

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5**

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In the Matter of the Application of LANDMARK WEST!,

Index No. 107387/05

Petitioner,

**Decision, Order and
Judgment**

For a Judgment Pursuant to Article 78 of the C.P.L.R.

- against -

ROBERT B. TIERNEY, LAURIE BECKELMAN,
JEROME A. CHAZEN, HOLLY HOTCHNER and
MUSEUM OF ARTS AND DESIGN,

Respondents.

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HON. MICHAEL D. STALLMAN, J.:

This Article 78 proceeding is the fifth action or special proceeding¹ commenced by petitioner Landmark West! concerning the vacant structure at 2 Columbus Circle, formerly Huntington Hartford's Gallery of Contemporary Art.

The Petition seeks an order barring respondent Tierney, a Landmarks commissioner, from further involvement with 2 Columbus Circle and from communicating with the other respondents, the Museum of Arts and Design and its alleged principals and agents; and barring the Museum

¹ Matter of Landmark West!, et al. v Burden, 3 Misc3d 1102 (A), 2004 NY Slip Op 50331 (U) (Sup Ct, NY County), affd 15 AD3d 308 (1st Dept 2005) (Article 78 proceeding challenging City's environmental review; dismissed); Landmark West!, et al., v Manhattan Borough Board, Sup Ct, NY County, Feb. 15, 2005, Beeler, J., Index No. 116913/2004 (declaratory judgment action challenging Borough Board's approval of proposed sale, claiming insufficient notice; dismissed); Landmark West! v City of New York, et al., Sup Ct, NY County, March 29, 2005, Stallman, J., Index No. 117996/2004 (Article 78 proceeding challenging response to Freedom of Information Law request; denied); Landmark West!, et al. v City of New York and NYC Economic Dev. Corp., Sup Ct, NY County, Stallman, J., Index No. 103689/2005 (action challenging building sale under public trust doctrine, Gifts and Loans clause of NY Constitution and NYC Charter §§ 383, 384; decided simultaneously herewith); Landmark West! v Tierney, et al., Sup Ct, NY County, Stallman, J., Index No. 107387/2005 (Article 78 proceeding to disqualify Landmarks Commissioner and bar communication with museum principals; the instant proceeding).

respondents from communicating with respondent Tierney about the building. The Petition seeks compensatory and punitive damages for an alleged conspiracy to subvert the functioning of the Landmarks Preservation Commission and to deprive petitioners and the public of the right to petition. The Petition also seeks prospective monetary damages, and to hold respondents personally liable, for damage to the building facade.

BACKGROUND

Petitioner, an advocacy group, has sought to obtain landmark designation for 2 Columbus Circle and to preserve its facade. The Museum of Arts and Design intends to purchase the building, renovate it for museum use and alter the facade. The sale is now in contract, having gone through all legally required land use and environmental review and mandated public meeting or hearing procedures, and approval by Community Board 5, the City Planning Commission and the Manhattan Borough Board. See, Matter of Landmark West! v Burden, 3 Misc 3d 1102 (A) (thorough review of factual background and procedural history).

Designed in 1964 by Edward Durrell Stone, the building's unusual design and location on a small, irregularly shaped plot has been controversial from its inception.² In 1996, the Landmarks Preservation Commission's Research Department and its Designation Committee each reviewed 2 Columbus Circle's architectural and historical status and determined that it did not merit further consideration for landmarking; the Commission exercised its discretion, followed its staff and committee recommendations, and declined to hold a hearing. Since then, others have requested that

² Reactions to architecture, like all matters of aesthetics, are highly subjective. They are not subject to judicial analysis. One might consider 2 Columbus Circle beautiful or ugly, uniquely imaginative or eclectically derivative. One person's masterpiece of mid-Twentieth Century art may be another's piece of outdated ephemera. Taste is not justicible.

the building be considered for landmarking, but the Commission has not reconsidered.

In May 2005, petitioner submitted a Request for Evaluation (RFE) advocating landmark status. The Commission's research staff examined the RFE and concluded that there are no new circumstances supporting calendaring the building for a public hearing. The Commission has apparently not determined otherwise.

In affirming denial of a prior Article 78 petition, the Appellate Division, First Department found that the Landmarks Preservation Commission "twice declined to designate the property a landmark." Landmark West! v Burden, 15 AD3d 308, 309. The Appellate Division held: "[N]or is there merit to the contention that the Landmarks Preservation Commission was obligated to hold a public hearing before declining to calendar a request for the property's designation as a landmark (see 63 RCNY 1-02)." Id. at 309. The Appellate Division implicitly recognized that city law vests in the Commission broad discretion – not only to determine whether or not there is a sufficient basis for holding a hearing but also discretion to determine how to conduct the internal study and review process (largely performed by staff), on which it decides whether to hold a hearing. Thus, the legality of whether the Landmarks Preservation Commission should have held a public hearing on landmarking 2 Columbus Circle is not before this Court; given the Appellate Division holding, it appears that this issue is not subject to review by a New York state trial court.³

³ Without questioning the legality of the Commission's exercise of discretion, the litigation and larger public debate raise serious questions about the wisdom of the Commission's internal, essentially private and effectively unreviewable decision that 2 Columbus Circle is not a worthy subject of a public hearing. Especially in retrospect, one may question, as petitioners do, whether that exercise of discretion may have affected the Commission's reputation as a guardian and arbiter of New York City's architectural heritage and undermined public confidence in the process. Those issues are fundamentally ones of public policy and agency culture, not issues of law, and cannot be decided by this Court.

Respondent Tierney moved to dismiss for failure to state a cause of action and sought sanctions, both monetary and in the form of an order barring petitioners from commencing any future litigation.⁴ The Museum respondents cross-moved for equivalent relief.⁵ Petitioner cross-moved to strike the motions to dismiss and for sanctions, on the ground of untimeliness.⁶

I

Petitioner alleges that in 2003 the Museum respondents arranged for Laurie Beckelman, a former member of the Commission, to meet with respondent Tierney, to advocate on behalf of the Museum, and that they subsequently met and exchanged e-mails. Petitioner selectively quotes excerpts out of context, in an effort to show a friendly relationship, and to suggest partiality. However, when the texts (obtained from a Freedom of Information Law [FOIL], request) are read fully and in context, they appear rather innocuous. Petitioners contend that these, and future anticipated communications, constitute improper ex parte communication in violation of City Charter § 1046, especially given petitioners' position that an RFE is pending before the Commission. Petitioners therefore seek a court order prohibiting respondent Tierney from participating in future

⁴ After a telephone conference with the Court and all counsel, respondent Tierney withdrew his request for sanctions.

⁵ By order dated July 29, 2005, noting that the motions to dismiss were not initially made returnable on the same date as the Petition, this Court inter alia directed respondents to file answers. After telephone conferences with the Court, by so-ordered stipulation dated August 15, 2005, all counsel agreed that the July 29, 2005 order be vacated and the motions to dismiss be decided on the papers already submitted.

⁶ In a telephone conference after receipt of petitioner's cross-motion, the attorneys agreed to a briefing schedule to permit them adequate time to oppose and reply to the motions to dismiss and petitioner's counsel acknowledged that his cross-motion was moot. The stipulation of August 15, 2005 makes clear that petitioner's cross-motion is moot.

Commission decisions relating to 2 Columbus Circle, and barring him and the Museum's representatives from communicating with each other.

A.

New York City Charter Section 1046 provides as follows:

§ 1046. **Adjudication.** Where any agency is authorized to conduct an adjudication, it shall act, at a minimum, in accordance with the provisions set forth below.***

c. Hearing. 1. All parties shall be afforded an opportunity for a hearing within a reasonable time. At the hearing the parties shall be afforded due process of law, including the opportunity to be represented by counsel, to issue subpoenas or request that a subpoena be issued, to call witnesses, to cross-examine opposing witnesses and to present oral and written arguments on the law and facts. Adherence to formal rules of evidence is not required. No ex parte communications relating to other than ministerial matters regarding a proceeding shall be received by a hearing officer, including internal agency directives not published as rules. (Emphasis added.)

New York City Charter Section 1041 defines an “adjudication” as follows:

“Adjudication” means a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing.

Charter Section 1046 applies to a required quasi-judicial hearing presided over by a hearing officer or administrative law judge. A public hearing held by a government agency, to allow members of the public to be heard on a proposal or issue, is not an adjudication as defined by the Charter. Because there is no right to a public hearing on a request for landmark designation, the Landmark Preservation Commission's study, investigation and decisional process is not a “proceeding”; neither is it “required by law” to be determined on an evidentiary hearing. The Commission is an administrative agency, not a quasi-judicial body. See Teachers Ins. & Annuity Assoc. of Am. v City of New York, 82 NY2d 35, 41 (landmark designation is an administrative determination). Assuming arguendo that, because of petitioners' recent RFE submission, there is

a currently ongoing review process, that does not constitute a pending or prospective adjudicative proceeding within the meaning of the Charter. Because the Landmarks Law (Administrative Code of City of NY § 25-301 et. seq.) neither provides for, nor requires the Commission to provide an RFE process, nothing in the law requires the Commission to do anything specific with respect to an RFE. The self-guided, private nature of the Commission’s process is very different from a judicial or quasi-judicial trial or hearing.⁷ In sum, Charter Section 1046 does not apply to the Landmarks Preservation Commission. There is no legal basis for this Court to expand the scope of the Charter provision to the Commission or to apply the standards of Section 1046 to respondent Tierney, and no other legal basis for the gag-order sought.⁸

Similarly, there is no legal basis for ordering Tierney’s disqualification. It is undisputed that the Commission has the discretion to reconsider, and decide to hold a hearing. That opportunity does not make Charter Section 1046 applicable or mandate that Tierney act in a particular way. In the absence of a city law or rule requiring recusal or disqualification, this Court cannot require it.

⁷ Whether the commission’s procedures should change, or whether a procedure and timetable for examining RFEs should be adopted and made available to the public, is a policy issue not before the Court.

⁸ It is not disputed that Landmarks commissioners and staff routinely speak with members of the public and interest groups relating to the Commission’s work, and are lobbied by them. The opportunity of the public to have access to the Commission members and staff, and vice versa, in order to persuade and learn, is an important part of the process. To prevent information-sharing and the free interchange of ideas would hamper the Commission’s work and increase its insularity; it would have serious First Amendment implications. It is ironic that petitioners seek to prohibit only one group – the one that disagrees with them – from having access to the Commission, while complaining of an infringement of their right to petition the Commission.

There is no basis to invoke equity to grant the relief sought.

B.

Petitioner seeks relief under CPLR Article 78, the statutory codification of the ancient common law writs which enabled the judiciary to curtail abuses of power by the sovereign. Petitioner seeks relief in the nature of prohibition, i.e., prohibiting Tierney from functioning in his official capacity and preventing respondents from communicating. Because prohibition seeks a judicial restraint on official action – here, on that of another branch of government (the executive) – it has been regarded as an extraordinary remedy, available only when a body or officer acting in a judicial or quasi-judicial capacity “proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.” CPLR 7803 (2); see Matter of Town of Huntington v New York State Div. of Human Rights, 82 NY2d 783. It is not available against an exclusively administrative act (Siegel, NY Prac § 559 at 962 [4th ed]) or to prevent, review or correct an error of law. See Matter of State of New York v King, 36 NY2d 59. Neither the Commission’s jurisdiction, nor that of Tierney as a commissioner, is at issue here. The Museum respondents are not acting in a judicial or quasi-judicial capacity. Prohibition does not lie.

Article 78 does not otherwise provide a vehicle adequate to permit petitioner to seek the requested relief. Mandamus to compel concerns whether the body or officer failed to perform a duty enjoined by law. CPLR 7803(1). Whether or not to speak with someone, or whether or not Tierney should recuse himself from Commission decision-making, are not legally required or ministerial acts; rather, they are matters of personal judgment, propriety and discretion. The activity that forms the subject of this proceeding was not a “determination” within the meaning of Article 78. CPLR 7803(3), 7803(4).

C.

Petitioner's allegations of conspiracy fail to state a cause of action as a matter of law. New York law does not recognize a substantive tort of civil conspiracy. MBF Cleaning Corp. v Shine, 212 AD2d 478. In order for a "conspiracy" to be actionable, one must plead an agreement to do something that independently would constitute a tort recognized under New York law. Smukler v 12 Lofts Realty, 156 AD2d 16, lv denied, 76 NY2d 701. One must allege facts sufficient to constitute an agreement or common understanding, a joint intent to tortiously injure. See generally 20 NY Jur 2d, Conspiracy-Civil Aspects § 19.

Viewed in a light most favorable to petitioner, the factual allegations in the Petition and its exhibits, including the subject e-mails, fail to adequately set forth either an agreement or any intent to tortiously injure petitioner. The speculation, assumptions and other conclusory language of the Petition are insufficient to state a cognizable cause of action for a conspiracy, a tort or a constitutional violation. See Matter of Daxor Corp. v New York State Dept. of Health, 90 NY2d 89; National Westminster Bank v Weksel, 124 AD2d 144, lv denied, 70 NY2d 604. To the extent petitioner alleges a conspiracy to defraud, that too is legally inadequate; petitioner does not make factual allegations sufficient to set forth the substantive elements of fraud. CPLR 3016(b); Linden v Moskowitz, 294 AD2d 114. Neither does petitioner sufficiently allege, by factual allegations rather than speculation or innuendo, the elements of prima facie tort: (1) intentional infliction of harm (2) causing quantifiable special damages (3) without excuse, justification or legal purpose (4) committed by an otherwise lawful act or series of acts. See Freihoffer v Hearst Corp., 65 NY2d 135.

II

Money damages may be sought in an Article 78 proceeding only if they are “incidental to the primary relief sought by the petitioner, and must be such as [the petitioner] might otherwise recover on the same set of facts in a separate action or proceeding suable in the Supreme Court against the same body or officer in its or his official capacity.” CPLR 7806. Damages are considered “incidental” only if a petitioner prevails on the primary claim, i.e., the relief in the nature of prohibition, mandamus or certiorari, and if the granting of the relief would impose a duty on the government to pay the money sought. Matter of Gross v Perales, 72 NY2d 231.

A money claim is incidental . . . if a natural or automatic result of a favorable determination on the issues would be reimbursement, restitution or payment of the sums in question, without the necessity of a separate judicial order or direction.

Siegel, NY Prac § 570, at 984 (4th ed); see e.g. Pauk v Board of Trustees of City Univ. of N.Y., 68 NY2d 702 (back pay held incidental to claim for reinstatement). Money damages are considered not incidental if a petitioner would not automatically be entitled to recover them upon winning the primary object of the Article 78 relief. See e.g. Matter of Golomb v Board of Educ of City School Dist. of the City of NY., 92 AD2d 256 (lost profits claim following license suspension considered compensatory not incidental); Murphy v Capone, 191 AD2d 683 (2d Dept) (harm to reputation and lost economic advantage not incidental to physician’s claim for reinstatement). Damages for claims not integral to Article 78 relief – e.g., for allegedly tortious conduct – may be compensatory or punitive, but are not incidental.

Petitioner claims two categories of money damages. First, petitioner seeks to impose individual and collective liability on all respondents for prospective damage to the building’s exterior and compensation for the cost of restoration. Second, petitioner seeks compensatory damages of

\$130,000 for its attorneys' fees, and punitive damages of \$1,000,000 to be used to support landmark preservation activities.

The damages sought are not incidental. They would not naturally flow from a grant of the object of this Petition, i.e., the gag-order and disqualification order. Given this Court's determination that petitioner is not entitled to the relief sought, it would not be entitled to any relief, including money damages.

The claim for prospective damages is speculative and hypothetical. It presumes wrongdoing (in the nature of tort, trespass or violation of law) for which a claim for damages would lie; it presumes that petitioner has standing, and a property interest or other legal right to pursue a claim for compensation; it presumes that the individual respondents can be held personally liable.

The record before the Court shows that respondents have acted in their official or representative capacities. There is no allegation or evidence that any of them acted ultra vires, outside the scope of their agency or representative role, or committed any independent tort. See e.g. Rodriguez v 1414-1422 Ogden Ave. Realty Corp., 304 AD2d. Respondent Tierney, as a public official acting in his official capacity, may not be held personally liable in an Article 78 proceeding. Schwartz v Heffernan, 304 NY 474. Absolute immunity protects an official for his or her discretionary acts. Tango v Tulevech, 61 NY2d 34. Such immunity serves an important public purpose: fear of personal liability might influence the exercise of judgment and conflict with the official's responsibility to give undivided loyalty to the public interest. See Arteaga v State of New York, 72 NY2d 212. There appears to be no past or present basis for imposing personal liability on any individual respondent.

The second category of damages, which the Petition labels “compensatory”⁹ and “punitive”, is by nature not incidental, and thus not cognizable in an Article 78 proceeding. Moreover, in the absence of a controlling statute authorizing a claim for attorneys’ fees, each party bears its own. See Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1. Punitive damages are intended to punish wanton and reckless or malicious conduct, acts that evince a high degree of moral culpability. See e.g. Walker v Sheldon, 10 NY2d 401. Petitioner’s allegations do not support a claim for punitive damages.¹⁰

In sum, respondents have demonstrated entitlement to dismissal as a matter of law. The factual allegations and supporting exhibits, viewed in a light most favorable to Petitioner, are legally insufficient to set forth a cognizable claim.

III

A

Dismissal of a claim or proceeding does not automatically entitle a prevailing party to sanctions. The New York sanctions rule recognizes that the power to impose sanctions is discretionary and prescribes guidelines to discourage abuse. Rules of the Chief Administrator of the Courts (22 NYCRR) § 130 - 1.1 (a). A finding that conduct is “frivolous” is a prerequisite to the

⁹ Petitioner apparently seeks reimbursement for attorneys’ fees voluntarily incurred in bringing this proceeding and other legal work done relating to 2 Columbus Circle. Such reimbursement does not conform to the concept of compensatory damages as traditionally understood, *i.e.*, the fair value of a party’s loss naturally flowing from a civil wrong.

¹⁰ Punitive damages are not available against a political subdivision of the state (such as a city, a city department or an independent city commission such as the Landmarks Preservation Commission) absence express statutory authorization. Sharapata v Islip, 56 NY2d 332; *see*, Krohn v New York City Police Dept., 2 NY3d 329.

imposition of sanctions. Rule 130 defines conduct as “frivolous” if

- (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, motivation or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1 (c).

When considering a claim for sanctions, the Court should consider, inter alia, the offending conduct, the requested sanction and the context within the parties’ dispute.¹¹ As required by Rule 130, the Court has considered the circumstances under which the conduct (i.e., this proceeding) took place, and whether it was continued when “its lack of legal or factual basis” was or should have been apparent. 22 NYCRR § 130-1.1 (c).

The parties agree that this proceeding, and the prior litigation, is only a small part of a much larger, continuing conflict. That background has spawned a high level of mutual suspicion, impatience and antagonism unusual even for contentious public policy litigation.¹²

Petitioner seems frustrated by what it regards as the Commission’s adamant refusal even to consider holding a public hearing, evincing a closed-minded decisional style. Petitioner appears incensed by what it perceives as the Commission’s clubbiness, partiality and compromised independence.

¹¹ Were the Court not required to decide this sanctions request, it would not have felt obliged to discuss the circumstances surrounding this proceeding.

¹² The attorneys in the two cases before this Court have treated each other and the Court with courtesy and professionalism.

Respondents seems frustrated by the costly and time-consuming serial litigation. Respondents appear incensed by what they regard as petitioner's confrontational approach, strident rhetoric and ad hominem attacks.

Neither side seems emotionally or institutionally able to listen to the other. Neither side seems to realize how its words and actions might be perceived by dispassionate observers.

Believing that respondents had a friendly relationship which posed a conflict of interest, petitioner tried to find a legal vehicle to restrain respondents from what petitioner viewed as suspect behavior. Petitioner named respondents individually, apparently because individuals, not institutions, speak and vote.

The proceeding raises novel questions of legal and public policy significance: Under what circumstances should a Landmarks commissioner recuse or be disqualified from decision-making? As a lesser alternative to disqualification, should a commissioner be restrained from contact with persons interested in a Commission decision? Petitioner unsuccessfully attempted to present these questions under commonly understood legal theories and tried to shoehorn them into the legally circumscribed form of an Article 78 proceeding. Because existing city law apparently does not consider these questions, it would seem that they are not now subject to judicial determination.

This Court cannot conclude, under the unusual circumstances presented, that bringing and pursuing this Article 78 proceeding was frivolous under the Rule 130 definition. Because this proceeding is decided as a matter of law on a pre-answer motion to dismiss (CPLR 3211 [a] [7]), this Court did not engage in a factual inquiry, and may not determine the truth or falsity of factual statements or the factual merit of the underlying premise of the proceeding. Although this Court found the proceeding without merit in law, it cannot say that petitioner's attempt to extend the law

was incapable of support by a reasonable argument. Neither can this Court find that the proceeding was undertaken or continued primarily to delay or prolong the litigation or to harass or maliciously injure. Petitioner's counsel consistently sought to expedite determination and cooperated in streamlining procedural issues to permit this Court to decide the legal issues on the merits.

Petitioner sought adjudication of novel legal and policy issues; their lack of legal basis became apparent only upon judicial analysis. Although a history of rancor may be some evidence of malice, it does not establish malice. Common law malice requires conduct done deliberately with knowledge of another's rights with the intent to interfere with those rights. Lamb v Cheney & Son, 227 NY 418. Harassment is understood as conduct intended to annoy, alarm or distress another with no legitimate purpose. Black's Law Dictionary 721 [7th ed 1999]; see also Penal Law § 240.25. Petitioner sought by this proceeding to stop conduct it believed was wrong; this Court cannot find that petitioner had no legitimate purpose.

In sum, the totality of circumstances do not justify the imposition of monetary sanctions, whether as costs or attorneys' fees, or a sanction in the nature of a fine.

B

Judicial discretion to impose monetary sanctions must be carefully exercised, inter alia, because of the chilling effect it may have on parties who may legitimately seek judicial recourse in the future. Here, the sanction sought is not limited to money. Rather, at issue here is whether this Court should enjoin petitioner from any future litigation relating to 2 Columbus Circle. In light of the strong public policy favoring access to the courts, only rarely has an absolute bar been held necessary. Ultracashmere House v Kenston Warehousing Corp., 166 AD2d 386; Sassower v Signorelli, 99 AD2d 358 (tort action against surrogate brought despite his absolute judicial immunity

and the dismissal of prior action seeking almost identical relief).

The proof before the Court and the surrounding circumstances do not prove entitlement to the extraordinary, ultimate sanction sought. They do not prove that petitioner, by commencing or continuing this proceeding, was “harassing individuals solely out of ill will or spite.” Sassower v Signorelli, 99 AD2d at 359.

This Court does not presume to predict the future. While considering the equities fairly, this Court cannot declare as a matter of law that under no future circumstances could petitioner have a valid claim. The proposed sale has not yet closed. There is not yet any indication that the Commission has considered or reached a decision on petitioner’s recent RFE. The parties agree that the Commission is permitted to reconsider, thereby giving it the opportunity to hold a public hearing.¹³

CONCLUSION

Accordingly, it is **ORDERED** that the motion and cross-motion to dismiss are granted only to the extent that the Petition is dismissed, and the request for sanctions is denied; and it is further **ORDERED and ADJUDGED** that the proceeding is dismissed.

This opinion constitutes the decision, order and judgment of the Court.

Dated: September 1, 2005
New York, New York

E N T E R:

s/

J.S.C.

¹³ After conferences with the Court, the City wisely promised that it would neither close on the contract of sale, nor authorize work on the building facade before September 7, 2005. It would be preferable for the City and the Museum to agree not to alter the facade, at least until the Commission publicly announces a decision on the RFE and on whether it will hold a public hearing. It would also be preferable for petitioner to forbear from further litigation and extravagant rhetoric. The City, the Museum and petitioner, by deescalating the tension, can assist the Commission to do its work fairly and can conduct the continuing public debate thoughtfully.