

CAHN WISHOD & KNAUER, LLP

ATTORNEYS AT LAW

425 BROADHOLLOW ROAD, SUITE 315
MELVILLE, NEW YORK 11747

(631) 752-1600

FAX: (631) 752-1555

E-MAIL: info@cahnwishod.com

RICHARD C. CAHN
EUGENE L. WISHOD
TODD A. KNAUER

BRIAN T. EGAN

March 16, 2001

VIA FEDERAL EXPRESS

Court of Appeals
State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Attention: Stuart M. Cohen
Clerk of the Court

Re: Ficalora v. The Town Bd. of the Town of
East Hampton and Sunbeach Montauk II, Inc.

Dear Mr. Cohen:

The undersigned represents the Town Board of the Town of East Hampton, sued herein as “the town board government of East Hampton.” We respond to your letter to Robert A. Ficalora dated February 21, 2001, indicating a sua sponte examination by the Court of this matter, and inviting comments on whether a substantial constitutional question is directly involved to support Mr. Ficalora’s appeal as of right, whether there is a jurisdictional predicate for an appeal as of right pursuant to CPLR § 5601(b)(1), whether there is a jurisdictional predicate for a direct appeal pursuant to CPLR § 5601(b)(2) and whether plaintiff is the authorized legal representative of Montauk Friends of Olmstead Parks, Inc. (“MFOP”). Mr. Ficalora is not entitled to appeal as of right to the Court of Appeals from the October 23, 2000 decision and order of the Appellate Division, Second Department, because no substantial constitutional question is directly involved, and Mr. Ficalora is not authorized to represent MFOP.

No Substantial Constitutional Question is Involved

In its decision and order, the Appellate Division affirmed Supreme Court’s dismissal of the complaint on the ground that CPLR § 321(a) requires a corporation to appear by attorney in a civil action. Although the Court cited a common law exception to this rule - that a corporation

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can validly assign a claim to an individual who is not an attorney - it correctly concluded in this case that “there was no valid assignment as the complaint expressly stated that plaintiff, who is not an attorney, was designated to represent the corporation before the court for the purposes for which the corporation was established.” (October 23, 2000 Decision & Order, pp. 1-2). Mr. Ficalora now argues, erroneously, that the affirmance of the dismissal of his complaint denied him equal protection and due process because the Appellate Division failed to apply the common law exception to CPLR § 321(a) in his case. Mr. Ficalora’s constitutional argument is without merit and his appeal should be dismissed by the Court sua sponte.

In *Kamp v. In Sportwear*, 39 A.D.2d 869 (1st Dept. 1972), the case principally relied upon by Mr. Ficalora, the Appellate Division, First Department held that when a corporation assigns its cause of action to a natural person, CPLR § 321(a) authorizes such a person to prosecute the action. *Id.* However, as stated, the Court below distinguished *Kamp* on the ground that there was no valid assignment in this case. This factual finding is not subject to review by this Court. Constitution Art. VI § 3(a).

Recent binding authority supports the Appellate Division’s order. The three Court of Appeals cases cited by that court, *MFOP v. Brooklyn Historical Society*, 95 N.Y.2d 821 (2000); *Matter of Ficalora*, 94 N.Y.2d 891 (2000); and *Hilton Apothecary*, 89 N.Y.2d 1024 (1997), adhere to the general rule of CPLR § 321(a) that a corporation must appear by attorney. The Appellate Division properly followed the binding authority of the Court of Appeals. Mr. Ficalora’s assertion that the Appellate Division was prejudiced by the Court is without merit. When an intermediate appellate court follows the law as enunciated by the Court of Appeals, it does no more than it is required to do.

The test for substantiality, in the words of the United States Supreme Court, is whether the contention raised is “so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance.” See Karger, *The Powers of the New York Court of Appeals*, § 37 at pp. 240-242 (3rd ed. 1997). As noted by Karger, the Court of Appeals has “generally not hesitated to dismiss appeals for lack of substantiality where the settled law is to the contrary of the position urged by the appellant” – as, for example, “where the purported constitutional question is predicated on a general claim that an allegedly erroneous decision by the courts below constituted a denial of due process.” *Id.* Mr. Ficalora’s constitutional argument is based solely on the claim that adherence by the Appellate Division to established and binding authority constituted a denial of equal protection and due process of law. Therefore, his constitutional argument is not “substantial” and the appeal should be dismissed.

Other Deficiencies in the Appeal

In addition to the requirement that the constitutional question be substantial, a party seeking an appeal as of right under CPLR §§ 5601(b)(1) or (b)(2) must satisfy several other requirements.

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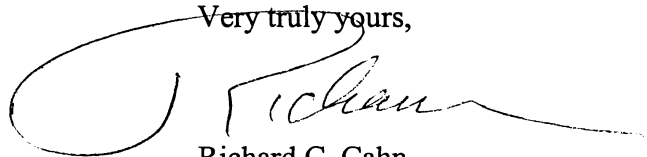
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First, although any substantial constitutional question can give rise to an appeal as of right under CPLR § 5601(b)(1), the constitutional question must have been “directly involved” in the Appellate Division decision: “It must clearly appear that the constitutional question was decisive of the Appellate Division’s determination, in the sense that such determination could not be independently supported on some other ground of a nonconstitutional nature...” Karger, *Ibid.* at § 38, p. 244. The Appellate Division merely engaged in the ordinary exercise of statutory interpretation, holding that the common law exception to the requirement of CPLR § 321(a) did not apply in Ficalora’s case. Therefore, there was no constitutional question at issue before the Appellate Division.

Another requirement is that the constitutional question on the basis of which the appeal as of right is taken must have been properly raised in the courts below. Otherwise, the question cannot be reviewed by the Court of Appeals, and the appeal must be dismissed. *NOW v. State Div. of Human Rights*, 32 N.Y.2d 940 (1973); *Glen Mohawk Milk Assoc. v. Wickham*, 21 N.Y.2d 719 (1967). Karger at § 37, pp. 238-239. In this case, the constitutional question was not raised in the courts below, so the question cannot be reviewed by the Court of Appeals, and the appeal must be dismissed.

CPLR § 5601(b)(2) is inapplicable to this case because this is not an appeal from the court of original instance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard C. Cahn", with a large, sweeping initial "R" on the left.

Richard C. Cahn

RCC/pdm

cc: Mr. Robert Ficalora ✓
via Federal Express