

**Matter of Okslen Acupuncture, P.C. v Cuomo**

2010 NY Slip Op 30655(U)

March 24, 2010

Supreme Court, New York County

Docket Number: 114191/09

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

Application of Okslen Acupuncture P.C.,

Petitioner,

-against-

Andrew M. Cuomo In His Capacity as Attorney  
General of the State of New York,

Respondent.

INDEX NO. 114191/09

MOTION DATE Feb. 17, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 114

The following papers, numbered 1 to 8 were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-5</u>
Replying Affidavits _____	<u>6-7</u>
Sur-Reply Affidavits _____	<u>8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition pursuant to CPLR Article 78 and respondent's cross motion to dismiss the petition are decided in accordance with the accompanying decision, order and judgment.

~~FILED~~  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: 3/24/10

O.P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61**

-----X

**Application of Okslen Acupuncture P.C.,**

**Petitioner,**

**DECISION, ORDER  
AND JUDGMENT**

**For a Judgment Pursuant to Article 78  
of the CPLR**

**Index No. 114191/09**

**- against -**

**Andrew M. Cuomo in His Capacity as Attorney  
General of the State of New York,**

**Respondent.**

-----X

**O. PETER SHERWOOD, J.:**

This is a CPLR Article 78 proceeding commenced by petitioner Okslen Acupuncture P.C. (“Okslen” or “petitioner”) seeking, pursuant to CPLR 7803 (1), a judgment compelling respondent, Andrew M. Cuomo, in his capacity as Attorney General of the State of New York (“Attorney General”), to investigate and, if necessary, prosecute the National Insurance Crime Bureau (“NICB”) for the NICB’s alleged criminal violations of Article 7 of the General Business Law (“GBL”). Alternatively, petitioner seeks a judgment compelling the Attorney General to order the NICB to cease and desist all conduct that falls under the definition of private investigation as defined under Article 7, § 71 of the GBL, unless and until the NICB is properly licensed pursuant to GBL’s Article 7. Respondent cross-moves to dismiss the petition on the ground that CPLR Article 78 may not be used to compel the Attorney General to take action that is within his discretion.

***Background***

Petitioner is in the business of acupuncture and maintains a principal place of business in New York County. Non-party NICB is a not-for-profit organization which is funded by the insurance industry through insurance companies’ membership dues. The NICB, through its relationship with various law enforcement agencies, provides its members with investigative information, and serves, at times, as an outsource for members’ prosecution needs. The NICB has collaborated with the New York City Police Department, as well as the Attorney General’s office, in such investigations.

On April 28, 2009, petitioner filed a complaint with the Attorney General, asserting that the NICB is not licensed by the State of New York to conduct private investigations, which is in violation of GBL Article 7 and, therefore, it is guilty of a class B misdemeanor (*see* GBL § 70 [4]) which the Attorney General is obligated to prosecute (*see* GBL § 85). GBL § 85, specifically provides that “[c]riminal action for violation of this article shall be prosecuted by the attorney-general, or his deputy, in the name of the people of the state ... .”

In the April 28, 2009 complaint, petitioner formally requested “that the Attorney General enjoin the NICB from performing private investigative activities until the NICB and its ... Special Agents are properly licensed” and further, that if the “investigative conduct continues ... that the Attorney General prosecute the NICB and its offending investigators as required by law” (*see* Notice of Petition, Ex. “1”).

The Attorney General did not respond and this proceeding ensued.

#### *Discussion*

CPLR 7803 (1) governs proceedings to determine “whether the body or officer failed to perform a duty enjoined upon it by law.” In this case, petitioner asserts that the Attorney General failed to perform its duty by neglecting to prosecute the NICB for its allegedly improper investigation of insurance fraud. Specifically, petitioner claims that the NICB is not authorized, pursuant to Article 7 of the GBL, to perform such investigations.

“While a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion” (*Matter of Mullen v Axelrod*, 74 NY2d 580, 583 [1989] [internal quotation marks and citation omitted]). Therefore, the petitioner “must have a clear legal right to the relief demanded, and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief” (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842 [1<sup>st</sup> Dept 2005] [internal quotation marks and citation omitted]).

Respondent argues that the decision to initiate an investigation and criminal prosecution under GBL § 85 is within his own discretion, and that he cannot be compelled under Article 78. “[T]he essence of a District Attorney’s constitutional, statutory and common-law prosecutorial authority is the discretionary power to determine whom, whether and how to prosecute [a criminal]

matter” (*Matter of Dyno v Hillis*, 274 AD2d 908, 910 [3<sup>rd</sup> Dept 2000] [internal quotation marks and citation omitted]).

Petitioner argues that the language of the statute mandates prosecution given that the statute reads that the Attorney General “shall” prosecute, meaning that no discretion is permitted, and that the Attorney General is required to prosecute all cases in violation of Article 7.

The purpose of Article 7 is to protect the public good, and the statute is “to be expounded in such a manner, as that [it] may as far as possible, attain the end [citation omitted]” (*Shorten v. Milbank*, 170 Misc 905, 906 [1939], *affirmed* 256 AD 1069 [1<sup>st</sup> Dept. 1939] [interpreting the purpose of GBL §§ 70, 72 - 74]). The statute must be construed “as not to advance a private and destroy the public interest, but always to advance the public interest” (*Id.*, at 906 - 907). By its terms, GBL § 85 designates authority to the Attorney General to prosecute violations of Article 7 “in the name of the people of the state.” Although GBL § 85 provides the Attorney General with exclusive authority to prosecute, the court does not interpret that statutory grant of authority to impose a mandate upon the Attorney General to prosecute all violations referred to it.

Article 7 is a regulatory scheme which vests authority in the Department of State to oversee the licensing of private investigators. The Department’s regulatory authority includes the power to license private investigators pursuant to GBL § 70, to set license application requirements pursuant to GBL § 72, to enforce and investigate any violations of Article 7 pursuant to GBL § 73, to receive, examine and process license applications pursuant to GBL § 74, to inspect license cards pursuant to GBL § 75, to replace lost license cards GBL § 76, to record licensees change of business address pursuant to GBL § 77, to renew licenses pursuant to GBL § 78, to revoke or suspend license cards pursuant to GBL § 79, to issue pocket cards or badges to licensees pursuant to GBL § 80, and to regulate employees of licensees pursuant to GBL §§ 81 and 82. While the Secretary of State holds regulatory authority under Article 7, the Department of State is not authorized to initiate criminal actions for violations of Article 7, as GBL § 85 reserves such authority to the Attorney General.

In the terms of GBL § 85, “in any such prosecutions, the Attorney General shall exercise all the powers and perform all duties which the district attorney would otherwise be authorized to exercise or to perform therein.” In general, the District Attorney has discretion over what to prosecute, and may refuse to prosecute a complaint (*People v Muka*, 72 AD2d 649, 650 - 51 [3<sup>rd</sup>

Dept. 1979]; *see also, Matter of Dyno v. Hill*, 274 AD2d 908, 910 [3<sup>rd</sup> Dept 2000]). GBL § 85 grants the Attorney General exclusive prosecutorial powers and duties with respect to violations of Article 7, including discretion analogous to that the District Attorney would otherwise have to carry out prosecutions.

In sum, we hold that although the Attorney General's authority under GBL § 85 is exclusive, any determination concerning prosecution of an alleged violation of Article 7 remains within the Attorney General's discretion. Accordingly, this Article 78 proceeding in the nature of mandamus to compel will not lie (*see, Matter of Anonymous v Commissioner of Health*, 21 AD3d at 842).

Based on the foregoing, the petition is denied and the cross motion is granted.

In light of this decision, the court need not reach the remainder of petitioner's arguments.

### *Conclusion*

Accordingly, it is

**ORDERED and ADJUDGED** that the petition is denied and the proceeding is dismissed; and it is further


**ORDERED** that the respondent's cross motion to dismiss is granted; and it is further

**ORDERED** that the Clerk shall enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

DATED: March 24, 2010

ENTER:



O. PETER SHERWOOD

J. S.C.

### **UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).**