

<b>Marone v Nassau County</b>
2012 NY Slip Op 33860(U)
August 20, 2012
Supreme Court, Nassau County
Docket Number: 003630-2012
Judge: James P. McCormack
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/JAS TERM, PART 43 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack  
Acting Justice of the Supreme Court**

\_\_\_\_\_ x

**JOSEPH MARONE, PAUL NANTISTA, and the NEW  
YORK CIVIL LIBERTIES UNION,**

**Petitioner(s),**

**Index No. 003630-2012**

**-against-**

**Motion Seq. No.: 001 & 002  
Motion Submitted: 6/29/12**

**NASSAU COUNTY and EDWARD P. MANGANO, in his  
official capacity as Nassau County Executive**

**Respondent(s).**

**For a judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules,**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion (seq. no. 1) by the attorneys for the petitioners for an order pursuant to CPLR Article 78 and Article XX § 2004 of the Nassau County Charter directing the respondent to appoint members to the Nassau County Correctional Center Board of Visitors is adjourned *sua sponte* to September 19, 2012.

Motion (seq. no. 2) by the attorneys for the respondent for an order pursuant to CPLR 3024(b) striking as scandalous and prejudicial matter unnecessarily inserted in the

Verified Petition dated March 21, 2012 and exhibits to the Verified Petition dated March 21, 2012 and various paragraphs from the affirmation of Samantha Frederickson dated March 21, 2012 is denied.

This action involves the Nassau County Correctional Center ("NCCC"), located in East Meadow, New York. Pursuant to Article XX of the Nassau County Charter, NCCC is operated by the Nassau County Sheriff's Department. NCCC has a maximum capacity of approximately 1,900 inmates, and is currently housing approximately 1,500 inmates, including pretrial detainees and convicted criminals serving sentences of up to one year. NCCC also houses federal prisoners, as well as inmates who are alternately housed from New York City and Suffolk County. Petitioners Joseph Marone and Paul Nantista are inmates in NCCC. Both petitioners assert complaints about the medical treatment they have received in NCCC. Petitioner New York Civil Liberties Union (NYCLU) is involved in advocacy for inmates who complain about jail conditions.

In this Article 78 proceeding, petitioners seek an order of *mandamus* pursuant to CPLR 7803(1) to compel County Executive Mangano to appoint seven members to a Board of Visitors pursuant to Nassau County Charter § 2004. Nassau County Charter § 2004 ("Charter § 2004" or "§ 2004") was enacted August 28, 1990. Section 2004 provides that the County Executive shall appoint seven Nassau County residents as a Board of Visitors to NCCC, and that such appointments must be approved by the Nassau County Legislature. Charter § 2004(F) grants the Board the powers and duties, *inter alia*,

to investigate inmates' written complaints and grievances, to advise the Sheriff in developing programs for improving NCCC services and duties with respect to inmate care, treatment, safety, rehabilitation, recreation, training and education, and to report and make recommendations to the Sheriff as necessary to fulfill the Board's powers and duties. Section 2004 states that:

Nassau County Correctional Center Board of Visitors; membership; appointment, compensation and expenses; power and duties.

a. There shall be within the Division of Corrections a Nassau County Correctional Center Board of Visitors. It shall consist of seven members, including a chairperson, each of whom shall be appointed by the County Executive subject to confirmation by the County Legislature. As far as may be practicable, the members shall possess a working knowledge of the correctional system.

b. All members of the Board shall be Nassau County residents.

c. All members of the Board shall be voting members.

d. The term of office of each member shall be three years, except that members first appointed shall be appointed as follows: four for a term of one year, two for a term of two years, and one for a term of three years. Upon expiration of the term of office of any member, his successor shall be appointed for a term of three years. Any appointed member of the Board may be removed by the County Executive for cause after an opportunity to be heard in his defense. Any member chosen to fill a vacancy created other than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed.

Vacancies caused by the expiration of term or otherwise shall be filled in the same manner as original appointments.

e. Members shall serve without compensation. The Board of Supervisors may appropriate sufficient sums to meet the expenses actually and necessarily incurred by members of the Board in the performance of their duties hereunder.

f. The Board and each member thereof shall have the following powers and duties:

1. To investigate, review or take such other actions as shall be deemed necessary or proper with respect to inmate complaints or

grievances regarding the correctional center as shall be called to their attention in writing.

2. To have access to the correctional center and all books, records and data pertaining to the correctional center which are deemed necessary for carrying out the Board's powers and duties.

3. To obtain from correctional center personnel any information deemed necessary to carry out the Board's powers and duties.

4. To request and receive temporary office space in the correctional center for the purpose of carrying out the Board's powers and duties.

5. To report periodically to the Sheriff and, where appropriate, to make such recommendations to the Sheriff as are necessary to fulfill the purposes of this section.

6. To advise the Sheriff in developing programs for improving correctional center services and duties and for coordinating the efforts of correctional center officials in respect to improving conditions of inmate care, treatment, safety, rehabilitation, recreation, training and education.

7. To meet on a regular basis at a time and place designated by the Chairman of the Board.

Since enactment of § 2004 in 1990, some members were appointed in 1999 and 2001. Additional members were considered but not appointed in 2003. It is not disputed that no County Executive, including former County Executives Thomas S. Gulotta and Thomas R. Suozzi as well as present County Executive Mangano has appointed seven members to the Board.

The attorneys for the County argue that the sole issue in this Article 78 proceeding is whether Nassau County Charter § 2004 imposes a mandatory duty on the County Executive to appoint, or whether § 2004 is discretionary in nature, and therefore not subject to an order of *mandamus* pursuant to CLR 7803(1).

Respondent has not answered the Petition, but rather interposed the within motion pursuant CLR 3024(d) to strike what it contends are numerous, irrelevant, scandalous, prejudicial and inflammatory allegations including newspaper articles, medical reports and editorials contained in the Petition and Fredrickson Affirmation. CLR 3024(b) provides that "A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." If a motion made pursuant to CLR 3024(b) is denied, the responsive pleading, in this case, respondents' Verified Answer and Objections in Point of Law in response to the Petition, "shall be served within ten days after service of notice of entry of the order[.]" Alternatively, if respondents' § 3024(B) motion is granted, petitioners must then serve an Amended Petition, complying with the Court's order to strike the designated matter, within that time.

A motion to strike is properly addressed to the discretion of the court. *Wegman v Dariylea Co-Op*, 50 AD2d 108, 111, *lv dismissed*, 38 NY2d 918. "In reviewing a motion pursuant to CLR 3024(b), the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v Minelli*, 41 AD3d 390, 392, citing *New York Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391; *Bristol Harbour Assocs. v Home Ins. Co.*, 244 AD2d 885; *Rice v St. Luke's-Roosevelt Hosp. Ctr.*, 293 AD2d 258. Prejudicial allegations irrelevant to a petitioner's claims should be stricken. *Soumayah v Minelli*, *supra*, quoting Siegel, N.Y. Prac. § 230, at 380 [4<sup>th</sup> ed.]:

“ [R]elevancy is still the best key to whether matter is ‘unnecessarily’ pleaded, and the best key to relevancy is whether it would be admissible in evidence at the trial”]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7b, CLR C:3024:4, at 323 [“In general, we may conclude that ‘unnecessarily’ means ‘irrelevant.’ We should test this by the rules of evidence and draw the rule accordingly. Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CLR 3024(b)”].’ ”

The County wants to delete 36 of the 52 decretal paragraphs in the Petition; delete Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, O, P, Q, and U to the Verified Petition; and delete from the affirmation of Samantha Frederickson 30 of the 39 paragraphs. Paragraph 19-39 of the Frederickson affirmation refer to the previously mentioned exhibits in the Petition. The alleged objectionable material deals with the following: inmates who have died in custody; complaints about alleged failure to provide medication and medical treatment and alleged lack of mental health services. The exhibits include redacted reports from the New York State Commission of Correction, newspaper articles from Newsday, the Long Island Press, and New York Times; correspondence dated September 11, 2000 from U.S. Dept. of Justice to County Executive Thomas Gulotta regarding conditions at the jail; correspondence between New York Civil Liberties Union and past Nassau County Executives; New York State Commission of Correction and Local

Correctional Faculty Evaluation dated December 8-12, 2008; and Resolutions passed by the Nassau County Legislature on May 10, 1999 and December 17, 2001.

In support of the motion to strike the pleadings as being scandalous and prejudiced the County cites *Albany Law School v New York State Office of Mental Retardation and Developmental Disabilities*, 81 AD3d 145 wherein the Court held that paragraphs in the Petition discussing the deaths of individuals in the care of the Office of Mental Retardation and Developmental Disabilities were not relevant to the Petition claim but could serve to prejudice the office and were stricken. The County argues that numerous allegations claiming inadequate medical care by the jail as far back as 26 years ago, reference to court actions involving conditions at NCCC which were resolved decades ago and documents relating to legislative history should also be stricken.

The County also contends it will be prejudiced by having to answer allegations in the Petition that directly refer to impending present or legal actions concerning deaths, suicides, and medical treatment at the jail.

In this Article 78 proceeding where the Court is the trier of the fact, not a jury, there is no need to strike any of the pleadings or exhibits. This Court is fully capable of determining relevance and prejudice before deciding the merits of this action, regardless of the allegations in the Petition, Affirmations and accompanying exhibits. "Unlike a lay jury, a Judge, by reasons of . . . learning, experience and judicial discipline, is uniquely capable of distinguishing the issues of making an objective determination based upon



appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision” (internal quotation omitted). *See People v Moreno*, 70 NY2d 403, 406. For example, counsel for the petitioner recognizes that newspaper articles, no matter how learned, erudite and voluminous have little if any weight at a trial, and an experienced trial attorney would not even attempt to use them at trial. *See, for example, Prince*, Richardson on Evidence, 11<sup>th</sup> ed & supp Farrell § 10-104, § 10-114 and § 10-201; and *People v Flores*, 138 AD2d 512.

In answering the allegations about reports of recent deaths in NCCC, deaths which are the subject of litigation by the families of the deceased seeking to hold the County liable, the petitioner admits and is willing to stipulate they have no intention in this action of introducing or alleging facts regarding Nassau County’s alleged legal liability for any of the specific deaths referenced in the Petition or of litigating these issues in this action. Moreover, in responding to the allegations in the Petition, the County can do so in a way that the pleadings do not conflict with and prejudice strategies or positions that the County will adopt in any pending or future litigation.

Although redundant and tending to obscuration, there is nothing in the pleadings and the exhibits that will in any way preclude this Court from resolving the issue of law once all the submissions are finally presented.

The Court is reminded of the 18<sup>th</sup> century philosopher and economist John Stuart Mill who wrote in his well regarded treatise in 1859 *On Liberty*, the following:

“If all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind could be no more justified in silencing that person than he, if he had the power, would be in silencing mankind. . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”

Notwithstanding the weighty exhibits, the Court must be careful to avoid fashioning orders or judgments that go beyond any mandatory directives of existing statutes and intrude upon the policy making and discretionary decisions that are reserved to the legislative and executive branches.

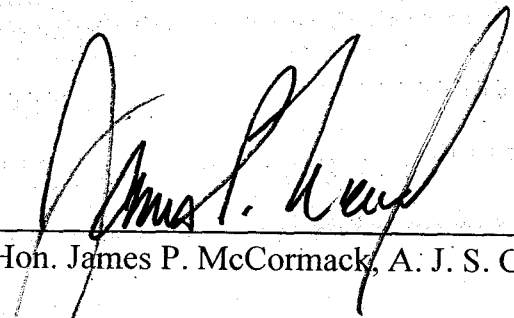
Respondent’s counsel shall serve a Verified Answer and Objection in Point of Law within 10 days of service of a notice of entry of this order. Petitioner may serve a Reply within five days of the receipt of the responsive pleadings. The motion (seq. no. 1) for an order pursuant to CPLR Article 78 and Nassau County Charter XX § 2004 is adjourned *sua sponte* of September 19, 2012. Motion (seq. no. 2) to strike the pleadings is denied in its entirety.

Counsel may stipulate in writing with notice to chambers to adjourn these dates.

This constitutes the Decision and Order of the Court.

Dated: August 20, 2012  
Mineola, N.Y.

**ENTERED**  
AUG 31 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
Hon. James P. McCormack, A. J. S. C.