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Under the Boardwalk, Down By the Sea

By Lance R. Pomerantz

The approaching summer combined with the good fortune of living on Long Island induces us to consider a nice, relaxing visit to our local waterfront. Land title lawyers, however, should be aware that the Court of Appeals, Appellate Division and Supreme Court have already been spending a lot of time there. Here are three recent cases (including two from Suffolk County).

Under the boardwalk

Our first case literally concerns ownership of the property under the boardwalk.

In *Estate of Becker v. Murtagh,* 2012 NY Slip Op 02417 (Court of Appeals, April 3, 2012) a long-term lessee was awarded title by adverse possession to a portion of his neighbor's premises. The neighboring parcel was also leased *from the same landlord*.

The two adjoining beachfront parcels are located in Oak Beach in the Town of Babylon. The town is the owner of both parcels and separately leased them to two different tenants (the parties to this action). In the early 1960's the town required the tenants to erect a wooden jetty on the leased lots to inhibit beach erosion. The jetty, as constructed, appeared to be built on the lot boundary. Soon thereafter, the plaintiff erected a small dock, using the jetty for support. He later extended a pre-existing boardwalk to reach the dock. The opinion does not give the location of the boardwalk extension in relation to the jetty.

More than 20 years later, both lessees learned that the dock and boardwalk extension were actually built inside the lot line of the defendant's lot. *The dispute focused only on the claims of the two lessees* to the areas occupied by the dock and boardwalk extension. After analyzing the "hostility" and "exclusivity" elements of adverse possession, the court concluded that both elements were present (along with the other necessary elements) and were "sufficient to establish title by adverse possession" in the plaintiff.


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The town was not a party to the proceedings. Hence, the court only adjudicated the competing rights of the lessees. In a footnote, the court states that the "resolution of [the plaintiff's] adverse possession claim has no bearing on [the town's] interest." But the whole idea of "adverse possession" is that it divests the *record owner* of title, not merely possession. When the lease terms expire, does the plaintiff still own the dock and boardwalk parcels in fee? Even if the plaintiff's acquisition of title ultimately inures to the benefit of the town, how can the town acquire adverse possession against itself? The court also does not discuss the undisputed fact that the original jetty (which "supported" the dock, if not part of the boardwalk as well) was built at the common landlord's behest and was clearly "permissive."

Our next "boardwalk" case involves a residential subdivision on the shore of Brant Lake in upstate Warren County. *Ford v Rifenburg*, 2012 NY Slip Op 02746 (3rd Dept., April 12, 2012).

The common grantor imposed a number of restrictive covenants on the lots for the benefit of all grantees. Plaintiff commenced this action pursuant to RPAPL §2001 seeking to enjoin construction of defendants' proposed boathouse in the waters of Brant Lake. The restrictive covenant at issue provides that

> "[a]ny dock, pier or land projection constructed in or over the lake shall be no closer than [15] feet from the adjoining property line and no such structure shall be built with sides."

The defendants did not dispute that they had notice of the restrictive covenant or that plaintiff has standing to enforce it. Instead, the defendants contended that it is unenforceable because the common grantor did not own the underwater land and thus had no right to impose any restrictions on it. They also contended that since *they* do not own the underwater land, RPAPL §2001 does not apply because the boathouse will not be on their "premises." Both the Supreme Court and the Appellate Division disagreed, stating that, regardless of the ownership status of the underwater land, defendants' littoral right to access the water adjoining their lot "is part and parcel of their use of their land and is therefore subject to the restrictions to which they agreed when they purchased the property."

Finally, the defendants argued that the restrictive covenant should not be construed to include boathouses in the absence of a covenant explicitly precluding them. The proposed structure consisted of a dock on which a boathouse composed of four sides and a roof was to be built. The court explained "it is the addition of sides to be built on the dock that runs afoul of the plain language of the restrictive covenant, regardless of the lack of any explicit mention of boathouses."

Down by the sea

Our last case comes out of Supreme Court, Suffolk County, and illustrates how far "down by the sea" this particular land description runs.

In 1900, the Town of East Hampton was embroiled in ongoing disputes with upland property owners about the northerly boundary of the Atlantic Ocean beach. In an attempt to resolve those disputes, the Trustees of the Freeholders & Commonality of the Town of East Hampton offered a quitclaim deed to each upland owner delineating an agreed-upon boundary. That boundary was fixed as the "general line of grass growing along the ... Banks or Dunes." Fast-forward 112 years and the validity of that monumentation has been upheld. *Macklowe v Trustees of the Freeholders & Commonality of the Town of East Hampton*, 2012 NY Slip Op 50452(U) (Sup. Ct., Suffolk Cty., March 2, 2012).

The plaintiffs' 1992 deed contained an ambiguity. The easterly line supposedly ran 264' from the point of beginning "to ... the southerly line of beach grass." The description continued westerly "along said ... southerly line of beach grass." Unfortunately, the beach grass line was not even close to 264' south. It actually lay more than 400' south of the point of beginning. The plaintiffs claimed ownership down to the beach grass line. The Town Trustees challenged the plaintiffs' claim by focusing on the single issue of whether a natural object set forth in a deed description must be fixed and permanent or whether it can be "ambulatory" (changing naturally over time). Their argument was that "reference to ambulatory nat-

ural objects cannot be enforced with certitude" and, therefore, the distance and area recited in the deed should control.

The court (Whelan, J.) disagreed, finding that the beach grass line is a "natural object." Pointing out that the rules of deed construction give the greatest weight to natural objects, the court went on to analogize this case to other cases involving ambulatory water-course boundaries. Finding that a natural object need not be "fixed," the court determined that it need only be "a tangible landmark in order to indicate a boundary, having visibility, a pronounced level of permanence and stability, and a definite location." Based on the expert testimony of a coastal geologist, as well as a formal viewing of the site by the court, all of these criteria were found to be established.

Beach grass viability is greatly influenced by soil chemistry, porosity, water retention capacity, etc., which are in turn influenced by natural forces like wind, rain, tides, erosion and accretion. In addition, man-made structures such as jetties can be a factor. While plaintiffs won the day, the decision makes clear that these various forces can also cause the lot size to "shrink" in the future

Part of a larger trend

High-profile appellate decisions have recently been handed down concerning beaches in Florida and Texas. In another ongoing Florida dispute, the local sheriff refused to eject trespassers from a private beach. Wherever there is water, there are title disputes. Suffolk County clearly has its share.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely-read land title newsletter Constructive Notice. Please visit www.LandTitleLaw.com.