

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2008-6979

DIVISION "L"

2011-0097

17TH STREET CANAL COALITION, ET AL

VERSUS

ORLEANS LEVEE DISTRICT, ET AL

CONSOLIDATED WITH

TERRY AND NINA LONATRO, ET AL

VERSUS

ORLEANS LEVEE DISTRICT AND SOUTHEASTERN FLOOD

PROTECTION AUTHORITY EAST

PROCEEDINGS held in the above-captioned matter before
the HONORABLE KERN A. REESE, JUDGE presiding on
Friday, January 14, 2011.

APPEARANCES:

RANDALL A. SMITH

L. TIFFANY DAVIS

MELISSA M. DESORMEAX

Attorneys for Plaintiffs

THOMAS P. ANZELMO, SR.

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Attorneys for Defendants

REPORTED BY:

DENISE K. ETHERIDGE, CCR, OCR

1 P R O C E E D I N G S

2 (Friday, January 14, 2011)

3 THE COURT:

4 Case number 2008-6979, consolidated
5 with 2011-0097, 17th Street Canal Coalition
6 versus Orleans Levee District and Terry and
7 Nina Lonatro, et al versus Orleans Levee
8 District.

9 Counsel, make your appearances,
10 please.

11 MR. SMITH:

12 Good morning, Judge, Randy Smith for
13 the plaintiffs. I'm also here with Tiffany
14 Davis and Melissa Desormeaux from my office.

15 MR. ANSELMO:

16 May it please the Court, Tommy Anzelmo
17 and Kevin Kress representing the Orleans
18 Levee District and South East Louisiana
19 Flood Protection Authority East.

20 THE COURT:

21 Okay. By way of housekeeping, there's
22 been several exceptions filed we can take
23 up initially and then we can go from there.

24 All right, Mr. Anzelmo.

25 MR. ANZELMO:

26 Yes, sir. May it please the Court,
27 Your Honor, the first exception that we
28 have advanced is the lack of necessary
29 party. The evidence that has been
30 introduced into this record demonstrates
31 ably that this is entirely a project of the
32 United States Army Corp of Engineers and

1 Exhibit Number 1 that's been attached to
2 plaintiff's brief as well as the exhibits
3 that we have attached reflect that it is a
4 total Corp project.

5 Additionally, the second exhibit that
6 we have filed attached to our affidavit
7 further reflects that the project is 100
8 percent funded by the United States Army
9 Corp of Engineers. It is a Corp project.
10 They are doing the work. They are funding
11 the work. They're directing the work that
12 lead the contracting work. If there's
13 going to be any injunctive relief sought or
14 requested in this case, an absolute
15 necessary party, and in the old vernacular,
16 an indispensable party is the United States
17 Corp of Engineers. And any relief to be
18 granted by this Court would necessarily
19 include them if the project would be
20 warranted.

21 THE COURT:

22 Yeah, well, if that -- you know.
23 Well, I just have one question as to that,
24 we've been down this road before, and as I
25 read the law and prepared for the hearing
26 back in 2008, had the Corp of Engineers
27 been on the point of this matter rather
28 than putting the Orleans Levee District,
29 and ~~lower the Southeastern Property~~ objection .t5754|746
30
31
32

1 utilizing the servitude they circumvent
2 that possibility.

3 So let me hear what the other side has
4 to say. I understand your argument.

5 MR. ANSELMO:

6 Thank you, Your Honor.

7 MR. SMITH:

8 I would say that too, Judge, and also
9 I'd point out that even in the affidavits,
10 including the one Steven Spencer signed in
11 January 12, 2001 that's attached to their
12 filing, he points out that all of the work
13 that's at issue will be performed within
14 existing rights of way held by the old
15 MSLPA and will be limited to that area.

16 So they're even acknowledging that the
17 work is within what they claim to be their
18 existing rights of way. So the Corp is
19 there by invitation and permission of the
20 defendants in this case. So I think it's
21 appropriate that the proceeding be held
22 against the defendant, just because I
23 would, might have guessed to use my
24 property doesn't mean that I'm not
25 responsible to find breaking the law.

26 THE COURT:

27 Mr. Anzelmo, anything else?

28 MR. ANZELMO:

29 Yes, Your Honor, very briefly. We can
30 not be braking the law. The Louisiana
31 Fourth Circuit has clearly said "We thus
32 conclude the OLD possessed a valid

1 servitude to the 17th Street Canal levee
2 based on the St. Julien doctrine. To the
3 extent a creation of the servitude resulted
4 in a taken, that occurred decades ago when
5 the 17th Street Canal was constructed.
6 Under the St. Julien Doctrine the right to
7 compensation is personal to the owners of
8 this property at the time the levee was
9 constructed" None of the landowners owned
10 the property in question at the time.

11 So what we are dealing here is we've
12 got a valid levy servitude.

13 THE COURT:

14 Hold it. My son would say "slow your
15 roll", counsel. What we are dealing with is
16 an indispensable party right now, and
17 that's the thing I'm asking or making
18 comments on.

19 MR. ANZELMO:

20 I'm responding to his argument that in
21 essence we have done something wrong. And
22 I'm suggesting Your Honor, that's because
23 there is a valid levee servitude, and
24 because in this case all we have done is
25 given a right of entry from actual toe to
26 actual toe, that if work is sought to be
27 enjoined. The party to be enjoined is the
28 party who has authorized the work,
29 contracted the work, and who is doing the
30 work, and it's not the Orleans Levee
31 District of the SLFPAE.

32 THE COURT:

1 Well, I understand your argument, but
2 I have no jurisdiction over an agency of the
3 United States government. Even if I were to
4 issue an injunction, they have no duty to
5 listen to this Judge in this state court.

6 So I don't see the need for them to be
7 here. It would be diminimus to be sure. So
8 that exception is denied.

9 What's the next one?

10 MR. ANZELMO:

11 The other one is an Exception of No
12 Right or No Cause of Action, because Andry
13 has been named as a plaintiff in this case,
14 however as of the latest filings there are
15 no affidavits for Mrs. Andry supporting her
16 claim. And additionally, the scope of work
17 that's to be done was north of Veterans
18 Highway. And by the address that she has in
19 her petition she is south of Veterans
20 Highway. She is not effected by the work.

21 MR. SMITH:

22 We will not oppose that motion.

23 THE COURT:

24 All right. Very well. That one is
25 granted.

26 Now that takes us to No Right of
27 Action and No Cause of Action. What do you
28 say to that? You're talking about just Ms.
29 Andry?

30 MR. ANSELMO:

31 It was just Ms. Andry, Your Honor,
32 because I needed to introduce additional

1 evidence and I. --

2 THE COURT:

3 All right. We are taking the matter
4 in chief. Unless we have any other
5 motions, I am not aware of that.

6 MR. SMITH:

7 That would be my motion, I believe,
8 Judge, for a preliminary injunction.

9 THE COURT:

10 Yes, sir.

11 MR. SMITH:

12 It's interesting because the last time
13 we were here was April. And I looked at
14 the transcript of that hearing the other
15 day, and we are still waiting, I guess, as
16 you know, on a judgment from Your Honor. I
17 wasn't -- I started to think maybe Mr.
18 Anzelmo and I were supposed to prepare the
19 judgment.

20 THE COURT:

21 He prepared a judgment. He was ready
22 to dismiss it with prejudice.

23 MR. SMITH:

24 Right, but you told us --

25 THE COURT:

26 They remanded it to me. And you know,
27 I just like to hear from both sides before
28 I take some action, that is just me, but
29 anyway, go ahead, counsel.

30 MR. SMITH:

31 Right, but re-reading that transcript
32 and what we had discussed in length at that

1 hearing was that the Fourth Circuit
2 reversed and remanded, didn't reverse and
3 render. All of us made comments about
4 that. In fact, Mr. Anzelmo said I wish they
5 just reversed and rendered, and you said
6 you have to read something into the fact
7 that they reversed and remanded. And you
8 weren't really sure why. It was all pretty
9 fresh at the time. You ultimately said
10 that what you were going to do is issue a
11 judgment that granted that Summary Judgment
12 but allowed our amendment to proceed. And
13 it's all in the transcript.

14 THE COURT:

15 Yes. I have a copy.

16 MR. SMITH:

17 The reason I bring that up is because
18 I think in looking at that judgment more
19 one of the reasons why they didn't render
20 was that they never defined the extent of
21 the servitude that they are saying the St.
22 Julien Doctrine granted. If you look at
23 their opinion they disagree with our
24 position and your ruling on the navigable
25 waterway issue. And they find that St.
26 Julien applies in this case. But they
27 never -- they never define what that
28 servitude is, when it was created, what
29 year, where the levee was at that time,
30 that either the geographical or usage
31 nature of that servitude, just the concept
32 that there could be a servitude from the

1 levee being in place years ago under St.
2 Julien.

3 And that's important here because the
4 first injunction that we sought and the
5 first case that we brought had to do with
6 the clearing of the trees and mowing of the
7 grass and things that Mr. Anzelmo and his
8 clients repeatedly referred to as regular
9 maintenance. And I mean I can quote over
10 and over again, necessary inspection,
11 maintenance, limited entry and use for
12 removal, this case does not involve
13 construction of a new levee or enlargement
14 of existing, where the servitude is used
15 merely for clearing of maintenance, does
16 not involve construction or enlargement,
17 perform regular maintenance, acquire
18 servitude for maintenance, not permanent,
19 ongoing or substantial occupational land,
20 etcetera, etcetera. There is 13 references
21 in their briefs, according to Ms.
22 Desormeax, of maintenance, minor,
23 inspection, and that that was their basis
24 why we had no rights.

25 In this case we are talking about
26 clear enlargement. We are talking about
27 going down eighty feet. We are talking
28 about document published by the Corps of
29 engineers that says they're going to build
30 new structures, engage in deep soil mixing,
31 inserting a giant mixer up to 80 feet deep
32 in to the ground, churning up the soil,

1 inserting a Portland cement mixture into
2 the churned up soil to create a subsurface
3 wall, adding a new embankment wall.

4 This is way beyond inspection and
5 maintenance. This is enlargement. This is
6 increasing what they're doing. And it's
7 clearly impacting our land. It's going to
8 go 80 feet down. With all of this it's
9 going to seriously impact the landowners
10 whose property is right there. So their
11 distinctions in the past don't apply.

12 And 38:225, which is the statute they
13 relied on for the right of the levee to
14 remove trees and so forth doesn't apply.
15 There is nothing in 38:225 about enlarging
16 the levees and so forth. You're talking
17 about 150 days of continuous work that is
18 intended to create a new levee system
19 there.

20 So this, our position, is a trespass
21 both on the ground and underground, outside
22 any alleged servitude. And part of the
23 problem is that they need to prove what
24 that extent of that servitude is, which
25 they never did, the Fourth Circuit never
26 reached. And they haven't proved to you.
27 They just tossed it out, the concept of
28 some kind of a servitude for St. Julien, as
29 if that gives them the right to then do
30 whatever they want. And that's not the
31 law.

32 One of the cases we cited to Your

1 Honor was a Fourth Circuit case from 1981,
2 Robe Co. versus Consolidated Sewerage
3 District of the City of Kenner, 400 So. 2d
4 3:13. And that's where the injunction that
5 was granted and affirmed involved the city
6 using sewer lines that were going to impact
7 into plaintiff's property. And the writ
8 was denied by the Supreme Court.

9 So -- and that's a Trespass case. And
10 that's what going on here.

11 So our position is if they want to do
12 this work, if they believe it's in the
13 interest of the public, fine, institute a
14 taking, do what everybody else does, file a
15 Petition for Expropriation with an
16 appraiser that certifies this is the amount
17 of money, put that money in the Registry of
18 the Court. There is nothing we can do. I
19 am never going to come in here and say that
20 improving the levees is not a public
21 purpose. I am not going to challenge the
22 taken. My clients aren't going to challenge
23 the taking. We're going to say thank you,
24 there's nothing we can do about that. If
25 we think your compensation is fair, that's
26 the end of it. If we don't, if we have an
27 appraiser and it turns out the damage is
28 more we are going to ask for more money.
29 That's the remedy instead of all this
30 shenanigans to try to avoid paying. It
31 just -- every other state and federal
32 agency pays the money with they take or

1 impact private property.

2 38:113, as they point out, says "Where
3 the servitude is used merely for cleaning
4 and maintenance, no compensation is owed.
5 That seem to be their argument last time.
6 And you know, we think cutting trees down
7 on our property is a little more than
8 cleaning and maintenance. That was that
9 case. This is a different case.

10 This is enlargement. This is very
11 impactfull, and they should have to pay if
12 they're going to do it, hence we ask that
13 you issue a preliminary injunction
14 enjoining them from doing this unless
15 they're going to comply with the
16 expropriation laws of the state.

17 THE COURT:

18 All right. Mr. Anzelmo.

19 MR. ANZELMO:

20 We are here to argue a case where
21 they're seeking a preliminary injunction.
22 Counsel has placed at issue the original
23 matter that was before Your Honor, which we
24 believe and we agree would have been
25 dispositive of this case because it would
26 never be here.

27 The determination that we believe was
28 made by the Fourth Circuit Court of Appeal
29 was clear. What's I said will be in that
30 transcript. And we can certainly re-argue
31 this today --

32 THE COURT:

1 No, we are not going to do that. And
2 I -- candidly, that decision was a bit
3 perplexing, you know. You got to be
4 careful how you talk about your boss,
5 because you don't want to reign down too
6 much grief, but --

7 Anyway, go ahead, finish your
8 argument. Let me stop. I'm just musing
9 here. Don't mind me.

10 MR. ANZELMO:

11 Your Honor, when I read what the boss
12 said, that -- I've been guided by that many
13 times in the past and have used it as a
14 basis for president.

15 THE COURT:

16 I was about to do an old style end
17 trail reading, but I said I don't want to
18 cause some poor animal to lose his life, so
19 that might try to look for a reason from
20 end trail from that decision, because I
21 still don't understand quite what they did.

22 Go ahead, Mr. Anzelmo, like I said,
23 I'm just musing here.

24 MR. ANZELMO:

25 But because I have the decision of the
26 Court of Appeal, and I feel that I am
27 guided by it, because it provided what we
28 believe is an absolute clear direction as
29 to what the law was relative to the St.
30 Julien doctrine. And while there may be a
31 concern on Your Honor's part as to what you
32 were actually directed to do by the final

1 statement. What they clearly said was that
2 we possess a St. Julien servitude over the
3 levee. And the relationship in this case
4 is that the right of entry that we granted
5 the United States Army Corp of Engineers
6 was from toe to toe to the levee. Where
7 there is a judicially confirmed legal
8 servitude over the area where we are
9 letting the Corp do the work.

10 That work that is going to be done is
11 for levee purposes. The purpose as set out
12 in their Exhibit Number 1, and we furnished
13 Your Honor a color copy, two-sided, and it
14 sets out at 1.1, the purpose of the
15 proposed action is to strengthen
16 approximately seven miles of flood walls
17 that have been examined for stability,
18 seepage, settlement and deflection along
19 the 17th Street and London and Orleans.
20 The proposed action results from a need to
21 reduce flood risk and water damage to
22 residences, businesses and other
23 infrastructure within the project area.
24 This is a final critical project. It
25 involves levee stability. We are doing
26 exactly what we are supposed to be doing.
27 And that is providing for the maintenance
28 and stability of levees within our system.
29 We know the catastrophic effects that can
30 result from a failure of a levee,
31 particularly this levee. The work that is
32 going to be accomplished by the Corp is

1 certainly within the judicially confirmed
2 servitude area under St. Julien. It is for
3 levee purposes. What we have done can
4 never constitute a trespass because we are
5 allowing work within our right of way.
6 Without a trespass they lose the
7 fundamental claim that they have as the
8 basis for injunctive relief. They have not
9 pled irreparable injury. What they are
10 claiming is that they don't need to prove
11 irreparable injury because they said a
12 violation of a law has occurred. And they
13 claim the trespass.

14 They cite Your Honor to Code of Civil
15 Procedure Article 3663. But when Your
16 Honor examines that article and viewed in
17 light of what the law says relative to St.
18 Julien servitude, what the Fourth Circuit
19 has said, that there is the servitude here,
20 that there can be no trespass about letting
21 someone use our own land for these
22 purposes, because it is levee purposes.

23 Now when we consider what's the nature
24 of injunctive relief. First of all it's to
25 preserve the status quo to let there be a
26 trial on the merits. Insofar as the
27 critical nature of what this work is when
28 Your Honor previously denied the Temporary
29 Restraining Order in the original case you
30 stated "In Southeast Louisiana there is no
31 more paramount purpose than flood
32 protection, a lesson painfully inculcated

1 and never to be forgotten."

2 Then you cited Judge Tate, "Further,
3 however unfair the exercise of the levee
4 servitude may seem to the owners of this
5 type of land they are without right to
6 complain, because their acquisition of such
7 land was subject to this agent servitude
8 and the private mischief may be endured
9 rather than the public inconvenience or
10 calamity." Dixon versus Board of Levee
11 Commissioners, 265 So.2d 479.

12 So what we are faced with here, Your
13 Honor, is they can never prevail on the
14 merits of this case because there can be no
15 trespass of the use of our land from toe to
16 toe. The purpose is that additionally,
17 because we only granted a right of entry,
18 that has been done. The status quo, if you
19 would grant an injunction, the status quo
20 is we have granted a right of entry. The
21 Corp, if there is something to be enjoined,
22 if the work is to be enjoined, who would be
23 enjoined, it's not us, because there is no
24 countervailing affidavit or information
25 that would suggest to you, other than
26 what's here, that we are not doing the
27 work. The OLD is not doing it. The SLFPAE
28 is not doing it. The injunction, not only
29 is it legally insufficient, based on what
30 the law is and what the facts are, but
31 there is nothing to enjoin on behalf of the
32 Orleans Levee District or the SLFPAE.

1 Your Honor, the examination of what is
2 here leads us to, I believe, these ultimate
3 conclusions. They haven't proved
4 irreparable injury. They haven't proved
5 any immediate injury. They haven't proved
6 a trespass under what is here. They don't
7 fall into the provisions of 36 -- of 63.
8 There is clear -- a clear decision of the
9 Fourth Circuit on the point about is there
10 a levee servitude here, yes, it is. Is it
11 under St. Julien, yes, it is.

12 This is not a case involving
13 compensation or a right to compensation.
14 It's a question about the right of
15 permissible use. There can't be any
16 brighter or any clearer a line that in so
17 far as us granting a right of use, a right
18 of entry from levee toe to levee toe, as is
19 in our affidavits is legitimate, lawful use
20 to protect against the calamity that Your
21 Honor has already noted.

22 The granting of an injunction, a
23 preliminary injunction, has to envision
24 that there is some ultimate relief down the
25 line. We suggest there is none.

26 And further, Your Honor, and I am
27 concluding now, that is if Your Honor
28 grants a judgment in the earlier case and
29 it says what we believe the Fourth Circuit
30 directed you to do, and if it says that our
31 Motion for Summary Judgment is granted,
32 their case is over and we are never here,

1 because the decision would have been met
2 that we were correct in all of the things
3 that we alleged. That's what we believe
4 the Fourth Circuit suggested.

5 And as Your Honor knows we have a
6 statute conference in that other case, I
7 think immediately following here, and we
8 can discuss it some more.

9 THE COURT:

10 I'm going to deal with all of this.
11 I've got a good idea what I'm going to do.
12 Go ahead, finish your argument.

13 MR. ANZELMO:

14 Your Honor, I was going to say that
15 concludes my argument, unless you have any
16 other questions for me.

17 THE COURT:

18 I'm good.

19 MR. ANZELMO:

20 Thank you, Your Honor.

21 THE COURT:

22 Mr. Smith, I got this.

23 This is what we are going to do, on
24 the issue of the Preliminary Injunction,
25 that is certainly denied. And for the
26 record, the decision of the Fourth Circuit
27 acknowledging the servitude has to be
28 adhered to as promulgation of the Court
29 upon which I -- which has supervisory
30 jurisdiction over me. And I have to
31 certainly abide by that.

32 But what I think I'm going to do is,

1 Mr. Anzelmo, I'm going to vacate my
2 previous ruling. I'm going to grant your
3 Exception of Failure to Join an
4 Indispensable Party, the U.S. Army Corp of
5 Engineers. And Mr. Smith, I'm going to
6 allow you to amend your petition to request
7 damages against the U.S. Army Corp of
8 Engineers for an unpermitted taking of
9 property from these property owners without
10 due process of law and just compensation.

11 Now I know once they enter the case
12 they're probably going to try to take it
13 down Poydras Street, to Poydras and Camp.
14 I have no control over that because I have
15 no jurisdiction over a federal agency, not
16 in a state court.

17 But I think that that is the only
18 hopeful opportunity for these property
19 owners to receive relief for what's
20 transpired.

21 I hold to my belief that a new
22 servitude was created in 2006. They were
23 not compensated for that servitude, that
24 constitutes an unpermitted taking without
25 just compensation. And as a consequence I
26 think that if that is born out at trial
27 with sufficient evidence presented then
28 damages may be owed. That remains to be
29 seen. And it remains to be seen whether
30 that will be tried in this court or in
31 another court. But I think that is the
32 issue that's present.

1 So as a consequence I grant the -- I
2 mean I deny the injunction. The OLD's
3 servitude is acknowledged per the Fourth
4 Circuit's ruling. But since they reversed
5 and remanded it back to me, since I'm
6 allowing the U.S. Army Corp of Engineers to
7 be brought into this action, then you may
8 amend, seek damages against the Corp. And
9 my understanding of the law is if the Corp
10 undertakes action, and if they take
11 property they have to compensate the
12 property owners. And I think that's what
13 the Corp is doing here, utilizing the Levee
14 District and the Southeast Louisiana Flood
15 Protection Authority to accomplish that
16 without providing compensation.

17 And like I said, if that is born out
18 then there should be a different result.
19 So --

20 And one final thing I'll say to these
21 property owners, you know, one of my
22 favorite subjects was Civics, and I learned
23 a long time ago there are three branches of
24 government, executive, legislative and
25 judicial, and I only represent one aspect,
26 on the federal side you have a couple of
27 branches of government that you may
28 petition, and I strongly urge you to do
29 that as citizens, to make your voices heard
30 loud and long about this situation. We
31 have a duty to take care of ourselves in
32 this part of the world and we love living

1 here, but we also have a duty to stand up
2 as citizens. So I urge you to do that.

3 That's the ruling of the Court. Mr.
4 Smith, if you'd draft the judgment and
5 circulate it to Mr. Anzelmo.

6 Mr. Anzelmo, you won the junction so
7 you get to do the honors and send it to Mr.
8 Smith.

9 MR. ANZELMO:

10 Yes, sir.

11 THE COURT:

12 Good luck to you.


13 (End of proceedings.)

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C E R T I F I C A T E

I, Denise K. Etheridge, Certified Court Reporter, in and for the State of Louisiana, do hereby certify that the preceding pages were taken down by me, on a shorthand machine, transcribed by me to the best of my ability and understanding.


Denise K. Etheridge, CCR

