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 Berger, Karen Berger, David Cook and Jody Cook, 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") and part 673 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The matter first came before the Office of Hearings and Mediation Services ("OHMS") upon the filing of a Notice of Motion for Summary Judgment and Ancillary Relief, dated July 25, 2007, by Robert Berger and Karen Berger ("Berger respondents").[1] Attached to the notice of motion were: (i) an affidavit of Robert Berger ("Berger affidavit"); (ii) an affirmation of Carl G. Dworkin, Esq., counsel for the Berger respondents; (iii) a memorandum of law ("Berger memorandum") in support of the motion; (iv) a copy of the complaint; (v) a copy of the Berger

---

[1] David and Jody Cook ("Cook respondents") are not parties to this motion.

respondents' answer; and (vi) an affirmation of service of the motion papers on Department staff and on "Mr. and Mrs. David Cook." The Berger respondents twice supplemented or amended the motion papers. On August 1 OHMS received corrections to the Berger respondents' motion papers and on August 13 OHMS received an amended affidavit of Robert Berger, dated August 7, replacing in its entirety, the affidavit attached to original filing. Accordingly, the Berger respondents' pleading consists of the July 25 filing as supplemented or amended through August 7.

Under cover letter dated August 17, Department staff submitted the following in reply to the Berger respondents' motion: (i) an affirmation ("staff affirmation") of Robyn Adair, Esq., counsel for staff; (ii) an affidavit ("staff affidavit") of Donald E. Canestrari, an Environmental Engineer 2 with the Department; and (iii) sixteen exhibits, lettered A through P. Under cover letter dated August 24, the Berger respondents filed a reply ("Berger reply") to staff's submissions.

By letter dated August 28, I noted that the Berger reply was not authorized absent permission from the assigned Administrative Law Judge ("ALJ") (see 6 NYCRR 622.6[c][3]). Nevertheless, I advised the parties that I would consider the Berger reply in my ruling on the motion and that staff was authorized to file a sur-reply on or before September 5. Staff filed a sur-reply on September 5 and, under separate cover of the same date, filed a motion to compel discovery ("staff motion").

For the reasons set forth below, the Berger respondents' motion for summary judgment and ancillary relief is denied in its entirety and Department staff's motion to compel discovery is denied.

POSITIONS OF THE PARTIES

The Berger respondents deny that they own any portion of the Honk Falls Dam and assert that "the Department never considered the Bergers or their predecessors-in-title to have owned the lake or the dam until 2004" (Berger memorandum, at 1). The Berger respondents acknowledge ownership of "the parcel of land best described as tax map number 83.6-1-11" ("parcel 83.6-1-11") but assert that parcel 83.6-1-11 does not include the dam (Berger affidavit, at ¶¶ 1, 3, 4). The Berger respondents argue that the Department lacks authority to determine title because

the "exclusive authority to determine title to real property that is in dispute is vested in the [State] Supreme Court" (Berger memorandum, at 2 [citing article 15 of the Real Property Law[2]]). The Berger respondents maintain that, under Department precedent, once title is placed in dispute, the Department cannot find them to be owners in the absence of "absolute, iron-clad proof" (id. [citing Matter of Kinneary, Order of the Commissioner, May 9, 1994]).

The Berger respondents also argue that Department staff should be sanctioned for continuing the enforcement action against them after being advised that the Bergers do not own the dam. The Berger respondents state that Department staff "is subject to the same rules of conduct to which all other litigants are subject, including the rules against prosecution of actions that the party has every reason to believe it cannot win" (Berger memorandum, at 3 [citing 22 NYCRR part 130 which, inter alia, provides for sanctions for frivolous conduct in civil litigation]). According to the Berger respondents, staff's refusal to withdraw its allegations in the absence of proof of ownership of the dam "is the kind of prosecutorial misconduct that shocks the conscience" and, therefore, the Berger respondents should be reimbursed for their expenses relating to the instant motion (id. at 4).

Department staff argues that the motion for summary judgment is not ripe for review because the Berger respondents have failed to comply with the provisions governing discovery under 6 NYCRR part 622 (staff affirmation, at 4, ¶ 5). Staff argues that compliance with its discovery demands is long overdue and the Berger respondents should now be compelled to comply (staff motion, at ¶¶ 12-17).

Irrespective of ripeness, staff argues that it has established a factual dispute exists concerning the Berger respondents' ownership of the dam. Staff asserts that the dam is owned by adjoining property owners; the Berger respondents and the Cook respondents. According to staff, the Berger respondents

---

[2] There is no article 15 of the Real Property Law. The Berger respondents may have intended to reference article 15 of the Real Property Actions and Proceedings Law, however, that article pertains to adverse claims to real property. Department staff is not making such a claim in this proceeding.

own the parcel to the east of the dam and the Cook respondents own the parcel to the west of the dam (staff affidavit, at ¶¶ 12-15, Appendices E and F).

Staff maintains that the Berger respondents are both title owners and owners under the "very broad" definition of owner found at ECL 15-0507(1) (id. at ¶¶ 17-19). Staff cites to 6 NYCRR 622.11(a)(9), which provides that "all maps, surveys and official records affecting real property" that are on file with certain state offices "are prima facie evidence of their contents." Staff argues that several documents it submitted in support of its allegations fall within the rubric of this provision and, accordingly, are prima facie evidence of the Berger respondents' ownership.

With regard to the Berger respondents' request for sanctions against staff, Department staff argues that the sanctions provided for under 22 NYCRR part 130 pertain only to actions in certain State civil courts and, therefore, such sanctions are not available in this administrative proceeding. On the merits, staff asserts that the request for sanctions is "not only baseless, but flagrantly unprofessional and unfounded" (staff affirmation, at 6, ¶ 24). As in its main argument in opposition to the instant motion, staff again argues that its evidence of ownership is more than sufficient to survive a summary judgment motion and, therefore, staff had "more than a good faith basis for filing the Complaint" (id.).

DISCUSSION

Motion for Summary Judgment and Ancillary Relief

As a threshold matter, Department staff's claim that the instant motion is not ripe is without merit. Department regulations do not expressly state when a motion for summary judgment may be served. Here, the complaint has been served and the Berger respondents have filed an answer. Further, both parties have made their arguments and submitted evidence in support of their respective positions. I see no reason to delay a determination on the merits of the motion (see also section 3212(a) of the Civil Practice Law and Rules ["CPLR"] providing that a motion for summary judgment in a civil action may be served after joinder of the issue).

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. Although section 622.12(d) is couched in terms of a motion initiated by staff, it sets the same standard for summary judgment in relation to a cause of action as it does for a defense. 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][cite 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 cites omitted]).

Applying this standard to the instant motion for summary judgment, it is clear that the motion must be denied. The Berger respondents assert that summary judgment is appropriate because they do not own the dam and ownership is a necessary element of the cause of action against them. The Berger respondents admit that they own parcel 83.6-1-11 (Berger affidavit, at ¶ 4). They deny, however, that parcel 83.6-1-11 encompasses any part of the dam and assert that staff "has no reasonable basis for its claim [that the Berger respondents are owners]" (id.). The Berger affidavit also questions the probative value of documents offered by staff (id. at ¶ 11). The Berger respondents' counsel attacks staff's reliance on Ulster County tax maps and, to underscore the argument that staff's reliance on such maps is misplaced, counsel provides a copy of a portion of a map identified as yet "[a]nother version" of the "tax map done for the Ulster County Legislature" (Berger reply, affirmation, at ¶ 12 [referencing Exhibit B attached thereto]). The Berger respondents also note that the Department has historically asserted only that the Cook respondents, and their predecessors in interest, hold title to the dam (Berger affidavit, at ¶ 11). The Berger reply attaches a Department Visual Inspection Form, dated August 10, 2004, wherein the dam owner is identified as Recycled Paper Corporation (Berger reply, Exhibit C, at 1).

On this record, it is not clear that the Burger respondents have carried their burden of submitting evidence sufficient to demonstrate the absence of any material issue of fact. Regardless, assuming that the Berger respondents have met their burden as the movants on this motion, the affidavit and documents submitted by staff are more than sufficient to overcome a motion for summary judgment.

The staff affidavit states that the Berger respondents are both title owners of the dam and "owners as specifically defined in ECL § 15-0507.1" (staff affidavit, at ¶ 19). The definition of owner under the ECL includes not only title owners but also extends to those who, inter alia, maintain or use the dam. Staff asserts that, irrespective of title, the Berger respondents are owners under the broad ECL definition. However, staff fails to proffer facts to support this assertion.

Therefore, on the current record, staff's assertion that the Berger respondents are owners irrespective of title is conclusory and is not sufficient to defeat a motion for summary judgment.

Nevertheless, staff has provided documentary support for the allegation that the Berger respondents are title owners of the dam. The parties agree that the Berger respondents own parcel 83.6-1-11. Therefore, title to parcel 83.6-1-11 is not in dispute.[3] The true dispute is over whether the property boundary of parcel 83.6-1-11 extends over any portion of the dam. The Berger respondents' parcel and Cook respondents' parcel are situated in different tax blocks; the former is in tax block 83.006 and the latter is in tax block 83.001. The tax map submitted by staff[4] for block number 83.006 depicts the property

---

[3] The Berger respondents' reliance on the Commissioner's Order in Matter of Kinneary is misplaced. Therein, the respondent did not admit ownership of the parcel at issue and, belatedly, challenged staff's assertion that he was the owner. The Commissioner held that, by a preponderance of the evidence, staff established the respondent owned the property. In dicta, the Commissioner suggested that, had there been a timely denial of ownership, staff could have introduced the deed (Matter of Kinneary, Order of the Commissioner, May 9, 1994, at 2).

[4] I am not persuaded by the Berger respondents' argument that, as a matter of law, staff may not rely upon Ulster County tax maps. Because staff cites 6 NYCRR 622.11(a)(9), which provides that certain documents affecting real property are prima facie evidence of their contents, the Berger respondents attempt to inject the "ancient document rule," codified at CPLR 4522 (Berger reply, memorandum of law, at 4-5). However, CPLR 4522 and 6 NYCRR 622.11(a)(9) are facially distinct, the latter being broader in at least two respects: (i) it does not require that the document be on file for a particular period of time (cf. CPLR 4522 requiring the document to be on file "for more than ten years"); and (ii) it expands the number of government offices where such documents may be on file by including "any department of the state" (cf. CPLR 4522 listing only certain county offices, courts of record and departments of the City of New York). Moreover, the rules of evidence are not strictly applied in these proceedings (see 6 NYCRR 622.11[3]). On the record before me, I am satisfied that the tax maps filed by staff are of sufficient probative force to warrant consideration in the determination of

line for parcel 83.6-1-11 as extending past the shoreline and into Roundout Creek, generally following the contours of the shoreline.[5] As such, parcel 83.6-1-11 would include a portion of the dam.

The partial copy of a tax map submitted by the Berger respondents does not indicate which tax block it depicts, but it is clearly that of block 83.001. That portion of block 83.006 that is depicted, including the Berger respondents' parcel, does not denote individual parcel numbers, is shaded out and the shoreline is not shown. Of the tax maps submitted by the parties, only that designated as Exhibit F to the staff affidavit contains parcel 83.6-1-11 within the boundary of the tax block depicted on the map. Accordingly, and contrary to the assertions of the Berger respondents' counsel, staff has not submitted different versions of the same tax map.

In regard to demarcating the property lines of riparian owners, "it has long been established as the law of this State that the settlement of the actual boundary line of land under water between conterminous proprietors is a question of much difficulty, that there is no general rule which is applied in all cases, and that the proper boundary line has to be determined by the facts in each case" (Huguenot Yacht Club v. Lion, 43 Misc 2d 141, 145, [Sup Ct, Westchester County 1964]). On the record before me, the evidence submitted by staff is sufficient to demonstrate that facts remain in dispute regarding the location of the boundary line of parcel 83.6-1-11.

---

the instant motion.

[5] This demarcation of the property line would be consistent with a method of apportioning submerged lands that was cited favorably by the Court of Appeals more than 150 years ago. The Court wrote "each riparian owner is to have his proportion of the outer or water line according to the length of his shore line" and that it may be necessary "that slight indentations in the shore line should be disregarded, and a general line of the shore adopted" (O'Donnell v. Kelsey, 10 N.Y. 412, 413 (1852); see also 107 NY Jur 2d Water § 87 [citing O'Donnell for the proposition that "each owner takes . . . according to straight lines drawn at right angles between the side lines of his or her land on the shore and the center line of the water"]).

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. Accordingly, the matter is not amenable to resolution as a matter of law. The Berger respondents' motion for summary judgment must be denied.

My ruling on the motion for summary judgment belies the Berger respondents' claim that Department staff has engaged in prosecutorial misconduct by pursuing this matter in the face of their denial of ownership of the dam. On the record before me, it is clear that the claim of prosecutorial misconduct is without merit. Accordingly, the Berger respondents' demand for ancillary relief is summarily rejected.

Staff Motion to Compel Discovery

With regard to the dispute between the parties concerning suspension of discovery during the pendency of a summary judgment motion, Department regulations do not provide for the automatic suspension of discovery. Rather, a party seeking to postpone or avoid discovery should seek agreement of opposing counsel or, failing that, move for a protective order. The Berger respondents' position regarding the suspension of discovery during the pendency of a motion for summary judgment is understandable. Had they moved for a protective order, it would likely have been granted in the absence of compelling reasons for denial. Regardless, the motion for summary judgment has been denied and the parties should now proceed with discovery in accordance with the provisions of 6 NYCRR part 622.

In light of the proceedings to date, particularly the Berger respondents' good faith, though misplaced, belief that discovery would be automatically suspended, I deny staff's motion without prejudice to renew.

Finally, in light of my denial of staff's motion, the Berger respondents' reply to the motion, received on September 18, is largely moot. With regard to the Berger respondents' request for sanctions in relation to staff's motion, the request is denied. The Berger respondents' request is premised, in large part, on their assumption that discovery in this administrative proceeding was automatically stayed upon their motion for summary judgment. As previously discussed, that assumption is incorrect.

CONCLUSION

For the reasons set forth herein, the Berger Respondents' motion for summary judgment and ancillary relief is denied in its entirety. Department staff's motion to compel discovery is denied without prejudice.

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

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: September 19, 2007
Albany, New York

To: Carl G. Dworkin, Esq.
Attorney at Law
44 Brentwood Court
Albany, New York 12203

Robyn Adair, Esq.
Senior Attorney
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

J. Benjamin Gailey, Esq.
Jacobowitz & Gubits, LLP
158 Orange Avenue
PO Box 367
Walden, New York 12586-0367