

Supreme Court of the State of New York Appellate Division : Second Judicial Department

Robert A. Ficalora as assignee of Montauk Friends of
Olmsted Parks, inc., a not-for-profit corporation established
under the laws of the State of New York

Plaintiff,

- against -

Case No.
99-02065

The town board government of East Hampton
and
Sunbeach Montauk II, inc., as claimant fee title holder to the
Hither Plain Reservation and Bathing Reservation
properties in Montauk.

Defendants.

Appellant's Reply

ROBERT A. FICALORA as Assignee,
Montauk Friends of Olmsted Parks,
Inc.

P.O. Box 2612

Montauk, L.I., New York 11954

Tel: (516) 668-3119 (Summer)

(360) 866-2278 (Winter)

ESSEKS, HEFTER & ANGEL, ESQS.

Attorneys for

Sunbeach Montauk Two, inc.

108 East Main Street - P.O. Box 279

Riverhead, New York 11901

CAHN, WISHOD & KNAUER

Attorneys for *the town board*

government of East Hampton,

425 Broad Hollow Road - Suite 315

Melville, N.Y. 11747

Appellant's reply

This court should note that defendant Town of East Hampton has carefully avoided all arguments upon the merits of the legal and constitutional challenges made as a part of this action and makes brazen misstatements of fact. Is the Town Board a legal and constitutional entity? Is the legal title to the reservation properties a valid instrument adverse to the equitable claim made by MFOP as trustee? Did appellant commence this action both individually and as assignee of MFOP as asserted by defendant Town in the first sentence of their "Statement of Facts"?

In reply to defendant Town's Point 1: Appellant's brief makes no reference to the package of "Supplemental Public Documents" rejected by this court by its order dated October 6th, 1999. The quotations shown are from documents of public record made in much the same way as citations of law. The package of documents rejected by the court was to simplify the court's reference only.

In reply to defendant Town's Point 2: Contrary to the assertions of Respondent Town, a corporation may be represented by a non-lawyer by assignment of its board of directors "for whatever reason." Kamp as assignee of AAA Stretch, Inc., Appellant v. In Sportswear, Inc., Respondent 39 A.D. 2nd. 89 *reversing on dissenting opinion of Mr. Justice Lupiano*, 70 Misc. 2d 898:

"The objection to a corporation appearing in person is that it is not a natural person and must act through its agents; therefore, in legal matters it must act through licensed attorneys. But when it assigns its cause to a natural person, for whatever reason, the statute authorizes the latter to prosecute the action in person." Kamp, supra, 899 (emph. added)

Appellant reemphasises that both the First and Second Departments maintain that CPLR 321(a) does not extend to a corporation appearing *pro se* upon a valid assignment by its board of directors. Neither Traktman v. City of New York, 182 A.D2d 814, 582 N.Y.S.2d 808 (A.D. 2 Dept, 1992) nor Medical Facilities, inc. v. Pryke 172 A.D.2d 338, 568 N.Y.S.2d 406 (A.D. 1 Dept. 1991) can be distinguished as simply “money claims” nor upon the ground that, somehow, the claim must redound to the assignee individually as apposed to the assignor. Both Medical Facilities and Traktman are reliant on the decision rendered in the Kamp case, *supra*.

Respondent’s reliance upon Gazdo Properties Corp. v. Lava, 150 Misc.2d 1019, 1020, 579 N.Y.S.2d 305, 306 (2d Dept. 1991) also fails. There is no indication that the corporation made an assignment Mr. Thomas Brankovic, the petitioner therein.

Under the circumstances presented, to enter judgment dismissing this appeal on the grounds of failure of a corporation to appear by attorney (CPLR 321(a)) would be a reversal of existing law.

In reply to defendant Town’s Point 3: The point of law raised herein is not whether a judge should recuse, which is discretionary, but whether a judge should take active steps to take jurisdiction in a matter wherein an affidavit of prejudice against him was previously filed. The court must consider that by Justice Underwood’s action the appellant was denied a trial by the court below. It was a clear abuse of discretion to take active steps to take jurisdiction over a case from another justice for the sole apparent purpose of summarily dismissing a party’s claims without trial.

In reply to defendant Town’s Point 4: Service was made upon Town on June 29th, 1998 (21) during an aborted trip to Riverhead to file. The cause was filed and the

filing fee paid the following day, June 30th. To the extent that Gershel v. Porr, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 84 (1996) might apply under the new system of commencement by filing, it is uncontroverted that the matter has been filed and the filing fee paid. To the extent that service was made a day early, it was irregular.

The perfection of personal service of the summons and complaint, together with the Record on Appeal herein, was made by the Gotcha legal process service on April 29th, 1999 (attached). “The irregularity in service has been corrected and thus may be deemed proper *nunc pro tunc* so as to afford us jurisdiction for determination of the issue of applicable law.” Kjeldsen v. Ballard, 1967, 52 Misc.2d 952, 277 N.Y.S.2d 234.

In any event, the court below did not dismiss upon the ground of improper service.

Summary

No citation was made of the papers rejected by this court upon motion. Appellant may appear as pro se assignee upon a valid assignment as in the matter *sub judice*. Justice Underwood’s reassuming of jurisdiction over this matter in order to dismiss appellant’s claims was a clear abuse of discretion. Personal service has been perfected upon all parties. Defendants have failed to answer the substantive claims made as a part of this action.

The order of the Supreme Court, Suffolk County (Underwood, J.) granted February 1st, 1999, and entered in the Office of the Clerk on February 3, 1999, should be, in all respects, reversed and the matter remanded to Supreme Court for further litigation and trial.

Afterword

Your *pro se* appellant Robert A. Ficalora, appearing as assignee of the Montauk Friends of Olmsted Parks corporation, does pray that this court does remember that he is before this court for honorable purposes only. He has at all times attempted to comport himself properly, has avoided frivolousness in his pleadings, and has done his best to serve the Montauk Friends of Olmsted Parks corporation and the interests which it was established to protect.

Continuing this and other actions has placed a huge burden upon him and his family, however, and he would very much prefer to work with an elected body of trustees with an attorney and some staff under their direction. Appellant is fully cognizant that to continue as a *pro se* litigant of the matters currently before this court may result in a disservice both to the Montauk trustee corporation and to this court. For reasons of lack of funds or available counsel, however, this has been necessary.

Concurrent with submission of this reply, a motion is being filed with the court for an allotment of funding and facilities for the MFOP corporation as claimant successor to the 1852 corporation of the Trustees of Montauk. Please consider it closely as it would enable the Montauk Trustee corporation to work through the courts to settle the many issues which are raised in re: Montauk. If remanded for further litigation and trial, that motion will be remade below.

Montauk's proprietors have a right to the full security and enjoyment of their property. The people of the State of New York want Montauk protected.

Affidavit of Personal Service - Town and Sunbeach Montauk II, 4/29/99

AFFIDAVIT OF SERVICE

State of New York

County of SUFFOLK

Supreme Court

Index Number: 99-02065

Date Filed: _____

Plaintiff:

ROBERT A. FICALORA AS ASSIGNEE OF MONTAUK
FRIENDS OF OLMSTED PARKS, INC., A
NOT-FOR-PROFIT CORPORATION ESTABLISHED UNDER
THE LAWS OF THE STATE OF NEW YORK

COPY

vs.

Defendant:

THE TOWN BOARD GOVERNMENT OF EAST HAMPTON ET
ANO

For:

MONTAUK FRIENDS OF OLMSTEAD PARKS, INC.
P.O. Box 2612
Montauk, NY 11954

FILED
APR 29 1999
EDWARD P. ROMAINE
COUNTY CLERK

Received by GOTCHA LEGAL PROCESS SERVICE INC. on the 27th day of April, 1999 at 3:10 pm to be served on TOWN BOARD GOVERNMENT OF EAST HAMPTON, BY SERVING THEIR ATTORNEYS, CAHN, WISHOD & KNAUER, 425 BROAD HOLLOW ROAD, SUITE 315, MELVILLE, NY 11747.

I, Todd Levine, who, being duly sworn, depose and say that on the 28th day of April, 1999, at 1:30 pm, I:

Delivered a true copy of the RECORD ON APPEAL to TODD KNAVER as agent of the above who stated they were authorized to accept.

DESCRIPTION of Person Served: Age: 42; Sex: M; Race/Skin Color: White; Height: 5'9"; Weight: 170; Hair: Gray; Glasses: N

I am over the age of eighteen, have no interest in the above action and have the authority to serve process pursuant to CPLR 2103.




Todd Levine
PROCESS SERVER

Subscribed and Sworn to before me on the 28th day of April, 1999 by the affiant who is personally known to me.

GOTCHA LEGAL PROCESS SERVICE INC.
P.O. Drawer 1525
Stony Brook, NY 11790
(516) 751-1450

Our Job Serial Number: 99002383



NOTARY PUBLIC
PATRICIA DEMAIIO
Notary Public, State of New York
No 02DE5026458
Qualified in Suffolk County
Commission Expires April 18, 2000

AFFIDAVIT OF SERVICE

State of New York

County of SUFFOLK

Supreme Court

Index Number: 99-02065

Date Filed: _____

Plaintiff:

ROBERT A. FICALORA AS ASSIGNEE OF MONTAUK
FRIENDS OF OLMSTED PARKS, INC., A
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For:

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P.O. Box 2612
Montauk, NY 11954

FILED

APR 29 1999

EDWARD P. ROMAINE
COUNTY CLERK

Received by GOTCHA LEGAL PROCESS SERVICE INC. on the 27th day
of April, 1999 at 3:10 pm to be served on **SUNBEACH MONTAUK TWO INC,**
BY SERVING THEIR ATTORNEYS, ESSEKS, HEFTER & ANGEL, ESQS., 108 EAST
MAIN STREET, RIVERHEAD, NY 11901.

I, Seth Korin, who, being duly sworn, depose and say that on
the 28th day of April, 1999, at 12:44 pm, I:

Delivered a true copy of the RECORD ON APPEAL to KAREN UNLINGER as
agent of the above who stated they were authorized to accept.

DESCRIPTION of Person Served: Age: 45; Sex: F; Race/Skin Color:
White; Height: 5'5"; Weight: 125; Hair: Brown; Glasses: Y

I am over the age of eighteen, have no interest in the above action
and have the authority to serve process pursuant to CPLR 2103.



Seth Korin
PROCESS SERVER

Subscribed and Sworn to
before me on the 28th day of
April, 1999 by the affiant
who is personally known
to me.

GOTCHA LEGAL PROCESS SERVICE INC.
P.O. Drawer 1525
Stony Brook, NY 11790
(516) 751-1450

Our Job Serial Number: 99002382



NOTARY PUBLIC
PATRICIA DEMAIIO
Notary Public, State of New York
No. 02DE5026458
Qualified in Suffolk County
Commission Expires April 18, 2000