To be argued by:
ROBERT A. FICALORA
Time requested: 10 minutes

New York State Supreme Court

Appellate Division - Second Judicial Department

Robert A. Ficalora, both *pro se* and as acting president of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Petitioner-Appellants

- against -

The Planning Board and Building Department

of

the town board government of the Town of East Hampton, 159 Pantigo Road, East Hampton, 11937

Respondents-Respondents

Docket No.

98-07988

Appellant's Reply Brief

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Suffolk County Clerk's Index No. 97-23205

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Preliminary Statement

Sanctions were assessed by the court below for litigation allegedly "completely without merit in law or fact" and "continuing when its lack of a legal or factual basis was apparent" (22N.Y.C.R.R. § 130.1.1). Appellant asserts that this proceeding and its companion action are completely meritorious and that at no time was a lack of legal or factual basis apparent.

This appeal is made on the ground that Justice Underwood's granting of the extraordinary remedy of dismissal without trial and punishment by sanctions can only be explained by an extreme bias and prejudice against him both individually and as founding president of a not-for-profit corporation. Appellant asserts violation of his personal and corporate rights to a fair trial and to equal protection under the law.

Respondents' brief makes material factual statements which are false, presents disparaging arguments which were not found by the court below, and fails to answer even one of the arguments made by Appellant in his opening brief.

Appellant believes that the material factual statements which are false made by Respondents in their brief are so frivolous as to warrant the application of sanctions upon them by this court (22N.Y.C.R.R. § 130.1.1(c)3).

The special proceeding which underlies this appeal was commenced upon an order to show cause seeking an affirmative injunction against illegal permits issued by the Planning Board and Building department of the Town of East Hampton. The supporting affidavit detailed only a few of the laws which had been violated and made known that a motion for consolidation within a companion action commenced for declaratory and injunctive relief had been made. No answer has been made nor

judgment entered upon the specific alleged violations of state and local laws and enabling acts as required by the order to show cause.

Appellant has approached this court honorably and in good faith for the purpose of upholding state and local public interest laws and has presented detailed unrefuted showings on the facts and the law. All motions, affidavits, and other necessary papers are properly before this court for the purposes of determining the issues presented. To the extent that there is some irregularity, it should not be so construed as to be of enough significance to dismiss this appeal. The underlying special proceeding has merit, is not frivolous, and case law upon the use of sanctions is wholly inapplicable.

Justice Underwood's granting of the extraordinary remedy of dismissal without trial and punishment of appellant by sanctions, therefore, can only be understood by other motives. A review of the pleadings and motions granted by the court below reveals that Respondents sought to engender prejudice against appellant in both his personal and corporate capacities and also to obtain an order which would deny appellant free access to the courts. The judgments and orders entered by Justice Underwood clearly demonstrate that they were successful in their pleadings.

The issue at bar is whether Justice Underwood's bias and prejudice against appellant both individually and as acting president of Montauk Friends of Olmsted Parks corporation has violated MFOP's constitutional right to equal protection under the law (New York State Constitution, Article 1 §11); and, to the extent that Appellant has individually shown a legally cognizable interest in a neighboring resort zoned property, whether his Constitutional right to a fair trial has been violated (U.S. Constitution, 5th Amendment, due process clause).

Rebuttal of facts

Respondents make a series of legal and material assertions of fact in their brief beginning at page 5 which will be rebutted *seriatim.*

I.

> "Since Mr. Ficalora is not an attorney, his representation of [MFOP] is unlawful under the Judiciary Law § 478."

Appellant has received repeated assignments from the MFOP board of directors to represent the corporation and has at times sought counsel in Mr. Joel Kupferman, Esq. This court has reversed in the matter of Herman Kamp as assignee of AAA Stretch, inc. v. In Sportswear, inc., 1972, 39 A.D. 2d 89 upon the dissenting opinion of Mr. Justice Luciano that when a corporation "assigns its cause to a natural person, for whatever reason, the statute [CPLR 321] authorizes the latter to prosecute the action in person." Kamp, 70 Misc. 2d 899.

II.

> "Demolition of the motel and construction of single family residence required the issuance of a special permit by the Planning Board and Building Department [sic] of the Town under the Town's Code, Chapter 153, Article V."

The work described by Respondent is legally a "conversion" (EH §153-1-14, 507) & EH § 153-5-50, 523). The special permit discovered to have been issued was for "creation". This proceeding was commenced by order to show cause to annul that special permit. The prohibition upon the creation of a dwelling unit on an over density lot required a use variance from the zoning ordinance (EH § 153-1-70, 515, 512, 523 Conversion(4), Town Law § 267 1(b)).

III.

> "When the documentary evidence that incontrovertibly established the issuance of the permit was exhibited to Ficalora, rather than discontinuing the action, he instituted a new proceeding based upon the alternative theory that the "town board government" had no right to regulate the use of land in Montauk at all, since MFOP, a not-for-profit corporation which he seems to have founded in 1994 and now controls (256-261), possessed the sole right to legislate with respect to certain lands in Montauk by virtue of certain colonial grants (311). Ficalora's proceedings were founded on unrecognized legal principles, having to do with MFOP's declaration (311) that it, and not the Town, had "municipal jurisdiction" over the property at issue in this case (record in 97-10463 at 179-80)" [emph. added]

The underlined segments of the above quoted section of Respondents ' "Statement of Facts" assert material factual statements which are false, frivolous conduct and a sanctionable offense under 22NYCRR § 130.1.1(c)3.

Upon discovery of the "special permit" an order to show cause was obtained by appellant from Justice Alan D. Oshrin, J.S.C., seeking to annul it for violating local laws and exceeding the jurisdiction of the Planning board. A temporary restraining order was sought to stop all construction (8/7/97, 266, 269-75). The special proceeding *sub judice* was not commenced for over a month and was also to annul the special permit and building permit (9/12/97, 11, 12-21). *No proceeding was ever commenced asserting either total jurisdiction by MFOP over Montauk or over the Guarneri property.* Furthermore, the issue of jurisdiction was not raised as a part of either the proceeding *sub judice* or its companion action.

Appellant submits that the above material statements of fact by Respondents which are false are frivolous conduct as defined by the Chief Administrator of the Courts and that the application of sanctions should be considered by this court.

IV.

"29 separate sets of legal papers"

The court below did not assess sanctions on the ground of a frivolous number of papers but for allegedly continuing litigation when "lack of merit" was apparent. This court has the full record of the papers filed before it. The urgency and volume of paperwork was derived from Justice Underwood's refusal to consider a temporary restraining order upon construction. Justice Lester E. Gerard, J.S.C., had granted a restraining order (252), and Justice Alan D. Oshrin, J.S.C., had ordered that Appellant could submit such an order to Justice Underwood (266). The order was prepared for Justice Underwood but was refused unheard and unseen by him by his law clerk (77).

V.

January 6th, 1999, "Notice of Demand for Judgment"

The motion made for Judicial self-examination and judgment on the ground of alleged bias and prejudice was made before the order of sanctions *sub judice* was issued. The significance of such a demand to this court is two fold:

1.) if Justice Underwood examines his conscience and disqualifies himself, all of his judgments and orders herein are automatically vacated changing the groundwork for the pending judgments of this court.

2.) If Justice Underwood refuses to issue judgment upon the motion, an Article 78 proceeding in the nature of mandamus to compel judgment could theoretically be brought to this court within four months of such a refusal.

It is asserted in the demand that proper protocol is to render judgment forthwith. Justice Underwood, however, remains silent and continues to accept related cases...

Point I

Justice Jones' order to show cause and the complaint and pleadings in the companion action for declaratory and injunctive relief were ignored by the court below.

In assessing sanctions against appellant, court below found that in the initial complaint in the companion action for declaratory and injunctive relief,

> "the documentary evidence in this action overwhelming [sic] demonstrated that it was initially predicated on a factual error, namely the respondents' failure to obtain a necessary permit." (R4)

This assertion is continued in Respondents' preliminary statement as Appellant's "principle claim" (Brief 1). The sentence considered fatally defective below is found at p. 176 ¶17 of the main volume of the companion cases. This finding by the court below is in error and is barely specious.

The final sentence of the paragraph (176, ¶17) complains of the lack of a use variance citing Town Law Article 16 §267 which deals with the Zoning Board of Appeals and use variances, not Planning Board special permits. Appellant also complained of the issuance of a building permit without the a use variance (174, ¶9). Furthermore, he pleaded for the court to enjoin and restrain defendants from constructing any structures in violation of the zoning ordinance (177-178). These complaints and pleadings were ignored by the court below.

This special proceeding was brought upon an order to show cause why permits should not be annulled for specific violations of state and local laws and enabling acts (11). This proceeding was not initiatially predicated on a belief that "a necessary permit" had not been obtained. The order to show cause was also ignored.

Point II

Justice Bracken was uninformed about method of compiling the record. No significant legal defect or deficiency exists.

The order to show cause entered by Justice Lawrence J. Bracken, J.A.D., to show why this appeal should not be dismissed for failure to properly perfect this appeal by the filing of a Record on Appeal that complies with CPLR 5526 and 22 N.Y.C.R.R. § 670.10 was made upon incomplete information.

Justice Bracken could not have been aware of Appellant's discussions with the Clerk's office in Brooklyn about the form of the Record. We discussed whether it was necessary to submit redundant documents to the court, and a clerk said that he was entering a note in the system on our discussion.

Justice Bracken was probably not aware of the statement in the CPLR 5531 on page 2 of the record submitted which states:

> This Appeal is made on this record of the proceedings subsequent to the much delayed June 17th, 1998, hearing upon sanctions, the full record submitted in Appellate file number 97-10457, and the record of companion action by plaintiff/petitioner against Joseph & Joanne Guarneri and the Town of East Hampton (Suffolk index 97-17016, A.D. 97-10463.

Appellant has discovered no violations of CPLR 5526 and only very minor violations of 22 N.Y.C.R.R. § 670.10 (ex: Table of contents before 5531 statement, lack of indexing of statements in transcript). The only papers missing before this court are the billings of Respondents, which Appellant has never seen and are unimportant.

Appellant submits that no legal defect or deficiency exists with the record submitted herein that would warrant dismissal of this appeal.

Point III

This proceeding is in the nature of prohibition and mandamus to compel and is not time barred.

This court should look closely at Town Law § 274 b(9) as it appears overly broad, and contradicts other statutes pertaining to review. Town Law § 274 applies to the powers of a Planning Board, yet this new ordinance appears as a catch-all for review of all municipal approvals and may be dangerous to the public interest in zoning.

A review of the manner in which the permits in this matter were procured or granted, however, has never been at issue. Appellant has shown that the permits were issued without jurisdiction and are illegal on their face. In seeking to have them annulled, Appellant is asking the court to issue a writ in the nature of prohibition to estop any further force or effect of the illegal permits and a writ of mandamus to compel Respondents to uphold the law.

It is possible that no statute of limitations exists upon matters brought in the nature of prohibition. See 3 N.Y. Jud. Council Rep 186 (1937). This would be perfectly consistent with the general rule that if jurisdiction is lacking, as is alleged herein with Planning Board, it may be raised at any time. (See commentary upon CPLR § 217 by Judge Joseph M. McLaughlin in Westlaw).

The statute of limitations upon an proceeding brought for a writ of mandamus to compel generally lies within four months after the demand to enforce the law is made (CPLR § 217).

Neither form of proceeding is for review of a decision made. This special proceeding was brought within four months of the issuance of both the special permit and building permit at issue herein.

Point IV

Exceptional case: bias by Justice Underwood has denied equal protection under the law to the Montauk Friends of Olmsted Parks corporation as claimant trustee for Montauk's proprietors.

In matters where allegations of bias and prejudice are subjective, one can only rely on judicial conscience (People v. Bonnerwith, 330 N.Y. S. 2d 254, cites omitted). Even if there is an affirmative showing of bias, as in the case *sub judice*, the courts are not constrained to disqualify a judge except in exceptional cases (Bonnerwith, op. Cit. 254, Fitzgerald v. Wells, 14 Misc. 2d 435, 179 N.Y.S.2d 29 (Sup.Ct 1958), People v. Kohl, 17 Misc.2d 320, 192 N.Y.S2d 83). Appellant is, therefore, constrained to demonstrate that this is, indeed, an exceptional case.

The bias found in this matter cannot be explained by the actions of Appellant either procedurally or upon any reasonable assessment of the merits of his arguments. The substance of the argument of the motion to dismiss granted by Justice Underwood (306-309) focused him upon the MFOP corporation's claims of equitable rights in and to the Benson Reservation properties and to the corporate rights and powers established at Chapter 139 of the Laws of 1852. The shrewish and incendiary statements contained in the motion, echoed in the similarly frivolous false assertions of fact made in Respondents' brief, are not relevant to the illegality of the permits under review by this court. It is a sanctionable offense to bring frivolous motions for sanctions under the rules of the Chief Administrator of the Court (22NYCRR. § 130.1.1(c)3).

The issue of Montauk Proprietor rights in and to the Benson Reservation properties has been before Justice Underwood since 1985 in the matter of the Breakers

Motel, et. al. v. Sunbeach Montauk II et ano. It was decided upon Summary Judgment in 1994 due to papers commenced by Appellant on behalf of the Breakers Motel. The issue of proprietors' rights were known by his court from inception when Sunbeach brought a motion to dismiss for failure to join indispensible parties. The indispensible parties therein, all Montauk proprietors, were never joined.

This court recognized the covenanted rights of the proprietors when it modified Justice Underwood's 1994 ruling to reflect the proprietary nature of the Benson covenants (22 AD2d 473, 63 N.Y.S. 2d 135). During that appeal Appellant had entered a motion for leave to submit a brief as *amicus curiae* to make these rights known. Although the motion was denied, it was read and the purpose of the motion was accomplished.

The claims by MFOP corp. are made as corporate trustee of the singular class of interested parties recognized by this court with that modification and by the incorporation by N.Y. State Assembly at Chapter 139 of the laws of 1852. The unjust treatment accorded to appellant by Justice William L. Underwood, Jr., J.S.C., clearly evidences an extreme bias against the rights claimed on behalf of that class: Montauk's proprietors.

The MFOP currently has about 100 voting members of which 51 proprietors have signed affirmations supporting MFOP efforts to recover their historic properties. A solid core of proprietors have been members of the corporation for many years.

Such biased and unjust treatment of a class of citizens by a New York Supreme Court Judge clearly violates their personal and corporate rights to equal protection under the law as established under the Constitution of the State of New York at Article 1 § 11.

Conclusion

Court below granted a frivolous motion for sanctions. Bias and prejudice against claimant corporate trustee of Montauk's proprietors has denied its Constitutional right to equal protection under the law.

Appellant has come honorably before this court to uphold state and local public interest laws. The issues of escheats and sovereign jurisdiction in Montauk were not considered as a part of the action herein.

Appellant believes that he has come before this court by the good and just hand of God. He seeks to fulfill his duty to the proud Puritan men who came before, to the good people of Montauk who are with him today, to the people of the State of New York who know and love Montauk and want to see it protected, and to our posterity who seem mostly forgotten.

He has brought before this court significant issues of law for its determination. At no time has he been frivolous in his submissions to the court. Inciteful and frivolous motions by respondents have, however, been granted by the court below which has denied his rights to equal protection under the law and to due process of law. The severity of the judicial malfeasance below has effectively denied him access to the courts.

Appellant has two actions pending before the lower court which are dangerously stalled before Justices in which appellant has no confidence. Appellant submits that if this court is to uphold or to fail to reverse the judgment and order appealed from herein, that it do so quickly so that he might discontinue those actions. Otherwise, he asks for a writ of approval so that he may bring those actions properly before you.