

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25147
G/kmg

_____AD3d_____

REINALDO E. RIVERA, J.P.
HOWARD MILLER
THOMAS A. DICKERSON
SHERI S. ROMAN, JJ.

2009-08978

DECISION & JUDGMENT

In the Matter of Aslam A. Jivani, etc., petitioner,
v Peter J. O'Donoghue, etc., et al., respondents.

Belair & Evans, LLP, New York, N.Y. (James B. Reich of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Michael J. Siudzinski of counsel), for respondent Peter J. O'Donoghue.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola, N.Y. (Norman H. Dachs of counsel), for respondent John Gisburne.

Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent Peter J. O'Donoghue, a Justice of the Supreme Court, Queens County, to determine a motion and cross motion in an underlying action entitled *Gisburne v St. John's Queens Hospital*, pending in the Supreme Court, Kings County, under Index No. 25725/08.

ADJUDGED that the petition is denied and the proceeding is dismissed, with one bill of costs to the respondents.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16). The petitioner has failed to demonstrate a clear legal right to the relief sought, as, before this proceeding was commenced, the subject motion and cross motion had been deemed withdrawn in an order of the Supreme Court,

November 24, 2009

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Kings County, dated September 9, 2009. To the extent that the petitioner contends that the order dated September 9, 2009, erroneously deemed the motion and cross motion withdrawn, his remedy is to move in the Supreme Court, Kings County, to vacate that order.

RIVERA, J.P., MILLER, DICKERSON and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court