

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.

Affidavit in Reply
to Defendant's
Opposition
Case no. 99-02065

God, the Supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people, for his own glory and the public good; and to this end, hath armed them with the power of the sword, for the defense and encouragement of them that are good, and for the punishment of evil-doers.

From: **The Westminster Confession of Faith**, CHAPTER XXIII article 1, Of the Civil Magistrate submitted to the English Parliament in 1646.

STATE OF NEW YORK)
) sworn statement:
COUNTY OF SUFFOLK)

ROBERT A. FICALORA, being duly sworn, deposes and says:

- 1.) I am the acting president and assignee of the Montauk Friends of Olmsted Parks/Montauk Trustee corporation as set forth in the papers commencing this motion for reconsideration of the court's October 23rd, 2000, decision and order or, in the alternate, for leave to appeal the legal and Constitutional issues raised herein to the Court of Appeals of the Supreme Court of the State of New York.

2.) Your deponent comes before this court with clean hands and honorable purposes and does honor this court and has always comported himself with the utmost and due respect. He has praised Justice Underwood in open court and in the record and does herewith affirm that praise and recognition.

3.) In his "affidavit in opposition" dated 11/30/2000 attorney Richard C. Cahn makes arguments supporting his contentions that:

- a.) [Mr. Ficalora] "cannot represent a corporation without violating CPLR § 321(a) as both this court and the Court of Appeals have repeatedly held" and
- b.) "he attempts to void application of § 321(a) as applied by this court and by the court of appeals by submitting to the court a purported new "Resolution of Assignment dated November 7, 2000"

4.) In reply to "a", deponent notes that the October 23rd, 2000, decision was the first time that the Appellate Division has dismissed one of our matters upon the ground of lack of representation of a corporation by an attorney (CPLR 321[a]). Mr. Cahn's statement, therefore, that this court, the Appellate Division, has "repeatedly held" that your deponent cannot represent the corporation upon assignment by the MFOP corporation citing CPLR 321(a) is a misstatement of fact.

5.) The Court of Appeals remanded this matter subsequent to dismissal of the corporation's other actions pursuant to CPLR 321(a) without determining the validity of the assignments made. This court, therefore, has jurisdiction in this matter which is legally unaffected by the Court of Appeals prior decisions (exh. A).

6.) Furthermore, the decision and order of 10/23/2000 does modify existing law in order to deny equal protection of law. The argument of a Constitutional violation is, therefore, properly brought at this time.

7.) In reply to assertion "b", above, your deponent does assert that in Kamp as

Assignee of AAA Stretch, Inc., Appellant v In Sportswear, Inc., Respondent (39 A.D. 869, reversing for reasons stated in dissent at App term 70 Misc.2d 898, 899), Traktman v. City of New York, (182 A.D.2d 814, 815) and Medical Facilities v. Pryke (172 A.D.2d 338) this court held that the assignment of a corporation's cause to a non-attorney conferred the Assignor's right to the Assignee to enforce the claim by action (General Obligations Law, § 218).

8.) Given this court's 10/23/2000 decision and the prior decisions of the Court of Appeals, all of which denied consideration of the assignments presented in the decisions and orders entered, it must be inferred that the assignments made were somehow irregular.

9.) By increasing the board to a substantial size composed of a majority of individual proprietors of Montauk and establishing compensation for your deponent assignee's efforts on the corporation's behalf, the 11/7/2000 resolution of assignment corrects any irregularity of the prior assignments made and, therefore, may be considered to allow this court jurisdiction *nunc pro tunc* to continue this action.

10.) The motion for reconsideration of this court's 10/23/2000 decision and order of this court was timely filed and this court has jurisdiction and we do further pray that it will be granted together with such other and further relief that this court deems equitable and just.

Sworn before me this
___ day of December, 2000

Robert A. Ficalora

Notary Public

State of New York,
Court of Appeals

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on thetwentieth.....day
of.....June..... 2000

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

2-12 Mo. No. 399
Robert A. Ficalora, &c.,
Appellant,
v.
Town Board Government of East
Hampton, et al.,
Respondents.

A motion in the above cause having heretofore been made upon
the part of the appellant herein and papers having been submitted
thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is
dismissed upon the ground that no motion for the relief sought
properly lies in this Court.

Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

ENTERED ON DOCKET
DATE *6/20/00* BY *[Signature]*