To be Argued by:
MARK P. DELLA POSTA, ESQ.
Time Requested for Argument:
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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Number: CA 19-02264

SUZANNE PEARCE, ADMINISTRATRIX OF THE ESTATE OF MITCHELL PEARCE, DECEASED,
Plaintiff-Respondent,

vs.

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT (a/k/a THE ERIE-WYOMING JOINT WATERSHED BOARD),
Defendant-Appellant,

Erie County Index No. 805498/2014.

BRIEF FOR DEFENDANT-APPELLANT JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, (a/k/a The ERIE-WYOMING JOINT WATERSHED BOARD)

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PRELIMINARY STATEMENT

This Appeal arises from an action commenced in the Erie County Supreme Court, by the Plaintiff-Respondent, SUSANNE PEARCE, Administratrix of the Estate of MITCHELL PEARCE (hereinafter referred to as "Plaintiff"). Following an earlier Appeal, this Court denied the Defendant-Appellant, JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT's, (a/k/a the ERIE-WYOMING JOINT WATERSHED BOARD)(hereinafter referred to as "the Joint Board") Motion for Summary Judgment on the basis that the Joint Board "failed to eliminate triable issues of fact regarding ownership of the subject dam." *Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 A.D.3d 1093, 1095, 107 N.Y.S.3d 595, 597 (4th Dept. 2019).

Thereafter, Judge Grisanti granted the Joint Board's Motion to Bifurcate, so that the first phase of the trial would solely address whether the Joint Board owned the dam (R. 46-48). From October 28, 2019 through October 29, 2019, the issue of ownership was tried before a jury (R. 72-281). At the close of proof, the Joint Board moved to dismiss the Plaintiff's case pursuant to N.Y. C.P.L.R. 4401 since the evidence established that it did not own the subject dam on June 12, 2012 (R. 221-234). The Plaintiff also moved for a judgment as a matter of law, arguing the

opposite (R. 221-234). Judge Grisanti reserved decision, and the Jury unanimously found that the Joint Board did not own the subject dam (R. 273-274, 282-283).

Once the jury was dismissed, Judge Grisanti set aside the verdict, denied the Joint Board's motion, and granted the Plaintiff's N.Y. C.P.L.R. 4401 motion, finding that the Joint Board was an/the owner of the subject dam on June 12, 2012 (R. 275-281). This Appeal arises from Judge Grisanti's December 3, 2019 Order (R. 5-19).

QUESTIONS PRESENTED

1) Did the Joint Board own the Earsing Sills on June 12, 2012?

The jury answered No (R. 282-283), but the Hon. Mark J. Grisanti, J.S.C. set aside the verdict and answered Yes (R. 5-19).

STATEMENT OF FACTS

Buffalo Creek and the Earsing Sills:

The Buffalo Creek, as depicted in Trial Exhibit 2 (R. 180), is a tributary of the Buffalo River (R. 152) that flows through the Town of West Seneca (R. 107-108) towards Lake Erie (R. 118, 152). Historically this section of the Creek would freeze and cause flooding (R. 114-115) and a flood control project was performed in the mid-20th Century (R. 112-113) to straighten the Creek by cutting off a portion of its meander (R. 116). This project essentially shortened the length of the Creek and increased the velocity of the water, leading to more erosion (R. 117-118).

In the 1950's, five (5) sills/low head dams (a/k/a "the Earsing Sills") were installed in this section of the Creek to reduce the velocity of the water (R. 118-119). The Sills were part of a larger, 57 linear mile stream bank stabilization project (R. 114) and the Federal government, through the U.S.D.A. Natural Resource and Conservation Service (formerly the Soil Conservation Service and hereinafter referred to as the "NRCS") designed, constructed, and placed the five (5) Sills in the Creek (R. 133-134, 157). None of these man made structures (R. 109) are moveable or detachable (R. 161-162).

In 1984-85, the Joint Board determined that Sill 1, which is the subject of this litigation (R. 122, 146), was not functioning properly and it petitioned the NRCS for

assistance (R. 126, 158, 160). Just like the original construction, the NRCS funded this project, hired the contractors, and built the permanent structures (R. 141, 158), which required the installation of sheet piling that was driven eight (8) to ten (10) feet into the riverbed (R. 160-161). Trial Exhibits 9 and 10 (R. 206-207) depict portions of the reconstruction work (R. 126-127, 139). Sill 1, as shown in Trial Exhibit 4 (R. 182), remains permanently affixed and attached to the riverbed and it has never been removed or detached from the property following its 1984 reconstruction (R. 160-161).

Aside from the 1984 maintenance work, no other maintenance has been performed on Sill 1 besides the Federal government touching up some rocks that were displaced during the 1984-85 reconstruction (R. 164).

The Joint Board:

Marc Gaston, the District Field Manager for the Erie County Soil and Water Conservation District (R. 108, 149),was the only witness who testified during the trial (R. 106-178). Mr. Gaston informed the jury that Soil and Water Conservation Districts are natural resource management agencies enacted at the County and State levels, which work on a variety of water quality improvement programs (R. 113). Though Mr. Gaston does not work for the Joint Board, he gathers and presents technical information to the Joint Board at their meetings (R. 149-150). As of June

12, 2012, the Joint Board consisted of members from the Board of Directors for the Erie District and the Wyoming County Soil and Water Conservation District (R. 109-110).

The Joint Board was the local sponsor for the initial Sill construction (R. 111, 151) and on December 23, 1959 it entered into an Agreement with the NRCS, relating to the operation and maintenance of the Sills (R. 128-129, 132-133, 185-192). Additional Agreements were made between these entities on October 6, 1975 (R. 135-136, 194-196) and September 14, 1984 (R. 139, 197-204), and the 1984 Agreement remains in effect to date (R. 165). This Court concluded in *Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 A.D.3d 1093, 1095, 107 N.Y.S.3d 595, 597 (4th Dept. 2019) that these Agreements were "not so comprehensive and exclusive that it entirely displaced the NRCS's duty to maintain the premises safely, such that [the Joint Board] owed a duty to the decedent."

Mr. Gaston testified that the Erie District members of the Joint Board will request that he inspect the Sills (R. 156-157), and he has participated in every inspection since he began working for the District in 1998 (R. 149, 152). The inspections are performed annually or following large storm events (R. 158, 163, 174), and as of June 12, 2012 the Sills were functioning as designed (R. 112, 124, 145, 163-164). The NRCS has also inspected the Sills on many occasions (R. 159).

In the twenty-one (21) years that Mr. Gaston has been employed by the Erie District and working with the Joint Board, the Joint Board has not done any maintenance or repairs to Sill 1 (R. 164, 175).

Mr. Gaston further testified that he does not believe that the Joint Board owns the Sills (R. 141, 150-151) and he bases this belief on how the Joint Board has operated for the last twenty (20) years (R. 151). The Joint Board does not have an office, it does not have a staff, it does not have anything (R. 151), and because of its very limited technical and financial capabilities, it relies heavily on the NRCS (R. 158). Mr. Gaston also does not believe that the 1984 Operation and Maintenance Agreement's specific terms and conditions spell out that the Joint Board owns these structures (R. 141-142, 150-151) because the Federal government likes to use standard documents and it would not surprise him if the 1984 Agreement is a standard document that came from another portion of a project (R. 151). The Agreement also requires the Joint Board to get NRCS' permission for any modifications (R. 158).

Neither the NRCS nor the Joint Board own the physical land, the creek or the property that abuts the Sills (R. 146). *See also Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 A.D.3d 1093, 1095, 107 N.Y.S.3d 595, 597 (4th Dept. 2019) (Recognizing that "the Board established that it did not own the creek or the banks adjacent thereto").

ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE GRANTED THE JOINT BOARD'S MOTION FOR A DIRECTED VERDICT

"A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556, 686 N.E.2d 1346, 1348, 664 N.Y.S.2d 252, 254 (1997); *see also A&M Global Mgmt. Corp. v. Northtown Urology Assocs., P.C.*, 115 A.D.3d 1283, 1287-88, 983 N.Y.S.2d 368, 374 (4th Dept. 2014); *De Angelis v. Protopopescu*, 37 A.D.3d 1178, 829 N.Y.S.2d 790 (4th Dept. 2007). In *Bentley v. City of Amsterdam*, 170 A.D.2d 725, 565 N.Y.S.2d 533 (3d Dept. 1991), the Court granted the defendant-Cemetery's N.Y. C.P.L.R. 4401 Motion where the plaintiff failed to establish that the defendant owned the sidewalk where the plaintiff fell. The Court concluded that the plaintiff's reliance on two ambiguous deeds, along with his expert's inability to opine that the sidewalk was in the defendant's property line, was insufficient to establish the defendant's ownership. *Id.* at 725-726. The defendant also submitted proof through the testimony of its employee that the Cemetery had not maintained the sidewalk since 1976 and only replaced a

portion of that sidewalk in 1964 after getting permission from the City. *Id.*

The Third Department in *Herbold v. Labarre*, 176 A.D.3d 1428, 111 N.Y.S.3d 439 (3d Dept. 2019) also upheld a defendants's N.Y. C.P.L.R. 4401 Motion where the plaintiff failed to established that he owned the disputed property. The Court concluded that the Plaintiff's proof , which "lacked a survey map or the opinion of a qualified expert fixing the location of his property, was insufficient to establish ownership of the area." *Id.* at 1429.

Viewing the evidence in the light most favorable to the plaintiff, it is respectfully submitted that the plaintiff failed to make out a *prima face* case of ownership. Plaintiff's only witness was Mark Gaston, who testified that he does not believe that the Joint Board owned Sill 1 (R. 141). When plaintiff's counsel attempted to cross examine his own witness by referencing the 1984 Operation and Maintenance Agreement, Mr. Gaston's opinion not only remained the same (R. 141-142, 145-146), but he elaborated that the Federal government likes to use standard documents so it would not surprise him if that document/language came from another portion of a project (R. 151). This unrebutted testimony, combined with the plaintiff's failure to introduce any deeds, surveys, drawings, maps, title searches of the area, or expert testimony, prevented the plaintiff from establishing that the Joint Board was an/the owner of the subject dam on June 12, 2012.

The fact that the trial concerned the ownership of a Sill/dam does not alter the plaintiff's evidentiary burden. "By definition, fixtures are articles of personal property that have been annexed to realty and are regarded as part thereof." 10 Warren's Weed N.Y. Real Property §113.07. "To become a fixture, the article must be annexed to the realty, there must be adaptability of the article affixed to the freehold, and the intention of the party creating the annexation must be to make the article a permanent accession to the freehold." 10 Warren's Weed N.Y. Real Property §113.07; *see also In re County of Nassau*, 40 Misc. 2d 384, 243 N.Y.S.2d 223 (N.Y. County Ct. 1963)(finding that a sewer system was a fixture and part of the real property since the system was imbedded into the land and could not be removed without substantial damage to the realty).

The proof at trial was sufficient to show that the Sill's permanent placement in the Buffalo Creek qualified it as a fixture that ran with the land. Since the Joint Board "did not own the creek or the banks adjacent thereto," *Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 A.D.3d 1093, 1095, 107 N.Y.S.3d 595, 597 (4th Dept. 2019), the plaintiff could not prove that Joint Board had title to the Sills. Rather the title would rest with either the State or the adjacent property owners since "[o]nly a riparian owner, or one who owns riparian rights, may construct and use a dam." *Berger v. N.Y. State Dept. Of Envtl.*

Conservation, 125 A.D.3d 1128, 1135, 4 N.Y.S.3d 631, 637 (3d Dept. 2015) citing Warren's Weed, N.Y. Real Property §151.08(3).

"[T]he State [also] has exclusive jurisdiction over the regulation of structures in navigable tidal waters where the State owns the submerged land." *Town of Carmel v. Melchner*, 105 A.D.3d 82, 97, 962 N.Y.S.2d 205, 216 (2d Dept. 2013). Pursuant to §701c of the Flood Control Act of 1936, which authorized the Federal Government to construct the various flood control projects throughout the nation, New York was required to:

> (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

Central N.Y. Broadcasting Corp. v. State, 3 A.D.2d 128, 129, 158 N.Y.S.2d 650, 651 (4th Dept. 1957); *see also Miller v. State*, 199 Misc. 237, 239, 98 N.Y.S.2d 643, 645 (N.Y. Ct. Cl. 1950) *aff'd in part* 279 A.D. 1139, 113 N.Y.S.2d 220 (4th Dept. 1952). In the cases that followed these projects, the Courts consistently treated the State of New York as the owner of the property:

- Discussing the state's lack of liability because "[a] landowner is ordinarily relived of responsibility where he is out of control." *Central N.Y. Broadcasting Corp. v. State*, 3 A.D.2d 128, 130, 158 N.Y.S.2d 650, 652 (4th Dept. 1957);

- "It does not appear when the State of New York did relinquish possession; and while in such possession of claimants' property, the rights and obligations of the State of New York in connection therewith were not unlike those of an owner." *Demoski v. State*, 12 Misc.2d 416, 422, 168 N.Y.S.2d 242, 249 (N.Y. Ct. Cl. 1957);

- "We have already had occasion to consider the nature of the relationship between the State and Federal Governments under the Federal flood control legislation and the companion New York legislation and have concluded that it is in the nature of a joint venture, and that the State, as owner of the lands involved, remains subject to those obligations of a landowner which are nondelegable even though it does not design, supervise or perform the work." *Allen v. State*, 208 Misc. 385, 387, 143 N.Y.S.2d 867, 870 (N.Y. Ct. Cl. 1955);

- "The result, we think, is that the State, as a participating principal in and beneficiary of the project remains subject to the obligations of an owner...despite its limited control in the particular situation." *Miller v. State*, 199 Misc. 237, 241, 98 N.Y.S.2d 643, 647-648 (N.Y. Ct. Cl. 1950) *aff'd in part* 279 A.D. 1139, 113 N.Y.S.2d 220 (4th Dept. 1952);

- "In attempting to apply the foregoing principles to the present case, we are at once confronted with the peculiarity that the State, although the owner of the land on which the excavation took place, did not devise the plan did not control, supervise or perform the work, and was not a party to the construction contract." *Wolcott v. State*, 199 Misc. 229, 234, 99 N.Y.S.2d 448, 454 (N.Y. Ct. Cl. 1950).

The State's ownership of the property is significant not only because ownership of a fixture, such as the Sills, runs with the land, but also because the only evidence that the plaintiff relied on at trial to show a transfer of ownership was the 1984 Operation and Maintenance Agreement. The Flood Control statutes and subsequent case law demonstrate however, that the Federal Government did not have any

ownership interest in the property once the projects were completed and, as a result, had nothing to convey. "Real Property §245 provides that a greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed." *Bouffard v. Befese, LLC*, 111 A.D.3d 866, 870, 976 N.Y.S.2d 510, 514 (2d Dept. 2013). "Thus, conveyances of land to which the grantors had no title convey no interest to the grantees." *O'Brien v. Town of Huntington*, 66 A.D.3d 160, 167, 884 N.Y.S.2d 446, 451 (2d Dept. 2009). Further, "if a document purportedly conveying a property interest is void, it conveys nothing, and a subsequent bona fida purchaser or bona fide encumbrancer for value receives nothing." *Bouffard v. Befese, LLC*, 111 A.D.3d 866, 870, 976 N.Y.S.2d 510, 514 (2d Dept. 2013); *see also ABN AMRO Mtge. Group, Inc. v. Stephens*, 91 A.D.3d 801, 803, 939 N.Y.S.2d 70, 72 (2d Dept. 2012).

Since the Federal government had no ownership interest in the Earsing Sills once the project was finished, it could not legally convey any interest to the Joint Board. The plaintiffs's failure to introduce any evidence showing that the State of New York conveyed the land back to the Federal government or directly to the Joint Board by deed, grant or otherwise prevented the plaintiff from satisfying her burden on the issue of ownership.

POINT II

THE JURY'S VERDICT WAS REACHED BY A FAIR INTERPRETATION OF THE TRIAL EVIDENCE AND THE TRIAL COURT SHOULD NOT HAVE SET IT ASIDE

"It is well established that a verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence." *Rew v. Beilein*, 151 A.D.3d 1735, 1737, 57 N.Y.S.3d 808, 810-811 (4th Dept. 2017); *see also Clark v. Loftus*, 162 A.D.3d 1643, 1644, 79 N.Y.S.3d 785, 786 (4th Dept. 2018). "[I]t is within the province of the jury to determine issues of credibility, and great deference is accorded to [it] given its opportunity to see and hear the witnesses." *Sauter v. Calabretta*, 103 A.D.3d 1220, 959 N.Y.S.2d 579, 580 (4th Dept. 2013). "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view." *McCulloch v. New York Cent. Mut. Ins. Co.*, 175 A.D.3d 912, 914, 107 N.Y.S.3d 545, 549 (4th Dept. 2019); *see also Hollamon v. Vinson*, 38 A.D.3d 1159, 1160, 831 N.Y.S.2d 781, 782 (4th Dept. 2007)("Further, where an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view").

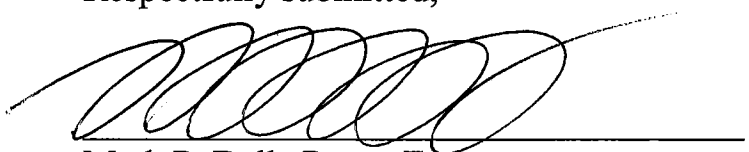
It is respectfully submitted that the Jury's verdict was based on a fair interpretation of the evidence. This Court previously determined that issues of fact existed as to whether the Joint Board owned the subject dam, *see Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 A.D.3d 1093, 1095, 107 N.Y.S.3d 595, 597 (4th Dept. 2019), and the plaintiff failed to submit any proof that would warrant a finding of ownership as a matter of law, as set forth above. Rather, the testimony from Marc Gaston, that plaintiff's only witness, included statements that the Joint Board did not own the Sills (R. 141) and also an explanation on why the language in the 1984 Operation and Maintenance Agreement did not apply (R. 151). This proof, along with Mr. Gaston's testimony that the Federal government designed, paid for, and constructed the original and the 1984-85 reconstructed Sills (R. 133-134, 141, 157-158) and the fact that Joint Board was required to get the Federal government's permission before making any modifications to the Sills (R. 158), presented sufficient evidence for the jury to find that the Joint Board was not an owner.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant, JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, (a/k/a the ERIE-WYOMING JOINT WATERSHED BOARD), respectfully requests that this Court reverse the December 3, 2019 Order of the Hon. Mark J. Grisanti, and grant the Defendant-Appellant's N.Y. C.P.L.R. 4401 motion or, in the alternative, reinstate the verdict rendered by the jury on October 29, 2019 and dismiss the Plaintiff's Complaint in the above-entitled action.

DATED: Buffalo, New York
August 3, 2020

Respectfully submitted,



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