

\*\*\*\*\* UNITED STATES DISTRICT COURT \*\*\*\*\*

*1/17/03*  
NORTHERN DISTRICT OF NEW YORK

*45*

JUDGMENT IN A CIVIL CASE

DOCKET NO. 1:01-CV-1066 (LEK/DRH)

*1/17/03*  
**CLADYS GHERARDI, ET AL.,**

Plaintiffs,

**THE STATE OF NEW YORK, ET AL.,**

Defendants.

**U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED**

DEC 11 2003

*1/17/03*  
**LAWRENCE K. BAERMAN, CLERK  
ALBANY**

**JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**XX DECISION by COURT.** This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the defendants as against the plaintiffs, in accordance with the MEMORANDUM-DECISION and ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated December 11, 2003.

DATE: December 11, 2003

**LAWRENCE K. BAERMAN**

CLERK OF THE COURT

*BK*  
DEPUTY CLERK, Scott A. Snyder

12/11/03 JNL  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

GLADYS GHERARDI, ET AL.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, ET AL.,

Defendants.

U.S. DISTRICT COURT  
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01-CV-1066  
(LEK)

**MEMORANDUM-DECISION AND ORDER**

**I. BACKGROUND**

Plaintiffs own land in an area protected by the Long Island Pine Barrens Protection Act (the "Act"). N.Y. ENVTL. CONSERV. LAW § 57-0105. They bring this action, and previously filed separate actions in various courts, contending that the Act violates the United States Constitution and the New York State Constitution. Part of the land protected by the Act includes the largest natural drinking water source in the State of New York. *Id.* §57-0105. The Act was intended to "allow the state and local governments to protect, preserve and properly manage the unique natural resources of the Pine Barrens-Peconic Bay system." *Id.* §57-0105.

In light of Olsen v. New York State Department of Environmental Conservation, et al., 762 NYS 2d 538 (3d. Dept. 2003) and Dittmer v. County of Suffolk, 188 F. Supp. 2d 286, 292 (E.D.N.Y. 2002), Defendants argue that the present action should be dismissed based on the doctrine of *res judicata*.

In Olsen, the plaintiffs were a group of current or former owners of real property located in

the Long Island Central Pine Barrens who argued that the land-use restrictions imposed by the Act were unconstitutional. The trial court dismissed the plaintiffs' claim on jurisdictional grounds and the Third Department affirmed, noting that it would have also dismissed the case based on the merits of the plaintiffs' claim. Olsen, 762 N.Y. 2d. at 538. In Dittmer, the plaintiffs brought an action alleging that the Act violated the United States Constitution, and the Court granted the defendants' motion for summary judgment. Dittmer v. County of Suffolk, 188 F. Supp. 2d 286 (E.D.N.Y. 2002) aff'd, Dittmer v. County of Suffolk, 59 Fed. Appx. 375 (2d Cir. 2003).

## II. Motions to Dismiss

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In assessing the sufficiency of a pleading, the Court must "assume all well-pleaded factual allegations to be true, and . . . view all reasonable inferences that can be drawn from such allegations in the light most favorable to the plaintiff." Dangler v. New York City Off Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999). Consideration is limited to the complaint, written instruments that are attached to the complaint as exhibits, statements or documents that are incorporated in the complaint by reference, and documents on which the complaint heavily relies. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002) (citations omitted).

"The Second Circuit has held that res judicata challenges may properly be made via a threshold motion to dismiss." Marshall v. National Association of Letter Carriers, 2003 U.S. Dist. LEXIS 19918 \*23 (S.D.N.Y. 2003) (citing Thompson v. County of Franklin, 15 F.3d 245, 253 (2d

Cir. 1994)).

### III. DISCUSSION

#### A. *Res Judicata*

*Res Judicata* bars relitigation of issues between the same parties that were decided on the merits or could have been litigated in an earlier proceeding. Jemzura v. Public Service Commission, et. al., 971 F. Supp. 702 (N.D.N.Y.1997). After a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. Id; see also, Interoceanica Corp. v. Sound Pilots, Inc. 107 F.3d 86, 90 (2d Cir. 1997)(*res judicata* precludes cases arising from the same nucleus of operative facts). “To invoke *res judicata* under New York law, a defendant must show that ‘1) the prior decision was a final judgment on the merits, 2) the litigants were the same parties, 3) the prior court was of competent jurisdiction, and 4) the causes of action were the same.’” Caidor v. Chase Manhattan Bank et. al., 1998 U.S. Dist. LEXIS 4701 (S.D.N.Y. 1998) (internal citations omitted).

##### (a) On the Merits

In Olsen, the Appellate Division affirmed the trial court’s dismissal of the case on jurisdictional grounds and noted that the case would also be dismissed on the merits. While dismissal based on subject matter jurisdiction is not normally considered “on the merits” for *res judicata* purposes, the circumstances surrounding the present case clearly show that the Appellate Division, which did have jurisdiction, did consider the merits of Plaintiffs’ claim. The Third Department stated, “[E]ven if this bar [the jurisdictional issue] were removed and we were to review the merits of plaintiffs’ other contentions, we would agree with Supreme Court’s thorough review

and affirm its finding of alternate bases for dismissal of all of their claims." Olsen, 762 N.Y.S. 2d 538 at 3. Thus, the Third Department did consider the merits of Plaintiffs' claim and any attempt by them to file it in the proper trial court would have been futile.

The Dittmer court dismissed plaintiffs case pursuant to a motion for summary judgment. Dismissal on this basis is "on the merits" for purposes of *res judicata*. Hadar v. Concordia Yacht Builders, et al., 1997 U.S. Dist. LEXIS 11182 \*12 footnote 4 (S.D.N.Y. 1997) (internal citation omitted).

**(b) Same Litigants**

Defendants claim, and Plaintiffs do not refute, that the plaintiffs in Olsen are identical to those in the instant action. The Court also notes that at least fifty-nine of the plaintiffs in Dittmer are also plaintiffs in the present case. The Defendants in both Olsen and Dittmer are substantially the same as those in the instant action. It is also notable that Plaintiffs' rely on the same counsel in Olsen, Dittmer and the present action.

**(c) Court of Competent Jurisdiction**

Olsen was affirmed by the Appellate Division of New York State Supreme Court, Third Department and Dittmer was heard in U.S. District Court, Eastern District of New York. Both are courts of competent jurisdiction.

**(d) Same Cause of Action**

"The case law requires that the concept of transaction receive a flexible, common-sense construction that recognizes the practical realities presented. Of primary importance is the identity of facts surrounding the occurrence which constitutes the cause of action, as opposed to the legal theory within which a complaint is framed." Waldman v. Kiryas Joel, 39 F. Supp. 2d 370, 377

(S.D.N.Y. 1999) (internal quotations omitted).

Plaintiffs concede that the factual background of both cases is similar, but argue that each case was separately drafted because each had distinct issues. Plaintiff's Brief at 1. Not surprisingly, Plaintiffs' fail to cite any authority which would permit them to file separate claims, in separate courts based on what is essentially the same transaction. "[A] party cannot split a claim by first seeking one type of remedy in one action and later asking for another type of relief in a second action." Id. at 20 (internal quotations and citations omitted).

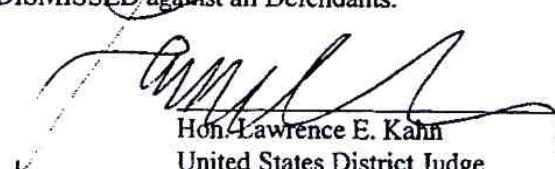
Applying the common sense approach discussed in Waldman, it is obvious that the facts, the occurrence which constituted the cause of action, are the same in the instant case as in both Dittmer and Olsen. The plaintiffs in all three actions are challenging the Long Island Pine Barrens Protection Act and as the court in Waldman stated, the fact that a party may rely on a different legal theory in advancing their case a second (or third) time does not permit that party to circumvent dismissal based on res judicata. Waldman, 39 F. Supp. 2d at 18.

#### CONCLUSION

For the reasons stated herein, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED; and it is further

ORDERED, that Plaintiffs' case be DISMISSED against all Defendants.

Dated: December 17, 2003  
Albany, New York

  
Hon. Lawrence E. Kahn  
United States District Judge

