

**Matter of Midland Funding NCC-2 Corp. v Ciaffa**

2014 NY Slip Op 30561(U)

February 14, 2014

Supreme Court, Nassau County

Docket Number: 13391/13

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 11 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***  
**Justice of the Supreme Court**

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**In the Matter of the Application of**

**MIDLAND FUNDING NCC-2 CORP.,**

**Index No. 13391/13**

**Petitioner(s),**

**Motion Submitted: 1/9/14  
Motion Sequence: 001, 002**

**For an Order and Judgment pursuant to  
Article 78 of the CPLR**

**-against-**

**HONORABLE MICHAEL A. CIAFFA,  
JOSELINE RODRIGUEZ,**

**Respondent(s).**

\_\_\_\_\_ X

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Petitioner moves this Court for an Order pursuant to CPLR Article 78 compelling the Hon. Michael A. Ciaffa (Nassau County District Court) to mark the case entitled Midland Funding NCC-2 Corp. v Joseline Rodriguez (CV-034250/2005) settled, rather than dismissed.

Respondent, Hon. Michael A. Ciaffa moves to dismiss the instant petition, and also to seal his residence address from the papers in this proceeding, namely the Request for Judicial Intervention (RJI) and the Notice of Petition. Respondent *pro se*, Rodriguez, has not

submitted any papers in response.

At the outset, the Court notes that petitioner has failed to include an affidavit of service of the petition upon respondent *pro se* Rodriguez.<sup>1</sup> Proceedings brought under Article 78 of the CPLR are special proceedings, requiring that the notice of petition be served in the same manner as a summons in an action (*see CPLR §§ 403, 7804*). Having failed to establish service of the notice of petition upon Rodriguez as statutorily required, the petition as against Rodriguez is dismissed.

Procedurally speaking, it is undisputed that a default judgment in favor of petitioner was entered against respondent Rodriguez on May 24, 2006, in the sum of \$1,286.71. By Order to Show Cause dated July 29, 2013, and upon consent of petitioner, that default judgment was vacated by respondent Hon. Michael A. Ciaffa via Decision and Order dated August 26, 2013. Judge Ciaffa set the matter down for a conference on September 26, 2013. At all times during the pendency of the lower court matter giving rise to this proceeding Rodriguez appeared *pro se*.

On September 26, 2013, petitioner and Rodriguez executed a document entitled “Stipulation of Settlement.” When the calendar call of the case was made, and the Stipulation presented to Judge Ciaffa, he raised various issues/concerns, based upon Rodriguez’s *pro se* affidavit submitted in support of the Order to Show Cause seeking to set aside the default judgment. Specifically, Judge Ciaffa requested that petitioner provide paperwork to substantiate that petitioner had right, title, and interest in the claimed debt.

Judge Ciaffa issued a written decision on September 26, 2013, which states, “[u]pon plaintiff’s failure to provide proof of its standing to pursue assigned debt claim against [defendant], and [defendant’s] sworn affidavit that she has no knowledge of who this plaintiff is, [plaintiff’s] complaint is DISMISSED as a matter of discretion and in the interest of justice” (emphasis in original).

It is further undisputed that the Stipulation between petitioner and Rodriguez had not been filed with the county clerk, or entered, at the point when Judge Ciaffa dismissed the lower court action (*see CPLR § 2104*).

In the instant petition, Midland Funding claims that Judge Ciaffa’s direction to Midland to produce proof that it had all right, title, and interest in and to the unpaid revolving

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<sup>1</sup>Petitioner has also failed to include an affidavit of service upon respondent Ciaffa; however, respondent Ciaffa has moved to dismiss the instant petition without raising that issue, thereby waiving any defects in service (*see CPLR § 3211 [e]*).

credit account “did not accurately reflect the existing legal standard applicable to the assignment of the account at issue in the [u]nderlying [l]awsuit, but instead reflected his subjective and biased opinion against Midland.” Moreover, petitioner asserts that Judge Ciaffa’s refusal to honor the stipulation, and his subsequent dismissal of the case was “sua sponte and without just cause or any basis in law and [is] an abuse of his discretion as a judge and officer of the court . . . .” Petitioner now seeks “an order and judgment pursuant to Article 78 of the CPLR compelling Respondent Honorable Michael A. Ciaffa pursuant to CPLR 2104 to mark the [underlying Civil Court action] settled rather than dismissed based upon the September 26, 2013 Stipulation of Settlement . . . .” Thus, this proceeding brought against Judge Ciaffa is in the nature of mandamus to compel.

CPLR § 7801 provides, in pertinent part, that, “a proceeding under this article shall not be used to challenge a determination which . . . can be adequately reviewed by appeal . . . or which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court” (*CPLR § 7801 [1], [2]*).

“In limited circumstances, mandamus to compel may be invoked in connection with civil actions and criminal matters despite CPLR 7801 (2)’s general proscription against the use of Article 78 to challenge determinations made in such proceedings. If the challenged matter is the performance or nonperformance of an official duty in the nature of a ministerial or clerical act, no ‘determination’ is being reviewed” (*Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR § 7801:3*).

“It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion” (*Brusco v Braun*, 84 NY2d 674, 679 [1994]). Furthermore, a party seeking mandamus must show a “clear legal right” to the relief requested (*Id.*).

“The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law. It may also be addressed to subordinate judicial tribunals, to compel them to exercise their functions, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions (citation omitted)” (*People ex rel. Francis v The Common Council of the City of Troy*, 78 NY 33, 39 [1879]; see also *Crain Communications v Hughes*, 74 NY2d 626 [1989][the decision to seal, or later unseal, records, by its very nature, involves a measure of discretion, precluding mandamus]; *Dyno v Rose*, 260 AD2d 694 [3d Dept 1999][mandamus not available to compel a judicial officer to render a decision with a particular outcome where decision involves discretion or judgment]).

Petitioner seeks to circumvent this difficulty by ignoring Judge Ciaffa's September 26, 2013 Order dismissing the underlying debt action on the ground that plaintiff failed to provide proof of its standing to pursue the assigned debt claim against Rodriguez. The dismissal remains in effect, and it has given rise to the instant petition.

Notably, however, petitioner does not request that this Court vacate Judge Ciaffa's dismissal Order, which this Court does not have authority to do, and which is obviously not permitted under Article 78 of the CPLR. Instead, plaintiff seeks mandamus to compel Judge Ciaffa to perform what plaintiff contends is a ministerial act: to mark the underlying case settled rather than dismissed.

Petitioner's position is inherently contradictory and, thus, fatally flawed. Even if this Court were inclined to compel Judge Ciaffa to mark the underlying action "settled," the Order dismissing the action remains in effect. Thus, in order for any such "settled" marking to be effective and deliver the result petitioner wants, the Order dismissing the underlying action would either have to be vacated by Judge Ciaffa himself, or reversed in the normal process of appellate review. Accordingly, petitioner has not demonstrated a clear right to the relief sought (*see Berkman v Family Court of Nassau County*, 146 Misc2d 733 [Sup Ct, Nassau County 1990]).

Whether or not dismissal of the action was an appropriate legal determination is not within the province of this Court to decide. Judge Ciaffa's determination was just that, a determination and exercise of his judgment, and not a ministerial or clerical act.

Acknowledging that stipulations are favored (*Matter of Galasso*, 35 NY2d 319, 321 [1974]; *Hallock v State of New York*, 64 NY2d 224 [1984]; *Freight Brokers Global Services, Inc. v Molfetta*, 90 AD3d 828 [2d Dept 2011]), this Court, nonetheless, knows of no official or statutory duty requiring that Judge Ciaffa mark a case on his calendar "settled" when, in the exercise of his judgment, he apparently had questions regarding petitioner's standing to bring the action. The very issue of standing was raised by respondent Rodriguez in her *pro se* affidavit in support of her application to vacate the default judgment previously obtained against her. Rodriguez's July 26, 2013 affidavit, which is attached to petitioner's papers, states that "I have no knowledge of who this debt is with."

Moreover, 22 NYCRR § 212.22 of the Uniform Civil Rules for the District Courts provides in pertinent part that "the judge presiding [over pretrial and prearbitration conference calendars] shall consider with counsel and parties the simplification and limitation of the issues and the obtaining of admissions of facts and of documents to avoid unnecessary proof, *as well as the ultimate disposition of the action by settlement or*

*compromise*” (emphasis added). By petitioner’s own admission, the September 26, 2013 court appearance was a prearbitration conference (Verified Petition, paragraphs 6, 7). Thus, it appears that Judge Ciaffa was called upon by the Uniform Rules to make a determination, using his judgment and discretion, with respect to the settlement of the underlying action.

Thus, unlike the situation presented in *Brusco (supra)*, where RPAPL § 732 (3) requires a judge to render judgment in favor of the petitioner upon specific conditions having been met, Judge Ciaffa was not statutorily required to mark this action “settled.”

The circumstances of this proceeding are not unlike the matter of *Onewest Bank, FSB v Fernandez* (2013 NY Slip Op 8233 [2d Dept 2013]), where plaintiff appealed the lower court’s order denying plaintiff’s *ex parte* motion for an order of reference and dismissing the complaint *sua sponte*. Notably, *Onewest Bank, FSB* is cited by petitioner in opposition to Judge Ciaffa’s motion to dismiss the petition; yet, the procedural posture of that case supports the determination that this Article 78 proceeding cannot lie, because an appeal is the appropriate vehicle to challenge Judge Ciaffa’s dismissal Order.<sup>2</sup>

As cited in *Onewest*, “[a] court’s power to dismiss a complaint, *sua sponte*, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” (*Onewest Bank, FSB, supra*, citations omitted), which necessarily requires a court to weigh various factors, and use its discretion in determining whether extraordinary circumstances exist. Such is not a ministerial or clerical act whose performance is dictated by law.

Clearly then, Judge Ciaffa’s decision to dismiss the underlying action was a determination made by him, in the exercise of his discretion and judgment, based upon that which was presented to him, rather than a ministerial or clerical act.

Accordingly, the instant petition is dismissed.

Further, and pursuant to a telephone conference call with the Court and counsel for all parties that took place on December 5, 2013, petitioner consented to respondent’s counsel’s request to seal Judge Ciaffa’s residence address, which appears on the Notice of Petition and the RJI. Accordingly, this Court directs petitioner to submit a new/ amended RJI (without the necessity of additional payment), and an amended Notice of Petition without

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<sup>2</sup>Apparently, petitioner has not moved the lower court for reargument of the September 26, 2013 Order, and there is no indication in the papers submitted that petitioner has filed/perfected an appeal of that Order.

Judge Ciaffa's residence address.<sup>3</sup> Upon presentation of the new/amended papers to the Nassau County Clerk, the Clerk shall seal only the original RJI and Notice of Petition (*see 22 NYCRR 216.1*).

The foregoing constitutes the Order of this Court.

Dated: February 14, 2014  
Mineola, N.Y.

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J. S. C.  
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<sup>3</sup>Petitioner may consider using Judge Ciaffa's business address in the new/amended papers.