

STATE OF NEW YORK
COURT OF APPEALS

TOWN OF MONTAUK, INC.,

Petitioner-Appellant,

-against-

HON. GEORGE E. PATAKI, ESQ.,
Governor of the State of New York, et al.,

~~Respondents-Respondents.~~

Motion No. 09-51

Second Department
Docket No. 2005-10912

Suffolk County
Index No. 27553/04

**AFFIRMATION IN
OPPOSITION TO MOTION
FOR RE-ARGUMENT**

DAVID LAWRENCE III, an attorney duly admitted to practice law before the Courts of the State of New York, affirms as follows under penalty of perjury:

1. I am an Assistant Solicitor General in the Office of Andrew M. Cuomo, Attorney General of the State of New York, counsel for Respondent-Respondent former Governor George E. Pataki. I am fully familiar with the matters set forth in this affirmation based on my having handled this appeal in the Appellate Division, Second Department, and upon my review of the Office's case file.

2. In this C.P.L.R. article 78 proceeding, Petitioner-Appellant Montauk Friends of Olmsted Parks/Montauk Trustee Corporation, a/k/a

Town of Montauk, Inc. makes the meritless claim, contrary to law and long common understanding, that the Town of Montauk is not part of respondent Town of East Hampton, but instead is a sovereign entity owned by Appellant under a colonial land grant.

3. I submit this affirmation in opposition to Appellant's motion to reargue this Court's April 24, 2008, order denying Appellant's prior motion to vacate this Court's December 18, 2007, order dismissing this appeal for want of prosecution. As discussed below, Appellant has completely failed to show that the Court overlooked or misapprehended any relevant law or facts. See C.P.L.R. 2221(d)(2).

4. For the procedural background of this case, I respectfully refer this Court to my January 23, 2008, Affirmation in Opposition to Motion to Vacate Order Dismissing Appeal. That Affirmation, as well as my March 4, 2008, letter responding to this Court's first jurisdictional inquiry, established that: (a) the appeal is entirely meritless, and presents no substantial constitutional question; (b) the appeal is untimely; and (c) Appellant presents no valid excuse for its counsel's failure to file the Preliminary Appeal Statement in the proper court (i.e., in this Court rather than in Supreme Court).

5. Appellant's present motion makes little effort to dispute any of these points. Appellant simply relies again upon "the personal activities and hardships of" its corporate executive, Motion at 4, which cannot excuse its counsel's failure to ascertain the plain instruction of 22 N.Y.C.R.R. § 500.9(a) that the Preliminary Appeal Statement be filed in this Court. Appellant also implicitly reiterates the meritless argument in its March 10, 2008, letter to this Court, that the appeal is timely because the New York State Assembly served no notice of entry. *See* Motion at 5. However, the Assembly was never properly served with the article 78 petition or amended petition, and hence it never became a party to this proceeding.¹

6. As I further established in my March 19, 2008, letter responding to this Court's second jurisdictional inquiry, the Appellate Division order appealed from does not finally determine the matter within the meaning of the Constitution. In particular, Appellant seeks to appeal from the July 13, 2007, order of the Appellate Division, Second Department, denying its motion for leave to appeal to this Court from the

¹ Appellant erroneously attempted to serve the State Assembly 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), *lv. denied*, 5 N.Y.3d 701 (2005).


Appellate Division's May 8, 2007, decision and order on the merits. My letter cites numerous authorities that an order denying a motion for leave to appeal is not a final order for purposes of appeal to this Court. *See, e.g., Watt v. Richardson*, 3 N.Y.3d 735 (2004); *In re Wisheart*, 96 N.Y.2d 935 (2001); H. Cohen & A. Karger, *Powers of the New York Court of Appeals* § 4:6 at 63-64 (3rd ed. 2005).

7. Appellant's current motion does not mention any of these authorities, much less seek to refute their applicability here. Instead Appellant simply argues the irrelevancy that the underlying May 8, 2007, decision and order on the merits, from which Appellant did not purport to appeal, is a final order. *See Motion* at 8-14.

CONCLUSION

8. For all of the foregoing reasons, this Court should deny the motion for reargument.

Dated: New York, New York
January 8, 2009


DAVID LAWRENCE III
Assistant Solicitor General

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COURT OF APPEALS
STATE OF NEW YORK

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IN THE MATTER OF TOWN OF MONTAUK, INC.,

Appellant,

AFFIDAVIT OF
SERVICE

- against -

GEORGE E. PATAKI, et al.,

Respondents.
-----X

STATE OF NEW YORK)
 : ss.:
COUNTY OF SUFFOLK)

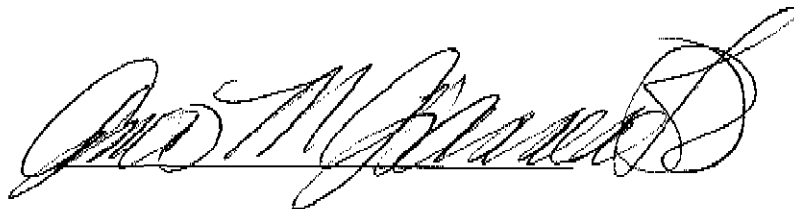
Gina M. Gianninoto, being duly sworn deposes and says, I am not a party to this action, am over 18 years of age and reside at Nesconset, New York; that on the 8th day of January, 2009, I served the within Affidavit in opposition to Appellant's Motion to Reargue, upon the attorneys listed below, by depositing a true copy of same enclosed in a post-paid, properly addressed wrapper, in a official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York:

Jason B. Kolodny, Esq.
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Great Neck, NY 11020

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Department of Law
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Albany, NY 12207

Hon. Andrew M. Cuomo, Esq.
Attorney General of the State of N.Y.
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Melville, NY 11747



Gina M. Gianninoto

Sworn to before me this
8th day of January, 2009.



Notary Public

MORANTE
Notary Public, State of New York
No. 02MO6170247
Qualified in Suffolk County
Commission Expires July 2, 2011