SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:
HON. EMILY PINES
J. S. C.

X

BISTRIAN LAND CORP.,

Plaintiff,

-against-

RUSSELL BAKER PLEASANTS, RICHARD H. PLEASANTS IV AND CAROL TRAVERS PLEASANTS,

Defendants.

X

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DECISION AFTER TRIAL

Plaintiff, a family owned mining corporation, commenced this action pursuant to Article 15 of the Real Property Actions and Proceedings (RPAPL) Law, seeking a Court Order declaring the position of the common boundary line property adjoining Defendants' property located in Amagansett New York, as set forth in a 1994 survey performed by David Saskas, Licensed Surveyor, on Plaintiff's behalf. Plaintiff also claimed title to the subject property by adverse possession, asserting that it had mined the property for the statutory period; however, the adverse possession claim was dismissed by Order (Doyle,J.) dated December 11, 2006. In their Answer, Defendants asserted that the lands described by Plaintiff in its Complaint "(i)ncorrectly overlaps the lands of the Defendants . . . .". As a Counterclaim, Defendants also asserted that the Plaintiff's actions constitute a private nuisance and continuing trespass and, accordingly, Defendants seek an Order from the Court enjoining further trespass and directing that Plaintiff restore the property to the

condition that existed before Plaintiff's mining operations occurred.

Plaintiff argues that, having asserted a claim to the property in question, albeit not through a direct counterclaim under RPAPL Article 15, the Defendants bear the same burden as Plaintiff; i.e., to demonstrate, as consistent with the weight of the evidence, the location of the boundary of their real property, citing, inter alia, **Hannah v Babylon Holding Corp**, 28 NY 2d 89, 320 NYS 2d 35; and **Trinkle v Cordisco**, 228 Ad 2d 433, 643 NYS 2d 626 (2d Dep't 1996). Plaintiff asserts further that while it can meet that burden based on expert testimony and review of deeds, wills and monuments by its experts, that the Defendants cannot do so. Defendants counter that title is not at issue in the action and that, since Plaintiff cannot maintain what Defendants assert to be a stringent standard of proof, they are entitled to Judgment on their trespass counterclaim by default, citing **Crawford v Town of Huntington**, 299 AD 2d 446, 749 NYS 2d 737 (2d Dep't 2003). However, Defendants have produced witnesses at trial asserting that a 1988 survey performed by Frank Barylski sets forth the proper boundary between the parcels in question, taking into consideration their review of deeds, wills, maps and monuments.

The Court tried this matter over six days in May, 2008, during which eight witnesses testified. The Court had significant opportunity to measure the credibility of each witness and to review the extensive historic exhibits as an aid to a final determination of this matter.

In 1844, John Baker and George Baker divided the land of their father, Annanias Baker, in Amagansett, New York (Plaintiff's 24 and Defendant's Nn). In their deeds, the land is described as consisting of "twenty five acres two roods", which all expert witnesses in this case state equates to 25 and one half acres. In 1848, Samuel Mulford conveyed to Benjamin Hedges, real property admittedly directly adjoining the land of George Baker to the east. This property is described as land "containing by estimation eighteen acres be the same more or less" (Plaintiff's 17). Since that time, both properties continued to be conveyed until the present and were both further subdivided. The deeds are replete with inconsistencies. There exists a deed stating that the original Mulford parcel is twenty acres (Plaintiff's 20); there exists a deed describing a portion of the original Mulford parcel as containing six acres (Plaintiff's 43) and another describing the same exact parcel as 8.392 acres (Plaintiff's 44). Not surprisingly, there exists a later deed in the John Baker chain of title, describing a portion of the Baker division as containing 8 and three quarters

acres (Defendants' Rr) as well as one stating that it contains 10.57 acres (Defendant's Aaa). A 1975 surveyor's map set the Bistrian parcel as containing ten acres (Plaintiff's 53) and the Pleasants' parcel at 7.186 acres (Plaintiff's 54), which the Pleasants protested. A later 1988 survey set the Pleasants' parcel as containing 8.9 acres (Defendants' F, Yy). The most recent survey of the Bistrian's parcel sets the acreage at 9.596 (Plaintiff's 10). In other words, there is a 150 year history of internal contradictions in what constitutes the east/west border between the parcels belonging to the parties to this litigation.

The Court annexes Plaintiff's 16 and Defendants' Mm, prepared by the expert title examiners of both parties as a guide to the history of the transfers and subdivisions of the subject properties.

TESTIMONY OF BONNIE BISTRIAN KRUPINSKI

Ms. Krupinski is an owner, officer and director of Plaintiff Bistrian Land Corp, a family owned gravel and mining business. She claims to be aware of the boundaries of her father, Peter Bistrian's property in Amaganssett, having lived there and worked in the sand mining business since the late 1970's She testified that the State DEC required permits for mining beginning in late 1970's when she began working in the business for her father. Maps, such as Exhibit 6, were required to be filed with DEC, setting forth the metes and bounds descriptions of the property for which a mining permit was sought. Plaintiff did so. Plaintiff's 7 is a mined land use plan prepared for Plaintiff by a civil engineer and Plaintiff's 8 is a Reclamation plan, required by DEC (October 1, 1979). All these documents demonstrating the area of property to be mined are on file with DEC and required in order to obtain the permits under which Plaintiff operated . Ms Krupinski stated that after DEC received a complaint from the neighbors to the west (Defendants herein) that the Plaintiff was mining on their land, Plaintiffs hired Robert Saskas, L.S. in 1994 to prepare a survey (Plaintiff's 10) which was submitted to the DEC in 1994. DEC never took any enforcement action against the Plaintiff for mining on another's land.

TESTIMONY OF EDWARD McGINN

Edward McGinn testified of behalf on Plaintiff as an expert witness in the

field of title searching. He reviewed deeds and wills for the parcels in question as well as parcels to the east and to the south of the Bistrian parcel to prepare an abstract for the Bistrian parcel (Plaintiff's 1). He believes that recent deeds have become more accurate than the older ones which often just estimated acreage. He explains the change in the acreage of what is today called the Bistrian parcel, originating with Plaintiff's 17 (describing it as 18 acres) and Plaintiff's 20 (describing it as 20 acres) as due to difficulty in measuring acreage in these wooded lands. With regard to the Bistrian parcel, he followed the deeds, wills and available surveys of neighboring parcels until the present time. Mr. McGinn opined that a 1947 deed from May Leek to Peter Bistrian states that it contains "20 acres more or less" (Plaintiff's 4) and in his opinion is far more likely to be accurate than the original deed describing the same parcel in 1848.

Looking to the deeds in the Defendants' chain of title, Mr. McGinn found the description of the original filed predecessor deed to the Pleasants' parcel contained in Plaintiff's 24 to be unreliable despite the fact that it contained a precise acreage because it set forth a north/south line along its easterly boundary that was clearly in error. He chose instead to rely on two later deeds describing a portion of the original parcel as "(c)ontaining eight acres more or less" (Plaintiff's 30 dated 1925 and 31 dated 1951). When Mr. McGinn added this "8 acres" to one of two identical parcels which derived from the original George Baker parcel and which was surveyed by a former local surveyor, Wallace Halsey, and stated to be .911 acres (Plaintiff's 28 and 29), he reached a determination that the original George Baker parcel was limited to the sum of 8 plus .911 times two or 9.82 acres. Based on his review of all the records, Mr. McGinn estimated the current Pleasants parcel to be approximately 8 acres.

With regard to the Bistrian chain of title, Mr.McGinn also relied on references to monumentation found in the deeds of a portion of the original " 20 acres", identified as the "Loper" parcel to the east of Bistrian, but originating as part of the original 1848 parcel. (Plaintiff's 44-47). These deeds refer to an old survey by one Wallace Halsey, whom the witness says is worth credence, although the actual survey was never found. He, therefore, rejects earlier deeds describing this portion of the original Bistrian chain as approximately 6 acres (Plaintiff's 43) as opposed to 8.392 acres (Plaintiff's 44). He also relied on references to a granite monument in deeds to the "Gardiner's Bay" property to the South of the subject Bistrian parcel. He claims they often refer to a "monument" on the border of the old May Leek parcel (which was in the chain of title to Bistrian) (Plaintiff's 48 - Plaintiff's 52).

TESTIMONY OF DAVID WEAVER

Mr. Weaver, a licenced surveyor, was called to testify on behalf of the Plaintiff to identify maps and surveys which were prepared by the Walbridge Co on behalf of the Bistrians and the Pleasants. He was a partner at Walbridge Surveyors for 14 years. He prepares surveys mostly within Town of East Hampton. He has records of prior surveyors from the Town, including some of Wallace Halsey's surveys. He testified that Plaintiff's 65, which is a survey of the Disunno parcel, (containing the easterly half of the original predecessor to Bistrian) demonstrates monuments all around the parcel. On cross examination he stated that a dark line on Plaintiff's 55 (also from old Walbridge files) with arrows is a depiction of a ditch bank, which were sometimes used to mark divisions of property. He also admitted that it references a granite monument, which is in line with the ditch bank.

TESTIMONY OF CHARLES KIME

Charles Kime, a partner in Walbridge Co, and a land surveyor, testified on behalf of the Plaintiff. Walbridge prepared surveys for Bistrian and Pleasants in the mid 1970's. He stated that the basis for the boundary lines of the Bistrian parcel came from the deeds of Bistrian and Mulford (Plaintiff's 5A - 5E). Plaintiff's 53 is work done for Bistrian in 1975 for a Town mining permit. Although he noted the ditch bank in the drawings, he did not use it as the east-west boundary between the parcels. Plaintiff's 54 is the Pleasant's survey done by the Walbridge firm in 1977. Mr Kime was the one who set the concrete monuments around the Pleasants parcel allegedly at the request of that client. He did not use the granite monument found in his work sheets for the Pleasants, despite the fact that it was referenced in many of the surrounding parcels, such as the survey for Hawk's Nest to the South (Plaintiff's 61) and the lot line modification of other property to the South in 1996 (Plaintiff's 63).

Mr. Kime also looked at the chain of title for the Pleasants' parcel when doing the survey for them but he rejected the description in Plaintiff's 24, the original filed deed in that chain. He didn't use the ditch bank as the easterly property line between the two parcels because he claimed it did not match up to the acreage for the parcels from the east. In addition, he ignored the fact that parcels in the Bistrian chain and to the east also had some discrepancies in their history. Thus, while the Loper parcel is said in one deed to have 8.392 acres (Plaintiff's 44), the predecessor deed calls the

same exact parcel as containing plus or minus 6 acres (Plaintiff's 43). He testified that approximate acreage in old deeds was common and that little weight was to be afforded them. Since there was never a complaint from any of the surveys his firm did for the owners of parcels to the east of Bistrian, (i.e., Plaintiff's 65, the survey for Disunno) Mr. Kime concluded that he had no reason to alter or question the easterly property line as Defendants herein suggest. Mr. Kime's 1977 survey found the Pleasants' parcel to be 7.186 acres (Plaintiff's 54).

TESTIMONY OF DAVID SASKAS

David Saskas has been a licensed surveyor since 1991. He testified as an expert surveyor on behalf of Plaintiff. He apprenticed with Walbridge Co. He claimed to have had no knowledge of the prior surveys of the Bistrian parcel by his former employer when he conducted his actual survey for the Plaintiff in 1994. Mr. Saskas testified that he relied for his survey on the following information: 1) the 1947 May Leek deed to Peter Bistrian conveying 20 acres more or less; 2) the deeds in Plaintiff's 5A - 5E from Peter Bistrian to Mulford, containing a "700 width call", which the witness states translates into a total of 20 acres, half of which derives from the transfer of the original Bistrian parcel to Mulford totaling 9.881 acres; 3) the Map leading to the Hawks Nest subdivision to the South (Plaintiff's 61) from 1975, referencing Bistrian to the North and West; 4) a monument in the Southwest corner of Bistrian meaning another surveyor came to the same conclusion regarding the boundary as well as a monument in the Northeast corner within one-half foot from where Mr. Saskas placed the Eastern edge of Bistrian property; and 5) Walbridge's 1977 survey of the Pleasants' property confirming his thoughts on the boundary (Plaintiff's 54). When the witness added his concluding of 9.6 acres for Bistrian to Mulford's of 9.8 acres he reached a total of 19.4 acres, very close in his opinion to the description in Plaintiff's 4 (Leek 1947 deed) of 20 acres more or less.

Mr Saskas stated that a surveyor should look for the following: 1) monuments in the field; 2) deeds that have metes and bounds that mathematically close the property; 3) deeds with some distances and measurements, followed by deeds without linear distances but some numerical evidence such as acreage; 4) deeds without any numerical figures such as those with only abounding owners; 5) possession, and 6) finally, verbal evidence. He estimated the overlap between the two parcels that gave rise to the Bistrian claim to be 1.76 acres. He did not consider the older deeds and even knowing of the discrepancies that they raise, he would not

change his conclusion that such property is titled to the Plaintiff. He also does not find the location of a ditch bank to be significant in the Hamptons, where he surveys and says it has no bearing on the boundary line.

TESTIMONY OF CAROL TRAVERS PLEASANTS

Carol Travers Pleasants testified that she, like Ms. Bistrian Krupinski, walked the borders of the Pleasants' parcel with her father in the 1980's. She asserts that she was present when her father demonstrated the location of the Northeast boundary in the presence of the Barylski surveyors. She states that her father had been shown the same boundaries by her grandfather.

TESTIMONY OF JOHN BARYLSKI

John Barylski testified that he is a land surveyor, who was asked in 1988 by Richard Pleasants to do a survey of his property (Defendant's F and Yy). Mr. Barylski was aware that Richard Pleasants disagreed with the outcome of the earlier 1977 Walbridge survey but he was unsure whether he actually had a copy of the Walbridge survey (Plaintiff's 71) in his files when he participated in the survey work. John Barylski testified that he participated in the formation of the 1988 survey performed for the Pleasants along with his father and two of his brothers. He stated that he and his firm (father and brothers) consulted written descriptions, maps, field points, deeds, bounding calls, actual evidence of possession, monuments if set in accordance with written instruments and verbal evidence, if available to complete the task. On direct examination, he claimed to have set the Northeast boundary of the Pleasants' parcel by reference to a large tree as well as discussions with Richard Pleasants but , in his field notes, there is no discussion or mention of the tree. The Defendants' F and Yy also make no mention of a "ditch bank" nor is there a mention of a "concrete monument" which appears in Plaintiff's 10 (Saskas survey) and in Plaintiff's 71 (Walbridge survey). Mr. Barylski stated he did not refer to the most recent deed in Pleasants' chain of title, which refers to the parcel as being 8 acres more or less (Plaintiff's 31) in reaching his conclusion. The Barylski survey concluded that the Pleasants' parcel contained 8.9 acres.

TESTIMONY OF LANCE POMERANTZ

Lance Pomerantz testified on behalf of Defendants as a title examiner. He reviewed the chain of title for the Defendants' parcel by looking at the most recent deeds and working his way back to the original recorded deeds. He also researched wills in Surrogate's Court. He found the easterly line of the Pleasants parcel to include the 1.76 acres in dispute. He was convinced by the following information: 1) the two 1848 deeds conveying to John and George Baker recited the division of a definite acreage of 25.5 acres; 2) by adding up the acreage of the lands deeded from the original 25.5 acres, he was able to verify that the entire parcel, part of which was deeded ultimately to the Defendants, added up to 25.5 acres; 3) the deeds to the South (Defendant's S, written in 1882) state that Jacob Schellinger is bounded no further east than the corner of George Baker's land (George Baker being predecessor in interest to Defendants herein); 4) Defendant's Tt (1896) states that Jacob M Schellinger's land is bounded by Strong and Jeremiah (predecessors in the Pleasants chain of title), not Hedges or any other of Plaintiff's predecessors.

When Mr. Pomerantz added the 10.57 acres from Gosman to Chirney (Defendants' Aaa), which is the result of a survey; the 4 acres of the Loper parcel (Defendant's Qq); the 1 acre each for the two located in the Northwest of the original George Baker parcel (Plaintiff's 28 and Defendant's Ll) and the 8.9 acres that the Barylski survey found for the Pleasants' parcel (Defendant's F and Yy), he arrived at the figure of 25.47 acres, extremely close to the 25.5 acre call in the original deed in the Pleasants' chain of title (Plaintiff's 24).

Mr. Pomerantz stated that he believes that there was an early survey done of the Bakers' parcels due to the definitive acreage; i.e., it is the only deed that does not mention "more or less" and it contains a specific bearing; i.e., "N 22 deg W". That is, according to the witness, indicative of a survey having been done.

The witness also found consistency among Plaintiff's 73 and 74 and Defendant's Tt, T and U in that all five deeds refer to a point on the corner of a parcel previously owner by Baker, clearly a predecessor of Pleasants not Bistrian.

With regard to inconsistencies in some of the deeds that contained land belonging to predecessors in the Pleasants' chain of title, Mr. Pomerantz explained that a change from 8 3/4 (Rr and Aaa) acres to 10.57 acres could be explained because the later deed was as a result of a definitive survey whereas the earlier one

(Defendants' Rr) was by its terms, merely an estimation of acreage.

TESTIMONY OF BONNIE BISTRIAN KRUPINSKI

Called by the Defendant, **Bonnie Bistrian Krupinski** testified that the disputed portion of the property has been mined by the Plaintiff. The property was mined between the 1940's and the 1980's and she asserted that although the property has been somewhat lowered some has been raised back as part of DEC reclamation process which is ongoing.

TESTIMONY OF ROBERT NELSON

Robert Nelson, both a civil engineer and a surveyor since 1949, testified as an expert witness on behalf of the Defendants. He analyzed data after reviewing existing surveys, deeds of all parcels and serial photographs. Mr. Nelson believed, like Mr. Pomerantz, that the Baker parcels had been surveyed since they contained some specific courses and a definitive rather than an approximate acreage. He also reviewed the history of the Bistrian parcels and the Loper parcels. His goal was to establish an easterly line for the Pleasants' parcel. He reviewed numerous surveys performed for the parties herein and for predecessors in interest to the original filed deeds for both parties. Thus, he reviewed the surveys of Saskas, Barylski, Bass, Halsey, a survey of Fresh Pond Road to the North and a 1926 survey of the Loper parcel by Wallace Halsey. By reviewing the above, he plotted an overall outline of the Pleasants' parcel. He used the Gardiner's Bay granite monument referred to in all deeds as the Southeast edge of the property for Pleasants.

Like Lance Pomerantz, Mr. Nelson also found the 25.5 acre call in the original Baker deeds to be persuasive since it was definite and not an estimate. He added 4 acres referred to in deed from Strong to Loper (Qq); 2 one acre parcels referred to in Plaintiff's 28 and Defendant's Ll; 10.574 acres referred to in a deed from Gosman to Chirney (Defendant's Aaa); and the 8.9 acres found to belong to Pleasants in Barylski survey (Defendant's F and Yy). He was able to recreate the original Baker grant of 25.5 acres; his addition came, like that of Mr. Pomerantz, to 25.47 acres.

In two aerial photos he reviewed, Mr. Nelson found further evidence to support the easterly boundary found by the 1988 Barylski survey. Mr. Nelson prepared overlays of the original 25.5 acre Baker parcel up to the eastern boundary of the property found in the Barylski survey. When he placed the overlay on a 1938 photo (Defendant's P), the ditch bank is evident right at the boundary found by Barylski. In addition, the property to the west shows a different color of vegetation, indicative of a property line, where the line was later found in Frank Barylski's survey. Later in the 1955 photo (Defendant's Q), when the overlay is placed on the photograph, the witness pointed out a "cut line" on eastern edge of Pleasants' parcel which looks like trees had ben cut along property edge. Again, he pointed to a ditch bank, which he believes is indicative of property line along two-thirds of the easterly property line. Interestingly, the 1955 aerial photo shows clearing of the vegetation along the line of what Defendants are claiming is the boundary between the two owners. Mr. Nelson also testified that the North/South measurement in the original predecessor deed to Defendants referring to 52 "chains" is in error and that the measurement was most likely a reference to the word "rods", which would render the length of the property to over 890 feet, its actual vertical length.

BURDEN OF PROOF

In an action brought under RPAPL Article 15, the burden is generally stated to be upon the proponent of title to demonstrate by a fair preponderance of the evidence, that a disputed property is within its chain of title. **See, State v Moore**, 298 AD 2d 814, 751 NYS 2d 321 (3d Dep't 2002); **Frampton v Indelicato**, 144 Ad 2d 880, 534 NYS 2d 5894 (3d Dep't 1988). Where two parties lay claim to the identical parcel, the Appellate Division, Second Department has stated that the burden of establishing ownership applies equally to the Plaintiff and the Defendant counterclaimant. **LaSala v Terstiege**, 276 Ad 2d 529, 713 NYS 2d 767 (2d Dep't 2002).

Examining the issue of burden of proof in a case where a Plaintiff claimed title to real property under Article 15 and the Defendant, a Town, having originally counterclaimed, withdrew its counterclaim prior to court determination, the Court stated that RPAPL § 1521 required the Supreme Court to declare whether the Plaintiff had met its burden but not the Defendant. In so holding, the Court noted that since the Defendant had withdrawn its counterclaim, and since the Plaintiffs had failed to demonstrate the invalidity of the Defendant's title, the Court was not

required to make any determination as to the Town's rights regarding the subject property. **Crawford v Town of Huntington**, 299 AD 2d 446, 749 NYS 2d 737 (2d Dep't 2002).

More recently, the same Court examined the issue of the Court's powers where only one party claimed title to real property through a pleading but one defendant expressed entitlement to a life estate through an affirmative defense. In **Torre v Giorgio,** 51 AD 3d 1010, 858 NYS 2d 765 (2d Dep't 2008), the Court held both that denomination of what is really a claim via an affirmative defense rather that by counterclaim does not deprive the Court to treat it as such and that CPLR § 3017(a) permits the Court to award undemanded relief if there is no substantial prejudice to an adverse party. **Id.**

While each party herein relies on the general principles set forth in both cited cases and neither is directly on point, the Court believes that examination of the pleadings as well as the trial of this action leads to the conclusion that the Defendants herein are asserting title to the 1.76 acres in question; that the Plaintiff is and has long been aware of that allegation, thus precluding a claim of prejudice, and that Defendants should be held to the same burden in this case as the Plaintiff. While the Defendants have not asserted a technical counterclaim under RPAPL Article 15, they have asserted one for trespass and have stated in their answer that they and not Plaintiff hold title to the property in question. Indeed, the essence of a claim for trespass is the invasion of a party's interest in the exclusive possession of land. **See, Ward v City of New York**, 15 AD 3d 392, 789 NYS 2s 539 (2d Dep't 2005). Defendants do make such assertion through a counterclaim against Plaintiffs. While Defendants insist this is not a case about title but, rather, about locating a boundary, that is semantical nonsense. The location of the boundary of Plaintiff's property and Defendants depends on the ability to demonstrate title.

This Court will not exalt form over substance. The gravamen of the testimony presented by eight witnesses over six days was the strength of each party's claim to the subject land in Amagansett. Therefore, the Court will examine the evidence set forth by both parties in support of their opposing claims to title, despite the fact that the Defendants have not technically asserted a counterclaim under RPAPL Article 15.

PREPONDERANCE OF EVIDENCE

In order to prevail in an action under RPAPL Article 15, a party must demonstrate good title in itself; it is , therefore, not sufficient to rely on the weakness of the adversary's title. **Best Renting Co v City of New York**, 248 NY 491, 162 NE 497 (1928); **LaSala v Terstiege**, 276 AD 2d 529, 713 NYS 2s 767 (2d Dep't 2000). The claimant must demonstrate by a preponderance of the evidence that it has good title to the land in question. **State v Moor**, 298 Ad 2d 814, 751 NYS 2d 321 (3d Dep't 2002).

This is not a case where either party was in a position to prove anything with certainty. Both parties presented the Court with copies of deeds and wills dating back over 150 years. In each case, there are internal inconsistencies among several of the documents. Ultimately, the Court found most credible, the exhibits and explanations set forth on behalf of the Defendants. Mr. Pomerantz and Mr. Nelson were both extremely credible witnesses. They both agreed that the only early deeds to set forth a precise acreage were those in 1844 of the Bakers and that such deeds were the likely result of an actual survey of the Baker parcel. Unlike those of the same period in the Bistrian chain of title, the 1844 deeds set forth a definite, not approximate acreage and a specific course (Plaintiff's 24,Defendants' Nn). Second, if the portions of the what was originally the Baker parcel are added up in the more recent deeds (Plaintiff's 28, Defendants' Ll, Qq, and Aaa), the remaining acreage necessary to reach the original 25.5 acres is 8.9 acres, the precise acreage found to belong to the Pleasants in the Barylski survey (Defendants' F and Yy). Third, the aerial photographs discussed by Robert Nelson, taken long before there existed any controversy between the predecessors to the Bistrians and the Pleasants demonstrate what looks like a definite property boundary. (Defendants' P and Q). By looking at the aerial photographs, the adage that a picture is worth a thousand words is striking. There is both a difference in the vegetation along the purported boundary line in 1938 and evidence of the ditch bank, which this Court believes was used in former days as a designation of a property line. It is also no coincidence, as stated by Robert Nelson, a surveyor and civil engineer, that the ditch bank leads directly to a granite monument, which is referred to in so many of the deeds as bordering on property of the predecessors to the current Defendants. (Plaintiff's 73 and74, Defendants' S, T, U and Tt).

On the other hand, the original deed in the Bistrian chain of title had an estimate of 18 acres. Although the next deed did have a 20 acre call (Plaintiff's 43), it was not filed until 1926, and there appears no appropriate explanation for this gap.

While the Court accepts the expert testimony of Mr. Kime and Mr. Saskas to the effect that monuments are significant, they are only as significant as the written instruments on which they are based. Accordingly the Court does not give much weight to those placed by Mr. Kime based on inconsistent deeds. The Court does not find Mr. Kime's survey of the Pleasants' parcel to be convincing because he bases it entirely on the assumption that the survey for the Bistrian's is correct and makes no room for the possibility that the contradictions in the Bistrian deeds were due to a mistake occurring in the mid nineteenth century. Finally, Mr. Saskas gave no explanation for his unwillingness to take the Baker and its progeny deeds into consideration and his opinion that ditch banks are irrelevant was contradicted by all other expert evidence including that of Mr. Weaver, a long time surveyor in East Hampton.

The Court acknowledges that there were clearly problems with the Defendants' proffered evidence also, such as the reference in the original predecessor to Pleasants filed deed which set forth a vertical length of the original Baker parcel of "52 chains, 72 links", which would bring the property far north of Fresh pond Road (Plaintiff's 24 and Defendants' Nn). However, Defendants' experts all gave a rational explanation that such was probably an error and that if "rods" were substituted for "chains", the length of the property would be what all are agreeing it is today. Moreover, the distinction between an earlier deed transferring 8 and three quarters acres of what was originally a portion of John Baker's parcel to the next deed of 10.574 acres is explained by Mr. Pomerantz since the subsequent deed was as a result of a survey (Aaa) and the prior states that it is an approximation (Rr). In other words, Defendants' expert witnesses gave rational explanations for discrepancies; whereas, Mr. Saskas and Mr. Kime merely insisted that the inconsistencies were irrelevant and that they were relying on a 1947 deed, and monuments Mr. Kime placed as a result of his unsupported conclusions.

Interestingly, the testimony of the three actual surveyors, Misters Kime, Saskas and Barylski was far more difficult to accept. Each sought to support surveys from many years ago prepared by their firms and relied heavily on verbal evidence given by their clients. However, ultimately Mr Barylski's survey is credibly supported by the documentary evidence and the striking photographs.

The Court believes both Ms. Krupinski and Ms. Travers testified credibly based on what their fathers told them. However, the strength of their testimony must rest on the strength of the documentary evidence.

Based on the evidence as a whole, the Court finds that the Defendants have proved by a fair preponderance of the credible evidence that the property set forth in the Barylski survey (Defendants F, Yy); i.e., 8.9 acres, is, in fact, property in title to the Defendants in this action. In addition to this declaration, Defendants are entitled to relief in the form of an injunction, prohibiting the Plaintiff from any further mining on the property in question.

TRESPASS

A person entering upon the land of another without permission, whether innocently or by mistake, is considered a trespasser, since the essence of the tort is the invasion of the Plaintiff's interest of exclusive possession of the land. **See, Ward v City of New York**, 15 AD 3d 392, 789 NYS 2d 539 (2d Dep't 2005). In a normal case where injury to real property is alleged, the measure of damages for engaging in the tort of trespass is the lower of the decline in market value and the cost of restoration. **Jenkins v Etlinger**, 55 NY 2d 35, 447 NYS 2d 696, 432 NE2d 589 (1982); **Hartshorn v Chaddock**, 135 NY 116, 31 NE 997 (1892); **McDermott v Albany**, 309 AD 2d 1004, 765 NYS 2d 903 (3d Dep't 2003). However, where damages cannot be ascertained, nominal damages will be allowed. **Guilderland v Swanson**, 29 AD 2d 717, 286 NYS 2d 425 (3d Dep't 1968), **aff'd**, 24 NY 2d 872, 301 NYS 2d 622, 249 NE 2d 467 (1969).

Although Defendants have established title to the real property in question, they submitted no evidence whatsoever of the cost of restoration nor of any diminution in value. The sum and substance of the testimony on this issue is that of Ms. Krupinski, wherein she states that the Plaintiff mined some portion of the land in question ; that the operations ended approximately 20 years ago; and that some reclamation had been accomplished (Plaintiff's 7 and 8). The Defendants presented no testimony of what exactly they wished the Court to do in this context.

In a post trial brief, Defendants ask the Court to take judicial notice of the statutory and regulatory requirements of the DEC in the context of mining reclamation, and to maintain continuing jurisdiction over this matter for the purpose of enforcing DEC's reclamation plan. DEC was not a party to this action; if that State agency wishes to enforce its own regulations, it will do so. While concurrent jurisdiction to enforce such regulations may exist, where, as here, there exists an administrative agency having the special expertise necessary to handle a technical issue, resort to a judicial tribunal should be withheld pending resolution of available

administrative proceedings. **See, Davis v Waterside Housing Co**, 274 AD 2d 318, 711 NYS 2d 4 (1st Dep't 2000). It appears to the Court that Defendants' request for this particular relief in a post trial memorandum derives from the fact that Defendants real underlying claim herein is one for title under RPAPL Article 15 and not for trespass based upon mining property some twenty to forty years ago.

In any case, it is not the role of this Court to retain jurisdiction over a case that has been tried and for which Defendants only put in proof of title and not of a remedy for their trespass counterclaim. In view of the above and because the Court will not speculate where the party has failed to provide any proof, the Court awards Defendants the nominal sum of one dollar ($1.00) for the trespass on their land by the Plaintiff. As set forth above, Defendants are also entitled to injunctive relief, prohibiting Plaintiff from any further mining on the property in question.

Accordingly, in accordance with the above determinations, the Court declares the Plaintiff's claim to any of the real property contained within the Barylski survey (Defendants' F and Yy) to be invalid and Plaintiff is barred from asserting any future claims to such real property. The Court declares the Defendants' claim to the real property encompassed within the boundaries of the Barylski survey (Defendants' F and Yy) to be valid. The Court awards Defendants nominal damages in the sum of one dollar ($1.00) on their cause of action for trespass; and Plaintiff is hereinafter enjoined from conducting any mining operation on the Defendants' land.

This constitutes the ***DECISION*** and ***ORDER*** of the Court. Submit Judgment on Notice in accordance with the terms of this Decision.

Dated: September 12, 2008
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.