Roman Catholic Diocese of Albany, N.Y. v Vullo
2018 NY Slip Op 33829(U)
December 28, 2018
Supreme Court, Albany County
Docket Number: 2070-16
Judge: Jr., Richard J. McNally

[* 1]

At a IAS Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 27th day of December, 2018.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs,

-against-

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; CAPITAL DISTRICT PHYSICIANS' HEALTH PLAN, INC.; CDPHP UNIVERSAL BENEFITS INC.; HEALTHNOW NEW YORK INC.; UNITEDHEALTH CARE OF NEW YORK, INC.; MVP HEALTH CARE, INC.; EXCELLUS HEALTH PLAN, INC.; INDEPENDENT HEALTH ASSOCIATION, INC.,

Defendants.

DECISION AND ORDER
Index No. 2070-16

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.;

Plaintiffs,

-against-

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; AND NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

DECISION AND ORDER
Index No. 7536-17

APPEARANCES:

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MCNALLY, J.

Pending before the Court is a consolidated matter whereby plaintiffs, employers affiliated with the Catholic Church or similar religious denominations, are challenging a regulation adopted by New York State Department of Financial Services ("NYSDFS"). The regulation at issue involves insurance coverage which plaintiffs collectively argue contains an "undisclosed" requirement to provide abortion services thereby imposing a substantial burden on their core religious beliefs. Both matters (Action No. 1 - Index No. 2070-16 and Action No. 2 - Index No. 7536-17) (hereinafter "Action 1" and "Action 2") have dispositive motions pending.[1] Plaintiffs oppose dismissal of their actions as sought by defendants. The Court has heard oral argument and has accepted supplemental submissions by the parties.

Plaintiffs' consolidated action contains a number of challenges, under the New York State and Federal Constitutions, involving what plaintiffs term an "abortion mandate" by New York State. Plaintiffs assert the "abortion mandate" forces church institutions, employers, and individuals, to provide health insurance to their employees which cover abortion and abortion related services. Plaintiffs state the mandate places them at the center of the following moral dilemma: on the one hand abortion is in direct conflict with the teachings of their respective faiths; while on the other hand the parties believe they have a moral duty to consider the well-being of their employees which necessarily includes providing just wages and benefits such as health insurance. Plaintiffs argue defendants have surreptitiously mandated coverage for abortion under the service category of "medically necessary" surgery. This was not disclosed to

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[1] The causes of action in the Amended Verified Complaint in Action 1 and Verified Complaint in Action 2 are nearly identical. The Verified Complaint in Action 2 contains a separation of powers argument (Sixth Cause of Action) not contained in the Amended Verified Complaint in Action 1.

plaintiffs, who now claim they have unwittingly providing for the funding of objectionable coverage by the payment of premiums and co-pays.

Pursuant to the statutory and regulatory framework found within New York State's Insurance Law, abortion and abortion related services must be covered. Under the Insurance Law the NYSDFS's Superintendent is authorized to promulgate regulations "necessary or desirable to establish minimum standards . . . for the form, content, and sale" of health insurance polices (Insurance Law § 3217). Pursuant to New York Insurance Law § 3221, health insurance policies providing major medical or comprehensive-type coverage to be delivered or issued in New York State are regulated as to form and content by the NYSDFS. Health insurance providers are regulated, pursuant to Insurance Law § 4303, which dictates policy coverage, language, and benefits.

Plaintiffs "abortion mandate" moniker is derived, in part, from the adoption of an amendment to the Insurance Department's regulations which states the following:

> (1) Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16 (c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, **insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.**
>
> (2) Section 52.16 (o) of this Part makes explicit that group and blanket **insurance policies that provide hospital, surgical, or medical expense coverage delivered or issued for delivery in this State shall not exclude coverage for medically necessary abortions.** Section 52.16 (o) of this Part also provides for an optional, limited exemption for religious employers as provided in that section while ensuring that coverage is maintained for any insured seeking a medically necessary abortion (11 NYCRR § 52 (p)) (emphasis added).

Likewise, plaintiffs point to "model language" issued by NYSDFS, on September 2017,

requiring employers offering health insurance benefits, to include in their renewal contracts the following:

> We Cover medically necessary abortions including abortions in cases of rape, incest or fetal malformation. [We Cover elective abortions [for one (1) procedure per Member, per [calendar year; Plan Year].

As a result of the above, plaintiffs filed the instant actions and this matter ensued.

It is well settled that "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" *(Napierski v Finn*, 229 AD2d 869, 870 [3d Dept 1996] [internal quotation marks and citations omitted]). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (*Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The evidence must be construed in a light most favorable to the party opposing the motion (*Dykstra v Winridge Condominium One*, 175 AD2d 482 [3d Dept 1991]). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Initially, the Court must address whether plaintiffs State and Federal Constitutional claims must be dismissed given the Court of Appeals decision in *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510 [2006]) (hereinafter "*Catholic Charities*"). In *Catholic Charities*, plaintiffs were faith-based organizations affiliated with the Catholic Church and challenged the New York State Legislature's enactment of the Women's Heath and Wellness Act

("WHWA"). The WHWA required employer health insurance contracts to include coverage for the cost of contraceptives for its employees. The WHWA did provide an exemption for religious employers so long as they met certain criteria which would enable them to contract for a plan that did not contain such coverage. However, plaintiffs in *Catholic Charities* did not qualify for the exemption (*Catholic Charities of Diocese of Albany*, 7NY3d at 520).

Given the religious organization's moral objection to the mandatory coverage for contraceptives, plaintiffs in *Catholic Charities* argued the legislation compelled them to violate their religious beliefs and was otherwise unconstitutional. Ultimately, the Court of Appeals rejected plaintiffs' claims (*Catholic Charities of Diocese of Albany,* 7 NY3d 510).

Defendants urge this Court to dismiss plaintiffs' constitutional claims based upon the precedent set forth in the Court of Appeal's holding in *Catholic Charities*. This Court, of course, is obligated to follow the determinations of the Court of Appeals. "In order for a statement of law made by the Court of Appeals to have a binding effect, . . . [the Court] must have addressed an issue that was before" it (*Robinson Motor Xpress, Inc., v HSBC Bank, USA*, 37 AD3d 117, 123 [2d Dept 2006]) (citations omitted). "Principals are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision" (*Robinson Motor Xpress, Inc.*, 37 AD3d at 123) (citations omitted).

Here, plaintiffs attempt to preserve their State and Federal Constitutional claims by arguing the following distinguishing factors. First, plaintiffs argue the claims in *Catholic Charities* were disposed on a motion for summary judgment, here defendants have filed motions

to dismiss. The Court would note that since defendants filed their motion to dismiss in Action 1, the Court converted it to a motion for summary judgment. In Action 2, plaintiffs have cross-moved for summary judgment. The Court does not consider the procedural posture of this case to be a distinguishing factor from that of *Catholic Charities*.

Plaintiffs also contend that the plaintiffs in *Catholic Charities* challenged a statute (i.e. the WHWA) whereas here, plaintiffs are challenging a regulation. Contrary to plaintiffs' argument, a duly promulgated regulation has the same force of law as a statute (*Raffellini v State Farm Mut. Auto Ins. Co.*, 9 NY3d 196, 201 [2007]). Thus, the Court finds the challenges in both cases to be similar in this regard.

Next, plaintiffs assert that the regulation in this case does not contain a "carve-out" exemption similar to the one contained in the WHWA. Defendants counter plaintiffs' claim by demonstrating that the regulation was amended to include an exemption similar to the exemption addressed in *Catholic Charities* (11 NYCRR § 52.1 (p) (2)).

Finally, petitioners most notably argue the two cases are different in that this case involves abortion and *Catholic Charities* dealt with coverage for contraceptives. Literally speaking, the use of contraceptives, to prevent pregnancy, is obviously different than abortion, the act of terminating a pregnancy. Legally, however, petitioners' claims challenging medical coverage for both contraceptives and abortion are identical. Plaintiffs believe contraceptives and abortion to be a moral "evil" and the legal mandate compelling coverage for the same a violation of their core religious beliefs causing a deprivation of rights.

The Court finds the constitutional claims challenged in this case to be same as those

raised in *Catholic Charities*. Given that the Court of Appeal's addressed and rejected the same arguments, *Catholic Charities* is binding precedent requiring dismissal of plaintiffs constitutional claims in this matter.

As for plaintiffs consolidated action, in the only remaining claim, plaintiffs argue the "abortion mandate" violates the separation of powers and rule making provision of Article III, § 1, and Article IV, § 8 of the New York State Constitution.

The Court of Appeals, in *Matter of LeadingAge N.Y., Inc., v Shah* (2018 NY Slip Op 06965 [2018]), recently enunciated the following:

> The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions. This principle requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies. Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator. Thus, a legislature may enact a general statute that reflects its policy choice and grants authority to an executive agency to adopt and enforce regulations that expand upon the statutory text by filling in details consistent with that enabling legislation. If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers (*Matter of LeadingAge N.Y., Inc.* at *11-12) (internal quotation marks and citations omitted).

Plaintiffs argue the "abortion mandate" is an improper delegation of legislative authority to an administrative agency. The nature of the inquiry as it relates to such an allegation is whether the legislative branch of government intended, as evidenced by the scope and language of the enabling legislation, "to grant regulatory authority over a specific subject matter to an administrative agency which exists as part of the coequal executive branch" (*Boreali v Axelrod*,

71 NY2d 1, 15 [1987]).

The *Boreali* factors include (1) whether the agency merely "balance[d] costs and benefits according to preexisting guidelines," or instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems", (2) whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance", (3) "whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve", and (4) whether any "special expertise or technical competence" was involved in the development of the challenged regulation (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610-612 [2015]). These factors are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power (*Greater N.Y. Taxi Assn.* 25 NY3d at 612).

The Court has considered the *Boreali* factors. Here, the Financial Services Law §§ 202 (a) and 302 provide the NYSDFS's Superintendent with substantial authority to promulgate regulations. Section 3217 of the Insurance Law expressly authorizes the Superintendent to issue regulations that establish minimum standards for health insurance policies issued in New York State. As stated above, the insurance regulations require that all basic and major medical health care policies issued in New York State provide coverage for surgical services (11 NYCRR § 52). As a result, insurance polices that provide hospital, surgical, or medical expense coverage are required, under the law, to include coverage for abortions that are medically necessary. The promulgation of 11 NYCRR § 52 (p) is derived from the above statutory mandates and thus is

not an improper delegation of legislative authority to NYSDFS.

Turning now to plaintiffs' request for a preliminary injunction, a court evaluating a motion for a preliminary injunction must be mindful that "[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (*Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]) Further, "the remedy is considered a drastic one, which should be used sparingly" (*McLaughlin, Piven, Vogel v. Nolan & Co.*, 114 AD2d 165, 172 [2d Dept 1986]). As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*Doe v Axelrod*, 73 NY2d 748 [1988]). The court must determine if the moving party has established a likelihood of success on the merits, that it will suffer irreparable harm if the relief is not granted, and that equities weigh in the moving party's favor (CPLR § 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Plaintiffs preliminary injunction application seeks to prevent enforcement of the "abortion mandate" implemented by NYSDFS. Plaintiffs argue they have met the threshold requirement for a preliminary injunction. Given this Court's determination that *Catholic Charities* is binding precedent, plaintiffs can not established a likelihood of success on the merits or that plaintiffs will suffer irreparable harm if the relief sought is not granted. Likewise, this Court finds, when balancing the equities in this matter, granting the preliminary injunction would only serve to limit the health, medical, and reproductive rights of women insured by plaintiffs, which goes against this State's strong commitment to protecting such rights. Therefore plaintiffs' application for a preliminary injunction must be denied.

The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination (*Hubbard v County of Madison*, 71 AD3d 1313 [3d Dept 2010]).

It is hereby,

ORDERED, that summary judgment is granted and the consolidated action is hereby dismissed.

This shall constitute the Decision and Order of the Court. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR § 2220. The parties are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED!

ENTER.

Dated: December 28, 2018
Albany, New York

RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

Action No. 1

1. Verified Complaint dated April 29, 2016.

2. Notice of Motion dated September 30, 2016, Affirmation of Rachel Maman Kish, Esq., with annexed exhibit, Memorandum of Law.

3. Amended Verified Complaint dated October 26, 2016.

4. Notice of Cross-Motion dated December 28, 2016, Affirmation of Michael L. Costello, Esq., with annexed exhibits, Affidavit of Edward B. Scharfenberger with annexed exhibits, Affidavit of Sister Robert Mullen with annexed exhibits, Affidavit of Kevin

Pestke, Affidavit of Charles Caccavale, affirdavit of William H. Love with annexed exhibit, Affidavit of Terry R. Lavalley with annexed exhibits, Affidavit of Ann L. Nolte, Affidavit of Patrick T. Murnane with annexed exhibit, Affidavit of John Fontanella, Memorandum of Law.

5. Letter by Rachel Maman Kish, Esq,, dated November 16, 2016.

6. Reply Memorandum of Law submitted by Rachel Maman Kish, Esq. Dated January 23, 2017.

7. Reply Affirmation of Michael L. Costello, Esq., dated January 26, 2016, Memorandum of Law.

Action No. 2

1. Verified Complaint dated November 21, 2017.

2. Notice of Motion dated February 2, 2018, Affirmation of Adrienne J. Kerwin, Esq. with annexed exhibits, Memorandum of Law.

3. Notice of Cross-Motion dated May 17, 2018, Affirmation of Michael L. Costello, Esq., in Opposition to Defendants' Motion and in Support of Plaintiffs' Cross-Motion for Summary Judgment with annexed exhibits, Affidavit of Edward B. Scharfenberger in Opposition to Defendants' Motion and in Support of Plaintiffs' Cross-Motion for Summary Judgment with annexed exhibits, Memorandum of Law

4. Reply Memorandum of Law submitted by Adrienne J. Kerwin, Esq. and Helena O. Pederson, Esq. dated May 31, 2018.

5. Letter by Michael L. Costello, Esq. dated October 25, 2018 with exhibit.