

Yagan v Fitzpatrick

2010 NY Slip Op 33049(U)

October 27, 2010

Sup Ct, Onondaga County

Docket Number: 10-4837

Judge: John C. Cherundolo

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SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

DESIREE YAGAN,

Plaintiff,

Index No. 10-4837
RJI No. 33-10-4175

vs.

ONONDAGA COUNTY DISTRICT ATTORNEY
WILLIAM FITZPATRICK; CHIEF ADA ALISON
FINEBERG; JUDGE KAREN UPLINGER;
JUDGE JAMES CECILE; SYRACUSE CITY COURT,

DECISION & ORDER

Defendants.

The petitioner, Desiree Yagan ("Yagan"), *pro se*, brings the instant Article 78 petition for mandamus, apparently seeking the restoration of three charges of aggravated unlicensed operation of a motor vehicle ("AUO") charges that were pending against her. These charges were dismissed upon motion of the Office of the District Attorney on or about October 10, 2009. Yagan wishes to proceed to trial on these charges. She initially sought to have the charges restored in a proceeding before Syracuse City Court Judge, Hon. Jeffrey R. Merrill. In a letter decision dated August 10, 2010, Judge Merrill dismissed Yagan's motion to vacate the dismissal citing an appropriate basis for the dismissal existed and due to prosecutorial discretion.

Yagan now comes before this Court seeking restoration of the AUO charges so that she might "prove her innocence" at trial. She names the following persons and governmental bodies as respondents herein: Onondaga County District Attorney William Fitzpatrick; Chief ADA Alison Fineberg; Syracuse City Court Judge Karen

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Uplinger; and Syracuse City Court Judge James Cecile. The County Department of Law representing respondents Fitzpatrick and Fineberg moves to dismiss Yagan's petition and for an Order enjoining Yagan from filing further vexatious litigations.

To fully appreciate the totality of Yagan's litigation and the reasoning behind the respondents' motion, the Court now sets forth Yagan's litigation history - at least all of which the Court is presently aware.¹

On or about October 10, 2006, charges of disorderly conduct and criminal trespass that had been pending against Yagan were dismissed by Hon. Langston McKinney of Syracuse City Court, upon motion of the District Attorney's Office. In response to this dismissal, on October 26, 2006, Yagan filed an Article 78 petition seeking restoration of said charges so she could have the opportunity to prove she was innocent (Supreme Court, County of Onondaga, Index No.: 2006-6995). Yagan named Judge Langston McKinney; Onondaga County District Attorney William Fitzpatrick; Chief ADA Michael Price; ADA Geoffrey Ceriek; and ADA Michael Mordue as respondents. This matter was assigned to Supreme Court Judge, Hon. Deborah H. Karalunas. In a Decision and Order filed April 30, 2007, Judge Karalunas dismissed Yagan's petition in its entirety. It appears from the contents of the Decision that due to Yagan's *pro se* status, the Court afforded Yagan every courtesy and excused numerous procedural and jurisdictional errors that would otherwise result in the petition being a nullity.

¹ Not all of the decisions arising from actions filed by Yagan are published online or by any reporting service. Without spending inordinate amounts of time tracking down all of the litigation that has been initiated by Yagan, the Court recounts only that of which it is presently aware.

Judge Karalunas, in dismissing Yagan's petition, stated:

Pursuant to the terms of Article 78, the petition must be dismissed. Construing all of the papers in the light most favorable to petitioner, Yagan seeks to challenge a determination made in a criminal matter. Section 7801(2) expressly states that Article 78 is not available to review a "criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court." CPLR § 7801(2). There is no allegation of any contempt proceedings in the papers before the court. Instead, petitioner challenges Judge McKinney's decision to dismiss the pending criminal charges and the decision of the remaining respondents to request the dismissal. Any challenge to the Article 730 proceedings does not lie to compel a judicial decision to be made in a particular way." Ricapito v. People of the State of New York, 20 AD2d 567 (2d Dep't 1963) (dismissing Article 78 petition where petitioner sued county court and district attorney concerning denial of motion to compel transfer of a pending criminal action). See also Bloeth v. Marks, 20 AD2d 372 (1st Dep't 1964) (dismissing Article 78 petition where petitioner sued Supreme Court justice and district attorney concerning removal of indictments from trial calendar). See Yagan v. McKinney, Index No.: 06-6995.

On or about October 10, 2008, Yagan turned to the Federal Court for the Northern District of New York for redress when she faxed three separate documents to the Chambers of Hon. Norman A. Mordue, Chief United States District Judge. One of the documents requested Declaratory and Injunctive Relief; the other a self-described "Draft Incomplete"; the third a "rambling three-page letter" from Yagan, stating that she was filing a "7 page Notice of Intention to File ex-parte TRO preceding Filing Complaint Pursuant to 42 USC Section 1983 and Sections 1985(2), 1986." Because Yagan was *pro se*, Judge Mordue erred on the side of caution and considered the documents in the various contexts in which it could have been submitted. In a Decision and Order dated

October 23, 2008, citing the fact that the documents were not properly filed with the court, nor was there payment of the requisite filing fee (or in the alternative, a motion for poor person status), the matter was dismissed without prejudice.

On or about November 3, 2008, Yagan filed in the federal court for the Northern District of New York an “Ex Parte TRO Motion and Affidavit in Support of TRO 3 Judge Court” as well as a motion to proceed *in forma pauperis* - Case: 5:08-CV-1176. With this application for a TRO, Yagan filed approximately 200 pages of exhibits. Yagan named as respondents: “Syracuse City Court Judges, Fifth Judicial District; All Judges Within the Fifth Judicial District; Stephen Dougherty, Judge; Salvatore Pavone, Judge; James Cecile, Judge; Kevin Young, Judge; Langston McKinney, Judge; William Fitzpatrick, District Attorney; Onondaga County Prosecutor; James Tormey, Judge; and Jeffrey Merrill, Judge.” Yagan sought a restraining order against the city court judges and the prosecutor for alleged injuries arising from an arrest that she had already sustained. In a Decision and Order, dated December 11, 2008, Hon. David N. Hurd, granted Yagan’s motion for poor person status, and, after reviewing all of the documents before the court, dismissed the action as frivolous, pursuant to 28 USC 1915(e)(B)(ii), as it failed to state a cause of action upon which relief could be granted. See Yagan v. Syracuse City Court Judges Fifth Judicial District, Case: 5:08-CV-1176.

Yagan returned to federal court shortly thereafter and in or about July, 2009 filed three separate actions: Yagan v. Fitzpatrick, et al, Case 5:09-CV-00776; Yagan and Petrus v. Driscoll, et al, Case 5:09-CV-763; and Yagan v. Burlingame, Case 5:09-CV-836.

In the matter of Yagan v. Fitzpatrick, et al, Case 5:09-CV-00776, Yagan sought poor person status, as well as a change of venue, among other things, for “[13] false

arrests that began on July 16, 2000, all maliciously prosecuted,” and for which she demanded compensatory damages as well as punitive damages. She brought the action against: William Fitzpatrick, Onondaga County District Attorney; Mathews, [Department of Motor Vehicles Administrative Law Judge]; Judge Christopher Gaiser; Judge David Gideon; David Brownell, [Office of Mental Health] Commissioner; Robert Long; Emmett Creahan, Mental Hygiene Legal Service Director; Michael Hungerford, [Mental Hygiene Legal Services; David Zucker, Disability Advocates Director; Mitchell Langbart, MD; Marilyn Ward, MD; Liette Dennis, CSWR Director [Behavioral Health Unit]; Colleen Clancy, Deputy Director BHU; Patrick Schaubrook, CSW BHU; and Jill Ciciarelli, SW BHU.

In a decision filed August 12, 2009, Hon. David N. Hurd describes Yagan’s papers as follows:

Plaintiff’s papers contain so many unrelated and disjointed facts that it is almost impossible to determine what plaintiff might be attempting to claim. At best, plaintiff alleges that all of her problems with the law stem from a gigantic conspiracy in which all of the prosecutors, judges and defense attorneys participated. Plaintiff also continues to challenge her confinement to [Central New York Psychiatric Center] for mental evaluation in 2002. See Yagan v. Fitzpatrick, 5:09-CV-00776.

After attempting to make heads or tails of Yagan’s papers, Judge Hurd ultimately granted Yagan’s poor person status; however, he dismissed the action as frivolous, pursuant to 28 USC 1915(e)(2)(B)(ii), (iii) for failure to state a cause of action upon which relief can be granted, as well as the fact that Yagan was attempting to seek monetary relief against a defendant who is immune from such relief. Further, Judge

Hurd denied Yagan's motion to amend her complaint as it was clear that plaintiff would be unable to amend in a manner that would survive dismissal:

In this case, it is clear that plaintiff has tried to raise the issue relating to her 2002 commitment to [Central New York Psychiatric Center] for a psychiatric evaluation and her claims that the District Attorney has conspired with judges and defense counsel to deprive plaintiff of her constitutional rights. Plaintiff filed 08-CV-1176 making many of the same claims. This Court has dismissed 08-CV-1176, and the plaintiff has appealed that dismissal. Plaintiff has also filed a case with her mother as a co-plaintiff (09-CV-763), repeating many of the *same* allegations against the *same* and other defendants. Plaintiff continues to attach a multitude of documents to all her complaints, all in some way relating to the same basis issues. Thus plaintiff will not be allowed the opportunity to file an amended complaint in this case. (See Yagan v. Fitzpatrick, 5:09-CV-00776)(*emphasis in original*).

On August 18, 2009, Judge Hurd issued a Decision and Order with regard to Yagan's action Yagan and Petrus v. Driscoll, Case: 5:09-CV-00763. Yagan brought this on behalf of herself and her mother, Julia C. Petrus ("Petrus"), as against then Syracuse Mayor Matthew Driscoll; Chief of the Syracuse Police Department, Gary Miguel; Syracuse Police Officer Michael Toia; Howard Jenkins, Administrator of Loretto; David Mooney, Project Co-ordinator of Bernardine Apartments (the elder care facility run by Loretto in which Petrus resided.); Steve Volza, Senior Vice President of Loretto; Michael Sullivan, President and CEO of Loretto; The Loretto Board of Trustees; Onondaga County District Attorney William Fitzpatrick; and the City of Syracuse. This action appears to revolve around the seizure and removal of Yagan's motor vehicle from the parking lot of Bernardine Apartments where her mother resided, although Yagan goes on quite a bit about alleged illegal evictions and false arrests, as well as a series of assaults and other accidents to which Yagan was allegedly a victim. Judge Hurd,

admittedly, had trouble discerning just exactly what relief Yagan was seeking as Yagan runs the gambit of accusations against all manner of public entities and officials as well as private individuals.

In this August 18, 2009 Decision and Order, Judge McCurn set forth clearly that as Yagan is not an attorney, she may not sign the complaint on behalf of her mother nor may she represent her mother in this action. After much discussion and affording Yagan every benefit of the doubt, Judge McCurn granted Yagan's poor person application and dismissed the action as frivolous, pursuant to 28 USC 1915(e)(2)(B)(ii), (iii) for failure to state a cause of action upon which relief can be granted, as well as the fact that Yagan was attempting to seek monetary relief against a defendant who is immune from such relief. In doing so, Judge McCurn dispenses with each of Yagan's purported claims in turn, finding each without merit.

On November 25, 2009, Judge Hurd issued a Decision and Order with regard to all three of the actions Yagan filed in federal court in July, 2009, as she had filed identical "motions" in all three actions purportedly to challenge the constitutionality of 28 USC 1915 and 2201. Apparently by this time, all three of those cases had been dismissed with prejudice and Yagan had filed a notice of appeal in each matter. It was unclear to the Court just what relief Yagan was seeking with these motions as her papers were incomplete and, "As usual, plaintiff's submissions are completely confusing, and this Court cannot tell what plaintiffs are seeking in these recent submissions." All three motions were denied. *See Yagan v. Burlingame*, 2009 WL 4575229 (N.D.N.Y.).

Apparently, all was quiet for several months, until, on April 16, 2010, Yagan filed yet another action in federal court, again on behalf of herself and her now deceased

mother: Yagan and Petrus v. Jenkins, et al, Case: 5:10-CV-00453. This was the sixth case that Yagan had filed in the Northern District of New York (in less than two years), and the second which was purported to be on behalf of herself and her mother.

Yagan applied to proceed as a poor person and sought an “Emergency Motion” for a preliminary injunction and temporary restraining order to avoid eviction. Yagan named Howard Jenkins, Administrator of the Bernardine Apartments; Loretto; David Mooney, Project Co-ordinator; Steve Volza, Loretto Senior Vice President; Michael Sullivan, Loretto, President and CEO of Loretto; and The Board of Trustees of Loretto; as well as Michael Toia, a City of Syracuse Police Officer; Gary Miguel, former Syracuse Chief of Police; William Fitzpatrick, Onondaga County District Attorney, and former Mayor Syracuse, Matthew Driscoll.

This matter was assigned to Senior United States District Judge, Neal P. McCurn, and in a Decision and Order issued April 20, 2010, Judge McCurn granted Yagan’s application to proceed as a poor person and dismissed the action in its entirety with prejudice as frivolous pursuant to 28 USC 1915(e)(2)(B)(ii), (iii) for failure to state a cause of action upon which relief can be granted.

On May 5, 2010 Yagan filed a seventh action in federal court: Yagan v. Dougherty, Case: 5:10-CV-528. Yagan named Judge Stephen Dougherty; Judge Kevin Young; Judge Jeffrey Merrill; Judge Jack Schultz; Judge David Gideon; Judge James Tormey; Onondaga County District Attorney, William Fitzpatrick; and J. Patrick Barrett. Yagan alleged that the defendants have shown “extreme hostility” and “animus” in previous court cases as well as “three ongoing criminal cases”, as a result of which Yagan sought federal court intervention to enjoin these state court proceedings so that plaintiff may

vindicate her rights. This newest filing was referred to United States Magistrate Judge, Andrew T. Baxter for a report and recommendation.

On or about May 6, 2010, Yagan turned to Supreme Court, filing a poor person application so that she might file an action on behalf of herself and her now deceased mother as against the Michael Sullivan, CEO and President of Loretto (an elder care services corporation and owner of the building in which Yagan's late mother resided); Howard Jenkins, Administrator of Bernardine Apartments (the building in which Yagan's late mother resided); Syracuse City Police Ordinance Officer Toia; Syracuse City Police Chief; and the City of Syracuse. Yagan v. Sullivan, Onondaga County, Index No.:2010-2571. Yagan sought a TRO to stop an alleged illegal lockout; seizure of her late mother's apartment, and to reinstate possession of the apartment to Yagan. In an Order filed May 6, 2010 (Hon. John C. Cherundolo), this application was denied as Yagan lacked standing to sue on behalf of her mother's estate and because she failed to provide adequate information with regard to her financial status to properly consider her poor person application. Yagan was given 120 days to pay the requisite filing fees or the file would be closed. As no filing fees were paid within that time period, the file was closed.

On June 9, 2010, Magistrate Baxter issued his report and recommendation on Case: 5:10-CV-528. Yagan v. Dougherty, et al, 2010 WL 2594790 (N.D.N.Y. 2010).

The first three paragraphs of Magistrate Baxter's report and recommendation pretty much sum up what all Yagan's filings and interactions with the judicial system are like - a rapid-fire succession of filings, applications for emergency relief, and quasi-motions, each more confusing and convoluted than the last:

On **May 5, 2010**, *pro se* plaintiff, Desiree Yagan, filed this action, seeking declaratory and injunctive relief under 42 USC §1983. In her complaint, she also requests a “Three Judge Court,” pursuant to 28 USC §2284. Plaintiff has filed a motion to proceed *in forma pauperis* (“IFP”). At the bottom of pages one through eight of the complaint, plaintiff indicates that this is a “Complaint seeking federal intervention into state courts.”

On **May 18, 2010**, plaintiff filed what she has labeled an “Emergency Motion for Declaratory and Injunctive Relief/Ex Parte Temporary Restraining Order.” In her “motion,” plaintiff added two defendants and a variety of new factual statements from an incident that occurred between May 11, 2010 and May 14, 2010. On **May 21, 2010**, plaintiff returned to the Clerk’s Office and filed a “Supplement” in support of her motion for a “Temporary Restraining Order.” On **May 24, 2010**, plaintiff filed an additional “Supplement” in support of her application for a Temporary Restraining Order and a “Notice of Removal from State Court.” On **May 28, 2010**, plaintiff returned to the Clerk’s Office to file another “Ex Parte Emergency Motion for [a] Temporary Restraining Order,” including a defendant not named in the original complaint or added in her “Ex Parte” Temporary Restraining Order (“TRO”) motion of May 18, 2010.

On June 3 and 4, 2010, plaintiff filed two “Emergency Motions” for a TRO, and, later in the day on June 4, 2010, plaintiff filed a “Supplement” to her June 4, 2010 motion for a TRO. On **June 7, 2010**, plaintiff filed another motion for a TRO, due to the alleged theft of her rolling briefcase. See Yagan v. Dougherty, 2010 WL 2594790 (N.D.N.Y. 2010) (*internal citations omitted; emphasis added*).

After looking in depth at the full history of Yagan’s litigation in the federal district court, Magistrate Baxter turned to the inquiry as to whether Yagan should be deemed a vexatious and harassing litigant. “A review of this plaintiff’s litigation history shows that

almost every case that she has brought has been held to be frivolous or duplicative. This court has reviewed plaintiff's litigation history and is extremely concerned, not only with her continuous filing of repetitive and frivolous litigation, but with her recent behavior in the federal courthouse." Id. Further,

The court has attempted to be as patient as possible, given plaintiff's pro se status. However, it appears that plaintiff is continuing to file abusive litigation and when she files an action, she returns to the court almost daily to file "amendments," "supplements," and requests for "emergency" relief. The plaintiff has not been allowed to cause needless expense for defendants because the court has not allowed these meritless complaints and motions for injunctive relief to be served. However, the plaintiff has certainly posed an unnecessary burden on the court and its staff. This is the seventh case that plaintiff has filed in the Northern District of New York since 2008. Plaintiff has been allowed to spend countless hours in the Clerk's Office and has made veiled threats to employees when plaintiff believes that the court is not acting quickly enough to suit her. Her constant "amendments" have delayed her own action..." Id.

Magistrate Baxter recommended that Senior Judge McCurn issue an order to show cause why Yagan should not be barred from filing further actions without court approval. Upon that recommendation, on June 23, 2010, Judge McCurn did indeed issue an order to show cause and Yagan was given until July 23, 2010 to show cause in writing as to why she should not be thus enjoined. Yagan v. Dougherty, 2010 WL 2594369 (N.D.N.Y.).

On July 28, 2010, in an unpublished decision, Judge McCurn issued a Bar Order, enjoining Yagan from filing any document or pleading of any kind with the district court as a *pro se* plaintiff, except in pending litigation, unless she sought prior leave of court

granting her written permission to file the document or pleading and a judge of the court granted Yagan permission to file.

After the issuance of the federal court's Bar Order, Yagan turned once again to the State Supreme Court in earnest. On August 20, 2010, Yagan submitted a poor person application. On August 23, 2010, she submitted a "supplement" to said application. On August 23, 2010, that application was denied (Hon. John C. Cherundolo) as the contents of the application did not indicate that Yagan qualified for poor person status.

On August 31, 2010, Yagan filed a Notice of Appeal, Petition of Mandamus and Prohibition, appealing the August 23, 2010 Order of this Court.

After having heard from Yagan as to why she is unable to pay the costs and fees and expenses necessary to prosecute the action underlying her poor person application, this Court issued an Amended Order on August 31, 2010, superceding the previous order of the Court and granting Yagan's poor person application. This grant of poor person status allowed Yagan to file the instant action without having to pay the filing costs and fees.

This apparently opened the floodgates and Yagan began to file motions and petitions and demands for emergency relief - each application more confusing than the last and none wholly making any sense. Most were filed in the clerk's office, however, some were sent directly to Chambers, despite explicit instructions to Yagan that she not do so. Further, Yagan began making daily visits to the Courthouse - the Offices of the County and Supreme Court Clerk and going directly to Chambers demanding almost immediate responses and orders to her motions and demanding to see the judge

assigned to the matter.

Turning to the matter at bar - the allegations of the underlying action now sound familiar - Yagan objects to the dismissal of three counts of aggravated unlicensed operation of a motor vehicle that were pending in Syracuse City Court. These charges were dismissed on the motion of the District Attorney's Office on or about October 5, 2009. Yagan seeks to restore these charges so that she might prove her innocence at trial. She names in this suit: Onondaga County District Attorney William Fitzpatrick; Chief ADA Alison Fineberg; Judge Karen Uplinger, Syracuse City Court; and Judge James Cecile, Syracuse City Court.

On **August 31, 2010**, Yagan filed a Notice of Constitutional Challenge to CPLR §1101, alleging that her constitutional access to the courts was usurped. On **September 2, 2010**, Yagan filed a Notice of Motion to Consolidate, apparently seeking to consolidate into one action multiple actions she alleged to have pending in various courts. On **September 3, 2010**, Yagan filed a motion for leave to serve the various defendants in this action by alternative means. Her proposed means of service - to make one copy of the necessary papers and file that one copy in the Syracuse City Court for distribution to all respondents. That same date, **September 3, 2010**, Yagan filed the following: motion for oral argument; motion for digital recording; motion to expedite/transfer; and motion to recuse pursuant to 28 USC 455(a). And again, on **September 3, 2010**, Yagan found herself in the clerk's office, filing yet another Notice of Constitutional Challenge to CPLR §1101. On **September 7, 2010**, Yagan filed what she even described as "abruptly written and incomplete to be amended tomorrow":

Affidavit in support of Motion for Evidentiary Hearing on ILLEGAL WARRANT OF EVICTION RESULTING IN IREPALE (sic) INJURY AND TOTAL DEVESATATION (sic) OF ALL PROPERTY; 3 DAYS SOLITARY CONFINEMENT ON NON-JAILABLE OFFENSE, DENIED HABEAS CORPUS AND DUE PROCESS Pursuant to ARTICLE 7801(3) implicating Fourth Amendment and Sixth Amendment substantive rights. (*emphasis in original*).

On **September 8, 2010**, Yagan filed the amended affidavit for the September 7, 2010 filing, as well as an “Omnibus Motion for Hearing and Relief.” On **September 9, 2010**, filed what appears to be a motion for removal to federal court all of her pending criminal and civil cases. On **September 13, 2010**, Yagan filed the following: Motion to Recuse; Motion to Expediate (sic) and Transfer to Appellate Division in Interest of JUSTICE; and Motion for Digital Tape Recorded Proceedings. On **September 13, 2010**, Yagan also filed a “motion for Special Preference to Set Expediated (sic) Hearing in 2 Days/September 15, 2010, Oral Argument Necessary to Avert Irrepreable (sic) Injury.”

On September 13, 2010, this Court issued an Order denying Yagan’s *ex parte* motion for leave to serve the respondents herein by alternative service. The Court further denied Yagan’s motion to expedite the motion date previously assigned to this matter as it would not have afforded the respondents proper and timely notice of the proceedings. Finally, this Court, out of necessity, issued a temporary restraining order enjoining Yagan from filing any additional motions in this proceeding until the motions already pending were heard and the Court could render a decision on their respective merits, and Yagan was directed to appear at motion term on October 7, 2010, and to

show cause as to why she should not be permanently enjoined and restrained from filing any additional motions in this or any other action pending in this Court.

On **September 14, 2010**, and ostensibly prior to her receipt of the Court's order of September 13, 2010, Yagan filed what she called a "Service of Article 7803(3) and Notice of Removal."

Unfortunately, the same date, the Court found it necessary to issue yet another Order further limiting Yagan as she had abused the privilege of being allowed free copying of documents pursuant to her poor person status. She had taken up over half a day of time of one of the clerks in the Office of the County Clerk for making multiple copies of almost each and every document in her file and in the multitude of bags and a rolling suitcase she has with her which contain her "legal papers."

On September 29, 2010, the County Law Department, on behalf of the respondents Onondaga County District Attorney William Fitzpatrick and Chief ADA Alison Fineberg filed responding papers and motions to dismiss Yagan's Petition for Mandamus and for an Order enjoining Yagan from filing further vexatious litigation. An Affidavit of Service, sworn to on September 30, 2010, indicates that copies of the respondents' papers and motions were duly and timely served on Yagan on September 30, 2010 via first class mail at the address provided by Yagan on her Request for Judicial Intervention and which is noted on almost every paper she has submitted to the court - a P.O. Box in Dewitt, New York.

On October 7, 2010, oral argument was heard from both sides. Yagan appeared *pro se* and argued on her own behalf. She presented herself as pleasant, intelligent and well-spoken; however, when asked by the Court how this matter was any different than

the multitude of actions previously dismissed by the district court, Yagan was unable to articulate with any discernable basis any differences. She was clearly distressed and bothered by what she sees as injustices she has suffered at the hands of all levels of local law enforcement, the judicial system and others. She spoke repeatedly of malicious persecution, false arrests, malfeasance, and corruption at every level of government and the multitude of injuries she has suffered as a result. She claims she has been blacklisted and that there is a conspiracy against her and that she has received threats by officials and threats on her life. Yagan spoke at length of all of these perceived wrongs and yet was unable to clearly state how this matter was at all different from those that have been pronounced frivolous and meritless by the federal court.

When asked by the Court why she should not be permanently enjoined from filing additional motions or papers without leave of Court, again Yagan was unable to articulate a discernable reason. She did state that she never received the respondents' opposition and motions, and was taken by surprise at the request that she be deemed a vexatious litigant. She was unable to state any reasons for the Court as to why the respondents' relief should not be granted, and instead of taking the opportunity provided to oppose their motions, she simply rehashed the arguments and allegations of malfeasance, conspiracy and corruption that she has already expressed many times before.

The Court reserved decision after oral argument and informed the parties that a decision would be forthcoming within 60 days. On October 12, 2010, without any decision having yet been issued and despite this Court's Order of September 13, 2010, Yagan filed two motions to re-argue. On October 14, 2010, Yagan filed another

application to proceed as a poor person so that she might initiate an action as against various Syracuse City Court judges, the City Court Clerk, and various City Court support staff. This application is still pending.

First and foremost, with regard to Yagan's motion for recusal - this motion is DENIED. Yagan has failed to establish any basis for mandatory recusal and her allegations of bias are vague and speculative. See Jason A.C. v. Lisa A.C., 30 AD3d 1110 (4th Dep't 2006).

With regard to Yagan's petition for mandamus and the respondents' motion to dismiss, Yagan's action cannot stand for the same reasons as set forth by Judge Karalunas in the matter of Yagan v. McKinney, Index No.: 06-6995.

Yagan seeks to have three charges of aggravated unlicensed operation of a motor vehicle reinstated against her so that she might prove her innocence at trial. These charges were dismissed upon motion of the District Attorney's Office as a ministerial matter. What Yagan seeks now is not permissible under Article 78 of the CPLR. Article 78 is not available to review a "criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court." CPLR § 7801(2). See Bloeth v. Marks, 20 AD2d 372 (1st Dep't 1964) (dismissing Article 78 petition where petitioner sued Supreme Court justice and district attorney concerning removal of indictments from trial calendar).

Additionally, mandamus may not be awarded to compel an act in respect to which an officer may exercise judgment or discretion. Klostermann v. Cuaomo, 61 NY2d 525 (1984). It is well-settled that the decision of whether to prosecute is entrusted to the sole discretion of the District Attorney. Mandamus cannot be used to compel a purely

discretionary act by a public official. McTottle v. Rice, 60 AD3d 1068 (2nd Dep't 2009) [internal citations omitted]; Mullaney v. Brown, 300 AD2d 307 (2nd Dep't 2002).

Yagan is further prohibited from seeking relief here by the doctrines of res judicata and collateral estoppel. These matters were already litigated - and dismissed, time and time again by the district court. The allegations in the instant papers appear to be almost identical to those that were considered repeatedly by the district court. The simple act of moving across town from the district court to the state court does not give the petitioner another bite at the apple.

As such, the respondents' motion to dismiss is GRANTED and Yagan's petition is DISMISSED in its entirety and with prejudice.

Finally, with regard to respondents' motion for an Order enjoining Yagan from filing any further motions or pleadings without leave of court.

Yagan argued, at oral argument, that she was not on notice of this motion, that she had not received the answering papers and motion for injunction from the respondents and that she was blind-sided by the relief requested by the respondents. Aside from the fact that respondents provided an affidavit of service evidencing that their answering papers and motion were duly and timely served on Yagan at the address provided by Yagan on the RJI and her many submissions, Yagan cannot reasonably claim that she was blind-sided by the possibility that she could be enjoined from filing further papers without leave of court. This Court, in its September 13, 2010 Order in this matter directed Yagan to appear at motion term on October 7, 2010 and show cause as to why she should not be permanently enjoined and restrained from filing any additional motions in this or any other action pending in this Court. She was surely put on notice of

the impending motion - either at the Court's initiative or that of the respondents. For her to now allege that she had no idea that she faced injunctive relief is implausible.

The right to represent oneself in both civil and criminal matters is basic to our system of justice. Spremo v. Babchik, 155 Misc.2d 796 (Queens 1992), *aff'd as modified* 216 AD2d 382 (2nd Dep't 1995). Section 6 of Article I of the New York State Constitution gives a person accused of a crime the right to appear and defend in person in any trial in any court. A party can both prosecute and defend civil actions in person. CPLR §321(a). However, the right of access to the courts is neither absolute nor unconditional. In re Green, 669 F2d 779 (DC Cir. 1981). Further, the right to appear *pro se* is not unlimited. Muka v. New York State Bar Association, 120 Misc2d 897; Muka v. Hancock, Estabrook, Ryan, Shove & Hust, 120 Misc2d 146; Matter of Winters v. Gould, 143 Misc2d 44. A court has the power and duty to protect courts, citizens and opposing parties from the deleterious impact of repetitive *pro se* litigation. Muka v. New York State Bar Association, *supra*. In bringing these types of actions, such a litigant deprives other litigants of their proper share of judicial resources. Id.

Many courts have found it necessary to enjoin *pro se* litigants from commencing or continuing any further actions when it was found those litigants were abusing the judicial process. "The fact that one appears *pro se* is not a license to abuse the process of the Court and to use it without restraint as a weapon of harassment and libelous bombardment...when it becomes clear that the courts are being used as a vehicle of harassment by a 'knowledgeable and articulate experienced *pro se* litigant'...the issuance of an injunction is warranted." Kane v. City of New York, 468 F. Supp 586 (S.D.N.Y. 1979), *aff'd* 614 F2d 1288 (2nd Cir. 1984); *see also* In re Martin-Trigona, 737 F2d 1254

(2nd Cir 1984), *after remand* 592 F. Supp. 1566 (D. Conn 1984), *aff'd* 763 F2d 140 (2nd Cir. 1985).

When *pro se* litigants have abused the judicial process, New York courts have limited the scope of their right to appear *pro se* in civil action. In Matter of Rappaport, (109 Misc2d 640), a litigant's disruptive courtroom practices caused the courts to revoke his right to appear *pro se*. In Martin-Trigona v. Capital Cities/ABC (145 Misc2d 405), an abusive *pro se* litigant was enjoined from commencing or continuing any actions in the New York State courts on a *pro se* basis.

In Sassower v. Signorelli (99 AD2d 358), the Second Department held that in light of plaintiff's palpable abuse of the judicial process, it was well within the judicial discretion of the IAS court to enjoin plaintiff from pursuing additional litigation against defendants and related parties in the absence of judicial approval. The "court will not tolerate the use of the legal system as a tool of harassment." Sassower v. Signorelli, *supra*.

This Court has no direct knowledge that Yagan has the intention of harassing the respondents herein, all of whom have been named in a multitude of suits previously dismissed by this or the district court; however, her actions are harassing and distressing nonetheless. In doing so, she has abused the rights flowing from her "poor person" status, and has - *de facto* - abused the court system and those who work within the court system. While Yagan may have a genuine belief that she has been wronged by those she names as defendants in her various actions, she has been told time and time again that she seeks relief which cannot be obtained. Regardless, she files action after action, petition after petition, rehashing the same alleged causes of action against the

same defendants. Her actions are abusive and harassing. Yagan cannot have a reasonable, rational basis to believe that she will succeed on the merits of this action; she has been informed that the causes of action she pursues are frivolous not less than 5 times by this and other courts. With each filing, she causes excessive wasted time by the clerks of the County Clerk's Office and the Supreme Court Clerk's Office, as well as this Court's staff, who must review and research each and every submission she makes. She causes the respondents unnecessary attorneys fees in having to defend again and again against these baseless and meritless actions. And as the staff and judges must take the time to consider each and every submission made by Yagan, hours that are forever lost; this only delays justice for others who come before the court on claims that actually have merit.

It is NOW, upon reading the petition for mandamus of Desiree Yagan, petitioner *pro se*, filed August 31, 2010, with attached exhibits, and the other various submissions, petitions and motions submitted by petitioner as set forth above,

AND, having read the answering affidavit of Karen Bleskoski, Esq., sworn to the 29th day of September, 2010, with attached exhibits, as well as respondents' Notice of Motion to dismiss petitioner's petition in its entirety, as well as a request for injunctive relief to enjoin petitioner from further filing vexatious litigation without prior leave of court, it is hereby

ORDERED, that the petitioner's motion for recusal is DENIED, and it is further

ORDERED, that petitioner's petition for mandamus is DENIED and the respondents' motion to dismiss all actions brought by petitioner is GRANTED and petitioner's petition is DISMISSED in its entirety, with prejudice; and it is further

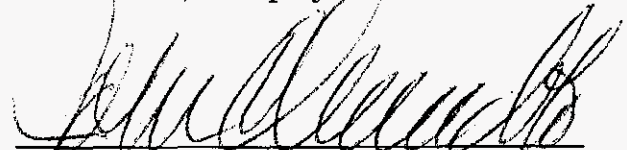
ORDERED, that respondent's motion for an injunction prohibiting petitioner from filing any further vexatious litigation without prior leave of court is hereby GRANTED, and henceforth, petitioner herein, Desiree Yagan, is hereby ENJOINED and PROHIBITED from instituting any further actions and proceedings in any court in the Unified Court System in the State of New York without prior approval of the Administrative Judge of the Court in which she seeks to institute a further action or proceeding. See Spremo v. Babchik, 155 Misc.2d 796 (Queens 1992), *aff'd as modified* 216 AD2d 382 (2nd Dep't 1995). Any violation of this order will result in service upon Yagan of an Order to Show Cause issued by the Court for her to show cause why she should not be adjudicated and punished for criminal contempt pursuant to Section 750 *et seq.* of the Judiciary Law. If so adjudicated, the court will consider the maximum penalty provided by law.

The only exception to this Order is that Yagan has leave to request in any legal fashion, a higher court to review by appeal or otherwise this determination as a *pro se* litigant without leave of court. Further, Yagan is not prohibited from instituting or continuing any action or proceeding with an attorney representing her. The purpose of this injunction is not to exclude Yagan from her right to use the courts to air her grievances, but rather to limit that right as aforesaid. An attorney representing Yagan as an officer of the court would be bound by the Code of Professional Responsibility. That attorney would be required to represent his or her client zealously, but within the bounds of the law; and it is further

ORDERED, that petitioner's motions for re-argument are deemed a nullity as they were filed prior to the issuance of this Order; and it is further

ORDERED, that to the extent petitioner seeks any other type of claim, redress or relief by the rambling papers submitted to this Court, such claims, redress or relief is/are DENIED, and all such claims are hereby DISMISSED, with prejudice.

DATED: October 27, 2010.



Hon. John C. Cherundolo, A.J.S.C.