

Mascolo v. Romaz Properties, Ltd. Supreme Court of New York, Appellate Division, Second Department 28 A.D.3d 617 (Decided April 18, 2006)

John D'Ambrosio, Class of 2009

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IN A DISPUTE AS TO RIPARIAN RIGHTS, BOTH PLAINTIFF AND DEFENDANT RAISED TRIABLE ISSUES OF FACT SUFFICIENT TO PRECLUDE THE GRANT OF THEIR MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT, RESPECTIVELY

Plaintiff and defendant owned adjacent parcels of waterfront property abutting a creek. At issue was defendant's right to use a boat basin at the northern boundary of plaintiff's property to reach the creek. Plaintiff claimed ownership of the boat basin because it was artificially created from upland property within the confines of his property; defendant argued that it was entitled to riparian rights allowing access across the basin to the creek. The Appellate Division modified the trial court's order, finding that each party had raised triable issues of fact and that neither party was entitled to summary judgment.

Mascolo v. Romaz Properties, Ltd.
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In an action pursuant to NY RPAPL § 1501, plaintiff property owner appealed an order of the Supreme Court, Suffolk County, which denied their motion for summary judgment and granted defendant property owner's cross-motion for summary judgment, resulting in a dismissal of plaintiffs' complaint.

Plaintiff Frank A. Mascolo ("Mascolo") and Defendant Romaz Properties, Ltd. ("Romaz") owned adjacent parcels of waterfront property in Suffolk County. Plaintiff's and the defendant's parcels abut Orowoc Creek at their eastern boundaries. The plaintiff's property includes a boat basin at the northern boundary of his parcel, which leads out to Orowoc Creek. The southern boundary of the defendant's property abuts the boat basin. Part of the defendant's property includes a private marina, which also fronts the boat basin. Individuals seeking to utilize the marina are required to navigate vessels across the boat basin at issue to access the creek.

Mascolo brought this action claiming ownership of the boat basin and the submerged land under it. Mascolo moved for summary judgment, alleging that the boat basin was artificially created using land that existed within the boundaries of his property. Romaz cross-moved for summary judgment, claiming it was entitled to riparian rights which allowed it access to Orowoc Creek by crossing the boat basin. The Supreme Court denied Mascolo's motion and granted Romaz's cross-motion; the Appellate Division modified.

"Riparian rights" generally refer to the rights of the owner of land forming the bank of a river or stream to use water from the waterway on the land, such as for drinking water or irrigation. State laws vary as to the extent of the rights; however, a riparian owner may not act to deny riparian rights to the owner of downstream properties along the waterway, meaning the water may not be dammed and channelled away from its natural course.

The Appellate Division noted that amongst the rights of a riparian owner is the right of access to a navigable river or body of water which his or her land abuts. *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 571. This right of access includes the right of passage to and from the waterway with reasonable safety and convenience. *City of New York v. Wilson & Co.*, 278 N.Y. 86, 101. However, the riparian owner's right of access is not absolute, but is qualified by the rights of the owner of the submerged land over which the riparian owner must cross. *Hedges v. West Shore R.R. Co.*, 150 N.Y. 150, 158. When the parties' rights are in conflict, the court must strike the correct balance.

The Appellate Division found that Mascolo, in his motion for summary judgment, had made a prima facie showing of entitlement to judgment as a matter of law by demonstrating: 1) that he sustained damages; and 2) that the boat basin was artificially made, in which case Romaz would have no riparian

rights. However, Romaz had raised triable issues of fact with respect to whether the boat basin was naturally made and whether Mascolo had sustained damages. Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment.

With respect to Romaz's cross-motion for summary judgment, the defendant demonstrated, *prima facie*, entitlement to judgment as a matter of law by establishing that its property abutted a navigable waterway, namely Orowoc Creek, thereby entitling it to riparian rights allowing access to the abutting creek via the boat basin at issue. However, in opposition, Mascolo had raised triable issues of fact, including whether the defendant's property abutted a navigable body of water, whether the boat basin was natural or man-made, and whether the defendant's access to the creek by crossing the boat basin at issue, rather than from the shoreline of its own property, was reasonable. Accordingly, the Supreme Court erroneously granted the defendant's cross-motion for summary judgment.

Based on the fact that both Mascolo and Romaz had raised triable issues of fact, the Appellate Division concluded that the Supreme Court had erred in granting summary judgment to Romaz, affirmed the court's denial of Mascolo's motion for summary judgment and reinstated Mascolo's complaint.

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