



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 23, 2011

UPS - Next Day Delivery

Hon. Jane Zarecki, County Clerk
Hamilton County
102 County View Drive, P.O. Box 204
Lake Pleasant, New York 12108



Re: *Friends of Thayer Lake, et al. v. Brown et al.*; Index # 6803-10

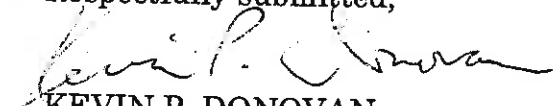
Dear Ms. Zarecki:

Enclosed for filing in this matter are the following papers:

Request for Judicial Intervention;
Notice of Motion to Intervene and to Excuse Service on Unnamed and
Unidentifiable Defendant;
Affidavit of Christopher A. Amato, Esq.;
Affirmation of Assistant Attorney General Kevin P. Donovan;
Answer, Affirmative Defenses and Verified Counterclaim;
Memorandum of Law in Support of State's Motion to Intervene; and
Affidavit of service.

I have enclosed an extra copy of the Notice of Motion which I would appreciate returned to me after it is date stamped, in the enclosed self-addressed stamped envelope. Pursuant to CPLR § 8017, the State is exempt from a filing fee.

Respectfully submitted,


KEVIN P. DONOVAN
Assistant Attorney General
(518) 474-4843

Encl: as stated

copy: Dennis J. Phillips, Esq.
McPhillips, Fitzgerald & Cullum LLP
Attorneys for Plaintiffs
288 Glen Street
P.O. Box 299
Glens Falls, New York 12801

John W. Caffry, Esq.
Caffry and Flower
Attorneys for defendant Phil Brown
100 Bay Street
Glens Falls, New York 12801

REQUEST FOR JUDICIAL INTERVENTION

SUPREME Hamilton 6803-10
 COURT COUNTY INDEX NO. DATE PURCHASED

For Clerk Only
IAS entry date
Judge Assigned
RJI Date

PLAINTIFF(S):
 FRIENDS OF THAYER LAKE LLC., et al.

DEFENDANT(S):
 PHIL BROWN, et al.

PROPOSED INTERVENORS-DEFENDANTS:
 THE STATE OF NEW YORK and the
 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Date issue joined: _____ Bill of particulars served (Y/N): Yes No

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

- | | |
|--|--|
| <input type="checkbox"/> Request for preliminary conference | <input type="checkbox"/> Notice of petition (return date: _____)
Relief sought _____ |
| <input type="checkbox"/> Note of issue and/or certificate of readiness | <input type="checkbox"/> Notice of medical or dental malpractice action (specify: _____) |
| <input checked="" type="checkbox"/> Notice of motion (return date: _____)
Relief sought <u>INTERVENTION</u> | <input type="checkbox"/> Statement of net worth |
| <input type="checkbox"/> Order to show cause
(clerk enter return date: _____)
Relief sought _____ | <input type="checkbox"/> Writ of habeas corpus |
| <input type="checkbox"/> Other ex parte application (specify: _____) | <input type="checkbox"/> Other (specify: _____) |

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

MATRIMONIAL

- Contested -CH
 Uncontested -UM

COMMERCIAL

- Contract -CONT
 Corporate -CORP
 Insurance (where insurer is a party, except arbitration) -INS
 UCC (including sales, negotiable instruments) -UCC
 *Other Commercial -OC

REAL PROPERTY

- Tax Certiorari -TAX
 Foreclosure -FOR
 Condemnation -COND
 Landlord/Tenant -LT
 *Other Real Property -ORP

OTHER MATTERS

- * Public Nuisance -OTH

TORTS

Malpractice

- Medical/Podiatric -MM
 Dental -DM
 *Other Professional -OPM

- Motor Vehicle -MV
 *Products Liability -PL

- Environmental -EN
 Asbestos -ASB
 Breast Implant -BI
 *Other Negligence -OTN

- *Other Tort (including intentional) -OT

SPECIAL PROCEEDINGS

- Art. 75 (Arbitration) -ART75
 Art. 77 (Trusts) -ART77
 Art. 78 -ART78
 Election Law -ELEC
 Guardianship (MEL Art. 81) -GUARD81
 *Other Mental Hygiene -MHYG
 *Other Special Proceeding -OSP

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a

YES NO YES NO
[] [X] Municipality: (Specify) [] [X] Public Authority: (Specify)

YES NO
[X] [] Does this action/proceeding seek equitable relief?
[] [X] Does this action/proceeding seek recovery for personal injury?
[] [X] Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:

(This applies to all cases except contested matrimonials and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

[X] Expedited: 0-8 months [] Standard: 9-12 months [] Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? [] No [] Yes, Date

Was a Notice of No Necessity filed? [] No [] Yes, Date

ATTORNEY(S) FOR PLAINTIFF(S):

Table with 4 columns: Self Rep., Name, Address, Phone #. Row 1: Dennis J. Phillips, Esq., McPhillips, Fitzgerald & Cullum LLP, 288 Glen Street P.O. Box 299 Glens Falls, New York 12801, (518) 792-1174.

ATTORNEY(S) FOR DEFENDANT(S):

Table with 4 columns: Self Rep., Name, Address, Phone #. Row 1: John W. Caffry, Esq., Caffry and Flower, 100 Bay Street Glens Falls, New York 12801, (518) 792-1582. Row 2: Kevin P. Donovan, for Intervenors, NYS Office of the Attorney General The Capitol Albany, NY 12224, (518) 474-4843.

*Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

INSURANCE CARRIERS:

RELATED CASES: (IF NONE, write "NONE" below)

Title Index # Court Nature of Relationship

NONE

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated:

(SIGNATURE) Kevin P. Donovan

Kevin P. Donovan

(PRINT OR TYPE NAME)

Intervenors

ATTORNEY FOR

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION

STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC., et al.

Plaintiffs,

-against-

PHIL BROWN, et al.,

Defendants,

and

THE STATE OF NEW YORK and the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Proposed Intervenors-Defendants.

Index No. 6803-10

RJI No. _____

Hon. _____

NOTICE OF MOTION
TO INTERVENE AND TO
EXCUSE SERVICE ON
UNNAMED AND
UNIDENTIFIABLE
DEFENDANT

PLEASE TAKE NOTICE that upon the annexed Affidavit of Christopher A. Amato, Esq., sworn to the 15th day of February, 2011; the Affirmation of Assistant Attorney General Kevin P. Donovan dated February 15, 2011; the proposed Answer, Affirmative Defenses, and Verified Counterclaim, sworn to the 15th day of February, 2011 by Kenneth R. Hamm, Esq.; and the Memorandum of Law In Support of the Motion of the State's Motion to Intervene; that the State of New York and the New York State Department of Environmental Conservation (hereinafter, the "State") will respectfully move this Court, at the Courthouse, 223 W. Main Street, Johnstown, N.Y. 12095 on March 21, 2011, at 9:30 a.m., for an order granting the


State's motion to intervene in this action and for an order excusing service on the unnamed Jane Doe until plaintiffs have accomplished service of process on her.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering papers, if any, must be served on the undersigned attorneys for the State by March 14, 2011.

Dated: February 23, 2011
Albany, New York

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Plaintiffs

By:


KEVIN P. DONOVAN
LISA M. BURIANEK
Assistant Attorneys General
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 474-4843

To: Dennis J. Phillips, Esq.
McPhillips, Fitzgerald & Cullum LLP
Attorneys for Plaintiffs
288 Glen Street
P.O. Box 299
Glens Falls, New York 12801

John W. Caffry, Esq.
Caffry and Flower
Attorneys for defendant Brown
100 Bay Street
Glens Falls, New York 12801

STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC., et al.

Index No. 6803-10

Plaintiffs,

RJI. No. _____

-against-

Hon. _____

PHIL BROWN, et al.,

Defendants,

AFFIRMATION OF
ASSISTANT ATTORNEY
GENERAL
KEVIN P. DONOVAN

and

THE STATE OF NEW YORK and the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Proposed Intervenors-Defendants.

Kevin P. Donovan, an attorney duly authorized to practice law in the State of New York, hereby affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General, representing the State of New York and the New York State Department of Environmental Conservation ("DEC" or the "State") in this case.

2. I make this affirmation based on my knowledge of the facts of this case and in support of the motion intervene in this action.

3. On February 14, 2011, I telephoned John Caffry, Esq., counsel for the defendant Phil Brown. He stated that he consented to the State's intervention in this action.

4. On February 14, 2011, I also telephoned Dennis Phillips, Esq., counsel for plaintiffs. He stated that he would oppose the State's intervention because plaintiffs contend that the waters are not navigable and therefore the State cannot have an interest in them. He also stated that he would seek attorney fees from the State because, in his view, the State's position that these waters are navigable was "not substantially justified."

5. As shown in the Affidavit of Christopher Amato, Esq. sworn to on February 14, 2011 ("Amato Aff."), filed with these motion papers, DEC personnel who paddled the waters at the invitation of plaintiffs both demonstrated and concluded that the waters were navigable-in-fact. Accordingly, as explained in the Amato Affidavit, the State has an interest in this waterway as it would in a public highway. Amato Aff., ¶¶ 18, 19, 20, 25.

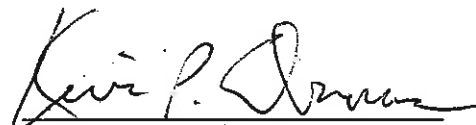
6. The State's compelling interest in the public right of navigation is not a new issue between plaintiffs and the State. The record of correspondence between plaintiffs and the DEC regarding over the navigability of the waters in question demonstrates plaintiffs' recognition of this issue as one in which the State has an interest. See Amato Aff., ¶¶ 14 - 25 and Exhibits 2 - 8 appended thereto (correspondence between plaintiffs and DEC).

7. In my telephone call with Mr. Phillips I also asked what steps he had taken to serve the Summons and Complaint on the defendant identified as "Jane Doe, the Lady in Red" and he stated that he had taken none, and did not know the dates that Jane Doe had been on the waters involved in this action.

8. The State does not know the identity of defendant "Jane Doe" or where she may reside, whether in or out of New York State. Thus, the State is unable to serve these motion papers upon her, nor any responsive pleadings should this Court grant the State's motion to intervene. Accordingly, the State requests that the Court excuse service upon "Jane Doe," or defer such service until plaintiffs have demonstrated valid service upon her, as required by CPLR 308.

WHEREFORE, the State respectfully requests that this Court issue an order allowing the State to intervene, excuse the requirement of service of papers on Jane Doe until such time as plaintiffs have accomplished service on her, and for such other and further relief as to the Court may seem just and proper.

February 15, 2011
Albany, New York


KEVIN P. DONOVAN
Assistant Attorney General

STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC., et al.

Index No. 6803-10

Plaintiffs,

-against-

RJI No. _____

PHIL BROWN, et al.,

Hon. _____

Defendants,

and

THE STATE OF NEW YORK and the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Proposed Intervenors-Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF THE STATE'S MOTION TO INTERVENE**

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Counsel for Proposed Intervenors-Defendants

Of counsel:

Lisa M. Burianek
Kevin P. Donovan
Assistant Attorneys General
Environmental Protection Bureau

PRELIMINARY STATEMENT

The State of New York ("State") and the New York State Department of Environmental Conservation ("DEC"), collectively (the "State") move to intervene in this action by which plaintiffs seek to forever extinguish the right of the public to travel on a navigable waterway. Navigable waters are public highways or easements held in trust for the public by the State, regardless of whether the waters run through privately owned land. Since the plaintiffs seek to extinguish that easement, the State is entitled to intervene as a matter of right, or alternatively, by permission. The State's motion to intervene is supported by the fact that a defendant has raised the affirmative defense that the State is a necessary party to this litigation.

APPLICABLE STATUTES

The DEC may bring an action or proceeding to enforce the State's rights or interests in real property. Environmental Conservation Law ("ECL") § 9-0105(9).

The Attorney General shall prosecute all actions and proceedings in which the State is interested. Executive Law § 63(1).

A party may intervene as a matter of right, upon timely motion, "When the action involves . . . the title . . . to, property and the person may be affected adversely by the judgment; . . ." CPLR 1012(a)(3).

A party may be permitted to intervene when the person's claim or defense and the main action have a common question of law of fact. CPLR 1013.

through a corner of the plaintiffs' property, denominated in the Amended Complaint as "The Mud Pond Parcel," (the "Parcel"). Counterclaim, ¶ 39; Amended Complaint, ¶ 13. The waters on the Parcel include a small portion of Lilypad Pond, Mud Pond, the outlet of Mud Pond, and a portion of Shingle Shanty Brook. Amended Complaint, ¶ 13, Exh. A, map. All of these waters are hydrologically connected in that they flow from the eastern portion of the Whitney Area, through the Parcel, into the western portion of the Whitney Area. The named ponds en route are merely areas where topography causes water to pool. Counterclaim, ¶ 38.

In December 2007, Plaintiffs Friends of Thayer Lake ("FOTL") took title to the Parcel. Amended Complaint, ¶ 18. Other plaintiffs, the Brandreth Park Association and Brandreth Park Association Recreational Trust ("Brandreths") claim a right of exclusive hunting, fishing, and recreational rights there. Amended Complaint, ¶¶ 4-6, 11-15, 19-20. The recorded deed by which FOTL took title states that the public has the right to navigate the surface waterway of Lilypad Pond, Mud Pond, the outlet leading from Mud Pond, and the portion of Shingle Shanty Stream before it flowed onto State land, and that the property was taken subject to any and all easements, whether or record or not. Counterclaim, ¶¶ 44-46. The easement of navigability pre-existed that deed.

Nonetheless, plaintiffs have erected cables, signs, and cameras where the waterway enters and leaves the Parcel, which are intended to and do discourage or prevent public navigation where the waterway crosses the Parcel. Further, plaintiffs have demanded that DEC bring criminal trespass charges against

travelers on this public highway. Affidavit of Christopher A. Amato, sworn to on February 15, 2011 ("Amato Aff."), ¶¶ 22, 24; Counterclaim, ¶¶ 69-71.

Staff of the DEC paddled the waterway on June 22, 2010, at the invitation of, and accompanied by, plaintiffs. Amato Aff., ¶¶ 19-20. After paddling the waterway both upstream and downstream, DEC concluded that the waterway was of sufficient depth to allow easy navigability and that there was easy passage by land around the one short area of shallow rapids. DEC concluded that the waters were navigable-in-fact according to the legal standard in the caselaw. Amato Aff., ¶ 25; Counterclaim, ¶¶ 59-66. *See, Adirondack League Club v. Sierra Club*, 92 N.Y. 2d 591 (1998).

Following DEC's inspection of the waters, plaintiffs renewed their demands that DEC bring criminal trespass charges against travelers on the waters. Amato Aff., ¶¶ 22, 24; Counterclaim, ¶¶ 69, 71. DEC declined, informed plaintiffs that in DEC's opinion the waters were navigable, and requested that plaintiffs remove their threatening signs, cameras and cables across the water. Amato Aff., ¶ 25; Counterclaim, ¶ 72. Plaintiffs then filed a suit, subsequently amended, demanding punitive damages against Phil Brown and an unidentified person (collectively "defendants") and a declaratory judgment extinguishing this public right of way. Amended Complaint ¶¶ 70-90. Defendant Brown has raised the affirmative defense that the State is a necessary party, due to the State's interest in this public right of way. Brown Answer, ¶¶ 49, 50.

ARGUMENT

A. The State Has The Right to Intervene Because This Action Affects a Property Right of the State.

"Upon timely motion, any person shall be permitted to intervene in any action . . . [w]hen the action involves . . . the title . . . to . . . property and the person may be affected adversely by the judgment;" CPLR 1012(a)(3). The requirements for intervention under both CPLR 1012, intervention as of right, and CPLR 1013, permissive intervention, should be liberally construed to prevent multiplicity of suits on common questions of fact and law. *Bay State Heating and Air Conditioning Co. v. American Ins. Co.*, 78 A.D. 2d 147, 149 (4th Dep't 1980).¹

1. This Action Relates to Title to Property

Intervention should be granted when the State claims an interest in property that is at issue in a case. *Hatch v. Turner*, 282 A.D. 818, 818 (3d Dep't 1953). The property interest need not be full title. See *Weinstein v. Marks*, 167 A.D.2d 704, 705 (3d Dep't 1990) (contract to purchase property); *Myertin 30 Realty Dev. Corp. v. Oehler*, 82 A.D. 2d 913, 915 (2d Dep't 1981) (claimed interest in private road). An easement is a property interest, *Alexy v. Salvador*, 217 A.D. 2d 877, 878 (3d Dep't 1995), which affects title, *Crepin v. Fogarty*, 59 A.D. 3d 837, 839 (3d Dep't 2009). A landowner who interferes with an easement can be ordered to remove all obstructions and permanently enjoined from blocking the right of way. *B.J. 96 Corp. v. Mester*, 262 A.D.2d 732, 732-33 (3rd Dep't 1999). Under the law, the holder

¹ A successful intervenor is a party for all purposes. *Matter of Greater New York Health Care Facilities Assn. v. DeBuono*, 91 N.Y.2d 716, 720 (1998).

of the easement possesses the dominant estate; the title holder has the subservient estate. *Mittnacht v. Montana*, 205 A.D. 643, 645 (1st Dep't 1923).

The right of the public to travel on waterways that are navigable-in-fact is an irrevocable public trust easement held by the State that protects the public's navigation on them as on a public highway. *Douglaston Manor, Inc., v. Bahrakis*, 89 N.Y. 2d 472, 479 (1997); *Adirondack League Club v. Sierra Club*, 92 N.Y. 2d at 601. The State is required to preserve such waters for use of the public, *Smith v. State*, 153 A.D. 2d 737, 739-40 (2d Dep't 1989), and is a proper party in cases concerning navigability of waters. *Hanigan v. State*, 213 A.D. 2d 80, 83 (3d Dep't 1995). DEC is authorized to bring actions concerning property claims.

ECL § 9-0105(9). Interference with the right of navigability constitutes a public nuisance, which the Attorney General can enforce on behalf of the State. *Lewis v. Blue Point Oyster Cultivation Co. v. Briggs*, 198 N.Y. 287, 293-94 (1910), *aff'd* 229 U.S. 82; *People v. Vanderbilt*, 1 Tiffany 396, 397 (1863); Exec. Law § 63(1). In a case similar to this, the State was allowed to intervene when property owners sued members of the public for traveling on a water route. *Adirondack League Club*, 92 N.Y. 2d at 600.

There is no question that this case involves issues of title to real property as plaintiffs brought this action "for a determination of claims to real property pursuant to Article 15 of the Real Property Actions and Proceedings Law, and for a declaratory judgment." Amended Complaint, ¶ 2. Specifically, they seek a declaration that the waterway that runs through their property is not navigable-in-

fact, that the common law easement in favor of the public does not exist, and that the general public be forever barred from their use. Amended Complaint, ¶¶ 87, 90, 90.B., 90.C, 90.C.1, 90.C.2.

Since the State claims that the waterway in this case is navigable-in-fact and thus subject to this public easement, the State has a right to intervene.

Counterclaim, ¶¶ 59-66. In fact, the deed under which plaintiffs took title and which was duly recorded expressly asserts that it is subject to the right of the public to navigate on these waters and is subject to any other easements recorded or not, which would include the easement of public navigation. Counterclaim, ¶ 44-47, Exh. 4, 2007 deed.

2. The State May Be Adversely Affected by the Judgment

Unlike other provisions regarding intervention as of right, an intervenor concerning property matters need only show that they *may* be adversely affected by the judgment, not that they *are* bound by the judgment. *Compare* CPLR 1012 (a)(3) *with* CPLR 1012(a)(2). Thus, there is no need to show that the State will be bound in the *res judicata* sense, as prejudice as a practical matter will suffice. CPLR 1012, *Practice Commentaries*, C1012:4 (McKinney's 1987).

Plaintiffs' actions prove that the State will be adversely affected if plaintiffs' litigation is successful. They have already placed a host of intimidating "no trespassing" signs across the navigable waterway, have threatened persons with prosecution for trespass, have placed cables and cameras to deter the public from

Amended Complaint, ¶ 2. Since the State claims a real property interest in the form of an easement over this property, the State should be granted leave to intervene pursuant to RPAPL § 1511(2). While intervention under RPAPL § 1511(2) is phrased as permissive (“may direct that such person be made a party”), the cases indicate that courts view joinder of parties with an interest in the real property to be mandatory, dismissing cases that have not included such parties. *Hitchcock v. Boyack*, 277 A.D. 2d 557, 558 (3d Dep’t 2000); *Fila v. Angiolillo*, 88 A.D. 2d 693, 693 (3d Dep’t 1982).

C. The State Should Be Allowed to Intervene By Permission.

Should the Court deny the motion for intervention as of right and under RPAPL § 1511, it is in the Court’s discretion to grant intervention by permission when the intervenor’s claim and the main action have a common question of law or fact. CPLR 1013. The questions of law and fact concerning navigability of this waterway are at the heart of both the present action and the counterclaim of the State. *Compare* Amended Complaint, ¶¶ 68, 87, 90 *with* State’s Affirmative Defenses ¶¶ 2, 3, 4 and Counterclaim ¶¶ 44-66.

"Intervention should be liberally allowed" in claims involving common questions of law and fact. *Teleprompter Manhattan CATV Corp., v. State Board of Equalization and Assessment*, 34 A.D.2d 1033, 1033 (3rd Dep’t 1970). An intervenor’s "direct and substantial" interest outweighs other factors in discretionary grants. *Pier v. Board of Assessment Review of Town of Niskayuna*, 209 A.D.2d 788, 789 (3rd Dep’t 1994). Here, both the State and DEC have a direct and

substantial interest in protecting the easement of public navigability because the waterway provides the public and Department administrative personnel with access to and from State lands under DEC's jurisdiction which are located on both sides of this corner of plaintiffs' property. Consequently, the State and DEC should be allowed to intervene.

CONCLUSION

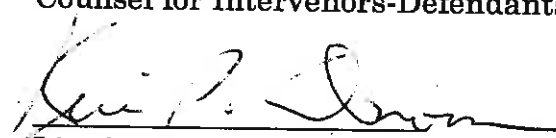
For the reasons stated above and for any others that the Court may deem appropriate, the Court should grant the motion to intervene.

Respectfully submitted,

Dated: February 23, 2011

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Counsel for Intervenors-Defendants

By:


Lisa M. Burianek
Kevin P. Donovan
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 474-4843

STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC., et al.,

Plaintiffs,

-against-

**AFFIDAVIT IN SUPPORT OF
MOTION TO INTERVENE**

Index No. 6803-10

PHIL BROWN, et al.,

Defendants,

RJI No. _____

and

Hon. _____

THE STATE OF NEW YORK and the NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Proposed Intervenors-Defendants.

CHRISTOPHER A. AMATO, Esq., being duly sworn, deposes and says:

1. I am the Assistant Commissioner for Natural Resources of proposed intervenor-defendant New York State Department of Environmental Conservation ("DEC"), a position I have held since May 2007. My responsibilities include providing supervision and policy direction for DEC's Division of Lands and Forests. The Division is responsible for the care, custody and control of Forest Preserve lands and the preparation and implementation of Unit Management Plans for each unit of Forest Preserve lands in conformance with the Adirondack Park State Land Master Plan. See Adirondack Park Agency Act, Executive Law § 816 [formerly § 807]. The Division is also responsible for constructing and maintaining recreational facilities on Forest Preserve lands, managing recreational activities on those lands, and providing

information to the public regarding recreational opportunities, including information regarding canoe routes in the Adirondack Park.

2. I have read the complaint and am familiar with the facts and circumstances underlying this proceeding. I submit this affidavit in support of the motion by the State of New York and DEC (hereinafter, "State") pursuant to CPLR §§ 1012 and 1013 to intervene as a defendant in this proceeding.

The State's Interest in This Litigation

3. If a waterway is navigable-in-fact, it is considered a public highway notwithstanding the fact that its bed and banks are in private ownership. In such cases, the private ownership is subject to an implied, reserved public easement of navigation.

4. Plaintiffs in this action seek, *inter alia*, a declaratory judgment that a public navigation easement does not exist on a certain waterway which connects two areas of State land but which flows across a corner of their property.

5. As described below, the State has concluded after examination of the waterway in question that it is navigable in fact and is therefore subject to a public right of navigation. The State therefore requests intervention to address the issue of navigability of these waters.

6. The public right to navigation constitutes an easement for public travel and as guardian of the public trust, the State is the proper entity to protect and assert the right of public navigation and represent the public's interest in this matter.

7. The public's right to navigate the subject waterway is at the heart of both the action filed by plaintiffs and in the proposed counterclaim by the State, namely whether the waterway is suitable for travel and is navigable-in-fact.

8. The State has a compelling interest in the public navigability of the waterway at issue in this case because (i) the waterway at issue is part of a wilderness canoe route between Little Tupper Lake and Lake Lila, and that route is open to and utilized by members of the public; (ii) DEC has been involved in lengthy discussions and negotiations with plaintiffs and the paddling public regarding public navigation on the waterway at issue in this case; (iii) representatives of the State have, accompanied by plaintiffs' representatives and at their invitation, paddled the entirety of the disputed waterway; and (iv) prior to the filing of this action, DEC informed plaintiffs that in the Department's opinion the waterway at issue is subject to a public right of navigation and requested them to refrain from obstructing or interfering with public navigation on the waterway.

The Wilderness Canoe Route Between Little Tupper Lake and Lake Lila

9. A wilderness canoe route connects Little Tupper Lake with Lake Lila, both of which are located within the William C. Whitney Wilderness Area. As shown on DEC maps, the canoe route traverses several ponds and waterways and includes several portages, or canoe carries, of varying lengths.

10. The canoe route begins (or ends, depending on the direction of travel) at Little Tupper Lake, exits the lake at its southwest end and follows a brook and a short carry to Rock Pond. From Rock Pond, there is a carry to Hardigan Pond; after crossing Hardigan Pond another carry leads to the Salmon Lake Outlet, which is paddled to Little Salmon Lake. After crossing Little Salmon Lake, the route continues via a carry to Lilypad Pond. After crossing Lilypad

Pond, a paddler has the option of either paddling down Mud Pond and thence into Shingle Shanty Brook or carrying from Lilypad Pond overland approximately 0.8 miles to Shingle Shanty Brook. The portion of the canoe route running through Mud Pond and into Shingle Shanty Brook is bordered by plaintiffs' property and is the only portion of the route that flows through private lands. From Shingle Shanty Brook, the route continues to Lake Lila.

11. The trip between Little Tupper Lake and Lake Lila traverses rugged, remote backcountry and most paddlers take two or more days to complete the route.

12. The canoe route between Little Tupper Lake and Lake Lila is described in DEC's brochure for the William C. Whitney Wilderness Area.

DEC's Prior Negotiations With Plaintiffs and Examination of the Disputed Waterway

13. By letter dated August 27, 2009, Sierra Club requested that "DEC take action to remove the blockage of the State-owned public right-of-way on Mud Pond and a segment of Shingle Shanty Brook between the outlet of Mud Pond and the downstream Forest Preserve boundary." A copy of the August 27, 2009 Sierra Club letter is annexed hereto as **Exhibit 1**.

14. By letter dated October 9, 2009, the Brandreth Park Association ("Association"), one of the plaintiffs herein, responded to the August 27 Sierra Club letter, denying that a public right to navigate the waters at issue exists, and proposing a meeting with DEC to discuss the issue. A copy of the Association's October 9, 2009 letter is annexed hereto as **Exhibit 2**.

15. In response to the Sierra Club and Association letters, meetings were held between DEC and plaintiffs' representatives on December 4, 2009, and between DEC and Sierra Club representatives on January 6, 2010. I was present at both meetings.

16. As a result of the meetings with plaintiffs and Sierra Club, DEC concluded that an amicable resolution of the public navigability issue should be pursued. Accordingly, by letter to

plaintiffs dated March 10, 2010, DEC set forth the terms of a proposed compromise, which included the following terms:

- i. The plaintiffs would, on a trial basis to continue for a specified time period (e.g., three years) agree to refrain from interfering with or prosecuting members of the public who wish to paddle on the disputed waterway;
- ii. Members of the public using the disputed waterway would be prohibited from engaging in camping, hiking, tree cutting, removal of vegetation, littering, swimming, hunting, fishing and trapping;
- iii. Plaintiffs would remove the "Posted No Trespassing" signs, cables and cameras from the disputed waterway, and could replace them with signs reminding paddlers that access is by permission of the landowners on a trial basis, subject to the restrictions stated above;
- iv. Plaintiffs could, by cables and/or appropriate signage, prohibit public access to any other portion of their property, including a channel that is a tributary to the disputed waterway;
- v. The Department would publicize the terms of the compromise and would assist in enforcement of the terms and restrictions;
- vi. The Sierra Club would agree to refrain from instituting any litigation concerning the alleged public right to navigation on the disputed waterway as long as the compromise was in effect and would inform its members of the terms and restrictions of the compromise;
- vii. The compromise would be set forth in a written agreement signed by DEC, Sierra Club, and plaintiffs, and would include an express provision

that the parties to the agreement reserve all of their legal rights and entry into the agreement does not constitute a waiver of those rights or a legal concession by any party; and

- viii. At the conclusion of the trial period, the parties to the agreement would meet to discuss whether and under what conditions public access to the disputed waterway should continue.

A copy of DEC's March 10, 2010 letter is annexed hereto as **Exhibit 3**.

17. A second meeting between DEC and plaintiffs was held on April 14, 2010, for the purpose of discussing the compromise set forth in DEC's March 10, 2010 letter. I attended that meeting.

18. By letter to DEC dated April 29, 2010, plaintiffs' counsel characterized the April 14 meeting as "constructive" and on behalf of plaintiffs invited DEC representatives to visit plaintiffs' property in order to paddle the disputed waterway. A copy of plaintiffs' counsel's April 29, 2010 letter is annexed hereto as **Exhibit 4**.

19. On or about June 22, 2010, I, along with Rob Davies, Director of DEC's Division of Lands and Forests, visited plaintiffs' property and paddled the entire length of the disputed waterway in the company of plaintiffs' representatives. We also walked the canoe carry from Lilypad Pond to Shingle Shanty Brook.

20. After examining the waterway in question, and after consulting with DEC's Office of General Counsel, it was our conclusion that the waterway is navigable-in-fact because it is suitable for travel, both upstream and downstream. Travel was completed with no difficulty, and the water was of adequate depth to permit easy passage. There was only one area where a

short series of rapids required us to perform an easy carry which we estimated to be less than 100 yards. Such a carry does not interfere with a waterway's navigability.

21. On July 13, 2010, a conference call was held between plaintiffs' representatives and DEC for the purpose of discussing details of the proposed compromise. I participated in that call. During that call, I informed plaintiffs that DEC considers the waterway at issue in this case to be navigable-in-fact and subject to a public right of navigation. During the call, plaintiffs stated that the compromise proposal set forth in DEC's March 10, 2010 letter was scheduled to be considered by the membership of the Brandreth Park Association and that the Association's response to DEC's proposal would be provided shortly.

22. Plaintiffs did not respond to DEC's proposed compromise. Rather, by letter to DEC dated July 23, 2010, plaintiffs' counsel requested that DEC and the State Police "upon information and belief and/or upon probable cause, remove trespassers from [plaintiffs' property], ticket them, and duly follow through with prosecutions in the local justice or county courts." A copy of plaintiffs' counsel's July 23, 2010 letter is annexed hereto as **Exhibit 5**.

23. By letter to plaintiffs dated July 27, 2010, DEC responded to plaintiffs' July 23, 2010 letter by reiterating our desire to resolve the issue of public use of the disputed waterways through compromise rather than litigation. DEC's letter noted that the Association had promised to consider the compromise proposal at its next meeting and provide a response, and inquired as to the status of the Association's consideration of the compromise proposal. The letter further urged that disagreement regarding the legal issues should not stand in the way of compromise:

Throughout our discussions, the assumption has been that the involved parties have fundamental disagreements concerning the application of common law principles of public navigation rights to the Shingle Shanty Brook/Mud Pond Outlet situation. Consequently, a key component of our proposed compromise is the reservation by all involved parties of their respective legal rights and arguments concerning the public navigability issue.

A copy of DEC's July 27, 2010 letter is annexed hereto as **Exhibit 6**.

24. By letter dated September 3, 2010, plaintiffs' counsel informed DEC that the Brandreth Park Association met on August 7, 2010 to consider DEC's proposed compromise and that "after due deliberation, upon motion duly made and almost unanimously carried, the idea of a public access agreement for no monetary consideration was rejected." The letter reiterated plaintiffs' request that DEC and the State Police remove, ticket and prosecute "trespassers." A copy of plaintiffs' counsel's September 3, 2010 letter is annexed hereto as **Exhibit 7**.

25. By letter to plaintiffs dated September 24, 2010, DEC responded to plaintiffs' September 3, 2010 letter:

The Department has carefully reviewed the facts and history pertinent to the Shingle Shanty Brook situation and the applicable case law concerning the legal standard for establishing public navigability. Based on that review, the Department has concluded that Mud Pond, Mud Pond Outlet and Shingle Shanty Brook are subject to a public right of navigation, and that members of the public are therefore legally entitled to travel on those waters and to make use, when absolutely necessary, of the bed and banks of those waters, including the right to portage on riparian lands bordering those waters. Consequently, we respectfully decline your request that the Department ticket, arrest and prosecute persons attempting to exercise their right to navigate those waters.

DEC's letter also requested that plaintiffs discontinue their efforts to interfere with, impede or prevent public navigation of the subject waters. A copy of DEC's September 24, 2010 letter is annexed hereto as **Exhibit 8**.

26. Upon information and belief, on or about November 15, 2010, plaintiffs filed this action against defendants Phil Brown and Jane Doe ("the Lady in Red") and any other person known or unknown. The complaint alleges causes of action for trespass, determination of claims to real property, and declaratory relief, all arising out of defendants' navigation of the waterway that was the subject of the extended negotiations between plaintiffs and DEC as detailed above.

27. The State has an interest in protecting the public easement on the waterway, and

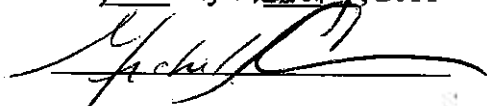
the State's proposed counterclaims against plaintiffs for maintaining a public nuisance go to the heart of the issue for which plaintiffs seek declaratory relief – namely, whether the waterway at issue herein is navigable-in-fact and subject to a public right of navigation.



CHRISTOPHER A. AMATO

Sworn to before me

this 15th day of February, 2011



Notary Public

