

**Matter of Grecco v Cimino**

2010 NY Slip Op 33920(U)

July 9, 2010

Supreme Court, Suffolk County

Docket Number: 09-45759

Judge: Theresa Whelan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 1/14/10  
ADJ. DATES 5/28/10  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MG; Settle Judgment  
CDISP

-----X  
In the Matter of the Application of ALLAN :  
GRECCO, :  
 :  
 Petitioner, :  
 :  
 For a Judgment under Article 78 of the Civil :  
 Practice Law and Rules compelling a :  
 determination to provide a legal defense, :  
 :  
 -against- :  
 :  
 ROBERT J. CIMINO, former County Attorney :  
 of the County of Suffolk, CHRISTINE MALAFI, :  
 as County Attorney of the County of Suffolk and :  
 the COUNTY OF SUFFOLK, :  
 :  
 Respondents. :  
-----X

HARVEY B. BESUNDER, PC  
Atty. For Petitioner  
1601 Veterans Hwy.  
Islandia, NY 11749  
  
CHRISTINE MALAFI  
Suffolk County Atty.  
By: John r. Petrowski, Esq.  
Assist County Atty.  
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Upon the following papers numbered 1 to \_\_\_\_\_ read on this Article 78 Petition and cross motion to dismiss  
\_\_\_\_\_ ; Notice of Petition and supporting papers 1 - 3 ; Notice of Cross Motion and  
supporting papers 4-6 ; Answering Affidavits and supporting papers 7-9 ; Replying Affidavits and  
supporting papers 10-11 ; Other 12 (memorandum); 13 (memorandum) ; ~~(and after hearing counsel in support~~  
~~of and in opposition to the motion) it is,~~

**ORDERED** that the motion (#002) by the respondents/defendants for dismissal of this hybrid Article  
78 proceeding and declaratory judgment action is considered under CPLR 3211(a) and CPLR 7803, and  
is granted; and it is further

**ORDERED** that the petitioner/plaintiff's demands for relief contained in the Article 78 petition  
(#001) are denied as the petition/complaint served and filed in this action is dismissed.

Grecco v County of Suffolk et al  
Index No. 09-45759  
Page 2

The petitioner/plaintiff (hereinafter “petitioner”) commenced this hybrid action for declaratory and other relief requiring the respondent/defendant, County of Suffolk (hereinafter “County”), to reimburse the petitioner for all legal fees, costs and disbursements incurred in defending two suits previously pending in this court and those incurred in connection with certain proceedings and investigations before State and County officials. At issue in these proceedings were the propriety of the actions of the petitioner while he negotiated the County’s purchase of the Chandler Estate during his tenure as Director and Deputy Director of the Suffolk County Division of Real Estate from 1997-2001.

In 2002, the petitioner filed a hybrid action like the instant one against the County and respondent Cimino, who was then the Suffolk County Attorney, after Cimino declined the petitioner’s request that the County provide him with a defense to a “Tweed” action that had been commenced by the Attorney General in an action entitled *State of New York v Grecco, et al.* The petitioner also claimed that the County owed him a defense and reimbursement for legal services incurred in a prior, taxpayer action commenced against him, the County and others entitled *Glass v Grecco, et al.* The petitioner further demanded reimbursement for all counsel fees and costs then incurred by him in connection with investigations and administrative proceedings conducted by certain municipal officials who inquired into the propriety of Grecco’s actions in connection with the purchase of the Chandler Estate. The defenses and reimbursement demanded by the petitioner in the 2002 hybrid action were purportedly required by § 35-3(A) of the Suffolk County Code.

The petitioner’s demands for relief in the 2002 hybrid action were granted by the trial court in an order and decision dated July 22, 2002 (Lifson, J). However, the Appellate Division, Second Department reversed the trial court’s determination in a decision dated December 6, 2004 (*see Grecco v Cimino*, 13 AD3d 371, 786 NYS2d 204 [2d Dept 2004]). Therein, the Appellate Division issued the following declaration:

ADJUDGED and declared that Robert J. Cimino, as County Attorney of the County of Suffolk, properly determined that Allan Grecco was not entitled to legal defense pursuant to Suffolk County Code § 35-3(A) in the underlying actions, proceedings and investigations, and consequently, that the County of Suffolk was not obligated to reimburse him for counsel fees and costs he has incurred in the underlying actions, proceedings and investigations.

The Appellate Division qualified the foregoing finding as follows:

However, our determination is without prejudice to Grecco seeking reimbursement for counsel fees and costs incurred in the actions entitled *Glass v Grecco* (Suffolk County Index No. 01-30336 and *State of New York v Grecco* (Suffolk County Index No. 02-09384 and in the proceedings and investigations (*see Matter of Salino v Cimino, supra* at 172, n.5, 770 NYS2d 702, 802 N.E. 1100), in the event that it is ultimately determined that Grecco’s conduct concerning the purchase of the Chandler Estate was within the scope of his duties and public employment.

The taxpayer action entitled *Glass v Grecco* (Index No. 01-30336) was disposed by order dated May 6, 2003 (Lifson, J.). The order referred to a stipulation of all parties in which “it was agreed that the action

should be withdrawn". The court went on to direct that the Clerk note that the action had been withdrawn as to all defendants.

The State's claims against Grecco, in the action entitled *State of New York v Grecco* were resolved a by written "Stipulation of Settlement" dated June 17, 2009, executed by the plaintiff's counsel and Grecco, which terminated the action with prejudice<sup>1</sup>. In paragraph numbered 3, the parties stipulated as follows: "This stipulation does not constitute a finding that he [Grecco] acted outside the scope of his authority nor finding that he acted within the scope of his authority". Paragraph 7 of the stipulation referred to a Claim Reduction document and recited, with respect thereto, as follows: "The County of Suffolk will receive valuable consideration upon execution of this Stipulation, including a Claim Reduction that is annexed as Exhibit A, equal or to at least \$67,500.00..

In the "Claim Reduction" document, which was signed by Grecco and the plaintiff's counsel, Grecco agreed to limit "the claim he may have against the County of Suffolk for legal fees arising out of the above entitled action, any investigations relating to the Chandler Estate, and any related legal fees, costs and disbursements in the amount of \$100,000.00". The Claim Reduction document concluded with the following statement: "Nothing in this document constitutes a finding on the validity of any such claim or affects any claim for legal fees other than those made with respect to the above referenced matters." The County of Suffolk was not a signatory to either the stipulation of settlement nor the Claim Reduction document attached thereto as Exhibit A.

On June 18, 2009, the County Attorney's office advised Grecco's counsel by e-mail that the County was not responsible for reimbursement of Grecco's counsel fees, costs and disbursements. Immediately following receipt of that e-mail, Grecco's counsel wrote, by letter dated June 19, 2009, to respondent Malafi, the Suffolk County Attorney. Therein, he detailed Grecco's position with respect to his claim for reimbursement of attorney's fees. Counsel asked Malafi to "consider our request for reimbursement as expeditiously as possible and let me know your position so that I might advise Allan of our next step." On August 20, 2009, Malafi advised petitioner's counsel that "my position that Allan Grecco is not entitled to recover such costs and fees has not changed." It concluded with the following: "For all of these reasons, the County shall continue to abide by the decision of my predecessor [Cimino] and will not pay any of Mr. Grecco's litigation costs in these matters."

The petitioner commenced this hybrid Article 78 proceeding and declaratory judgment action by filing on December 14, 2009. The petitioner demands reversal of the July 22, 2002 determination of respondent Cimino that was "reiterated" and confirmed by respondent Malafi in June and August of 2009, to deny reimbursement of litigation costs to petitioner Grecco and for an order awarding such costs to him. In lieu of answering, the respondents/defendants (hereinafter respondents) interposed the instant motion (#002) to dismiss pursuant to CPLR 3211(a) and 7803. Therein, the respondents claim that none of the petitioner's claims for relief are actionable in as much as they are legally insufficient and/or are barred by applicable statutes of limitations, and principles of res judicata and/or collateral estoppel. For the reasons set forth below, the respondents/defendants' motion is granted.

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<sup>1</sup> The State's claims against the other defendants, Robert Toussie and Chandler Property Inc., were also resolved by a stipulation of settlement, pursuant to which the State recovered, on behalf of the County of Suffolk, settlement monies in an amount less than \$100,000.00.

Grecco v County of Suffolk et al  
Index No. 09-45759  
Page 4

The December 6, 2004 decision of the Appellate Division in *Grecco v Cimino*, 13 AD3d 371, 786 NYS2d 204, *supra*) sustained, as rational and proper, the 2002 determination of respondent Cimino to deny Grecco's request that the County provide him with legal defenses in the subject actions and proceedings beyond that initially provided to him in the pre-answer stages of *Glass v Grecco*. The Appellate Division's decision also contained an adjudication that Grecco was not entitled to a legal defense pursuant to Suffolk County Code § 35-3(A) in the underlying actions, proceedings and investigations, and consequently, that the County of Suffolk was not obligated to reimburse him for counsel fees and costs he has incurred in the underlying actions, proceedings and investigations.

The foregoing findings were made without prejudice to "Grecco's seeking reimbursement for counsel fees and costs incurred in the actions entitled *Glass v Grecco* (Suffolk County Index No. 01-30336) and *State of New York v Grecco* (Suffolk County Index No. 02-09384) and in the proceedings and investigations (see *Matter of Salino v Cimino*, *supra* at 172, n.5, 770 NYS2d 702, 802 N.E. 1100), in the event that it is ultimately determined that Grecco's conduct concerning the purchase of the Chandler Estate was within the scope of his duties and public employment." The condition upon which the Appellate Division granted Grecco a second chance to seek reimbursement, namely, "in the event that it is ultimately determined that Grecco's conduct concerning the purchase of the Chandler Estate was within the scope of his duties and public employment", was not fulfilled or satisfied in any of the prior actions, proceedings and/or investigations.

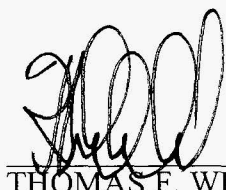
Contrary to the contentions of Grecco in this action, the condition precedent upon which his right to re-assert his claims for reimbursement may not be satisfied in this hybrid action. To do so, the court would have to re-hear and determine his claims for the legal defenses and reimbursement that were rejected by the Appellate Division under the very same circumstances prevailing here, namely, the absence of a determination of the scope of the duties issue. The court would also have to hear and determine the claims and allegations of wrongdoing that were asserted against Grecco in the two prior actions, both of which were concluded between Grecco and his adversaries by stipulations, without any express reservation of Grecco's right to litigate the issue of whether he was acting within or without the "scope of his duties and public employment" in a subsequent action, such as the instant one.

Since it is not disputed that the issue of whether Grecco was acting within the scope of his duties and public employment was not determined any time prior to the commencement of this action, Grecco's claims for a favorable determination of that issue in this action are not cognizable. The respondents' motion to dismiss this action pursuant to CPLR 7803 and 3211(a)(7) is thus granted and the petition/complaint served and filed by petitioner Grecco is dismissed.

Settle Judgment upon a copy of this Order.

DATED: \_\_\_\_\_

7/9/10



THOMAS F. WHELAN, J.S.C.