New York State Supreme Court

Appellate Division - Second Judicial Department

Docket No. 98-07988

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

Petitioner-Appellants

- against -

the Planning Board and Building Department

of

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

Respondents-Respondents

Appellant's Brief

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Suffolk County Clerk's Index No. 97-23205

A.D. case no. 98 - 07988 (Suffolk 97-23205)

Statement Pursuant to CPLR § 5531

Supreme Court of the State of New York

APPELLATE DIVISION - SECOND JUDICIAL DEPARTMENT

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

Petitioner-Appellant

- Against -

The Planning Board and Building Department

of

The Town Board Government of the Town of East Hampton.

Respondents

The index number of this special proceeding is 97-23205.

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

This action was commenced in the Supreme Court of the State of New York, County of Suffolk.

This action was commenced by service of a Summons to appear in opposition to the entry of an order to show cause (OTSC) containing a temporary restraining order (TRO) on or about September 9th, 1997, with the OTSC having been entered by Hon.

John J. J. Jones, Jr., J S.C., without the TRO on September 12th. Issue was joined by Verified Answer of defendants on or about October 3rd, 1997.

This is a special proceeding pursuant to Article 78 of the Civil Procedures Law and Rules in the nature of prohibition and mandamus to compel for a permanent injunction annulling a Special Use Permit and a Building Permit as being issued in violation of State and Local law.

This appeal is from a Judgment and Order of the Supreme Court of the State of New York, County of Suffolk, by Underwood, Jr., J.S.C., dated July 29th and entered August 3rd, 1998, assessing sanctions for litigation allegedly frivolous in fact and in law.

This Appeal is made on this record of proceedings subsequent to the much delayed June 17th, 1998, hearing upon sanctions, the full record submitted in Appellate file number 97-10457, and the record of companion action by plaintiff/petitioner against Joseph & Joanne Guarneri and the Town of East Hampton (Suffolk index 97-17016, A.D. 97-10463).

References to record in this appeal are prefixed with the letter "a"

References to the record of A.D. 97-10457 & 97-10463 are prefixed with "b"

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A.D. case no. 98 - 07988 (Suffolk 97-23205)

Questions Presented

Was a hearing ever had or order entered at or by which it was "resolved" that the "requisite permit" had been issued?

Did defendants ever show cause as ordered why the permits issued should not be annulled for allowing violations of statute without the necessary variances from the zoning ordinance?

Did the court of Justice Underwood obstruct appellant's attempts to uphold state and local public interest laws?

Did the court of Justice Underwood deny appellant's constitutional right to equal protection under the law and to a fair trial?

Does the court of Justice Underwood desire to stifle good faith litigation and deter free access to the courts?

Can this court disqualify Justice Underwood for violation of his oath to administer impartial justice, for obstructing plaintiff's attempts to uphold state and local law, and/or for denying his constitutional rights?

Is this appeal honestly and humbly made in good faith?

Preliminary Statement

This brief is filed upon an appeal of a judgment and order assessing sanctions for litigation alleged to be frivolous and without merit in the law on the ground that it had been "resolved" that "the requisite permit" had been issued.

The court will find, however, that no hearing was had nor order entered at or by which it was "resolved" that "the requisite permit" had been issued. Further, plaintiff had no knowledge that such resolution had been made, nor was this ever argued in defendants' briefs.

No legal and valid permit has been issued for the creation of a single family dwelling unit on the nonconforming over density quarter acre Guarneri lot. The court below failed to sustain the order to show cause entered by Justice John J. J. Jones, J.S.C., and dismissed specific unanswered allegations of illegality with a simple "we disagree."

The record before this court reflects a difficult struggle by appellant to overcome the legal and procedural obstructions presented by unfair treatment by the court of Justice William L. Underwood, Jr., J.S.C., and that his bias and prejudice did actually and unjustly affect that orders and judgments entered herein.

Statement of facts

The creation of a single family residence (dwelling unit) upon a nonconforming over density resort zone lot is prohibited under the zoning ordinance.

No variance from maximum dwelling unit density has been issued.

The creation of a single family residence upon a resort zone lot fully developed for resort use requires a special use permit for a "conversion" and a building permit may not be issued absent such a special use permit.

No special permit for a conversion has been issued.

The minimum standard lot size for creation of a single family residence in the Town of East Hampton is one-half acre and the subject lot is one-quarter acre.

No variance from minimum standard lot size has been issued.

The Planning Board cannot issue permits at variance with the law or for uses ambiguous under the law.

Building permit 36017 allows for construction in a (CI) Commercial Industrial district while the Guarneri lot is in a (RS) Resort zone district.

No hearing was had or order entered at which it was "resolved" that the "requisite permit" had been issued to create the Guarneri structure.

Point I

Justice Jones' order to show cause was not sustained. No hearing was had nor order issued at or by which it was determined that the "requisite permit" had been issued. There is no basis for assessment of sanctions.

The order to show cause (OTSC) entered by Justice John J. J. Jones, J.S.C.. upon specific assertions of violations of state and local law was dismissed without a hearing or answers upon the merits by respondents. In summarily dismissing this proceeding as frivolous, Justice Underwood did fail to sustain the OTSC as entered and has denied appellant due process of law and equal protection under the law.

In his July 29th order and judgment Justice Underwood does assess sanctions against appellant because:

> The documentary evidence in this action overwhelming [sic] demonstrated that it was initially predicated upon a factual error, namely: respondents' purported failure to obtain a requisite permit. When this was resolved, the plaintiff continued to prosecute this action under alternative theories. (a 4).

The court will find in the record that no hearing was had nor order entered at or by which it was "resolved" that a legal and valid "requisite permit" had been issued for the construction of the Guarneri building. Nor was plaintiff at any time aware of such resolution.

To assess sanctions without a hearing having been had or order having been entered making such alleged determinations, and without any warnings or indications having been made by the court to this effect, is groundless and defies all reasonableness.

Point II

Requisite special use permit was for "conversion". Special use permit issued for "creation" of a dwelling unit upon the nonconforming over density resort zoned lot is illegal. No legal and valid permits have been issued.

The order to show cause which commenced this special proceeding asserted that the "special use permit" for "creation" of a single family residence upon the over density Guarneri lot is illegal, and that the requisite special use permit for the Guarneri structure was for a "conversion".

The "factual error" in the original complaint in companion action for declaratory relief (b 176) that defendant Guarneri did fail to apply for a special use permit is true, but, however, no legal and valid permit for the "creation" of a dwelling unit upon the over density Guarneri lot has been issued and the complaint remains valid.

The specific standards and safeguards for conversion of a portion of the Guarneri lot for the creation of a single family residence would have required variances from road setback, maximum dwelling unit density and minimum lot size. A use variance was required from the prohibition upon exceeding maximum dwelling unit density.

Furthermore, a special permit for a conversion was required for a building permit, and the permit required was for an RS (Resort) zone district. Building permit 36017 was issued without a special permit for conversion and for a CI (commercial industrial) zone district.

No legal and valid permit for the creation of the Guarneri structure has been issued. Award of sanctions based on finding that proceeding had "resolved" that "requisite permit" had been issued is groundless. Judgment and order should be reversed with costs.

Point III

Justice Underwood seeks to provide relief to Town outside of the law which he was unable to provide in the law. Appellant's constitutional rights violated. Justice Underwood should be disqualified.

Given the foregoing arguments, the assessment of sanctions by Justice Underwood can only be understood as an extreme bias against appellant in favor of the Town of East Hampton, whom he refers to as "the sovereign". (a5)

Respondent town board government did move for an order enjoining appellant from bringing further applications without prior leave of the court. (b340) Justice Underwood did consider that motion but could not support such an extreme sanction in the law. (b167) Instead, Justice Underwood seeks to provide such relief through obstruction, unfair treatment, and the intimidation of sanctions.

Appellant's constitutional rights to equal protection under the law (N.Y. Art. 1 § 11) and to a fair trial (U.S. 5th Amend. due process clause) have been violated.

Disqualification should be considered by this court. Appellant has, however, discovered no statutory interest or relation by Justice Underwood which works to his disqualification in this matter, nor has he discovered a direct relation between Justice Underwood and the Town or the Guarneris.

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 act of his, justified a doubt of his impartiality." Moers v. Gilbert, 175 Misc. 733, 737, 25 N.Y.S.2d 114, 118, affirmed 261 App. Div. 957m 27 N.Y.S.2d 425, 426.

Certain of Justice Underwood's actions in the politically sensitive matter of Montauk proprietors' rights over the Reservation properties, together with the extreme

nature of his actions herein, may constitute grounds for reversal or disqualification. (a69ff) People v. Kohl, 17 Misc. 2d 320.

In Kohl, the Justice was a member of the local town board which had instituted a corollary action against defendant. In the matter *sub judice*, Justice Underwood has presided for *thirteen years* over matters pertaining to the controversial Benson Reservation properties and has maintained close relations with the Town and its attorneys.

The matter before Justice Underwood of Montauk Friends of Olmsted Parks v. the Town of East Hampton and Sunbeach Montauk II, Suffolk 98-14806, which seeks to finally determine the validity of Sunbeach title to the Reservation property, is stalled with an affidavit of prejudice filed. Judicial process is being substantially impaired.

Through his long involvement in these matters Justice Underwood has become an interested and biased party herein. He is unable to render fair and impartial treatment. He should be disqualified and/or his judgments and orders reversed with costs.

Point IV

Allegations of misuse of courts unfounded and unreasonable

Justice Underwood, in his July 29th, 1998 order assessing sanctions states that appellant believes *"That a noble purpose justifies ignoble means and that his property rights entitled him to trample upon the rights of other freeholders"*. He further states that appellant has used the court *"not as a forum, but as a weapon to injure the innocent."* (a5)

Is appellant/plaintiffs' approaching the court for declaratory and injunctive relief in order to uphold state and local laws an "ignoble means"?! This denies all purposefulness in approaching the court for relief.

Is it the right of a freeholder to conspire with civil authorities to violate our public interest laws, or is it the right of a freeholder to approach the court in order that they be upheld?

Furthermore, the "innocence" of the defendants/respondents upon the laws argued by appellant remains undetermined.

The extent of the bias and prejudice of Justice Underwood against appellant is best revealed by the language of this judgment. Appellant has approached the court properly, honorably and in good faith. Allegations of misuse or abuse of the courts by appellant are unfounded and unreasonable.

Conclusion

There is no basis for the assessing of sanctions. Appellant seeks only fair and honest treatment by the court..

This brief opposes the assessing of sanctions against appellant for contesting the legality of certain permits issued by the Planning Board and Building Department of the town board government of the Town of East Hampton. There has been no answer to the order to show cause which commenced this proceeding upon the merits presented. If the order had been sustained by an impartial judge, the permits would have been annulled.

In the two related cases, three orders to show cause have been entered by four different Justices of the Supreme Court, including Associate Justice Lawrence Bracken of the Appellate Division, requiring a showing of why the permits issued should not be annulled for being in violation of the zoning ordinance. No hearing was had upon these orders and none have been answered by defendants upon the merits presented.

No hearing was had nor order issued at or by which it was determined that "the requisite permit" had been issued. The court below had every opportunity to hold such a hearing or enter such an order had such a determination been made. There is no basis for finding this litigation frivolous and without merit in fact or in law.

Appellant seeks only fair and honest treatment by the courts of the State of New York. Judgment and order should be reversed with costs of both appeals and such other and further relief which the court deems equitable and just.