

To be argued by:
DAVID LAWRENCE III
Time requested:
3 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

TOWN OF MONTAUK, INC.,

Petitioner-Appellant,

-against-

Docket No. 2005-10912

HON. GEORGE E. PATAKI, ESQ., Governor of
the State of New York, THE PEOPLE OF THE
STATE OF NEW YORK MET IN ASSEMBLY, THE
TOWN BOARD OF THE TOWN OF EAST HAMPTON,
THE TRUSTEES OF THE FREEHOLDERS AND
COMMONALTY OF THE TOWN OF EAST HAMPTON,
THE SUFFOLK COUNTY WATER AUTHORITY,
INC., THE COUNTY OF SUFFOLK, THE
BROOKLYN HISTORICAL SOCIETY, INC., 511
EQUITIES, INC., and THE NATURE
CONSERVANCY, INC.,

Supreme Court
Suffolk County
Index No. 27553/04

Respondents-Respondents.

BRIEF FOR RESPONDENT GOVERNOR GEORGE E. PATAKI

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PRELIMINARY STATEMENT

Petitioner-Appellant Montauk Friends of Olmsted Parks/Montauk Trustee Corporation, a/k/a Town of Montauk, Inc., appeals from the June 20, 2005, order of the Supreme Court, Suffolk County (Daniel J. Loughlin, J.), denying the amended C.P.L.R. article 78 petition. Petitioner bizarrely alleges, contrary to reality, that it owns and is the sole sovereign of "The Incorporated Township of Montauk," which it claims is not a part of the Town of East Hampton, and is not even subject to the jurisdiction of the State Legislature.

Supreme Court's order should be affirmed, because the Court correctly found that the amended petition is largely incomprehensible, is more in the nature of a plenary action than an article 78 proceeding, and, in any event, states no cognizable claims for relief. Although not reached by Supreme Court, the claims are barred also by the applicable statutes of limitations and the equitable doctrine of laches. Moreover and in all events, the purported claims against Governor George E. Pataki should be dismissed with prejudice.¹

¹ This brief is filed solely on behalf of Governor Pataki. The other purported State respondent, i.e., the New York State Assembly, was never properly served with the petition or the amended petition. Instead, petitioner erroneously attempted such service solely by serving the Solicitor General (A. 20). See C.P.L.R. 307(2); Matter of Conciatori v. Office of Sec'y of State, 15 A.D.3d 397, 398 (2d Dep't), leave denied, 5 N.Y.3d 701 (2005).

QUESTIONS PRESENTED

1. Are petitioner's claims more aptly pled as a plenary action than an article 78 proceeding, where petitioner seeks \$100 million in damages that are not "incidental to the primary relief sought by the petitioner," C.P.L.R. 7806, and petitioner averred that this is an "action" that should be assigned to the Commercial Part of Supreme Court?

The court below answered this question in the affirmative.

2. Does the amended petition fail to state any cognizable claims for relief, where it relies upon an incomprehensible, centuries-long history of charters, statutes, and court cases that would contradict the reality of Montauk's legal status?

The court below answered this question in the affirmative.

3. Should the purported claims against Governor Pataki be dismissed with prejudice, because petitioner's vague and conclusory allegations fail to establish any right to relief against him?

The court below did not address this question.

4. Are petitioner's claims barred by the applicable statutes of limitations and by laches, where petitioner waited decades or even perhaps centuries to bring its claims?

The court below did not address this question.

STATEMENT OF THE CASE

A. The Current Article 78 Proceeding

Seeking to proceed by order to show cause on November 24, 2004, petitioner commenced this proceeding by filing an article 78 petition in the Supreme Court, Suffolk County (A. 67). On November 29, 2004, Supreme Court (Ralph F. Costello, J.), declined to enter the order to show cause (A. 81). By order dated January 10, 2005, this Court (Gabriel M. Krausman, J.), also declined to sign the order to show cause, on the basis that, inter alia, petitioner was a corporation not represented by counsel (A. 80).

After obtaining counsel, petitioner filed its amended petition on March 30, 2005 (A. 21-31). That amended petition alleged, contrary to long understanding, that Montauk is not a part of the Town of East Hampton, but instead is a separate incorporated township owned by petitioner, pursuant to a 1686 land grant and an 1851 court order (A. 21-22). Petitioner claims that this township is not subject to the jurisdiction of the State Legislature, which allegedly has usurped petitioner's "private corporate right to govern" (A. 361).

The amended petition principally seeks the following relief: (1) a declaratory judgment recognizing the Incorporated Township of Montauk; (2) an injunction preventing the Town of East Hampton from "all planning, permitting or use of lands at Montauk," and

requiring the deposit of all tax revenues from Montauk into court, "while maintaining essential services (police, etc.)"; (3) an annulment of certain sales of properties located within Montauk on the basis that petitioner owned those properties; and (4) a jury trial to award compensatory damages "accruing from eighty years of usurpation and mis-rule" by the Town of East Hampton (A. 21-23).

B. Dismissal of the Amended Article 78 Petition

Respondents Town of East Hampton and Suffolk County Water Authority answered the amended petition. The Water Authority and the Suffolk County Legislature filed a motion to dismiss the amended petition on December 30, 2004 (A. 810-822).

Subsequently, petitioner's March 4, 2005, affirmation sought unsuccessfully to have the matter assigned to the Commercial Part of the Suffolk Supreme Court, averring that the "action" seeks over \$100 million in damages (A. 71-72).

By short form order dated June 20, 2005, Supreme Court (Daniel J. Loughlin, J.), denied the amended petition on the grounds that:

The amended petition, which is largely incomprehensible, appears to be more in the nature of a plenary action than a CPLR Article 78 proceeding. To the extent that the petition seeks any immediate relief under Article 78, the petitioner has failed to establish its entitlement to any such relief.

(A. 16).

On August 3, 2005, petitioner filed a notice of appeal to the Court of Appeals. By order dated October 27, 2005, that Court transferred the appeal to this Court based on the Court of Appeals's lack of jurisdiction (A. 12).

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY FOUND THAT PETITIONER'S CLAIMS ARE INAPPLY PLED IN AN ARTICLE 78 PROCEEDING

Petitioner does not even attempt to dispute Supreme Court's reasoning that petitioner's claims "appear[] to be more in the nature of a plenary action than a CPLR Article 78 proceeding" (A. 16); and Supreme Court clearly was correct in so holding.

First, petitioner seeks over \$100 million in damages (A. 23, 71). But in an article 78 proceeding, "[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner." C.P.L.R. 7806. In other words, the question is "[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim." Matter of Gross v. Perales, 72 N.Y.2d 231, 236 (1988).

Incidental "damages generally include those which may be recovered only if the challenged determination is found to be irrational." LaDuke v. Lyons, 250 A.D.2d 969, 971 (3d Dep't 1998) (citing Matter of Awad v. State Educ. Dep't, 240 A.D.2d

923, 925 (3d Dep't 1997); Matter of White v. Regan, 171 A.D.2d 197, 199 (3d Dep't 1991)). By contrast here, petitioner does not challenge any administrative determination. Furthermore, its demand for money damages cannot be "incidental," C.P.L.R. 7806, to its claims for other relief typically available under article 78, i.e., writs of mandamus and prohibition, because such claims are vague, impenetrable, and insufficient. See Point II infra.

Second, petitioner's March 4, 2005, affirmation sought to have what it conceded was this "action" (A. 71) assigned to the Commercial Part of the Suffolk Supreme Court, averring that the action "complies with the guidelines" for such assignment (A. 72). Those guidelines do not provide for Commercial Part assignments for cases that challenge alleged governmental actions or failures to act, which is the essence of an article 78 proceeding.²

² See Commercial Div. of the State of N.Y., N.Y. State Supreme Court, "Guidelines for Assignment of Cases to the Commercial Part," available at http://www.nycourts.gov/comdiv/Suffolk_guidelines_for_assignment.htm.

POINT II

THE COURT BELOW CORRECTLY FOUND THAT THE "LARGELY
INCOMPREHENSIBLE" AMENDED PETITION FAILS TO ESTABLISH A
RIGHT TO RELIEF

Supreme Court also was entirely correct in finding that the amended petition is "largely incomprehensible" and that "[t]o the extent that the petition seeks any immediate relief under Article 78, the petitioner has failed to establish its entitlement to any such relief" (A. 16). Indeed, the petition sets forth a convoluted set of property transactions, laws, and court cases over a period of centuries that is impossible to fathom, and does not state cognizable claims. See, e.g., Matter of Reden v. Nassau County Civil Serv. Comm'n, 133 A.D.2d 694, 694 (2d Dep't 1987) ("The statements contained in a pleading must be sufficient particular to give the court and parties notice of the transactions or occurrences to be proved and must support the material elements of the cause of action."); Matter of Oliver v. Donovan, 32 A.D.2d 1036, 1037 (2d Dep't 1969) ("[A] petition in an article 78 proceeding" must contain statements that are "sufficiently particular to give the court and parties notice of, inter alia, the material elements of each cause of action or defense."); Matter of Ford v. La Vallee, 55 A.D.2d 799, 800 (3d Dep't 1976) (where the petition's allegations are insufficient on their face to prove the claim, dismissal is proper); Matter of Jahn v. Town of Patterson, 23 A.D.2d 688 (2d Dep't 1965) (same).

Moreover, an allegation of the amended petition that is comprehensible pleads the ludicrous claim that the Court of Appeals recognized that Montauk is an independent township in People v. Vorpahl, 2 N.Y.3d 781, reconsideration denied, 2 N.Y.3d 794 (2004) (A. 21). Petitioner apparently relies upon the happenstance that in the Court's May 6, 2004, order dismissing petitioner's motion to intervene, it stated that petitioner's principal Robert A. Ficalora is not an attorney authorized to represent petitioner "on behalf of the Incorporated Township of Montauk" (A. 61). See also Town of Montauk, Inc. Br. at 8, 12; (A. 108). This is hardly a holding that the Court recognized the legitimacy of petitioner's claim to independent, township status, as opposed to simply reciting the name that appeared on petitioner's motion papers.

Indeed, People v. Vorpahl only serves to illustrate the preposterous nature of petitioner's claims here. In Vorpahl, the petitioner here contended that Vorpahl could not be criminally responsible for fishing without a state license, because the state and federal governments have no jurisdiction to regulate fishing by the "freeholders" of East Hampton and Montauk, but instead only "the trustee corporations" established under certain seventeenth century charters could do so (A. 108, 345).

POINT III

**IN ALL EVENTS THE CLAIMS AGAINST GOVERNOR PATAKI SHOULD
BE DISMISSED WITH PREJUDICE**

The amended petition states no cognizable claims as against Governor Pataki in particular, and therefore all claims against him should be dismissed with prejudice. Petitioner conclusorily alleges that "the honorable Governor must be made a party"; "[w]e seek mandamus relief to compel the fullest exercise of the Governor's executive powers to remedy the grievances made herein"; and "Governor Pataki [h]as been involved in real property transactions with The Nature Conservancy corpor[ation] including the 'Shadmoor' purchase of the Estate of Alfred M. Hoyt, and possibly 'The Sanctuary' both of which we believe may be the property of the Township of Montauk by reason of escheat" (A. 24). These allegations of "involvement" in real property transactions are entirely vague, and petitioner does not specify any particular manner in which the Governor is to "remedy the grievances" (A. 24), hence petitioner states no cognizable claims. See Matter of Niagara Mohawk Power Corp. v. State, 300 A.D.2d 949, 952 (3d Dep't 2002) ("conclusory" and "vague" allegations are insufficient); Application of Lincoln Plaza Tenants Corp. v. Dinkins, 171 A.D.2d 577 (1st Dep't 1991) (where the petition did not request any relief as against a particular official, the petition must be dismissed as against him).

The claims against Governor Pataki should be dismissed for the additional reason that petitioner has not established that it has a "clear legal right" to mandamus relief against him. See, e.g., Matter of Altamore v. Barrios-Paoli, 90 N.Y.2d 378, 387 (1997).

POINT IV

FURTHER, PETITIONER'S CLAIMS ARE UNTIMELY

Petitioner's claims are, as the Suffolk County respondents and the Town of East Hampton pled below (A. 821, 825), untimely. In particular, those claims are barred by the four-month statute of limitations applicable to article 78 proceedings, see C.P.L.R. 217(1); the twenty-year statute of limitations applicable to claims "with respect to real property by a person claiming by virtue of letters patent or a grant from the state," id. 211(d); and laches.

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.'" Matter of Barabash, 31 N.Y.2d 76, 81 (1972) (quoting 2 John N. Pomeroy, Equity Jurisprudence § 419, at 171-172 (5th ed. 1941)). Here, petitioner claims title under seventeenth-century land grants and an 1851 court decision, and alleges "eighty years of usurpation

and mis-rule" by the Town of East Hampton (A. 22). In the intervening decades and centuries, countless persons have relied upon a contrary understanding of who owns the lands at issue, and what governments have jurisdiction over those lands. See, e.g., Congregation Yetev Lev D'Satmar, Inc., v. 26 Adar N.B. Corp., 219 A.D.2d 186, 191-92 (2d Dep't 1996) (action to invalidate conveyance of real property barred by laches based on plaintiffs' twelve-year delay, "in light of the palpable detriment to several innocent, bona fide purchasers and incumbrancers for value"); Delamater v. Rybaltowski, 161 A.D.2d 1001, 1002 (3d Dep't 1990) (action to enforce restrictive covenants on land barred by laches based on twenty-five-year delay, during which numerous conveyances allegedly violating the covenants took place); Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 74 U.S.L.W. 3639 (U.S. May 15, 2006) (No. 05-982) (action for alleged dispossession from land, relating to eighteenth-century treaties, barred by laches).

CONCLUSION

For all of the foregoing reasons, this Court should affirm Supreme Court's June 20, 2005, short form order, and dismiss all claims against Governor Pataki with prejudice.

Dated: New York, New York
June 23, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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