

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC; BRANDRETH  
PARK ASSOCIATION, CATHRYN POTTER, AS  
TREASURER; BRANDRETH PARK ASSOCIATION  
RECREATIONAL TRUST, CATHRYN POTTER, AS  
INITIAL TRUSTEE; AND WILLIAM L. BINGHAM, JR.,  
INDIVIDUALLY AND AS A REPRESENTATIVE  
MEMBER OF THE BRANDRETH PARK ASSOCIATION  
AND A REPRESENTATIVE BENEFICIARY OF THE  
BRANDRETH PARK ASSOCIATION RECREATIONAL  
TRUST,

DECISION

Index #6803-10  
RJI #17-1-11-0078

Plaintiffs,

-vs-

PHIL BROWN AND JANE DOE, AND ANY  
OTHER PERSON KNOWN OR UNKNOWN,

Defendants,

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

Intervenors-Defendants.

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On November 15, 2010, the plaintiffs commenced the within action against the defendant by filing a summons and complaint in the Hamilton County Clerk's Office. The plaintiffs' action seeks damages for trespass by the defendants on plaintiffs' Mud Pond waterway. The plaintiffs also seek a determination from the Court which would adjudge them to be the owners of the Mud Pond waterway, and finally, plaintiffs seek a declaratory judgment that the Mud Pond waterway is not navigable-in-fact, and that the plaintiffs have the right to forever bar the general public from its use.

The plaintiffs allege they are the owners of a parcel of property, commonly referred to as the Mud Pond parcel. The property is located in Town of Long Lake, Hamilton County, New York. The

amended complaint, which is dated February 4, 2011, alleges that the defendant, Phil Brown, disregarded the posted signs and warnings and trespassed upon the plaintiffs' property (Mud Pond waterway). The complaint also alleges that defendant, Brown, posted an article in the "Adirondack Explorer" which described his trip across the plaintiffs' waterway as being "navigable-in-fact" under New York law.

The defendant Brown's amended answer asserts numerous affirmative defenses, and seeks a declaratory judgment that the Mud Pond waterway is navigable-in-fact. On February 23, 2011, intervener-defendants, the State of New York and the New York State Department of Environmental Conservation (DEC), served a proposed answer with counter claims seeking a declaratory judgment that the Mud Pond waterway is navigable-in-fact. By Decision and Order dated August 12, 2011, this Court granted DEC's motion to intervene.

By notice of motion, dated August 9, 2012, DEC moves for an order, pursuant to CPLR § 3212, granting DEC summary judgment, and declaring that the Mud Pond waterway is navigable-in-fact, and subject to an easement for public navigation, and, further, plaintiffs' interference with travel on the waterway constitutes a public nuisance. By notice of motion, dated August 31, 2012, defendant Brown moves for an order, pursuant to CPLR § 3212, dismissing the plaintiffs' causes of action and declaring that the Mud Pond waterway is navigable-in-fact. By notice of cross motion, dated September 28, 2012, plaintiffs move for an order, pursuant to CPLR § 3212, declaring that the waterway is not navigable-in-fact, and for an order finding the defendant Brown liable for trespass.

The parties to this action agree that, for the most part, the issues of fact in this case are not disputed and request that the Court make a determination of their respective motions on the papers submitted. Upon considering and reviewing the papers submitted, this Court would be inclined to

determine that sufficient issues of fact exist to preclude the issuance of summary judgment (for instance, the trier of fact would have to make a judgment call on the weight to place upon the size and characteristics of the undisputed 500 foot portage around the Mud Pond Outlet Rapids when determining navigability). However, the Court will make a determination based upon the papers submitted, since the parties are free to chart their own course and may fashion the basis upon which a particular controversy will be resolved (see, Kaczor v. Kaczor, \_\_ AD3d \_\_ [3<sup>rd</sup> Dept. 2012]; see also, plaintiffs' memorandum of law in support of their cross-motion for summary judgment, at pg. 5).

In Adirondack League Club v. Sierra Club, (92 NY2d 591 [1998]), the Court of Appeals wrote the following regarding the standard for determining whether a waterway is navigable-in-fact:

"Both the Navigation Law definition and that of *Morgan* have as their touchstone the idea that a river must have 'practical usefulness to the public as a highway for transportation' (Navigation Law § 2[5]). The fact that before the middle of the 20<sup>th</sup> century a river's practical utility was measured by its capacity for getting materials to market does not restrict the concept of usefulness for transport to the movement of commodities. Although evolving necessities and circumstances may warrant a different emphasis regarding a river's usefulness, the central premise of the common-law rule remains the same—in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation. Thus, while the purpose or type of use remains important, of paramount concern is the capacity of the river for transport, whether for trade or travel" (at pg. 602-603) (emphasis supplied)

" \*\*\* we are satisfied that recreational use should be part of the navigability analysis. Appellant's fear that consideration of the recreational use unduly burdens the common-law standard and threatens private property rights is unfounded. We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it. \*\*\* Here, we recognize what was assumed in *Morgan*—that boaters can make use of the common-law easement. We only hold that such transport need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for travel or transport nevertheless remains the standard" (at pg. 603-604). (emphasis supplied)

On May 21, 2009, defendant Brown entered the plaintiffs' property at Mud Pond in a canoe from Lilypad Pond in the state owned Whitney Wilderness area. Brown paddled into Mud Pond

through a narrow channel past plaintiffs' no trespassing signs, instead of using a State created portage that avoided the plaintiffs' property. At the outlet of Mud Pond (on the plaintiffs' property), Brown carried his canoe and gear across a hiking trail, otherwise referred to as a portage, approximately 500 feet down the outlet brook. A 500 foot portage is considered a very short portage. The portage allowed Brown to circumvent a bedrock ledge and some rapids at the Mud Pond outlet. Brown then continued down the Mud Pond outlet brook to Shingle Shanty Brook, and exited the plaintiffs' property. Following Brown's article in the Adirondack Explorer, at least ten additional people have used and enjoyed the Mud Pond waterway, despite plaintiffs' no trespassing signs.

The Mud Pond Outlet measures an average of sixteen feet wide and seventeen inches deep with a minimum width of twelve feet and depth of four inches. It has never been used to float pulp or timber logs to mill or market. Prior logging operations in the vicinity used railroads and bridges to transport their logs. A guidebook written by E.R. Wallace, first published in 1875, described the traverse up Shingle Shanty Brook to Mud Pond as an indirect and difficult route in which boats are generally towed or poled to the bottom of the rapids. Although described as difficult, such guidebook does demonstrate that the route has historically been used for some amount of travel (the parties do not agree with respect to the volume of such travel). Over the years, and at least since 1918, the plaintiffs have used the Mud Pond waterway extensively: transporting themselves, building materials (lumber, windows, doors, telephone wire, 1500 pounds of shingles, tar paper, metal sheeting, stoves and beds) and supplies to the Mud Pond Camp; trapping, fishing and hunting in the surrounding areas; transporting animal skins from trapping; maintaining the portage trail at the Mud Pond outlet; and recreational canoeing. Between 2008 and 2011, plaintiffs' cameras have recorded at least 17 parties with 44 people passing through the Mud Pond waterway and using the portage around the Mud Pond Outlet. Donald Potter has personally observed two parties paddle through in

the last ten years. On June 22, 2010, DEC staff, in the company of representatives of the plaintiffs, did a site visit to the Mud Pond waterway and found that their travel was completed with no difficulty, with adequate water to permit easy passage. DEC then made a determination that the waterway was subject to the public right of navigation.

David Cilley, the owner of St. Regis Canoe Outfitters, has approximately 50 clients that would utilize the Mud Pond waterway rather than undertake the difficult DEC marked carry between Lilypad Pond and Shingle Shanty Brook.

The Court of Appeals has made clear that since a river's practical utility for travel or transport is no longer measured by its capacity for getting materials to market, the recreational use of such river should be part of the navigability analysis (Adirondack League Club v. Sierra Club, *supra*). Practical utility for travel or transport remains the standard (*Id.*). An argument similar to plaintiffs' contention that a grant of summary judgment in defendants' favor, based upon the recreational use of the waterway, "would precipitate serious destabilizing effects on property ownership principles and precedents" (Douglaston Manor, Inc. v. Bahrakis, 89 NY2d 472, 482 [1997]), has already been rejected by the Court of Appeals, since the "riparian owners retain their full panoply of rights, subject only to the long recognized navigational servitude" (Adirondack League Club v. Sierra Club, *supra* at pg. 604).

This Court reiterates that the parties agreed to proceed with the determination of this motion rather than participate in a trial regarding the facts greatly, but not completely, developed in the record. Based upon the Mud Pond waterway's use to some degree for travel as early as 1875; the plaintiffs' own extensive and extended use of the waterway for the activities enumerated above; defendant Brown's detailed description of his travel down the waterway in 2009; the use for recreational travel of the waterway by at least ten additional people since Brown's article was

published; the passage of many groups through the waterway and using the Mud Pond portage between 2008 to 2011 (which must necessarily include the people since Brown's article was published); and the guide, David Cilley, setting forth that approximately fifty of his guided tour clients would utilize the waterway if it was not posted, this Court finds and declares that the Mud Pond waterway is navigable-in-fact. There is extensive evidence in the record that the Mud Pond waterway is capable of being used for travel and has been used for travel for an extended period of time. Although the primary purpose of the majority of such travel has been recreational in nature, there is evidence in the record that St. Regis Canoe Outfitters will use the disputed waterway as part of its commercial guided tour business, and that the waterway has the capacity to carry furs, goods and supplies. Therefore, defendants have established that the waterway has a practical utility for travel and the transport of some materials.

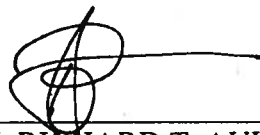
The required 500 foot portage at the Mud Pond Outlet, which all parties have agreed cannot be navigated by canoe, does give this Court pause. However, the 500 foot portage is considered a very short portage, and the right to navigate "carries with it the incidental privilege to make use, when absolutely necessary, of the beds and banks on riparian lands" (Adirondack League Club v. Sierra Club, *supra* at pg. 607). The availability of the 500 foot portage also demonstrates that the Mud Pond has more than one access point (see, Mohawk Valley Ski Club v. Town of Duanesburg, 304 AD2d 881 [3<sup>rd</sup> Dept. 2003]; Hanigan v. State of New York, 213 AD2d 80 [3<sup>rd</sup> Dept. 1995]).

Based upon this Court's declaration that the Mud Pond waterway is navigable-in-fact, the motion of the defendant DEC and the summary judgment motion of the defendant Brown are granted and plaintiffs' cross motion for summary judgment is denied. Plaintiffs' First and Second causes of action are dismissed; plaintiffs' Third cause of action for a declaratory judgment is denied; defendant Brown's and defendant DEC's causes of action for a declaratory judgment that the Mud

Pond waterway is navigable-in-fact are granted; and defendant DEC's second counterclaim for an injunction enjoining the plaintiffs from posting and prosecuting trespassers who use the public's right of navigation over the Mud Pond waterway, and the required incidental use of the Mud Pond portage, is hereby granted. Plaintiffs are free to continue to post and prosecute trespassers that fish or enter other parts of their property. Based upon the foregoing determination, the remainder of the defendant DEC's motion is moot. Defendant DEC is directed to submit a proposed Judgment on notice to all parties.

This writing constitutes the Decision of the Court.

Signed this 25<sup>th</sup> day of February, 2013, at Johnstown, New York.



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HON. RICHARD T. AULISI  
Justice of the Supreme Court

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