Matter of Metropolitan Movers Assoc., Inc. v Liu
2012 NY Slip Op 33414(U)
August 14, 2012
Sup Ct, New York County
Docket Number: 107755/2011
Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN **PART** 12

Index Number : 107755/2011

METROPOLITAN MOVERS

vs

LIU, JOH C.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: 8/14/2012

_____
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/JUDG.** ☐ **SETTLE ORDER /JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

In the Matter of the Application of

METROPOLITAN MOVERS ASSOCIATION, INC., EAST SIDE MOVERS, INC. and UNIVERSAL MOVING & STORAGE CO.,

Petitioners,

-against-

JOHN C. LIU, AS COMPTROLLER OF THE CITY OF NEW YORK,

Respondent.

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Index Number: 107755/2011
Mot. Seq. Nos.: 001 - 005

DECISION AND ORDER

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Papers considered in review of the petition, motions and cross motions:	**Papers Numbered:**
Motion Seq. No. 001:	
Notice of petition, Verified petition and exhibits A - F, Millman affirmation and exhibits A - E and petitioners' memorandum of law	1 - 4
Notice of cross motion to dismiss, O'Connor affirmation and exhibits A - B and respondent's memorandum of law in support of cross motion	5 - 7
Petitioners' reply memorandum of law	8
Petitioners' omnibus memorandum in opposition to motions to intervene	9
Transcript of February 1, 2012 oral argument, e-file number 11	10
Petitioners' letter dated October 7, 2011, and exhibits 1 - 6	10-a

Comptroller's letter dated November 2, 2011	10-b
Motion Seq. No. 002:	
SEIU Local 32BJ's notice of motion to intervene, memorandum of law in support of intervention, memorandum of law in support of motion to dismiss, and Baker affirmation and annexed exhibits A - E	11 - 14
Ide affirmation for Local 814	15
Petitioners' omnibus memorandum in opposition to motions to intervene	9
Respondent's amended cross motion for a stay	16
SEIU Local 32BJ's memorandum of law in response to respondent, memorandum of law in response to petitioner's opposition, and Baker supplemental affirmation and exhibit A	17 - 19
Ide reply affidavit and Local 814 response to motion for stay	20 - 21
Motion Seq. No. 003:	
Local 814 notice of motion to dismiss and memorandum of law in support	22 - 23
Motion Seq. No. 004:	
Local 814 notice of motion to intervene, memorandum of law	24 - 25
Respondent's cross motion for a stay, O'Connor affirmation to Local 814 motion to intervene and in support of cross motion and exhibits A - C	26 - 27
Petitioners' omnibus memorandum in opposition to motions to intervene	9
Local 814 reply memorandum in support of motion to intervene, memorandum of law in opposition to cross motion	28 - 29
Motion Seq. No. 005: *(this motion has been e-filed - all numbers are e-file document numbers)*	
AFL-CIO and New York City Central Labor Council notice of motion for permission to file as amicusis curiae, memorandum of law in support, O'Rourke Pennington affirmation in support	4 - 5

PAUL G. FEINMAN, J.:

Petitioners Metropolitan Movers Association, Inc., East Side Movers, Inc. and Universal Moving & Storage Co. commenced this proceeding pursuant to CPLR article 78 against respondent John C. Liu, as Comptroller of the City of New York, challenging the Comptroller's July 1, 2011 determination of the prevailing wage schedule for workers under Labor Law § 230 (motions sequence number 001). The Comptroller cross-moves for dismissal based on petitioners' purported lack of standing. Service Employees International Union Local 32BJ ("Local 32BJ") and Local 814, International Brotherhood of Teamsters ("Local 814") each move to intervene under motion sequence numbers 002 and 004, and Local 814 moves to dismiss under motion sequence number 003. The Comptroller cross-moves for a stay of Local 814 and Local

32BJ's respective motions. In motion sequence number 005, New York State AFL-CIO and New York City Central Labor Council (collectively referred to as "AFL-CIO/CLC") move for permission to file a submission as amicus curiae.

Motion sequence numbers 001 through 005 are joined for purposes of decision. For the reasons set forth below, the Comptroller's cross motion to dismiss is denied and he is directed to serve an answer to the petition in accordance with the terms of this decision and order. Local 814 and Local 32BJ's motions to intervene and to dismiss are each denied, except to the extent that the court will deem the motions as also seeking permission to file a brief on the merits of the petition as amicus curiae and are granted to that limited extent only. AFL-CIO/CLC's motion is granted. Finally, the Comptroller's various other cross motions are denied in their entirety.

BACKGROUND

1. Parties

Petitioner Metropolitan Movers Association, Inc. ("MMA") is a not-for-profit association founded to support the moving and storage industry in the New York City area. East Side Movers, Inc. and Universal Moving & Storage Co. are New York corporations and members of MMA. East Side currently has contracts for moving services with the City of New York or its agencies. Respondent John C. Liu is the Comptroller of the City of New York charged under Article 9 of the Labor Law with determining the prevailing wages for employees in the locality engaged in certain building services for the City. Proposed intervenor Local 814 is a labor organization that represents a number of moving and storage employees working in New York City. Proposed intervenor Local 32-BJ is a labor union representing property service employees, including janitorial and security employees. New York State AFL-CIO is a federation of

approximately 3,000 labor organizations representing approximately 2.5 million workers throughout New York. CLC is a non-profit labor membership organization comprised of 400 local unions from a variety of trades, including proposed intervenors Local 814 and Local 32BJ.

2. Article 9 "Prevailing Wage" Determinations

Under Article 9 of the Labor Law, the Comptroller is tasked with promulgating a yearly schedule of prevailing wages and supplemental benefits for building service employees. Contractors or subcontractors entering into building service contract with the City are required to pay their employees, at a minimum, the prevailing wage as determined by the Comptroller. The prevailing wage determination at issue in this proceeding was adopted by the Comptroller on July 1, 2011.

3. Prior "Prevailing Wage" Proceeding

MMA and several of its individual members were the petitioners in a prior CPLR article 78 proceeding commenced against the Comptroller challenging his July 1, 2010 prevailing wage determination. By a decision, order and judgment issued by the justice presiding over that case on March 29, 2011, the Comptroller's July 2010 prevailing wage determination was annulled and "the matter was remanded to the Comptroller for further determination of the actual prevailing wage schedule for movers in accordance with section 230 of the Labor Law and the terms of [that] decision" (*Metropolitan Movers v Liu*, 32 Misc 3d 175, 185 [Sup Ct, NY County 2011][Schlesinger, J.] [hereinafter referred to as "*Metropolitan Movers I*"]). MMA's request for a declaratory judgment defining the prevailing wage as that which is "commonly occurring" or set by the United States Department of Labor was denied, as was its request for incidental monetary relief.

Thereafter, the Comptroller appealed. He also promulgated a new annual prevailing wage determination pursuant to Article 9 of the Labor Law on July 1, 2011. A month earlier, on June 1, 2011, notice of the prevailing wage schedule that would be adopted had been published by the Comptroller for all categories of employees except movers. For that category, the June 2011 notice simply said "to be determined" (Doc. 2, ex. C, The City Record, June 2011). The prevailing wage schedule promulgated on July 1, 2011, like the July 2010 determination, references specific labor unions in connection with each category of workers.

Shortly after the July 1, 2011 schedule was issued, petitioners commenced the instant CPLR article 78 proceeding seeking its annulment. Subsequently, the Appellate Division, First Department, affirmed *Metropolitan Movers I* in a decision issued May 15, 2012 (*see Metropolitan Movers Association, Inc. v Liu*, 95 AD3d 596, 2012 NY Slip Op 03756 [1st Dept 2012] [hereafter referred to as "*Metropolitan Movers II*"]). In doing so, the Court held that "the Comptroller's use of Local 814's collective bargaining agreement as the sole basis for determining the prevailing wage schedule was arbitrary, capricious, and lacked a rational basis" (*id.* at *3). The Court noted that the data compiled by the Comptroller indicated "that wages between $10 and $20 per hour were prevailing in the moving industry, roughly half of the $31 to $39 range that he adopted ...," and "no matter what statistical method is chosen - average, median or mode - the [Comptroller's] survey results reveal figures substantially lower than the wages chosen by the Comptroller" (*id.*). As such, "[b]y ignoring the data from his own survey and instead blindly adopting Local 814's rates, the Comptroller failed to comply with the statutory mandate to determine the wage 'to be prevailing' (Labor Law § 230 [6]), meaning the actual prevailing wage" (*id.*; citing *Matter of Action Elec. Contrs. Co. v Goldin*, 64 NY2d 213 [1984]

[annulling Comptroller's prevailing wage determination because it was based on arbitrary and irrational interpretation of statute]). The Court found "no merit to the Comptroller's contention that Labor Law § 234 (1) (a) gives him the unbridled discretion to use the 30% rule ..." of Labor Law § 220 (5) (a), stating that "merely because the Comptroller has the discretion to use various methods [under Labor Law § 234 (1) (a)] does not divest him of his statutory responsibility to determine the wage rate 'to be prevailing' (Labor Law § 230 [6])" (*id.*). Finally, it concluded that "[w]here, as here, the union contract contains wage rates grossly disproportionate to the other data collected, the Comptroller cannot blindly use the 30% rule while ignoring the other data" (*id.*).

4. Verified Petition in this Proceeding

The verified petition seeks an order pursuant to CPLR article 78 for the following relief: (1) setting aside the prevailing wage schedules published under section 230 of the Labor Law on July 1, 2011, and declaring such schedules void; (2) setting aside the Comptroller's July 1, 2011 determination that Local 814 has negotiated the prevailing wage for movers and declaring such determination to be void; (3) declaring that the Comptroller may not issue new schedules without affording the public 30 days' notice and without complying with section 230 of the Labor Law; and (4) granting petitioners incidental monetary relief and their attorney's fees and costs, including attorney's fees under CPLR article 86.

In lieu of answering the petition on the merits, the Comptroller cross-moved to dismiss on the basis that petitioners lacked standing to maintain this proceeding. The proposed intervenors filed their respective motions for leave to intervene and to dismiss, and AFL-CIO/CLC filed its motion for leave to submit a brief as amicus curiae. The Comptroller cross-moved for a stay of

the proposed intervenors' motions or, in the event the court denied his request for a stay, a 14-day extension to submit opposition on the merits of the motions to intervene.

ANALYSIS

1. Article 78 Standards

In a proceeding under CPLR article 78, an administrative action may be "set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion" (*Matter of Metropolitan Movers II*, at *2; citing CPLR 7803). An administrative determination is "arbitrary" if it "is without sound basis in reason and is generally taken without regard to the facts" (*id.*; quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Generally, great deference is accorded to an administrative agency's determination, except where such determination "runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*id.*; quoting *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285 [2009] [quotation marks omitted]).

2. Standing

It is well established that "[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation" (*Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975]; *see also New York State Assoc. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004] [standing "is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action"]). The Court of Appeals has applied a two-part test for determining whether plaintiff has standing to challenge governmental action: (1) plaintiff must show "injury in fact," meaning that plaintiff will "actually be harmed by the

challenged administrative action"; and (2) plaintiff's 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 Assoc. of Nurse Anesthetists*, 2 NY3d at 212; citing *Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]; *Matter of Colella v Board of Assessors*, 95 NY2d 401, 409-410 [2000]). Where plaintiff is an organization, to establish standing it must "show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*id.*; citing *Rudder v Pataki*, 93 NY2d 273, 278 [1999]; *Matter of Dental Socy. of State of N.Y. v Carey*, 61 NY2d 330, 333-334 [1984]; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975]). "Standing principles, which are in the end matters of policy, should not be heavy-handed ..." (*Sun-Brite v Bd. of Zoning*, 69 NY2d 406, 412 [1987]). If any one of the petitioners has standing, the court does not need to determine whether each of the petitioners also has standing (*see Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003] *cert denied* 540 US 1017 [2003]); citing *County of Rensselaer v Regan*, 80 NY2d 988, 991 n [1992]).

The petitioners, particularly MMA, has sufficiently established that it has organizational standing to pursue the claims raised in the petition. At least one of MMA's members is, or was at the time of commencement of this proceeding, a party to a contract for building services with the City of New York that is subject to the prevailing wage requirements of Article 9 of the Labor Law (Doc. 9, Petitioners' omnibus opp. memo. at 13; Doc. 4, Millman affirm. at ¶ 5 [claiming to have identified several members of MMA with contracts for moving services with the City based on his review of Comptroller's "Clearview" database, including A-1 First Class -

Viking Moving & Storage Inc., East Side Movers, Inc. (a named petitioner herein), Business Relocation Services, Inc., Corporate Relocation Systems Inc. and Moveway Transfer & Storage, Inc.]; *see also* Doc. 4, ex. B, Schwartzberg affid. at ¶ 3 [stating, as president of A-1 First Class, that it has held City moving contracts, currently holds City moving contracts and hopes to secure more in the future]). As such, under Labor Law § 231 (1), these members are required to pay each building service employee "a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee." Pursuant to Labor Law § 231 (3), each contract held by one of MMA's members that is subject to Article 9 must contain "as part of the specifications thereof a schedule of the" prevailing wages as determined by the Comptroller, and must "contain a provision obligating the contractor to pay each employee on such work not less than the wage specified for his craft, trade or occupation in such schedule" (Labor Law § 231 [3]). The Comptroller is given extensive investigative powers under Article 9, which includes the power to hold hearings whenever he or she has reason to believe that a service employee has been paid less than the amount stipulated in the contract or, if no wage schedule is attached, less than the prevailing wage (Labor Law § 235 [1] - [9]). If a contractor or subcontractor is ultimately determined to have violated the prevailing wage requirements, in addition to the payment of any back wages plus interest, it is subject to civil penalties under the statute, including exclusion from bidding on future building service contracts, and criminal penalties (*see* Labor Law §§ 235 [5], [7]; 238).

Thus, assuming it is ultimately found to be arbitrary and capricious, the July 1, 2011 prevailing wage schedule promulgated by the Comptroller would cause direct and actual injury to those of MMA's members who have contracts for building services with the City, since those

contracts must incorporate the Comptroller's prevailing wage schedule and pay their employees the wages set forth therein. These members would be directly injured by an arbitrary and capricious prevailing wage determination since they would be required to pay those wages to their employees or risk substantial civil or criminal penalties. Furthermore, petitioners have established that at least some of MMA's members have stated injuries which fall within the "zone of interests" sought to be promoted or protected by the statutory provision under which the Comptroller has acted - Article 9 of Labor Law (*see Socy. of Plastics*, 77 NY2d at 773-774). The express statutory mandate sought to be enforced by petitioners is that the Comptroller must determine the "actual prevailing wage" (*see Metropolitan Movers II*, at *3-*4 [holding that Comptroller's prevailing wage determination was arbitrary and capricious since it was based on his exclusive reliance on a labor union agreement that did not reflect the wages that were actually prevailing, and the discretion afforded to him in choosing the particular methodology employed did "not divest him of his statutory responsibility to determine the wage rate 'to be prevailing'"]). The Comptroller's arbitrary and capricious adoption of a schedule that does not reflect his reasonable determination of the prevailing wages would be inconsistent with the express mandate of the statute. As such, the petitioners' claimed injuries, which are said to result from the Comptroller's July 1, 2011 prevailing wage determination, are within the zone of interests sought to be promoted by Article 9 of the Labor Law.

However, the Comptroller contends that because Article 9 was intended to "insure that individuals employed as building service employees were provided with prevailing wage protections," the petitioners cannot satisfy the "zone of interest" test because they "seek to invoke Article 9 to significantly reduce the statutory labor standards that have evolved over the

years" (Doc. 7, Comptroller's memo. at 10 [*emphasis in original*]; citing Doc. 7, Appx A, Legislative History). The Comptroller does not provide any details as to how petitioners are seeking to invoke Article to "significantly reduce the statutory labor standards that have evolved over the years." A ruling on the merits in petitioners' favor would result in the matter being remanded to the Comptroller for a new determination of the prevailing wage schedule consistent with the plain language of Article 9 and relevant case law. The fact that this could conceivably result in a reduction from the prevailing wages originally determined by the Comptroller in its July 1, 2011 schedule does not take this matter outside of the zone of interests sought to be protected by Article 9.

The Comptroller argues that in addition to meeting the injury-in-fact and "zone of interest" tests, petitioners must establish that they have suffered direct harm that is in some way different from that of the public at large (Doc. 7, Comptroller's memo. at 11; citing *Energy Assoc. v PSC*, 273 AD2d 708 [3d Dept]). To the extent the requirement applies outside of the land use context (*see Socy. of Plastics*, 77 NY2d at 774 [stating that this additional limitation to standing is imposed in "land use matters especially"]), petitioners' claimed injuries, which arise out of MMA's members' contractual relationships for building services covered by Article 9, are clearly distinct from any general injury to the public at large.

Accordingly, MMA has made a sufficient demonstration of individualized harm befalling at least one of its members, and has shown that the injury asserted falls within the "zone of interests" sought to be promoted or protected by Article 9 (*see Socy. of Plastics*, 77 NY2d at 773; *see also Matter of Dental Socy.*, 61 NY2d at 333-334). In addition, MMA demonstrates that the interests advanced in this proceeding are germane to its purposes as a not-for-profit advocate for

the New York City moving industry so as to satisfy the court that it is an appropriate representative of those interests (*see Socy. of Plastics*, 77 NY2d at 775). Finally, it is evident from the petition that neither the asserted claim nor the requested relief require the individual participation of each of MMA's individual members, since the primary relief requested in the petition is a judgment setting aside the July 1, 2011 prevailing wage schedules published under Section 230 of the New York Labor Law, and declaring such schedules to be void (Doc. 2, Petition at 10-11). As such, MMA has satisfied the requirements for organizational standing (*see Socy. of Plastics*, 77 NY2d at 775).

Furthermore, there is no merit to the Comptroller's contention that certain evidentiary submissions made by petitioners in opposition to his motion to dismiss were untimely or otherwise improper (Doc. 8, Comptroller's reply memo. at 22-23). The disputed submissions include affidavits from representatives of certain named petitioners or MMA's members indicating that their companies have contracts with the City which are subject to the prevailing wage requirements of Article 9 of the Labor Law. These submissions are not improper simply because they were not specifically made in the petition. It is well-settled that "[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation" (*see Socy. of Plastics*, 77 NY2d at 769 [*emphasis added*]). Thus, only when the Comptroller moved to dismiss raising a challenge to petitioners' standing did petitioners have to meet their burden on this issue. Even if these facts should have been stated in the petition itself, the Comptroller has not shown any prejudice resulting from petitioners' failure to do so, as he had an opportunity to address these issues in his reply papers. Furthermore, any claim of prejudice would be undermined by the fact

that several of the affidavits challenged by the Comptroller are based upon information found on the publicly available database maintained by the Comptroller.

The court also rejects the Comptroller's contention that Labor Law § 235 creates an express administrative mechanism whereby a business can challenge a prevailing wage determination, and only after that mechanism is exhausted will it have standing to bring a proceeding under CPLR article 78. Labor Law § 235 sets out extensive investigative and enforcement provisions to be applied where the Comptroller has reason to believe that a service employee has been paid less than the wages stipulated in the contract or less than the prevailing wage. However, it does not provide a specific mechanism to be employed by a contractor to challenge a prevailing wage determination.

Having determined that petitioner MMA has organizational standing, the court need not determine whether any of the other petitioners also had standing (*see Mulgrew v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 75 AD3d 412, 413, n 2 [1st Dept 2010]). Nor is it necessary to address petitioners' alternative standing arguments under General Municipal Law § 51 and State Finance Law § 123-b.

The court's determination that petitioners have standing also means there is no need to reach the issues raised by petitioners as to the effect of the Comptroller's failure to raise the issue of standing in the prior Article 78 proceeding pertaining to his July 2010 prevailing wage determination. Nonetheless, the court notes that both proceedings involve essentially the same parties and same issues, differing only with respect to the particular prevailing wage schedule being challenged. It would seem inequitable to dismiss the instant case on the basis of standing where the Comptroller waived such defense in the prior proceeding by litigating solely on the

merits of the petition, and now repeatedly characterizes the instant petition as nothing more than petitioners' attempt to enforce the judgment entered in the prior proceeding.

Accordingly, the Comptroller's cross motion to dismiss the verified petition based on petitioners' purported lack of standing is denied in its entirety.

3. Effect of Denial of the Comptroller's Cross Motion to Dismiss

CPLR 7804 (f) allows a respondent in a proceeding under CPLR article 78 to raise an objection in point of law by setting it forth in a motion to dismiss the petition. "If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just ..." (CPLR 7804 [f]). When a respondent challenges petitioner's standing only, generally, it is error to dismiss the petition on the merits prior to service of respondent's answer (*see Matter of Nassau BOCES Central Council of Teachers v Bd. of Cooperative Educ. Services of Nassau County*, 63 NY2d 100, 101-102 [1984]). CPLR 7804 (f) "envisions that the motion has addressed only a specific defense and thus poses no occasion for a treatment of the whole record on the merits" (Siegel, NY Prac § 567 [5th ed 2011]). However, the courts "frown" upon a respondent making a motion on a specific defense while at the same time including in the motion arguments based on the merits, as this "amounts to the respondent's attempt to get two bites at the apple" (*id.*). Notwithstanding the mandate of CPLR 7804 (f), dismissal on the merits may be granted following respondent's unsuccessful motion to dismiss where "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Nassau BOCES Central Council of Teachers*, 63 NY2d at 102; citing *O'Hara v Del Bello*, 47 NY2d 363 [1979]). If it is "plain from all the papers that the respondent has nothing with which to answer and that

further proceedings would be wasteful, the court should not prolong the petitioner's agony. It should be able to close the case out with a judgment" (Siegel, NY Prac § 567 [5th ed 2011]).

Here, even petitioners argue that it would be premature to reach the merits of the petition because the administrative record has not been submitted by the Comptroller (Doc. 9, Petitioners' Omnibus memo. at 28-29). Although it appears from the face of the July 2011 prevailing wage determination that the Comptroller has employed the same methodology used in connection with his July 2010 determination by importing the terms of a particular union's collective bargaining agreement, it cannot be said that "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Nassau BOCES Central Council of Teachers*, 63 NY2d at 102). Many facts that were developed in the record in the prior proceeding are not present in the existing record. For example, that record contained facts suggesting that the Comptroller blindly adopted the terms and wages found in collective bargaining agreements for particular unions even though those wages were grossly disproportionate to the wage rates suggested by the data he collected. Here, the record lacks any information as to what, if any, data was collected and considered by the Comptroller in adopting his July 2011 prevailing wage determination. While the express reference in the July 2011 prevailing wage schedule to specific unions, when coupled with the Comptroller's insistence that he had no obligation to comply with any aspect of *Metropolitan Movers I* because of his pending appeal of that decision, suggests, but does not establish, that the Comptroller has once again blindly adopted the terms of various labor union contracts regardless of whether the wages provided therein are actually prevailing; the yet undeveloped state of the record requires the court to afford the Comptroller an opportunity to

answer.

Accordingly, the Comptroller's cross motion to dismiss is denied and he is directed to answer the petition on the merits. Under CPLR 7804 (f), such answer shall be served and filed within 5 days after service of the order with notice of entry, subject to the court's discretion to alter this time period "upon such terms as may be just." While the court believes the Comptroller should be afforded more than 5 days to answer, it is also cognizant of the need to avoid any unnecessary delays, and the fact that the Comptroller has had more than enough time to review and prepare the record in the event that his cross motion to dismiss was denied. In light of these considerations, the Comptroller must serve his answer within 30 days of service of notice of entry of the instant decision and order. At that point, petitioners may re-notice the matter for hearing upon 2 days' notice, or the Comptroller may re-notice the matter for hearing upon service of the answer upon 7 days' notice (CPLR 7804 [f]). Petitioners may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

4. Local 32BJ's Motion for Leave to Intervene

Pursuant to CPLR 7802 (d), a court "may allow other interested persons" to intervene in a special proceeding under CPLR article 78. "This provision 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'" (*see Matter of Greater N.Y. Health Care Facilities Assoc. v DeBuono*, 91 NY2d 716, 720 [1998]). Because a successful intervenor becomes a party for all purposes and the intervenor's claim will be deemed to have been

interposed as of the filing date of the petition, the "court must first determine whether the addition of a new party is appropriate" (*id.* at 720). The general rule is that intervention should be permitted under CPLR 7802 (d) where the proposed intervenor has "a real and substantial interest in the outcome of the proceedings" (*id.*). To be an "interested" party, "one must have a legally cognizable claim to intervene pursuant to CPLR 7802 (d), rather than just a general interest in the result ..." (*Kruger v Bloomberg*, 1 Misc 3d 192, 195 [Sup Ct, NY County 2003]; citing *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 195 Misc 2d 119, 122-123 [Sup Ct, NY County 2003], citing *Matter of Greater N.Y. Health Care Facilities Assn.*, 91 NY2d at 718, 720-721; also citing *Ferguson v Barrios-Paoli*, 279 AD2d 396, 398-399 [1st Dept 2001]). Thus, intervention is not appropriate where the claimed interest is "wholly speculative" (*Matter of Pier v Bd. of Assessment Review of the Town of Niskayuna*, 209 AD2d 788, 789 [3d Dept 1994]; citing *Vantage Petroleum v Board of Assessment Review*, 91 AD2d 1037 [2d Dept 1983]). Furthermore, an "interested person" is one who will be "directly affected by the outcome" (*Cleveland Place Neighborhood Assoc. v New York State Liquor Authority*, 268 AD2d 6, 9 [1st Dept 2000]; citing *Matter of White v Incorporated Vil. of Plandome Manor*, 190 AD2d 854 [2d Dept 1993]). Ultimately, intervention in a CPLR article 78 proceeding is a "matter addressed to the sound discretion of the court" (*Matter of White*, 190 AD2d at 854). Thus, a court may deny leave to intervene, notwithstanding the proposed intervenor's interest in the matter and the broad power to grant such relief in an article 78 proceeding, where inclusion of the proposed intervenor as a party would prejudicially delay a determination as to the individual petitioner (*see Meringolo v Jacobson*, 256 AD2d 20, 20-21 [1st Dept 1998]). Intervention may also be denied where the proposed intervenor fails to demonstrate that the existing parties would be unable to adequately

protect the interests it seeks to protect (*see Hope v Perales*, 189 AD2d 287, 298 [1st Dept 1993]).

Local 32BJ argues that it is an "interested person" entitled to intervene pursuant to CPLR 7802 (d) because it has an "interest in the lawful determination of prevailing wage rates for classifications in which its members are employed" and the "precise issue in this proceeding - whether the July 1, 2011 prevailing wage schedule established by the Comptroller was lawful - is one in which Local 32BJ has a substantial interest because it has a direct impact on the terms and conditions of Local 32BJ's 3,000 members working on service contracts covered by Article 9" (Doc. 12, Local 32BJ's memo. at 4). It claims that the economic interests of its members will be affected and "this potential injury in fact to thousands of Local 32BJ members justifies Local 32BJ's intervention in this proceeding" (*id.*). In support of these arguments, Local 32BJ submits an affirmation from its attorney in which she claims that if the July 2011 prevailing wage determination is found to be arbitrary and capricious, "some, if not all of Local 32BJ's publicly contracted members" would "lose their jobs because employers who are signatory to Local 32BJ collective bargaining agreements will be forced to terminate their service contracts with the City or unable to obtain successor contracts in the competitive bidding process due to the disparity between their obligations under the Local 32BJ agreements and the prevailing wage" (Doc. 12, ex. A, Baker affirm. at ¶ 9).

Local 32BJ claims that the court's decision in *L&M Bus Corp. v New York City Dept. of Transportation*, 2008 NY Slip Op 31246 (U) (Sup Ct, NY County 2008), is instructive. There, a labor union was permitted to intervene under CPLR 7802 upon the court's finding that the union had an interest in protecting the working conditions of its members which would be directly affected by the elimination of certain employment protection provisions in contracts between the

petitioners, comprised of various bus transportation companies, and the Department of Education (*id.* at *13-14). Local 32BJ emphasizes that even though the union's legal position on the merits was ultimately rejected by the Court of Appeals, (*see L&M Bus Corp. v New York City Dept. of Transportation*, 17 NY3d 149, 159-160 [2011]), *L&M Bus Corp.* stands for the proposition that a ruling on the merits of an intervenor's substantive claim is not a prerequisite to granting intervention (Doc. 18, Local 32BJ's reply memo. at 4-5). It argues that its "interest in protecting the wages and working conditions of its publicly contracted building service members" is the same as the one asserted by the union in *L&M Bus Corp.* Next, in response to petitioners' contention that Local 32BJ's failure to intervene in the prior Article 78 proceeding regarding the July 2010 prevailing wage determination suggests that there is no need for intervention in this proceeding, Local 32BJ argues that the petitioners in *Metropolitan Movers I* only challenged the prevailing wage determination pertaining to movers, who were not represented by Local 32BJ, whereas the instant petition seeks annulment of the entire July 2011 prevailing wage determination (*id.* at 5).

Petitioners oppose Local 32BJ's motion for leave to intervene arguing that Local 32BJ has no legally cognizable interest in this proceeding and, to the extent it has an interest in securing adequate wages for its workers, such interest could be "satisf[ied] at the collective bargaining table" (Doc. 9, Petitioners' omnibus memo. at 7). Petitioners further contend that Local 32BJ's members would not be directly affected by a determination in this proceeding that the July 2011 prevailing wage schedule is arbitrary and capricious, since such determination would not have any impact on the existing contractual rights that have been negotiated by Local 32BJ's members. Thus, they claim Local 32BJ has no cognizable interest because, even if the

instant proceeding resulted in a revised prevailing wage determination setting prevailing wages at lower rates, Local 32BJ's members would still be paid their bargained-for rates. Petitioners also argue that the law does not recognize the interest advanced by Local 32BJ to the extent that it seeks to defend an inflated prevailing wage determination (*id.* at 8). Finally, they argue that intervention will cause them to suffer prejudice, because Local 32BJ would use the instant proceeding to challenge the court's holding in *Metropolitan Movers I*, and its participation would only further complicate this matter.

The Comptroller opposes intervention and cross-moves for a stay of Local 32BJ's motion to intervene pending determination of his motion to dismiss for lack of standing. He further requests that if the court denies his motion for a stay, he should be granted 14 days from the date of entry in which he could file a response on the merits of Local 32BJ's motion to intervene (Doc. 16, O'Connor affirm. at ¶ 10).

As an initial matter, the Comptroller's cross motion for a stay is denied as academic since a determination has now been made on his motion to dismiss for petitioners' alleged lack of standing. Moreover, his request for an additional 14 days to file a response to Local 32BJ's motion to intervene is denied. The Comptroller has had more than enough time to respond to Local 32BJ's motion to intervene and he offers no reason for further prolonging the resolution of this matter.

The interest asserted by Local 32BJ is not direct (*see Cleveland Place Neighborhood Assoc.*, 268 AD2d at 9). The injuries it claims would result from a finding that the Comptroller's July 2011 prevailing wage determination was arbitrary and capricious is both indirect and speculative. Such a finding would have no direct effect on Local 32BJ's members' wages and

benefits, as those arise out the collective bargaining agreements negotiated and entered into between the union on its members' behalf and particular contractors/subcontractors, or groups of contractors/subcontractors. Thus, even if the court ultimately rules in petitioners' favor on the merits and annuls the Comptroller's July 2011 prevailing wage determination as arbitrary and capricious, the matter would remanded back to the Comptroller for a new prevailing wage determination. Even if the revised prevailing wage schedule resulted in the Comptroller setting prevailing wages at rates lower than his July 1, 2011 schedule, Local 32BJ's wages would remain the same. The interest that Local 32BJ seeks to protect is that which results from having the rates found in its collective bargaining agreements adopted as the prevailing wage by the Comptroller. This means that if the actual prevailing wage determined by the Comptroller is lower than the rate found in Local 32BJ's collective bargaining agreements, contractors who do not employ Local 32BJ's members, and thus are not bound by the wage rates found in its collective bargaining agreements, could potentially have an advantage over contractors who employ Local 32BJ's members in obtaining future contracts in the competitive bidding process. The purported loss of competitive advantage in the bidding process is an injury that would be incurred by Local 32BJ's members' employers, and only indirectly by the members themselves. Moreover, "competitive injury, in and of itself, does not confer standing to challenge an administrative determination" (*Matter of Subway Check Cashing Serv., Inc. v Considine*, 158 AD2d 406, 406 [1st Dept 1990]; citing *Matter of Dairylea Coop.*, 38 NY2d at 11).

Local 32BJ's reliance on *L&M Bus Corp.* is misplaced, as the facts of that case differed from those present here. It appears that the issue of intervention was only raised in the supreme court, and was not at issue on appeal. There, after noting that the union's "interest" in the

proceeding "must be found in the proposed intervenors' entitlement to the protection afforded by the employee protection provisions" (2008 NY Slip Op 31246 [U], at *13), and that the employment protection provisions sought to be inserted into bid specifications by the Department of Education were the "direct result of an agreement between Local 1181 and [the] DOE and other bus companies" (*id.* at *14). Thus, the court found that any "determination by the Court that the employment protection provisions in the ...bid specifications are unlawful, has a direct effect on the existing contracts under which Local 1181 members are currently employed" (*id.* at *15). Here, in contrast, Local 32BJ's members' existing contracts would not be directly affected by a determination that the July 2011 prevailing wage schedule was arbitrary and capricious. As such, *L&M Bus Corp.* does not support Local 32BJ's position with respect to intervention.

To the extent Local 32BJ's goal in intervening is to have the verified petition dismissed and the July 2011 prevailing wage determination implicitly upheld, such interest is adequately protected by the Comptroller's own diligent defense in this proceeding (*see Hope*,189 AD2d at 298). Furthermore, in the event the court ultimately grants the petition and remands the matter to the Comptroller for a new prevailing wage determination, Local 32BJ would be able to advance its interests at that time. The court is also cognizant of the fact that at least some of the arguments that Local 32-BJ advances in connection with its proposed motion to dismiss appear to revisit legal issues which were previously decided in the prior Article 78 proceeding. Although Local 32BJ stresses that it did not seek to intervene in that proceeding because the petition only sought to annul the Comptroller's prevailing wage schedule as it pertained to movers, Local 32BJ did, however, file a brief as amicus curiae which was considered by the Appellate Division in deciding *Metropolitan Movers II.*

To the extent Local 32BJ seeks to intervene to defend interests that go beyond the simple question of whether the Comptroller's July 1, 2011 prevailing wage determination was arbitrary and capricious, such interests are not legally cognizable within the meaning of CPLR 7802 (d). Although the court's ability to allow intervention in a CPLR article 78 proceeding is broad, its discretion is limited by the narrow scope of judicial review in such proceedings. The task of this court is only to determine whether the Comptroller's July 1, 2011 prevailing wage schedule was arbitrary and capricious, in that it was made without sound basis in reason or was generally made without regard to the facts (*see Metropolitan Movers II*, at *3). In performing this limited task, the court's review is "confined to the facts and record adduced before the agency" (*Featherstone v Franco*, 95 NY2d 550, 555 [2000] [*internal quotations omitted*]). Local 32BJ's intent to extend the scope of this proceeding beyond that permitted by CPLR article 78 is suggested by the arguments advanced in support of its proposed motion to dismiss. For example, in support of its contention that the Comptroller was entitled to rely on the terms of collective bargaining agreements as the basis of his prevailing wage determination, its attorney's affirmation offers descriptions of certain rate determinations made in 2009 and 2010, and submits copies of print-outs showing certain federal prevailing wage determinations issued by the Secretary of Labor (Doc. 14, Baker affirm. at ¶¶ 13-19; Doc. 14, exs. C-D, Federal wage determinations). It is worth noting that these submissions have been made at a time where the Comptroller has not yet filed an answer to the verified petition addressing the merits.

In light of the speculative and indirect nature of Local 32BJ's purported interest in the outcome of this proceeding, the complications that would result from granting its motion for leave to intervene, such as the necessity of resolving motions seeking essentially the same relief

and the fact that Local 32BJ's interest in obtaining dismissal of the verified petition is adequately protected by the Comptroller, the court concludes that Local 32BJ's motion for leave to intervene should be denied. However, denial of Local 32BJ's motion to intervene does not mean that the arguments raised in its papers should be entirely disregarded. Rather, in recognition of the possibility that Local 32BJ may be able to call to the court's attention law or fact that might otherwise escape its consideration, the court will deem Local 32BJ's motion as one also seeking permission to appear as amicus curiae (*see Kruger*, 1 Misc 3d at 196). Viewed as such, the motion is granted to the extent that the arguments raised by Local 32BJ in support of dismissal of the verified petition will be considered by the court when it ultimately reaches the merits.

5. Local 814's Motion to Intervene

Local 814's asserted interest in this proceeding is substantially the same as that claimed by Local 32BJ in that it argues that the relief sought by the petition could potentially result in a downward revision of the July 2011 prevailing wage determination, which, in turn, could negatively affect the ability of Local 814's members' employers to competitively bid on future government service contracts in New York City (Doc. 25, Local 814's memo. at 7). In addition, Local 814 argues that it has an interest in this proceeding because petitioners have purportedly challenged the "free speech activities that Local 814 has engaged in on behalf of its membership" and petitioners "go so far as to suggest that the order they seek from this Court is related to Local 814's peaceful protest activities relating to the wages its members receive" (*id.* at 3, 7). Unlike Local 32BJ, Local 814 claims to seek intervention under CPLR 1013 and 1014, rather than CPLR 7804 (d), the applicable provision for intervention in proceedings under CPLR article 78. Notwithstanding, the court will apply the same standards that were applied in connection with

Local 32BJ's motion to the instant motion.

For the same reasons provided above in connection with Local 32BJ's motion, the interests claims by Local 814 are too speculative and indirect to warrant granting its motion for leave to intervene in this proceeding as a party. The additional free speech and peaceful protest interests asserted by Local 814 also do not support granting leave to intervene, as such issues are not actually implicated by the claims at issue in the verified petition. The scope of this proceeding is limited to the question of whether the Comptroller's July 2011 prevailing wage determination was arbitrary and capricious. The resolution of this question has no effect on the rights asserted by Local 814 under the federal labor law.

Accordingly, Local 814's motion to intervene is denied. However, the court will deem the motion as one also seeking leave to file a brief as an amicus curiae, and as such, the motion is granted to the extent that the court will review the arguments raised by Local 814 in support of dismissal when it ultimately addresses the merits of the petition.

6. AFL-CIO/CLC's Motion for Leave to Appear as Amicus Curiae

Nonparty AFL-CIO/CLC moves for "leave to appear as amicus curiae" in this action based on their "keen[] interest[] in advocating for the protection of our State prevailing wage laws ..." (E-Filed Doc. 5, AFL-CIO/CLC memo. at 3). The other proposed intervenors, Local 814 and Local 32BJ, are both affiliates of the AFL-CIO/CLC. To the extent the AFL-CIO/CLC "seek to intervene as Amici Curiae in order to address the public policy implications raised by this proceeding, which reach far beyond the parties to this proceeding" (*id.* at 3), they have not satisfied CPLR 7814 (d) by showing a "real and substantial interest" beyond that which is being advanced by their affiliated intervenors. However, even where intervention is denied, the

proposed-intervenor may still be permitted to appear as amicus curiae (*see Kruger v Bloomber*, 1 Misc 3d 192, 196 [Sup Ct, NY County 2003]; citing *Finkelstein, Mauriello, Kaplan & Levine v McGuirk*, 90 Misc 2d 649, 650-651 [Sup Ct, Orange County 1977]). An amicus curiae is "one who, as a standerby, when a judge is in doubt or mistaken in a matter of law, may inform the court" (*id.* at 195; quoting *Kemp v Rubin*, 187 Misc 707, 708 [Sup Ct, Queens County 1946]). Unlike one who successfully intervenes, an amicus curiae is not a party, and cannot assume the functions of a party (*id.* at 196). It "must accept the case before the court with issues made by the parties, and may not control the litigation" (*id.*; quoting *Kemp*, 187 Misc at 709). "The function of an 'amicus curiae' is to call the court's attention to law or facts or circumstances in a matter ... that might otherwise escape its consideration ..." (*id.* at 195-196; quoting *Kemp*, 187 Misc at 709).

Although it seems dubious that AFL-CIO/CLC would be calling the court's attention to any law or facts that would not be pointed out by the Comptroller, Local 814 or Local 32-BJ, the court nonetheless grants AFL-CIO/CLC's motion and will consider its brief when ultimately assessing the merits of the petition.

7. Local 32BJ and Local 814's Motions to Dismiss

The motions to dismiss filed by Local 32BJ and Local 814 have been rendered academic by the court's denial of each of their respective motions to intervene. While the court will take the arguments raised in support of those motions into consideration in addressing the merits of the petition, the motions to dismiss are denied in their entirety.

Accordingly, it is

ORDERED that the respondent Comptroller's cross motion to dismiss on the basis of

petitioners' lack of standing is denied and the Comptroller is directed to serve an answer to the petition within 30 days of service of notice of entry of the instant decision and order; and it is further

ORDERED that upon the Comptroller's service of his answer, or, if no answer is filed, after the 30 day period for answering the verified petition has expired, petitioners may re-notice the matter for hearing upon 2 days' notice, or the Comptroller may re-notice the matter for hearing upon service of the answer upon 7 days' notice, and petitioners may raise any objections in point of law to new matters contained in the answer by setting it forth in their reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard, pursuant to CPLR 7804 (f); and it is further

ORDERED that the branch of proposed intervenor Local 32BJ's motion, filed under motion sequence number 002, seeking leave to intervene as a party in this proceeding is deemed as one also seeking permission to submit a brief as amicus curiae, and is granted solely to the extent that the court may consider Local 32BJ's papers in deciding the merits of the verified petition and otherwise is denied in its entirety; and it is further

ORDERED that the branch of proposed intervenor Local 32BJ's motion, also filed under motion sequence number 002, seeking dismissal of the verified petition is denied in its entirety; and it is further

ORDERED that the proposed intervenor Local 814's motion, filed under motion sequence number 003, seeking dismissal of the verified petition is denied in its entirety; and it is further

ORDERED that the proposed intervenor Local 814's motion, filed under motion

sequence number 004, seeking leave to intervene as a party in this proceeding is deemed as one also seeking permission to submit a brief as amicus curiae, and is granted solely to the extent that the court may consider Local 814's papers in deciding the merits of the verified petition and otherwise is denied in its entirety; and it is further

ORDERED that AFL-CIO/CLC's motion, filed under motion sequence number 005, seeking permission to submit a brief as amicus curiae is granted; and it is further

ORDERED that the Comptroller's various cross motions seeking to stay the motions filed under sequence number 002, 003 and 004, or in the alternative, additional time to address the merits of those motions in the event the court denies his request for a stay, are each denied in their entirety.

This constitutes the decision and order of the court.

Dated: August 14, 2012
New York, New York

Paul G. Feinman
J.S.C.

(2012 Pt 12 D&O_107755_2011_001_002_003_004_005_daz[art78_prevailingwage])