Suffolk County Elec. Contr. Assn., Inc. v Town Bd. of the Town of Islip
2013 NY Slip Op 33458(U)
December 19, 2013
Supreme Court, Suffolk County
Docket Number: 37609/2011
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX NO. 37609/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SUFFOLK COUNTY ELECTRICAL CONTRACTORS ASSOCIATION, INC., PALK ELECTRIC, INC., and DAVID KENNEDY,

Plaintiffs,

-against-

TOWN BOARD OF THE TOWN OF ISLIP and the TOWN OF ISLIP,

Defendants.

ORIG. RETURN DATE: JANUARY 31, 2012
FINAL SUBMISSION DATE: FEBRUARY 28, 2013
MTN. SEQ. #: 001
MOTION: MG

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Upon the following papers numbered 1 to 9 read on this motion FOR A PRELIMINARY INJUNCTION.
Order to Show Cause and supporting papers 1-3; Summons and Verified Complaint 4, 5; Affirmation in Opposition and supporting papers 6, 7; Verified Answer 8; Reply Affirmation 9; it is,

ORDERED that this motion by plaintiffs, SUFFOLK COUNTY ELECTRICAL CONTRACTORS ASSOCIATION, INC. ("SCECA"), PALK ELECTRIC, INC., and DAVID KENNEDY (collectively "plaintiffs"), for an Order granting a preliminary injunction restraining the defendants, TOWN BOARD OF THE TOWN OF ISLIP and the TOWN OF ISLIP ("Town Board" or "Town" or collectively "defendants"), from proceeding on a proposed local law entitled Chapter 3E, "Apprenticeship Participation in Commercial Construction" ("Local Law") upon the grounds that: (1) defendants have failed to provide the requisite public notice of the hearing on the proposed Local Law; (2) defendants are specifically prohibited from enacting the Local Law by Municipal Home Rule Law § 11 (f); (3) the proposed Local Law is preempted by the Labor Law; (4) defendants lack authority to enact the proposed Local Law; and (5) defendants are prohibited from proceeding unless and until they have complied with the

requirements of the Environmental Law (SEQRA), is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition to this application from defendants.

This action was commenced by summons and verified complaint on December 12, 2011, seeking a judgment, pursuant to CPLR 3001, declaring that defendants are without authority to enact the Local Law, as well as permanently enjoining defendants from taking any further actions in connection with the proposed Local Law. Plaintiffs filed the instant application, by Order to Show Cause, seeking a preliminary injunction restraining defendants from proceeding on the Local Law. The Court (Garguilo, J.), declined to grant plaintiffs a temporary restraining Order pending the determination of this motion, which was sought to preserve meaningful judicial review of the alleged inadequate public notice given regarding the Local Law.

SCECA is a trade organization comprised of approximately 280 electrical contractors within the County of Suffolk, including electrical contractors who have and continue to do business on commercial projects exceeding 100,000 square feet within the Town of Islip. Plaintiff PALK ELECTRIC, INC. is an electrical contractor, and plaintiff DAVID KENNEDY is a master electrician doing business as Kennedy Electrical Contracting, Inc., who have and continue to do business on commercial projects exceeding 100,000 square feet within the Town of Islip.

Defendants' resolution drafted in connection with the proposed enactment of the Local Law provides in pertinent part:

> WHEREAS . . . the Town Board wishes to enact a local law establishing a requirement that all applications for permits for the construction of a commercial building of at least 100,000 square feet must include documentation evidencing that any general contractor, contractor, or subcontractor participates in an apprenticeship training program appropriate for the type and scope of work to be performed, that has been approved by the New York State Department of Labor, in accordance with Article 23 of the New York State Labor Law.

Consequently, the proposed Local Law would mandate that all applications for building permits for commercial buildings of at least 100,000 square feet must include evidence of participation in an apprenticeship training program.

Plaintiffs now argue that: (1) the proposed local law is preempted by the comprehensive provisions of Article 23 of the Labor Law; (2) the Town Board's imposition of additional required preconditions for a building permit, which are unrelated to the property, are "patently" *ultra vires*; (3) the proposed legislative action represents overreaching which interferes with private contracts; and (4) the local law contravenes and abrogates preexisting competitive bidding laws. Further, plaintiffs allege that the mandatory provision of the Local Law contradicts New York State's Labor Law, which currently provides a voluntary apprenticeship program. Plaintiffs inform the Court that the apprenticeship program for an electrician requires five years of schooling, at a cost of $50,000.00 per apprentice, as well as additional on-the-job training. Plaintiffs contend that if members of SCECA attempt to comply with the proposed Local Law, "the restrictions will virtually bankrupt the majority of [its] membership" who are small, independent contractors that employ between one to eight electricians. Such members of SCECA are therefore allegedly at a competitive disadvantage as compared to larger contractors with existing apprenticeship programs.

Moreover, plaintiffs contend that defendants failed to give the requisite public notice of the enactment of the local law, in violation of Municipal Home Rule Law § 20 (5), as well as the Town Code of the Town of Islip. Notably, plaintiffs inform the Court that pursuant to Section 1A-3(B) of the Islip Town Code, "[n]o ordinance or amendment previously adopted or approved by the Town Board shall be void for failure to comply with the provisions of this local law." Therefore, plaintiffs claim that they will be foreclosed from challenging the failure to provide public notice unless the challenge is lodged prior to the adoption of the Local Law. Furthermore, plaintiffs argue that pursuant to Municipal Home Rule Law § 11 (1) (f), defendants are wholly prohibited from enacting a local law that "[a]pplies to or affects any provision of . . . the labor law." In support of the instant application, plaintiffs have submitted, among other things, an affidavit of Michael Towers, president of SCECA, and an affidavit of Thomas Palk, president of plaintiff PALK ELECTRIC, INC.

In opposition, defendants contend that the proposed Local Law was properly noticed in all respects, as the governing notice provisions are allegedly set forth in Municipal Home Rule Law § 20 (5), not in Section 1A-1(A) of the Islip Town Code. Defendants indicate that contrary to plaintiffs' argument, Chapter 1A of the Islip Town Code only applies to the enactment of ordinances, not local laws.

Defendants further contend that the Local Law does not indicate an intent to supersede any provision of the Labor Law, and therefore does not contain, and is not required to contain, the recitations set forth in Municipal Home

Rule Law § 22. Moreover, defendants allege that contrary to plaintiffs' contention, Municipal Home Rule Law § 11 (1) (f) does not prohibit passage of the Local Law, in that the Local Law does not fall within the ambit of what is prohibited by that section of the Home Rule Law. Defendants argue that Municipal Home Rule Law § 11 (1) (f) strictly applies to a local law which supersedes a State labor law, *only* if it applies to or affects "sections two, three and four of chapter one thousand eleven of the laws of nineteen hundred sixty-eight." However, the Court notes that "sections two, three and four of chapter one thousand eleven of the laws of nineteen hundred sixty-eight" were codified in Sections 971-a, 1012-a, and 1015 of New York's Unconsolidated Laws, and not in New York's Labor Law.

Furthermore, defendants allege that the proposed Local Law is not preempted by Article 23 of the Labor Law, as it has been held that Article 23 does not preempt the entire field of apprenticeship training. In addition, defendants argue that the proposed Local Law does not conflict with Article 23, but rather supplements it and governs how an apprenticeship program "must be run." Defendants claim that the Local Law actually advances the public policy underlying Article 23, in that it requires contractors on the largest commercial jobs in the Town of Islip to participate in registered and approved apprenticeship programs, and it "rewards" those who have instituted such programs. Finally, defendants contend that the Town was not required to comply with SEQRA, as the proposed Local Law is not an "action" as defined by SEQRA, which might have a significant impact on the environment.

In reply, plaintiffs maintain that the Local Law is preempted by Article 23 of the Labor Law, as it conflicts with the State legislation "in virtually all material respects," and prohibits activities that are permissible under State law and imposes additional requirements. Further, plaintiffs indicate that the Local Law diminishes the broad powers of the Commissioner of Labor to supervise apprenticeship programs, as it improperly transfers such powers to the Town's Chief Building Inspector. Additionally, plaintiffs allege that the Local Law offends the State policy by forcing private parties to implement costly apprenticeship training programs or face stiff and onerous penalties, which places plaintiffs at an extreme competitive disadvantage to those contractors with established apprenticeship programs.

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 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004];

Bonnieview Holdings v Allinger, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). 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.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]).

Here, the Court has weighed the elements necessary for the granting of a preliminary injunction and finds that plaintiffs have met their burden. Initially, the Court finds that this matter is ripe for determination, as the Town Board controls whether or not the contemplated Local Law is enacted, and plaintiffs allege that the Local Law will most likely be approved in the absence of an injunction. A justiciable controversy exists when the contingent future event is "contemplated by one of the parties" (*Hussein v State of New York*, 81 AD3d 132, 135-36 [2011]; *see Rockland County Multiple Listing System, Inc. v State*, 72 AD2d 742 [1979]; *Sydney Sol Group Ltd. v State of New York*, 2013 NY Slip Op 51968[U] [Sup Ct, New York County]).

The plain language of Municipal Home Rule Law § 11 (1) (f) requires that, in order to be invalid, a local law must first supersede a State statute, and then it must additionally apply to or affect a provision of one of the enumerated bodies of State law, i.e. the Labor Law (*see* Municipal Home Rule Law § 11 [1] [f]; *ILC Data Device Corp. v County of Suffolk*, 182 AD2d 293 [1992]). Here, as discussed, the Local Law contains no statement indicating an intent to supersede any other law. Additionally, the Local Law admittedly does not comply with the procedural requirements for superseding a State statute as set forth in Municipal Home Rule Law § 22, and in the absence of substantial compliance, supersession will not be found (*see Kamhi v Yorktown*, 74 NY2d 423 [1989]). Hence, as there is no supersession herein, the Court must still determine whether the Local Law is inconsistent with or preempted by New York State's Labor Law so as to render it invalid under New York Constitution, article IX, § 2 (c) (ii) and Municipal Home Rule Law § 10 (1) (ii).

Although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State (NY Const, art IX, § 2 [c]; Municipal Home Rule Law § 10; *New York State Club Assn. v City of New York*,

69 NY2d 211 [1987]; *Consolidated Edison Co. v Town of Red Hook*, 60 NY2d 99 [1983]; *Monroe-Livingston Sanitary Landfill v Town of Caledonia*, 51 NY2d 679 [1980]). A local law may be ruled invalid as inconsistent with State law not only where an express conflict exists between the State and local laws, but also where the State has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation (*New York State Club Assn. v City of New York*, 69 NY2d 211, *supra*; *Matter of Ames v Smoot*, 98 AD2d 216 [1983]). Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either: (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe (*New York State Club Assn. v City of New York*, 69 NY2d 211, *supra*); or (2) imposes additional restrictions on rights granted by State law (*see Robin v Incorporated Vil. of Hempstead*, 30 NY2d 347 [1972]). However, this Court is mindful of prior case law holding that the State has not preempted the entire field of legislation affecting apprenticeship training programs (*see Broidrick v Lindsay*, 48 AD2d 639 [1975]; *Stathopolos v Smith*, 141 Misc 2d 1023 [Sup Ct, New York County 1988], *affd for reasons stated below* 162 AD2d 252 [1st Dept 1990]).

Notwithstanding the foregoing, under the doctrine of conflict preemption, a local law is preempted by a State law when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows (*see Matter of Chwick v Mulvey*, 81 AD3d 161 [2010]). "The crux of conflict preemption is whether there is a head-on collision between the ordinance as it is applied and a state statute" (*Matter of Chwick v Mulvey*, 81 AD3d 161, 168 [citations omitted]). The Court of Appeals has held that the general principle set forth in the case relied upon by plaintiffs, *Wholesale Laundry Board of Trade, Inc. v New York*, 17 AD2d 327 (1963), *affd* 12 NY2d 998 (1963), applies when the State specifically permits the conduct prohibited at the local level (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91 [1987]; *see also Monroe-Livingston Sanitary Landfill v Town of Caledonia*, 51 NY2d 679, *supra*; *Niagara Recycling v Town of Niagara*, 83 AD2d 316 [1981]). Here, the Local Law mandates that plaintiffs participate in apprenticeship training programs for construction of commercial buildings of at least 100,000 square feet or else be precluded from obtaining a building permit therefor, while under State law plaintiffs would not be so precluded if they choose not to participate in an apprenticeship training program. Accordingly, the Court finds that on this record plaintiffs have demonstrated a likelihood of success on the merits based upon the doctrine of conflict preemption.

With respect to irreparable injury, plaintiffs allege that the enactment of the Local Law would essentially prevent plaintiffs from conducting any business in the Town, and would cause plaintiffs to lose all of their customers in the Town, thereby resulting in a substantial loss of business, opportunity, and good will. Plaintiffs claim that the Local Law may force many of the members of SCECA out of business completely. These types of losses are not easily quantified, not remedied by monetary damages, and have been held to be irreparable harm upon which injunctive relief may be granted (*see Gundermann & Gundermann Ins. v Brassily*, 46 AD3d 615 [2007]).

Finally, the Court finds that a balancing of the equities favors plaintiffs. The Town will not suffer prejudice in light of the existing State statutory scheme governing apprenticeship training programs, while in the absence of an injunction plaintiffs will likely suffer a loss of customers and business within the Town.

In view of the foregoing, this application for a preliminary injunction is **GRANTED** to the extent that defendants are hereby restrained from proceeding upon the proposed Local Law entitled Chapter 3E, "Apprenticeship Participation in Commercial Construction," pending further Order of the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: December 19, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**