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RICHARD C. CAHN

DANIEL K. CAHN

HEATHER A. MORANTE\*

\*ALSO ADMITTED IN N.J.

January 8, 2009

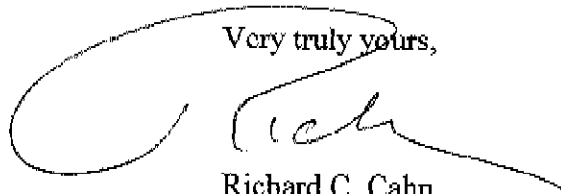
Jason B. Kolodny, Esq.  
21 Hereford Road  
Great Neck, NY 11020

Re: Town of Montauk, Inc. v. Pataki, et al.

Dear Mr. Kolodny:

We serve herewith Affidavit in opposition to Appellant's motion to reargue in the above action.

Very truly yours,



Richard C. Cahn

RCC/gmg  
Enclosure

cc: Hon. Andrew M. Cuomo, Esq.  
Solicitor General's Office  
Christine Malafi, Esq.  
John Courtney, Esq.  
Peter J. Mastaglia, Esq.  
Caitlin Halligan, Esq.  
Jonathan Kaledin, Esq.  
William J. Fleming, Esq.  
John T. McCarron, Esq.  
with enclosure

COURT OF APPEALS  
STATE OF NEW YORK

-----X  
IN THE MATTER OF TOWN OF MONTAUK,

Appellant,

AFFIDAVIT IN  
OPPOSITION  
TO APPELLANT'S  
MOTION TO  
REARGUE

- against -

GEORGE E. PATAKI, *et al.*,

Respondents.  
-----X

STATE OF NEW YORK        )  
                                      : ss.:  
COUNTY OF SUFFOLK        )

RICHARD C. CAHN, being duly sworn, deposes and says:

1. I am a member of the firm of Cahn & Cahn, LLP, attorneys for the Respondent Town Board of the Town of East Hampton ("the Town"), sued herein as "The Town Board gov't of the Town of East Hampton." I make this Affidavit in opposition to Appellant's extremely belated motion seeking reargument of this Court's April 24, 2008 Order, which denied Appellant's earlier motion to vacate the Court's December 18, 2007 Order dismissing the appeal for want of prosecution ("the Dismissal Order"). I have personal knowledge of the prior proceedings had herein.

2. Appellant's earlier motion, which resulted in issuance of the April 24, 2008 Order, was effectively a motion under §Rule 500.16(c) seeking review by

the Court of the Dismissal Order. Its denial has not been shown to be erroneous or unfair. This is now either a second motion under §500.16(c), which is not authorized by the rules, or a motion for reargument of the §500.16(c) motion, for which no grounds have been provided.

3. Civil Practice Law and Rules (“CPLR”) Rule 2221(d)(2) requires that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

The Appellate Division, Second Department has declared:

A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.

*McGill v. Goldman*, 261 A.D.2d 593, 594 691 N.Y.S.2d 75 (2d Dept. 1999).

4. The Appellant’s first motion failed to show grounds for excusing compliance with Rule §500.16(a), and thus was properly denied. The present motion fails to make the showing required under §500.24(c), because it does not state “the points claimed to have been overlooked or misapprehended by the

Court” in denying the first motion. Appellant instead asks the Court to exercise its “discretion” in the application of its rules stating:

...in its filing its motion to vacate appellant pleaded that the personal activities and hardships of the corporation’s executive charged with controlling and directing the litigation, Mr. Robert A. Ficalora, prevented the timely prosecution of the appeal to the satisfaction of this court. The motion to vacate, therefore, did then, as now, appeal to the court’s discretion in applying its rules.

Such a statement ignores the fact that it is the duty of the attorney, not “the executive charged with controlling and directing the litigation” to timely prosecute the appeal. That “executive,” a non-lawyer, has on prior occasions attempted to represent the Corporate Appellant himself, only to see his filings rebuffed under CPLR §321(a). *See, e.g., People v. Vorpahl*, Motion No. 277, decided in this Court on May 6, 2004.

5. The Court’s December 18, 2007 dismissal Order was proper.

§500.16 (a) of this Court’s Rules of Practice provides:

Dismissal of appeal. If appellant has not filed and served the papers required by section 500.11, 500.12 or 500.26(a) of this Part within the time set by the clerk’s office or otherwise prescribed by this Part, the clerk of the Court *shall* enter an order dismissing the appeal.  
(Emphasis added)

In its December 18, 2007 Order, this Court made a finding that “[p]ursuant to section 500.16(a) of this Court’s Rules of Practice, sixty or more days now have

passed from the filing of the notice of appeal and appellant's papers [have not] been filed," and ordered that "the appeal to this Court is dismissed for want of prosecution." This Court correctly stated the facts, and did not misapply the law, which did not require it to overlook the time limits, ignore the mandatory language of §500.16(a), and permit the appeal to proceed.

6. Appellant in the present motion\* acknowledges that in the prior motion it did not argue that it was "not in violation of section 500.16(a)(or 500.12(b) of the court's rule [in perfecting its appeal]." Since Appellant failed to contest this Court's finding in its December 18, 2007 Order that its papers were not filed within the sixty-day period prescribed by §500.16(a) , and provides no valid excuse for the default, there is no basis to vacate it.

7. The appeal was already determined by this Court to be untimely, and a Motion to Reargue is not an appropriate vehicle to provide the unsuccessful Appellant with a second opportunity to reargue previously decided issues.

8. Moreover, there is no merit to the Appeal. The Appellate Division found that the Appellant lacks standing because it is not an established corporation, and in any event failed to show that it is the successor corporation to

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\* We are referring herein to the "Notice of Motion to Reargue" marked "Corrected Copy," and not containing a date under the signature of Jason B. Kolodny, Esq., the paper that we assume is before the Court.

the original incorporated proprietors of Montauk. *See, Matter of Town of Montauk, Inc. v. Pataki*, 40 A.D.3d 772, 773 (2d Dept. 2007).

9. The Appellate Division also held that Appellant's "contention that the Town of East Hampton is not a legitimate governing entirety is without merit," as "Chapter 64 of the Laws of 1788 established the Town of East Hampton, specifically including Montauk. The Town of East Hampton is therefore a legitimate municipal corporation with the authority to govern Montauk." *Id.*, at 773.

10. Perhaps most critically, the Appellant's appeal, taken by service of a Notice of Appeal on October 5, 2007, is untimely, as this office, representing the Town, served Notice of Entry of the Appellate Division's July 13, 2007 Order denying leave to appeal upon Appellant on July 17, 2007, well more than 30 days previously. This Court has limited discretion to protect appellants from their own mistakes. One mistake that cannot be cured is the failure to serve a timely notice of appeal upon the Respondent. CPLR §5520(a) makes timely service of the notice of appeal a prerequisite to the granting of time extensions. Thus, "it has been practice" of this Court "to grant an extension of time, for filing of the notice of appeal...so long as he had made timely service of that notice on the adverse party." Karger, *Powers of the New York Court of Appeals* (Rev. Third Ed.) §12:2 at pp. 431-432. Appellant neither filed nor served the notice of appeal in this case

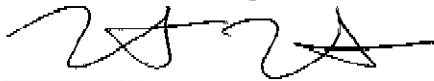
timely, and the Court, with respect, lacks the discretion to grant the relief now sought.

11. For all of these reasons, Appellant's present motion to reargue the Court's denial of its prior motion to vacate the Court's December 18, 2007 Order, of Dismissal, should be denied.



RICHARD C. CAHN

Sworn to before me this  
8<sup>th</sup> day of January, 2009.



Notary Public

HEATHER MORANTE  
Notary Public, State of New York  
No. 02MO6170247  
Qualified in Suffolk County  
Commission Expires July 2, 2011

HEATHER MORANTE  
Notary Public, State of New York  
No. 02MO6170247  
Qualified in Suffolk County  
Commission Expires July 2, 2011

COURT OF APPEALS  
STATE OF NEW YORK

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IN THE MATTER OF TOWN OF MONTAUK, INC.,

Appellant,

AFFIDAVIT OF  
SERVICE

- against -

GEORGE E. PATAKI, et al.,

Respondents.  
-----X

STATE OF NEW YORK     )  
                                  : ss.:  
COUNTY OF SUFFOLK     )

Gina M. Gianninoto, being duly sworn deposes and says, I am not a party to this action, am over 18 years of age and reside at Nesconset, New York; that on the 8<sup>th</sup> day of January, 2009, I served the within Affidavit in opposition to Appellant's Motion to Reargue, upon the attorneys listed below, by depositing a true copy of same enclosed in a post-paid, properly addressed wrapper, in a official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York:

Jason B. Kolodny, Esq.  
21 Hereford Road  
Great Neck, NY 11020

Solicitor General  
Department of Law  
N.Y. State Capitol Building  
Albany, NY 12207

Hon. Andrew M. Cuomo, Esq.  
Attorney General of the State of N.Y.  
The Capitol  
Albany, NY 12224-0341



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State of New York  
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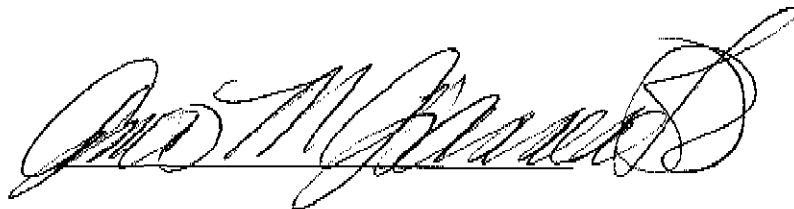
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445 Broadhollow Road  
Suite 124  
Melville, NY 11747



Gina M. Gianninoto

Sworn to before me this  
8<sup>th</sup> day of January, 2009.



Notary Public

**MORANTE**  
Notary Public, State of New York  
No. 02MO6170247  
Qualified in Suffolk County  
Commission Expires July 2, 2011