

Polydor v Kellenberg Mem. High School

2011 NY Slip Op 32403(U)

September 1, 2011

Supreme Court, Nassau County

Docket Number: 16841/10

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ANDREA POLYDOR and PAUL POLYDOR, on
behalf of JP, a minor,

TRIAL / IAS PART 30
NASSAU COUNTY

Plaintiffs,

Index No. 16841/10

- against -

HEARING

KELLENBERG MEMORIAL HIGH SCHOOL,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	_____
Answering Affidavits	_____
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	<u>1</u>
Defendant's / Respondent's	<u>2</u>

The plaintiffs parents seek a preliminary injunction. The plaintiffs claim a statutory right under Public Health Law § 2164 (9) to a vaccine exemption for genuine and sincere religious beliefs, and their right to freedom of religion protected by the First Amendment of the United States Constitution. The defendant high school opposes issuance of a preliminary injunction. The defense contends the plaintiffs failed to carry their burden to establish genuine and sincere religious beliefs which form the alleged basis of their religious objection to vaccinations of their child. This Court carefully reviewed and considered the testimony and other evidence elicited at a hearing together with the all of the parties' post hearing papers submitted by the with respect to this matter.

Fact Findings

The plaintiffs submitted a February 13, 2008 vaccination exemption letter to the defendant on or

about January 29, 2010. The defendant denied the plaintiffs' that religious exemption application in a June 7, 2010 letter. The plaintiffs moved by order to show cause on or about September 1, 2010 seeking a restraining the defendant from precluding their child's attendance at the high school pending a hearing on the matter. This Court held a preliminary injunction hearing on March 24, 2011.

The plaintiff mother testified she used to believe in the system placing trust in the United States Food and Drug Administration and the system, but she now realized to put her trust in faith, in God and in her own judgment for the three children as what is best for them. The plaintiff mother stated she realized she had blindly followed an incorrect path for her children's health. The plaintiff mother admitted the infant plaintiff had not been inoculated with all of the required vaccines, but the child had been immunized on multiple occasions prior to the parental health concern about vaccinations, including immunizations for poliomyelitis OPV IPV, Haemophilus influenzae type b (Hib), Hepatitis B, MMR line. The plaintiff mother also admitted her other two children received immunizations the similar to the infant plaintiff. The plaintiff mother further testified she received immunizations. The plaintiff mother testified about her child's autism diagnosis. The plaintiff mother also stated her two youngest children had significant health issues now, so she had to make a positive change for them.

The plaintiff mother stated she does not believe the vaccinations are safe, but are harmful to the body. The plaintiff mother acknowledged she is a founding member of Mindd Foundation which advocates against toxins, and tries to educate and inform parents and practitioners about some of the dangers of immunizations, environmental toxins, processed food, and chemicals in the food. The plaintiff mother testified her concern were of the children's wellness, and admitted full immunizations were done adding her current nutrition and holistic healing studies leading to a degree were a factor in the children's recovery. The plaintiff mother reiterated she had a problem with the United States Food and Drug Administration, including but not limited to its immunization policy.

The plaintiff mother testified she attends church, listens to the gospels, does not read the Bible.

The plaintiff mother admitted the biblical quotations in the February 13, 2008 vaccination exemption letter was supplied by the plaintiffs' attorney, and acknowledged she did not know what Bible version the quotes came from. The plaintiff mother testified she had serious objections to injecting disease into the human body because that action showed no faith in the human body itself to fight off disease.

Legal Conclusions

CPLR 6301 provides:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

The Second Department holds:

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (*see Uniformed Firefighters Assn. of Greater N.Y. v. City of New York*, 79 N.Y.2d 236, 241, 581 N.Y.S.2d 734, 590 N.E.2d 719; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 A.D.3d 334, 786 N.Y.S.2d 107; *Bonnieview Holdings v. Allinger*, 263 A.D.2d 933, 693 N.Y.S.2d 340). Thus, a party is entitled to a preliminary injunction only where it demonstrates (1) a probability of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of the equities in its favor (*see W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 438 N.Y.S.2d 761, 420 N.E.2d 953; *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 766 N.Y.S.2d 588). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*see Gagnon Bus Co., Inc. v. Vallo Transp., Ltd., supra*; *Dental Health Assoc. v. Zangeneh*, 267 A.D.2d 421, 701 N.Y.S.2d 106; *Blueberries Gourmet v. Aris Realty Corp.*, 255 A.D.2d 348, 680 N.Y.S.2d 557). Where the facts are in sharp dispute, a temporary injunction will not be granted (*see Blueberries Gourmet v. Aris Realty Corp., id.*)

Related Properties, Inc. v. Town Bd. of Town/Village of Harrison, 22 A.D.3d 587, 590, 802 N.Y.S.2d 221 [2nd Dept, 2005].

The Second Department three years later observed:

While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that "subvert the plaintiff's likelihood of success on the merits ... to such a degree that it

cannot be said that the plaintiff established a clear right to relief” (*Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328, 766 N.Y.S.2d 588; *see County of Westchester v. United Water New Rochelle*, 32 A.D.3d 979, 980, 822 N.Y.S.2d 287) *Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613, 862 N.Y.S.2d 551 [2nd Dept, 2008].

The Public Health Law § 2164 (7) (a) provides:

No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child’s immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib) and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization

And, Public Health Law § 2164 (9) provides: “This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.” The Second Department holds “the loss of First Amendment freedoms may constitute irreparable injury (*see, Berg v. Glen Cove City School Dist., supra*, at 654)” (*Bowden v. Iona Grammar School*, 284 A.D.2d 357, 359, 726 N.Y.S.2d 685 [2nd Dept, 2001]). So, the issue is whether the plaintiffs established a likelihood of success on the merits on whether they hold genuine and sincere religious beliefs contrary to Public Health Law § 2164 (7) (a) in their objection immunization to their child.

This Court finds the plaintiffs sincerely and genuinely oppose immunization for children, but the plaintiffs fail to establish a likelihood of success on the merits regarding whether the immunization objections are “religious” in nature. The plaintiff mother, a student of nutrition and holistic healing, objects to immunization is because it may be unsafe. The plaintiff mother indicated immunization of children may be harmful. The plaintiff mother testified she felt the human body could fight off disease. The plaintiff mother has real concerns, which is understandable, but those health concerns are not based

on a religious belief. The plaintiffs show an unlikelihood of success on the merits where their objections are health concerns rather than genuine and sincere religious beliefs. The plaintiffs have not met the statutory criteria under CPLR 6301 to grant a preliminary injunction.

Accordingly, the application for a preliminary injunction is denied. This decision constitutes the order and judgment of the Court.

So ordered.

Dated: **September 1, 2011**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE