

Matter of Grecco v Cimino

2014 NY Slip Op 30456(U)

February 18, 2014

Supreme Court, Suffolk County

Docket Number: 09-45759

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

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ORDERED that those portions of the petition/complaint (#001) served in this hybrid Article 78 proceeding wherein the petitioner seeks a judgment reversing and annulling the August 20, 2009 letter determinations of two Suffolk County Attorneys denying the petitioner a defense and/or reimbursement for legal costs incurred and other relief pursuant to CPLR Article 78 is denied and those claims are dismissed; and it is further

ORDERED, that a status conference on petitioner's remaining, plenary claims for declaratory relief, shall be held on Tuesday, **March 4, 2014**, at 9:30 a.m. in the courtroom of the undersigned in the Supreme Court Annex building of the courthouse located at One Court Street, Riverhead, New York 11901.

The hybrid petition/complaint served in this Article 78/declaratory judgment action was remitted to this court for further proceedings on the merits thereof by order of the Appellate Division, Second Department dated November 21, 2012 following an appeal of a prior order of this court which granted the respondents' motion for dismissal (*see Grecco v Cimino*, 100 AD3d 892, 957 NYS2d 115 [2d Dept 2012] [hereinafter "*Grecco II*"]). Pursuant to a stipulation of counsel dated November 12, 2013, the Article 78 petition portions of the plaintiff's pleading (#001) were restored to the motion calendar of this court for the date of December 13, 2013 and marked submitted on that day, while the declaratory judgment portions of such pleading were continued for pre-trial proceedings.

Now before the court are the petitioner's challenges to the August 20, 2009 letter determination of County Attorney Christine Malafi, and the prior determination of her predecessor, respondent Robert J. Cimino, which denied the petitioner's demands for a defense in two resolved civil actions titled *Glass v Grecco* (*Suffolk County Index No. 01-30336*) and *State of New York v Grecco* (*Suffolk County Index No. 02-09384*) on the grounds that such determinations were made in violation of lawful procedures and effected by an error of law and was arbitrary, capricious and abuse of discretion thereby entitling the petitioner to reimbursement of the costs incurred by him defending himself in such actions. The petitioner further seeks reimbursement for the attorneys fees and other legal costs he incurred in defending himself at criminal and legislative proceedings due to the erroneous, arbitrary, capricious and otherwise wrongful determinations and refusals of County Attorneys to provide him a defense at such proceedings. The petitioner also seeks relief in the nature of mandamus to compel the County's payment of the legal fees and costs expended by him in the prosecution of this hybrid Article 78/declaratory judgment action.

Since the matter has been returned to this court upon remittitur from the Appellate Division, Second Department "for further proceedings on the merits of the petition/complaint" (*Grecco v Cimino*, 100 AD3d 892, 898), a review of the Appellate Division's findings in its November 21,

2012 decision in Grecco II is warranted. Therein, the Appellate Division described and found the August 20, 2009 letter determination of County Attorney Christine Malafi to be as follows:

“Malafi, in her capacity as County Attorney, determined that Grecco was not an employee acting within the scope of his employment when the alleged wrongdoing occurred, and that he is, thus, not entitled to be indemnified or reimbursed for the attorney's fees and legal expenses he sought. The Malafi Determination was made seven years after Cimino, in his capacity as Malafi's predecessor, rejected Grecco's request for a legal defense. During those seven years, the following events, among others, occurred: (1) the Glass Action was discontinued in May 2003; (2) the deposition testimony of at least two witnesses, Teresa Allar and Stephen Jones, indicated that Grecco was acting within the scope of his employment; (3) the parties settled the Attorney General's Action in June 2009; (4) all of the governmental investigations were resolved without any adverse finding against Grecco; (5) Suffolk County never commenced an action against Grecco based on any wrongdoing; and (6) Suffolk County expressed its satisfaction with the acquisition of the Chandler Estate by rejecting the original seller's offer to repurchase the property for a higher price. The actions, proceedings, and investigations that culminated in the commencement and prosecution of the Glass Action and the Attorney General's Action have concluded. Accordingly, the Malafi Determination, which was made with the benefit of the additional facts and events that occurred over the seven years since this Court's decision and order in *Grecco I*,¹ was, in effect, the ultimate administrative determination in this dispute, which may be set aside if it is ultimately determined to be arbitrary and capricious” [citations omitted] (*Grecco v Cimino*, 100 AD3d 892, at 897).

The Appellate Division thus found that the August 20, 2009 letter determination of Ms. Malafi was a final and binding determination that the petitioner “Grecco was not acting within the scope of his employment when the alleged wrongdoing occurred” (*id.*). It went on to state, instructionally, that “the question of whether a county employee was acting within the scope of his or her employment when

¹ *Grecco I* was a prior proceeding commenced by the petitioner following a July of 2002 determination by then County Attorney Cimino (Malafi's predecessor) that the County was not obligated to defend or reimburse the petitioner in certain actions because he was not acting in the scope of his duties and public employment. After the trial court reversed Mr. Cimino's ruling, the Appellate Division reversed the trial court and validated the Cimino determination with respect to a separate federal action in which Grecco was charged solely with wrongdoing of a personal nature and it validated such determination with respect to the two resolved civil actions that are the subject of this action conditionally, and without prejudice to reassertion subject to certain conditions (*see Grecco v Cimino*, 13 AD3d 371, 786 NYS2d 204 [2d Dept 2004], hereinafter “*Grecco I*”).

the alleged wrongdoing occurred is a factual one, which must be determined in the first instance by the County Attorney, and that determination ‘may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious’” (quoting *Matter of Williams v City of New York*, 64 NY2d 800, 802, 486 NYS2d 918 [other citations omitted]). Continuing, the Appellate Division stated that “a determination is deemed to be arbitrary if it is made without a sound basis in reason and without regard to the facts” [citations omitted] (*Grecco v Cimino*, 100 AD3d 892, at 896).

The reason that the issue of whether a county employee was acting within the scope of his or employment at the time of the alleged wrongdoing is relevant and material to the determination of the claims interposed herein is attributable to certain provisions of the Suffolk County Code. In this regard, the Appellate Division in *Grecco II*, stated as follows:

With respect to the merits of the matter, the County's duty to defend its employees was governed, at all relevant times, by Suffolk County Code former § 35-3(A) (now recodified as Suffolk County Code § 42-3[A]), which was enacted in 1981 to protect employees who are charged in civil actions with misconduct in office. The legislative purpose of this provision was to alleviate the potential financial burden of litigation, which often discourages qualified people from seeking or accepting employment with the County (see Suffolk County Code former § 35-1). Notably, Suffolk County Code former § 35-3(A) tracks the language of similar state statutes, which were also enacted to ensure that public employees would not be required to personally defend themselves against claims arising out of the daily operation of the government (see Public Officers Law § 18[3][a] [protects employees of counties, cities, towns, villages and other political subdivisions]; General Municipal Law § 50-k[2] [protects New York City employees]; cf. General Municipal Law § 50-m [protects police and peace officers of Suffolk County]). Pursuant to Suffolk County Code former § 35-3(A), Suffolk County was, at all relevant times, obligated to provide a legal defense for its employees on the following conditions:

“Upon compliance by the employee, peace officer or legislator with the provisions of § 35-4 of this Article, the county shall provide for the defense of the employee in any civil action or proceeding in any state or federal court or administrative agency arising out of any alleged act or omission which occurred while the employee was acting, or in good faith purporting to act, within the scope of his public employment or duties or which is brought to enforce any provisions of Sections 1981 through 1988 of Title 42 of the United States Code. This defense shall not be provided where such civil action or proceeding is brought by or on behalf of the county or any

agency of the county. The determination of an issue of whether or not an employee was acting within the scope of his public employment or duties at the time of the occurrence, act or omission giving rise to a claim shall be made in the first instance by the County Attorney” (*Grecco v Cimino*, 100 AD3d 892, 895-896).

The conduct giving rise to the two resolved actions and other proceedings and investigations for which the petitioner sought a defense and now seeks indemnification from the County occurred while the petitioner was the Deputy Director, and then the Director, of the Suffolk County Division of Real Estate (hereinafter the SCDRE). During Grecco's tenure at the SCDRE, he was also the president and sole shareholder of a title company known as Peerless Abstract Corp. (hereinafter Peerless). The underlying issue in the resolved actions and the other proceedings and investigations was whether Grecco misused his position with the SCDRE to benefit local real estate developers, particularly Robert Toussie, who purportedly steered a substantial amount of business to Peerless.

The petitioner contends that he is entitled to a defense under the above cited provisions of the Suffolk County Code former § 35-3(A), now recodified as Suffolk County Code § 42-3(A). In addition, he contends that by virtue of the events expressly outlined by the Appellate Division in *Grecco II* and others advanced by the petitioner in the record, all of which occurred subsequent to the issuance of the Appellate Division's determination in *Grecco I*, warrant a finding that Malafi's August 20, 2009 letter determination was erroneous, arbitrary, capricious and an abuse of discretion. The respondent County refutes such claims in its answer and opposing affirmation of its counsel dated April 30, 2013 and in the opposing affidavit of Ms. Malafi dated April 29, 2013, which were served pursuant to the Sep 27, 2013 order of this court which vacated the County's default in answering.

Several grounds are advanced in the County's answer and opposing papers to support its challenges to the petitioner's entitlement to the relief requested pursuant to CPLR Article 78. Easily dispatched as unmeritorious is the statute of limitations defense asserted as the Third Objection in Point of Law in the County's answer. This defense was rejected by the Appellate Division decision in *Grecco II* and it included an express finding that this action was timely commenced and that such defense was thus lacking merit. The statute of limitations defense contained in the County's answer is, accordingly, rejected by this court.

Many of the other defenses asserted in the County's answer as Objections in Point of Law including, a purported failure to state a claim, res judicata/collateral estoppel and laches are without merit under the terms of the Appellate Division decision in *Grecco II*. Likewise without merit are the

claims advanced in the Fifth and Sixth objections in Point of Law. Therein, the County claims that the petitioner is barred from renewing his claim for attorney's fees under the terms of the Appellate Division's decision in *Grecco I* because "it was 'not ultimately determined that Grecco's conduct concerning the purchase of the Chandler Estate was within the scope of his duties and public employment'" (*see* Answer p. 1, Fifth Objection in Point of Law). The County further asserts that the petitioner is likewise barred from seeking declaratory relief "because [he] failed to obtain such determination by the fact finders in the Spitzer and Glass actions" (*see* Answer p. 11 Sixth Objection in Point of Law). Although these claims were sustained by this court in its July 9, 2010 order granting the County's motion for dismissal of the complaint, that order was reversed by the Appellate Division in *Grecco II*, upon an express finding that these claims lacked merit. This court thus finds that the defenses asserted in the Fifth and Sixth Objections in Point of Law in the answer served herein by the County are without merit.

The court is thus left with the County's denial of the validity of the merits of the plaintiff's claims for relief which is advanced as a Fourth Objection in Point of Law and articulated further in the affirmations in opposition of its counsel Petrowski dated April 30, 2013 and of former County Attorney Malafi dated April 29, 2013.² Therein, the August 20, 2009 letter determination to deny the petitioner's request for a defense to the actions and other proceedings alleged to have been "made in good faith, in accordance with applicable law and procedure, was not affected by error of law, does not constitute an abuse of discretion and was neither arbitrary and capricious" (*see* Answer p. 11 Fourth Objection in Point of Law). An examination of the grounds set forth in the August 20, 2009 letter determination of County Attorney Malafi, which is attached as Exhibit Q of the petition and as Exhibit 8 of Volume I of the Administrative Return of the County, and the others advanced in defense of the County Attorneys' actions set forth in the County's opposing papers shall thus be undertaken.

The first ground advanced in Ms. Malafi's August 20 2009 determination not to provide a defense and/or indemnification to the petitioner was based upon her reading of the Appellate Division's determination in *Grecco I*, from which, she concluded that "[t]here has not been an ultimate determination in the *Glass v Grecco* and *State v Grecco* actions as to the nature of Mr. Grecco's conduct and there is thus no predicate for a reconsideration" (*id.*, p1). This court finds, however, that

² The County's assertion of this defense is styled as its Fourth Objection in Point of Law and as such, may fairly be considered procedurally improper as Objections in Point of Law are generally limited to affirmative defenses in bar of the type contemplated by CPLR 3211 (*see* CPLR 7804[f]). This objection shall thus be considered as a merits based challenge to the petitioner's entitlement to the relief requested by him.

this predicate for the denial of the petitioner's demands for reimbursement for legal fees and costs in both the *Glass v Grecco* and *State v Grecco* actions is without a sound basis in reason and without regard to the facts as this argument was expressly rejected by the Appellate Division in its November 21, 2012 decision in *Grecco II* (see ***Grecco v Cimino***, 100 AD3d 892, 896-897, *supra*).

The next ground advanced by former County Attorney Malafi in her August 20, 2009 letter determination relates solely to the *Glass* action and rests upon allegations that her office appeared in that action in defense of the County and in defense of the petitioner and that such representation continued throughout the course of that action until its discontinuance. As evidence of such representation, Ms. Malafi recites that "all legal documents in the action, including the order withdrawing the action, list the County's Attorney's Office as representing Mr. Grecco". Although, the County acknowledges that the petitioner's company, Peerless, was represented by the petitioner's counsel in that action, the County maintains that it provided a full and fair representation of the petitioner in his official capacity in such action (see Exhibit 6 of Volume I of the County's Administrative Return- Email by Assist. County Atty., Petrowski of June 18, 2009; see also p.4 ¶ 7 of the Affidavit of Christine Malafi dated April 29, 2013, submitted in Opposition to the petition/complaint and the April 30, 2013 and the Affirmation of Petrowski in Opposition to the petition/complaint at p. 11 ¶ 20). It further asserts that the *Glass* action was dismissed with leave to re-plead in December of 2002, but that the plaintiff stipulated to withdraw the complaint with prejudice and that the action was thereafter discontinued prior to the joinder of issue (*id.*).

The petitioner admits that the County assumed his defense in the *Glass* action (see petition pp. 25-26, ¶¶ 137, 143). However, he claims that such defense cannot be "partial and limited" and that the defense so provided was "improperly limited to the pre-answer stages of the litigation" (see *id.* at ¶ 143; see also Exhibit 6 of Volume I of the County's Administrative Return, E-mail by Asst. County Attorney Petrowski dated June 19, 2009). A claim that in the *Glass* action, Grecco was included only as a nominal defendant in his official capacity due to the absence of any direct claims for recovery against him was first asserted by Mr. Cimino in his July 22, 2002 letter determination denying a defense to the petitioner in the *Glass* action (see Exhibit I of the petition/complaint), which denial was loosely incorporated by reference in the Malafi determination. The absence of any direct claims against the petitioner was also noted and found to exist by the Appellate Division in *Grecco II* (see ***Grecco v Cimino***, 100 AD3d 892, 893) ("Notwithstanding those allegations, the complaint in the *Glass* Action did not seek any relief from Grecco or Peerless"). Under these circumstances and in light of the absence of any proof of any written consent to change attorney by the petitioner indicating that the County Attorney was replaced by the petitioner's current or any other personal counsel retained to represent him in the *Glass* action, the court sustains the determination not to reimburse the

petitioner for legal fees and costs incurred as having a sufficiently sound basis in both reason and in fact to render nugatory all claims of arbitrary, capricious, error laden and otherwise improper conduct on the part of Ms. Malafi in the rendering of her administrative determination to deny reimbursement to the petitioner for expenses incurred in the *Glass* action.

With respect to the *State v Grecco* action, Ms. Malafi recites on page 2 of her letter determination of August 20, 2009, certain of the material allegations of wrongdoing advanced in the complaint served by the Attorney General in that action. Implicit in such recital is that these allegations served as a proper basis for her denial of the reimbursement demands of the petitioner. Ms. Malafi goes on to state that the deposition testimony of the witnesses on which the petitioner relied as basis for his 2009 demand for reimbursement of legal costs did not refute all of the allegations pleaded in the *State v Grecco* complaint and, accordingly, there was no basis to warrant any change in the denial of reimbursement to the petitioner previously determined by Ms. Malafi and her predecessor in office, respondent Cimino. This position is allegedly sustainable under the statutory language of the Suffolk County Code former § 35-3(A) now recodified as Suffolk County Code § 42-3(A) because the “alleged act or commission which occurred or is alleged in the complaint to have occurred” allegedly governs the determination as to whether a defense is required (*see* pp. 2-3 of the Affidavit of Christine Malafi dated April 29, 2013 submitted in Opposition to the petition/complaint and the April 30, 2013 Affirmation of Petrowski in Opposition to the petition/complaint at p. 4).

However, the court rejects this position as untenable as it was expressly rejected by the Court of Appeals in *Salino v Cimino*, reported at 1 NY3d 166, 770 NYS2d 702 (2003), reversing *Salino v Cimino*, 298 AD2d 589, 749 NYS2d 542 (2d Dept 2002). In its December 18, 2003 decision, the Court of Appeals found as follows: “Clearly, the Suffolk County Legislature by this provision did not commit public funds to an employee's defense based solely on the words chosen by a plaintiff in framing a complaint. Allowing a plaintiff to dictate whether Suffolk County must provide an employee with a defense would indeed be an unintended result of section 35-3[A]” [citations omitted] (*Salino v Cimino* 100 NY3d 166 at 172). The County's reliance upon this discredited argument is thus misplaced and its claim that the allegations of the complaint served in the *State v Grecco* action provide the measure for determining whether Grecco's conduct was or was not within the scope of his employment are devoid of merit.

While not advanced in either of the County Attorney's letter determinations of July 22, 2002 and August 20 2009 as a ground for the denial of the petitioner's reimbursement demands in the *State v Grecco* action, the County contends, in its opposing papers, that it had no duty to defend the petitioner under Suffolk County Code § 42-3(A) (formerly § 35-3[A]) because such action fell within the statutory exception expressly afforded to the County “where such civil action or proceeding is brought by or on behalf of the County” (*see* Malafi's 4/29/13 affidavit in opposition at p.2, ¶4 and the 4/30/13 affirmation of Assistant County Attorney Petrowski's in opposition p.3, ¶¶ 4,5).

Continuing, the County contends that the *State v Grecco* action was brought by the New York State Attorney General pursuant to Executive Law § 63-c, commonly known as the Tweed Law, General Municipal Law article 18, and Executive Law § 63(12) and as such, constitutes an action “brought on behalf of the County” within the contemplation of Suffolk County Code former § 35-3[A] which is now codified as Suffolk County Code § 42-3[A]. The Code provisions mandating that the County provide a defense are thus alleged to be inapplicable as a matter of law. With these contentions the court agrees as outlined below.

Executive Law § 63-c, was described at length in the Appellate Division, Second Department’s decision in *State v Grecco*, which sustained as legally sufficient certain of the Attorney General’s Tweed law claims against petitioner Grecco and a co-defendant (*see State v Grecco*, 21 AD3d 470, 477, 800 NYS2d 214 [2d Dept 2005]). The Appellate Division therein explained that its enactment was a response to the systematic looting of the New York City treasury by William “Boss” Tweed and his cohorts (*see* L. 1875, c. 49, §§ 1, 3 & 4; *People v New York & Manhattan Beach Ry. Co.*, 84 NY 565; *People v Tweed*, 63 NY 202)”. Citing the Court of Appeals decision in *People v Tweed* (5 Hun, 382), the Appellate Division quoted that court as follows: “‘Its object was to create a remedy for the ultimate benefit of the county which should not be controlled by the local authorities,’ and Judge ANDREWS states in *People v. N.Y. & M.B.R.R. Co.* (84 N.Y. 565): ‘The main object of the act, as is evident, was to give an additional remedy for the plundering of municipalities by faithless and venal officials.’ The case is, therefore, to be determined by the same principles which would govern an action brought by the [municipality], to recover the same moneys’ (*People v Wood*, 121 N.Y. 522, 530, 24 N.E. 952)”. (*see State v Grecco*, 21 AD3d 470, 476, *supra*).

In this regard it is noted that Executive Law § 63-c expressly provides for the disposition of the proceeds recovered in the action in subparagraph numbered 3. The proceeds of any Tweed Law action, which is of necessity founded upon the misappropriation of public property [other than real property] under any legal theory possessed by the state or other municipal body, are to be applied in the first, to the payment, into the state treasury, of all expenses incurred by the state in such action. As to the remainder, the statute provides as follows: “any court of the state in which an action is brought by the state, as prescribed in this section, may direct, by the final judgment therein, or by a subsequent order, that any money, funds, damages, credits, or other property, recovered by or awarded to the plaintiff therein, which, if that action had not been brought, would not have vested in the state, be disposed of, as justice requires, in such a manner as to reinstate the lawful custody thereof, or to apply the same or the proceeds thereof to the objects and purposes for which they were authorized to be raised or procured” (Executive Law §63-c[3]).

It was long ago held that this statute “recognizes and preserves the right of action in the political subdivisions of the state whose property has been wrongfully taken or received. It merely

authorized the state authorities to intervene and enforce causes of actions against offending parties which had accrued to certain subordinate political divisions of the state to recover property which had been taken or obtained from them without right. The State in the litigation when it brings suit, acts as the representative of the municipalities to establish their rights. It recovers on a cause of action existing in their favor, and the moneys when collected are to be delivered to the parties entitled to them” (*People v Townsend*, 133 Misc 843, 233 NYS 632 [Sup. Ct. Washington County 1929] *citing People v Wood*, 121 N Y 522, 24 NE 952 [1890], *supra*).

In light of this authority, and in view of the petitioner’s pleading admission in ¶ 155 of the petition/complaint that the “Attorney General brought an action on the County’s behalf”, this court finds that the *State v Grecco* action commenced by the State Attorney General constitutes one “brought by or on behalf of the county or any agency of the county” and is thus within the exception afforded by the relevant provisions of Suffolk County Code former § 35–3(A) now codified as Suffolk County Code § 42–3(A). The County has thus demonstrated that the petitioner’s demand for recovery of the attorney’s fees and costs incurred in the *State v Grecco* action pursuant to Suffolk County Code § 42–3(A) and its predecessor provision lacks merit due to applicability of the statutory exception afforded to civil actions and proceedings brought by or on behalf of the County or any agency of the County that is set forth therein.

Further evidence that the County is not liable for the legal fees and costs incurred by the petitioner in the *State v Grecco* action because such action was brought on behalf of the County as thus within exception afforded thereto (*see* Suffolk County Code § 42–3[A]), is apparent from the settlement documents executed by the State Attorney General, the County and the petitioner which concluded such action (*see* Exhibit 5 of Volume of the Administrative Return of the County). Paragraph 7 of the Settlement Agreement entered into by the petitioner, the State Attorney General and the County of Suffolk on June 17, 2009, contains the following recital; that the “County of Suffolk will receive valuable consideration upon execution of this stipulation, including of claim reduction that is annexed hereto a Exhibit A equal to at least \$67,500”. In the Claim Reduction paper executed by the petitioner and the State Attorney General that same day, the petitioner “agreed to the reduction of the claim he may have against the County of Suffolk for legal fees” arising out of the State action and the others asserted in this hybrid action “by \$100,000.00”. Finally, in a June 17, 2009 “Satisfaction Receipt and Acknowledgment” paper, the Attorney General “acknowledged that the Office of the Attorney General has received *on behalf of the County of Suffolk*, valuable consideration that is hereby accepted as full satisfaction of paragraph 7 of the Settlement Agreement” (emphasis added). In addition, there is evidence in the record that a co-defendant in the action [Toussie] paid to the County, the sum of \$75,000.00 in consideration of the settlement and discontinuance of the action against such defendant (*see* June 19, letter of petitioner’s counsel attached as Exhibit O of the petition and as Exhibit 7 to Volume I of the Administrative Return of the County and p.7, ¶ 15 of the Affidavit of Christine Malafi, p. 2-3, ¶4, submitted in Opposition to the petition/complaint). It is thus apparent that

the action commenced by the Attorney General was one brought on behalf of the County for which no defense was required to be provided under the exception set forth in the above cited provisions of the Suffolk County Code.

The court thus finds that the determination to deny the petitioner a defense and/or reimbursement of the costs of his defense in that action is thus sustained as having a sound and rational basis since the *Grecco action* falls within the statutory exception for civil actions or proceedings “brought by or on behalf of the county”. The availability of this statutory exception renders the issue of whether the petitioner was acting within or without the scope of his public employment, irrelevant.

With respect to the criminal proceedings against the petitioner undertaken by the federal and local authorities described in ¶¶ 75-79 of the petition, for which reimbursement of legal fees and costs are demanded in the petition’s Third cause of action, these demands were noted and rejected by Ms. Malafi in her August 20, 2009 letter determination without elaboration other than the general reference to the prior determination of her predecessor, Mr. Cimino, that is attached to Exhibit I to the petition/complaint (*see* pp.2 -3 ¶¶ 3.4 p. 10 ¶25 and p.11 26 of the Affidavit of Christine Malafi dated April 29, 2013, submitted in Opposition to the petition/complaint). Therein, County Attorney Cimino declined to afford the petitioner a defense to the criminal investigation undertaken by the U.S. Attorney for the Eastern District of New York due to the “unresolved status of such criminal investigation”. He concluded that these circumstances coupled with “the potential of a criminal action, however remote, militates against providing a legal defense at this time” (*see* July 22, 2002 letter determination of Robert J. Cimino, p. 1-2, attached as Exhibit I to the petition).

However, the petitioner has adduced proof that the joint criminal investigation at issue did not lead to the filing of any criminal charges against the petitioner and no criminal actions were ever commenced (*see* Exhibit J attached to the petition). Such proof, which has not been rebutted, rendered Mr. Cimino’s denial, which was temporal in nature, academic. The County nevertheless contends in its opposing papers that a criminal investigation is not a civil action or proceeding within the purview of Suffolk County Code § 42–3(A) or its predecessor since it does not qualify as a “civil action or proceeding in any state or federal court or administrative agency arising out of any alleged act or omission which occurred while the employee was acting, or in good faith purporting to act, within the scope of his public employment or duties” (Suffolk County Code § 42–3[A] formerly, § 35–3[A]; *see* p.3, ¶ 5 1 of the affirmation in opposition of Asst. County Attorney Petrowski and Malafi’s affidavit in opposition at p. 2, ¶ 4).

Upon its review of the record and its reading of the above quoted provisions of the Suffolk County Code, the court finds that the criminal investigations at issue are not within the purview of the statutory terms “in any civil action or proceeding in any state or federal court or administrative agency”. The criminal investigation at issue was conducted by the U.S. Attorney in the discharge of

his duties to undertake an investigation into whether criminal conduct may have been engaged in by the petitioner and if so, whether criminal proceedings should be brought against him. These proceedings thus fall beyond the ambit of those for which a defense may be required under the Suffolk County Code. The County is thus not obligated to provide a defense to the petitioner in connection with these investigations as the statutory duty to provide a defense is not applicable, as a matter of law, to such criminal investigations. Under these circumstances, the court finds that the County established a statutory defense to these claims for reimbursement by the petitioner that rests upon the unsatisfied statutory condition precedent to the imposition of a duty to defendants. As in the case of the applicable statutory exception detailed above, this unsatisfied statutory condition precedent renders the issue of whether the petitioner was acting within the scope of his public employment irrelevant. The court thus denies the petitioner's demands for reimbursement of the legal fees and costs he incurred in appearing in person or otherwise in the criminal investigations at issue contained in his Third cause of action.

Next considered are the petitioner's demands for reimbursement of the legal fees and costs incurred by him in appearing and defending himself at two legislative hearings conducted by committees of the County Legislature (*see* ¶¶ 81-88; 148-156 of the petition/complaint). The record reveals that these claims were not addressed in Ms. Malafi's August 20, 2009 letter determination nor in the prior letter determination of Mr. Cimino and they not addressed, as are the others, in the opposing affidavits and affirmations of the County. The record before the court contains no evidence of any written demand for reimbursement of these legal fees and costs incurred by the petitioner other than in his petition/complaint. In the absence of a demand for such reimbursement and a denial of such demand by the County Attorney, these claims, which are posited in the Third cause of action as claims for relief in the nature of mandamus to review the determinations of the County Attorneys, are not ripe for adjudication by this court. The petitioner's demands for such relief are thus denied pursuant to CPLR 7801(1).

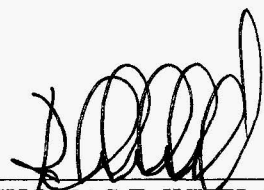
The petitioner's demands for recovery of the legal fees incurred in this action, which are advanced in the Fourth cause of action as claims in the nature of mandamus to compel pursuant to CPLR 7803(1), are also denied. The petitioner failed to demonstrate that the County Attorneys failed to perform a duty enjoined upon them by law and that such duty was comprised of a ministerial, non-discretionary duty to provide reimbursement of the legal fees and costs incurred by him in the prosecution of this hybrid Article 78/declaratory judgment action (*see Klostermann v Cuomo*, 61 NY2d 525, 539, 475 NYS2d 247 [1984]; *Gonzalez v Village of Port Chester*, 109 AD3d 614, 970 NYS2d 600 [2d Dept 2013]). The petitioner's demands for a judgment pursuant to CPLR 7803(1) directing the County to pay the petitioner the legal costs and expenses incurred in the prosecution of this action are thus denied.

The petitioner's claims for declaratory relief shall be the subject of a status conference which the court hereby schedules for the Tuesday, **March 4, 2014**, as such claims were not before the court

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on the Article 78 portions of the petition/complaint that was re-noticed and marked for the determination herein rendered. Said conference shall be held at 9:30 a.m. in the courtroom of the undersigned in the Supreme Court Annex building of the courthouse located at One Court Street, Riverhead, New York 11901.

Dated: February 18, 2014



THOMAS F. WHELAN, J.S.C.