

Mandamus Unavailable to Prevent Judge X from Referring Matter to Judge Y

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As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned. As to an unaggrieved citizen-taxpayer attacking the validity of a *state* law, the court of appeals case of *St. Clair* is controlling, and the petitioner will be deemed to lack standing to challenge its validity.

Mandamus unavailable to prevent judge X from referring matter to Judge Y.

In *Kahn v. Backer*,²⁹⁶ the question presented was whether an Article 78 proceeding was properly brought against a justice of the supreme court. The proceeding was instituted in the appellate division,²⁹⁷ first department, in order to compel the respondent to render a decision on a motion to dismiss a cause of action.²⁹⁸ The case was on the general jury reserve calendar when the motion was made. Respondent disposed of the motion by referring it to the trial justice. The appellate division held that the respondent had in fact exercised his discretion and that the disposition of the motion in the above manner was the equivalent of a denial of the motion. Proper procedure was to enter an order thereon and to appeal the order.

The court pointed out that an Article 78 proceeding could not be used to challenge a determination made in a civil action, unless it was an order summarily punishing a contempt committed while in the court's presence.²⁹⁹ The court also held that the disposition of the petitioner's motion, even if erroneous, could not be indirectly reviewed in a proceeding in the nature of mandamus, since the only proper avenue by which one may challenge such a determination is by appeal.³⁰⁰

The proceeding in the *Kahn* case was one in the nature of mandamus, which has always been a discretionary remedy. The court points out, relying on well-established case law,³⁰¹ that it will

945 (4th Dep't 1957). The court made a blanket statement in this case that injunctive relief is not appropriate in a proceeding under Article 78, Civil Practice Act.

²⁹⁶ 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

²⁹⁷ CPLR 506(b)(1).

²⁹⁸ A motion to dismiss a cause of action is made pursuant to CPLR 3211.

²⁹⁹ CPLR 7801(2).

³⁰⁰ CPLR 7801(1).

³⁰¹ See, e.g., *Walker v. Reidy*, 31 Misc. 2d 915, 221 N.Y.S.2d 564 (Sup. Ct. 1961); *Lindner v. Frisina*, 194 N.Y.S. 2d 843 (Sup. Ct. 1959).

not lie where another remedy is available or provided by law. An Article 78 proceeding in the nature of mandamus can be used to compel a justice to exercise the discretion he possesses by virtue of his position, but cannot be used to compel him to exercise his discretion in any particular manner.³⁰²

Particularity of statements in Article 78 pleadings.

Section 7804(d) is the only section in Article 78 pertaining to pleadings, and it provides, in part, that the "petition . . . shall comply with the rules for a complaint in an action. . . ." That requires cross-reference to CPLR 3013. This section does not require the pleading of "material facts," which was required under Section 241 of the Civil Practice Act, and there is no longer the prohibition of section 241 as to the pleading of "evidence." Under CPLR 3013 all that is required of the pleading is that it be sufficiently particular to furnish the parties and the court with notice of the "transactions" or "occurrences" that the pleader intends to prove. "Pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy."³⁰³ To date, the leading case construing the CPLR in this area is *Foley v. D'Agostino*,³⁰⁴ wherein the court held that statements in a pleading are sufficiently particular if when "viewed with reason and liberality" they "give the defendants notice of the plaintiffs' claims . . . and of the elements of plaintiffs' alleged cause of action. . . ." ³⁰⁵

Gallagher GMC Sales Corp. v. Central School Dist. No. 1 ³⁰⁶ involved an Article 78 proceeding in the nature of mandamus. One of the questions the court was confronted with was whether the statements in the petition were sufficiently particular. The petition contained conclusory allegations that did in fact inform the court and respondents of the specific transaction that the petitioner was complaining of, yet the court felt that the statements were not sufficiently particular to make out a cause of action, stating that "conclusory allegations not supported by facts need not be considered" ³⁰⁷

The court appears to have held that it is necessary to have specific allegations of fact in a petition, even though the so-called

³⁰² *Kahn v. Backer*, 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964); see CPLR 7801(1).

³⁰³ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3013.03 (1963).

³⁰⁴ 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

³⁰⁵ *Foley v. D'Agostino*, 21 App. Div. 2d 60, 68, 248 N.Y.S.2d 121, 129 (1st Dep't 1964).

³⁰⁶ 43 Misc. 2d 360, 251 N.Y.S.2d 119 (Sup. Ct. 1964).

³⁰⁷ *Gallagher GMC Sales Corp. v. Central School Dist. No. 1*, 43 Misc. 2d 360, —, 251 N.Y.S.2d 119, 121 (Sup. Ct. 1964).