Matter of Lewis v New York Public Library
2014 NY Slip Op 31426(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 100975/13
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN Justice

PART 7

In the Matter of
DAVID LEVERING LEWIS, JACOB MORRIS, MARK ALAN HEWITT, RUTH ANN STEWART, and JACK MACRAE,

INDEX NO. 100975/13

MOTION SEQ. NO. 001

Plaintiffs/Petitioners,

For an injunction pursuant to § 720 of the Not-for-Profit Corporation Law, and other relief,

- against -

THE NEW YORK PUBLIC LIBRARY, ASTOR, LENOX, AND TILDEN FOUNDATIONS ("NYPL") and THE TRUSTEES OF THE NYPL,

Defendants/Respondents.

- and -

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

CITY OF NEW YORK, CITY COUNCIL OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, and MICHAEL BLOOMBERG, in his official capacity as Mayor of the City of New York,

Respondents.

The following papers were read on this motion by plaintiffs for, *inter alia*, a preliminary injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Plaintiffs/petitioners David Levering Lewis, Jacob Morris, Mark Alan Hewitt, Ruth Ann Stewart, and Jack MaCrae (petitioners) move for an order preliminarily enjoining defendants/respondents (respondents) from taking any additional steps to implement the "Central Library Plan" (CLP), including the movement of books to "ReCap," the demolition of the stacks at the "Central Library," and the sale of the "Mid-Manhattan Branch" of the New York Public Library. This special proceeding also requests that the "Library Respondents" and the "City Respondents" be enjoined from any acts in furtherance of the Central Library Plan (*id.*, ¶ 3).

The New York Public Library, Astor, Lenox and Tilden Foundations (NYPL), and the Trustees of the NYPL (NYPL and Trustees together, Library Respondents) cross-move, pursuant to CPLR 3211(a)(1) and (a)(7), for dismissal of the second amended petition on the grounds of a defense based on documentary evidence and failure to state a cause of action.

The City of New York, City Counsel of the City of New York, New York City Department of Buildings, New York City Landmarks Preservation Commission, and Michael Bloomberg, in his official capacity as the Mayor of the City of New York (collectively, City Respondents) cross-move, pursuant to CPLR 3211(a)(7), for dismissal of the second amended petition on the ground of failure to state a cause of action.

BACKGROUND

Second Amended Petition

Petitioners characterize this as a hybrid special proceeding for declaratory and injunctive relief to restrain the Library Respondents from implementing its CLP. NYPL has removed at least 3.5 million books from the library stacks (Stacks) in the Central Library building, thereby significantly restricting access by petitioners to research materials. The CLP entails the demolition of the Stacks and replacement of the Central Library's research facility with a circulating library, and the selling off of two major library buildings: the Science, Industry and

Business Library (SIBL) and the Mid-Manhattan Library (second amended petition, ¶ 1).

The petitioners herein include: David Levering Lewis, a professor of history at New York University, and a researcher and frequent user of the Central Library's research services; Jacob Morris (Morris), an historian, scholar, and activist; Mark Alan Hewitt (Hewitt), an architect, professor, writer, and scholar; Ruth Ann Stewart, a specialist in library sciences and cultural policy; and Jack MaCrae, who worked at various book publishing houses (*id.*, ¶¶ 5-9).

Respondents comprise two groups. The Library Respondents include: NYPL, a not-for-profit corporation, and a charitable trust, and the exclusive provider of public library services to the people of Manhattan, the Bronx and Staten Island, and the Trustees of the NYPL. The City Respondents include: the City of New York and its officers and agencies (City); the City Council; at the time of the amended petition, respondent Michael Bloomberg, as the then Mayor of the City; the City's Department of Buildings (DOB); and the City's Landmarks Preservation Commission (Landmarks Commission) (*id.*, ¶¶ 10-17).

Pursuant to Education Law § 273(1)(g), the State of New York (State) appropriates $5,649,600 annually for the general support of NYPL's research libraries. Currently, NYPL has four research libraries: the Central Library, SIBL, the Schomburg Center for Research in Black Culture, the Library for the Performing Arts, and 87 branches (*id.*, ¶¶ 36-38).

The CLP, announced on March 11, 2008, calls for: (1) the removal of 3.5 million books that currently reside in the Stacks beneath the "Rose Reading Room"; (2) demolition of the Stacks; (3) sale of the buildings that then housed the SIBL and the Mid-Manhattan Library; and (4) replacement of the seven floors of Stacks beneath the Rose Reading Room with the construction of a circulating library containing some of the books originally housed in SIBL and the Mid-Manhattan Library, thus consolidating the two libraries into one in the space in the Central Library building (*id.*, ¶¶ 39-40).

In 2008, NYPL estimated the cost of implementing the CLP to be $250 million, revising it

to $300 million in 2012, and upwards to $350 million on January 29, 2013. Under the CLP, NYPL stated its intent to sell SIBL and the Mid-Manhattan Library for an anticipated recovery of $100 million each to defray the costs of the CLP. Without holding a public hearing, in June 2011, the City Respondents appropriated $150 million to NYPL for implementing the CLP. On June 22, 2012, NYPL sold five out of SIBL's six floors for $60.8 million, less than two-thirds of the reasonably expected price, leaving a $10 million dollar shortfall in the projected funding of the CLP (*id.*, ¶¶ 41-46).

In Spring 2012, Community Boards One, Nine, Eleven, and Twelve in Manhattan and Two in the Bronx, passed resolutions demanding that an economic impact study of the CLP be conducted before the CLP is implemented. In January 2013, at a public hearing before the Landmarks Commission, representatives of NYPL sought approval of the application to install rooftop mechanical equipment, replace windows, modify window openings, and modify the loading dock gate at the Central Library. Because the Central Library is an exterior landmark under the City's Landmarks Law, approval is required to alter the building's exterior. The Landmarks Commission approved NYPL's application, but issued no public notice of the contents of its decision, stating only that a binding report on the matter had been issued. No public presentation was made, nor public discussion held, regarding the significant issue of debris removal or its potential impact on the environment (*id.*, ¶¶ 49-56).

NYPL retained Foster & Partners, an architectural firm, and Silman & Associates, a structural engineering firm, to do the CLP work. In June 2013, DOB approved several work permit applications submitted in May 2013 (*id.*, ¶¶ 57-65).

Petitioners Morris and Hewitt filed requests with the Landmarks Commission in June 2012 to designate the Rose Reading Room and the Stacks as interior landmarks under the City's Landmarks Law. The Landmarks Commission calendared the request for a public hearing, but petitioners do not have knowledge of the date of said hearing (*id.*, ¶¶ 66-67).

On June 19, 2013, Morris filed a complaint with the Office of the Inspector General for the DOB relating to the building permit applications filed with DOB by Foster & Partners for the demolition of the Stacks. Morris alleged in his complaint that Foster & Partners had misrepresented on the application that the work to be performed is nonstructural. Since the Stacks act as support beams for each floor above them, the work of removing them is structural in nature (*id.*, ¶¶ 68-71).

According to petitioners, implementing the CLP will significantly reduce the space available to library users. Each year, 1.5 million people visit the Central Library, and two million people visit SIBL and the Mid-Manhattan Library. By merging these three libraries, all within the Central Library building, the CLP will cause the number of annual visitors to the Central Library to more than double. However, the space in which SIBL and the Mid-Manhattan Library will reside is less than one-third the size of the space that they previously occupied (*id.*, ¶¶ 72-74).

The books removed from the Stacks serve researchers in various disciplines, whereas NYPL's other research libraries serve only scholars interested in narrow disciplines. At least 3.5 million books have been removed from the Stacks, and 1.5 million have been moved offsite to a storage facility in Princeton, New Jersey (ReCAP). A researcher must order any such book in advance, and wait at least one to two business days, probably more, for it to arrive, and some requested books will not be sent at all, causing significant delays in conducting research (*id.*, ¶¶ 75-77).

Moreover, petitioners assert that opponents of the CLP have suggested publicly and in communications with the Library Respondents various alternatives to the CLP, such as spending the capital that is used on the CLP to reinvest in branch libraries throughout the City, and selling only the SIBL and renovating the Mid-Manhattan Library. They contend that Respondents "independent cost estimate" is nothing but a sham, and the Library Respondents do not intend to seriously consider alternatives to the CLP, even were such alternatives to prove

more cost-effective than the CLP (*id.*, ¶¶ 78-84).

The second amended petition contains six causes of action. The first alleges that, if not restrained, respondents will violate the rights of petitioners under Article I, § 8 of the State Constitution. The permanent removal of more than 1.5 million volumes from the Stacks will cause lengthy delays in obtaining research materials, and irreparably burden the ability of petitioners and others similarly situated to receive information and to communicate ideas (*id.*, ¶¶ 85-89).

The second cause of action is based on Education Law § 273(1)(g). In consideration of receiving $5,649,600 from the State, NYPL has agreed to direct that sum to the "general support of its research libraries." The City Respondents have appropriated $150 million to NYPL to implement the CLP, which, if not stopped, will constitute a breach of this provision of the Education Law (*id.*, ¶¶ 90-97).

The third cause of action alleges that the Library Respondents breached their fiduciary duty to act with reasonable care because they are not effectuating the purposes of the charitable trust under which NYPL operates pursuant to Estates, Powers and Trust Law § 8-1.1. The original intention of the trust was to permanently maintain a robust research library. The Library Respondents have sold five floors of the SIBL for a price far lower than was reasonably expected, and intend to sell other properties in furtherance of the CLP. The Library Respondents failed to perform an economic impact study pertaining to the CLP and failed to consider alternatives (*id.*, ¶¶ 98-105).

The fourth cause of action also alleges a violation of the terms of the charitable trust under which NYPL operates. The intent of the trust is to permanently maintain a world class research library for the public's benefit. Implementing the CLP will severely degrade NYPL's research capabilities by replacing the largest research library with a circulating library (*id.*, ¶¶ 106-110).

The fifth cause of action seeks an injunction pending the landmark hearing. Allegedly, implementing the CLP may render moot the Rose Reading Room landmark requests by the destruction of the historic aspects of the Central Library's interior (*id.*, ¶¶ 111-114).

The sixth cause of action alleges that the NYPL is funded in part by taxpayer monies, including monies received from the State and the City. The City Respondents have provided or intend to provide taxpayer monies to the Library Respondents in furtherance of the CLP, which constitute unlawful expenditures in violation of Finance Law § 123-b and General Municipal Law § 51. Respondents' refusal to consider alternatives is a breach of their duty to expend public monies in a fiscally prudent manner and in furtherance of the best interests of the public (*id.*, ¶¶ 115-119).

The seventh cause of action alleges a violation of the common law public trust doctrine. The removal of the books from the Library, and the further plans to destroy the Stacks constitute a breach of the public trust, because these assets were entrusted to the Library Respondents for the public's benefit and cannot be disposed of or removed. The violation of the public's right to have access to information and ideas is one example of the harm caused by the action of respondents (*id.*, ¶¶ 120-125).

Petitioners seek a judgment declaring that: (1) implementing the CLP (a) will violate their rights to receive and communicate information pursuant to Article I, § 8 of the State Constitution, and (b) will constitute a breach of the contract between NYPL and the State and governed by Education Law § 273(1)(g); (2) the Library Respondents breached their fiduciary duties to give effect to the purposes of the charitable trust under which NYPL operates; and (3) the CLP violates NYPL's purpose as a charitable trust.

Petitioners also seek an injunction, permanently restraining respondents from: (1) proceeding with any preparatory or demolition work on the Central Library building's exterior or interior related to the CLP; (2) any wholesale removal of books or other Central Library

materials to Bryant Park or ReCAP in furtherance of the CLP (other than in the normal course of business of operating the Library); (3) demolishing or removing any part of the Stacks until (a) the Landmarks Commission determines the issue of the Rose Reading Room designation as an interior landmark, (b) the Inspector General of DOB determines whether the permits obtained were issued based on false information, and (c) the entire administrative record from the Landmarks Commission is obtained and a determination as to whether false representations were made regarding the removal of books and the proposed demolition of the Stacks; (4) implementing the CLP; and (5) selling the Mid-Manhattan Library or the further sale of the SIBL. Petitioners also seek an award of costs and attorney's fees.

Arguments

1. *Petitioners*

Petitioners argue that they have satisfied all three elements for a preliminary injunction: likelihood of success on the merits, irreparable harm, and a balancing of equities in their favor. They argue likelihood of success on the merits because the CLP strongly implicates Article I, § 8 of the State Constitution and the First Amendment in that NYPL is a state actor, and petitioners' right to receive information will be infringed. Respondents breached the contract with the State (Education Law § 273[1][g]) by the proposed degradation of the research mission of the Central Library, and failing to effectuate to the intent of NYPL's donors.

Petitioners assert that money damages will not compensate them for the injuries they will suffer upon destruction of the irreplaceable Stacks, which they describe as an "engineering marvel." Further, they argue that a balancing of the equities favor petitioners because respondents would suffer only a delay for a brief time whereas, destruction of the Stacks will end the functioning of the Central Library as a research facility.

2. *Library Respondents*

The Library Respondents argue that: (1) NYPL is not a state actor, and there is no

constitutional right to receive library books quickly or dictate where a library stores its books; (2) the Education Law claim fails because petitioners have not asserted the existence or breach of a contract, and lack standing as third-party beneficiaries; (3) petitioners lack standing to bring claims for breach of fiduciary duty and violation of the terms of a charitable trust, and NYPL's governing charter grants the trustees wide discretion in operating its libraries and reading rooms; (4) the taxpayer waste claim relies on statutes that do not create a substantive cause of action; and (5) the public trust doctrine is applicable only to dedicated parkland or natural resources.

They also argue that the motion for a preliminary injunction should be denied because: (1) petitioners cannot establish likelihood of success in that they rely on claims supported by erroneous or misleading factual assumptions; (2) petitioners do not face irreparable harm, because the books have already been removed from the Stacks, and petitioners do not even allege that the books would be returned if the CLP were abandoned; and (3) the balance of equities tip in respondents' favor because scholars who use the Central Library's research services and resources would benefit from the changes effected pursuant to the CLP.

3. *City Respondents*

The first, fifth, sixth, and seventh causes of action pertain to the City Respondents, who contend that they are not responsible for any purported violation of Article 1, § 8 of the State Constitution. Since the books have already been removed, the alleged violation of petitioners' rights occurred without any City action. Although petitioners may rely on statutory provisions or contracts, the State Constitution does not give petitioners the right to a public library or a research library.

As for the fifth cause of action, they argue that petitioners are not entitled to an injunction pending a Landmarks Commission hearing. This is not a cause of action; rather it is simply a request for relief. Moreover, no decision has been made about whether to calendar

the Rose Reading Room for a hearing. Even if the Rose Reading Room was so designated, that would not restrict the use of that space as a library, research or otherwise. They also argue that Finance Law § 123-b applies to state employees, not municipal employees; no actionable wrong is alleged under General Municipal Law § 51; and the public trust doctrine is inapplicable.

DISCUSSION

For the reasons discussed below, petitioners' motion for a preliminary junction is denied, and the cross-motions for dismissal of the petition are granted.

Cross-Motions to Dismiss

1. *First cause of action*

Petitioners contend that, if not restrained, respondents will violate their rights under Article I, § 8 of the State Constitution and the First Amendment in that they will be denied timely access to reading and research materials, and irreparably interfere with their right to receive and communicate ideas. Petitioners argue that the First Amendment to the United States Constitution "protects not only the right to disseminate ideas, but also the inextricably linked right to receive information," and that the State's Constitution affords citizens speech rights stronger protection than the First Amendment (memorandum in support at 23). According to petitioners, the First Amendment is applicable because, in effect, NYPL is a public forum, and a state actor.

Article I, § 8 of the State's Constitution provides, in relevant part: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances."

Respondents argue that, in addition to pleading an actual infringement of these constitutional rights, petitioners must successfully plead that their actions are attributable to the State, something which they have failed to do. They contend that NYPL is a private, not-for-profit education corporation, not an agent of the government.

Petitioners argue that NYPL is a state actor because: (1) it operates on land owned by the City, in a building maintained by the City, and the City provides a majority of NYPL's budget; (2) the City's Mayor and the Speaker of the City Council sit on NYPL's Board of Trustees, as *ex officio* members; and (3) NYPL was created by an act of the State Legislature, and it is subject to the oversight of the State's Board of Regents.

Unless the conduct complained of involves state action, the Court may not consider whether respondents have or will violate petitioners' rights under Article I, § 8 of the State Constitution (*see SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 505 [1985] ["We now turn to the question whether a shopping mall owner's enforcement of a blanket no-handbilling policy constitutes State action within the meaning of our State Constitution. If there be no State action, our inquiries must end"]).

The Court must consider the following factors in determining whether state action is involved: "the source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person" (*id.* at 505, quoting *Melara v Kennedy*, 541 F2d 802, 805 [9th Cir 1976]). As "the test is not simply State involvement, but rather significant State involvement, satisfaction of one of these criteria may not necessarily be determinative to a finding of State action'" (*SHAD Alliance,* 66 NY2d at 505, quoting *Sharrock v Dell Buick-Cadillac*, 45 NY2d 152, 158 [1978]). In *Sharrock*, the Court of Appeals remarked:

> "But the mere fact that an activity might not constitute state action for purposes of the Federal Constitution does not perforce necessitate that the same conclusion be reached when that conduct is claimed to be violative of the State Constitution . . . . Indeed, on innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution . . . . This independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution as well as the long history of due process protections afforded the citizens of this State and, more generally, in fundamental principles of federalism" (45 NY2d at 159-160).

In *SHAD Alliance*, the plaintiffs were opposed to the use of nuclear energy to generate electricity. They alleged that the owner of a shopping mall violated their rights of free speech by prohibiting them from distributing leaflets on mall property. The Court of Appeals held that the plaintiffs' claims failed because they had neither alleged nor demonstrated the involvement of state action, and the mall was not the functional equivalent of a government (*id.* at 506). Although "the shopping mall has taken on many of the attributes and functions of a public forum . . . the characterization of the use of the property is immaterial to the issue of whether State action has been shown" (*id.*). In so holding, the Court noted that the plaintiff had "to show significant government participation in private conduct that limits free speech rights" (*id.*).

Here, plaintiffs have shown significant government participation in NYPL's conduct. The Library Respondents claim that the amended petition contains no allegations to demonstrate that NYPL is a state actor. Contrary to this assertion, the amended petition contains the following allegations pertaining to the Court of Appeals' designated factors:

> (1) More than 60% of NYPL's day-to-day operating revenues come from government, primarily the City, and NYPL has stated that it is dependent upon the City's funding to continue functioning. In 2012, 30% of NYPL's research library revenues came from the city, state, and federal governments, 21% being from the City alone. In addition, 85% of the branch library revenues came from government, 79% from the City, freeing up the library's privately donated money to spend on the research libraries (amended petition, ¶ 10);
>
> (2) NYPL is managed, in part, by 43 trustees, three of whom must be City officials. NYPL receives government property free of charge, and has taxes levied by the City specifically for its benefit. NYPL is the exclusive provider of

public library services for Manhattan, the Bronx and Staten Island (*id.*, ¶ 11);

(3) On January 18, 1849, the State legislature enacted a private bill incorporating the charitable trust of John Jacob Astor, the stated purpose of which was the establishment of a public library in the City of New York, based on a bequest in Astor's will (*id.*, ¶ 17);

(4) On January 20, 1870, the State legislature enacted a private bill incorporating the charitable trust of James Lenox, the stated purpose of which was the establishment of a public library in the City of New York, based on a bequest in Lenox's will (*id.*, ¶ 19);

(5) On March 26, 1887, the State legislature enacted a private bill incorporating the charitable trust of Samuel Tilden, the stated purpose of which was the establishment and maintenance of a free library and reading room in the City, in accordance with the purpose and intention of Tilden's will (*id.*, ¶ 21);

(6) On May 23, 1895, the Astor and Lenox library trustees, and Tilden trust agreed to consolidate into one incorporated organization, forming NYPL (*id.*, ¶ 22);

(7) The City owns the land on which the Central Library is located, and leased perpetually to NYPL free of charge on the condition that NYPL operates a library open to the public on the land. NYPL accepted this offer in 1911, and has been operating under it to the present day (*id.*, ¶ 25);

(8) Pursuant to Education Law § 273(1)(g), the State appropriates $5,649,600.00 annually specifically for the general support of NYPL' s research libraries (*id.*, ¶ 35); and

(9) The City Respondents appropriated $150 million for implementing the CLP, and NYPL has sought approval of the CLP from the City Respondents (*id.*, ¶ 87);

Petitioners also state in their memorandum of law that: (1) NYPL is subject to the oversight of the State Board of Regents; (2) NYPL employees are deemed state employees for purposes of their retirement plan; (3) the City pays for the heat, light, and power in the NYPL system; and (4) NYPL is regulated by the State's Education Department. Unlike the nine assertions listed above, these are not contained in the verified amended petition, and they appear without supporting citations or documentation. However, they all pertain to NYPL itself, and the Library Respondents do not challenge the accuracy of these assertions.

Nevertheless, even though NYPL is deemed a state actor for purposes of the claims

presented here, the amended petition does not validly allege that the proposed restructuring of the library's system constitutes Constitutional violations. In support of their argument, petitioners assert that the United States Supreme Court has recognized the importance that libraries play in the exercise of the right to receive information, citing *Board of Educ., Is. Trees Union Free School Dist. No. 26 v Pico* (457 US 853 [1982]) for the proposition that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom" (*id.* at 867 [emphasis in original]; *see* memorandum in support of petition at 23). Petitioners characterize *Pico* as holding that "the removal of books considered objectionable from a school library by the board of education of a school district violated the First Amendment rights of the school's students to receive information" (*id.*).

Pico does not support petitioners' quest for the finding of a violation of the First Amendment or the State Constitution, characterized by petitioners as a case of first impression. In *Pico*, the Supreme Court affirmed a Second Circuit decision, in holding that whether a school board could remove nine books from a school library depended on whether it had legitimate reasons for such removal, and whether the determination was based on a wrongful bias against those particular books (e.g. on religious or political grounds) (*id.* at 872, 874). Hence, there was a factual question to be determined at trial.

No such factual question exists here. Petitioners do not allege that the CLP's plan to remove books is based on a motivation to suppress access to a *particular* type of information. The argument that research might be hindered because of the delay of obtaining books is plausible, as petitioners persuasively assert; in the world of research, the reading of one book could easily lead to the need for another referenced in the former book, and the off-site removal of books could hinder this research. But the legal question before the Court - a question framed by petitioners themselves in constructing this cause of action - is whether this is or should be recognized as a violation of the First Amendment or the State's Constitution.

Petitioners also cite *Lamont v Postmaster General of U. S.* (381 US 301 [1965]) for the proposition that "burdening the receipt of information is as offensive to the First Amendment as the outright prohibition of receiving information" (memorandum in support at 24). *Lamont* dealt with a statute pertaining to mail originating in a foreign country and which the Secretary of the Treasury determined to be "communist political propaganda." In accordance with the statute, when the Post office determined that a piece of mail was "communist political propaganda," the addressee was mailed a notice identifying the detained mail, and advising that it would be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days (381 US at 303).

The Supreme Court found that the statute as construed and applied was unconstitutional, because it required an official act (*i.e.*, returning the reply card) as a "limitation on the unfettered exercise of the addressees First Amendment rights" (*id.* at 305). As stated by the Court: "The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail" (*id.* at 306).

One could analogize the situation in *Lamont* to the one presented here, because the Court stated that its finding was based "on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered" which amounted to "an unconstitutional abridgment of the addressee's First Amendment rights" (*id.* at 307). Thus, both situations involve a delay in the receipt of information. Significantly, however, the Court found it objectionable that the addressee had an affirmative obligation that the Government could not lawfully impose, because it is "almost certain to have a deterrent effect, especially as respects those who have sensitive positions" (*id.*). The deterrent effect was based on the content of the information. Indeed, both *Pico* and *Lamont* dealt with content, which is not at issue here.

Also cited by petitioners is *Kreimer v Bureau of Police for Town of Morristown* (958 F2d 1242 [3d Cir 1992]) for the proposition that "the First Amendment does not merely

prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas;" therefore, this right "includes the right to some level of access to a public library," the "quintessential locus of the receipt of information" (*id.* at 1255).

Kreimer involved a homeless man who resided in various outdoor public spaces in Morristown, New Jersey, and was a frequent patron of the "Joint Free Public Library of Morristown and Morris Township." He was expelled from the library on at least five occasions for violating its rules governing patron conduct. In his suit, he alleged that the library's rules were facially invalid under the First Amendment, basing his claim on the right to receive information and ideas, and the "'vital role played by public libraries' in promoting the fullest exercise of that right" (*id.* at 1251).

Although the Court found that "the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas," it determined that, as a "limited designated public forum," it is only required to:

> "permit use of its facilities which is consistent with the intent of the government when opening this forum to the public. Even within the scope of these consistent uses, it seems obvious that the Library may regulate conduct protected under the First Amendment which does not actually disrupt the Library. For example, we do not doubt that a Library may limit the number of books which a patron may borrow from it at any time, even though no request has been made by another patron for the book which the patron at his or her borrowing limit desires to withdraw. Similarly we do not doubt that the Library may limit the length of time during which a book may be borrowed" (*id.* at 1263).

The Court held that, based on the nature of the forum, the district court unduly restricted the "Library's authority to circumscribe admission to and expulsion from its facility" (*id.* at 1242). Although the Court stated that First Amendment "encompasses the positive right of public access to information and ideas," the "right to receive information is not unfettered and may give way to significant countervailing interests" (*id.* at 1255).

In their reply papers, petitioners cite several decisions wherein the plaintiffs challenged their exclusion from the library on Constitutional grounds (*see e.g. Wayfield v Town of Tisbury*, 925 F Supp 880 [D Mass 1996]). In *Wayfield*, the plaintiff was informed that, as a result of his alleged disruptive conduct, he would no longer be permitted in the library (*id.* at 882)." The Court held that:

> "Wayfield can make a colorable argument that (1) the deprivation he experienced was one that the state could be expected to anticipate (it does not require a leap of imagination to think that a patron's library privileges might be suspended); (2) the state could have provided predeprivation process (whether in the form of a warning letter and an opportunity to respond, or a hearing before the trustees, or in some other manner); and (3) that the state had delegated the library the authority to effect the deprivation, so their actions could not be said to be 'unauthorized' (*id.* at 887).

Wayfield, as with *Kreimer v Bureau of Police for Town of Morristown* (958 F2d 1242), involved plaintiffs who were singled out for library exclusion. Although in *Wayfield,* the Court stated that "Wayfield states a sufficient claim to support a finding that the suspension of his access to the library was a deprivation of a 'liberty or property right,'" (*id.* at 885), the ultimate issue was the process by which it was determined that his library privilege should be terminated. These cases involving claims of individual deprivation are not availing here.

Hence, petitioners have not demonstrated that, through the CLP, respondents will violate their rights under the First Amendment or Article I, § 8 of the State Constitution in that they will be denied timely access to reading and research materials, and which will irreparably interfere with their right to receive and communicate ideas.

2. *Second Cause of Action*

Petitioners allege that Education Law § 273(1)(g) creates minimum requirements for the terms of all contracts and grants between the State and the Library Respondents. In consideration of receiving the sum of $5,649,600.00 from the State, the Library Respondents have agreed to direct that sum to the "general support of its research libraries." The City

Respondents have appropriated $150 million to the Library Respondents to implement the CLP, which, if not stopped, will constitute a breach of Education Law § 273(l)(g) (*id.*, ¶¶ 96-103).

Petitioners argue that they can assert a violation of this statutory provision (which they characterize as contractual in nature) because they are intended third-party beneficiaries of this statutory "agreement," citing Justice Scalia's concurrence in *Blessing v Freestone* (520 US 329 [1997]) wherein Justice Scalia stated:

> "The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary" (*id.* at 349).

Assuming *arguendo*, that the petition validly alleges a breach of Education Law § 273(l)(g), petitioners have not shown that they are intended third-party beneficiaries to enable them to pursue such claim.

> "Parties asserting third-party beneficiary rights under a contract must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost'" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]).

Assuming that the statute is deemed a contract that was intended for petitioners' benefit, they have not shown that the benefit to them is "sufficiently immediate, rather than incidental." Moreover, the statute does not refer to them; it only refers to the "students of the City University of New York" (*see Alicea v City of New York*, 145 AD2d 315, 318 [1st Dept 1988] [petitioners "herein were not signatories to the contract, and no section of the contract refers to [petitioners] or to any employees of S & D Maintenance as third-party beneficiaries"]).

3. *Third and Fourth Causes of Action*

In the third cause of action, petitioners allege that the Library Respondents have sold five floors of the SIBL for a price far lower than was reasonably expected, and now intend to sell other properties in furtherance of the CLP, without performing an economic impact study relating to the effects of implementing the CLP, and without considering alternatives to the CLP. Thus, the Library Respondents have breached their duty to act with reasonable care, diligence, and prudence in administering the charitable trust under which it operates.

The fourth cause of action also alleges a violation of the terms of the charitable trust under which NYPL operates. The intent of the trust is to permanently maintain a world class research library for the public's benefit. Petitioners proffer that implementing the CLP will severely degrade NYPL's research capabilities by replacing the largest research library with a circulating library.

Petitioners do not have standing to bring either of these claims. In the amended petition, petitioners allege that NYPL is a charitable trust within the meaning of Estates, Powers and Trust Law § 8-1.1. In their reply papers, they appear to now agree with NYPL, that NYPL is a not-for-profit corporation (*see* memorandum in opposition to cross-motions and in further support at 34] ["Defendant NYPL admits it is not a charitable trust, and is, instead, a not-for-profit education corporation formed by special act of the legislature and is a member of the University of the State of New York"]).

Only the "Attorney General has the right to take action against a not-for-profit based upon a claimed violation of its legal obligations" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 109 [1st Dept 2009] ["Such 'privileges' as are enjoyed by charitable foundations are not accompanied, as plaintiff contends, by a general legal responsibility, enforceable by the public at large, to act at all times in the public interest and avoid actions that could appear self-serving. In the event there is proof of misconduct or bad faith on the part of the Foundation, the Attorney General may, in his discretion, take appropriate remedial action"], *lv denied* 15

NY3d 703 [2010]).

Similarly, in *Matter of Friends World Coll. v Nicklin* (249 AD2d 393 [2d Dept 1998]), a special proceeding was brought pursuant to Not-For-Profit Corporation Law § 511. Friends World College sought leave to dispose of 29.1 acres of waterfront property in Lloyd Harbor, Long Island, which was formerly part of the college campus. The Appellate Division held that the objectors to the proposed sale did not have standing, because they were not trustees, officers, or directors of the College (*id.* at 394).

As respondents correctly argue, even if NYPL were a charitable trust, petitioners would, nevertheless, not have standing to assert these claims (*Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465 [1985] ["The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust . . . . Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes" [citations omitted], *amend denied* 67 NY2d 717 [1986]; *Matter of Rosenthal*, 99 AD3d 573, 574 [1st Dept 2012] ["First, with respect to a trust, under EPTL 8-1.1 (f), only the Attorney General may enforce the trust provisions insofar as the beneficiaries are concerned"], *app denied in part, dismissed in part* 20 NY3d 1058 [2013]).

The exception to the general rule that only the Attorney-General has standing, described in *Alco Gravure, Inc. v Knapp Found.* (64 NY2d 458) is inapplicable here. In *Alco Gravure, Inc.*, the Court of Appeals stated that an exception exists when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in such fund's distribution, and the class of potential beneficiaries is sharply defined and limited in number. The Court found the presence of a class of beneficiaries, both well defined and entitled to a preference in the distribution of the funds at issue. Here, in contrast, the class is not well-defined, and it differs significantly from the "sharply defined" and "limited in number"

class of "potential beneficiaries" that caused the Court of Appeals to find standing in *Alco Gravure, Inc.*

4. *Fifth Cause of Action*

The fifth cause of action seeks an injunction pending the landmark hearing. Allegedly, petitioners Morris and Hewitt have filed requests with the Landmarks Commission to designate the Rose Reading Room an interior landmark, which have been calendared for a public hearing. Implementation of the CLP may render moot the landmark requests due to the destruction of the historic aspects of the Central Library's interior.

This claim is not validly stated as petitioners do not allege a violation of a statute, regulation, or procedure, or that the Landmarks Commission made a determination that was arbitrary or capricious in violation of any such statute or regulation (*cf. Matter of Stahl York Ave. Co., LLC v City of New York*, 76 AD3d 290, 295 [1st Dept 2010] ["Thus, our review is limited to a determination of whether the [Landmarks Commission's] designation of the buildings had a rational basis or, if, as petitioner contends, it was arbitrary and capricious"], *lv denied* 15 NY3d 714 [2010]).

5. *Sixth Cause of Action*

The sixth cause of action alleges that the NYPL is funded in part by taxpayer monies, including monies received from the State and the City. It is petitioners contention that the City Respondents have provided or intend to provide taxpayer monies to the Library Respondents in furtherance of the CLP, which constitute unlawful expenditures in violation of Finance Law § 123-b and General Municipal Law § 51. Moreover, petitioners maintain that the respondents' refusal to consider alternatives is a breach of their duty to expend public monies in a fiscally prudent manner and in furtherance of the best interests of the public.

Standing to enforce alleged violations of individual rights can be taxpayer-based if a party complains that public funds have been misused (*see Consumers Union of U.S., Inc. v*

State of New York, 5 NY3d 327, 351 [2005]). Petitioners argue that, under General Municipal Law § 51, they can maintain a taxpayer action whether the court deems it as one to enjoin the waste of taxpayer funds or as an action to enjoin the appropriation of funds for illegal purposes. "A taxpayer suit under General Municipal Law § 51 'lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009], quoting *Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014, 1016 [1983]). Petitioners do not allege that, under the CLP, respondents will use the public funds at issue for any purposes other than the renovation of the NYPL. As such, they have not shown that "the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes."

Similarly, under Finance Law § 123-b, a "citizen-taxpayer may bring suit to prevent the unlawful expenditure of state funds" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813, *cert denied* 540 US 1017 [2003]). It "grants citizen taxpayers standing to bring an action for equitable or declaratory relief against an officer or employee of the State to prevent a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2d Dept 2007]). "The statute is narrowly construed as a grant of 'standing to correct clear illegality of official action,' but does not allow the interposition of 'litigating plaintiffs and the courts into the management and operation of public enterprises'" (*id.*, quoting *Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992 [1976]). Here, the essence of the complaint is disagreement with the NYPL's contemplated allocation of State funds within the library system itself, and not the unlawful expenditure of State funds.

6. *Seventh Cause of Action*

The seventh cause of action alleges violation of the common law public trust doctrine.

"Under the public trust doctrine, dedicated parkland cannot be converted to a nonpark purpose for an extended period of time absent the approval of the State Legislature" (*Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks and Recreation*, 22 NY3d 648 [2014]; *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630 [2001]). "A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous use of the parcel as a public park" (*Powell v City of New York,* 85 AD3d 429, 431[1st Dept 2011], *lv denied* 17 NY3d 715 [2011]). Petitioners do not claim that the NYPL facility at issue "has ever been mapped or expressly dedicated as a public park." Therefore, the doctrine is not implicated (*Powell,* 85 AD3d at 431).

Petitioners seek to have the court expand the interpretation of the public trust doctrine "to include not only natural resources, but all inalienable resources that are held in trust for the general public" (memorandum of law in further support at 12). As precedent for the expansion of the doctrine, petitioners cite *Illinois Cent. R. Co. v State of Illinois*, 146 US 387 [1892]), which pertained to the determination of the right of a railroad company to construct, for its own business, as well as for public convenience, wharves, piers, and docks in a harbor bordering upon Lake Michigan in Chicago. The Supreme Court concluded that "the necessity of preserving to the public the use of navigable waters from private interruption and encroachment" was as applicable as to "waters moved by the tide" (*id.* at 436-437). It held that "the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations" (*id.*). Expansion is not warranted here, however, because, under the CLP, the NYPL is not being appropriated for use other than a library; the issue is the change in the functionality of the library. Based on the foregoing, the request for a preliminary

injunction is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion by petitioners is denied; and it is further,

ORDERED and ADJUDGED that the cross motions by the "Library Respondents" and "City Respondents" for dismissal of the complaint/petition are granted and the complaint/petition is dismissed with costs and disbursements as taxed by the Clerk; and it is further,

ORDERED that counsel for the Library Respondents are directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

Dated: 5-30-19

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).