

Particularity of Statements in Article 78 Pleadings

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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).

"legal conclusions" and "allegations of wrong doing" did apprise the parties and court of the particular transactions complained of. By requiring specific allegations of facts in the petition, the court actually required a more detailed and stricter pleading than is required in an action.³⁰⁸ Though the procedures of the special proceeding are more summary and expeditious than those of an action,³⁰⁹ one may argue that a petition giving the respondent "notice of the transactions . . . intended to be proved . . ." ³¹⁰ affords him ample basis on which to oppose it. In that light, there is practical reason, too, for using 3013's criteria for pleadings in actions as the criteria to govern petitions in special proceedings. A counterpoise here is that the special proceeding is less appropriate to the use of disclosure devices (though they are available there³¹¹) than is an action, for which reason it may be incumbent upon a petition to be more informative than a complaint. These factors were not investigated by the court. The CPLR itself was apparently satisfied to make 3013's criteria applicable, by cross-reference, not only to the petition in an Article 78 proceeding,³¹² but to the petition in all special proceedings governed by the CPLR.³¹³ This point does not appear to have been urged in the *Gallagher* case. That case, moreover, appears to have been disposed of on the merits rather than on the mere omissions of pleading, though these omissions are referred to by the court.

ARTICLE 80 — FEES

Poundage fees.

*Morris v. Morris*³¹⁴ involved an application by a sheriff for poundage fees. The sheriff served a copy of an execution on a garnishee. After the garnishee's refusal to deliver the property (a promissory note) to the sheriff, the judgment creditor instituted a special proceeding against the garnishee under CPLR 5225 and 5227 (as contemplated by 5232(a)) to compel surrender of the note. The court granted the poundage fees, holding that the sheriff was entitled to poundage notwithstanding the fact that it was necessary for the judgment creditor to bring a proceeding when the garnishee failed to turn the note over to the sheriff pursuant to the levy. The judgment creditor prevailed in the proceeding, and payment of the note was made directly to plaintiff's attorneys

³⁰⁸ See the *Foley* case, *supra*, note 305.

³⁰⁹ CPLR Art. 4; see 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE § 401.01 (1963).

³¹⁰ CPLR 3013.

³¹¹ See CPLR 408.

³¹² CPLR 7804(d).

³¹³ See CPLR 402.

³¹⁴ 43 Misc. 2d 854, 252 N.Y.S.2d 641 (Sup. Ct. 1964).