New York State Supreme Court

Appellate Division - Second Judicial Department

Docket No.

97-10457

File No.

97-10463

Robert A. Ficalora, both *pro se* and as acting president of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Plaintiff-Appellants

- against -

Joseph & Joanne Guarneri, owners in fee of Suffolk County tax lot no. 47-1-6.1 situate at the interchange of route 27 and the Old Montauk Highway (Cliff Drive),

and

The town board government of the Town East Hampton, 159 Pantigo Road, East Hampton, 11937

Defendants-Respondants

Appellant's Brief

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Suffolk County Clerk's Index No. 97-17016

APPELLATE DIVISION OF THE SUPREME COURT
SECOND JUDICIAL DEPARTMENT

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Statement Pursuant to
CPLR 5531

The index number of this action for declaratory judgment is 97-17016.

The full names of the original parties are as set forth above. There have been no changes.

The proceeding was commenced in the Supreme Court of the State of New York, County of Suffolk.

The proceeding was commenced by service of a Summons and Complaint, on July 13th, 1997. Perfected personal service upon all parties was made on or about August 27/28, 1997. A motion to dismiss was entered by defendants Guarneri in lieu of a verified answer on or about August 7th. Verified answer by respondent town board government of East Hampton was served on or about August 31st, 1997.

This action was commenced for a declaratory judgment determining: 1.) the legality of the permits issued under state and local law; and, 2.) declaring and determining the rights of the respective parties in this action. The pleading also sought a restraining order upon construction pending the determination of the court.

This is an appeal from the order and judgment of the Honorable William L. Underwood, Jr., J.S.C., dated October 31st, 1997, and entered November 7th, 1997 which summarily disposed of multiple motions/orders entered by plaintiff.

This appeal is made upon an appendix of the record (reproduced) and the full record of companion case no. 97-10457 (Suffolk# 97-23205) submitted March 31st, 1998, as one book. By notice dated April 3rd, 1998, this court did open this file as a consolidated case with the above companion special proceeding under docket number 97-10457.

The order and judgments appealed from were not made after a trial or hearing.

Dated:
Montauk, LI, New York
May 11th, 1998.

ROBERT A. FICALORA
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Questions Presented

1. Was this action commenced for declaratory judgment?

   ☞ The court below implicitly answered this question "No."

2. Was cause shown as ordered by Justices Lester E. Gerard, J.S.C., Lawrence J. Bracken, J.A.D., and Alan D. Oshrin, J.S.C., why the permits issued should not be vacated/annulled?

   ☞ The court below implicitly answered this question "Yes."

3. Was Plaintiff's pleading for a preliminary injunction properly heard?

   ☞ The court below implicitly answered this question "Yes."

4. Does Plaintiff have standing to sue both individually and as acting president of the Montauk Friends of Olmsted Parks corporation?

   ☞ The court below implicitly answered this question "Yes."

5. Should an order be issued enjoining plaintiff from bringing further applications without leave of the court?

   ☞ The court below answered this question "No."

6. What are the rights of the respective parties joined hereunto?

   ☞ The court below failed to determine and declare same as plead.

7. What is the Constitutional basis for town board government's claim of jurisdiction in Montauk?

   ☞ An action for declaratory judgment not having been maintained in the court below, this question remains unaddressed.

Preliminary Statement

This brief is submitted on behalf of the appellants.

This appeal is from an order of the Supreme Court, Suffolk County, entered November 7th, 1997, which in pertinent part:

a. summarily treated this action as a special proceeding pursuant to CPLR Article 78.

b. dismissed two orders to show cause why permits should not be vacated/annulled.

c. failed to determine the rights of the parties joined herein .

This action was commenced for declaratory judgment: 1.) determining the legality of permits issued under the local zoning ordinance; 2.) restraining defendants from continuing violation of said ordinance; and, 3.) determining and declaring the rights of the parties joined herein.

A companion action brought under CPLR article 78 has been perfected and is fully submitted to this court.

The town board government of East Hampton has questionable jurisdiction over Montauk; Constitutional issues are raised.

This appeal will attempt to cover the issues raised in the court below appropriate for determination by declaratory judgment as set forth in his July 16th, 1997, complaint. Questions raised and arguments presented in the companion proceeding will be minimized herein.

Statement of Facts

1. The matter at bar concerns the legality of permits issued to “create” a single family residence upon a quarter-acre non-conforming over-density lot in a Resort zone district in Montauk.
2. Subject quarter acre property occupies a prominent location within a historic landscape in Montauk.
3. A quarter acre lot is substandard under the zoning ordinance.
4. A judgment and order in this matter may be entered into the chain of title to subject property to ensure that it remains in harmony with its natural surroundings.
5. This action was commenced for declaratory judgment on July 16th, 1997, and sought a restraining order
6. Orders to show cause were entered by Hon. Lester E. Gerard, J.S.C., and Hon. Alan D. Oshrin, J.S.C..
7. The order to show cause entered by Justice Gerard was amended and reentered by Hon. Lawrence J. Bracken, J.A.D..
8. Motions for summary judgment and for consolidation with a companion action brought under Article 78 were also entered by plaintiff.
9. The order and judgment below summarily dismissed this action as “without merit” and did not render declaratory judgment as plead.

Point I

This action was properly commenced for declaratory judgment

The proper purpose of a declaratory judgment action is complete and final settlement of rights and legal relations of parties with respect to matters of controversy. Barry v. Ready Reference Pub. Co., 269 N.Y.S. 2d 665, 25 A.D.2d 827.

In Bloom v. Mayor of City of New York, 312 N.Y.S. 2d 912, the court held that:

> "We think that an action for a declaratory judgment provides a full remedy, which the more restrictive focus of an Article 78 proceeding cannot envelop. Thus, in a declaratory judgment action the court may not only review the constitutionality of the statute, but also determine whether a public official acted in disregard of the statutory standard, or in excess of the grant of authority, or in violation of due process (cit. omitted)."

Appellant asserts that the town board government acted in disregard of statutory standards in issuing a building permit for the creation of a single family residence upon a substandard, nonconforming, overdensity Resort zone lot, and that the Planning Board of same did exceed its grant of authority under both State and local enabling acts in issuing a special permit to allow such creation.

This action was correctly commenced for declaratory judgment to determine and uphold the laws of East Hampton and the State of New York. All of the necessary facts pertaining to the Guarneri permits are before the court; the court should retain jurisdiction and issue declaratory judgment.

Point II

Plaintiff asked the court below to uphold the law, not to substitute its discretion.

The court below asserted that "a special proceeding pursuant to Article 78 should not be utilized to allow a court to substitute its discretion for that of an administrative agency" (citing Chessin v. New York City Conciliation and Appeals Board, 100 A.D.2d 297 (1st Dept, 1984)).

In Chessin the court determined that the appellant-respondent Appeals Board had authority under the applicable statute and that its action was "well within the administrative discretion of the board."

However, it is argued herein that the Respondent Town did not have the authority to issue zoning (land use) permits in derogation of statute. Town Law §§ 261, 274-a. Ronning v. Thompson, 126 Misc. 2d 762 (citing Matter of Kamhi v. Town of Yorktown, 59 NY2d 385); McEnroe v. Planning Board of the Town of Clinton, 61 Misc. 2d 937, ; Marcus v. Mamaroneck 283, N.Y. 325, S. Chas. Gherardi & Sons, Inc. v. Glass, et al., 32 A.D.2d 960). (see p. 252, 266, 269ff).

Plaintiff asked the court below to uphold the law, not to substitute its discretion. Judgment of court below should be reversed and declaratory judgment granted.

Point III

The court below misapplied arbitrary and capricious standard.

Assuming jurisdiction, the court below applied an arbitrary and capricious standard in dismissing plaintiffs pleadings citing Harwood v. Bd of trustees of Incorporated village of Southampton, 176 A.D.2d 291 and Corliss v. Solomon, 75 A.D.2d 837. (p. 167)

In Harwood, a proceeding was commenced pursuant to CPLR Article 78 subsequent to the denial of an application by petitioner following a hearing for permission to construct a walkway and dock upon an easement across real property claimed in fee by a municipality. In the matter at bar, however, plaintiff: was not denied an application by a municipality after a hearing; did not commence this action pursuant to Article 78; and, pleaded for the court to declare and uphold state and local law. No request was made for the court to substitute its discretion: it was alleged the town board government did not have discretion.

Furthermore, in Corliss the court held that: "... the reviewing court may only annul a discretionary determination of an administrative body ... if the determination is illegal, arbitrary, or capricious." (emph. added.) Plaintiff commenced this this action for a declaratory judgment upon the legality of the permits at bar and repeatedly asked the court to stop violations of state and local law (177ff., 74, 76, 394ff.). No judgment was had upon these pleadings and orders. The judgment and order of the court below should be reversed and a declaratory judgment made.

Point IV

Rights of respective parties have not been determined and declared; Constitutional issues raised.

Pleading of Appellant demanded that the court declare and determine the rights of the respective parties hereto (178). The jurisdiction of the town board government is questioned (180, 104).

Most interesting to this court are the resolutions, claims, notices and other documents by or pertaining to the Montauk Friends of Olmsted Parks corporation in the record (107, 179, 256, 261).

Appellant believes that the Olmsted park system in Montauk is municipal in character due to the rights and privileges accruing to the proprietors of Montauk through the historic Town Patent of 1686 and Chapter 139 of the Laws of 1852.

A June 1682 petition by the settlers in East Hampton upon the raising of their militia demanded the birthright liberty of a government by a general and free assembly of representatives. This petition was delivered to the governor of the province of New York and caused the assembly of New York to be established. At that convening the first constitution of democratic government for New York was enacted on October 30, 1683. Many of its tenets have carried forward in the Constitution to this day.

The patent was issued to East Hampton when the Duke of York ascended the throne as James II and refused the Constitution which he had previously approved, thereby dissolving the assembly. It confers upon the property owners and inhabitants

absolute home-rule powers so long as the laws adopted are not repugnant to what now would be state or federal law. It established a corporation to administer these rights. The protection of this form of right was among the principal causes set forth in the Declaration of Independence.

The proprietary rights at East Hampton and Montauk were protected at Article I section 15 of the Constitution of the state of New York from 1777 until questionably repealed in 1962. These rights also appear to be protected at Article I section 10 (contract clause) of the federal Constitution. (Trustees of Dartmouth College v. Woodward, 4 Wheaton 518).

What is unsettling is that the upholding of these rights will place the governance of East Hampton, Montauk and possibly Southampton outside of the jurisdiction of the State Assembly. They will, however, remain under the jurisdiction of this court. If upheld, the Town Law would be unconstitutional in its application to these lands. Plaintiff has promised to deliver an instrument of government to the community. (299) It would be consistent with our history for the judiciary to have input into the framing of such a constitution.

The town board government has refused to answer freedom of information act requests as to its origin and the basis for its claim of jurisdiction. It appears to have been set up after the enactment of the 1909 Town Law and the fire which destroyed the library of the assembly at Albany in 1911. Appellant believes it to be operating without incorporation papers or enabling act from Albany.

Conclusion

Court should issue declaratory judgment upon the legality of permits and uses which may be lawfully made of the quarter acre Guarneri property and remand Constitutional questions for trial.

The Constitutional and jurisdiction questions, though raised in the record and important in the determination of the rights of the parties joined herein, were not made in re: the Guarneri permits. Appellant suggests that the court dispose of procedural and standing issues, enter judgment upon the Guarneri permits and property, and remand the Constitutional issues for further discovery and trial.

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

Robert A. Ficalora

Petitioner, *pro se*