

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
ROBERT KOLESSAR, JR.,

Plaintiff,

-against-

Index No.:

THE NYACK JOINT FIRE DISTRICT, THE BOARD OF FIRE
COMMISSIONERS OF THE NYACK JOINT FIRE DISTRICT,
CHAIRMAN JAMES B. HARTWICK, VICE CHAIRMAN TED
RYDER, COMMISSIONER ROBERT BOOTH, COMMISSIONER
JOHN PHILLIPS, COMMISSIONER JENNIFER KNECHT,

SUMMONS

Defendants.
-----X

TO THE ABOVE-NAMED DEFENDANTS:

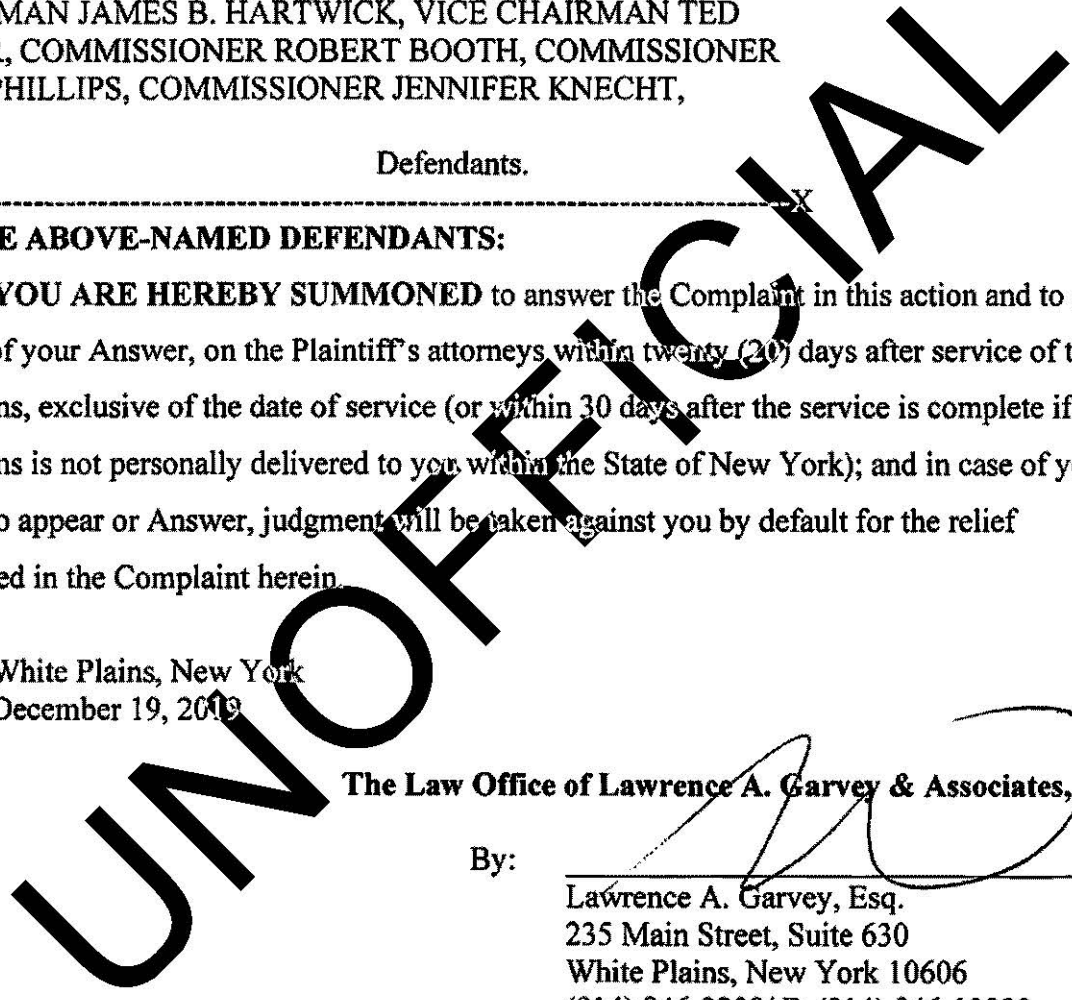
YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your Answer, on the Plaintiff's attorneys within twenty (20) days after service of this Summons, exclusive of the date of service (or within 30 days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or Answer, judgment will be taken against you by default for the relief demanded in the Complaint herein.

Dated: White Plains, New York
December 19, 2019

The Law Office of Lawrence A. Garvey & Associates, P.C.

By: _____

Lawrence A. Garvey, Esq.
235 Main Street, Suite 630
White Plains, New York 10606
(914) 946-2200/ F: (914) 946-13000
Attorneys for Plaintiff



TO:

THE BOARD OF FIRE COMMISSIONERS OF THE NYACK JOINT FIRE DISTRICT
PO BOX 732
NYACK, NY 10960-0732

THE BOARD OF FIRE COMMISSIONERS OF THE NYACK JOINT FIRE DISTRICT
Orangetown Town Hall
26 W Orangeburg Rd,
Orangeburg, NY 10962
845-359-5100

CHAIRMAN JAMES B. HARTWICK
Orangetown Town Hall
26 W Orangeburg Rd,
Orangeburg, NY 10962
845-359-5100

VICE CHAIRMAN TED RYDER
Orangetown Town Hall
26 W Orangeburg Rd,
Orangeburg, NY 10962
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COMMISSIONER ROBERT BOOTH
Orangetown Town Hall
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COMMISSIONER JOHN PHILLIPS
Orangetown Town Hall
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COMMISSIONER JENNIFER KNECHT
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UNOFFICIAL

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JOHN PHILLIPS, COMMISSIONER JENNIFER KNECHT,

COMPLAINT

Defendants.

-----X
ROBERT KOLESSAR, JR., Plaintiff, by his attorneys, The Law Office of Lawrence A.
Garvey & Associates, P.C., as and for his Complaint against the Defendants as set forth herein,
respectfully states, on information and belief, as follows:

PRELIMINARY STATEMENT

1. Plaintiff, Robert Kolessar, Jr., ("Plaintiff" or "Mr. Kolessar") is seeking a Declaratory Judgment pursuant to NY CLS CPLR § 3001 that he is a member of the of the Mazeppa Fire Engine Co. #2 and a member of the Nyack Fire Department entitled to perform the duties and enjoy the benefits associated therewith; and that he has earned credit for Active Service with the Fire Company and Fire Department for the period of time commencing no later than November 13, 2018, and continuing up to and including the date of this Court's Decision and Order.

2. Plaintiff was duly elected to the Mazeppa Fire Engine Co. #2 (the "Fire Company".)

3. Subsequently, Plaintiff was duly elected into the Nyack Fire Department (the ("Fire Department".))

4. No action was taken by the Board of Fire Commissioners of the Nyack Joint Fire District, ("Board of Fire Commissioners") either approving or disapproving the membership of Plaintiff, within seventy days after service of written notice of election to membership upon the Board of Fire Commissioners.

5. Consequently, Plaintiff's membership is deemed to have been approved.

6. The Fire Chief and officers of the Fire Company have refused to permit Plaintiff to perform the duties or have access to the benefits associated with membership in the Fire Company for fear of retaliatory action by the Board of Fire Commissioners.

7. In order that the Fire Chief and officers of the Fire Company will permit Plaintiff to assume the duties and benefits of membership in the Fire Company, the Plaintiff respectfully requests that this Court issue an Order recognizing that he is a member of the Fire Company.

THE PARTIES

8. Plaintiff is a resident of the Town of Clarkstown, in the County of Rockland, in the State of New York.

9. Defendant Nyack Joint Fire District (the "Fire District") is a district corporation in the County of Rockland, in the State of New York. "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law." (NY Town § 174.)

10. Defendant Board of Fire Commissioners of the Nyack Joint Fire District is the body having control the Fire District. (NY Town § 176.)

11. Defendant Board of Fire Commissioners of the Nyack Joint Fire District are authorized to approve membership in the Fire Company pursuant to NYS Town Law § 176-b.

12. Defendants, Chairman James B. Hartwick, Vice Chairman Ted Ryder, Commissioner Robert Booth, Commissioner John Phillips, and Commissioner Jennifer Knecht are the Commissioners of the Board of Fire Commissioners.

13. Defendant Fire Commissioners are Public Officers. 1955 Ops St Compt File #7343.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action because all Defendants are residents of the State of New York.

15. This Court is the proper Venue for this action pursuant to CPLR § 504:

Notwithstanding the provisions of any charter heretofore granted by the state and subject to the provisions of subdivision (b) of section 506, the place of trial of all actions against counties, cities, towns, villages, school districts and district corporations or any of their officers, boards or departments shall be, for:

2. a city, except the city of New York, town, village, school district or district corporation, in the county in which such city, town, village, school district or district corporation is situated, or if such school district or district corporation is situated in more than one county, in either county;

BACKGROUND

16. The Fire Company is located at 68 Main St, in the Village of Nyack, in the County of Rockland, in the State of New York, and is within the Nyack Joint Fire District.

17. Mr. Kolessar resides at 133 Highway Avenue, Congers, New York.

18. According to Google Maps it is 4.2 miles and an 11 minute drive from Mr. Kolessar's residence to the Firehouse at 68 Main St, Nyack, NY.

19. On August 7, 2018, Mr. Kolessar was duly elected to membership in the Fire Company by a majority of the members of the Fire Company present during balloting, in accordance with the By Laws of the Fire Company.

20. On August 30, 2018, Mr. Kolessar was duly elected to membership in the Fire Department by the Board of Fire Commissioners of the Nyack Fire Department (hereinafter referred to as the "Fire Department Commissioners", as distinguished from the Board of Fire Commissioners.)

21. Subsequently his application was submitted to the Board of Fire Commissioners.

22. There was a meeting of the Board of Fire Commissioners on September 6, 2018, at which meeting the consideration of Mr. Kolessar's membership was "tabled", to be considered at the next meeting on October 4, 2018.

23. There was a meeting of the Board of Fire Commissioners on October 4, 2018, at which meeting Commissioner Phillips moved that Mr. Kolessar's application for membership be accepted by the Board.

24. The motion to approve Mr. Kolessar's application for membership received no second.

25. Chairman Hartwick did not state the question on the motion.

26. Upon information and belief, there was no debate had on the question.

27. Chairman Hartwick did not put the question to a vote.

28. Upon the failure of the motion to be seconded, Chairman Hartwick declared that the motion had been denied.

29. Upon information and belief, the Board of Fire Commissioners took no further action regarding Mr. Kolessar's membership, and never voted on the motion to accept Mr. Kolessar's membership.

30. By letter dated January 3, 2019, Brian Looser, a lieutenant with the Fire Company, notified the Board of Fire Commissioners, "that Robert Kolessar Jr. was, by law, accepted into membership automatically either seventy days after the September meeting (November 13, 2018), or seventy days after the October meeting (December 13, 2018)." Mr. Looser's letter

then stated, "Robert Kolessar Jr. will be participating in firefighting activities as of the receipt of his letter."

31. In apparent response to that letter, the Chief of the Fire Department, Bryan Knecht, informed Mr. Looser via telephone that if Mr. Kolessar were observed at the scene of a fire, he and Mr. Looser would be arrested.

32. Subsequent to that time Mr. Kolessar has not performed the duties of a member of the Fire Company and Fire Department, out of fear of retaliation.

APPLICABLE LAW

33. NYS CPLR § 3001. Declaratory judgment, provides the following:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

34. NYS Town Law § 176-b. Volunteer members of fire district fire companies, contains the following provision:

6. A person who cannot meet the residence requirements of subdivision three of this section may be elected to membership as a volunteer member of any fire company of the fire department if by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the fire district or in territory which is afforded fire protection pursuant to a contract for fire protection by the fire department of the fire district, or a fire company thereof. Such election shall be pursuant to the by-laws, if any, of the fire company; otherwise by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. The membership of any person so elected shall not become effective unless approved by resolution of the board of fire commissioners. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving within seventy days after service of written notice of election to membership shall have been made by the secretary of the fire company upon the secretary of the board of fire commissioners, either personally or by mail.

AS AND FOR A FIRST CAUSE OF ACTION**(Declaratory Judgment)**

35. Mr. Kolessar was duly elected to the Fire Company and the Fire Department.

36. Written notice of the membership Mr. Kolessar's was forwarded to the Board of Fire Commissioners in the form of an application for membership, in accordance with the usual and customary practice for seeking the approval of the Board of Fire Commissioners.

37. The Board of Fire Commissioners received the written notice of membership, no later than the Board meeting on September 6, 2018.

38. At the Board meeting on September 6, 2018, consideration of his membership was "tabled."

39. This was an improper procedure as, upon information and belief, there was no motion was made nor seconded to consider the question of Mr. Kolessar's membership.

40. "[T]he motion to *Lay on the Table* can be applied *only* to a question that is actually *pending*," (GENERAL HENRY M. ROBERT, ROBERT'S RULES OF ORDER NEW AND REVISED § 17 (2)).

41. The next regular meeting of the Board of Fire Commissioners was held on October 4, 2016.

42. At the Board meeting on October 4, 2018, Commissioner Phillips moved that Mr. Kolessar's application for membership be accepted by the Board.

43. It is undisputed that the motion, that Mr. Kolessar's application for membership be accepted by the Board, did not receive a second. "As you state, a motion to accept Mr. Kolessar at the October 4 meeting was not seconded and was never considered." (See Letter from Frank

T. Simeone, Counsel for the Board of Fire Commissioners (the "Simeone Letter"), annexed as **EXHIBIT A.**)

44. It appears to be undisputed that Chairman Hartwick never put the question of acceptance of Mr. Kolessar's application for membership to the Board, and it was admittedly "never considered." (See the Simeone Letter, **EXHIBIT A.**)

45. "Based upon that, Mr. Kolessar's application was denied, which was clearly stated at that meeting." (See the Simeone Letter, **EXHIBIT A.**)

46. The Chairman had no authority to declare that a motion that did not receive a second was denied. "If there is no second, the chair says, "The motion [or "resolution"] is not seconded"; or "Since there is no second the motion is not before this meeting." (GENERAL HENRY M. ROBERT, ROBERT'S RULES OF ORDER NEW AND REVISED § 4 SECONDING A MOTION.)

47. Although Mr. Kolessar acknowledges that the requirement of a "second", may be dispensed with under certain circumstances, this merely permits the chair to "state the question" and bring it before the board for "*debate*."

48. It is unnecessary for this Court to decide whether or not Chairman Hartwick was authorized to dispense with the requirement of a second and permit debate on the question, because Chairman Hartwick did not permit debate, nor did he put the question to a vote.

49. The language of the controlling statute requires the finding that the failure to vote cannot be considered a disapproval of the election to membership. The statute requires that the Board take action *either* "approving or disapproving within seventy days", and that, "Membership is deemed to have been approved pursuant to this subdivision in the event that no action is taken..." (NY Town § 176-b (6).)

50. The Board takes action by voting on a "motion", be it termed a resolution, a question, an application, or otherwise.

51. The authority of the Board is exercised through the collective action of the Board, and that authority is not vested in an individual member or the Chairman.

52. The Chairman has no authority to usurp the function of the Board and declare a motion denied without debate and without a vote.

53. In failing to vote on whether to approve or disapprove of his membership, the Board of Fire Commissioners did not take action to approve or disapprove of Mr. Kolessar's membership, and in excess of seventy days have passed since the Board was notified of Mr. Kolessar's election to the Fire company and Fire Department.

54. By reason of the foregoing, Mr. Kolessar begs the Court for an Order pursuant to CPLR § 3001, declaring that he is a member of the Mazepa Fire Engine Co. #2 and a member of the Nyack Fire Department entitled to perform the duties and enjoy the benefits associated therewith; and that he has earned credit for Active Service with the Fire Company and Fire Department for the period of time commencing no later than November 13, 2018, and continuing up to and including the date of this Court's Decision and Order.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

For an Order that Robert Kolessar Jr. is a member of the of the Mazeppa Fire Engine Co. #2 and a member of the Nyack Fire Department entitled to perform the duties and enjoy the benefits associated therewith as of November 13, 2018, or another date as determined by this Court; and,

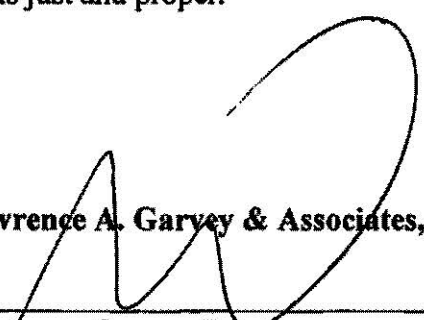
For an Order that Robert Kolessar Jr. has earned credit for Active Service with the Fire Company and Fire Department for the period of time commencing on November 13, 2018, or an earlier date, if so determined by the Court, and continuing up to and including the date of this Court's Decision and Order; and,

For such other and further relief as this Court deems just and proper.

Dated: White Plains, New York
December 19, 2019

The Law Office of Lawrence A. Garvey & Associates, P.C.

By:



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