

1 STATE OF NEW YORK
2 SUPREME COURT

COUNTY OF FULTON

3 BALBOAA LAND DEVELOPMENT CORPORATION,

4 PLAINTIFF,

5 -against-

INDEX NO.: 07599

RJI. NO.: 17-1-2018-03394

6 TOWN OF CAROGA,

7 DEFENDANT.

8 Fulton County Courthouse
9 Johnstown, New York

October 25, 2019

10 B E F O R E:

11 HON. RICHARD A. KUPFERMAN
12 ACTING SUPREME COURT JUSTICE

13 A P P E A R A N C E S:

14 FOR THE PLAINTIFF:

15 ABDELLA & SISE, LLP
16 8 West Fulton Street
17 P.O. Box 673
18 Gloversville, New York 12078
19 BY: JOSEPH M. SISE, ESQ.

20 FOR THE DEFENDANT:

21 DUNN & DUNN, LLP
22 59 West Grand Street
23 Palatine Bridge, New York 13428
24 BY: GREGORY T. DUNN, ESQ.

25 ALSO PRESENT:

BRIDGET CONBOY, COURT SECRETARY
DAWN McKENNA CARR, OFFICIAL COURT REPORTER

ROBERT ABDELLA, ESQ.
GEORGE ABDELLA, ESQ.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF FULTON

JOHN J. LIVINGSTON, JR.,

PLAINTIFF,

-against-

INDEX NO.: 07829

TOWN OF CAROGA, TOWN OF CAROGA TOWN BOARD, JAMES K.
SELMER, JEREMY MANNING, JAMES LONG, KENT KIRCH, LINDA
GILBERT and FULTON COUNTY BOARD OF ELECTIONS.

DEFENDANTS.

Fulton County Courthouse
Johnstown, New York

October 25, 2019

B E F O R E:

HON. RICHARD A. KUPFERMAN
ACTING SUPREME COURT JUSTICE

A P P E A R A N C E S:

FOR THE PLAINTIFF:

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP
6 Tower Place
Albany, New York 12203
BY: JUSTIN W. GRAY, ESQ.

FOR THE DEFENDANTS:

DUNN & DUNN, PLLC
59 West Grand Street
Palatine Bridge, New York 13428
BY: GREGORY T. DUNN, ESQ.

1 THE COURT: I have two cases that are
2 separate cases but they are intertwined and we
3 just can't talk about one without talking about
4 the other. First case is Balboaa Land
5 Development Corporation versus Town of Caroga.
6 And the second is Livingston versus the Town of
7 Caroga.

8 Can I have counsel for both of those
9 cases set up at the table, please.

10 Now, the first case is Index Number
11 07599. And the second case is 07829. I'd like
12 to get appearances for the record and then more
13 or less set the table.

14 The first action I'll refer to as
15 Sherman *part one*. The second is Sherman's *part*
16 *two*. And then I will elaborate for the record
17 what each of those actions entail.

18 So, can I get appearances.

19 MR. SISE: Good afternoon, Your Honor.
20 Joseph Sise from the law firm Abdella & Sise,
21 on behalf of the Plaintiff under Index Number
22 7599, Balboaa Land Development Corp. I'm here
23 with my partner Robert Abdella, as well as with
24 my other partner George Abdella, who is a
25 representative of Balboaa Land Development.

1 THE COURT: Thank you. You may have a
2 seat.

3 Sir.

4 MR. DUNN: Judge, Greg Dunn from Dunn &
5 Dunn. I represent the Town of Caroga in the
6 first matter before the Court, Balboaa Land
7 Development Corporation versus the Town of
8 Caroga. And I represent the Town of Caroga,
9 the Town of Caroga Board, James Selmer, Jeremy
10 Manning, James Long, Kent Kirch, and Linda
11 Gilbert in the second matter John J.
12 Livingston Junior versus those parties, in
13 addition to the full Town Board of Elections.
14 So I do not represent...

15 THE COURT: I'll get to that in a
16 minute.

17 MR. GRAY: Good afternoon, Your Honor.
18 Justin Gray of Maynard, O'Connor, Smith and
19 Catalinotto, and I represent John Livingston
20 Junior, in the Index Number matter 2019-07892
21 which is versus the Town of Caroga, Town of
22 Caroga Board, et cetera.

23 THE COURT: All right. Please have a
24 seat. First, the Fulton County Attorney's
25 Office sent correspondence indicating that they

1 could not appear today due to scheduling
2 conflicts and asked for their appearance to be
3 excused. Did everyone get a copy of that
4 correspondence?

5 MR. DUNN: Yes, Your Honor.

6 MR. GRAY: Yes, Your Honor.

7 THE COURT: It was made clear in that
8 letter that the Board of Elections could do
9 whatever the order of this Court is; however,
10 it's unfortunate the ballots are already
11 printed and it's a question of what then.
12 They're going to appear, people are going to
13 vote, and it's a question of whether this Court
14 is going to -- obviously if the vote fails,
15 makes part of it moot. But if it is voted and
16 succeeds, this Court may stay its transfer of
17 the Sherman property to the not-for-profit
18 pending the outcome of Sherman 1, and
19 Livingston and Sherman 2. I don't know, I
20 don't have a crystal ball, but I have to be
21 clear for the record, that there's nothing that
22 I can do to take this off the ballot.

23 Is that understood?

24 MR. DUNN: Yes, Your Honor.

25 MR. GRAY: Yes, Your Honor.

1 THE COURT: Now, Sherman 1, Balboaa, in
2 that case, the deed that was transferred by
3 George Abdella to the Town, was executed I
4 believe simultaneously with an agreement, a
5 donation agreement. Now, the deed doesn't
6 reflect that and I have read the papers in
7 opposition to that case, but there's a cloud on
8 this title, and it's beyond me how did this end
9 up on the ballot to set up a piece of property
10 that has an existing lawsuit that is the very
11 nature of ownership?

12 I'm talking to you, counsel, for the
13 Town. How could this happen?

14 MR. DUNN: Yes, Your Honor. The lawsuit
15 I believe was filed after we entered into a
16 settlement -- excuse me -- a sales agreement
17 with this non-profit, if it was approved by the
18 prior owner of the property. However, I wanted
19 to make clear before the Court today that we
20 have entered into a settlement agreement. We
21 have a written settlement agreement with
22 Balboaa that we would like to present to the
23 Court today, that not only resolves that case
24 but also causes the second matter to become
25 moot before the Court today.

1 THE COURT: Well, someone enlighten me.

2 MR. DUNN: So, Your Honor, I just say
3 that the parties in the first matter have
4 entered into a settlement agreement where the
5 Town of Caroga and Balboaa are agreeing to
6 rescind their original donation and that the
7 Town of Caroga is going to transfer back the
8 property to the original owner, Balboaa Land
9 Development Corporation.

10 THE COURT: Who's going to pay all the
11 taxes that have been accrued? Is this a
12 voiding of the transfer from the date that the
13 deeds were transferred or is it prospective
14 from today onward?

15 MR. DUNN: We're going back in time,
16 setting the parties back as if the transaction
17 never happened.

18 THE COURT: My question to you would
19 have been along the line, how does a town
20 obtain donated and intend unilaterally?

21 MR. DUNN: That's what they did
22 originally.

23 THE COURT: That's what they try to do.

24 MR. DUNN: Correct.

25 THE COURT: All right. I will have to

1 get to the merits, no comment. I appreciate
2 that. So what does that do to Mr. Livingston's
3 case since there's no longer property being
4 sold?

5 MR. GRAY: Well, it certainly
6 complicates the matter. Obviously, we are not
7 party to the other action, but having just
8 learned of this this morning, my client is
9 certainly contemplating challenging the
10 resolution and/or the settlement. One of the
11 arguments that we would see, it's a transfer of
12 property and none of the prerequisites that
13 were challenging in the first action have been
14 met either.

15 THE COURT: Well, but if you were to
16 prevail on your first action, and I don't
17 really buy that Article 78 is not an
18 appropriate venue, and it's not under Town Law
19 Section 64, where they can only vote whether
20 the sale price is right or not, makes no
21 commentary on the procedural legalities that
22 led up to the sale, so I would've probably been
23 a little harsher than I want to be. But back
24 to you. You have one case in front of me right
25 now that's essentially rendered moot. There's

1 no sale that's going to occur.

2 MR. GRAY: Yeah, Your Honor, that is
3 correct.

4 THE COURT: Do I have to dismiss? You
5 can withdraw it and then get copies of this and
6 then go after whatever remedy you seek in a
7 subsequent filing. I mean, I don't know what
8 else I would do with your petition, if there's
9 something that -- granted, you've already seen
10 the settlement, but they're telling me the Town
11 no longer -- or they're free to agree,
12 whatever, you can challenge, whether they
13 lawfully could give back the donation. I'm
14 telling you, my research and what I looked at,
15 the original agreement, whether the town
16 supervisor entered into it without the
17 authority and the town board, and then all of
18 the minutes that revolved around the March and
19 May meetings, in all likelihood, I would have
20 looked at it as a gift that was never
21 completed. And I would have probably believed
22 it. I'm not saying I would have, because I
23 don't have the memorandum of law, but my take
24 of the case was, they don't have to give back
25 that which would have been void anyway. So you

1 can then bring a challenge, say wait a minute,
2 that gift should be enforced and, you know,
3 Mr. Abdella signed these. Whatever your
4 arguments may be. But at this point, based
5 upon the representations of counsel, I will
6 have to see what they provide me. But are you
7 going to withdraw your existing claim?

8 MR. GRAY: I would like -- one, I
9 haven't seen the proposed agreement. And the
10 other is, you said today that you cannot stop
11 this ballot. So, in terms of at least just
12 preserving the issue, if anything, I would like
13 to at least hold it in abeyance until after the
14 election.

15 THE COURT: Well, I can't strike the
16 physical properties on the election ballot that
17 the voter sees, but I can declare any tally as
18 void, you know, or I can, as you say, hold it
19 in abeyance, but it doesn't really matter. I
20 don't have a problem with holding your motion
21 in abeyance under the circumstances, the voters
22 who are not going to hear about -- not every
23 voter is going to hear about what occurred here
24 today and they vote to sell the property to
25 this non-profit. Your client is only

1 challenging that sale. Why would I hold your
2 papers in abeyance? The main thing you were
3 challenging was that it was going to be sold.
4 Now it's not going to be sold. You don't
5 really ask for anything else.

6 MR. GRAY: I don't disagree, Your Honor.

7 THE COURT: So I'm going to dismiss your
8 petition today only because without prejudice
9 for you to do anything you need to do in the
10 future, but the Court does not like having open
11 files for no particular reason. If you could
12 demonstrate to me a reason in your papers that
13 would survive the Town not owning this
14 property. You're free to attack whatever they
15 don't in the conveyance bag or the nullity of
16 the deed, but what's in front of me today, I
17 see nothing that's actionable and I have given
18 you the opportunity today to convince me
19 otherwise.

20 MR. GRAY: Well, I don't believe Your
21 Honor has even seen the settlement agreement
22 yet, so I don't believe it should be
23 appropriate to dismiss it right now.

24 MR. SISE: Your Honor, may I approach?

25 THE COURT: I just want to say

1 irrespective, right, the Town, they're the ones
2 that move -- you wanted it off the ballot.
3 That's what you asked for.

4 MR. GRAY: Correct.

5 THE COURT: They're taking it off the
6 ballot. What they do procedurally with this
7 property now is subject for another day and
8 that other day is not addressed in your current
9 papers. That's all I'm saying to you.

10 MR. GRAY: Understood.

11 THE COURT: I'm a reasonable guy, but in
12 this case they're basically sending you back to
13 the drawing board and you can get a shot of
14 what they're attempting to do now.

15 Fair enough?

16 MR. GRAY: Fair enough, Your Honor.

17 THE COURT: Dismissed. I'm going to
18 need a stipulation of settlement -- oh, you
19 already have it?

20 MR. DUNN: Yes, Your Honor.

21 THE COURT: Well, that's very nice.

22 Joe, I didn't mean to cut you off. I'll
23 give you the opportunity...

24 MR. DUNN: There are five copies, Your
25 Honor. It's five originals.

1 THE COURT: Five originals, okay.

2 MR. DUNN: So you only have to read one.

3 THE COURT: I will take the one, the
4 Stipulation and Agreement. So I can so order
5 it after I read it at my leisure.

6 MR. DUNN: Yes, Your Honor.

7 (Whereupon, an off-the-record discussion
8 was held.)

9 THE COURT: You want them executed?

10 MR. DUNN: Yes. Signed by you, Judge.

11 THE COURT: All right. It's not my
12 practice to read stipulations and orders on the
13 desk. I like to contemplate what I'm reading.
14 So I will bring them back to my office.

15 MR. SISE: Your Honor, we do have
16 Mr. Abdella here on behalf of the Plaintiff.
17 We wish to have an allocution on the record
18 regarding the stipulation, if you wish.

19 THE COURT: I don't think that's
20 necessary. I believe the parties when the Town
21 and Balboa have resolved their issues, what
22 they think they've done lawfully, which I'm not
23 saying it's not, the public will have a right
24 to review and take whatever appropriate steps
25 should they feel that there's been any

1 inconsistencies of applicable law. I think
2 that resolves some fairly complex matters going
3 into the voting season, so.

4 If there's nothing further --

5 Mr. Abdella, do you want to say
6 anything?

7 MR. ABDELLA: No, thank you, Your Honor.

8 MR. SISE: I would just like to say this
9 for the record, Your Honor, it's clear that
10 after reviewing this, when it's in this
11 agreement, what has gone into the stipulation,
12 that both the Town and Mr. Abdella on behalf of
13 Balboaa Development Corp. recognizes the
14 original eleemosynary intent of the donation of
15 this very valuable piece of land, the Sherman
16 Amusement Park, which is what I knew it as
17 growing up as a young boy coming from Amsterdam
18 to go visit, has been a gem of Caroga, in the
19 Town of Caroga for the last 60 years. And it
20 was George Abdella who rescued it when it was
21 falling, not just in disrepair, Your Honor, but
22 falling apart, and sunk vast amount of monies
23 into it to rejuvenate it and restore it and to
24 maintain it. That the Town appears, recognizes
25 that in eleemosynary gift with the specific

1 conditions and the conditions were --

2 THE COURT: I read them.

3 MR. SISE: To hold it in perpetuity and
4 demand higher standards. And just for the
5 record, Your Honor, and I know you're aware of
6 it because you read the papers, that this is so
7 important for Mr. Abdella, and we appreciate
8 the Court's being a *hot bench* on this issue.

9 Thank you.

10 THE COURT: You're welcome. In reading
11 of the papers, it's clear to me that the deed
12 just wasn't given without the restrictions;
13 this donated agreement is what it is. And
14 whatever the advice was given at the Town
15 Board, if they could just ignore it, and you
16 have to convince me that it was proper. So I
17 think this was a good resolution at this point.
18 Moving forward, I don't know what claims could
19 come forward. We will evaluate at that time.

20 If there's nothing further -- hang on.

21 (Brief pause in the proceedings.)

22 THE COURT: The only question remains
23 is, what I'm going to tell the Board of
24 Elections to do with the results and I'm going
25 to, at this point, I'm going to just have them

1 seal it. There's no reason; it's not on the
2 ballot. I can't strike from the ballot, but
3 any results as a result of that resolution...
4 because it is really moot at this point. I'm
5 going to give a sealing order to the Board of
6 Elections.

7 Do you have any objection to that?

8 MR. SISE: No objection, Your Honor.

9 THE COURT: Objection.

10 MR. DUNN: No objection.

11 MR. GRAY: No, Your Honor.

12 THE COURT: I think that's fair if you
13 don't want to prejudice whatever actions the
14 Town may take with regard to this property down
15 the road. All right. Thank you.

16 MR. SISE: Thank you, Your Honor.

17 MR. GRAY: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, Dawn McKenna Carr, Official
Court Reporter in the Fourth Judicial District,
do hereby certify that I stenographically
recorded the proceedings at the time and place
herein in the above-entitled matter and the
foregoing is a true and accurate computer-aided
transcript, to the best of my knowledge and
belief.

A handwritten signature in black ink, appearing to read 'D Carr', written over a horizontal line.

DAWN MCKENNA CARR