

Jenkins v Astorino

2012 NY Slip Op 33937(U)

October 16, 2012

Supreme Court, Westchester County

Docket Number: 12-2584

Judge: Barry E. Warhit

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND
ENTERED
ON Oct 16 2012
Westchester
County Clerk

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KENNETH W. JENKINS, in his Individual capacity
and in his capacity as a Westchester County Resident
and Taxpayer, Chairman and Member of the
Westchester County Board of Legislators, and Member
of the Westchester County Board of Acquisition and
Contract, LYNDON WILLIAMS, in his Individual Capacity
and his capacity as a Westchester County Resident
and Taxpayer and in his capacity as Vice-Chairman and Member of the
Westchester County Board of Legislators, and
PETER HARCKHAM, in his Individual Capacity
and in his capacity as a Westchester County Resident and
Taxpayer and as Member of the Westchester
County Board of Legislators
Petitioners/Plaintiffs

-against-

Decision and Order
On Order to Show
Cause on Petitioner's
Second Renewed
Application for A
Preliminary Injunction

ROBERT R. ASTORINO, in his Individual capacity¹
and as Westchester County Executive, and Member
of the Westchester County Board of Acquisition and
Contract, JAY T. PISCO, in his Individual capacity
and as the purported Commissioner/Acting
Commissioner of the Department of Public Works
& Transportation and a purported Member of the
Westchester County Board of Acquisition &
Contract, and ROBERT F. MEEHAN, in his
Individual capacity and as Westchester
County Attorney,
Respondents/Defendants.

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WARHIT, A.J.S.C.

¹ The referenced caption appears upon the filings. However, by letter, dated August 15, 2012, counsel for Petitions/Plaintiffs indicated an intention to withdraw all claims against the Respondents/Defendants in their individual capacities.

Petitioners/Plaintiffs previously moved, by Order to Show Cause dated March 25, 2012, for a Temporary Restraining Order and Preliminary Injunction requiring Respondents/Defendants to comply with, implement and enforce Westchester County Local Law 6-2012 and for relief related to precluding Jay Pisco from serving on the Westchester County Board of Acquisition and Contract ("County Board of A&C").

With respect to that application, this court considered Petitioners' Amended Verified Petition/Complaint and an Order to Show Cause and Affidavits and a Supplemental Memorandum of Law in Support thereof. Further, this court considered Respondents/Defendants' Memorandum of Law in Opposition to Petitioner's Order to Show Cause and Affirmations, Affidavits and Exhibits annexed thereto. Additionally, this court gave consideration to Petitioners/Plaintiffs Reply Memorandum of Law. Subsequently, on April 11, 2012, this court rendered and entered a Decision and Order which denied Petitioners/Plaintiffs' application for temporary relief.

Thereafter, the parties stipulated to a motion schedule. Respondents/Defendants agreed to submit a motion to dismiss by May 8, 2012 and Petitioners/Plaintiffs were required to respond thereto by June 19, 2012. To the extent Respondents/Defendants wished to file a reply, it was due by June 26, 2012. All papers were filed in accordance with the stipulation or as the parties subsequently consented². Additionally, this court received correspondences, dated June 22, 2012 and July 2, 2012, from counsel for the Board of Legislators, a non-party to the within Article 78 proceeding, and Respondents/Defendants' responses thereto. Prior to rendering a determination

² Respondents/Defendants filed a motion to dismiss with exhibits A-HH and a memorandum of law in support thereof, Petitioners/Plaintiffs filed a Memorandum in Opposition to Respondents/Defendants' Motion to Dismiss and Respondents/Defendants filed a Reply Memorandum of Law in Further Support of Respondents/Defendants' Motion to Dismiss and a Supplemental Affirmation in Further Support Motion to Dismiss.

upon the voluminous legal submissions, this court held a conference which proved unsuccessful to resolve the matter.

Subsequent to a conference, on or about August 17, 2012, Petitioners/Plaintiffs filed the instant Order to Show Cause³ for leave to reargue and leave to renew their prior application for a preliminary injunction ordering Respondents/Defendants to comply with Local Law 6-2012 and enjoining Respondent/Defendant Pisco from participating in any further meetings of the Westchester County Board of Acquisition and Contract ("Board of A&C")⁴. Specifically, Petitioners/Plaintiffs have filed an Affidavit and Affirmation and an additional Affirmation in Further Support of Second Renewed Application for Order to Show Cause for Preliminary Injunction. On September 12, 2012, Respondents/Defendants filed an Affirmation in Opposition to Second Renewed Application for Preliminary Injunction and a Memorandum of Law in Opposition to Petitioners/Plaintiffs' Second renewed Application for a Preliminary Injunction. On September 21, 2012, Petitioners/Plaintiffs have filed a Reply Memorandum in Further Support of Their Motion to Renew/Reargue. Upon consideration of these papers, this court disposes of Petitioners/Plaintiffs' motion to reargue and motion to renew s follows.

Petitioners/Plaintiffs have filed a combined motion for leave to reargue and for leave to renew (CPLR § 2221(f)). In determining such a combined application, it is incumbent upon the

³ The Order to Show Cause was signed on this court's behalf by Hon. Robert A. Neary on August 20, 2012. A motion schedule was set and the matter was adjourned to September 25, 2012..

⁴ The within application is Petitioners/Plaintiffs' third application for preliminary injunctive relief. Subsequent to this court having rendered its April 11, 2012 Decision and Order denying such relief, Petitioners/Plaintiffs moved by Order to Show Cause, on July 10, 2012 for such relief. On this same date, Respondents/Defendants filed an Affirmation in Opposition to Petitioners/Plaintiffs' renewed application for injunctive. On July 10, 2012, this court signed Petitioners/Plaintiffs' Order to Show Cause but struck the language of the order granting immediate injunctive relief. At court proceedings held on July 10, 2012 and August 13, 2012 this court orally declined Petitioners/Plaintiffs' renewed application for preliminary injunctive relief.

court to decide each aspect of the application as if it were separately made (CPLR § 2221(f)).

In support of their application for leave to reargue, Petitioners/Plaintiffs contend this court overlooked or misapprehended pertinent facts and legal arguments. Specifically, Petitioners/Plaintiffs contend that the defense proffered by Respondents/Defendants, which challenges the validity of Local Law 6-2012 and, in essence, asserts Respondent Pisco may serve as the Commissioner or Acting Commissioner of the Department of Public Works and Transportation despite the Westchester County Board of Legislators not having confirmed his appointment, renders the Westchester County Board of Legislators a necessary party to the within proceeding. The validity of the Petitioners/Plaintiffs' assertions aside, their within application for leave to reargue must be denied.

The facts and arguments Petitioners/Plaintiffs have asserted in the present application were not overlooked or misapprehended by this court. Rather, they were not previously proffered by Petitioners/Plaintiffs. Accordingly, since these facts and legal arguments were not advanced prior to this court having rendered and entered its April 11, 2012 Decision and Order, which denied Petitioners/Plaintiffs' application for preliminary injunctive relief, a motion to reargue is procedurally improper (CPLR § 2221(d)(2); see, Simpson v. Loehmann, 21 NY2d 990 (1968)(holding a motion to reargue to be an improper vehicle in which to raise new questions that had not earlier been advanced to the court); and see, Ul Haque v. Daddazio, 84 AD3d 940, 942 (2d Dept. 2011)).

Even assuming *arguendo* that Petitioners/Plaintiffs' motion to reargue was not procedurally flawed, it must be noted that, to the extent Petitioners/Plaintiffs' assert Respondents/Defendants' proffered defense is time barred, according to Petitioners/Plaintiffs Respondents had until sixty (60)

days after December 22, 2011⁵ to mount an affirmative challenge to Local Law 6-2012 and until four months after February 16, 2012 to implement a legal challenge to the Board of Legislators' act or failure to act with respect to Pisco's appointment. In each instance, the purported statutes of limitations would have run subsequent to this court having rendered its April 11, 2012 Decision and Order. As such, this court could not have misapprehended or overlooked these facts or this legal argument.

Further, Petitioners/Plaintiffs are not entitled to leave to renew. A motion for leave to renew is a vehicle by which a party may present the court with new facts or apprise the court of a significant change in the law that could or would affect the court's earlier decision (CPLR § 2221(e)(2)). Nevertheless, a moving party is entitled to leave to renew only upon a demonstration that the party had a reasonable justification for having failed to present the information prior to the court having rendered its initial determination (CPLR § 2221(e)(3); see, Greene v. NYC Housing Auth., 283 AD2d 458 (2d Dept. 2001); see also, Ulster Savings Bank v. Goldman, 183 Misc. 2d 893, 895-896 (Rensselaer Co. Sup. Ct. 2000). Petitioners/Plaintiffs have not provided any justification for having failed to assert that this court could not consider Respondents/Defendants' proffered defenses to Petitioners/Plaintiffs' application for preliminary injunctive relief or to the ultimate relief requested by the Article 78 petition absent the Respondents/Defendants moving to join the Board of Legislators as a necessary party to the proceeding.

There has been no significant change in the applicable law. The cases pronouncing that the legislative body responsible for passage of a particular law is a necessary party to any

⁵ Petitioners/Plaintiffs concede the effective date of the legislation could have been as late as February 29, 2012, which is the date Westchester County received confirmation of its filing from the Secretary of State. In any event, there is no argument that the statute of limitations period had run as of April 11, 2012 when this court issued its Decision and Order denying preliminary injunctive relief.

challenge to the law's validity are not recent (see, Stoffer v. Department of Public Safety of Town of Huntington, 77 AD3d 305 (2d Dept. 2010); and see, Overhill Bldg. Co. v. Delany, 28 NY2d 449 (1971). Accordingly, this court finds Petitioners/Plaintiffs could have, but inexplicably failed, to assert this argument during this court's consideration of their first application for preliminary injunctive relief and, rather, submitted comprehensive arguments advancing the validity of Local Law 6-2012 and as to their position concerning Pisco's appointment.

Although this court has discretion, in the interest of justice, to relax the requirement that a moving party provide a reasonable justification for its failure to assert relevant facts or legal arguments in a timely fashion, the facts of this case do not require this court to invoke its discretion (see, Mejia v. Nanmi, 307 AD2d 870, 871 (1st Dept. 2003). The application Petitioners/Plaintiffs seek to renew relates solely to their application for preliminary injunctive relief. Petitioners/Plaintiffs have had and will continue to have a full opportunity to advance the arguments raised in connection with the within application to renew in connection with this court's disposition of the underlying Article 78 proceeding.

It is worthy of note that even if this court relaxed the requirement that Petitioners/Plaintiffs assert reasonable justification and granted leave to renew, Petitioners/Plaintiffs would still not be entitled to preliminary injunctive relief. A petitioner who seeks preliminary injunctive relief must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits of the underlying claim, (2) irreparable injury or harm in the absence of injunctive relief, (3) that the hardships or equities favor them and (4) that the requested relief is not outweighed by public policy considerations (CPLR § 6301, et. seq.; see, Albini v. Solork Assoc., 37 AD2d 835 (2d Dept. 1971)).

The arguments advanced by Petitioners/Plaintiffs nearly exclusively advance their belief that the ultimate outcome will favor them. However, likelihood of success on the merits is but a single

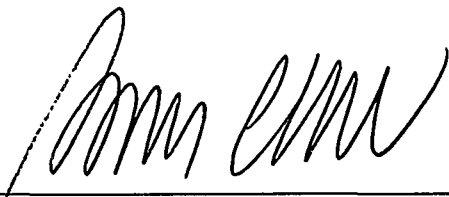
factor of judicial consideration. Petitioners/Plaintiffs herein have not shown that absent this court granting immediate relief, irreparable harm or injury will be suffered. Petitioners/Plaintiffs merely assert an amorphous reference to a “cloud that currently envelops all of [the Board of Acquisition and Contract’s] actions” and an unspecified need to protect taxpayers from possible litigation and waste (Eisemann Affirmation in Support of Second Renewed Application for Order to Show Cause for Preliminary Restraining Order, p. 4, ¶ 6). These wholly conclusory, completely unsupported statements are insufficient to establish, by clear and convincing evidence, that exists a risk of immediate and irreparable injury to Petitioners/Plaintiffs or to the taxpayers of Westchester County (see, CPLR § 6801). That Petitioners/Plaintiffs cannot cite to a specific instance of harm or injury while the within proceeding has been pending further defeats any claim that immediate court intervention is required.

For all of the foregoing reasons, Petitioners/Plaintiffs’ application for leave to reargue and renew and for preliminary injunctive relief are denied.

Upon consideration Respondents/Defendants’ application to strike allegedly scandalous, prejudicial unnecessary and irrelevant matter is deemed without merit and is denied.

The foregoing constitutes the decision, order and judgment of the Court and is so ordered.

Dated: White Plains, New York
October 16, 2012



Hon: Barry E. Warhit
Acting Supreme Court Justice