

Prinzivalli v Farley

2012 NY Slip Op 32011(U)

July 23, 2012

Sup Ct, NY County

Docket Number: 114372/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 114372/2009
PRINZIVALLI, JOANN MARIE
vs.
FARLEY, THOMAS
SEQUENCE NUMBER : 004
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 30 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: July 23, 2012

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 11

JOANN MARIE PRINZIVALLI,
SAM BERKLEY, and
PATRICIA HARRINGTON,

Petitioners,

Index No.: 114372/09

- against -

DECISION/ORDER

THOMAS FARLEY in his official
capacity as HEALTH COMMISSIONER
OF THE CITY OF NEW YORK,
NEW YORK CITY BUREAU OF VITAL
STATISTICS, NEW YORK CITY OFFICE
OF VITAL RECORDS, NEW YORK CITY
BOARD OF HEALTH, NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL
HYGIENE, and THE CITY OF NEW YORK,

Respondents.

FILED

JUL 30 2012

MADDEN, JOAN A., J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioners Joann Marie Prinzivalli (Prinzivalli), Sam Berkley (Berkley), and Patricia Harrington (Harrington), who are transgender individuals, challenge respondents' denial of their applications to amend their birth certificates to change the designated "sex." They also seek a declaration that the New York City Board of Health regulation requiring transgender applicants to submit proof of "convertive surgery" in order to obtain an amended birth certificate, and respondents' implementation of the regulation, are arbitrary, capricious, and unlawfully discriminatory. Petitioners now move for leave to conduct discovery of "materials bearing on the policies and procedures governing amendments to

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the sex designation on birth certificates." Memorandum of Law in Support of Petitioners' Motion for Leave to Take Discovery, at 9.

Pursuant to CPLR 408, discovery in special proceedings is permitted only with leave of court. While the rationale underlying this requirement is that "discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding" (*Matter of Town of Pleasant Valley v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 16 [2d Dept 1999]), "[d]iscovery is not inherently 'hostile to the nature of a summary proceeding.'" *New York Univ. v Farkas*, 121 Misc 2d 643, 645 (Sup Ct, NY County 1983) (internal citation omitted). Thus, discovery will be allowed when there is a demonstrated need for it, and when the discovery sought is "material and necessary" to the prosecution or defense of the proceeding. See *Matter of Allocca v Kelly*, 44 AD3d 308, 309 (1st Dept 2007); *Matter of Town of Wallkill v New York State Bd. of Real Prop. Servs.*, 274 AD2d 856, 859 (3d Dept 2000); *Matter of Town of Pleasant Valley*, 253 AD2d at 16; *Matter of Social Servs. Empls. Union v City of New York Admin. for Children's Servs.*, 2010 WL 5044082, 2010 NY Misc LEXIS 5843, *4-5 (Sup Ct, NY County 2010); *Matter of Nespoli v Doherty*, 17 Misc 3d 1117(A), ***8 (Sup Ct, NY County 2007).

"Material and necessary" should be "interpreted liberally to require disclosure ... of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues

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and reducing delay and prolixity." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968); see *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 340-341 (1st Dept 2007); *Town of Pleasant Valley*, 253 AD2d at 15-16. Further, the court has broad discretion to grant or deny discovery (*id.* at 16), and to determine whether information sought is material and necessary (*Allen*, 21 NY2d at 406), although it "must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." *Town of Pleasant Valley*, 253 AD2d at 16; see *Matter of Nespoli*, 17 Misc 3d 1117(A) at ***10.

In this case, in addition to challenging the denial of their individual applications to amend their birth certificates, petitioners challenge the validity of the provision of section 207.05 (a) (5) of the New York City Health Code (24 RCNY 207.05 [a] [5]), requiring proof of genital surgery, the absence of which was the primary reason for denying petitioners' applications. At issue are whether respondents' reasons for retaining the convertive surgery prerequisite, and for interpreting that requirement to mean genital surgery, have a rational basis, and whether the regulation and the implementation of it are the result of discriminatory animus against transgender and disabled persons.

By prior order of this court, petitioner Prinzivalli's original Article 78 proceeding was converted into a declaratory

judgment action, which would otherwise allow petitioner to conduct discovery without leave of court. While the parties subsequently agreed to reconvert the action and consolidate it with the two Article 78 proceedings brought by Berkley and Harrington, the proceeding remains, in essence, a hybrid declaratory judgment/Article 78 proceeding (see e.g. *New York State Psychiatric Assoc., Inc. v New York State Dept. of Health*, 19 NY3d 17 [2012]; *Matter of Kapell v Incorporated Vil. of Greenport*, 63 AD3d 940 [2d Dept 2009]; *Price v New York City Bd. of Educ.*, 51 AD3d 277, 293 [1st Dept 2008]), and raises more complex issues than commonly arise in summary proceedings. See *Gargano v C. & J. Constr. Corp.*, 148 AD2d 492, 493 (2d Dept 1989). In view of the nature of the proceeding, and the issues it raises, the court finds that petitioners have demonstrated sufficient need for discovery with respect to the rationality of requiring convertive surgery, as defined by respondents, and with respect to whether discriminatory animus has played any part in addressing requests of transgender or disabled individuals. See *Ranus v Blum*, 96 AD2d 1144 (4th Dept 1983) (discovery related to employee fitness permitted in "destigmatization" proceeding); *Matter of Goldstein v McGuire*, 84 AD2d 697 (1st Dept 1981) (discovery permitted to show discriminatory enforcement of gun licensing regulation); *Matter of Social Servs. Empls. Union v City of New York Admin. for Children's Servs.*, 2010 WL 5044082,

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2010 NY Misc LEXIS 5843, *supra* (discovery related to claim of bad faith decision permitted in Art. 78); *Matter of Nespoli v Doherty*, 17 Misc 3d 1117(A), *supra* (discovery permitted in Art. 78 as to rational basis for extending employees' probationary period).

Petitioners make the following requests for documents and information:

(1) All policies, procedures, rules, or regulations relating to correcting, altering, amending, deleting or omitting the sex designation on a birth certificate, including policies, if any, for amending, altering, changing, correcting, deleting, or omitting the sex designation on birth certificates for transgender individuals who do not submit proof of "convertive surgery," as used in Section 207.05 (a) (5) of the New York City Health Code, for applicants correcting the sex designation pursuant to 207.01 of the New York City Health Code, and for applicants with intersex conditions or disorders of sex development; and

(2) The definition, construction, interpretation, or application of the term "convertive surgery" as used in Section 207.05 (a) (5) of the New York City Health Code, including the specific documentation required for the Bureau of Vital Statistics or the Office of Vital Records to issue a birth certificate with a changed, altered, corrected, or amended sex designation, including whether any exceptions to these requirements are made and, if so, under what circumstances, and including the application of the term to female-to-male transgender individuals who have undergone phalloplasty or metoidioplasty but not vaginectomy; and

(3) The names of all Health Department personnel who currently review applications that request a change in sex designation as well as the names and curriculum vitae of all physicians and mental health professionals who currently review applications that request a change in sex designation; and

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(4) The number of applications to correct, alter, or amend a birth certificate that include a request to correct, alter, amend, delete, or omit the sex designation that were processed or received by the Department of Health and Mental Hygiene of the City of New York, or any department, division, or unit thereof, on an annual basis from 2001 to the present, including, if available, the numbers or percentages of those applications granted and denied; and

(5) Any changes, amendments, proposed changes, or proposed amendments to Section 207.05 (a) (5) of the New York City Health Code, including but not limited to a proposed amendment to the Health Code, proposed on or about September 26, 2006, addressing amending, altering, changing, correcting, deleting, or omitting the sex designation on a birth certificate; this request includes records regarding any votes made or taken in connection with such changes, amendments, proposed changes, or proposed amendments as well as comments received from all sources including but not limited to the public and other New York City agencies and officials; and

(6) The external committee convened by the Health Department, or any department, division, or unit thereof, that made recommendations or findings concerning the rules, policies, procedures for amending, altering, changing, correcting, deleting, or omitting the sex designation on birth certificates, including proposed amendments to Section 207.05 (a) (5) of the New York City Health Code, including the names, titles, and addresses of the members of that committee and the names and titles of any Health Department staff that assisted the external committee; and

(7) The Intelligence Reform and Terrorism Prevention Act of 2004 and the REAL ID Act of 2005 as it relates to implications for changing the sex designation on birth certificates; and

(8) All policies, procedures, rules, regulations, reports, studies, or proceedings relating to amending, altering, changing, correcting, deleting, or omitting the sex designation on a birth certificate for individuals prior to the adoption of Section 207.05 (a) (5) of the New York City Health Code, including

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but not limited to a request made in or about 1965 to the New York Academy of Medicine in connection with its report entitled "Change of Sex on Birth Certificates for Transsexuals" and the October 13, 1965 meeting and resolution of the Board of Health; and

(9) The decision of the Board of Health to amend the New York City Health Code in 1971 by enacting or adopting what is now Section 207.05 (a) (5) of the New York City Health Code, including any reports, studies, or other documents prepared, received, considered, or reviewed by the Board of Health in connection with the adoption of that provision and any voting records pertaining to the Board of Health's adoption of the provision; and

(10) The names, titles, and addresses of the current members of the Board of Health and the members or former members of the Board of Health who served at any point from 2002 to the present; and

(11) Documents related to changing the sex designation on birth certificates that were (i) submitted by the Health Department to corporation counsel pursuant to the CAPA requirements of § 1044 (a) (1) of the Charter or (ii) are on file in the municipal reference and research center pursuant to § 1045 (c) of the Charter.

Petitioners' Memo of Law in Support, at 11-13.

Petitioners acknowledge that they have already received numerous documents from respondents, through a Freedom of Information Law (FOIL) request, and respondents also have provided, with their answer to the petition, additional documents responsive to petitioners' requests. Although petitioners are entitled to discovery of additional, non-privileged information relevant to the basis for retaining the requirement for convertive surgery, and the reasons for interpreting that

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requirement to include only particular genital surgeries, as well as the reasons for denying the applications of the individual petitioners, petitioners have not shown that all of the above requested information is necessary or relevant, or would lead to relevant evidence.

Relevant information includes materials related to the basis for the Board of Health's rejection of the recommendations of the 2006 committee, convened by the Board of Health, to amend Section 207.05 (a) (5) to eliminate the convertive surgery requirement and replace it with other medical proof, and the basis for the Board of Health's consequent decision to withdraw the amendment and retain the convertive surgery requirement. The recommendations of the 2006 committee are not in dispute, however, and no need for further discovery with respect to the 2006 committee has been shown. Nor have petitioners made a showing that what took place in 1965 or 1971 is material and necessary. Petitioners also have not shown how the names of all employees and physicians who review applications is relevant. The issue regarding compliance with CAPA also requires no additional discovery.

Respondents therefore shall respond to petitioners' discovery requests numbered 1, 2, 4, 5. Respondents shall also provide a response to request number 10, but only as to current members of the Board of Health, and members at the time that the

2006 amendment was being considered. Requests numbered 3, 6, 7, 8, 9, and 11 are denied, however, as either irrelevant, unnecessary or overbroad.

In addition to document discovery, petitioners seek leave to serve interrogatories and take oral depositions of respondents, or their current or former officers and employees, and current members of the Board of Health and the Commissioner, as well as those serving in 2006, and members of the 2006 Committee. See Petitioners' Memo of Law, at 13. Petitioners will be permitted to question persons with knowledge of the decision-making process engaged in during the time that the 2006 amendment was being considered, and of the reasons for the Board of Health's decision to reject the amendment, and of the decisions made to grant or deny applications of transgender persons; but petitioners need to more carefully tailor their request for interrogatories and depositions to identify individuals that they seek to depose or otherwise question. See *Ranus*, 96 AD2d at 1145; *Matter of Rice v Belfiore*, 15 Misc 3d 1105(A), ***25 (Sup Ct, Westchester County 2007); see generally *Matter of Lonray, Inc. v Newhouse*, 229 AD2d 440, 441 (2d Dept 1996).

As information about persons involved in such decision making is in the control of respondents, this branch of the motion will be granted to the extent of directing respondents to provide an affidavit from an individual or individuals with

personal knowledge of the 2006 amendment process, of the decision to reject the 2006 committee's recommendations, and of other persons involved in such decision making; and with knowledge of the reasons for granting or denying transgender applications to amend the sex on birth certificates, including petitioners' applications. This branch of the motion is otherwise denied, with leave to renew the application upon the completion of document discovery, and with legal and factual support for each deposition requested.

Accordingly, it is

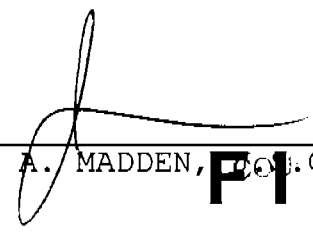
ORDERED that petitioners' motion for leave to conduct discovery is granted to the extent of directing respondents to provide the discovery authorized above, within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a conference in Part 11 (Room 351, 60 Centre St.), on September 20, 2012, at 9:30 a.m.; and it is further

ORDERED that the disposition of the proceeding is held in abeyance pending the completion of discovery.

Dated: July 23, 2012

ENTER:


HON. JOAN A. MADDEN, C.J.C.

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