Doe v County of Nassau
2018 NY Slip Op 32014(U)
July 31, 2018
Supreme Court, Nassau County
Docket Number: 612571/2017
Judge: John M. Galasso
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SHORT FORM ORDER **ORIGINAL**

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

JANE DOE AND CONTRAL AMERICAN
REFUGEE CENTER (CARECEN – NY),

Plaintiffs,

- against -

COUNTY OF NASSAU,

Defendant.

Index No. 612571/2017
Sequence # 001

MG

Part 18
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Upon the foregoing papers, the motion of defendant, County of Nassau (hereinafter "County") for an Order, dismissing plaintiffs' complaint, pursuant to CPLR § 3211(a)(3) and (7) is granted as set forth below.

This is a declaratory action by plaintiffs, Jane Doe (hereinafter "Doe") and Central American Refugee Center (hereinafter "CARECEN"), against defendant, County. Plaintiffs seek declaration that the County's Administrative Order 07-001 (hereinafter "AO 07-001") violates N.Y. CRIM. PROC. LAW § 140.10(1); that AO 07-001's authorization of arrests based on United States Immigration and Customs Enforcement (hereinafter "ICE") warrants or detainers is unlawful; and that the County's policy of holding foreign-born individuals in custody based on ICE warrants or detainers is unlawful.

Defendant contends that plaintiffs lack standing to bring this action because they have not suffered an injury-in-fact. Additionally, defendant contends that plaintiff CARECEN lacks representative standing to bring this action on behalf of the immigrant community it represents because it has not shown that at least one of its members would have standing to sue. Defendants also contend that for these reasons the complaint fails to state a viable cause of action.

In opposition, plaintiffs submit, *inter alia*, a copy of the complaint, a copy of AO 07-001, a copy of a United States Department of Homeland Security (hereinafter "DHS") immigration detainer, the affidavit of CARECEN Legal Services Director Patrick Young, a copy of a DHS warrant for arrest of an alien, an email from Assistant Solicitor General James Cole, and a document entitled "Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions."

The United States of America (hereinafter "U.S.") seeks leave to participate in this action in support of defendant County of Nassau. U.S. makes application for leave to participate as amicus curiae inclusive of a statement of interest pursuant to 28 U.S.C. § 517 and 22 NYCRR 670.11.

United States of America application to participate via amicus curiae brief

In reviewing an application to participate as amicus curiae, the court uses its discretion when deciding whether to permit a non-party to be heard as a "friend of the court." *Liotti v. Peace, 36 Misc.3d 1218(A), 2003 WL 26119406 at *9 [Sup. Ct., Nassau County. 2003] (citing New York State Senator Kruger v. Bloomberg, 1 Misc.3d 192, 768 N.Y.S.2d 76, 2003 WL 21815083 [Sup. Ct., N.Y. County. 2003])*. The authority of the court to grant amicus curiae status "has long been recognized" and is part "of the 'judicial function' with respect to rendering determinations on motions." *Id. [citations omitted]*. Consequently, the absence of a specific rule or statute authorizing a nisi prius court to grant amicus curiae status is inconsequential because the court's power to do so is recognized by the common law and stands as part of the "inherent powers" of the court. *Id. at *9-11 [citations omitted]*.

In deciding whether to grant amicus curiae status to a non-party the appropriate analysis "is similar to the review an appellate court uses in determining whether to grant amicus status." *Kruger, 768 N.Y.S.2d at 81*. Where a party seeks amicus curiae status, such party is seeking to participate "in a judicial proceeding to assist the court by giving information or otherwise." *Empire State Ass'n of Assisted Living v. Daines, 887 N.Y.S.2d 452, 455 [Sup. Ct., Albany County 2009]*. Such status may be granted where the "movant would invite the court's attention to the law or arguments which might otherwise escape its consideration." *Kruger, 768 N.Y.S.2d at 83.* Where, as here, a case involves "questions of important public interest[,] leave is generally granted to file a brief as amicus curiae." *Id. at 81 (quoting Colmes v. Fisher, 151 Misc. 222, 223, 271 N.Y.S. 379 [Sup. Ct., Erie County 1934]); see also, Empire State Ass'n of Assisted Living, 887 N.Y.S.2d at 455-56.*

While considering plaintiffs' opposition to submission of the U.S. amicus curiae statement of interest based upon notice requirements for intervention pursuant to CPLR Sections 1012, 1013 and 1014, this Court notes that the U.S. has not made application for intervention, but rather seeks permission to file a statement of interest amicus curiae pursuant to 22 NYCRR 670.11. In as much as the U.S. has provided its statement of interest to all parties, and plaintiffs do not contest receipt of same through its opposition thereto, this Court finds the U.S. application appropriate given the questions posed by plaintiffs' complaint that are of important public interest. While this action involves questions of New York State law and its relationship with federal law, the U.S. is uniquely qualified to provide the court with information that cannot be as adequately addressed by either of the parties.

Participating as amicus curiae in support of defendant, the U.S. asserts that the County's policy is consistent with both federal and New York State law. The U.S. contends that the Immigration and Nationality Act (hereinafter "INA") specifically authorizes local governments to comply with ICE detainers where the local government is acting pursuant to a request, approval, or instruction from the Federal Government. Additionally, the U.S. contends that AO 07-001 complies with New York State law because it does not compel the Nassau County Police Department (hereinafter "NCPD") to make arrests.

<u>Motion for dismissal based upon plaintiff Jane Doe's lack of standing</u>

In reviewing a motion pursuant to CPLR 3211(a)(3) to dismiss a complaint for lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law. *See HSBC Mtge. Corp. [USA] v. MacPherson, 89 A.D.3d 1061, 1062, 934 N.Y.S.2d 428*. Where defendant makes a prima facie showing to put standing into issue, plaintiff must prove it has standing to be entitled to relief. *See Deutsche Bank Natl. Trust Co. v. Haller, 100 A.D.3d 680, 682, 954 N.Y.S.2d 551; Wells Fargo Bank, N.A. v. Frankson, 157 A.D.3d 844, 845; Deer Park Assoc. v. Town of Babylon, 121 A.D.3d 738, 740-41*. To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing. *See U.S. Bank N.A. v. Faruque, 120 A.D.3d 575, 578, 991 N.Y.S.2d 630; Deutsche Bank Natl. Trust Co. v. Haller, 100 A.D.3d 680, 683, 954 N.Y.S.2d 551; U.S. Bank Nat. Ass'n v. Guy, 125 A.D.3d 845, 5 N.Y.S.3d 116 [2d Dept. 2015]*. Additionally, the fact that an issue is "one of vital public concern" will not entitle a party to standing. *Society of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1038 [N.Y. 1991] [internal quotation marks omitted]*.

Plaintiff Doe contends that she has standing because she has alleged an injury-in-fact based on potential harm from AO 07-001 in the form of warrantless and unlawful arrest. In addition, plaintiff contends that an injury-in-fact does not require that the alleged harm has already occurred, and that she has established standing based upon potential harm.

Where a plaintiff seeks to challenge governmental action, standing is a threshold requirement for which there is a two-part test. *New York State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 [N.Y. 2004]*. "First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action" and that the alleged injury is more than conjectural. *Id.* "Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Id. [citations omitted]; see also Society of Plastics Indus., 573 N.E.2d at 1041; Colella v. Board of Assessors of County of Nassau, 741 N.E.2d 113 [N.Y. 2000]*. The injury-in-fact requirement serves to ensure that the plaintiff "has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution." *Society of Plastics Indus., 573 N.E.2d at 1040 [citation and internal quotation marks omitted]*.

Though plaintiff Doe alleges that she has standing by the possibility of being subject to AO 07-001, she fails to show that such enforcement would result in harm that can be remedied by this Court. Upon review of AO 07-001, the policy does not set forth any procedure for the arresting of individuals. Rather, the policy dictates the procedure that NCPD officers should follow when a foreign-born individual is in custody, to ensure that defendants who are the subject of active ICE warrants or detainers are not released. In as much as the harm that plaintiff Doe alleges from potential unlawful arrest is hypothetical, it fails to show any injury in fact.

Plaintiff also supposes, that even assuming an arrest is lawful, the County's policy of complying with ICE warrants and detainers is unlawful because it violates New York State law for arrests, and that plaintiff has standing based on the possibility of being detained per the County's policy. As asserted by amicus curiae U.S., the INA authorizes local governments to comply with federal law regarding arrest warrants, and that an ICE arrest warrant sets forth the basis for the issuing officer's probable cause determination. In as much as the plain reading of AO 07-001 does not authorize arrests, but rather, instructs NCPD officers of the procedure once an arrest has been made, plaintiff also fails to maintain an injury in fact on this basis.

Thus, AO 07-001, by complying with ICE warrants and detainers, does not cause those who would be subject to the policy to suffer an injury-in-fact. In as much as the plaintiff fails to allege that any other injury, such as unlawful arrest, has occurred, or shown that such injury is likely to occur as a result of AO 07-001, plaintiff Doe fails to raise an issue of fact to dispute defendant's prima facie showing that plaintiff lacks standing.

Accordingly, defendant's motion to dismiss the complaint of plaintiff Jane Doe is granted.

Motion for dismissal based upon plaintiff CARECEN's lack of standing

CARECEN contends that it has associational standing because one or more of its members has standing; the interests at stake are germane to CARECEN's purpose; and the case does not require the participation of individual members.

An organizational plaintiff must meet a three-part test to establish standing. It must show (1) that at least one of its members would have standing to sue, (2) that the asserted interests are germane to the organization's purposes, and (3) that the case would not require the participation of individual members. *See e.g., New York State Ass'n of Nurse Anesthetists, 810 N.E.2d at 407; Rudder v. Pataki, 711 N.E.2d 978 [N.Y. 1999]; Matter of Dental Soy. of State of N.Y. v. Carey, 462 N.E.2d 362 [N.Y. 1984]*. The "key determination" for associational or organizational standing is whether one or more of the organization's members would have standing. *Society of Plastics Indus., 573 N.E.2d at 1042; see also, New York, Inc. v. The City of New York, 2014 WL 2776622, 2014 N.Y. Slip Op. 31570(U).*

Plaintiff CARECEN fails to show that any of the people it represents has or would have standing to sue. Similar to the allegations made by Doe, CARECEN asserts that compliance with ICE warrants and detainers has caused its clients direct injury but fails to make more than conjectural claims of injury to those it represents.

Plaintiff CARECEN also contends that it has suffered an injury-in-fact because AO 07-001 has caused it to expend additional resources.

While a "perceptible impairment" of an organization's activities can be sufficient to trigger standing, the impairment must be to the organization's ability to perform its activities. *See, Nnebe v. Daus, 644 F.3d 147, 157 [2d Cir. 2011]; see generally, Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 [1982].*

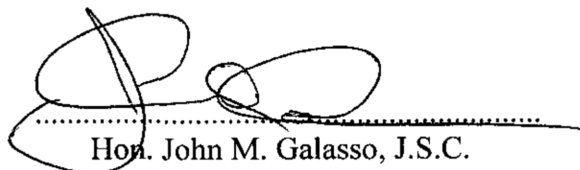
Plaintiff CARECEN states that its purpose is to advocate on behalf of immigrants on Long Island, and that it has an interest in preventing unlawful arrests in the Long Island immigrant community. In as much as CARECEN's expenditures to represent clients detained by ICE or in accordance with AO 07-001 are directly serving the organization's purposes, it cannot be concluded that the increase in detentions associated with enforcement of the subject regulation impairs plaintiff's activities. Nor is such claim readily pleaded in plaintiffs' complaint.

Accordingly, defendant's motion to dismiss the complaint of plaintiff CARECEN is granted.

Plaintiffs fail to raise an issue of fact to dispute defendant's prima facie showing that they lack standing. Accordingly, the motion of defendant, County of Nassau, is granted, and the plaintiffs' complaint is dismissed.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

July 31, 2018



Hon. John M. Galasso, J.S.C.

ENTERED
AUG 16 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE