

To be argued by
WILLIAM A. QUINLAN, ESQ.
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STATE OF NEW YORK

Supreme Court

Appellate Division - Fourth Department

SUZANNE PEARCE, ADMINISTRATRIX OF THE
ESTATE OF MITCHELL PEARCE, DECEASED,

Plaintiff - Respondent,

-against-

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING
COUNTY SOIL CONSERVATION DISTRICT (a/k/a
the ERIE-WYOMING JOINT WATERSHED BOARD)

Defendant-Appellant.

County of Erie Index No. 805498/2014
Appellate Division Docket No. CA 19-02264

**BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT
SUZANNE PEARCE**

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STATEMENT OF FACTS

A. Evidence Admitted At Trial

The only affirmative evidence before the jury in this bifurcated trial upon the issue of the ownership of the Earsing Sills low head dams clearly established that the defendant-appellant, Joint Board of the Erie County Soil and Water Conservation District and of the Wyoming County Soil and Water Conservation Districts (hereinafter “the Joint Board”) was an owner of the structure constituting such low head dams, where the subject accident, the drowning of plaintiff’s decedent, Mitchell Pearce, took place, on June 12, 2012.

There is no dispute in this case that the subject low head dams were built following the granting of easements to the Joint Board from landowners whose property would have to be accessed in order for the dams to be built, inspected and maintained (R. 125, 134-135, 230-231).

While the 1984 Operation and Maintenance Agreement between the Joint Board and the Federal Government’s Natural Resource and Conservation Service (hereinafter "the NRCS") and/or its predecessor, the “Soil Conservation Service”, is referenced in passing in the Joint Board’s brief, not one word of its actual text is quoted.

However, the 1984 Maintenance and Operation Agreement was discussed in a brief previously submitted to this Court upon a prior appeal.

In the Operation and Maintenance Agreement, dated September 14, 1984, the "Soil Conservation Service, United States Department of Agriculture," is referred to as "the Service" and the Erie-Wyoming County Soil and Water Conservation Districts' Joint Board is referred to as "the Sponsor" (R. 197).

Under the "Definitions" section of the Operation and Maintenance Agreement, dated September 14, 1984, "Real property" is defined as follows: "Real Property means land, including land improvement, structures, and appurtenances thereto, excluding moving machinery and equipment." (See page 4 of the Operation and Maintenance Agreement, dated September 14, 1984, R. 200). It is submitted that this definition of "Real Property" covers the Earsing Sills low head dam "structures" at issue.

The "Sponsor", i.e., the Joint Board, owns the "Real Property" covered by the Operation and Maintenance Agreement, dated September 14, 1984, under 3. Use and Disposition of Real Property: "a. Title to real property shall vest in the sponsor subject to the condition that the sponsor shall use the real property as long as needed for the purpose for which it was acquired and in accordance with the O&M agreement." (See page 4 of the Operation and Maintenance Agreement, dated September 14, 1984, R. 200).

An earlier provision of this Operation and Maintenance Agreement

provided for the following:

VI. Time of Responsibility

The Sponsor(s) responsibility for operation and maintenance begins when a part of or all of the work of installing a measure is completed and accepted or is determined complete by the service. This responsibility shall continue until the expiration of the evaluated life of all the installed project measures. This does not relieve the Sponsor(s) liability which continues throughout the life of the measure or until the measure is modified to remove potential loss of life or property. (R. 198).

The above represented the only affirmative evidence regarding ownership of the Earsing Sills low head dams at issue. A district field manager for the Erie County Soil and Water Conservation, Mark Gaston, offered what best can be described as “non-opinions” regarding the ownership issue (R. 108, 147-151). Mr. Gaston testified that he did not affirmatively know who owned the low head dams that are the subject of this case (R. 147-148). He later offered, almost as a non-sequitor, and without any affirmative proof, testimony regarding the 1984 operations and maintenance agreement being based upon a “standard document” of the Federal government (R. 151). However, no explanation was offered regarding how the fact that the document was based upon a “standard document” would change the contents of what was plainly agreed to in the forgoing section of the 1984 Operation and Maintenance Agreement.

Although various legal pronouncements from other cases are improperly inserted into this case for the first time upon appeal, no expert in property law was called to testify at trial to provide any evidence for the jury to consider in opposition to the provisions of the Operation and Maintenance Agreement, dated September 14, 1984, set forth above.

B. Jury Charges And Jury Verdict Sheet

By the time the jury was charged in this case, counsel for the plaintiff and for the Joint Board had resolved the prior disputes they had on the issue of what should be charged to the jury, and jury was charged without objection (R. 219, 271-272). Regarding the jury verdict sheet, the one objection of the Joint Venture was to the language of Question 1 of the verdict sheet (R. 282). Plaintiff had wanted the sole question upon the verdict sheet to read: “Was defendant, JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, an owner of the Earsing Sills low head dams structures on June 12, 2012?” (R. 218). Plaintiffs asserted this was the correct charge, because under the Operation and Maintenance Agreement, dated September 14, 1984, there could be more than one owner of the low head dams: the Joint Board could be considered the contractual owner for the purpose of

performing routine inspection and maintenance of the low head dams, and the Federal government's Soil Conservation Service ("SCS") could be considered to be the owner for the purpose of performing major, structural changes, replacement or repairs to the dam (R. 197-201). The Joint Board's counsel requested that the jury verdict sheet refer to "the" owner. (R. 218). The trial Court in effect split the difference and incorporated both "an" and "the" into the single question upon the verdict sheet, as follows: "Was defendant, JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, an or the owner of the Earsing Sills low head dams structures on June 12, 2012?" (R. 218). There were no other objections to the verdict sheet.

C. Motions For A Directed Verdict and The Jury's Verdict

Both plaintiff and defendant made motions for a directed verdict, and the trial Court reserved upon both of them. (R. 221-234). During plaintiff's oral argument of the motion for a directed verdict in plaintiff's favor, this Court's prior decision upon a prior appeal in this case was discussed (R. 225-229). In that prior appeal, which, among other things, reviewed the prior denial of the Joint Board's summary judgment motion, this Court stated the following:

Contrary to the Board's contention, however, it failed to eliminate

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 (see generally Knapp v. Hughes, 19 NY3d 672, 674, [2012]; Douglaston Manor v. Bahrakis, 89 NY2d 472, 480–481[1997]), 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 (see Smith v. City of Syracuse, 298 AD2d 842, 842 [4th Dept. 2002]). 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 AD3d 1093, 1095 (4th Dept 2019).

Based upon the forgoing, this Court found that the agreement language quoted above would be sufficient for a trier of fact to find that the Joint Board owned the dam structures. At trial, the plaintiff again relied upon the Operation and Maintenance Agreement, dated September 14, 1984 and this Court's most recent opinion in this case. Defendant presented no affirmative proof at all, and merely relied upon defense counsel's rhetoric that the owner of the creek-bed had to be the owner of the sills, a position this Court had already rejected.

The jury's verdict answered "No" to the following question: "Was defendant, JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, an or the owner of the Earsing Sills low head dams structures on June 12, 2012?" (R. 218).

Justice Grisanti, following the verdict in favor of the Joint Board, held that the only evidence admitted upon the subject, the 1984 Operations and Maintenance Agreement, and testimony related to it, in the context of this Court's prior decision in the instant case, required a verdict finding that the Joint Board was an owner of the subject low head dams. (R. 275-278).

The Joint Board's appeal followed (R. 1).

POINT I

JUSTICE GRISANTI PROPERLY GRANTED PLAINTIFF'S MOTION FOR A DIRECTED VERDICT UPON THE ISSUE OF THE OWNERSHIP OF THE EARSING SILLS LOW HEAD DAMS

A. The Joint Board of Directors of Erie-Wyoming County Soil Conservation District Was An Owner of the Earsing Sills Low Head Dams Structures As A Matter of Law, Based upon the 1984 Operations and Maintenance Agreement Between It and The Federal government's Soil Conservation Service

This Court's prior decision in this case held that the Joint Board was created by the New York State Legislature as a separate legal entity, specifically so that it may "serve as the local sponsor for the project in the Buffalo Creek watershed funded under the Federal 1944 Flood Control Act." Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist., 175 AD3d 1093, 1096 (4th Dept 2019). This Court went on to note the following:

The legislative history establishes that the United States Department of Agriculture, which was cooperating with the conservation districts in the flood control project, had authorized an expenditure of nearly \$2 million for stream bank erosion control; contingent on the State or local government assuming annual maintenance costs after the control measures were installed (see Letter from St Conservation Dept, February 24, 1949, Bill Jacket, L 1949, ch 374 at 13; Mem of Div of Budget, Bill Jacket, L 1949, ch 374 at 19; see also Board of Supervisors' Res in Support, Bill Jacket, L 1949, ch 374 at 8-9). To fulfill that purpose, the legislature empowered the Board to engage in stream bank maintenance work within the Buffalo Creek watershed and to receive monies available from the federal or state government or any other source and expend such monies in its discretion on any

portion of the watershed (L 1949, ch 374, § 1). In addition, the record establishes, and plaintiff does not dispute, that the Board is capable of entering into contracts and being sued

Suzanne P., 175 AD3d at 1096.

This Court concluded by stating that “the legislation creating the Board and the abovementioned powers and capabilities of the Board establish that it exists as an entity that is separate and distinct from the Districts (see generally John Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84, 88 [1978]; Facilities Dev. Corp. v. Miletta, 246 AD2d 869, 870 [3d Dept. 1998], lv dismissed 92 N.Y.2d 843, 677 N.Y.S.2d 69, 699 N.E.2d 428 [1998], rearg. denied 92 N.Y.2d 921 [1998]).”

Suzanne P., 175 AD3d at 1096.

Based upon the forgoing, the Joint Board had the authority as a separate legal entity to contract with an arm of the Federal Government to assume the duties of an “owner” of the Earsing Sills low head dams responsible for operation and maintenance. That agreement provided that “title” to “real property” (defined so as to include “structures”) would vest in the “sponsor”, the Joint Board. (R. 197, 200). The 1984 Operations and Maintenance Agreement provided that title would continue to vest in the “sponsor”, the Joint Board so long as “the sponsor shall use the real property as long as needed for the purpose for which it was acquired and in accordance with the O&M agreement.”

Significantly, district field manager for the Erie County Soil and Water Conservation, Mark Gaston, admitted that the Joint Board continued to use the Earsing Sills low head dams for the purposes for which they were acquired as of the date of the subject accident, June 12, 2012 (R. 108, 112, 169-170). It is respectfully submitted that Mr. Gaston's answers, admitting that the low head dams were still functioning as intended on June 12, 2012 and thereafter, in combination with the terms of the 1984 Operations and Maintenance Agreement, requires a finding as a matter of law that the Joint Board was an "owner" of the low head dams as of June 12, 2012 .

The 1984 Operations and Maintenance Agreement, and the forging testimony by Mr. Gaston constitutes the only affirmative evidence regarding the ownership of the subject low head dam presented to the jury during the trial case in this case. The jury's verdict was contrary to such evidence and the jury's verdict was therefore properly set aside, in favor of a finding that the defendant, Joint Board, was an "owner" of the Earsing Sills low head dam which caused the death of plaintiff's decedent, Mitchell Pearce.

B. The Fact that the Joint Board Did Not Own The Creek Bed Had No Bearing Upon Its Ownership of the Low Head Dam Structure.

The sole substantive argument of the Joint Board on appeal is that it cannot be the owner of the low head dam structures without owning the creek bed to which they are, in the Joint Board's opinion, "permanently affixed."

However, as noted above, this Court, in its prior decision deciding the Joint Venture's appeal denying its summary judgment motion, denied that it was entitled to summary judgment on grounds that it did not own the underlying creek bed. In doing so this Court cited to the case of Smith v City Of Syracuse, 298 AD2d 842 (4th Dept 2002). The Smith court held that there was a question of fact regarding whether a utility owned an electrical pull box or hand hole, which housed wiring for street lights, notwithstanding that the street pavement surrounding the pull box was owned by the defendant, City of Syracuse .

In the instant case, unlike the Smith case, there was no affirmative proof stating that the Joint Board did not own the low head dams. The most that Mr. Gaston could testify to is that he did not know who owned the low head dams. (R. 147-148).

In the Joint Board's brief, Mr. Gaston's testimony, set forth as page 151 of the Record, is the only evidence offered in support of the jury's verdict.

Mr. Gaston first testifies, essentially, that the Joint Board does not own anything and is incapable of owning anything (R. 151). Such testimony flies in the face of and is inconsistent this Court's prior decision in this case, quoted above, which granted the summary judgment motions of the two entities which make up the Joint Board, the Erie County Soil & Water Conservation District and the Wyoming County Soil Water Conservation District.

In any event, there was no affirmative evidence from Mr. Gaston or anyone else that the Joint Board was not an owner of the Earsing Sills low head dams in accordance with the 1984 Operations and maintenance agreement. 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.

Mr. Gaston also offered speculation that the 1984 Operation and Maintenance agreement was derived from a "pre-printed form." Even if such an assertion were true, it would in no way refute the unchallenged evidence contained within such agreement, that by its terms, the Joint Board was an "owner" of the Earsing Sills. Income tax returns, motor vehicle registrations and titles, deeds and many other legal documents are based upon "pre-printed forms," which in no way compromises their validity as legal documents.

The Smith case provides a useful analogy for this case in that the Joint Board in this case is in a position akin to that of a utility (such as NiMo) in the Smith case, which installs its own structure upon the land of another, having obtained an easement for the underlying purpose. Thus, if a utility installs a pole or a pipeline, that structure is owned by the utility, regardless of the fact that it may not own the surrounding land upon which it is installed.

The exclusion of underlying landowners from being considered to be “owners” of utility poles and wires erected upon the real property owned by the landowner is highlighted by the case of Paul v Vil. of Quogue, 178 AD3d 942 (2d Dept 2019). In the Paul case, the defendants, the Village of Quogue and Town of Southampton, were joint owners of real property upon which a utility pole and attached wires were constructed. It was emphasized in the Paul case that joint ownership by defendants of the land upon which the utility pole and wires were located did not translate into any ownership interest in the pole and wires, which in fact were owned by a utility or utilities.

In this case, counsel for the Joint Board sought to draw a false dichotomy from a utility pole or even a pipe, which purportedly may be removed at the whim of the utility, and the Earsing Sills low head dam structures, which are said to be “permanently affixed” to the creek-bed. (R. 238-239). Without any evidence,

other than his own argument during summation, defense counsel asserted that utility poles and pipelines are removed for relocation and reuse, in contrast with the low head dams, which he stated were permanently affixed to the creek-bed and would not be reused (R. 238-239). However, in reality, the same standard governs whether or not the pole or pipeline of the utility or the low head dams at issue in the case are permitted to remain upon another's real property.

In this case, there is a provision 1984 Operation and Maintenance Agreement which provides that the Joint Board's ownership duties to inspect and maintain the low head dam extends only until "the expiration of the evaluated life of all the installed project measures" and the Joint Board authority continues throughout the life of the "measures." (R. 170-171). Mr. Gaston testified that at the time of trial, the structure was still functioning as intended (R. 124, 164, 170-171).

It is common knowledge that various utility structures, such as water pipelines, may remain in service for over a century, yet they will remain in service only so long as they continue to be fit for their intended purpose, or, in other words, the structure is no longer fit for such purpose, or that intended purpose is somehow changed or negated, or that purpose is served by some new construction. Therefore, in reality, the low head dams are no different than the utility poles or

pipes to which defense counsel compared the low head dams, in that they will remain until they cease to serve their purpose, that purpose is changed or it is replaced by some new construction. In either case, the issue of whether or not the structure at issue has ceased to serve its purpose is not determined by the owner of the land upon which the structure rests.

Based upon the forgoing, the unrefuted evidence at the trial of this case established as a matter of law that, pursuant to the 1984 Operation and Maintenance Agreement it had signed, the Joint Board was an owner of the Earsing Sills low head dams. Thus, Justice Grisanti properly rejected the jury's verdict and granted plaintiff's motion for a directed verdict upon the issue of the Joint Board's status as an "owner" of the Earsing Sills low head dams.

POINT II

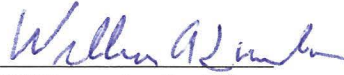
ARGUMENTS MADE FOR THE FIRST TIME IN A REPLY BRIEF ARE NOT PROPERLY BEFORE THIS COURT

If defendant makes any new arguments in its reply brief, such arguments should not be considered by this Court. See PNC Bank, N.A. v Steinhardt, 159 AD3d 999, 1001 (2d Dept 2018); Turner v Canale, 15 AD3d 960 (4th Dept 2005) and Greene v Xerox Corp., 244 AD2d 877, 878 (4th Dept 1997).

CONCLUSION

The Order appealed from should be affirmed.

Dated: November 4, 2020


William A. Quinlan

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