

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DORIS L. SASSOWER,

Petitioner,

- against -

COMMISSION ON JUDICIAL CONDUCT OF
THE STATE OF NEW YORK,

Respondents.

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**NOTICE OF MOTION
TO DISMISS**

Index No. 95-109141

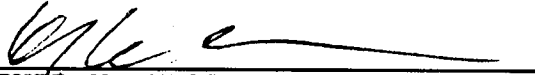
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PLEASE TAKE NOTICE that upon the complaint and affirmation of OLIVER W. WILLIAMS, dated May 30, 1995, the undersigned, on behalf of respondent, Commission on Judicial Conduct of the State of New York, will move this Court at the Motion Support Office, Room 130, 60 Centre Street, New York, New York, on June 12, 1995 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 7804(f) and 3211(a)(7) dismissing the complaint for failure to state a cause of action cognizable under Article 78 of the CPLR and for such other relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering papers, if any, must be served on the undersigned at least seven (7) days before the return date of this motion, or on or before June 5, 1995.

Dated: New York, New York
May 30, 1995

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondent
Commission on Judicial Conduct
By:


OLIVER W. WILLIAMS
Assistant Attorney General
120 Broadway, Room 24-120
New York, New York 10271
(212) 416-8569

TO: DORIS L. SASSOWER
283 Soundview Avenue
White Plains, New York 10606

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DORIS L. SASSOWER, :

Petitioner, :

- against - :

COMMISSION ON JUDICIAL CONDUCT OF THE :
STATE OF NEW YORK, :

Respondent. :
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**AFFIRMATION IN
SUPPORT OF
RESPONDENT'S
MOTION TO DISMISS**

Index No. 95-109141

OLIVER W. WILLIAMS, an attorney at law, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury:

1. I am an Assistant Attorney General in the office of DENNIS C. VACCO, Attorney General of the State of New York, attorney for respondent, Commission on Judicial Conduct of the State of New York. I make this affirmation in support of the Commission on Judicial Conduct's motion to dismiss this Article 78 proceeding. Dismissal is required because the petition fails to state a cause of action cognizable under Article 78 of the CPLR.

2. Petitioner commenced this Article 78 proceeding by Verified Petition dated April 10, 1995. Petitioner seeks by way of mandamus, prohibition and certiorari¹ to have Respondent's Rule 22 NYCRR 7000.3 declared unconstitutional, to compel Respondent to

¹ Although petitioner seeks to characterize this proceeding as in the nature of certiorari, it is clearly either mandamus or prohibition. Certiorari is intended to apply to proceedings where the court is reviewing an administrative determination made after a hearing held pursuant to direction by law. In such cases, the court reviews the determination on the basis of whether it is supported by substantial evidence. Siegel, New York Practice § 560 (1978). This is not what petitioner seeks here.

conduct an investigation of each complaint it receives and to compel an investigation of Respondent's conduct by the New York State Attorney General, the United States Attorney and the New York State Ethics Commission. Petition ("Pet."), ¶ 10 and "Wherefore" clause.

3. According to the petition, Respondent violated Art. VI, § 22.a of the New York State Constitution as well as § 44.1 of the New York State Judiciary Law. Specifically, petitioner maintains that 22 NYCRR § 7000.3 (the "Rule") as promulgated by Respondent is unconstitutional as written and applied in that it permits Respondent to summarily dismiss complaints without investigating them. Pet., ¶¶ 10, 13, 14 and 18.

4. Petitioner maintains Respondent summarily dismissed eight complaints she filed with it from 1989 through December of 1994. Further, petitioner contends that in summarily dismissing her complaints, Respondent conspired with "judicial wrongdoers", aiding and abetting them in violating petitioner's rights under the First and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 6, 8 and 11 of the New York State Constitution insofar as she was statutorily and constitutionally entitled, under Art. VI, § 22.a of the New York State Constitution and § 44.1 of the Judiciary Law, to have each complaint investigated. Pet., ¶¶ 20, 19 and 23.

5. On May 11, 1995, by Order to Show Cause signed by this Court, but undated, petitioner applied for a temporary restraining order ("TRO") and preliminary injunction ("PI"),

prohibiting Respondent from summarily dismissing complaints of judicial misconduct until the merits of this proceeding are determined. Petitioner's application for a TRO was stricken; her application for a PI was set for hearing on May 23, 1995 at 2:00 p.m., and was taken under advisement by the Court.

6. The petition should be dismissed because the Rule is constitutional as written and applied. Moreover, the Commission has the discretion to decide whether a complaint merits an investigation, and thus did not abuse its discretion when it dismissed petitioner's complaints without investigating them.

7. The extraordinary remedy of prohibition lies only where there is a clear legal right to the relief requested and only when the body or officer involved acts, or threatens to act, in a matter over which he lacks jurisdiction over the subject matter or where he exceeds his authorized powers in a proceeding over which he has jurisdiction. CPLR 7803(2). Town of Huntington v. N.Y.S. Division of Human Rights, 82 N.Y.2d 783 (1993); Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988); Dondi v. Jones, 40 N.Y.2d 8 (1976); LaRocca v. Lane, 37 N.Y.2d 575 (1975); State v. King, 36 N.Y.2d 59 (1975). Even then, prohibition does not issue as of right, but may issue only in the discretion of this court following consideration of such factors as the gravity of harm caused by the alleged excess of power, the availability of an adequate remedy on appeal, at law or in equity, and the remedial effectiveness of such a writ to the extent that it would furnish more complete relief. LaRocca v. Lane, supra; Greenwald v. Scheinman, 94 A.D.2d 842 (3d Dep't 1983).

8. Similarly, mandamus is an extraordinary remedy that lies only "to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." Matter of Legal Aid Society of Sullivan County v. Scheinman, 53 N.Y.2d 12, 16 (1981). See also Marburg v. Cole, 286 N.Y. 202 (1941). "A ministerial act ... has been defined as a specific act which the law requires a public officer to do in a specified way." Matter of Posner v. Levitt, 37 A.D.2d 331 (3d Dep't 1971). The relief demanded in the petition must be specifically and "clearly imposed by law ... It is not enough that the act, performance of which is sought, is not prohibited, its performance must be directed." Matter of Burr v. Voorhis, 229 N.Y. 382, 387 (1920). Mandamus "will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion." Klpostermann v. Cuomo, 61 N.Y.2d 540 (1984); Matter of Hampton Hospital v. Moore, 52 N.Y.2D 88-96 (1981); Matter of Mansfield v. Epstein, 5 N.Y.2d 70, 73 (1958).

9. In the instant matter, the petition fails to set forth facts sufficient to show that petitioner is entitled to relief in the nature of prohibition or mandamus. Petitioner argues, incorrectly, that because the Rule enables the Commission to dismiss complaints without investigating them, it contravenes N.Y.S. Const. Art. VI, § 22 and Jud. § 44.1. Compl., ¶ 24. To the contrary, these provisions and the Rule are consistent and harmonious.

10. Article VI, § 22(a) creates the Commission of Judicial Conduct and provides for the investigation of complaints alleging judicial misconduct. It provides, in part, as follows:

There shall be a commission of judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including but not limited to, misconduct in office, ...

Implicit in the Commission's authority to investigate is the mandate to investigate only those complaints alleging acts of judicial misconduct. Thus, if the face of the complaint is void of legally cognizable allegations of judicial misconduct, the Commission does not have anything to investigate, nor does it have jurisdiction to institute an investigation. Moreover, the Commission may not be forced to investigate a complaint once it has dismissed it for lack of merit. Mullan v. Axelrod, 74 N.Y.2d 484, 491 (1988); see also Matter of Independent Counsel, 766 F.2d 70 (2d Cir. 1984) ("separation of powers precludes individual from invoking power of court to compel government to act to indicate administration of justice"), cert. denied, 474 U.S. 1020 (1985).

11. Further, Jud. L. § 44.1(b) is in harmony with Art. 6, § 22(a). It reads, in pertinent part, as follows:

... Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. ...

The Rule is consistent with each of the aforementioned provisions, for it reads:

Upon receipt of a complaint, or after an initial review and inquiry, the complaint may be dismissed by the commission or, when authorized by the commission, an investigation may be undertaken.

The Rule simply states the Commission's inherent discretion, implicit in the power to investigate provided for by Art. 6, § 22(a) of the N.Y.S. Const., Jud. L. § 44.1, to determine which complaints merit investigating. The Commission necessarily had the discretion to investigate petitioner's complaints if they contained allegations of judicial misconduct within its jurisdiction or, if otherwise, to dismiss them without investigation. Thus, the petitioner has not demonstrated either a "clear legal right" to relief or a mandatory duty warranting mandamus or prohibition. Accordingly, she failed to meet her burden of proof in this proceeding. The petition should be dismissed.

WHEREFORE, it is requested that the petition be dismissed, and any other relief as this Court deems just and proper.

Dated: New York, New York
May 30, 1995



OLIVER W. WILLIAMS