the waters, was managed and controlled solely by the trustees (***People v Jessup***, 160 NY 249 [1899]; ***The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co.***, 116 NY 1 [1889]; ***The Trustees of Brookhaven v Strong***, *supra*). The beach was part of the undivided land over which the town proprietors, and not the trustees, were given to manage as a result of New York Chapter 155 of the Laws of 1818, as "[it was] quite clear, as disclosed by the case,

that the terms 'undivided lands' and 'common lands' were used interchangeably to refer to the uplands and to the beaches as well" (***The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts***, 163 NY 454, 460 [1900]). The trustees, who retain the title to the lands under water and have the power to grant rights to erect structures on those submerged lands and to take shellfish from them, do not have control of the shores and beaches (***Knapp v Fasbender***, *supra*). As is defined by Southampton Town law (at Rules Article I), the ocean beach area is that area "along the Atlantic Ocean bounded on the north by the crest of the primary dune, ... on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees control the land in the vicinity of the Atlantic Ocean within their township that is south of the high-water mark of the Atlantic Ocean, and not the beach area north of the high-water mark.

The jurisdiction of the trustees is not limited by the authority of the State because Navigation Law §2 (4) specifically excluded "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" from the navigable waters of the state (the basis of the exemption being derived from the various patents and their progeny) (*see* ***Rottenberg v Edwards***, 103 AD2d 138, 478 NYS2d 675 [2d Dept 1984]). Although the defendant Village would generally have jurisdiction of the areas within its territorial limits, because of the various colonial land grants which have been confirmed by the state and federal legislatures, the lands lying on or bordering the tidewaters are not under its jurisdiction as they remain under the jurisdiction of the town or its trustees (*see* ***Inc. Village of Manorhaven v Ventura Yacht Services, Inc.***, 166 AD2d 685, 561 NYS2d 277 [2d Dept 1990]; *compare* ***Malloy v Inc. Village of Sag Harbor***, 12 AD3d 107, 784 NYS2d 141 [2d Dept 2004]).

To the extent that a party or entity desires to build, construct, or affect the land or waters south of the high-water point in the vicinity of the Atlantic Ocean within the Village of Quogue, the plaintiff trustees would be authorized to regulate that activity. Here, however, plaintiffs' complaint makes no reference to the high-water mark but states in general that it has jurisdiction over the "Ocean Beach Area", which is not the case. Thus, that portion of plaintiffs' complaint which seeks a declaration that they possess the right to regulate the subject beaches and to protect their easement over them cannot be granted, as it is clear that they possess only the right to regulate that portion of the beach which may be south of the high-water mark and not all of the ocean beach areas in the township. Similarly, in connection with their request for an injunction, plaintiffs fail to show that their "easement rights" have been or are in danger of being obstructed. Finally, although the Rules and Regulations of the Trustees may be valid and enforceable, as stated in the portion of the complaint which seeks a declaratory judgment, the plaintiffs have failed to set forth a valid cause of action against the defendant since no allegation is made that the actions of the defendant affected the land or waters below the high-water mark of the Atlantic Ocean. Accordingly, as plaintiffs are without jurisdiction to maintain any of the causes of action alleged in their complaint, defendant's motion for an order granting summary judgment dismissing the complaint is granted; and, the Court declares that plaintiffs do not possess the right to regulate the subject beaches to protect their easement over them, to the extent that the beaches lie north of the high-water mark in the vicinity of the Atlantic Ocean.

Dated: 9/9/2

PETER H. MAYER, J.S.C.