

**Matter of Lancaster v Incorporated Vil. of Freeport**

2010 NY Slip Op 32341(U)

August 26, 2010

Supreme Court, Nassau County

Docket Number: 2876/2010

Judge: R. Bruce Cozzens

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**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. R. BRUCE COZZENS, JR.  
Justice.

TRIAL/IAS PART 6  
NASSAU COUNTY

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In the Matter of the Application of

VILMA LANCASTER, DONALD MILLER, WILLIAM  
WHITE and JORGE MARTINEZ,

Petitioner(s),

for a judgment pursuant to Article 78 of the CPLR vacating a  
Directive dated January 5, 2010 and compelling the Incorporated  
Village of Freeport to immediately comply with New York Public  
Officers Law Section 18 and Chapter 130, et seq. of the Village  
Code of the Incorporated Village of Freeport

MOTION #001  
INDEX #2876/2010  
MOTION DATE:  
May 20, 2010

-against-

INCORPORATED VILLAGE OF FREEPORT and  
BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE  
OF FREEPORT,

Respondent(s).

\_\_\_\_\_  
In the Matter of the Application of

WILLIAM F. GLACKEN, RENAIRE FRIERSON-DAVIS and  
HARRISON J. EDWARDS,

Petitioner (s),

for a judgment pursuant to Article 78 of the CPLR compelling the  
Incorporated Village of Freeport to immediately comply with New  
York Public Officers Law §18 [3] and [4]; Chapter 130 of the Code  
of Freeport, and §§103, 105 and 107 of the Public Officers Law for the  
State of New York,

MOTION #001, 002  
INDEX #5018/2010

-against-

INCORPORATED VILLAGE OF FREEPORT, ANDREW HARDWICK,  
MAYOR, ROBERT KENNEDY, TRUSTEE, CARMEN PINEYRO,  
TRUSTEE, WILLIAM H. WHITE, TRUSTEE, JORGE MARTINEZ,  
TRUSTEE, each in their official capacity as "Trustee" for the Incorporated  
Village of Freeport and collectively, together with Mayor Hardwick,  
comprising the Board of Trustees for the Incorporated Village of Freeport;  
CUSTOMIZED CLAIMS SERVICES, LLC, in its capacity as Claims  
Administrator for the Incorporated Village of Freeport, and HOWARD  
COLTON, in his official capacity as Village Attorney for the Incorporated  
Village of Freeport,

Respondent(s).

\_\_\_\_\_

The following papers read on this motion:

Notice of Petition.....	2
Cross Motion.....	1
Verified Answer(s).....	2
Answering Affidavits.....	3
Briefs: Petitioner's.....	1
Respondent's.....	1

Upon the foregoing papers, it is ordered that the Petitions pursuant to CPLR Article 78, and for declaratory judgment; and the cross-motion to dismiss by Customized Claims Services, LLC, are determined as hereinafter set forth.

Initially, it is noted that pursuant to Short Form Order dated May 20, 2010, the Petition (Index #2876/2010) of Vilma Lancaster, Donald Miller, William White and Jorge Martinez, was joined with the Petition of William F. Glacken, Renaire Frierson-Davis and Harrison J. Edwards (Index #5018/2010).

The respective Petitions seek an order vacating the January 5, 2010 directive of the Board of Trustees, a direction that the respondents provide a defense in the pending Federal action, a direction that the firm of Wilson, Elser, Moskowitz, Edelman & Dickey, LLP be restored as counsel for petitioners, a declaration that the January 4, 2010 Resolution of the Board of Trustees is illegal, arbitrary and capricious, and a declaration voiding the January 4, 2010 Resolution and awarding counsel fees, costs and disbursements.

The Petitions arise out of a Directive of the Board of Trustees dated January 5, 2010, where the defense and indemnification of the petitioners in the Federal actions commenced by Water Works Realty Corp., was revoked and terminated. The Directive states that the Water Works actions had been settled and that the petitioners elected not to sign the settlement which resulted in additional expenditure of Village funds to defend the action that had been settled. The Directive further states that the Village is not authorized to indemnify the petitioners beyond the scope of the stipulation of settlement.

In support of the respective Petitions, it is asserted that the executive sessions at which the Directive was adopted was in violation of Public Officers Law §103. The petitioners also assert that Public Officers Law §18 and Freeport Village Code §130-5 mandate the Board provide a defense in the Water Works actions. Further, it is maintained that the Board lacked authority under Public Officers Law to deny indemnification as no judgment has been rendered in the Water Works actions. The Petitions, in addition, maintain that the Directive does not state that the petitioners failed to cooperate in the defense of the action in violation of Public Officers Law and the Village Code.

In opposition to the Petitions, it is asserted that the adoption of the Directive during Executive Session was lawful and appropriate. Further, it is maintained that the petitioners' refusal to execute the Stipulation of Settlement constituted a failure to cooperate pursuant to Public Officer's Law and is a rational basis to withdraw the petitioners' defense and

indemnification.

In support of Customized Claims Services LLC's cross-motion to dismiss, it is asserted that it is not a proper party to these proceedings. It is asserted that Customized Claims is a company specializing in claims administration and investigation and is not an agency of the Village, and did not participate in the Executive Session that resulted in the Directive of January 5, 2010.

In opposition to the cross-motion, it is asserted that the motion should be deferred pending production of the contract and the resolution authorizing the contract.

In the instant matter, the Court finds that any purported irregularities in the calling of an Executive Session on January 4, 2010 to be unintentional and not grounds for invalidating the Directive of January 5, 2010 (see Public Officer's Law §107).

In an analogous situation pursuant to an insurance policy concerning cooperation by an indemnitee, "[I]n order to disclaim coverage on the insured's lack of cooperation, the carrier must demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation, (2) the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) the attitude of the insured, after cooperation was sought, was one of willful and avowed obstruction (*see, Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168-169, 225 NE2d 503, 278 NYS2d 793 [1967]; *Commercial Union Ins. Co. v Burr*, 226 AD2d 416, 417, 641 NYS2d 69 [1996]; *cf. State Farm Fire & Cas. Co. v Imere*, 182 AD2d 683, 582 NYS2d 463 [1992]."  
*New York State Insurance Fund v Merchants Insurance Company of New Hampshire*, 5 AD3d 449, 773 NYS2d 431, 433 [2nd Dept., 2004].

In the instant matter, the Village agreed to settle the Water Works actions for \$3,500,000.00. In addition, the actions were to be discontinued against the petitioners herein without any costs or admission of wrongdoing. The Court finds that the Village acted diligently in seeking to bring about the petitioners' cooperation in agreeing to the settlement and their effort to obtain the cooperation of the petitioners was reasonable. Further, the Court finds the petitioners' argument that their First Amendment rights would be infringed upon by agreeing not to interfere, challenge or criticize the settlement to be unavailing. The Court finds the condition of non-disparagement of the settlement reasonable, given the benefits achieved by the petitioners from the settlement. The Court finds the actions of the petitioners by failing to consent to the proposed stipulation to be willful.

As a result, the Court finds the Directive, dated January 5, 2010, which terminated and revoked the defense and indemnification of the petitioners in the Federal action commenced by Water Works Realty Corp. was not made in violation of lawful procedure, or by error of law. Further, the Court finds that the Directive was not arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]).

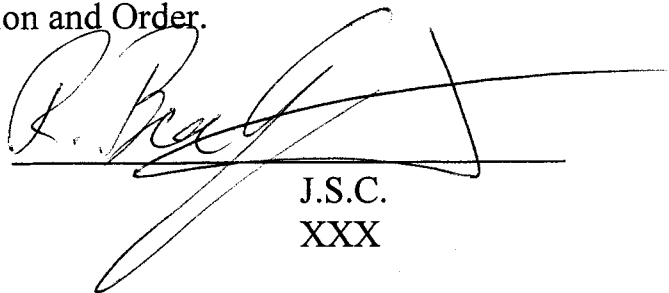
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Index #5018/2010

As such, the respective petitions are denied. The proceeding is dismissed. The cross-motion is denied as academic.

The foregoing constitutes the Court's Decision and Order.

Dated: **AUG 26 2010**



J.S.C.  
XXX

**ENTERED**  
AUG 27 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE