To be Argued by:
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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.

REPLY 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 Reply Brief is submitted in further support of 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"), appeal of the Hon. Mark J. Grisanti's December 3, 2019 Order (R. 5-19).

ARGUMENT

POINT I

THE JOINT BOARD WAS ENTITLED TO A DIRECTED VERDICT

Contrary to statements contained in the Plaintiff's Brief, the crux of the Joint Board's arguments is not whether the Joint Board was legally capable of owning Sill 1 or whether or not there could be multiple owners. The issue before this Court is the issue that was addressed by the jury: was the Joint Board an or the owner of the Earsing Sills low head dams structures on June 12, 2012? Since the plaintiff failed to make out a *prima facie* case on this issue at trial, it is respectfully submitted that the Joint Board was entitled to a Directed Verdict.

A. The Plaintiff Failed to Establish, by a Preponderance of the Evidence, that the Joint Board was an or the Owner of Sill 1

The Court's prior decision set the framework for the trial. After finding that the Joint Board's agreements with the Federal government were "not so comprehensive and exclusive that it entirely displaced the [Federal government's] duty to maintain the premises safely," this Court stated that:

> [T]he Board...failed to eliminated triable issues of fact regarding ownership of the subject dam. While the Board established that it did not own the creek or the banks adjacent thereto, its submissions are insufficient to establish as a matter of law that it did not own the subject dam, which allegedly constituted and created the dangerous condition. The Board asserts that the deposition testimony of ECSWCD's district

> field manager establishes that, under the agreement, the Board was a contractor only and not an owner. That assertion lacks merit, however, because the district field manager specifically testified that he did not know who owned the dams. Moreover, the language of the agreement, which was submitted by the Board in support of its motion, indicates that ownership of the dams may have been transferred to the Board, and the Board failed to establish as a matter of law that no such transfer could or did occur. We thus conclude on that basis that the Court properly denied the Board's motion for summary judgment. *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).

Though appellate courts have "the authority to search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion before the Court," *Halloway v. State Farm Ins. Co.*, 23 A.D.3d 617, 805 N.Y.S.2d 107 (2d Dept. 2005), this Court did not do so. The Court determined rather that the Operation and Maintenance Agreement and the deposition testimony of Mark Gaston created an issue of fact that had to be resolved at trial.

Instead of submitting additional evidence, such as deeds, surveys, title searches or expert testimony to prove ownership however, the plaintiff relied on the same proof that was before this Court on the prior (2019) Appeal; proof, which at its best, only raises issues of fact. The proof at trial was worse for the plaintiff however because unlike Mr. Gaston's deposition testimony, where he stated that he did not know who owned the dams, *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, 598 (4th

Dept. 2019), Mr. Gaston testified as follows when he was asked whether the Joint Board owned the Sills:

> Q. But isn't it in fact the case that as of June 12th of 2012, dam number one structure number in Buffalo Creek that's a subject matter of the underlying claim in this case was owned by the Joint Board? It was owned by the Joint Board, wasn't it?
>
> A. I do not believe so.
>
> Q. Isn't it, in fact, the case that the very specific terms and conditions of the third operating and maintenance agreement spell out that the Joint Board owns that dam structure in Buffalo Creek as of June 12th of 2012, isn't it?
>
> A. I don't believe so (R. 141-142).

Mr. Gaston reaffirmed this opinion later on in his direct examination:

> Q. But based on your interpretation of it, as far as you're concerned, the Joint Board didn't own that structure that was in there, despite what this says here in the document?
>
> A. I don't believe so, no.
>
> Q. What do you base your belief on?
>
> A. I base my belief on how we've operated for the last twenty years (R. 150-151).

This testimony not only undermined the plaintiff's theory on ownership, but the plaintiff offered no other evidence to counter the statements of her only witness, whose credibility is now being attacked in the Plaintiff's Brief. *See* Plaintiff-

Respondent's Brief, Page 12 ("Furthermore, there is no evidence in this case that Mr. Gaston possess any legal expertise or credentials which would give him any standing to make a pronouncement regarding whether the Joint Board was legally capable of owning anything").

It is respectfully submitted that plaintiff's failure to offer any other proof aside from the evidence that was before this Court on a prior Appeal prevented the plaintiff from satisfying her burden at trial. *See Bentley v. City of Amsterdam*, 170 A.D.2d 725, 565 N.Y.S.2d 533 (3d Dept. 1991)(granting defendant's N.Y. C.P.L.R. 4401 motion where plaintiff's reliance on two ambiguous deeds and uncertain expert testimony failed to prove ownership); *see also Herbold v. Labarre*, 176 A.D.3d 1428, 111 N.Y.S.3d 439 (3d Dept. 2019)(granting defendant's N.Y. C.P.L.R. 4401 motion where plaintiff's proof , which "lacked a survey map or the opinion of a qualified expert" failed to establish ownership).

B. The Plaintiff Failed to Establish by a Preponderance of the Evidence, that the Federal Government had the Ability to Transfer Title to the Joint Board

When this Court previously discussed the significance of the Operation and Maintenance Agreement, it noted that "the language of the agreement...indicates that the ownership of the dams may have been transferred to the Board, and the Board failed to establish as a mater of law that no such transfer could or did occur." *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, 598 (4th Dept. 2019). Once this case went to trial, it became the plaintiff's responsibility to prove, by a preponderance of the evidence, that a transfer could or did occur. To do so, the plaintiff had to submit more than the Agreement because "[a] grantor cannot convey what the grantor does not own." *Nationstar Mtge., LLC v. Goodman*, 2020 N.Y. App. Dev. LEXIS 5854*3-4 (4th Dept. 2020); *see also O'Brien v. Town of Huntingtown,* 66 A.D.3d 160, 167, 884 N.Y.S.2d 446, 451 (2d Dept. 2009); *Bouffard v. Befese, LLC*, 111 A.D.3d 866, 870, 976 N.Y.S.2d 510, 514 (2d Dept. 2013)("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"). Thus, the plaintiff had to first establish that the Federal government had an ownership interest in the Sills before it could prove that this interest was conveyed to the Joint Board.

The plaintiff never addressed this issue at trial, and no opinion or documentary evidence was ever introduced that would explain how the land was acquired for this project. Aside from the Operation and Maintenance Agreements, the only evidence in the record were the photographs of the Sill (R. 206-207) which confirm that the Sill was permanently attached to the Creek bed, rendering it a fixture that ran with the land. *See* 10 Warren's Weed N.Y. Real Property §113.07 ("By definition, fixtures are articles of personal property that have been annexed to realty and regard as part thereof"). Because 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 record evidence established that title to the Sill rested with the State and/or the adjacent property owners since they were the entities who owned the creek bed per the common law. *See 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)("Only a riparian owner, or one who owns riparian rights, may construct and use a dam"). The plaintiff never explained how the Federal government fit into this legal arrangement, and this failure to do so was fatal to the plaintiff's case because there is no evidence showing whether the Federal government had and/or retained a property interest that it could convey at a later date.

As also set forth in the Joint Board's initial Brief, cases involving Flood Control Act projects repeatedly treat New York State as the property owner. *See Central N.Y. Broadcasting Corp. v. State*, 3 A.D.2d 128, 129, 158 N.Y.S.2d 650, 651 (4th Dept. 1957)(Discussing the state's lack of liability because "[a] landowner is ordinarily relieved of responsibility where he is out of control"); *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)("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"). This consistent approach by the Courts demonstrates that the plaintiff had to submit some evidence showing that the Federal government, rather than the state of New York, had an interest in the Sill once the project was completed. The absence of evidence in the plaintiff's favor on this issue further highlights the plaintiff's failure to establish ownership by a preponderance of the evidence.

POINT II

THE JURY'S VERDICT MUST BE REINSTATED

At the very least, the evidence cited above raised issues of credibility that fell within the province of the jury. *See Sauter v. Calabretta*, 103 A.D.3d 1220, 959 N.Y.S.2d 579, 580 (4th Dept. 2013). The plaintiff's only witness, Mark Gaston, testified that he did not believe that the Joint Board owned the Sills. The plaintiff also failed to offer any opinion or documentary evidence that would counter these statements and establish, by a preponderance of the evidence, that the Federal government actually conveyed an ownership interest to the Joint Board. Since the evidence did not "so preponderate in favor of the plaintiff," *Rew v. Beilein*, 151 A.D.3d 1735, 1737, 57 N.Y.S.3d 808, 810-811 (4th Dept. 2017), and because it was reasonable for the jury to find in the Joint Board's favor, the Joint Board respectfully requests that this Court reinstate the jury's October 29, 2019 verdict. *See McCulloch v. New York Cent. Mut. Ins. Co.*, 175 A.D.3d 912, 914, 107 N.Y.S.3d 545, 549 (4th Dept. 2019)("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"); *see also Hollamon v. Vinson*, 38 A.D.3d 1159, 1160, 831 N.Y.S.2d 781, 782 (4th Dept. 2007).

CONCLUSION

For the foregoing reasons and for the arguments raised in the Joint Board's initial brief, 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 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
November 11, 2020

Respectfully submitted,

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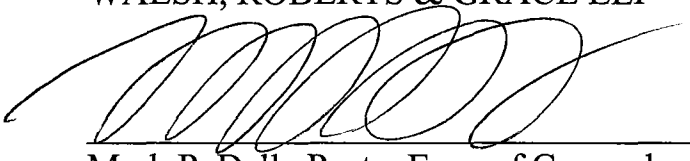

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