

**Matter of Amato v County of Nassau**

2011 NY Slip Op 31629(U)

June 7, 2011

Supreme Court, Nassau County

Docket Number: 495/11

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

In the Matter of the Application of

TRIAL / IAS PART 30  
NASSAU COUNTY

THOMAS AMATO,

Index No. 495/11

Petitioner,

Motion Sequence No. 001

For a Judgment pursuant to Article 78 of the  
Civil Practice Law and Rules

- against -

THE COUNTY OF NASSAU,

Respondent.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The petitioner Thomas Amato seeks pursuant to CPLR Article 78 an order compelling the respondent County of Nassau to provide the petitioner with legal representation in a federal civil action, to wit Kenneth C. Varricchio, plaintiff against Nassau County State of New York, Nassau County Sheriff's Dept., Nassau County District Attorney's Office, Thomas Amato and Desiree Laster, defendants under United States District County, Eastern District of New York index number 08CV04526 (JFB)

(AKT) pursuant to Nassau County Administrative Code § 22-2.8 (2) (a), or if the respondent determines the Nassau County Attorney's representation of the petitioner would be inappropriate to notify the petitioner in writing and reimburse the petitioner for the reasonable attorney's fees and litigation expenses incurred in defense of the petitioner in that federal civil action. The federal civil action was brought by former detainee at the Nassau County Correctional Center who alleged the petitioner used excessive force against him in violation of 42 U.S.C. § 1983. The petitioner claims here the respondent failed to perform a legal duty required by law, specifically Nassau County Administrative Code § 22-2.8 (2) (a). The petitioner also asserts a hearing before the Court is required under CPLR 7804 (h) because there are material issues of fact requiring resolution by a trier of fact. The petitioner maintains he exhausted his administrative remedies, and there is no adequate remedy at law.

The petitioner's attorney states, in the January 11, 2011 verified petition, the petitioner may be entitled to defense and indemnification in the federal law suit from the respondent if the Nassau County Peace Officer Indemnification Board found the petitioner's actions were within the discharge of the petitioner's duties and scope of employment. The petitioner's attorney asserts the petitioner requested representation from the respondent, but the respondent notified the petitioner on May 20, 2009 the Nassau County Peace Officer Indemnification Board determined the respondent would neither represent nor indemnify the petitioner pursuant to General Municipal Law § 50-n.

The petitioner's attorney avers the petitioner retained that law firm on or about June 30, 2009 to represent the petitioner in the pending federal litigation paying the law firm from personal funds. So, the petitioner's attorney wrote to the Nassau County Attorney's Office to request the respondent evaluate the petitioner's request for representation under Nassau County Administrative Code § 22-2.8, but the respondent did not respond. The petitioner's attorney maintains an August 16, 2010 letter was sent which reiterated the June 22, 2010 request, and added if the law firm did not receive a response within 30 days then an Article 78 proceeding would be commenced. No response came from the respondent, so the petitioner commenced the instant special proceeding in the nature of a mandamus to compel the respondent.

The respondent challenges the petition, and opposes the relief sought by the petitioner. The Nassau County Attorney's Office maintains, in a February 11, 2011 verified answer and objections to points of law, General Municipal Law § 50-n vests sole authority and power with the Nassau County Peace Officer Indemnification Board to determine whether any Nassau County peace officer will be indemnified and provided with defense by the Nassau County Attorney's Office. The respondent's attorney points out a notice of personnel action filed on July 28, 2006 against the petitioner for certain unprofessional physical contact with an inmate, and the Nassau County Peace Officer Indemnification Board determined on May 20, 2009 that those acts by the petitioner were not committed while in the proper discharge of the petitioner's duties and were not in the

scope of his employment. The respondent's attorney notes the Nassau County Peace Officer Indemnification Board declined to provide neither defense nor indemnification to the petitioner. The respondent's attorney asserts the petitioner's claims are time barred under CPLR 217 (1) because the petitioner was notified by certified mail return receipt requested on May 22, 2009 of the determination by the Nassau County Peace Officer Indemnification Board, yet the petitioner filed the instant petition on January 13, 2011, to wit more than 16 months later or more than the four month limitation under CPLR 217 (1). The respondent's attorney avers the local ordinance, that is Nassau County Administrative Code § 22-2.8 (2) is inapplicable in these circumstances because it does not include Nassau County peace officers within its definition of officers and employees. The respondent's attorney notes the petitioner makes no showing regarding why peace officers are omitted in the definition of county officers covered by Nassau County Administrative Code § 22-2.8. The respondent's attorney maintains General Municipal Law § 50-n preempts in this regard, that is it was the intent of the State Legislature for the statute to apply to a Sheriff and Deputy Sheriffs, such as the petitioner. The respondent's attorney adds the State Legislature enacted General Municipal Law § 50-n almost a decade after the passage of Nassau County Administrative Code § 22-2.8, and General Municipal Law § 50-n specially carved out a procedure for an Indemnification Review Board to address claims against deputy sheriffs, such as the petitioner. The respondent's attorney avers the determination by the Nassau County Peace Officer Indemnification

Board was an exercise of discretion regarding whether the petitioner's acts were performed, and not a ministerial act as maintained by the petitioner.

The petitioner replies with a March 14, 2011 affirmation by counsel. The petitioner's attorney asserts none of the respondent's arguments change the fact that the petitioner's circumstance falls within the parameters of Nassau County Administrative Code § 22-2.8. The petitioner's attorney argues General Municipal Law § 50-n is inapplicable to the petitioner, and even if General Municipal Law § 50-n was applicable, Nassau County Administrative Code § 22-2.8 offers broader protection to the petitioner. The petitioner's attorney states General Municipal Law § 50-n provides for the defense of a peace officer involved in tort or negligence litigation while Nassau County Administrative Code § 22-2.8 provides for the defense of an employee involved in a 42 U.S.C. § 1983 violation. The petitioner's attorney avers this petition in the nature of mandamus is proper because a showing of the exercise of discretion by the Nassau County Peace Officer Indemnification Board is not required under Nassau County Administrative Code § 22-2.8. The petitioner's attorney also points out the respondent has no statute of limitations defense.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Court determines General Municipal Law § 50-n vests sole authority with the Nassau County Peace Officer Indemnification Board to determine whether a peace officer, such as the petitioner, will be indemnified and

provided with a defense by the Nassau County Attorney. The Court also finds the lack of indemnification nor legal representation may not be prevented nor significantly ameliorated by further administrative action or by steps available to the petitioner. However, “Mandamus does not lie to compel the performance of a discretionary act (*Matter of Mullen v Axelrod*, 74 NY2d 580)” (*Garrison Protective Services, Inc. v. Office of Comptroller of City*, 92 N.Y.2d 732, 736, 685 N.Y.S.2d 921 [1999]). This Court finds, as a matter of law, the Nassau County Peace Officer Indemnification Board is under no duty to indemnify nor provide a defense to the petitioner. The relief sought by this petitioner, in the nature of mandamus, is unavailable to him to compel the performance of a discretionary act by the Nassau County Peace Officer Indemnification Board (*see VSF Coalition, Inc. v. Scopetta*, 13 A.D.3d 517, 786 N.Y.S.2d 575 [2<sup>nd</sup> Dept, 2004]). This Court lacks authority to interfere with the Board’s proper use of its discretion under General Municipal Law § 50-n (*see generally Elmwood-Anderson Corp. v. Novello*, 11 A.D.3d 969, 782 N.Y.S.2d 312 [4<sup>th</sup> Dept, 2004]). This Court also determines a hearing is not required here because the sole issue is a legal one under these circumstances. Hence, there are no material issues of fact at issue requiring resolution by a trier of fact.

The Second Department holds:

A CPLR article 78 proceeding to review a determination of a public body or officer must be brought within four months of the date which the determination is “final and binding upon the petitioner” (CPLR 217[1]; *see* CPLR 7801[1]; *Matter of Carter v. State of N.Y., Exec. Dept., Div. of*

Parole, 95 N.Y.2d 267, 270, 716 N.Y.S.2d 364, 739 N.E.2d 730). The Court of Appeals has identified two requirements for fixing the time when agency action is final and binding upon the petitioner. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 832 N.E.2d 38; see *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 454, 672 N.Y.S.2d 281, 695 N.E.2d 232; *Matter of Putnam v. City of Watertown*, 213 A.D.2d 974, 625 N.Y.S.2d 384) *Agoglia v. Benepe*, 77 A.D.3d 927, 931, 910 N.Y.S.2d 126 [2<sup>nd</sup> Dept, 2010].

The Court observes May 20, 2009 determination by the Nassau County Peace Officer Indemnification Board found the petitioner's relevant acts were committed outside the scope of his employment, so the Board declined to provide any defense or indemnification to the petitioner. The Court decides the petitioner was duly notified of that determination on May 22, 2009, yet he filed this petition on January 13, 2011. This Court determines the Nassau County Peace Officer Indemnification Board reached a definitive position on the issue of whether to indemnify and defend the petitioner which appears to be the basis for this petition. The Court holds this petition is time barred under CPLR 217 (1) because it was commenced more than four months after the Board determination was final and binding upon the petitioner.

The petitioner asserts General Municipal Law § 50-n does not apply to federal litigation commenced pursuant to 42 U.S.C. § 1983. The petitioner indicates Nassau County Administrative Code § 22-2.8 is applicable with regard to indemnification and a defense. The Court determines Nassau County Administrative Code § 22-2.8 is

inapplicable under these circumstances because General Municipal Law § 50-n was specifically enacted to address claims against a deputy sheriff such as the petitioner. The Court finds deputy sheriffs are not included in the definition of county officers contained in Nassau County Administrative Code § 22-2.8. Moreover, the determination regarding indemnification and a defense are vested with the Nassau County Peace Officer Indemnification Board and not the Office of the Nassau County Attorney (*see* General Municipal Law § 50).

Accordingly, the petition is dismissed in all respects, and judgment is awarded to the respondent. This decision shall constitute the judgment and order of this Court.

So ordered.

Dated: **June 7, 2011**

ENTER:



J. S. C.

**ENTERED**

JUN 13 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

FINAL DISPOSITION