To Be Argued By:
RICHARD C. CAHN
Time Requested: 10 Minutes

New York Supreme Court

Appellate Division—Second Department

Docket No.
99-02065

ROBERT A. FICALORA, as assignee of Montauk Friends of Olmstead Parks, Inc., a not-for-profit corporation established under the laws of the State of New York,

Plaintiff-Appellant,

–against–

THE TOWN BOARD GOVERNMENT OF EAST HAMPTON,

Defendant-Respondent,

–and–

SUNBEACH MONTAUK II, INC., as claimant fee title holder to the Hither Plain Reservation and Bathing Reservation properties in Montauk,

Defendant.

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the defendant-respondent, THE TOWN BOARD OF THE TOWN OF EAST HAMPTON (the "Town" or "Respondent,")[1], in connection with an appeal by appellant ROBERT FICALORA ("Ficalora" or "Appellant"), both *pro se* and as the claimed assignee of MONTAUK FRIENDS OF OLMSTED PARKS, INC. ("MFOP"), from a short form order of the Supreme Court, Suffolk County (William L. Underwood, Jr., J.), dated February 1, 1999 and entered February 3, 1999, Index No. 14806,[2] which (1) denied Appellant's motion for disqualification and reassignment; and (2) granted Respondent's motion to dismiss the complaint.

STATEMENT OF FACTS

Appellant filed this action characterizing himself both as a *pro se* litigant as well as an assignee of MFOP, a corporate party not otherwise represented by counsel herein as required by law. See CPLR §321(a). He alleges that: beginning in about 1957, the Town, "asserted power to control land use (zoning) under the Town Law of the State of New York" (14);[3] by resolution, dated June 29, 1997, MFOP claimed equitable title in and jurisdiction over the "Benson Reservation properties in Montauk," which resolution was "filed with the Suffolk County Clerk on June 30, 1997" (14); the decision of the Supreme Court, Suffolk County in Breakers Motel, Inc. v. Sunbeach Montauk Two, Inc, Index No. 85-5656 (Sup. Ct. Suffolk County Feb. 18, 1994) (Underwood, Jr., J), modified, 224 A.D.2d 473, 638 N.Y.S.2d 135 (2d

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[1]Erroneously sued herein as "THE TOWN BOARD GOVERNMENT OF THE TOWN OF EAST HAMPTON."

[2] So as to avoid confusion, Respondent makes reference to docket numbers and index numbers throughout this brief, since, at the present time, Appellant has two actions against the Town pending before this Court.

[3]Page references are to pages of the Record on Appeal.

Dep't 1996) (reprinted in incomplete and non sequential fragments at Record 35), determined that the subject property was encumbered by a negative easement "granting full and unencumbered common use by all successor owners to Arthur W. Benson of land in Montauk (all Montauk property owners)" (14); the Town has been unable to prove itself a municipal corporation or to substantiate its claim of jurisdiction over the Reservation properties, the beach or Montauk in general. (15-16).

Appellant's rambling complaint alleges that the Town: asserted police power to regulate and patrol the Reservation beaches and issued "driving permits" to drive on the Reservation in violation of the Benson covenants; denied citizens their First Amendment right to convene and assemble in celebration of the July 4th holiday; claimed the power to deny MFOP the right to promote and administer the common use of the Reservation properties; and illegally zoned the Reservation property residential in violation of an order of the court. (16).

Appellant further alleges that: "MFOP's application for a building permit for a picnic deck/stage for the common use of the dominant estate cannot be appropriately considered by the building department"; the Town wrongfully denied a "Mass-gathering permit" for a "peaceable assembly" on the Reservation property over the 1997 Fourth of July weekend;[4] and respondent Sunbeach has failed to comply with the order of the court to remove certain fencing, thus interfering with MFOP's common use of the Reservation properties. (16-17).

Ficalora claims that declaratory judgment is required with respect to the following four disputes: (1) the validity of the claim of title by respondent Sunbeach in and to the Benson Reservation properties; (2) the Town's zoning, use, taxation of, and jurisdiction over the

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[4] A gathering that Appellant apparently held despite the Town's denial of the permit. (99).

Reservation properties and beaches; (3) the constitutionality of local statutes requiring permits to exercise the First Amendment right to peaceable assembly; and (4) the nature and extent of the jurisdiction and powers claimed by the Town in Montauk, and whether such powers are in violation of the State and Federal Constitutions. (17).

Ficalora's complaint was supported by an affidavit in which he claimed that the July 1997 construction of a single-family residence, commenced by residents named Guarneri, "grievously crowds" the Reservation properties. (23). In that affidavit, he concedes that two prior actions were filed by him relevant to the construction,[5] and notes that "there is some overlap with this action on the constitutionality of the Town's claim of jurisdiction." (23).

On June 30, 1998, the date this action was filed, Ficalora submitted a proposed order to show cause containing two temporary restraining provisions to Justice Underwood. (89). The court struck the restraining provisions and signed the order to show cause, bringing the matter on for July 9, 1998, but, on July 6th, Ficalora withdrew the motion. (91).

On June 30th, the same day Justice Underwood struck the temporary restraining order, Ficalora prepared a notice of motion seeking Justice Underwood's recusal. The notice of motion read as follows:

> By your actions today, you did fail to protect the now established legal right of common use of the Reservation properties.
>
> You did further fail to protect Montauk citizens of First Amendment right to convene a peaceable assembly, a fundamental

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[5]Although both of these cases were dismissed and the dismissals were affirmed by this Court (Ficalora v. Planning Bd. of Town of East Hampton, 691 N.Y.S.2d 538, 1999 N.Y. Slip Op. 05057 (2d Dep't June 1, 1999) (No. 10457); Ficalora v. Guarneri, et. al, _____N.Y.S.2d ____, 1999 WL 366786, 1999 N.Y. Slip Op. 05034 (2d Dep't June 1, 1999) (No. 97-10463), Ficalora has moved in both cases for leave to appeal to the Court of Appeals. Those motions are pending before this Court *sub judice*.

> liberty which we do enjoy as Americans, in celebration of the Fourth of July holiday.
>
> You did further strike reasonable and temporary restraining orders causing me material financial injury in excess of $600 due the insurance-before-consideration requirement of town for its 'mass-gathering permit.'
>
> All of this you did alone in chambers without allowance for argument, an act which I find insulting to my person.
>
> The above continues a long history of treatment which I find prejudicial and abusive. I have lost all confidence in this court.
>
> It is the law in the State of Washington that a party may for any reason have one automatic reassignment upon demand. Although I am unaware of such a law in the State of New York, it is a reasonable and just allowance.
>
> In order that I might find justice and equitable treatment according to the laws of the State of New York, I herewith move this court for an immediate order of recusal by you in this and all other of our matters before you for judgment. I do further request that the new Justice be quickly assigned by a manual drawing in my presence at the special term clerks' office in Riverhead. (92-93).

On July 6, 1998, Ficalora served a motion for a discretionary order of disqualification to disqualify Justice Underwood. (94). In the affidavit that accompanied that motion, Ficalora accused the court of demonstrating "extreme bias or prejudice against me in this and other matters in a manner that may discredit the judiciary and does undermine judicial process." (95). His strenuous efforts to disqualify Justice Underwood are ironic in light of the fact that the decision in Sunbeach Montauk Two, see supra, upon which Ficalora relied, was authored by Justice Underwood. (35).

On July 8, 1998, the Town Board cross-moved for an order dismissing the complaint, and opposed the motion for recusal. (102-03). The Town predicated its motion on

the basis that Ficalora, as a non-attorney, lacked the capacity to sue on behalf of MFOP and, as such, his appearance on behalf of the corporation clearly violated CPLR 321(a). (106).

The Town, in its motion, made note of the fact that Ficalora's complaint was "nothing more than an indecipherable hodge-podge of vague and conclusory allegations which -- either individually or collectively -- fail to state a cause of action," additionally pointing out that the summons did not bear either an index number or a filing date making it defective and legally insufficient for purposes of commencing an action under the provisions of CPLR 305(a). (107-08).

Ficalora's motion for injunctive relief was opposed on the grounds that Appellant had failed to show a likelihood of success on the merits and irreparable injury absent the grant of a preliminary injunction and a balancing of the equities in his favor. (110). In addition, the Town opposed Ficalora's request for injunctive relief and opposed the disqualification motion on grounds that the motion was both procedurally flawed and substantively meritless. (109-110).

The Town also noted that, in 1997, in the context of the Guarneri actions, Ficalora had sought Justice Underwood's recusal and then withdrawn his applications. (112). Thereafter, at a hearing in connection with the application of the defendants/respondents in the prior actions for awards of costs and sanctions against Ficalora, Ficalora complimented Judge Underwood – both in a written submission and on the record in open court – for "the exceptional quality of its jurisprudence." (112).

On February 1, 1999, the court denied the disqualification motion, holding "a review of this Court's decisions in this matter fails to raise the slightest inference of bias or lack of impartiality." (2). The court noted that the order to show cause for injunctive relief had been withdrawn, and dismissed the action in light of Ficalora's status as a non-attorney, holding that

Ficalora's appearance on behalf of the corporate plaintiff was improper under CPLR 321(a). (2). On March 1, 1999, Ficalora served a Notice of Appeal.

The Town received no correspondence from Ficalora until, on April 28, 1999, it received the present Record without a brief. Thinking that the Appellant was simply going to file the Record and rely upon his arguments in the lower court, the Town prepared to file its Brief by May 28, 1999. Upon further investigation, and prior to submitting its brief to the Court, the Town's counsel learned from one of the Clerks of the Court that Ficalora had failed to file a brief with this Court, in addition to failing to file the Record that he had served upon the Town.

September 7, 1999, marked the beginning of a two week barrage by Ficalora in which he caused no less than seven documents to be served upon the Town. On that day, Ficalora served the Town, by mail, with a "Motion to Supplement the Record on Appeal," although the Record had not been filed with the Court. Ficalora enclosed several additional papers with his September 7, 1999 motion: a brief, dated August 30, 1999 (that the Town learned had never been filed with this Court); a "new" Record on Appeal, dated August 31, 1999 (also unfiled); and, a ninety-three page document dated August 22, 1999, entitled "Supplemental Public Documents" (also unfiled). The Town opposed his motion, explaining (1) that Ficalora had failed to comply with the provisions of CPLR 2214(b) since the Town received this motion less than three days before the return date of September 10, 1999; and (2) that Ficalora had failed to perfect the Appeal within the six month time frame provided for in 22 NYCRR § 670.8(e).

On September 13, 1999, Ficalora served the Town with a combined motion, a "Corrected Motion to Supplement the Record" and a "Motion to Enlarge the Time to Perfect the Appeal," as well as an affidavit. The Town opposed this combined motion.

On September 22, 1999, Appellant served the Town with still another document responding to Respondent's Affidavit, dated September 9, 1999. The Town, exhausted from responding to Ficalora's barrage, did not reply.

On October 6, 1999, this Court: (1) granted Ficalora's "Motion to Enlarge the Time to Perfect the Appeal," accepting his Record and brief, nunc pro tunc, and enlarging the Town's time to file and serve its brief until November 8, 1999; and (2) denied Ficalora's "Motion to Supplement the Record on Appeal."

Unfortunately, like the papers submitted by Ficalora in the court below, the Record that Ficalora has now filed is replete with errors and omissions which, without more, require dismissal of this appeal.[6] First, although Ficalora includes a copy of the summons and complaint that purportedly commenced this action (12-13), Ficalora's submission, unlike the original served upon the Town, includes the index number and filing date. (105).

Respondent is constrained to note, inter alia, the following additional defects and omissions in Appellant's record: the original exhibits to the July 8, 1998 Affidavit of Scott M. Karson, Esq., (104-113), have been replaced by Mr. Ficalora's "versions" of these documents, although Ficalora admits that they differ from the originals, (114), (Respondent points out the following discrepancies: the summons lacks an index number and date of filing; Ficalora's affidavit, dated June 29, 1998, was unsworn and lacked an index number; the complaint, verified on June 29, 1998, lacked an index number and date of filing; the "affidavit" of personal service (which though labeled as an affidavit, is merely "signed" – but not sworn to –before a notary

[6] Recognizing that motions to dismiss appeals based on inadequacies in the record on appeal or appendix are generally referred to the panel of Justices hearing the appeal for determination with the appeal, we have not separately moved to dismiss this appeal but have simply enumerated the pertinent defects herein for the Court's determination.

public, and which is described therein as an affirmation despite the absence of a statement by the purported affirmant that he is a person authorized by law to affirm).[7] (105).

ARGUMENT

POINT I

APPELLANT IS DISREGARDING THE ORDER OF THIS COURT BY RELYING UPON DOCUMENTS THAT WERE EXPRESSLY PRECLUDED IN THE DENIAL OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL

On September 7, 1999, Ficalora served the Town, by mail, with a "Motion to Supplement the Record on Appeal," along with a "new" Record on Appeal, dated August 31, 1999, and a 93 page submission referred to as "Supplemental Public Documents," dated August 22, 1999. The "new" Record on Appeal was almost identical to the Record the Town received on April 28, 1999. The submission entitled "Supplemental Public Documents," consisting of scattered pages of documents that are in some instances over three hundred years old., contains documents that were not before the court in the instant action. On October 6, 1999, this Court denied Ficalora's "Motion to Supplement the Record on Appeal" with these supplemental public documents.

Appellant is attempting to circumvent the ruling of this Court, which denied his motion to supplement the Record on Appeal, by using these documents to support the convoluted and specious arguments in his brief. For example:

- "In regard to the Benson Reservations, it is uncontested that the 1979 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,

[7] Ficalora has also relied, in his brief, on documents and facts that were not before the court in the first instance. This point will be addressed by Respondent later in this brief.

Orville B. Ackerly, clerk, Suffolk Liber 246 of deed, p. 256," see Appellant's Brief at 11.

- "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, 12/1/1979, Liber 246 of deeds p. 263)," see Appellant's Brief at 13.

- "[S]hortly thereafter, Mr. Benson proceeded to convey fee title to properties in Montauk . . .(Benson to Hoyt, 9/25/1889 [sic], Suffolk: Liber 322 of deeds, p. 593)," see Appellant's Brief at 13.

- "[T]he 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 . . . (Gov. Nicoll's patent, 1666. . .)," see Appellant's Brief at 16-17.

- "[A] second patent for East Hampton was issued in 1686 known as the . . . 'Donagan Patent' incorporating the township . . .(1686 East Hampton ("Donagan") patent)," see Appellant's Brief at 16-17.

- "[L]arge 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. [sic]; Suffolk: Liber 4147 pp. 76-9-, 7/9/56," see Appellant's Brief at 18.

In New York, all parties, even those who are *pro se*, must adhere to the policy that "[a]ppellate review is limited to the record before the court of first instance." In re Heinemeyer v. New York Power Auth., 229 A.D.2d 841, 843, 645 N.Y.S.2d 660, 663 (3d Dep't 1996), lv. to appeal denied, 89 N.Y.2d 801, 653 N.Y.S.2d 278 (1996) (citation omitted) (explaining that "portions of the original record on appeal," an "unpaginated newspaper article," and certain pages of *pro se* appellants' brief would "not be considered on this appeal" since they were not before the lower court); see also Leszcynski v. Pennsylvania Ry. Co., 274 A.D.2d 1003, 1004, 84 N.Y.S.2d 579, 580 (2d Dep't 1948), appeal denied, 298 N.Y. 919, 85 N.E.2d 62 (1949), aff'd, 299 N.Y. 709, 87 N.E.2d 124 (1949) (affirming decision of trial court noting that

statements contained in respondents' brief that were "unsupported by the record, have no place in a brief submitted to this court"); Chimarios v. Duhl, 152 A.D.2d 508, 508, 543 N.Y.S.2d 681, 682 (1st Dep't 1989) (citation omitted) (granting motion to strike matter from appellant's brief which is dehors the record, explaining that "[t]his court is limited to a review of facts and information contained in the record); Garza v. Vico Util., Inc., 150 A.D.2d 522, 522, 548 N.Y.S.2d 1001, 1001-02 (2d Dep't 1989) (citation omitted) (striking appellant's reply brief, explaining that it contains "material that is dehors the record and may not be considered by this court in connection with the appeal"). It is the appellant's responsibility to see to it that the record is not "inadequate" or incoherent," see Cross Westchester Dev. Corp. v. Sleepy Hollow Motor Court, Inc., 222 A.D.2d 644, 644, 636 N.Y.S.2d 372, 373 (2d Dep't 1995), lv. to appeal denied, 88 N.Y.2d 802, 644 N.Y.S.2d 688 (1996) (citing CPLR 5528(a); 5529(b)(c); 22 NYCRR 670.10(c)), so that the court can "render an informed determination of the merits of the appeal" upon a presentation of the issues "in a concise and clear manner." Id. at 644, 636 N.Y.S.2d at 373.

Parties have been "severely condemned" for including, in their papers, material "that was not properly part of the record on appeal." Terner v. Terner, 44 A.D.2d 702, 702, 354 N.Y.S.2d 161, 162 (2d Dep't 1974) (citation omitted) (explaining "[c]ounsel do not help their cases by attaching to brief matter dehors the record); see also Ro-Stan Equities, Inc. v. Schechter, 44 A.D.2d 577, 577, 353 N.Y.S.2d 224, 225 (2d Dep't 1974) (noting the "impropriety" of respondent's conduct in "attach[ing] records to his brief" which were dehors the record). The Court should not consider the parts of Ficalora's brief that refer and rely upon matter that is not only dehors the Record, but which this Court has expressly prohibited to be included in this Record.

This Court has held that it "should not be subjected to the task of untangling and mastering the facts from an inadequate and incoherent" Record. See Lo Gerfo v. Lo Gerfo, 30 A.D.2d 156, 157, 290 N.Y.S.2d 1005, 1007 (2d Dep't 1968). This action has, from the outset, been frought with procedural infirmities and disregard for the rules of the Court. This Court should penalize appellant for submitting such unauthorized materials by dismissing the appeal, or alternatively, must strike all such offending materials from the Record.

POINT II

FICALORA HAS NO STANDING TO BRING THIS SUIT SINCE CPLR 321(a) MANDATES THAT A NON-ATTORNEY MAY NOT REPRESENT A CORPORATION

Ficalora argues that CPLR 321(a) "does not prohibit a non-attorney from representing a corporation upon a valid assignment." Appellant's Brief at 4. In support of this contention, Ficalora relies upon Traktman v. City of New York, 182 A.D.2d 814, 815, 582 N.Y.S.2d 808, 809 (2d Dep't 1992) and Medical Facilities Inc. v. Pryke, 172 A.D.2d 338, 568 N.Y.S.2d 406 (1st Dep't 1991).

Appellant's understanding of Traktman is misguided. Although a corporation may assign a cause of action for money to a non-attorney, even to "circumvent the statutory prohibition against a corporation appearing *pro se*, see Traktman, 182 A.D.2d at 815, 582 N.Y.S.2d at 809, the alleged "assignment" to plaintiff is not of a money claim, but rather of a claim that MFOP personally asserts for its own benefit, to the use of the so-called "Reservation property" without interference. This is not a claim that an assignee can purchase and enjoy

individually; it is a claim, if successful, that can redound to the benefit only of the alleged "assignor". It thus does not qualify as a true assignment.

Ficalora's reliance on Pryke, supra, a First Department case, is equally unavailing, since unlike the assignment referred to in Pryke, MFOP's form of assignment is questionable. MFOP did not assign its cause of action to Ficalora, it merely "retained" him as "corporate assignee," together with an attorney who, before this action was filed, had already "relocated" and was "unavailable." (33-34) (emphasis added). A corporate assignment of a money claim is easily distinguished from MFOP's statutorily defective attempt to assign Ficalora the "power to represent" MFOP" (34). A careful look at the document entitled "Resolution of Assignment" (33-34) shows that, although the board of directors of MFOP purports to act in making this assignment to Ficalora, the only party's signature (other than that of a notary public) on the document is that of Ficalora's. In essence, we have Ficalora making the assignment to himself. Certainly, MFOP does not have the power to confer upon a private individual, a power that only state law may grant to duly admitted attorneys. See, Rembrandt Personnel Group Agency v. Van-Go Transport Co., Inc., 162 Misc.2d 64, 617 N.Y.S.2d 258 (App. Term 1994) (holding "[t]here is no basis in law for a corporate defendant to assign away its status as defendant to an individual . . . in order to circumvent the CPLR 321(a) requirement that a corporation appear by attorney).

The policy behind CPLR 321(a) derives from the fact that a corporation insulates its shareholders from personal liability, and New York accordingly recognizes its status as "hydra headed entity," requiring that it act in legal matters through a licensed attorney. Mineola Mack Distrib., Inc. v. Huntington Fleet Serv., Inc., 132 Misc.2d 18, 19, 502 N.Y.S.2d 651, 652 (Dist. Ct. Nassau County 1986); see also Hilton Apothecary, Inc. v. State of New York, 89

N.Y.2d 1024, 1024, 657 N.Y.S.2d 595, 595 (1997), reargument denied, 90 N.Y.2d 845, 660 N.Y.S.2d 871 (1997) (dismissing corporation's appeal when brought by non-attorney); Gazdo Properties Corp. v. Lava, 150 Misc.2d 1019, 1020, 579 N.Y.S.2d 305, 306 (2d Dep't 1991) (noting that a non-attorney could not appear for corporation and, as such, appeal must be dismissed due to lack of standing).

The Court of Appeals, recognizing that the determination of "[w]hether a person seeking relief is a proper party to request an adjudication" must be "considered at the outset of any litigation, has held that a person "seek[ing] judicial review" bears the "burden of establishing standing to raise [a] claim." Society of the Plastics Indust., Inc. v. County of Suffolk, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 782 (1991) (quoting In re Dairylea Coop. v. Walkley, 38 N.Y.2d. 6, 9, 377 N.Y.S.2d 451, 453 (1975)); see also In re Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven, 213 A.D.2d 484, 485, 623 N.Y.S.2d 613, 615 (2d Dep't 1995). As such, since Ficalora, as a non-attorney, has not borne his burden of establishing standing to bring this suit on behalf of MFOP, this Court should affirm the dismissal of his complaint.

POINT III

JUDGE UNDERWOOD'S DECISION NOT TO RECUSE HIMSELF WAS NOT AN ABUSE OF DISCRETION SINCE, ABSENT LEGAL DISQUALIFICATION, A TRIAL JUDGE IS THE SOLE ARBITER OF RECUSAL

Ficalora alleges that Justice Underwood "re-taking of jurisdiction was improper. Appellant's Brief at 5. This assertion, as best as can be discerned, comes from Ficalora's belief that Justice Underwood improperly re-assumed jurisdiction after a motion for disqualification was made and then mooted by the automatic assignment of the case to another judge.

Judiciary Law § 14 provides that "'[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party . . . or in , in which he is interested.'" People v. Capuano, 68 Misc.2d 481, 484, 327 N.Y.S.2d 17, 21 (Sup. Ct. Monroe County 1971) (quoting Judiciary Law § 14 (McKinney's 1983)). The "nature of the interest" that § 14 refers to is the interest of a party or that of a "pecuniary or property right from which [the judge] might profit or lose." Id., 327 N.Y.S.2d at 22 (citation omitted). It is well-settled in New York that, absent one of the "legal disqualification[s]" enumerated in the statute, a trial judge "is the sole arbiter of recusal" and any decision concerning recusal is left to the "personal conscience of the court," People v. Moreno, 70 N.Y.2d 403, 405, 521 N.Y.S.2d 663, 665 (1987) (citing People v. Horton, 18 N.Y.2d 355, 362, 275 N.Y.S.2d 377, 381 (1966)), and "may not be overturned unless it was an abuse of discretion." Id. at 406, 521 N.Y.S.2d at 665 (citing People v. Tartaglia, 35 N.Y.2d 918, 919-20, 364 N.Y.S.2d 901, 902 (1974) (further citation omitted)); see also People v. Muka, 72 A.D.2d 649, 650, 421 N.Y.S.2d 438, 440 (3d Dep't 1979) (finding that *pro se* litigant's "rambling" allegations that the trial judge "should have disqualified himself from presiding at the proceedings because [the litigant] had lodged criminal complaints against him stemming from his denial of pretrial motions" had no support in the record which "disclosed absolutely no bias against [the litigant], whose rambling presentation might well have irritated a less patient jurist.").

The case of Ortiz v. City of New York, 136 Misc.2d 500, 518 N.Y.S.2d 913 (Sup. Ct. New York County 1987) contains an excellent discussion of Judiciary Law § 14 and the public policies that it embodies. In Ortiz, the court explained:

> The discretion left to each individual judge stems from the interest in the efficient administration of justice. It is untenable to require judges to recuse themselves whenever even an unsupported allegation of bias is made. One would be

> hardpressed to find a judge that would completely satisfy all litigants and such a system would undoubtedly promote the undesirable problem of judge shopping. Therefore if a judge, surveying the circumstances, believes he is able to preside impartially over the proceedings before him, he is able to do so. Id. at 502, 518 N.Y.S.2d at 915.

As far as can be discerned, Ficalora's request for Justice Underwood's recusal stem from the court's June 30, 1998 action in issuing an order to show cause without adopting two temporary restraining orders that had been proposed by Ficalora (89). ("An order to show cause was submitted to you which you entered without a hearing yet striking restraining orders") (95). Ficalora's "rambling" allegations include that Justice Underwood : has failed "to protect the now established legal right of common use of the Reservation properties"; has caused him to suffer a "material financial injury in excess of $600"[8] by striking his "reasonable and temporary restraining orders," an act, done by Justice Underwood "alone in chambers without allowance for argument," the doing of which "insult[ed]" Ficalora's "person"; has engaged in "a long history of treatment which [Ficalora] finds prejudicial and abusive" causing him to "los[e] all confidence in th[e] court"; should follow the "law in the State of Washington" which allows (allegedly) a party to have "one automatic assignment upon demand" (although Ficalora concedes that he is "unaware of such a law in the State of New York").

What is missing from Ficalora's allegations, however, is any reference to the statutory grounds for disqualification (that Justice Underwood stands to profit or lose from this action in a pecuniary fashion). Furthermore, the Record is devoid of any support whatsoever for

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[8]This allegation strikes the undersigned as brash and shameless, in light of the Court's earlier reversal of Justice Underwood's order of sanctions in the Guarneri litigation, which had attempted to compensate the defendants-respondents for a small portion of far more than $9,000 in attorneys' fees incurred in responding to nearly 30 frivolous applications made by Ficalora in less than one month. See Ficalora v. Guarneri, et. al, supra, 1999 WL 366786, 1999 N.Y. Slip Op. 05034 (2d Dep't June 1, 1999) (No. 97-10463).

Ficalora's allegations, and the irony of the request becomes apparent after considering the fact that the decision in Sunbeach Montauk Two, upon which Ficalora principally relies, was authored by Justice Underwood.

Because Justice Underwood, as a trial judge, is the "sole arbiter of recusal," Moreno, 70 N.Y.2d at 405, 521 N.Y.S.2d at 665 (further citation omitted), and his denial of the recusal motion should "not be overturned" absent "an abuse of discretion," see id. (further citations omitted), his denial should be sustained in all respects. In furtherance of the prohibition against "judge shopping," and in an effort to promote the "efficient administration of justice," see Ortiz, 136 Misc.2d at 502, 518 N.Y.S.2d at 915, the decision of the lower court should be affirmed.

POINT IV
FICALORA'S FAILURE TO PROPERLY SERVE THE TOWN MADE THE SUMMONS JURISDICTIONALLY DEFECTIVE

a. Appellant Failed to Serve the Proper Party

Under CPLR 311(5), personal service upon a town must be made by delivering the summons to the "Town Supervisor or the Town Clerk." Rankel v. Town of Greenburgh, 117 F.R.D. 50, 53 (S.D.N.Y. 1987) (cited in Weinstein, Korn, Miller, N.Y. Civ. Prac. § 311.19 n.95 (1998)) (finding service upon defendant-town defective when *pro se* plaintiff served Town Attorney). Since Ficalora served Deputy Town Attorney Richard Whalen, (20), rather than the town clerk or supervisor, service was never properly effectuated under the statute and his claim could have been dismissed on this ground alone.

b. Appellant Failed to Comply With the Commencement-by-Filing Provisions of the CPLR

Ficalora served the Town on June 29, 1998. (20). Appellant's summons and complaint, however, were not filed until June 30, 1999, one day later. (12-13).

In 1992, the Legislature effected a change in "civil practice in the Supreme and County Courts from a commencement-by-service to a commencement-by-filing system." In re Gershel v. Porr, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 84 (1996) (citation omitted). In the Supreme and County court, "the payment of a filing fee and the filing of initiatory papers [mark] the acts that commence an action or special proceeding." Id. (citing CPLR 304, 306(a). Now, under the new system, when a party effects service of process "without first paying the filing fee and filing the initiatory papers, the action or proceeding"is a "nullity, . . . never having been properly commenced" in the first place. Id. (citation omitted).

Since Appellant failed to pay the filing fee and file his initiatory papers before serving the Town, this action is a "nullity" and as such, should have been dismissed on this ground alone.

Appellant's failure to serve the Town with a summons containing an index number and date of filing is thus understandable since he had not filed his summons and complaint at all before the date of service. Thus, cases such as Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dep't 1995), Forsythe-Kane v. Town of Yorktown, 228 A.D.2d 548, 644 N.Y.S.2d 329 (2d Dep't 1996), and Maldonado v. County of Suffolk, 229 A.D.2d 376, 644 N.Y.S.2d 572 (2d Dep't 1996), are inapplicable.

Conclusion

Since a motion to dismiss under CPLR § 3211 was made by the Town in lieu of serving an answer, we have limited this brief to the procedural grounds upon which the Supreme Court dismissed the action, and several other grounds which could and should probably have been relied upon by that court in dismissing the action. Should the Court reject Respondents' claims, however, and reverse, the matter would be remanded to Supreme Court for the service of an answer by the Town, following which the Appellant's substantive claims would be litigated.

The order of the Supreme Court, Suffolk County (Underwood, J.) granted February 1, 1999 and entered in the Office of the Clerk on February 3, 1999, should be, in all respects, affirmed.

Dated: Melville, New York
November 2, 1999

Respectfully submitted,

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