

**Mirani v Cannavo**

2012 NY Slip Op 30871(U)

March 30, 2012

Sup Ct, NY County

Docket Number: 402496/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

DEEPAK MIRANI,

Plaintiff,

-v-

VINCENT CANNAVO, et al.,

Defendant.

INDEX No. 402496/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 002

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-4

Answering Affidavits- Exhibits \_\_\_\_\_ 6

Replying Affidavits \_\_\_\_\_ 5

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 3/30/12

*Donna M. Mills*  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION \_\_\_\_\_ NON-FINAL DISPOSITION

**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 141B).

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----x  
DEEPAK MIRANI,

Petitioner,

Index No.: 402496/11

-against-

VINCENT CANNAVO, in his official capacity as Program Director of the Adult Care Facility Program for the Metropolitan Area Regional Office of the New York State Department of Health, and NIRAV R. SHAH, in his official capacity as Commissioner of the New York State Department of Health,

Respondents.

-----x  
DONNA MILLS, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, petitioner moves, pursuant to CPLR Article 78, to : (1) direct respondents to enforce their corrective order, dated June 3, 2011, insofar as it requires petitioner's health care facility to comply with New York Social Services Law; (2) judicial review of said corrective order as it (i) failed to address all of petitioner's allegations; (ii) was arbitrary and capricious; and (iii) represents an abuse of discretion with respect to the penalties imposed. Respondents cross move, pursuant to CPLR 3211 (a) (2) and (7), to dismiss the petition.

**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 141B).

In motion sequence number 002, Garden of Eden Home for Adults (Garden of Eden) and Martin J. Amsel (Amsel), in his capacity as operator and administrator of Garden of Eden, seek: (1) leave, pursuant to CPLR 7802 (d), to intervene in this proceeding as interested party-respondents; (2) an order amending the caption to add the proposed intervenors as party-respondents; (3) to move, pursuant to CPLR 3211, to dismiss the petition; or, in the alternative, (4) an order allowing the proposed intervenors leave to serve the proposed verified answer; and (5) an order, pursuant to CPLR 408, for leave to conduct limited discovery.

#### **BACKGROUND**

According to the petition, petitioner is a resident of Garden of Eden, an adult care facility, into which he moved in January of 2003. Petitioner suffers with a mental illness, defined as a disability under the Americans with Disabilities Act. Garden of Eden is an "impacted home," licensed by the State of New York, in which 25% or more of the residents have a mental illness.

Petitioner receives SSI benefits, which include a personal needs allowance (PNA) of \$178.00 per month, in addition to the facility fees of \$1,190.00, payable to Garden of Eden. Petitioner claims that the facility's assistant administrator coerced him into signing a contract that provided for the

facility to deduct \$80.00 per month from his PNA to cover the facility's charges while petitioner's SSI payments were interrupted. The petition further alleges that petitioner was threatened into signing this contract and misled as to its details.

The petition alleges that petitioner, along with other residents, have complained to respondents after experiencing threats, retaliation and other acts defined as "endangerment," inflicted by Amsel and Garden of Eden staff in recent years. Petitioner says that an inspection report was issued on March 21, 2011, finding that the residence's operator failed to ensure that residents were not threatened with retaliation or reprisals from the operator and Garden of Eden staff, and ordering Garden of Eden immediately to restrict Amsel's interactions with the residents.

On March 31, 2011, petitioner filed a complaint with the New York State Department of Health's Adult Home Complaint Unit, alleging: (1) the facility had unlawfully pressured him into signing over a portion of his PNA; (2) Garden of Eden was unlawfully withholding retroactive PNA payments in satisfaction of facility fees; and (3) petitioner's case manager refused to assist him in requesting a waiver from SSA to resolve or reduce his outstanding overpayment obligations to the government.

On April 5, 2011, petitioner wrote a letter advising the

Department of Health that the facility's assistant administrator had pressured him into signing the above-referenced contract. On April 11, 2011, petitioner again wrote to the Department of Health, advising it that Amsel had orally threatened him. These letters were acknowledged as received on or about April 22, 2011.

On June 3, 2011, respondents sent the following letter, signed by respondent Vincent Cannavo (Cannavo), to petitioner:

"This is to advise you that we have completed our investigation regarding Garden of Eden Home, and were able to substantiate your complaint. The Department is required to identify those areas reviewed during the inspection. The following areas were reviewed: Resident Services-Case Management and Resident Services-Personal Allowances. Appropriate violation [sic] are being issued for the facility to correct. The operator has the right to contest these violations. Should there be a change in the status of the report, you will be notified. Should you have any further questions or have any additional information you would like to share with us, please call Oswald Sancho, Coordinator, who may be reached at 212-417-4440."

Petition, Ex. H.

On July 21, 2011, respondents ordered the following corrective action:

"CORRECTIVE ACTION REQUIRED

- a) The operator must ensure that each resident receives a personal allowance equal to the amount the resident is entitled to, without any modification, as any waiver of the right of an SSI recipient to any portion of his/her personal allowance benefits is null and void.
- b) The operator must ensure that each resident is treated with courtesy [sic] and respect, and must not coerce, intimidate, or make threats of retaliation against any resident for any reason.
- c) The operator must ensure that the aforementioned resident is provided with case management services to

address his financial needs. A plan must be specifically developed and implemented for that purpose. Submit a copy of this plan for review.

The operator shall implement a method of case management where the residents of the facility are assisted with all benefits and assistance with all financial matters when needed. Submit to [sic] this Department with the response to the report a plan on how the facility will implement the assistance with the residents.

Petition, Ex. H.

On August 9, 2011, petitioner wrote to Cannavo to request notification as to whether Garden of Eden has requested a review of respondents' findings, a copy of the corrective action plan required by respondents, and a request that petitioner meet with him to review the investigative report and recommend modifications thereto. Petition, Ex. J. According to petitioner, to date, Garden of Eden has not complied with the corrective order and respondents have failed to ensure Garden of Eden's compliance. In addition, petitioner claims that respondents ignored his complaints asserted against the assistant administrator of Garden of Eden, and found his allegations asserted as against Amsel to be unsubstantiated, without gathering any evidence concerning his allegations.

In their cross motion, respondents argue that petitioner lacks standing to challenge an administrative action, because respondents have not caused petitioner to suffer an injury, nor has petitioner stated a claim for mandamus to compel their action, because petitioner has no legal right to compel

respondents to institute enforcement proceedings which are discretionary and not subject to judicial review.

It is respondents' position that the order requiring corrective action did not injure petitioner, since the order directs the facility to stop threatening petitioner and to ensure that he receives appropriate case management services. Hence, respondents state that the order benefits, rather than injures, petitioner. Further, respondents insist that petitioner's claims of harm occasioned by their failure to compel Garden of Eden to comply with their order is conjectural at best.

In opposition to respondents' cross motion, petitioner maintains that he has standing because respondents' failure to act is causing him direct and immediate harm. Further, petitioner argues that respondents' obligation to enforce their own orders is not discretionary, but is mandated by the Social Services Law. Lastly, petitioner asserts that the investigative report fails to identify the basis for respondents' finding that there was no substantiation for his claim that the assistant administrator threatened him.

In reply, respondents reiterate their initial arguments regarding standing and the discretionary nature of their decision as to what actions to take regarding enforcement of their orders. In addition, respondents point to the investigative report, which clearly indicates that their findings were based on interviews

with residents and staff at Garden of Eden, which is their support for the finding that petitioner's charges asserted as against the assistant administrator were unsubstantiated.

In motion sequence number 002, Garden of Eden and Amsel assert a right to intervene as interested parties who will be affected by the ultimate decision of this court. In her affidavit in support of this motion, the assistant administrator of Garden of Eden states that an administrative hearing is under way regarding the allegations of abuse directed at her and Amsel and, therefore, it would be inappropriate for this court to determine such matters prior to a final administrative determination. The court notes that no argument is posited with respect to the branch of the proposed intervenors' motion seeking to dismiss the petition, and no legal authority is provided for proposed intervenors' request for discovery.

In opposition to this motion, petitioner claims that proposed intervenors are neither interested parties nor is their motion timely, having been asserted more than four months after the administrative action under scrutiny. Petitioner maintains that, in order to intervene, proposed intervenors' claims must relate back to petitioner's claims, whereas, in the instant matter, proposed intervenors have indicated no claims, just defenses, and their position is antithetical to that of petitioner. Moreover, petitioner says that proposed intervenors

are merely buttressing respondents' arguments.

In reply, proposed intervenors state that, as proposed respondent intervenors, their claims do not have to be identical to petitioner's claims, and that their motion is timely, based on the provisions of CPLR Article 78.

#### **DISCUSSION**

At the outset, the court notes that the only affirmative action requested by petitioner in his notice of petition and petition is to direct respondents to enforce their corrective action appearing in their order of June 3, 2011, and to "review" that corrective action as arbitrary, capricious and an abuse of discretion.

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). In the instant matter, except for the mandamus request, petitioner is not asking the court to substitute its judgment or to take any action other than to "review" respondents' corrective action: he does not ask the court to vacate, modify or confirm that action. It is not the function of the court, pursuant to

Article 78 of the CPLR, to review administrative determinations for no purpose other mere examination. Therefore, these branches of the petition are denied.

Contrary to respondents' contention, the court finds that petitioner does have standing to maintain this proceeding.

Standing is a threshold issue that must be resolved before the court can address the merits of the challenge to the administrative action. See *New York State Association of Nurse Anesthetists v Novello*, 2 NY3d 207 (2004); *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 (2003), cert denied 540 US 1017 (2003); *Security Pacific National Bank v Evans*, 31 AD3d 278 (1<sup>st</sup> Dept 2006).

New York has established a two-pronged test for determining standing to challenge administrative action. First, the petitioner must demonstrate an "injury in fact," meaning that he or she "will actually be harmed by the challenged administrative action," and the injury must be "more than conjectural." *New York State Association of Nurse Anesthetists v Novello*, 2 NY3d at 211. In addition, the petitioner must show that the injury is personal to him, as distinct from that of the general public. *Matter of Transactive Corp. v New York State Department of Social Services*, 92 NY2d 579, 587 (1998).

The second prong of the test requires that the injury " must fall within the zone of interests or concerns sought to be

promoted or protected by the statutory provision under which the agency has acted." *New York State Association of Nurse Anesthetists v Novello*, 2 NY3d at 211.

Petitioner is seeking mandamus to compel respondents to see that Garden of Eden complies with the corrective action ordered by respondents. The order was based on petitioner's claims of unlawful treatment, personal to him, and, since respondents' order mandates corrective measures to ensure that petitioner will no longer suffer such treatment, petitioner has demonstrated that if the orders are not complied with he will suffer personal injury in fact so as to satisfy the first prong of the test to establish standing.

The Department of Social Services' regulations require government agencies to "promote the development of sufficient and appropriate residential care programs for dependent adults" and "to administer a system of supervision, inspection and enforcement for adult-care facilities which assures compliance with regulations and the maintenance of standards of care." 18 NYCRR § 485.3. Petitioner is seeking to see that the mandated standard of care is maintained and, hence, he has met the second prong of the test for standing.

The court finds unpersuasive respondents' argument that the action complained of benefits petitioner and, consequently, he lacks standing. Although the corrective measure was taken to

benefit petitioner, if respondents do not see that those measures are carried out, respondents' order acts to his detriment, in that the conditions complained of will continue to exist. Moreover, since respondents' investigative report, which resulted in their corrective order, substantiates petitioner's complaints, and respondents do not deny that those complaints have not been remedied, respondents have failed to rebut petitioner's assertions that he continues to suffer from the complained of actions. Therefore, petitioner's injuries, as evidenced by respondents' own report, cannot be deemed speculative.

Having determined that petitioner has standing to maintain this action, the court must now address the substance of the petitioner's request for mandamus.

"It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion [citation omitted]." *Matter of Brusco v Braun*, 84 NY2d 674, 679 (1994).

"Mandamus is often characterized as an 'extraordinary remedy' that is available only in limited circumstances. Traditionally, the writ of mandamus is the relief invoked when a party seeks to compel performance by a governmental agency of a duty enjoined by law. A party seeking relief in the nature of mandamus must show a 'clear legal right' to the relief. However, the availability of a mandamus to compel 'depends not on the applicant's substantive entitlement to prevail, but on the nature of the duty to be commanded-i.e., mandatory, non-discretionary action' [internal citations omitted]."

*Matter of County of Fulton v State of New York*, 76 NY2d 675, 678 (1990).

Simply stated, mandamus does not lie to enforce discretionary duties. *New York Civil Liberties Union v State of New York*, 4 NY3d 175 (2005).

In support of his position that the action for which he seeks mandamus is ministerial and not discretionary, petitioner relies on 18 NYCRR § 485.3 (a) (5), which states that the responsibility of government agencies includes the obligation to:

"administer a system of supervision, inspection and enforcement for adult-care facilities which assures compliance with regulations and the maintenance of standards of care."

However, the method whereby the government agency chooses to administer and enforce the adult-care facilities is discretionary and, consequently, inappropriate for mandamus. Pursuant to 18 NYCRR § 486.1 (d):

"The department *may* undertake enforcement action against any operator of an adult care facility who fails to operate the facility in compliance with applicable provisions of law and regulation [emphasis added]."

Respondents claim, and the court agrees, that since the enforcement action is discretionary (*may undertake enforcement*), the petition must be dismissed.

Even if the court were to agree with petitioner that the corrective action is ministerial, not discretionary, he would still not be entitled to a writ of mandamus under the

circumstances herein presented.

It has long been held that "a public entity's decision not to invoke authorized penalties falls within 'the areas of management of public affairs and discharge of public duties where judicial intervention in the ordinary case is least fitting' [internal citation omitted]." *Matter of Mullen v Axelrod*, 74 NY2d 580, 583 (1989) (case involved the Department of Health's failure to substantiate claims of abuse at a nursing home). "Moreover, mandamus is not available 'to compel a general course of official conduct or a long series of continuous acts', performance of which it would be impossible for the court to oversee [internal citation omitted]." *Matter of Community Action Against Lead Poisoning v Lyons*, 43 AD2d 201, 202-203 (3d Dept 1974), *affd* 36 NY2d 686 (1975).

The corrective measures required of Garden of Eden by respondents involve Garden of Eden creating methods of case management to ensure certain rights for the residents, which would necessarily involve an ongoing course of regulatory enforcement, actions inappropriate for mandamus. See *Matter of Okslan Acupuncture, P.C. v Dinallo*, 25 Misc 3d 637 (Sup Ct, NY County 2009), *affd* 77 AD3d 451 (1<sup>st</sup> Dept 2010).

Therefore, as a consequence of the foregoing, the court concludes that petitioner is not entitled to a writ of mandamus and the petition must be denied.

CPLR 7802 (d) states that a court "may allow other interested persons" to intervene in an Article 78 proceeding. CPLR 7802 (d) grants the court "broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action, which requires a showing that the proposed intervenor's claim or defense and the main action have a common question of law or fact" or CPLR 1012, concerning intervention as of right [internal quotation marks and citation omitted]. *Matter of Greater New York Health Care Facilities Association v DeBuono*, 91 NY2d 716, 720 (1998); *Ferguson v Barrios-Paoli*, 279 AD2d 396 (1<sup>st</sup> Dept 2001). An "interested person" has been defined as one who will be directly affected by the outcome of the proceeding. *County of Westchester v Department of Health of State of New York*, 229 AD2d 460 (2d Dept 1996). Whether or not to allow a party to intervene, pursuant to CPLR 7802 (d) lies within the sound discretion of the court. *Matter of White v Incorporated Village of Plandome Manor*, 190 AD2d 854 (2d Dept 1993).

Contrary to petitioner's position, an intervenor does not have to be in the same position as the petitioner; a party may also intervene as a respondent, provided that the proposed intervenor has a real and substantial interest in the outcome of the proceedings. *Matter of Bernstein v Feiner*, 43 AD3d 1161 (2d Dept 2007). In the case at bar, the outcome of the proceeding

directly affects the proposed intervenors.

However, since the court has dismissed the petition, the proposed intervenor's motion, motion sequence number 002, is denied as moot.

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that respondents' cross motion (motion sequence number 001) is granted; and it is further

ADJUDGED that the petition (motion sequence number 001) is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondents, having an address at \_\_\_\_\_, do recover from petitioner, having an address at \_\_\_\_\_, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor; and it is further

ORDERED that proposed intervenors' motion to intervene (motion sequence number 002) is denied as moot.

Dated: 3/30/12

ENTER:

Donna Mills

**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 141B).**

Donna Mills, J.S.C.