Time requested: 10 minutes

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Robert A. Ficalora as assignee of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Plaintiff,

- against -

The town board government of East Hampton
and
Sunbeach Montauk II, inc., as claimant fee title holder to the Hither Plain Reservation and Bathing Reservation properties in Montauk.

Defendants.

Case No.
99-02065

Appellant's Brief

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Suffolk County Index number 98-14806

Table of Contents

Table of Authorities

New York Constitution

Deeds/Filed Maps

Local Law

Colonial Patents

Statute

Questions Presented

- ☞ Can a corporation be represented *pro se* by a non-attorney upon assignment of its board of directors?

- ☞ Can a court of equity void legal title to parcels of land where covenanted affirmative grants by a prior owner have been adjudged a negative easement and where the valid claims of plaintiff are threatened by the defendants?

- ☞ How does the town board government of East Hampton make its claim of jurisdiction over Montauk?

- ☞ Who owns Montauk's beaches?

- ☞ What are the rights, properties and powers of the Montauk Trustee corporation?

- ☞ Are Montauk's proprietors (taxpayers) and inhabitants due the rights and privileges of a Township under the Constitution of the State of New York?

- ☞ Have the obligations of contracts historically established by the proprietors of Montauk both with the King as predecessor to the State of New York and with the Montauk tribe of Indians been impaired?

- ☞ What is the impact of declaring Montauk a Township?

Preliminary Statement

This brief is submitted on behalf of appellant Montauk Friends of Olmsted Parks corporation both pursuant to its incorporated purposes and its claim as successor to the 1852 corporation of the Trustees of Montauk.

This appeal is from an order of the Supreme Court, Suffolk County, dated February 1st, 1999, and filed with the Suffolk County Clerk on February 3rd, 1999, which in pertinent part:

> a. denied a motion for discretionary disqualification by Justice William L. Underwood, Jr., J.S.C.
>
> b. dismissed this action on the grounds that appellant, a non attorney, cannot represent a corporation *pro se*.

This action was commenced for declaratory judgment:

> 1.) Enjoining and restraining defendants from interfering with plaintiff's administration, use and improvement of the Benson Reservation properties;
>
> 2.) declaring legal title to the reservation properties void and equitable title as vested in the Montauk Friends of Olmsted Parks Corp. as Trustee;
>
> 3.) determining and declaring the town board government of East Hampton's claim of jurisdiction over Montauk to be in violation of the State and Federal Constitutions.

Plaintiff does further pray that the court will immediately suspend all claim of jurisdiction over Montauk by the Town of East Hampton and order an allotment of sufficient facilities and funding for the MFOP to bring the many unsettled issues in Montauk before it for full and proper resolution.

Plaintiff approaches this court with clean hands and honorable purposes. The court will find all arguments herein substantive and supported in the law, and does pray for the relief requested.

Statement of Facts

1. The covenanted grant of "common use" in favor of all owners of land in Montauk (proprietors) has been upheld by this court as a negative easement burdening the Benson/Olmsted Reservation properties.
2. Montauk's proprietors have powerful home rule powers under a 1686 patent as affirmed by an 1852 incorporation by the State Assembly (chapter 139)..
3. The town board government of East Hampton has repeatedly acted to interfere with and harm the rights upheld over the Reservation properties.
4. Defendant town board government has unlawfully maintained a zoning designation adverse to the judgment of this court over the reservation properties despite protest.
5. Defendant Sunbeach Montauk II, inc., has not removed the fence-posts erected as ordered by this court.
6. Defendant town board government continues to allow vehicular trespass in knowing violation of the clear language of the Benson covenants.
7. The MFOP has made claim to equitable title in and to the possession and management of the Reservation properties on behalf of the dominant estate.
8. The 1686 patent is a contract between the Crown and Montauk's proprietors the obligations of which cannot be impaired by an act of the New York State Assembly.
9. The town board government of East Hampton is unconstitutional in its claim of jurisdiction over Montauk.
10. Personal service has been made upon all parties, this court has jurisdiction.

Point I

CPLR 321[a] does not prohibit a non-attorney from representing a corporation *pro se* upon a valid assignment.

This action was commenced by Robert A. Ficalora, founder and acting president of the Montauk Friends of Olmsted Parks corporation, subsequent to an exclusive resolution of assignment by its board of directors dated June 5th, 1998 (34-35).

Both the First and Second Departments have held - and maintain - that CPLR 321(a) does not extend to a *pro se* litigant representing a corporation upon a valid assignment by its board of directors (see: Traktman v. City of New York, 182 A.D.2d 814, 582 N.Y.S.2d 808 (A.D. 2 Dept, 1992) and Medical Facilities v. Pryke, 172 A.D.2d 338, 568 N.Y.S.2d 406 (A.D. 1 Dept. 1991).

The basis for the above holdings which allow *pro se* representation of a corporation by assignment to a non-attorney is the dissenting opinion of Hon. Justice Lupiano in the matter of Kamp v. In Sportswear, Inc., 39 A.D.2d 869, 332 N.Y.S.2d 983, *revg. on dissenting opinion at the Appellate Term*, 70 Misc. 2d 898, 335 N.Y.S.2d 306).

Plaintiff has come before the court with clean hands and honorable purposes. It is most important both to this court and to the plaintiff that our papers be fully and properly prepared, and that they be presented in a timely fashion for the court's review and determination.

Plaintiff prays that the court will find the resolutions of the Montauk Friends of Olmsted Parks corporation to assign Mr. Ficalora the power to represent it to be legally valid, and that it will not find herein any grounds for reversal or modification of existing law.

Point II

Justice William L. Underwood Jr.'s re-taking of jurisdiction was improper.

A related appeal currently before this court, Appellate case no. 98-07988, was made on the ground of bias and prejudice by Justice Underwood against plaintiff. Plaintiff asserted therein his belief that Justice Underwood obstructed due process because he was asked to declare the rights of parties in a matter which joined a private party, the town board government of East Hampton, and the MFOP as corporate claimant of the powers of the 1852 corporation of the Trustees of Montauk. Prior motions for recusal had been made in the court below which were refused.

In this more current matter, the case was assigned to Justice Underwood over plaintiff's objection and he immediately moved for recusal and reassignment (pp. 93). This motion was mooted by an automatic re-assignment a year-end to Justice Robert Webster Oliver, J.S.C.. Justice Underwood did shortly thereafter, however, re-take jurisdiction over this case (p. 4).

It is well settled law in New York that "the State is bound to furnish to every litigant not only an impartial judge, but one who has not, by any action of his, justified any doubt of his impartiality." Moers v. Gilbert, 175 Misc. 733, 737, 25 N.Y.S.2d 114, 118, affirmed 261 App. Div. 957, 27 N.Y.S.2d 425, 426. Re-assuming jurisdiction over a matter in which prior affidavits of prejudice have been filed and appeals made on the grounds of bias and prejudice should be specifically disallowed.

Plaintiff has been denied his day in court. The court should consider this important issue of law and render judgment thereupon. Plaintiff has no remedy at law under the laws of the State of New York.

Point III

The Benson covenants are an affirmative grant in and to the Reservation properties for the common use of Montauk's proprietors.

The boiler-plate covenants utilized by the estate of Arthur W. Benson read:

> ... and also a right of way over such roads as may be opened from time to time to the various lots of land known and designated on said map as "Reservation", which said "Reservations" shall be for the common use of the said parties of the first part, their grantees, or the grantees of the late Arthur W. Benson, deceased, of land at Montauk. A right of way is also reserved, in favor of pedestrians only, along the beach at the foot of the Cliffs or bluffs, between the foot of said Cliffs or bluffs and the edge of the Ocean or of the Block Island Sound. (Deed: Benson to Gould, 4/17/1906, Liber 585 of deeds, p. 419-20 , emph. added.)

In the matter of The Breakers Motel inc., et. al. v.. Sunbeach Montauk II, et ano. (Suffolk# 85-5656, 2/18/94, mod. 224 A.D.2d 473, 638 N.Y.S. 2d 135 (1996)) the court found that:

> ... a review of Map #496 in conjuction with the deeds conveying the various properties persuades us that plaintiffs possess an easement for traverse over and for use of the areas marked "Reservation"... (emph. added, 52)

The court in Breakers held the above language to constitute an affirmative grant (54, citing Jakobson v. Chestnut Hill Properties, 16 Misc.2d 918, 921, 922 [Supreme, Nassau Co., 1981], 436 N.Y.S.2d 806, 810). Furthermore, it is unrefuted that in 1926 the "Reservation" properties were conveyed subject to the rights of the dominant estate in and to them by deeded conveyance found at Liber 1167 p. 360.

The grant of "common use" has been adjudged a negative easement in favor of a private class: Montauk's proprietors. The Benson grant of common use is an open ended contract in perpetuity in and to the use of the Reservation properties enforceable in favor of MFOP corp. as claimant trustee.

Point IV

Plaintiff's valid claims are threatened by defendants. Judgment should be granted voiding legal title and declaring equitable title vested in MFOP as trustee.

The statutory provisions of Real Property and Procedures Law (RPAPL) relate to the determination of adverse claims to real property (RPAPL, Art 15). The statute is not exclusive, however, and plaintiff asserts that it provides an inadequate remedy at law due to special facts and circumstances requiring an action in equity for declaratory judgment. (Pure Strains Farm Co. v. Smith, 99 Misc. 108, 163 NYS 615; RPAPL § 1551)

A court of equity will interpose its power to set aside or cancel an instrument which is absolutely void, either by statute or by the principles of the common law, where there is a danger that the rights of the complainant may be put to hazard by reason of the cloud cast over the title to his land if the instrument is not so annulled (Schroeder v. Gurney, 73 NY 430).

Despite this court's holdings in the case of Breakers Motel, et. al. v. Sunbeach Montauk II, et. ano. (op. cit.) the hostile and adverse treatment of the Reservation properties by both of the defendants herein leaves the protection and enjoyment of these properties at risk if legal title is not annulled and equitable title not affirmed in MFOP as trustee.

No adequate remedy at law exists to determine the validity of plaintiff's claims into and over the Reservation properties and beaches. Defendants' claim of possession clearly threatens the established right of the dominant estate in the private common use and enjoyment of the Reservation properties.

Declaratory judgment should be granted voiding legal title and declaring fee title vested in plaintiff MFOP as proper trustee.

Point V

The Montauk Trustee corporation has a valid claim to the beaches.

The origin of all claims of fee title to real property in East Hampton, Southampton and Montauk originate with deeds from the native Indians as confirmed by letters patent by royal authorities. Because these significant, inclusive, patents not only confirmed the purchases of these lands but also incorporated, affirmed and granted the rights and privileges of a township upon the proprietors and the inhabitants of them, what was established politically were municipal commonwealths.

In his March 1931 opinion in the case of Beers v. Hotchkiss 256 N.Y. 41 (pp. 46ff.), Chief Justice Benjamin Cardozo described the process used by these commonwealths to allot their lands to the settlers:

> "As early as 1647, inhabitants of Southampton had been contributors to a fund of £6,000 which was expended for the purchase of lands for the use of the new community. The contributors were known as the "proprietors" and were deemed to have at least an equitable interest in the lands so purchased. The inhabitants resolved in town meeting (Southampton Town Records, vol. 1 p. 50) that the town be divided "into fortie house lots, some biger, some less, as men have put in a share, six thousand pounds being divided into fortie parts. ...
>
> "Southampton in its beginnings was without a Royal patent, though its inhabitants like true precursors of the thought of Hobbes and Locke, had organized themselves into a political community. The defect in the documents was supplied by the Andros patent of 1676 and the Dongan patent a decade later. By these the title to the town lands was vested in a public corporation, the Trustees of the Freeholders and Commonalty of the Town of Southampton." (emph. added)

By this system, all unallotted (or "undivided") land remained the municipal property of the Township.

The corporation of the Trustees of the Freeholders and Commonalty of the Town of East Hampton was established by royal letters patent (East Hampton Patent) dated December 9, 1686, which covered all of East Hampton and Montauk.

Montauk, however, was purchased by the Town for a separate group of investors. In 1851, after the Town had begun to administer Montauk as the property of the Township, a suit was joined as Henry P. Hedges, et. al. (Proprietors of Montauk) v. the Trustees of the Freeholders and Commonalty of the Town of East Hampton, (N.Y. Supreme Court, 1851, citation unknown, record removed from Riverhead)

The case of the Proprietors of Montauk proceeded to trial before the Hon. Nathan B. Morse, J.S.C. of Riverhead, Suffolk County, and the East Hampton Trustee corporation was found in breach of trust in its administering of Montauk. The court ordered that a deed be issued issued by the 1686 corporation of the Trustees which surrendered all claim to the possession or management of Montauk to a committee of proprietors claiming an equitable title thereunto. (Trustees of the Freeholders and Commonalty of the Town of East Hampton to the Proprietors of Montauk dated March 9th, 1852 at Liber 63 of deeds, p. 171.)

Because the Constitution of the State of New York held that the power to govern was established by the colonial patent, the 1852 deed left Montauk without government. Recognizing this void of jurisdiction, on April 2nd, 1852, the New York State Assembly passed a law, recorded at Chapter 139 of the laws of 1852, which incorporated the proprietors of Montauk, established the Montauk Trustee corporation, and affirmed its power to govern.

Plaintiff asserts that, given the powers established through the underlying patents, the 1852 incorporation, in its unstated effect, established the Township of Montauk.

The ownership of unallotted lands in East Hampton (not Montauk) remains recognized in the current Town code. For example, Section 43 of the Town Code of the Town of East Hampton, Article I - Beaches (adopted 9-24-91 as L.L. No. 21-1991) defines two types of Beaches - "Town Beaches" and "Trustee Beaches."

> TOWN BEACHES - Beaches owned and/or managed by the East Hampton Town Board. Included within "town beaches" are all beaches within the boundaries of the Town of East Hampton, exclusive of those beaches located within the incorporated villages of East Hampton and Sag Harbor and exclusive of Trustee beaches.
>
> TRUSTEE BEACHES - Beaches owned and managed by the Trustees of the Freeholders and Commonalty of the Town of East Hampton. Included in the "Trustee beaches" are the following:
>
> A. ***The ocean beaches from the westerly boundary of the Town of East Hampton to the westerly boundary of Hither Hills State Park.***
>
> B. The beaches adjacent to the following bodies of water: Wainscott Pond, Georgica Pond, Napeague Harbor, Gardiners' Bay, Fresh Pond, Accabonac Creek and Harbor, Pussy's Pond, Hog Creek, Three Mile Harbor, Duck Creek, Hands Creek, Alewive Brook, Northwest Harbor, Northwest Creek, Little Northwest Creek and Sag Harbor.
>
> C. ***Specifically excluded from the definition of Trustee beaches are ... all beaches east of the western boundary of Hither Hills State Park (Montauk).***

The Trustee exclusion from the Town Board's claim of ownership and jurisdiction is for all of East Hampton's beaches except Montauk.

The Town Board has no basis for any claim of ownership of the beaches in Montauk. The westerly boundary of Hither Hills State Park is the 1648 purchase line of

the Town of East Hampton; all lands purchased in Montauk subsequent to 1648 were separated from East Hampton by the 1851 court order and above referenced deed.[1]

Alternately, in regard to the Benson Reservations, it is uncontested that the 1879 sale by the Proprietors of Montauk to Arthur W. Benson conveyed the entirety of Montauk (12/1/1879, recorded and filed 2/26/80, New York County, Orville B. Ackerly, clerk, Suffolk Liber 246 of deeds, p. 256). The Montauk Trustee corporation itself was also conveyed in the deed (1879 deed, p. 262).

The first deeds granting the "common use" of the Reservation properties were issued in 1904 and 1906 (see MFOP certificate of incorporation). The Reservation properties shown upon the two filed Olmsted subdivision plans include the beaches (Suffolk: Wompenanit, Map #34, filed 6/20/1898 and Hither Hills, Map #496, filed 12/12/1905). The Benson covenants granting the Reservation properties leave no doubt: the Reservation beaches are for the private common use of all Montauk proprietors. (See: Breakers Motel, et. al. v. Sunbeach Montauk II, et. ano., (op. cit.)).

For the purposes of this argument it is sufficient to show that, in addition to an equitable claim to the possession and management of the Hither Plain Reservation and Bathing Reservation beaches through the covenanted grants of the Benson estate as the legal owners thereof, a claim to the beaches and foreshores of the Reservation properties is also made by the Montauk Friends of Olmsted Parks corporation as claimant successor to the Montauk Trustee corporation.

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1 The court should consider that the emergence of "the town board government" (1911?) allowed East Hampton to retake control of Montauk.

Point VI

The Montauk Trustee corporation has valid claim in equity to other significant properties in Montauk through contracts with the Montauk tribe of Indians.

Plaintiff asserts that there are significant other unallotted lands covering thousands of acres which may be claimed in equity by the Montauk Trustee corporation. The equitable claims emanate from contracts which were made by our predecessor proprietors of Montauk with the Montauk tribe of Indians.

The report of referee Everett A. Carpenter in the action in partition of Grinnell v. Baker (cite unknown, N.Y. Supreme, Suffolk 1879) contains the following assessment of the effect of these Indian (and proprietors') rights upon the possible methods of partition:

> The nature of the said rights of the Montauk Tribe of Indians is such that it would be impossible to enjoy any portion of the land which is subject to such rights if set off in severalty. The whole of the tracts affected by the said rights or liens is however, of great value while undivided and owned in connection with adjacent parcels, and the existence of Indian rights now diminishes but very little the annual yield or profits of the land. If the whole land of Montauk were sold as a unit, the existence of Indian rights would but slightly affect the value of the portions over which the rights extend. Small parcels within the said portions, if owned in severalty, would by reason of the existence of said rights be rendered nearly valueless.
>
> In case any division of the premises in question [Montauk] was made whether among the present owners or for the purpose of offering for sale in parcels, it would be necessary to fence each of said parcels in such a manner as to keep them in stock."
>
> (from Grinnell v. Baker, [Supreme, Suffolk Co., 1879, index unknown] Found in the Record on Appeal, p. 309-10, of Pharoah v. Benson, et. al., 69 Misc. Rep. 241 [Supreme, Suffolk Co., 1910], affd 164 App. Div. 51, affd. 222 N.Y. 665, emphasis added.)

Subsequent to the referee's determination, Arthur W. Benson took title at auction to the whole of Montauk "sold as a unit" "subject to the rights and privileges of the Montauk tribe of Indians" (Carpenter, as referee, to Arthur W. Benson, 12/1/1879, Liber 246 of deeds p. 263).

Shortly thereafter, Mr. Benson proceeded to convey fee title to properties in Montauk. The September 25th, 1889 deed into Alfred M. Hoyt for a 98 acre parcel outside of the Indian reservation areas contains the word "appurtenance(s)" no less than seven (7) times within it, the most pertinent clause is set forth as follows:

> ... Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining and the reversion and reversions remainder and remainders, rents, issues, profits thereof. And also all the estate right, title, interest, dower, and right of dower property possession, claim and demand whatsoever as well in law as in equity of the said parties of the first part of, in and to the same and every part and parcel thereof with the appurtenances. (Benson to Hoyt, 9/25/1889, Suffolk: Liber 322 of deeds, p. 593)

It should be noted that for almost two centuries prior 1879 the proprietor/Indian commonage had been used as profitable cattle pasturage and that this fact, and Mr. Carpenter's above quoted determination as referee, were well known.

Because the contracts with the Indians established rights in common with the proprietors and their heirs, successors and assigns, any purchaser of land in Montauk from Arthur W. Benson would acquire an interest in the Indian lands as a valuable appurtenance. The Indian lands to have been held "in stock" had again become, in effect, the unallotted property of the proprietary commonwealth.

Plaintiff asserts that, even with the Montauk Indians having been declared extinct at the 1910 trial in the matter of Pharoah, et. al. v. Benson, Hoyt, Montauk Dock

Company, et. al., [op. cit. 69 Misc. Rep. 241 [Supreme, Suffolk Co., 1910] aff. 164 App. Div. 51, aff. 222 N.Y. 665], that a significant number of properties had been sold in Montauk prior to that decision. Plaintiff holds that any one of those grantees or their heirs, successors or assigns can make a claim to these lands as valuable appurtenances. The Montauk Trustee corporation is empowered by law to bring just such an action on their behalf (see: Chapter 139 of the laws of 1852).

Plaintiff believes that the lands affected by this form of claim through the contracts with the Montauk tribe of Indians include all of the Hither Woods and Hither Hills State Park (1661, "Ye Deed of Guift"), the County Park at the proprietors' Third House (Indian Field, 1702-3 contracts) all undeveloped land remaining at "Culloden Point" (North Neck, 1702-3 contracts), the Railroad Station and property (North Neck, Hither Woods) and at Montauk Point (The Point field, 1702-3 contracts?).

These lands, together with Montauk's beaches, the Benson/Olmsted Reservation system of parklands and roadways, and all lands or resources otherwise recoverable either in law or in equity, may, subject to this court's disposition, comprise the base holdings of the Montauk Friends of Olmsted Parks/Montauk Trustee corporation.

Plaintiff MFOP, as claimant of the powers the Montauk Trustee corporation, has a valid claim to any and all rights established through the contracts made with the Montauk Tribe of Indians. All claim of juridiction in Montauk by the town board government of East Hampton should be suspended pending a review of the continuing rights and obligations established therein.

Point VII

Montauk's taxpayers (proprietors) and inhabitants have the constitutional privileges of a Township

The lands and waters of East Hampton and Montauk are covered by two colonial patents which affirm and grant unto the proprietors and inhabitants the powers of a Township under the Royal laws of England. Upon Independence, the State of New York assumed and, by its Constitution, affirmed the obligations of these patents.

The first patent was issued on March 13th, 1666 by Col. Richard Nicolls, the first governor of the proprietary colony of New York, in the midst of the second Anglo-Dutch war. At that time the Puritan settlers of Long Island were still unsettled by the recent restoration of King Charles II (1660) and the imposition of royal authority through the "Duke's laws" (1665). In pertinent part it read:

> To all to whom these presents shall come sendeth greeting, whereas, there is a certain town in Long Island, situate lying and being in the easternmost part of the said island commonly called and known by the name of East Hampton, now in the tenure or occupation of severall freeholders and inhabitants who having heretofore made lawfull purchase of the lands thereunto belonging have likewise manured and improved a considerable part thereof, and settled a competent number of familyes thereupon. Now for a confirmation unto the said freeholders and inhabitants in their enjoyment and possession of the premises; know ye, that by virtue of the commission and authority unto me given by his Royal highness I have ratified, confirmed, granted and by these presents do ratify, confirm and grant unto Mr. John Mulford, Justice of the Peace, Mr. Thomas Parker, Thomas Chatfield, Jeremiah Conklyn, Stephen Hedges, Thomas Osborne, Senior, and John Osborne, as pattentees on behalf of themselves and their associates, the freeholders and inhabitants of the said town, their heirs, successors and assigns. All that tract of land which already hath been or that hereafter shall be purchased for and on the behalf of the said town, whether from the native Indians, proprietors or others within the bounds and limits hereafter set forth and expressed, viz. To say, their west bounds beginning from the east limits of the bounds of South Hampton as they are now laid out and staked according to agreement and concent, so as to

> stretch east to a certain pond commonly called Fort Pond, which lyes within the bounds of belonging to the Montauk Indians, and from thence to go on still east to the utmost extent of the island; on the north they are bounded by the bay, and on the south by the sea or main ocean. All which said tract of land within the bounds and limits before mentioned; and all or any plantation thereupon from hence forth, and to belong and appertain to the said town, and be within the jurisdiction thereof, together with all havens, harbors, creeks, quarries, woodlands, meadows, pastures, marches, waters, lakes , rivers, fishing, hawking, hunting and fowling; and all other profits, commodityes, emoluments and hereditaments to the said tract of land and premises within the limits and bounds aforementioned, described, belonging, or in anywise appertaining. To have and to hold, all and singular, the said lands, hereditaments and premises, with their and every part and parcel thereof to the said patentees and their associates, their heirs, successors and assigns forever. *Moreover I do hereby ratify, confirm and grant unto the said patentees and their associates their heirs, successors and assigns all the privileges belonging to a town within this government.* (Gov. Nicoll's patent, 1666, emphasis added.)

The patent set the boundaries of the Town of East Hampton and granted the royal privileges of a Township to its proprietors and inhabitants. This patent established the Town of East Hampton under the laws of New York.

A second patent for East Hampton was issued in 1686 known as the "Town patent" or "Dongan Patent" incorporating the township:

> ... Moreover, the said Richard Nicholls, Esq. Governour as aforesaid, did thereby ratifie, confirm and grant unto the said patentees and their associates their heirs, successors and assigns, all the privileges belonging to a town within this Government...
>
> ... I have willed, determined, declared, and granted and by these presents to will, declare, determine and grant, that the said inhabitants and Freeholders, the freemen of East-Hampton aforesaid, commonly called by the name freeholders and Inhabitants of the town of East Hampton, or by whatever name or names they are called or named, and their heirs and successors, forever hencefoward are, and shall be one body corporate and politique in Deed and name, by the name of the Trustees of the Freeholders and Commonalty of the Town of East Hampton and them by the name of the

> Trustees of the Freeholders and Commonalty of the town of East-Hampton, one body Corporate and Politique in deed and name, I have really and fully, for his said Majesty, his heirs and successors erected, made, ordained, constituted and declared by these presents, and that by the same name they have succession forever... (1686 East Hampton ("Dongan") patent)

In the 1851 case of Henry P. Hedges & others (proprietors of Montauk) vs. The Trustees of the Freeholders of the town of East Hampton (op. cit.), the Hon. Nathan B. Morse, J.S.C., entered judgment against the Trustees and ordered that the plaintiffs are entitled:

> "To the possession thereof and are true and lawful owners thereof according to their several respective proportions as tenants in common in fee simple and that the defendants are not entitled against the will of the said plaintiffs and others tenants in common as aforesaid to the possession or management of the said lands or any parts thereof."

and that the Trustees would:

> And also draw up the form of a release and surrender of all and singular the said lands to the parties so showing title as aforesaid according to their several and respective interests so to be ascertained as aforesaid; and that the said defendants do on request execute such release and surrender under their corporate seal.

In 1852 the Trustees of the Freeholders and Commonalty of the Town of East Hampton were the singular government of the Town as established by the 1686 patent. When it executed the above ordered deed all corporate right by East Hampton to Montauk.was surrendered, leaving it without government.

Recognizing this void of jurisdiction, on April 2nd, 1852, the New York State Assembly at Albany passed a law found at Chapter 139 of the laws of 1852 which incorporated the proprietors of Montauk, established the Montauk Trustee corporation, and affirmed their underlying privilege to govern.

Point VIII

The claim of jurisdiction by the town board government of East Hampton is unconstitutional.

The "town board government" of East Hampton is unable to show either incorporation papers or an enabling act from Albany to support its claim of jurisdiction over Montauk. It is apparent that this situation exists because Albany is constrained from imposing such a government by both the State and Federal Constitutions due to the colonial patents and prior incorporations which covered the lands and waters of Montauk.

From 1777 until questionably repealed in 1962, the Constitution of the State of New York protected the 1686 Town patent and the 1852 charter from State interference (NY Constitution, Article 1 § 15) and the validity of the contracts with the Montauk Tribe of Indians made prior to Independence. (NY Constitution, Article 1 § 13).

In the period leading up to the 1962 repeals, Montauk proprietors' rights through the colonial patents and contracts with the Indians were under intensive review. Large tracts of real property burdened by Indian/Trustee rights and the Benson covenants were released out of the Estate of Mary Benson in 1956 (Manufacturers Trust Co., Harold Fowler and Thyrza Benson Fowler to Montauk Investing corp.; Suffolk: Liber 4147 pp. 76-90, 7/9/56). Zoning was initiated for Montauk by the town board government of East Hampton in 1957. Correspondence was had between the Long Island Historical Society (the repository of the Montauk Trustee papers) and East Hampton officials.

The sections repealed in 1962 covering allodial tenures, escheats, Indian lands, the sanctity of the colonial charters and of obligations of contracts were all in Article I, the Bill of Rights, and all had some direct application to Montauk.

N.Y. Constitution Article I, § 15, is traced to the State's first Constitution. At the time of the repeals of 1962, it read, in pertinent part, that:

> ... nothing contained in this constitution shall ... annul any charters to bodies politic and corporate, [made by the king or his authorities] before that day [10/14/1775], or shall affect any such grants or charters since made by the state, or by persons acting under its authority; or shall impair the obligation of any debts, contracted by this state or individuals, or bodies corporate, or any other rights of property, or any suits, actions, right of action, or other proceedings in courts of justice.

By this section the State Assembly is constrained from establishing an alternate government for East Hampton and Montauk from those established by 1686 patent or the 1852 incorporation.

N.Y. Constitution Article I, § 13, regarding real property contracts with the Indians is also traced to the State's first Constitution. At the time of repeal, this section read:

> No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred seventy-five; or which may hereafter be made of, or with the Indians, shall be valid unless made under authority, and with the consent of the legislature.

The contracts burdening the lands and waters of Montauk were entered into between the Montauk Indians and the our predecessor proprietors were made between 1660 and 1754, and were established in favor of their heirs, successors and assigns.

The Constitution of the United States of America also provides powerful protections. The 1686 patent is a contract the obligations of which cannot be impaired

by an act by the assembly of the State of New York, which is the successor to the crown. (Trustees of Dartmouth College v. Woodward, United State Supreme Court, 1819, 4 Wheaton 518).

In the Dartmouth College case, the state assembly of New Hampshire passed legislation replacing the board of Trustees of Dartmouth College with political appointees: Mr. Woodward was to appointed by the legislature to be President of the College. (In the matter *sub judice* no act by the legislature has been attempted to make the town board government a legal entity, instead it has simply been supported as if it were one.)

In the seminal decision which has been considered among the most important in United States Supreme Court history, the Chief Justice John Marshall found for the College that:

> This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within the spirit also."
>
> The American people have said, in the Constitution of the United States, that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said "that the judicial power shall extend to all cases in law or in equity arising under the Constitution." On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink....It can require no argument to prove that the circumstances of this case constitute a contract."

The 1686 Town Patent was purchased by the proprietors from Governor Dongan for £200. Acting upon the provisions of the patent, in 1687 the proprietors purchased the remaining unpurchased part of Montauk from the Montauk tribe of Indians. As with Dartmouth College, the 1686 patent established a corporation. In Chief Justice Marshall's words "Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

A reading of the Town Patent exhibits that the "home rule" privileges granted and released in the 1686 patent are extremely broad. To whit:

> ... and they and their successors shall and may at all convenient times hereafter upon a publique summons ... assemble and meet together in the town house of the said town, or in such other publique places as shall be from time to time appointed, to make such acts and orders in writing, for the more orderly doing of the premises as they, the said Trustees of the Freeholders and Commonalty of the town of East-Hampton aforesaid, and their successors from time to time, shall and may think convenient, so always the said acts and orders be in no ways repugnant to the laws of England and of this province....
>
> Wherefore by virtue of the power and authority aforesaid, I do, will and command, for and on behalfe of his said Majesty, his heirs and successors, that the aforesaid Trustees of the freeholders and commonalty of the town of East-Hampton and their successors, have, hold, use and enjoy, and that they shall and may forever have, and they shall hold use and enjoy, all the libertyes, authorityes, customes, orders, ordinances, franchizes, acquittances, lands, tenements and hereditaments, goods and chattels aforesaid, according to the tennure and effect of these presents, without the let or hindrance of any person or persons whatsoever. (1686 Town Patent of East Hampton)[1]

1 The court should know that a 1682 grievance and petition issued by the Town Meeting of East Hampton to King James II (while he was still the Duke of York and proprietor of New York) had resulted in the establishing of the first democratic Assembly of New York (Oct. 17, 1683) and the enactment of our first constitution of democratic government (Oct. 30, 1683). Subsequent to assuming the throne as King James II (Feb. 1685), however, he determined to disallow the New York Assembly and dissolve it. The 1686 Town Patent to East Hampton was issued on December 9th, 1686, at the first convening of the government which was to replace

The Trustee government is, however, fully within the jurisdiction of this court:

> They [Trustees] are and may be capable, in whatsoever place and places, and before whatsoever Judges and Justices or other persons or officials of his said Majesty, his heirs and successors, in all and all manner of actions, plaints, suits, complaints, causes, matters and demands whatsoever...

Plaintiff alleges that the town board government of East Hampton is unconstitutional in its claim of jurisdiction over Montauk, and this court has jurisdiction to resolve this claim. Acting in place of the Montauk Trustees, the town board government has substantially impaired the obligations of the contracts both between the proprietors and the State of New York (as successor to the King) and between the proprietors and the Indians (to the extent that the proprietors retain rights in common through them to substantial tracts of real property).

Injury has accrued and continues to accrue to the interests of the proprietors and residents of Montauk. Plaintiff does pray that this court can see the probablity of success on the merits of these claims and the necessity of estopping any further claim of jurisdiction over Montauk by the town board government of East Hampton.

the democratic one.

Point IX

The court should make the most magnanimous and fullest use of its powers.

This matter joins an action between the Montauk Friends of Olmsted Parks (MFOP) corporation and the town board government of East Hampton. The MFOP has claimed to assume the powers of the 1852 corporation of the Proprietors of Montauk which in turn has been shown to hold the powers and privileges of a Township. The town board government, for its part, cannot demonstrate that it is a legal entity under the laws of the State of New York, and its claim of jurisdiction over Montauk is in historic violation of the State and Federal Constitutions.

Faced with these claims and a probability of success on the merits, this court should immediately estop all claim of jurisdiction by the town board government over Montauk and issue a preliminary injunction restraining the issuance of all land use or building permits of any type or nature.

The immediate effect of the court's exercise of its powers to grant the relief plead for herein is to establish a protectorate in Montauk under the MFOP which is under its close supervision. All development will be frozen in place for review and determination by this court of issues such as the legality of the permits issued under state and local law, the legality and sufficiency of title, and fresh water availability.

Plaintiff believes that the State of New York and the County of Suffolk bear primary responsibility for the damages caused by the town board government of East Hampton by aiding and abetting its unlawful existence. As a result, they will be named defendants in many ensuing actions and this court may avail itself of the unusual power to utilize their treasuries to prevent harm to any innocent parties.

Irrespective of their broad privileges under the colonial patents, Montauk's proprietors have a right to security in their property. Currently, there is a cloud over the title to hundreds of parcels of land in Montauk which needs to be cleared. Furthermore, Montauk is out of fresh water resources and significant damage is accruing through the inequitable allocation and depletion of it. The recently completed pipeline connection to East Hampton represents a dangerous and insufficient answer which is being utilized to service a mad rush of new construction. (See: Curtis Wright corp. v. the Town of East Hampton, Appellate Division, 2nd dept, 442 N.Y.S. 2d 125 See page 129 at [8]).

The MFOP, as Trustee of the proprietors and inhabitants of the Town of Montauk, will bring these and other issues before this court for settlement.

The MFOP will also bring actions before this court seeking to recover and consolidate its ownership and/or control of vast sections of Montauk. We have before us an incomparable and recoverable Olmsted park system. MFOP proposes that these properties be improved and managed as public parkland according to the philosophies and principles of landscape architecture espoused and utilized by Frederick Law Olmsted. This possibility will provide immensely historic and beneficial use and enjoyment of these lands by the Montauk community and by the people of the State of New York.

Through the full force and magnanimous use of this court's broad powers in the matter currently before it, and in matters which are forseen as per above, we can protect, preserve and enhance Montauk for ourselves and our posterity forever.

Conclusion

The court should annul legal title to the Reservation properties and affirm equitable title as vested in MFOP as the claimant successor Montauk Trustee corporation. East Hampton's claim of jurisdiction over Montauk should be suspended until trial.

The defendants herein, Sunbeach Montauk II, inc., and the town board government of East Hampton have shown contempt for the orders of this court in the matter of Breakers Motel, et. al. v. Sunbeach Montauk II, et ano., and threaten injury to the rights upheld. Legal title to the Reservation properties should be voided and equitable title declared as vested in the MFOP corporation as trustee. Any and all claims by the defendants herein to the possession of or jurisdiction over the Reservation properties and beaches should be denied.

East Hampton's claim of jurisdiction over Montauk is unconstitutional under the Constitution of the United States of America and, historically, under the Constitution of the State of New York. By rights established through Colonial patents and the 1852 act of the Assembly of the State of New York, Montauk is a Town.

Additionally, there are urgent questions of title and water availability which must be settled. Development is taking place in Montauk at a frenetic pace, some of it driven by knowlege of the case before this court. Maintaining the status quo claim of jurisdiction by the town board government of East Hampton under the current circumstances is inequitable and unjust: all claim of jurisdiction by the Town of East Hampton over Montauk should be suspended until a trial is had upon the issues presented herein.

Appellant does pray that this court will grant the relief requested and provide such other and further relief as the court deems equitable and just.

Certification

Certification

I, Robert A. Ficalora, Assignee *pro se* , of the Montauk Friends of Olmsted Parks corporation, do hereby certify that the foregoing brief is comprised of arguments and citations of law and of fact known to me, and that they are approved by me for submission to the Appellate Division of the Supreme Court of the State of New York, 2nd Department, in this matter.

Dated: Montauk, Long Island, New York,
August 30th, 1999

Robert A. Ficalora
acting president,
Montauk Friends of Olmsted Parks / Montauk Trustee corporation