

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 -

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.

Notice of Motion for
Reconsideration or
for Leave to Appeal

Case no. 99-02065

Return Date:
Monday, Dec. 4, 2000
9:30 a.m.

May it please the court that on the fourth day of December, 2000, **ROBERT A. FICALORA**, assignee of the Montauk Friends of Olmsted Parks/Montauk Trustee corporation (MFOP), shall move upon this notice, the papers attached hereunto and all of the submissions and argument heretofore had herein for reconsideration of the decision and order of this court entered October 23rd, 2000, on the ground that it continues arbitrary treatment by this court and discriminates in the administering of law and does, therefore, violate the MFOP corporation's right to equal protection under the law. *U.S.C.A. Const. Amend. 14; N.Y. Constitution art. 1 § 11.*

Furthermore, on November 11th, 2000, the board of directors of the MFOP/Montauk Trustee corporation did adopt its fourth formal Resolution of Assignment which said resolution was filed in this matter with the Suffolk County Clerk on November 14th, 2000 (att. A). The corporate resolution specifically assigns this action, provides for increased compensation for Mr. Ficalora as assignee, and is signed by the board, a majority which are now individual proprietors of Montauk.

Also submitted herewith is an order to show cause for entry by this court why an order should not be entered to, among other things, enjoin and restrain the Town of East Hampton from permitting any and all further subdivision of, or new construction upon, Montauk lands absent a showing of some credible legal and Constitutional basis for its claim of jurisdiction over Montauk.

We do pray that this court will grant reconsideration of this matter, enter the order to show cause as submitted and remand this matter for further process of law and trial together with such other and further relief which this court deems equitable and just. Should our prayers be in vain, we do then pray that this court will grant us leave to appeal to the Court of Appeals upon the significant Constitutional and other issues of law raised herein.

Robert A. Ficalora
acting president / assignee
MFOP/Montauk Trustee Corp.

individually and as acting president of MFOP, Inc. vs. Planning Board and Building Dept. of Town of East Hampton and Ficalora &c v. Joseph & Joanne Guarneri and the town board government of the Town of East Hampton, 94 NY2d 891.

3.) Argument is made herein for reconsideration of this court's October 23rd, 2000 decision and order on the ground that it is arbitrary, discriminates in the administering of law, and violates the MFOP corporation's constitutional right to equal protection of law. *U.S.C.A. Const. Amendment 14; N.Y. Constitution art. 1 § 11.*

Equal protection of law denied

4.) The Fourteenth Amendment to our Federal Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of laws." Similar language is found in Section 11 of article 1 of the New York State Constitution.

"...the essence of the right to equal protection of the laws is that all persons similarly situated be treated alike and that no person or class of persons shall be denied the equal protection of the laws which is enjoyed by others in similar circumstances (Kentucky Co. v Paramount Exch., 262 US 544)" Matter of Lief v Hynes, 98 Misc2d 817, 820.

5.) Three standards that have evolved in determining the validity of a claim of denial of equal protection under the law are discussed in Lief, supra, at 820. The 'rational basis' or minimal rationality standard which requires "that the State's action be rationally based" applies to the matter *sub judice*. (citing: Dandridge v Williams, 397 US 471, 487.)

6.) Appellant MFOP, therefore, must demonstrate that it 1.) is within the same legislative classification as the parties within the law relied upon, 2.) is similarly circumstanced to those parties, and, 3.) has been subjected to arbitrary and discriminatory administration of the law.

1. Classification of similarly situated parties is the same.

7.) To determine whether a violation of the equal protection guarantees has occurred, the court must determine whether the person or class before it is similarly situated to those within the law relied upon. Under the “rational basis” standard

“classification must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (Reed v Reed, 404 US 71, 75-76; Neale v Hayduk, 35 NY2d 182, 186).” Lief, supra, at 823

8.) It is undisputed and recognized by the court that the Montauk Friends of Olmsted Parks corporation is a corporation within the meaning of CPLR 321(a).

9.) As recognized by this court, a corporation may appear *pro se* upon a valid assignment to a natural person (Kamp as Assignee of AAA Stretch, Inc., Appellant v In Sportswear, Inc., Respondent 39 A.D. 869, *reversing for reasons stated in dissent at App Term* 70 Misc.2d 898, 899, Traktman v. City of New York, 182 A.D.2d 814, 815 and Medical Facilities v. Pryke, 172 A.D.2d 338).

10.) In Kamp, Traktman and Medical Facilities this court found that valid assignments of corporate causes to a non-attorney were made by AAA Stretch, Inc., Metropolitan Heat and Power Co., and Medical Facilities, Inc. - all corporations within the meaning of CPLR 321(a).

11.) MFOP corporation is a member of the same class of parties (corporations) within the legislative intent of the law and the many assignments of its board of directors are due equal treatment under the law.

2. The MFOP corporation is similarly situated to the corporations in Kamp, Traktman and Medical Facilities.

12.) This court holds that

“...the rule is that equal protection of the laws is not denied when all persons in the same class are treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed (Matter of Sacharoff v Corsi, 294 NY 305, 312, cert. den 326 US 744; 9 NY Jur, Constitutional Law, § 297, p. 199).” People v Reilly, 85 Misc2d 702, 705.

13.) It is undisputed MFOP is a corporation within the legislative intent of CPLR 321(a) and is, therefore, in the same class of parties as the corporations in Kamp, Traktman and Medical Facilities (*supra*).

14.) In bringing or continuing four otherwise valid actions before this court upon assignment to Mr. Ficalora, MFOP corporation sought to avail itself of representation before this court in conformity with the law and was similarly situated with the corporations in Kamp, Traktman and Medical Facilities.

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3.) Equal protection denied: no valid reason exists for applying different standards of law for MFOP/Montauk Trustee corporation than established in law by Kamp and held in Traktman and Medical Facilities.

15.) Given the foregoing, it is necessary to prove that this court discriminated in denying MFOP/Montauk Trustee corporation equal treatment under the law.

16.) This court holds that:

“The essence of equal protection of the law is equal treatment for all persons similarly situated (Myer v Myer, 271 App. Div. 465, 66 N.Y.S.2d 83). Necessary to a charge of denial of equal protection is proof of discrimination. (cf., Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508, 521, 154 N.Y.S.2d 849, 858, 136 N.E.2d 827, 833).” Gordon v. Town of Huntington, 230 N.Y.S.2d 619, 623-624. *emph. added.*

17.) and that

“... a valid reason must exist for differentiating among members of the same class.” Matter of De Castro v. Ortiz, 119 Misc2d 777.

18.) The law which establishes that a corporation may be represented *pro se* upon assignment is the dissenting opinion of Justice Lupiano in Kamp (supra):

“The assignments, patently valid, transferred all interests of the Assignor to the plaintiff and he thereby acquired the right to enforce the claim by action (General Obligations Law, § 218). Nor does public policy require us to invalidate the assignments. 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, 70 Misc.2d 899 (*emph. added*).

19.) The United States District Court for the southern district in New York reviewed the above language in Kamp and held that

“In reaching this per curiam decision the Appellate Division reverses the judgment below (70 Misc.2d 898, 335 N.Y.S.2d 306) and relied exclusively on the two paragraph dissent of Mr. Justice Lupiano. The gist of the dissent was that if the assignment was technically valid *the motive*

underlying it is immaterial.” Mercu-Ray Industries, Inc., v. Bristol-Myers company, 392 F.Supp. 16 (1974) (emph. added.)

20.) Given the common class and circumstances of MFOP with others similarly situated in law in Kamp, Traktman and Medical Facilities, the previously uncontradicted or modified “for whatever reason” standard established in Kamp, supported by the district court’s interpretation of it in Mercu-Ray and relied upon by MFOP corporation in the matter *sub judice* , is by itself sufficient to demonstrate that the decision and order of October 23rd failed to provide equal protection under the law.

21.) Both the Appellate Division and the Court of Appeals, however, evidenced further discrimination by failing to acknowledge the multiple formal resolutions of assignment which appear in the record.

22.) The trial court’s opinion in Kamp which was reversed by this court held that:

“The assignment of a chose of action by a corporation to one of its stockholders, directors or officers who thereupon maintains suit in his individual name, *pro se*, is reasonably suspect as an attempted evasion of CPLR 321 (subdivision [a]) requiring the corporation to appear by attorney. Nor does he attempt to offer any explanation which might dissipate the suspicion of an attempt to flout the provisions of CPLR 321 (subd. [a]) which we deem declaratory of public policy... Thus the plaintiff lacks the capacity to sue.” Kamp, 70 Misc.2d 898 reversed at 39 A.D. 869

23.) In Medical Facilities the court held that:

The record contains an assignment of the corporate plaintiff’s cause of action to its sole shareholder, Owen J. McCormack. It is facially valid and we are unable to discern any reason why it should not be honored. (Citing Kamp) Medical Facilities v. Pryke, *supra*.

24.) In Traktman the court found that:

In an action to recover damages for breach of contract...Metropolitan Heat and Power Co. assigned to the plaintiff, its employee, a claim of \$12,000 against the defendant. Thereafter, the plaintiff commenced this action to recover on the claim. ...the assignment does not violate CPLR

321(a) which prohibits a corporation from appearing *pro se*. We find that the statutory prohibition does not extend to an assignee of a corporation... (Citing Kamp) Traktman v. City of New York, supra.

25.) In this matter the court inexplicably ignored the assignments appearing in the record and instead dismissed upon the broad language of the complaint:

APPELLATE DIVISION: "In this case, however, there was no valid assignment, as the *complaint* expressly stated that the plaintiff, who is not an attorney, was designated to represent the corporation for the purposes for which the corporation was established (See also, Montauk Friends of Olmsted Parks, inc., v The Brooklyn Historical Society, Inc., 995 NY2d 821; Matter of Ficalora v Planning Board of the Town of East Hampton, 94 NY2d 891; Hilton Apothecary v State of New York, 89 NY2d 1024.)" emphasis added.

26.) This arbitrary treatment continued that of the Court of Appeals which ignored the assignments shown and proclaimed that:

COURT OF APPEALS (1): "Motion, insofar as Robert A. Ficalora seeks leave to appeal purportedly on behalf of Montauk Friends of Olmsted Parks, Inc., is dismissed upon the ground that Robert A. Ficalora is not the authorized representative of said movant..." Ficalora v. the Planning Board and Building Departments of the Town of East Hampton, 94 NY2d 891, 2/24/2000, (emph. added.)

27.) and,

COURT OF APPEALS (2): "Motion for leave to appeal by Robert A. Ficalora, purportedly on behalf of the Montauk Friends of Olmsted Parks, Inc., dismissed upon the ground that Robert A. Ficalora is not the authorized representative of said movant (see, CPLR 321[a])" Montauk Friends of Olmsted Parks, Inc., v The Brooklyn Historical Society, Inc., (formerly Long Island Historical Society) and Ms. Irene Tichenor, as director thereof, 95 NY2d 1024, 6/20/2000. (emph. added.)

28.) None of the above decisions addresses the many corporate resolutions of assignment contained in the record and no valid reason was given for differentiating between members of the same class and denying the validity of the corporate resolutions which appear in the record.

29.) In Mercur-Ray the federal district court opined that:

The "validity" of the assignment, i.e., the following of proper corporate procedures and the giving of compensation, is not challenged..."Mercur-ray industries, (supra).

30.) The Resolutions of Assignment which appear at pages 34 and 35 of the record were adopted according to corporate procedure and deponent affirms that MFOP corporation's grant of indemnity in the resolution of June 5th, 1998, was compensatory in nature and was understood as such by the board. Furthermore, the corporation has increased compensation with its resolution of November 7th, 2000 (att. A.).

31.) Its corporate class being recognized and its circumstances being similar to the corporations in Kamp, Traktman and Medical Facilities, the MFOP/Montauk Trustee corporation has clearly been denied its right to equal protection under the law.

32.) For the foregoing reasons, Deponent does humbly submit that the court should reconsidered its decision and order of October 23rd, 2000, so that the MFOP/Montauk Trustee corporation will enjoy its legal right to appear *pro se* and to have access to this court and to due process of law. We seek a reversal and a remand to the trial court for futher process of law and a trial.

Robert A. Ficalora, assignee *pro se*

Sworn to before me this
_____ day of November, 2000

Notary Public

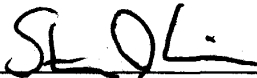
Montauk Friends of Olmsted Parks, Inc.
P.O. Box 2612
Montauk, NY 11954
(631) 668-3119
email: trustees@montauk.com



Resolution of Assignment
11/7/2000

On November 7th, 2000, we, the undersigned board of directors of the Montauk Friends of Olmsted Parks/Montauk Trustee corporation, having convened and considered the common law of the State of New York as established by in Kamp as assignee of AAA Stretch, inc., Appellant v. In Sportswear, inc., Respondent 39 A.D.2d 869, 332 N.Y.S.2d 983, *reversing on dissenting opinion of Mr. Justice Lupiano*, 70 Misc 2d 898, 899; 335 N.Y.S.2d 306, our past assignment of corporate causes before the Supreme Court of the State of New York to our acting president Robert A. Ficalora in attempted conformity with the law, and the decision and order of the Appellate Division of the Supreme Court of the State of New York entered on October 23rd, 2000, which dismissed our past assignments as invalid, do herewith attest our

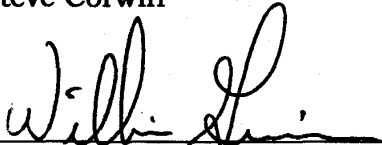
Resolve: that Mr. Ficalora is and for the present shall continue to be assigned the power and responsibility to represent this corporation in all of the corporation's matters before the court including and especially its pending cause in the matter of Robert A. Ficalora as Assignee of the Montauk Friends of Olmsted Parks corporation vs. the town board government of the Town of East Hampton, et. ano., filed with the Suffolk County Clerk as cause no. 98-14806, and that he shall do so in return for one dollar and other good and valuable consideration.



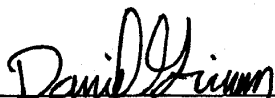
Steve Corwin



Helen Ficalora



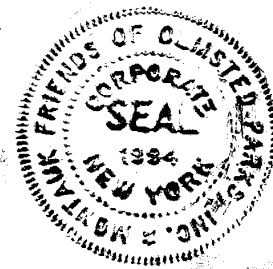
William Grimm



Daniel Grimm



Richard Monahan



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NOV 11 2000
EDWARD P. ROMANO
COUNTY CLERK

