

United States v. San Juan Bay Marina 239 F. 3d 400 (Decided February 21, 2001)

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PERMIT VIOLATION UNDER THE RIVERS AND HARBORS ACT

Under the Rivers and Harbors Act, no one may place obstructions into the navigable waters of the United States without authorization from the Army Corps of Engineers

United States v. San Juan Bay Marina

239 F. 3d 400

(Decided February 21, 2001)

Defendant, the San Juan Bay Marina (“the Marina”) has a number of commercial establishments located in piers in San Juan Harbor. The Marina leased the property from the Commonwealth of Puerto Rico (“Puerto Rico”). The Marina built new piers in the San Antonio Channel, part of the navigable waters of the United States, without obtaining the necessary permits from the Army Corps of Engineers (“Army Engineers”).

In April 1992, the Marina applied to the Army Engineers for a permit to build an 80 by 40 foot platform adjacent to – and to become part of – the existing structure. The Army Engineers issued a contingent permit for the construction, but it did not allow construction to start until the permit conditions were met. The Marina was required to obtain coastal zone certification or waiver from the Puerto Rico Environmental Quality Board. The Marina applied for the certification and/or waiver, but were denied by Puerto Rico. The defendant went ahead and built the platform anyway.

In May 1992 the Marina had a permit that authorized reconstruction and rehabilitation of existing structures but it did not allow deviation from the original blueprints. However, the Marina had the pier reconstructed to twice its original size.

In August 1993 the Marina applied for another permit to build onto the contingency authorized 80 by 40 foot platform applied for in April 1992. The Army Engineers again issued a contingency permit requiring certification from the planning board. The planning board objected to the proposed project and the Army Engineers denied the permit. The defendants did not appeal this decision, but went ahead and constructed an additional structure of approximately 40 by 57 feet. Subsequently, on July 5, 1995, the Army Engineers issued a cease and desist order after inspecting the sight. Even after this order, the Marina built an additional structure, a “sushi bar”

without even a permit application having been filed. The Marina then built another pier without a permit measuring 300 by 5 feet. The Army Engineers amended its order in September 1995 to include these two later violations.

In November 1995 the defendant filed for an-after-the-fact permit requesting approval for all the unauthorized structures. The Army Engineers denied this application and the United States brought suit under the Rivers and Harbors Act against the Marina to compel removal of the piers that had been erected without the requisite prior approval under the Act and sought an injunction against further construction.

The U.S. District Court for the District of Puerto Rico granted summary judgment to the United States and also ordered the injunction against further construction. Defendant appealed the grant of summary judgment arguing that the government of Puerto Rico was an indispensable party because it had a vested interest in the property and owned the premises. Defendant also argues that the Army Engineers should have approved the after-the-fact permit application because it was in the public interest that the structures be built, and that same public interest meant the plaintiff lacked standing to sue, and therefore the cease and desist order was not valid because it was not signed by the correct person. The Court of Appeals reviewed defendant's arguments *de novo* and found them to be frivolous and without merit thereby affirming the district courts decision.

The Rivers and Harbors Act of 1899, Section 403, has expressly stated for more than a century that no one may place obstructions into the navigable waters of the country without the authorization of the Army Engineers and that "the creation of any structure not affirmatively authorized by congress to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier...except on plans recommended by the chief of engineers and authorized by the secretary of the army." The court found the record was clear that the defendant built structures without the necessary permits and therefore the grant for summary judgment was proper.

The court disagreed with the argument that Puerto Rico was a necessary and indispensable party pursuant to Fed.R.Civ.P. 19(a) and (b) and in the absence of such the action should be dismissed. The court found that the defendant admitted in its answer that the Marina is the "sole owner" of all the property in question, the lease made the lessee, i.e. the Marina, responsible for obtaining and complying with all

applicable state and federal permit. Moreover, the lease did not grant rights to build on submerged lands next to the leased piers and premises, and as such, Puerto Rico's reversionary interest is in the improvements made on the leased property and the structures in question were made to submerged lands, and the order of the district court does not impair or impede Puerto Rico's ability to protect its interest in the property it does own, the original piers and structures. Finally, Puerto Rico is not a necessary party because the relief ordered by the district court is complete and concludes the controversy without harm to any legally cognizable interest Puerto Rico may have. Additionally, Puerto Rico never moved to intervene in the action perhaps because it did not deem its interests significantly threatened by the litigation, and the court was not going to second-guess this determination absent special circumstances.

The court also rejected defendant's "public interest" argument holding that the proper avenue for such a challenge is an action for review of the denial of the permits under the Administrative Procedure Act, 5 U.S.C. Section 701. Because the defendant failed to bring such an action under the APA, they are foreclosed from collaterally attacking the denial of the permits in the present enforcement proceeding. The court further holds that under the APA the agency's judgment would be entitled to considerable deference and as such, the court will not substitute its judgment for that of the agency.

The court found defendant's lack of standing argument incomprehensible as Congress expressly charged the Army Engineers with considering permit applications, and the United States clearly has standing under the statute to enforce cease and desist orders and to seek the removal of the structures built in violation of the law.

Finally, defendant challenged Mr. Muniz, Chief of the Regulatory Field Office, signing of the cease and desist order. The court quickly dealt with this argument relying on 33 C.F.R. Section 325.8(b) wherein is supported the fact that the Army Corps District Engineer is authorized to delegate his authority and the permit may be signed for and on his behalf by whomever he designates. Therefore, Mr. Muniz signature was proper and valid.

Overall, the court found defendant's claims to be frivolous and unsupported by specifics. That coupled with the fact that defendant's willfully violated the Rivers and Harbors Act, resulted in the court awarding double costs against the defendants and to affirm the grant of summary judgment and order of enforcement to remove all referenced structures in all six claims.

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