

Supreme Court of the State of New York

Appellate Division - Second Judicial Department

MONTAUK FRIENDS OF OLMSTED PARKS,
INC., a not-for-profit corporation established
under the laws of the State of New York

Plaintiff

- against -

THE BROOKLYN HISTORICAL SOCIETY,
INC., a not-for-profit corporation established
under the laws of the State of New York
(formerly the Long Island Historical Society)
and MS. IRENE TICHENOR, as director thereof

Defendants

Combined
case no.s

99-04460

99-04461

Appellant's Brief

Robert A. Ficalora, *pro se*
Assignee of the Montauk Friends
of Olmsted Parks corporation.

P.O. Box 2612
Montauk, NY 11954
(516) 668-3119
www.montauk.com

Thelen, Reed & Priest, LLP
Attorneys for Defendant
Brooklyn Historical Society, Inc.

40 West 57th Street
New York, NY 10019-4097
(212) 603-2000
www.thelenreid.com

Suffolk County Index number 97-14067

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Table of Contents

Questions Presented 1

Preliminary Statement 2

Statement of Facts 4

Point I

Plaintiff MFOP stated cause of action. 5

Point II

Items secretly entered in Preliminary Conference Stipulation may be struck on the ground of surprise and unjust effects. 6

Point III

The Montauk Friends of Olmsted Parks Corporation, as claimant successor to the Montauk Trustee Corporation, has a valid claim to its corporate papers. 7

Point IV

The records at issue should be ordered delivered into the court’s possession for their accounting and protection pending a determination of their proper disposition through an action at law or, alternately, ordered secured and accessible within the premises of the BHS building. 8

Conclusion

The cause of action was shown, the contested stipulation inclusions may be struck or the stipulation vacated, and the corporation of the proprietors of Montauk has a valid claim for relief. 9

Table of Authorities

Central Valley Concrete Corp. v. Montgomery Ward & Co., 310 N.Y.S.2d 925, 34 A.D.2d 860.	6
Henry P. Hedges, and others, against the Trustees of the Freeholders and Commonalty of the Town of East Hampton (citation unknown)	7
Humphries v. Shapiro, 187 App. Div. 96	6
Thermaletic, Inc. v. Still-Many Mfg. Corp., 43 A.D.2d 734, 350 N.Y.S.2s 685, 2 Carmody Wait 2d N.Y. Prac., 7:20, p. 29.)	6

Questions Presented

- Can the court grant relief from a stipulation on the grounds of surprise when it appears that denying such relief would be harsh or unjust?

The court below denied such a motion.

- Did Plaintiff fail to state the cause of action?

The court below said “yes”.

- Does the Montauk Friends of Olmsted Parks corporation, as claimant successor to the 1852 corporation of the Trustees of Montauk, have a valid claim to its corporate records and seal?

The court below failed to discern this cause of action.

- Did the Montauk Friends of Olmsted Parks corporation seek to protect historic documents which it believed were threatened by behavior of defendant Brooklyn Historical Society?

The court below failed to discern this cause of action.

Preliminary Statement

The cause set forth in the complaint commencing this action was to protect and determine the disposition of the municipal records and artifacts of the 1852 corporation of the Trustees of Montauk.

A delay in pursuing this litigation was caused by other litigation, the promised reopening of the BHS site, settlement discussions with Mrs. Cappozzola, and the possibility of a reasonable offer of settlement without judicial intervention. Plaintiff/Appellant was legally unable to accept the conditions for settlement sought by defendant/respondent Brooklyn Historical Society (BHS) .

The proceedings below were contentious. Plaintiff's request for preliminary conference was served on July 6th, 1998, but a conference was not available until October 15th, 101 days after the request was served. No order was issued by the court below to allow variance from the requirement that a conference be scheduled in 45 days (See Court Rule § 202.12(b)). The attorney for defendant/respondent did then refuse to participate in the preliminary conference unless attended by attorney Joel Kupferman who, upon his belated arrival, signed a stipulation agreeing to certain undiscussed requirements. Plaintiff/appellant asserts that he was prevented from reviewing the document before it was signed and was surprised at the inclusions discovered. A motion to strike was made on October 24th, nine days later. Attorney Kupferman has since abandoned the case.

Court process was deadlocked by multiple motions left undetermined by the court below and defendants/respondents lack of good faith and a preemptive motion for summary judgment during the discovery process.

The court will find that the security and judicial determination of the proper disposition of the documents of the Montauk Trustee corp. is a valid cause of action. The disposition question has been repeatedly raised by the Town of East Hampton which, however, cannot make a valid claim to these documents due to the September 6th, 1851 order of Hon. Nathan B. Morse, J.S.C., in the matter of Henry P. Hedges, et. al. (the proprietors of Montauk) v. the Trustees of the Freeholders and Commonalty of the Town of East Hampton, (citation unknown, record removed from Riverhead).

In the above matter the court had ordered the Town of East Hampton to release all corporate claim to Montauk and deliver many of the documents *sub judice*. The proprietors of Montauk were then incorporated at chapter 139 of the laws of 1852 wherein their power to govern was affirmed. Other of the papers are the records of that corporation including the minutes book, bylaws, etc. These papers are municipal records which, according to an agreement with Arthur W. Benson (the immediate successor proprietor of Montauk) were to be retained in Montauk.

Upon its incorporated purposes and by resolution of its membership, the Montauk Friends of Olmsted Parks corporation (MFOP) has claimed to assume the rights, privileges and powers of the 1852 incorporation of the proprietors of Montauk. Appellant asserts that by virtue of this claim the properties in the possession of the Brooklyn Historical society may be claimed by the MFOP corporation.

This is a justiceable complaint. We fear for the security of the subject documents and believe that they are the property of the Montauk Trustee corporation.

Given the unsettled facts and circumstances surrounding the BHS possession and care of these properties, the MFOP has no remedy at law.

Statement of Facts

By his September 6th, 1851, order, the Honorable Nathan B. Morse, Justice of the Supreme Court at Riverhead, Suffolk County, many of the historic documents now or formerly in the possession of the Brooklyn Historical Society were ordered released by the Town of East Hampton (Trustees) to the body of Montauk proprietors subsequently incorporated at chapter 139 of the laws of 1852 (Montauk Trustee corp.).

Among the records are contracts with the Montauk tribe of Indians which, among other things, burden large tracts of real property with covenanted agreements written in perpetuity to run with the land in favor of all heirs, successors and assigns of land at Montauk.

Also among the documents at issue are the corporate records of the Trustees of Montauk including the minutes book, bylaws, substantial legal records, account ledgers and receipts, and corporate miscellany.

The issue of defendant's possession of the Montauk Trustee documents has been repeatedly raised by the Town of East Hampton which has unsuccessfully sought to recover them.

Shortly after plaintiff/appellant discovered that the records were in defendant's possession in the Spring of 1997, defendant did close its doors and deny access to its site and is now closed "in preparation for a major building restoration project" (from www.brooklynhistory.org updated 9/22/99).

Point I**Plaintiff MFOP stated cause of action.**

In the verified complaint commencing this action appellant did state that:

“This action is brought pursuant to CPLR 2701 to compel the determination of the final disposition of the records of the corporation of the Trustees of Montauk...” (25)

While CPLR 2701 may normally be utilized as a part of process in other forms of action, in this matter the sole purpose is for the court to determine where these properties belong. To the extent that this statute is inappropriate or insufficient for the purposes of this action, it is within the power of the court to sit in equity and convert it to an action for declaratory judgment.

Plaintiff’s cause of action is further stated in line 5 of the verified complaint filed in this matter that plaintiff “does... fear for the security of the documents in [the Brooklyn Historical Society’s] possession” and does demand orders, at lines 14 & 15, that the documents be immediately delivered into the court’s possession pending a judgment and order determining their final disposition.

The court erred in failing to determine the cause of action presented in the Verified Notice of Claim filed June 10th, 1997.

Point II

Items secretly entered in Preliminary Conference Stipulation may be struck on the ground of surprise and unjust effects.

The preliminary conference stipulation entered into on 10/15/98 (101) was not made in open court and was challenged with a motion to strike by plaintiff dated 10/24/98 on the grounds that the dates contained therein did not represent those agreed upon in conference (106), or surprise. Parties may be relieved from stipulations if there has been a showing of fraud, collusion, mistake, accident, surprise, or where it otherwise appeared that to deny relief would be harsh or unjust. (Thermaletic, Inc. v. Still-Many Mfg. Corp., 43 A.D2d 734, 350 N.Y.S.2s 685, 2 Carmody Wait 2d N.Y. Prac., 7:20, p. 29.)

The entries made covertly upon the stipulation form by attorney for defendant would unjustly prevented plaintiff from the possibility of obtaining a judgment upon the merits and would have effectively discontinued the action.

Power to grant relief from a stipulation is founded upon the principle that court to which rights of parties have been submitted will supervise all proceedings in the action, and will control such proceedings with view to final disposition of the case according to the merits. (Central Valley Concrete Corp. v. Montgomery Ward & Co., 310 N.Y.S.2d 925, 34 A.D.2d 860.)

The entries made upon the stipulation conference agreement form were made without appellant's or his attorney's consent, regardless of the signature obtained. This court has the power to relieve plaintiff where of such a stipulation if both sides can be restored to substantially their former position. (Thermaletic, supra, citing Humphries v. Shapiro, 187 App. Div. 96)

Point III

The Montauk Friends of Olmsted Parks Corporation, as claimant successor to the Montauk Trustee Corporation, has a valid claim to its corporate papers.

In his order dated September 6th, 1851, in the matter of Henry P. Hedges, and others, against the Trustees of the Freeholders and Commonalty of the Town of East Hampton (citation unknown), the Honorable Nathan B. Morse, J.S.C., did order that the Trustees:

“do deliver up the possession of the said lands to the Ptffs. & other beneficial proprietors and all deeds, writings, and munuments of title whatever relating to the lands of Montauk mentioned in the complaint and all books of account vouchers and papers relating thereto are to be delivered to such person or persons as shall be named by the proprietors of Montauk...” (citation unknown, found in “Information in re: Montauk” filed April 14, 1925 with Lyman B. Ketcham, Town Clerk, East Hampton. N.Y.)

Subsequently, a deed releasing all corporate claim by East Hampton to the possession and management of Montauk was issued on March 9th, 1852 (Liber 63 of deeds p. 171ff). That release left Montauk without government and the proprietors of Montauk were then incorporated by an act of the New York State Assembly on April 2nd, 1852, recorded at Chapter 139 of the Laws of 1852 (41).

The 1879 sale of Montauk by the proprietors of Montauk to Arthur W. Benson included their corporation and did not extinguish subsequent proprietors’ interest in the corporation or the above documents. The MFOP, having claimed to assume the rights, privileges, powers and responsibilities of the 1852 corporation of the proprietors of Montauk has a clear interest in and claim to the possession of its corporate records.

Point IV

The records at issue should be ordered delivered into the court's possession for their accounting and protection pending a determination of their proper disposition through an action at law or, alternately, ordered secured and accessible within the premises of the BHS building.

The court should note that plaintiff/appellant believes that the hasty and over-length closing of the site of the Brooklyn Historical Society resulted from inquiries into the documents at issue in this case. The obstruction of discovery by the BHS is, therefore, not only legal but physical as well.

MFOP should have a right to access the documents. If they have been removed or stolen, we should be allowed discovery through standard discovery methods, including depositions. The "final deposition" may not provide a final answer but at least the parties will be able to work toward fashioning a remedy.

The court should take immediate action to break the roadblock so that the Brooklyn Historical Society may reopen (preferably as the Long Island Historical Society). The records at issue should be ordered into court for their accounting and protection or, if their delicate physical condition requires careful handling, then they should be secured within a separate room within the BHS site for the court's and appellant's examination.

In the meantime, the court should compel BHS to make available copies of the documents at reasonable cost.

Conclusion

The cause of action was shown, the contested stipulation inclusions may be struck or the stipulation vacated, and the corporation of the proprietors of Montauk has a valid claim for relief.

The conduct of the staff of the Brooklyn Historical Society and its attorneys gives significant reason to fear for the security of the documents *sub judice*. Defendant/respondent Brooklyn Historical Society has fought all attempts at disclosure of the items which it has in its possession.

The Montauk Friends of Olmsted Parks, as claimant successor to the 1852 corporation of the proprietors of Montauk, has the a valid claim to the either the security or possession of its corporate documents.

The documents should be revealed and their disposition determined by this court. Or, if sufficient information is not presented for such a determination, this matter should be remanded for further discovery and for trial.