

CITY COURT OF THE CITY OF WHITE PLAINS
STATE OF NEW YORK: COUNTY OF WESTCHESTER

-----X
JOHN McFADDEN,

Petitioner,

**NOTICE OF CROSS-MOTION
TO DISMISS**

-against-

Index No. 02-12153

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents.
-----X

PLEASE TAKE NOTICE that, upon the annexed affirmation of Dian Kerr McCullough, Assistant Attorney General, dated October 3, 2008 the Chief Clerk Patricia Lupi will move this Court on October 10, 2008, before the Honorable Jo Ann Fria. City Judge, The City of White Plains City Court, 77 South Lexington Avenue, White Plains, New York 10601 as soon thereafter as counsel may be heard for an order pursuant to Section 3211 (a) (2) of the Civil Practice Law and Rules, dismissing the complaint in its entirety on the ground that this Court lacks subject matter jurisdiction over the claim, and for such other and further relief as this Court may deem just and proper.

Dated: October 3, 2008
White Plains, New York

ANDREW M. CUOMO
Attorney General of the
State of New York

Attorney for Chief Clerk Patricia Lupi

By:


DIAN KERR MCCULLOUGH
Assistant Attorney General
101 East Post Road
White Plains, New York 10601
Tel. No. (914) 422-8757

TO: Ms. Elena Ruth Sassower
Pro Se
16 Lake Street, Apt. 2C
White Plains, NY 10603

Leonard A. Sclafani, Esq.
18 East 41st, Suite 1500
New York, NY 10017

CITY COURT OF THE CITY OF WHITE PLAINS
STATE OF NEW YORK: COUNTY OF WESTCHESTER
-----X

JOHN McFADDEN,

**AFFIRMATION IN SUPPORT
OF MOTION TO DISMISS**

Petitioner,

-against-

Index No. 02-12153

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents.
-----X

DIAN KERR McCULLOUGH, an attorney duly licensed to practice law in the State of New York, affirms that:

1. I am an Assistant Attorney General in the Office of ANDREW M. CUOMO, Attorney General of the State of New York, attorney for respondent Patricia Lupi, Chief Clerk of the City of White Plains ("Chief Clerk"). I submit this affirmation in support of a motion to dismiss for lack of subject matter jurisdiction pursuant to CPLR § 3211 (a)(2). Although the Chief Clerk is not a party to this action, the sole remedy that Elena Sassower ("Movant") seeks is for an order to compel the Chief Clerk to perform certain ministerial acts as it pertains to the above-referenced action. This affirmation is based upon my review of the petition and motion papers, as well as records maintained and information supplied by the City Court of the City of White Plains, Westchester County.
2. On or about September 19, 2008, this motion was filed in City Court of the City of White Plains seeking an order compelling the White Plains City Court Chief Clerk Patricia Lupi to furnish to the Appellate Term of the Supreme Court's Second Judicial Department inter alia, the

following:

- a) a proper “Clerk’s Return on Appeal” for the above-entitled case docketed by the White Plains City Court Clerk’s Office as #651/89 and #2008-1474;
- b) the docket sheets for #651/89 and #2008-1474;
- c) the microfilm/microfiche of #651/89 and the file of #2008-1474;
- d) a proper “Clerk’s Return on Appeal” for #1507/07, *John McFadden v. Elena Sassower*
- e) the docket sheet for # 1502/07
- f) the docket sheets, record entries and microfiche/microfilm for #1502/07, #434/88, #500/88, #504/88, #652/89
- g) an explanation for her failure to respond to Respondent Elena Sassower’s hand delivered August 22, 2008 and August 28, 2008 letters-and requiring her responses to those letters.

3. In addition, movant is seeking to refer Chief Clerk Lupi for disciplinary and criminal investigation and prosecution for official misconduct, obstruction of justice and other crimes involving violation of her oath of office...” See Notice of Motion to Compel and affirmation of Elena Sassower dated September 18, 2008.

4. As set forth below, this motion should be dismissed since Movant is attempting to obtain an order from this Court to compel a “body or officer” to perform a duty enjoined upon it by law. See CPLR §7803(1).

DISCUSSION

A. The City Court of White Plains Does Not Have Jurisdiction to Hear This Motion

5. Movant failed to commence this proceeding under Article 78 of the Civil Practice Laws and Rules (CPLR) which state the proper guidelines for commencing a proceeding against a state body or officer. For a “body or officer” the only questions that may be raised in a proceeding under this article are “whether the body or officer failed to perform a duty enjoined upon it by law” and

“whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.” See CPLR § 7803(1) and (2). Moreover, it is clear that any and all proceedings against a state “body or officer” of the court must be brought in the Supreme Court of the specified county pursuant to §7804(b). See Voccola v. Shilling, 88 Misc.2d 103; 388 N.Y.S.2d 71 (2d Dept. 1976); see also Byrnes v. County of Monroe, 122 A.D.2d 549;505 N.Y.S.2d 473 (4th Dept. 1987). Since Chief Clerk Patricia Lupi, who currently serves as Chief Clerk of the City Court of White Plains, is an officer of the court of the State of New York as defined under § 7802(a) of the CPLR, this motion should have been brought pursuant to Article 78 of the CPLR, in the Supreme Court in the County of Westchester.

6. In the case at bar, Movant is seeking an order to compel the Chief Clerk of the City of White Plains to perform certain duties and to furnish various documents to the Appellate Term of the Supreme Court’s Second Judicial Department. Therefore, in accordance with §7804(b) of the CPLR, the proceeding should have been brought in the Supreme Court of the County of Westchester. Movant, however, commenced this proceeding in the City Court of White Plains. The subject matter of this action is for mandamus to compel which, in accordance with CPLR Article 78 is outside the jurisdiction of this Court. The motion should have been filed in the Supreme Court of Westchester County. As such, this court does not have subject matter jurisdiction and the case should be dismissed under 3211(a)(2) of the CPLR.

B. The Motion Fails to State a Claim for Mandamus to Compel

7. Even if Movant commenced this proceeding pursuant to §7801 of the CPLR seeking judgment in the nature of mandamus to compel respondent Patricia Lupi to perform specific duties and to provide certain documents that Movant claims is enjoined upon respondent by law in

accordance with §7803, this action would fail. Movant has failed to demonstrate that she is entitled to this extraordinary relief. A mandamus to compel, under §7801 of the CPLR is “a judicial command to an officer or body to perform a specified ministerial act” that is legally required to be performed. Hamptons Hospital and Medical Center, Inc. v. Moore, 53 N.Y.2d 88 (1981). This extraordinary remedy can only be enforced where there is a “clear legal right to the relief sought.” Matter of Legal Aid Society of Sullivan County v. Scheinman, 52 N.Y.2d 12, 16 (1981). See also Harper v. Angiolillo, 89 N.Y.2d 761, 765 (1997); Matter of Brusco v. Braun, 84 N.Y.2d 674, 679 (1994); Marburg v. Cole, 286 N.Y.2d 202 (1941). A “ministerial act” has been defined as a specific act that in which the law requires a public officer to perform in a certain way. Matter of Posner v. Levitt, 37 A.D.2d 331 (3d Dept. 1971). In addition, the right to performance cannot be “clouded by reasonable doubt or controversy. Association of Surrogate and Supreme Court Reporters Within the City of New York v. Bartlett, 40 N.Y.2d 571, 547 (1976). See also Coastal Oil New York, Inc. v. Newton, 231 A.D.2d 55 (1st Dept.), appeal dismissed, 91 N.Y.2d 848 (1997), motion for leave to appeal denied, 91 N.Y.2d 808 (1998). The “ministerial act” cannot involve any “exercise of judgment or discretion” otherwise it will not be entitled to such relief. Gimprich v. Board of Education of the City of New York, 306 N.Y. 401 (1954). Lastly, a motion for mandamus to compel is only appropriate where “the officer or agency may have failed or refused to conduct a hearing or decide a particular matter where there was a mandatory, nondiscretionary duty to do so. Utica Cheese, Inc. v. Barber, 49 N.Y.2d 1028 (1980) (agency’s failure to perform a hearing and to decide on petitioner’s license application was found to be subject to a mandamus).

8. In order to demonstrate a “clear legal right” to the relief requested, petitioner must show “a clear and unequivocal expression of intent from the Legislature...” Harper v. Angiolillo, 89

N.Y.2d at 767. Without a clear statutory direction, mandamus will not lie. Id. See also Anonymous v. Grievance Committee, 244 A.D.2d 549 (2d Dept. 1997), leave to appeal denied, 91 N.Y.2d 808 (1998) (petitioner failed to demonstrate a clear legal right to compel a hearing before a full committee to review its determination where such hearings is not expressly required by the Court rules).

9. In the case at bar, the Movant fails to point to any statute or case law that is sufficient to show that petitioner has a “clear legal right” to relief by way of mandamus to compel to require Patricia Lupi to provide the requested documents or to perform her requested acts. Movant has not provided any statutory or common law evidence showing that Patricia Lupi, as the Chief Clerk of the City of White Plains, was required by law to perform any of the acts that petition states was requested. Without any evidence showing that Patricia Lupi, serving as a state officer, was legally required to perform the acts requested by Movant, Movant has thus failed to show that the acts of which she is requesting Patricia Lupi to perform are, in fact, ministerial acts.

10. In addition to there being no “clear legal right” to relief, the right to performance that Movant is requesting has a significant amount of reasonable doubt and/ or controversy. Movant has had an extensive history of controversial interactions with state officers of the court regarding this case. Several other state officers have, in fact, requested dismissal from proceedings involving this case because of controversial actions that have occurred involving Movant and related claims.

11. Lastly the motion does not show that Patricia Lupi, as Chief Clerk of the City of Westchester, “failed or refused” to perform an act that “where there was a mandatory, non-discretionary” duty to do so. Utica Cheese, Inc. v. Barber, 49 N.Y.2d 1028 (1980). Movant has not

provided any evidence that suffices to show that Patricia Lupi has a legal duty to perform any of the acts that were requested by Movant. As such, an action for mandamus to compel is not warranted.

12. In conclusion, since Movant has not shown an entitlement to the relief requested, the motion must be dismissed.

WHEREFORE, it is respectfully requested that the Court deny Movant's application for an order judgment (1) directing respondent to furnish the Appellate Term of the Supreme Court's Judicial Department with: (a) a "Clerk's Return on Appeal" for the above-entitled case; (b) the docket sheets for the above entitled case; (c) the microfilm for the above entitled case; (d) a "Clerk's Return on Appeal" for case# 1502/07; (e) the docket sheet for #1502/07; (f) the record entries and microfilm for case# 1502/07; (g) an explanation for alleged failure to respond to Movant's letters and (2) Movant's referral for criminal investigation and prosecution of Chief Clerk Patricia Lupi.

Dated: October 3, 2008
White Plains, New York


DIAN KERR McCULLOUGH

INDEX NO. 02-12153

STATE OF NEW YORK
CITY COURT OF WHITE PLAINS

JOHN McFADDEN,

-Petitioner-

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

-Respondents-

NOTICE OF CROSS-MOTION TO DISMISS

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Defendant
101 East Post Road
White Plains, New York 10601

DIAN KERR McCULLOUGH
Assistant Attorney General
of Counsel
(914) 422-8755