

ORIGINAL

To Be Argued By:
Richard C. Cahn
Time Requested: 5 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT



TOWN OF MONTAUK, INC.,

Petitioner-Appellant,

against

Case No.
2005-10912

HON. GEORGE E. PATAKI, ESQ., Governor of The State of New York, and The People of the State of New York Met in Assembly, and The TOWN BOARD GOV'T OF THE TOWN OF EAST HAMPTON, and The TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF EASTHAMPTON, and THE SUFFOLK COUNTY WATER AUTHORITY, INC., and THE COUNTY OF SUFFOLK, and THE BROOKLYN HISTORICAL SOCIETY, INC., and 511 EQUITIES, INC., and THE NATURE CONSERVANCY, INC.,

Respondents-Respondents.

BRIEF FOR RESPONDENT 511 EQUITIES, INC.

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Suffolk County Clerk's Index No. 04-27553

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APPELLATE DIVISION
SECOND DEPARTMENT

TABLE OF CONTENTS

Preliminary Statement.....	1
Statement of Facts.....	2
Point I	
This Court Should Affirm The Judgment Below On A Variety Of Grounds, Including The Ground That There Is No Claim Stated Against 511 Equities, Inc.....	6
Point II	
The Proceeding Against 511 Equities, Inc. Was Frivolous and Must Be Sanctioned.....	9
Conclusion.....	11

¹ The undersigned firm has also appeared for the Respondent Town of East Hampton, whose Town Board has expressly consented to our additionally representing Respondent 511 Equities, Inc.

Statement of Facts

As noted in the Statement of Facts of the Brief of Respondent Town of East Hampton (sued herein as “Town Board Gov’t of the Town of East Hampton”) (“East Hampton”), the Appellant purports to be “Town of Montauk, Inc.” However, as pointed out in East Hampton’s Brief and Addendum,² no such corporation appears of record in the Office of the New York Department of State. Robert A. Ficalora (“Ficalora”), the individual driving this litigation, is a domiciliary of Washington State (A249),³ who, during summers, is apparently a part-time resident of the Town of East Hampton (A52).

In 1994, Ficalora filed a Certificate of Incorporation for “Montauk/Friends of Olmstead Parks” (“MFOP”) (A388), in which the corporate purpose was stated to include, *inter alia*, the protection and conservation of Montauk lands “on filed Olmstead subdivision maps of ‘Wonpenanit’ and ‘Hither Hills’ and conveyed through covenanted agreements through the estate of Arthur W. Benson” (A388). Significantly, MFOP’s certificate of incorporation, executed by Ficalora (A390), states that “[t]he territory in which the activities of the corporation are principally to be conducted is *the unincorporated Village of Montauk, Township of East Hampton....*” (A389) (emphasis added).

² And in a motion separately filed on July 21, 2006 by East Hampton.

³ All page numbers beginning with “A” refer to pages in the Appellant’s Appendix.

In 1996, Ficalora, purportedly acting on behalf of MFOP, created a so-called “Declaration of Rights and Trusteeship” (A55). This document purported to assume the powers of and “reincorporate” the Proprietors of Montauk, as “established ... under Chapter 139 of the Laws of 1852.” *Id.* Several years later, in 2000, Ficalora, his wife and six other individuals executed a document entitled, “The Articulated Rights and Constitution of the Township of Montauk,” which purported to elaborate the “Rights” of the “Township” and provide for officers, including a Supervisor, Constables, and Town Assessors (A145-150). These are the only documents which could arguably be relied upon to confer standing upon the Appellant.

Although the Amended Petition (A-19 to A-29), contains a number of subheadings setting forth “causes of action” against Governor Pataki (A-24); the New York State Assembly (A-25); the Town of East Hampton (A-26); the Trustees of the Freeholders and Commonalty of the Town of East Hampton (A-27); the Suffolk County Water Authority (A-28); the Suffolk County Legislature (A-28); the Brooklyn Historical Society (A-29); and the Nature Conservancy, Inc. (A-29), no separate cause of action was stated against the Respondent 511 Equities.

Apart from the failure to formally state a specific claim against 511 Equities, the factual basis for any possible claim against this Respondent is non-existent. Other than in the caption of the proceeding, there are only two places in

which the name of this Respondent appears. At A-23, the Amended Petition seeks to

order [Respondent] 511 Equities to show all contracts entered into, deeds filed, and all claims into or over real property in Montauk since first established as the Montauk Beach Development corporation by Carl G. Fisher.

The Amended Petition claims that Respondent Nature

Conservancy,

oversaw and promoted the sale and development of proprietors' lands at North Neck (Culloden) adverse to notice delivered by the Montauk Trustee Corporation to the fee title holder 511 Equities Corp., the First American and Chicago/Ticor title companies, Suffolk County executive Robert J. Gaffney, Suffolk County legislator George Guldi, and which was publicized in the local press.

A-30.

There was no other mention of 511 Equities in the Appellant's pleading.

Moreover, the documentation accompanying the Amended Petition in no manner provides evidence of any claim against this Respondent. Ficalora's affidavit (A-327, *et seq.*) contains 26 exhibits, none of which refer to or concern 511 Equities. This fragmented and disorderly collection of papers grossly distort the claimed history of Montauk (and other parts of the world), commencing with the "Petition of Right" issued by the English Parliament to King Charles I in 1628

(A-335).⁴ The Ficalora affidavit makes no mention whatsoever of 511 Equities. The cases submitted by Appellant relating to the criminal case against Stuart B. Vorpahl (A-329 to A-362), make no mention of 511 Equities.

511 Equities is a private investment corporation which for some period of time owned land in the Montauk area of East Hampton. Over the years, Respondent sold off its property, such that at the present time, it no longer is conducting any activities in Montauk.

More to the point, the Amended Petition fails to allege any activity at any time on the part of 511 Equities that would be actionable, or that would confer standing upon the invented corporate entity, "Town of Montauk, Inc.," to make claim against it.

Based upon the non-existent allegations concerning 511 Equities contained in the Amended Petition, there is no relationship, legally cognizable or otherwise, between the Appellant and 511 Equities; no claim of any duty owed by this Respondent to the Appellant; and no facts alleged to suggest a breach of that duty. Thus, it is clear beyond question that no basis in law or in fact has been demonstrated for 511 Equities to have been designated a Respondent in this proceeding.

⁴ See, Brief of East Hampton at 18-25.

Because this case is palpably frivolous against all Respondents – including the Respondent 511 Equities – this Respondent joins East Hampton in requesting affirmance of the determination of Supreme Court dismissing the Petition and further seeks injunctive relief parallel to that requested by East Hampton, enjoining the Appellant from instituting any further actions, proceedings or motion filings against 511 Equities, except by prior leave of this Court. This Respondent also seeks imposition of a monetary sanction to compensate it for its legal expenses in defending against this proceeding.

POINT I

**THIS COURT SHOULD AFFIRM THE JUDGMENT BELOW
ON A VARIETY OF GROUNDS, INCLUDING THE GROUND THAT
THERE IS NO CLAIM STATED AGAINST 511 EQUITIES, INC.**

It is well settled that this Court has the power to affirm dismissal of an action or proceeding on different grounds than those relied upon by Supreme Court. *Creмоса Food Company, LLC et al. v. Frank P. Petrone, et al.*, 304 A.D.2d 606, 758 N.Y.S.2d 146 (2d Dept. 2003); *27th Street Associates, LLC v. Richard Lehrer*, 4 A.D.3d 165, 772 N.Y.S.2d 28 (1st Dept. 2004).

The Court below dismissed the Petition, stating,

The amended petition, which is largely incomprehensible, appears to be more in the nature of a plenary action rather than a CPLR Article 78 proceeding. To the extent that the petition seeks any immediate relief under article 78, the petitioner has failed to establish its entitlement to any such relief. Accordingly, the petition is denied.

A-16.

The Court's determination that the Amended Petition "is largely incomprehensible" is patently self-evident. What is also self-evident that as specifically concerns the Respondent-Respondent 511 Equities, the Petition failed to state any claim upon which relief could have been granted. As such, the Petition was required to be dismissed as against this Respondent pursuant to CPLR 7806.

511 Equities is a private entity, not a government agency whose official actions are ordinarily challenged by a special proceeding pursuant to Article 78 of the CPLR.

Although Article 78 proceedings may theoretically be brought against private corporations, there is no allegation in the Amended Complaint against 511 Equities that it "failed to perform a duty enjoined upon it by law"; that it "is proceeding or is about to proceed without or in excess of jurisdiction"; that it made a determination "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion"; or that it made a determination "as a result of a hearing held, and at which evidence was taken, ... [that it was unsupported by substantial evidence]." CPLR § 7803. Accordingly, there neither was nor is any basis for a claim against 511 Equities.

Moreover, although on certain occasions non-governmental actors may be named as respondents in a special proceeding challenging official action,

there is no specification of any official action by any government body at any level of state or local government as to which 511 Equities is alleged to be a party or co-actor, and, hence, arguably joinable as an indispensable or proper party to the proceeding in accordance with the provisions of CPLR §§ 1001 or 1002.

CPLR § 1001 requires the joinder of parties if, absent such joinder, “complete relief” cannot be accorded between the parties to the action, or the failure of joinder might “inequitably” affect parties who had no opportunity to protect their rights. CPLR § 1002 permits joinder as defendants of “persons against whom there is asserted any right to relief, jointly, severally or in the alternative, arising out of the same transaction or occurrence or series of transactions or occurrences..., if any common question of law or fact would arise.”

However, the Amended Petition failed to assert any right to such relief or any facts from which it could be gleaned that 511 Equities improperly derived any rights that arose out of some timely-challenged act on the part of East Hampton or any other governmental agency involved in this case, and that common questions of law or fact are present.

Even conceding Supreme Court’s power to convert a special proceeding into a plenary action, CPLR § 103, for the reasons specified above there are no factual allegations contained in the Amended Petition that state a claim upon which relief could be granted against 511 Equities in such a plenary action.

In short, there neither was nor is any basis stated for a claim, under Article 78 or otherwise, against 511 Equities, and Supreme Court, Suffolk County could properly have dismissed the proceeding against this Respondent on the additional grounds set forth herein.

POINT II

THE PROCEEDING AGAINST 511 EQUITIES, INC. WAS FRIVOLOUS AND MUST BE SANCTIONED

As seen in Point I, *supra*, this proceeding insofar as it has been brought against this Respondent is totally frivolous.⁵ Not only are there no substantive allegations against 511 Equities in the Amended Petition, but the Brief of the Appellant does not make any effort to justify reversal and reinstatement of whatever claims it thinks it made against this Respondent.

Under these circumstances, the bringing of this proceeding, and of this appeal, constitute frivolous conduct under Part 130 of the Rules of the Chief Administrator. For the purposes of Part 130, conduct is frivolous if “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.” 22 N.Y.C.R.R. § 130-

⁵ We share the position of the other Respondents that it was and is a frivolous proceeding against all Respondents.

1.1(c)(1). In determining whether the conduct undertaken was frivolous, the Court must consider, among other issues:

(1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) or whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

22 N.Y.C.R.R. § 130-1.1(c)(3).

Under the above definitions, the proceeding against this Respondent is frivolous and should not have been brought. Accordingly, pursuant to § 130-1.2, this Respondent requests an order awarding costs and imposing sanctions upon the Appellant and its attorney. It is respectfully submitted that a monetary sanction, as provided in Part 130 of the Chief Administrator's Rules, in an amount not to exceed \$10,000⁶ should be imposed upon Appellant and its counsel to redress the frivolous joinder of 511 Equities as a Respondent in this proceeding.

Additionally, as previously noted, 511 Equities respectfully submits a request to the Court that is parallel to the request made by the Respondent Town of East Hampton (*see*, Brief for Respondent Town of East Hampton at Point VII, pp. 38-42). The resources of 511 Equities could have been far better devoted to its business enterprises than to pay for legal fees to defend against a frivolous appeal.

⁶ Respondent has incurred fees and expenses totaling \$3,500 for representation in this matter.

We share completely East Hampton's view that those who abuse the judicial process may properly be restricted in their ability to file new suits. *See*, Brief of Respondent Town of East Hampton at 38-42; *Martin-Trigona v. Capital Cities/ABC, Inc.*, 145 Misc.2d 405, 546 N.Y.S.2d 910, (N.Y.Sup., 1989); *Winters v. Gould*, 143 Misc.2d 44, 539 N.Y.S.2d 686, (N.Y. Sup., 1989); *Wagner v. Goldberg*, 293 A.D.2d 527, 739 N.Y.S.2d 850 (2d Dept. 2002). *See, also, In re Sassower*, 20 F.3d 42 (2d Cir. 1994); and *Azubuko v. Giorlandino*, 213 F.3d 625 (2d Cir. 2000).

Also as pointed out by East Hampton, the Appellant "Town of Montauk, Inc." is not a corporation and the misrepresentation to this Court and to the Court of Appeals that it is, is in of itself an action that should lead to sanctions being imposed. *See, In Re Heller*, 9 A.D.3d 221, 780 N.Y.S.2d 314 (1st Dept. 2004); and *In re Thrasher*, 308 A.D.2d 160, 763 N.Y.S.2d 24 (1st Dept, 2003).

Conclusion

Respondent 511 Equities respectfully submits that the Order and Judgment of Supreme Court, Suffolk County (Loughlin, J.), dated June 20, 2005, be, in all respects affirmed, and that the Court further enter an order enjoining Robert A. Ficalora, Montauk Friends of Olmstead Parks, "Town of Montauk, Inc." or any other entity related to Ficalora, from commencing any further actions,

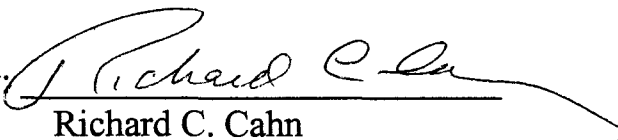
proceedings, or motions against 511 Equities, without prior leave of Court, any application for such leave to include a copy of this Court's order in this case.

This Respondent further seeks monetary sanctions against Appellant and its counsel in an amount not to exceed \$10,000 to deter them from further litigation seeking to challenge the exercise by the Town of East Hampton of its lawful jurisdiction of the territory in Montauk, or the lawful activities of private entities owning property or operating in that area, and for such other, further and different relief as to the Court seems just and proper.

Dated: Melville, New York
August 23, 2006

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.

Paul Budhu, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 8/24/2006 deponent caused to be served 2 copy(s) of the within

Brief for Respondent-Respondent 511 Equities, Inc.

upon the attorneys at the addresses below, and by the following method:

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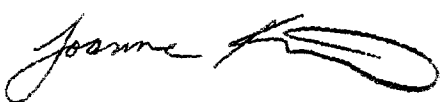
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Sworn to me this
August 24, 2006

JOANNE KIM
Notary Public, State of New York
No. 01K16121208

Case Name: Town of Montauk, Inc. v. Pataki 2

Docket/Case No.: