Garcia v New York City Dept. of Health & Mental Hygiene
2015 NY Slip Op 32601(U)
December 16, 2015
Supreme Court, New York County
Docket Number: 161484/2015
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

MAGDALENA GARCIA, individually and on behalf of her minor child PS, CLEMENCE RASIGNI, individually and on behalf of her minor child RN, LYNN ROSENGER, individually and on behalf of her minor children MR and RR, MICHELLE CARROLL, individually and on behalf of her minor child EP, and GABRIELLE JAKOB, individually and on behalf of her minor children AG and DG,

Plaintiffs-Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. MARY TRAVIS BASSET in her Official Capacity as Commissioner of the New York City Department of Mental Health and Hygiene,

Defendants-Respondents.

INDEX NO. 161484/2015
MOTION DATE 11-25-2015
MOTION SEQ. NO 001
MOTION CAL. NO

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

The following papers, numbered 1 to 9 were read on this Order to Show Cause for injunctive and declaratory relief.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 8, 9
Replying Affidavits	

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Petitioners' motion by Order to Show Cause to permanently enjoin Respondents from implementing and enforcing the amendments to §§ 43.17(a)(2)(B) and 47.25(a)(2)(B) of the New York City Health Code (herein "Amendments") as they are invalid and unlawful is granted, Respondents' pre-answer Cross-Motion dismissing the Petition is denied in its entirety.

In 2013, then Mayor Michael Bloomberg directed the Commissioner of the New York City Department of Health and Mental Hygiene - Mary T. Basset - and the New York City Board of Health to adopt the Vaccine Powers Rule which requires New York City children attending a day care or aged 6 months to 59 months to annually be administered an influenza vaccine. The Petitioners are New York City residents suing on behalf of their infant children who will be forced to receive the influenza vaccine pursuant to the Amendments.

Article 43 of the New York City Health Code applies to educational institutions "providing a compulsory education for children in grades one through twelve, and where more than six children ages three through five are provided instruction, but shall not

include a child care service defined in Article 47 of this Code," including public, non-public, chartered or other school or school facility recognized under the State Education Law and/or that has been determined by the State Education Department or the New York City Department of Education." The amendment to § 43.17(a)(2)(B) states:

> (2) Immunizations.
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> ...
>
> "(B) (i) Children aged from 6 months to 59 months shall be immunized each year before December 31 against influenza with a vaccine approved by the U.S Food and Drug Administration as likely to prevent infection for the influenza season that begins following July 1 of that calendar year, unless the vaccine may be detrimental to the child's health, as certified by a physician licensed to practice medicine in this state, or the parent, parents, or guardian of a child hold genuine and sincere religious beliefs which are contrary to the practices herein required. The principal or person in charge of a school may require additional information supporting either exemption.
>
> (ii) Except where prohibited by law, the principal or person in charge of a school may after December 31 refuse to allow any child to attend such school without acceptable evidence of the child meeting the requirements of clause (i) of this subparagraph. A parent, guardian, or other person in parental relationship to a child denied attendance by a principal or person in charge of a school may appeal by petition to the commissioner. A child who first enrolls in a school after June 30 of any year is not required to meet the requirements of clause (i) of this paragraph for the flu season that ends before July 1 of that calendar year.
>
> (C) A school that fails to maintain documentation showing that each child in attendance has either received each vaccination required by this subdivision or is exempt from such a requirement pursuant to paragraph A or B of this subdivision will be subject to fines for each child not meeting such requirements, as provided for under this Code.
>
> (D) All children shall have such additional immunizations as the Department may require."

Article 47 of the New York City Health Code defines child care services as " any program providing child care for five (5) or more hours per week, for more than 30 days in a 12-month period, to three (3) or more children under six (6) years of age," but specifically excludes "[a]ny State-regulated informal child care program, a group family or family day care home, or school age child care program, or a foster care program" from the meaning of child care services (see New York City Health Code § 47.01[c][1] and [c][2][a]-[f]). The amendment to § 47.25(a)(2)(B) states:

"(B) (i) Children aged from 6 months to 59 months shall be immunized each year before December 31 against influenza with a vaccine approved by the U.S. Food and Drug Administration as likely to prevent infection for the influenza season that begins following July 1 of that calendar year, unless the vaccine may be detrimental to the child's health, as certified by a physician licensed to practice medicine in this state, or the parent, parents or guardian of a child hold genuine and sincere religious beliefs which are contrary to the practices herein required. The permittee may require additional information supporting either exemption.
(ii) The permittee may refuse to allow any child to attend a child care service without acceptable evidence of the child meeting the requirements of clause (i) of this subparagraph. A parent, guardian, or other person in parental relationship to a child denied attendance by a permittee may appeal by petition to the commissioner. A child who first enrolls in a child care service after June 30 of any year is not required to meet the requirements of clause (i) of this paragraph for the flu season that ends before July 1 of that calendar year.

(C) A school that fails to maintain documentation showing that each child in attendance has received each vaccination required by this subdivision or is exempt from such a requirement pursuant to paragraph A or B of this subdivision will be subject to fines for each child not meeting such requirements as provided for under this Code.

(D) All children shall have such additional immunizations as the Department may require."

The Amendments only apply to approximately 2,200 out of 11,500 licensed and registered child care facilities within New York City and do not apply to over 20,000 legally exempt child care facilities within New York City (see Petition, Exhibits B & C).

Petitioners bring this special proceeding pursuant to CPLR §§ 3001 and 7803 seeking declaratory and injunctive relief. In the Petition, the Petitioners' First cause of action seeks relief enjoining the Respondents from implementing and enforcing the Amendments because Respondents lack the statutory authority to implement the same. The Second cause of action in the Petition seeks a declaration invalidating §§ 558 and 1043 of the New York City Charter as unconstitutional to the extent that these sections improperly delegate legislative powers to the Respondents.

Petitioners contend that there is no statutory authority for the enactment of the Amendments, and that the Respondents violated §§ 613, 2164 and 2165 of the New York State Public Health Law by mandating that New York City children aged 6 months to 59 months receive a vaccine not explicitly stated within the New York State Public Health Law.

Petitioners now move by Order to Show Cause for an Order seeking to (1) permanently enjoin and restrain Respondents from implementing or enforcing the Amendments and declaring that the Amendments are unlawfully ultra vires; (2) alternatively, declaring that §§ 558 and 1043 of the New York City Charter violate the separation-of-powers doctrine and are unconstitutional to the extent these sections are found to have improperly delegated legislative authority to Respondents; and (3) alternatively, preliminarily enjoining and restraining Respondents from implementing or enforcing the Amendments.

Petitioners claim that they will be irreparably harmed if Respondents are allowed to implement and enforce the Amendments because their children will be excluded from daycare/pre-school. Children will suffer social and emotional trauma by being deprived of critical development that occurs in daycare/pre-school. The parents of these excluded children will suffer economic hardships by having to forego their jobs and careers in order to care for their excluded children.

Respondents oppose the motion and make a pre-answer cross-motion for an Order dismissing the Petition pursuant to CPLR §3211(a)(5) and (7), and § 7804(f). Respondents argue that this special proceeding is untimely because the Amendments became effective in January 2014 and this special proceeding was commenced on November 19, 2015 well beyond the four months statute of limitations required for commencing a proceeding appealing a final determination of a government agency (see CPLR § 217[1]). Respondents also claim that this proceeding is barred by the doctrine of laches due to Petitioners' delay of almost two years in commencing this special proceeding.

Respondents' final argument is that the First and Second causes of action fail to state a claim upon which relief may be granted. Specifically, Respondents contend that this special proceeding is untimely and barred by the doctrine of laches; that Respondents have the statutory authority to implement and enforce the Amendments; that the Amendments meet the four-part test as stated in the Court of Appeals case Boreali v. Axelrod, 71 N.Y.2d 1,517 N.E.2d 1350, 523 N.Y.S.2d 464 [1987]); and that New York State properly delegated to Respondents the authority to protect the public and amend the Health Code through § 558 of the New York City Charter and §17-709(a) of the New York City Administrative Code.

Respondents contend that the First Cause of Action in the Petition fails to state a cause of action. Specifically, Respondents assert that the New York City Administrative Code § 17-109 - a statute enacted by the New York State Legislature over 150 years ago - allows Respondents to mandate vaccines. Alternatively, Respondents argue that the Amendments are not preempted because there is no conflict between the Amendments and New York State law.

Respondents claim that the Petitioners' Second Cause of Action - that the New York City Charter §§ 558 and 1043 are unconstitutional and violate the separations of powers doctrine by unlawfully delegating its legislative authority to the executive branch fails to state a claim because the New York State Legislature delegated the authority of protecting the public health to Respondents pursuant to § 558 of the New York city Charter and § 17-109 of the New York City Administrative Code.

§ 206(1)(l) of the New York State Public Health Law requires, in part, that the Commissioner of the New York State Department of Health "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health. Such programs may include the purchase and distribution of vaccines to providers and municipalities, the operation of public immunization programs, quality assurance for immunization related activities and other immunization related activities. The commissioner may promulgate such regulations as are necessary for the implementation of this paragraph." However, it states nothing in § 206(1)(l) "shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter."

Article 6 of the New York State Public Health Law addresses State aid to municipalities for basic services. § 613 addresses state aid for immunizations, and requires the commissioner to "develop and supervise the execution of a program of immunization, surveillance and testing, to raise to the highest reasonable level the immunity of the children of the state against communicable diseases including, but not limited to, influenza, poliomyelitis, measles, mumps, rubella, haemophilus influenzae type b (Hib), diphtheria, pertussis, tetanus, varicella, hepatitis B, pneumococcal disease, and the immunity of adults of the state against diseases identified by the commissioner, including but not limited to influenza, smallpox, hepatitis and such other diseases as the commissioner may designate through regulation" (see NYS PHL § 613[1][a]). However, § 613(1)(c) explicitly states that "[n]othing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter."

§ 2164 of the New York State Public Health Law explicitly mandates "immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B." § 2164 does not list the influenza vaccine mandated by the Amendments. § 2164(10) states that the "commissioner may adopt and amend rules and regulations to effectuate the provisions and purposes of this section," but does not grant the commissioner the power to add new vaccines absent New York State legislative amendments.

§ 2165 of the New York State Public Health Law applies to colleges and universities as defined by § 2 of the education law. § 2165 explicitly mandates specific vaccines for college students - not including the flu shot - and allows the commissioner to "adopt and amend rules and regulations to effectuate the provisions and purposes of [§ 2165]," but does not grant the commissioner the authority to mandate new vaccines.

Nothing within the cited New York State Public Health Law sections allows the Commissioner of the State Department of Health or municipalities to mandate vaccines that are not explicitly authorized under § 2164 and § 2165 absent New York State legislative amendments.

In opposition, Respondents argue that the New York State Legislature specifically empowered Respondents to adopt Health Code amendments pursuant to § 17-109 of the New York City Administrative Code, which states, in relevant part, that the New York City Department of Health and Mental Hygiene is "empowered to collect and preserve pure vaccine lymph or virus, produce diphtheria antitoxin and other vaccines and antitoxins, and add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases."

Petitioners correctly argue that Respondents' reliance on § 17-109 is misplaced. "The legislature is presumed to be aware of the law in existence at the time of an enactment, as well as of the effect and implications of its own enactments," and general statutes "must yield to later, more specific statutes" (Wager v. Pelham Union Free Sch. Dist., 108 A.D.3d 849, 66 N.Y.S.2d 126 [2nd Dept., 2013]). "Where, as here, a special statute is in conflict with a general act covering the same subject matter, the special statute controls the case and repeals the general statute insofar as the special act applies" (Velez v. Port Authority of New York and New Jersey, 111 A.D.3d 449, 450, 974 N.Y.S.2d 417, 419 [1st Dept., 2013]).

Assuming that the 150 year-old statute - § 17-109 - permitted Respondents to mandate new vaccines to effectively prevent the spread of communicable diseases, § 17-109 must yield to the more recent and more specific statutes - §§ 206, 613, 2164, and 2165 of the New York State Public Health Law, which do not mandate the influenza vaccines required by the Amendments, or give Respondents the statutory authority to mandate new vaccines without prior enactments from the New York State legislature.

Respondents also argue that they have separate and independent authority to enact the Amendments. Respondents claim that their "adoption of the Health Code amendments merely filled in the details set forth in Charter §§ 556 and 558" (see NYSCEF Doc. No. 34, Pg. 6). However, §§ 556 and 558 of the New York City Charter "reflect only a regulatory mandate, not legislative authority" (Matter of New York Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d 681, 694, 16 N.E.3d 538, 544, 992 N.Y.S.2d 480, 486 [2014]). The Court of Appeals further stated that § 558(b) of the New York City Charter "contains no suggestion that the Board of Health has the authority to create laws. While the Charter empowers the City Council to adopt local laws ... for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants (N.Y. City Charter § 28[a]), the Charter restricts the Board's rulemaking to the publication of a health code, an entirely different endeavor." (Id.).

The New York State Legislature retains the statutory authority to mandate vaccinations not already expressed within the Public Health Law. This is not a situation where it is "difficult-to-demarcate [the] line between administrative rulemaking and legislative policymaking," thereby requiring a "Boreali" analysis (New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene, 110 A.D.3d 1, 8, 970 N.Y.S.2d 200, 207[1st Dept., 2013]).

To establish, prima facie, entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor (International Shoppes, Inc. v At the Airport, LLC, 131 A.D.3d 926, 938, 16 N.Y.S.3d 72 [2nd Dept., 2015]).

Petitioners establish that the Amendments threaten to violate their rights by mandating the flu shot for children between the ages of 6 months to 59 months which is in direct violation of the New York State Public Health Law. Petitioners have no other adequate remedy at law. If the Amendments are implemented and enforced Petitioners will be irreparably harmed by being forced to have their children take the flu shot or forego day care and/or pre-kindergarten. The equities favor enjoining Respondents from implementing and enforcing the Amendments.

The Respondents actions in enacting the Amendments are not contemplated in the statute and are outside of the law. The relief sought in Petitioners' motion by Order to Show Cause seeking a permanent injunction enjoining Respondents from implementing and/or enforcing the Amendments as unlawful is granted.

The portion of Respondents' cross-motion to dismiss this special proceeding as time barred and barred by the doctrine of laches is denied.

In *Faison v. Lewis* (25 N.Y.3d 220, 32 N.E.3d 400, 10 N.Y.S.3d 185 [2015]), the Court of Appeals addressed the issue of whether an action to set aside and cancel a mortgage interest conveyed on the authority of a forged deed may be time-barred where the forged deed was null and void ab initio. The Court applied the holdings in *Marden v. Dorthy* (160 N.Y. 39, 53, 54 N.E. 726 [1899]), that a legal nullity at its creation is never entitled to legal effect because void things are as no things, and *Riverside Syndicate, Inc. v. Munroe* (10 N.Y.3d 18, 24, 853 N.Y.S.2d 263, 882 N.E.2d 875 [2008]), that a statute of limitations does not make an agreement that was void at its inception valid by the mere passage of time to hold that "a statute of limitations cannot grant legal significance to a document expressly rejected under the law; it cannot be deployed to validate what the law has never recognized" (Id., 228).

Here, this Court has determined that Respondents lacked the statutory authority pursuant to New York State's Public Health Law to mandate the Amendments, and that Respondents' reliance on § 17-109 of the New York City Administrative Code must yield to the more recent and more specific statutes - §§ 206, 613, 2164, and 2165 of the New York State Public Health Law. Therefore, the Amendments were improper ab initio, and must not be given legal significance or validated through the passage of time.

The four month statute of limitations imposed by CPLR § 217(1) for commencing this special proceeding may not be asserted by Respondents to bar this special proceeding as untimely.

"Laches and limitations are not the same. Limitations involve the fixed statutory periods within which actions must be brought, while laches signifies a delay independent of statute" (Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 816, 798 N.E.2d 1047, 1055, 766 N.Y.S.2d 654, 662 [2003]). Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" requiring a showing of prejudice (Id.).

Respondents contend that Petitioners' almost two-year delay in commencing this special proceeding gives rise to a significant delay within the doctrine of laches. However, Respondents fail to show how they are prejudiced by the delay. Respondents argue that they have invested hundreds of thousands of dollars in promoting and implementing the Amendments (see NYSCEF Doc. No. 28); but Respondents are required as a condition for receiving State aid for immunizations (see NYS PHL § 613[2]) to conduct "an annual survey to determine the immunization level of children entering school, and [to] conduct annually an audit of such survey and an audit of the immunization level of children attending school." Municipalities are required to submit a plan to the State Department of Health detailing "the results of th[e] survey of the immunization level of children entering schools in such local school districts." The Public Health Law also mandates that the Respondents, in conjunction with the Commissioner of the New York State Department of Health, "administer a program of influenza education to the families of children ages six months to eighteen years of age who attend licensed and registered day care programs, nursery schools, pre-kindergarten, kindergarten, school age child care programs, public schools or non-public schools" (NYS PHL § 613[1][b]).

Respondents were already required by State law to promote, educate, and administer - when requested - the flu shot. Prior to enacting the Amendments, the Respondents engaged in public campaigns to promote the influenza vaccine, including to the preschoolers. Similarly, prior to the Amendments, Respondents conducted inspections of preschools located within New York City. They would have incurred the costs of these campaigns in any event.

Their claims that they embarked on a costly public education campaign and inspection program is not persuasive. They offer no proof that distinguishes the additional costs associated with implementing the Amendments from the actual costs of promoting, educating, and administering the flu shot as mandated by the New York Public Health Law § 613(2). Respondents fail to show how they were prejudiced by Petitioners' delay in commencing this special proceeding.

Accordingly, it is ORDERED, that Petitioners' motion by Order to Show Cause is granted, and it is further,

ORDERED, that Respondents are permanently enjoined from implementing and enforcing the amendments to §§ 43.17(a)(2)(B) and 47.25(a)(2)(B) of the New York City Health Code as these are not lawful in accordance with §§ 206, 613, 2164 and 2165 of the New York State Public Health Law, and it is further,

ORDERED, that Respondents' cross-motion seeking dismissal of the First and Second Causes of action asserted in the Petition is denied in its entirety.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: December 16, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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