| **SNL Capital Partners, LLC v The City of New York** |
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| 2020 NY Slip Op 32088(U) |
| June 30, 2020 |
| Supreme Court, New York County |
| Docket Number: 652005/2020 |
| Judge: Arlene P. Bluth |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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SNL CAPITAL PARTNERS, LLC,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF FINANCE, JACQUES JIHA, in his official capacity as Commissioner of the New York City Department of Finance

Defendants.

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**INDEX NO.** 652005/2020

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

The motion by plaintiff for a preliminary injunction is denied and the cross-motion by defendants to dismiss is granted.

## Background

Plaintiff runs self-storage properties in New York City and seeks injunctive relief relating to the state's repeal of certain tax benefits for self-storage projects. Under the Industrial and Commercial Abatement Program ("ICAP"), properties receive tax abatements under certain circumstances (such as where the buildings were expanded, improved or modernized). Plaintiff says it has previously obtained ICAP benefits on six sites throughout New York City. In April 2020, the state legislature modified the program to exclude self-storage properties in connection

with the passage of the state budget. It provided a period by which self-storage properties could still receive ICAP benefits, but only if they got a permit before July 1, 2020.

Plaintiff contends that it is developing five projects in New York City and its entire business plan was developed in reliance upon getting the ICAP benefits "as of right." It contends that it won't be able to secure a permit for these projects before the July 1, 2020 deadline. Plaintiff argues that it only found out about the change in the law *after* it was enacted. It argues that the change in law will apply retroactively to its projects and destroy them. Plaintiff attaches the affidavit of John Geraci (a building code consultant) who details each project and contends that the Department of Buildings ("DOB") will likely have (or has already stated) objections that will make it impossible for plaintiff to secure permits before the July 1, 2020 deadline (NYSCEF Doc. No. 39). It also attaches the affidavit of the managing director of a private equity firm invested in plaintiff's projects who claims that his firm will withdraw from its agreement with plaintiff if the projects are unable to receive ICAP benefits (NYSCEF Doc. No. 48).

In this motion, plaintiff asks for a preliminary injunction preventing defendants from applying the April 2, 2020 law to plaintiff's self-storage development properties. Plaintiff claims it is likely to succeed on the merits because the law passed by the legislature has retroactive effect on its projects. The imposition of an unforeseen tax obligation, according to plaintiff, violates plaintiff's substantive due process rights. It complains that it had no forewarning about the change and that it will be unable to finance any of its projects. Plaintiff details how it entered into numerous agreements over the last few years related to these projects in reliance upon the fact that it would receive ICAP benefits. It argues there is no public purpose served by retroactively eliminating its right to tax abatements.

Plaintiff next argues that it will lose its properties if a preliminary injunction is not issued by this Court and that this constitutes irreparable harm. It also insists that a balancing of the equities weighs in its favor because it stands to lose money, property and professional capital. It argues that defendants will only lose tax dollars, money which defendants had no expectation of receiving. Plaintiff maintains it reasonably relied on the receipt of ICAP benefits, and that these benefits promote the public interest. Allowing the amendment to apply to its projects would "deprive the City's underserved outer boroughs of a much-needed amenity."

In opposition and in support of its cross-motion to dismiss, defendants insist that the law has no retroactive effect and points to the text of the law which states it applies immediately, except for projects where a "first building permit" is issued before July 1, 2020. They point out that it appears investors in plaintiff's projects were under the mistaken impression that ICAP benefits were guaranteed. Defendants note that letters from plaintiff's own advisor, New York Real Estate Tax Services ("NYRETS"), specifically state that future benefits should not be viewed as "warranties" and that the law could change (*see e.g.*, NYSCEF Doc. No. 14). They note that receiving benefits under ICAP is subject to numerous facts and circumstances, including a change in the law.

Defendants contend that a preliminary injunction should not be granted and that anticipated ineligibility for property tax relief does not constitute irreparable harm. They point out that the harms plaintiff contends will occur will not be caused by defendants: the loss of properties, relationships with funders and a credit hit will arise from interactions with third parties. Defendants emphasize that plaintiff's alleged entitlement to anticipated and potential ICAP benefits cannot be the basis for a preliminary injunction.

With respect to a balancing of the equities, defendants contend that plaintiff created its own mess. It leveraged its entire business model on getting ICAP benefits despite the fact that these tax abatements were not guaranteed. Defendants point out that the change in ICAP applicability was made due to the precipitous decline in state and local revenues cause by Covid-19. They maintain that in order for plaintiff to state a viable substantive due process claim, it must show it has already acquired a property interest, something that plaintiff cannot do.

In support of their cross-motion to dismiss, defendants insist that plaintiff has not stated a cognizable cause of action. They argue plaintiff has not alleged a viable substantive due process claim based on anticipated benefits it could have received at some future date. Defendants observe that there is no basis for plaintiff's claim that an entity who has yet to qualify for a tax abatement program can request injunctive relief to prevent the elimination of the program.

In reply, plaintiff emphasizes that it will lose millions in non-refundable deposits if its projects are no longer eligible for ICAP benefits, it will be forced to abandon its properties and it will not be able to obtain money damages for its losses. Plaintiff argues it has stated a substantive due process claim based on the retroactive effect of law in question. It asserts its properties are facially eligible for these benefits and it completed the application processes in good faith. Plaintiff attaches the affidavit of its co-founder, Aryeh Goldman, who details how plaintiff might lose a property in Queens. It also attaches the affidavit from its tax advisor from NYRETS who claims he is not aware of any eligible property failing to receive ICAP benefits and his language about laws changing was not meant to imply that there would be a denial of ICAP benefits.

In reply to its cross-motion, defendants argue that plaintiff's reply papers do not change plaintiff's inability to establish a substantive due process claim. They emphasize that ICAP

benefits have always been subject to terms, conditions and requirements. Defendants maintain that plaintiff is essentially arguing that the submission of a preliminary application is sufficient to guarantee ICAP benefits. They observe that the application specifically states that it does not confer any right or benefit.

**Preliminary Injunction**

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous. Inc.*, 4 NY3d 839, 840, 800 NYS2d 48 [2005] citing CPLR 6301]). "Entitlement to a preliminary injunction depends upon probabilities, any or all of which may be disproven when the action is tried on the merits" (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216, 889 NYS2d 793 [1st Dept 2009] [internal quotations and citation omitted]).

The Court denies plaintiff's request for a preliminary injunction. As an initial matter, plaintiff has not shown a probability of success on the merits. The program at issue—ICAP—is a tax abatement program used to encourage certain types of property improvement. The fact that plaintiff has projects that *might* have received ICAP benefits at some point in the future is not a basis for the Court to enjoin defendants from enforcing a duly enacted law.

The Court also finds that the law at issue does not have a "retroactive" application. "A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting 'substantive' rights. On the other hand, a statute that affects only 'the propriety of prospective relief' or the nonsubstantive provisions governing the procedure for

adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct" (*Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 2020 NY Slip Op 02127, *11 [2020] [internal quotations and citation omitted]). The law at issue here provides that changes to RPTL 489-cccccc "shall take effect immediately; provided that section one of this act shall apply to projects for which the first building permit is issued after July 1, 2020 or if no permit is required, for which construction commences after July 1, 2020."

Here, there is no question that the loss of ICAP benefits relates to the "propriety of prospective relief" rather than impairing rights that plaintiff actually possessed. While the change in the law certainly has an effect on agreements plaintiff may have previously reached with third parties, that does not mean this legislation has retroactive effect. The plain language of the statute clearly states that the act has immediate effect and even provided a grace period by which self-storage projects that obtained a permit before July 1, 2020 could still get ICAP benefits.

The fact that plaintiff claims it will be unable to get permits for its five projects before July 1, 2020 is of no moment. As plaintiff points out, DOB often has objections to proposed permits. The Court cannot direct DOB to abandon its usual procedure for approval of certain permits so that plaintiff can fall within the grace period. The legislature was entitled to pick a deadline. It could have, for instance, not provided any grace period and simply ordered that the changes have immediate effect. But simply because plaintiff's projects won't get a permit within the prescribed time period is not a valid basis upon which to find that it had retroactive effect.

And plaintiff's reliance on *Regina* is misplaced. In *Regina,* the Court of Appeals ruled that provisions of the Housing Stability and Tenant Protection Act ("HSTPA") that expanded the lookback period for overcharge calculations and imposed treble damages on landlords for past

conduct violated landlords' substantive due process (*Regina*, 2020 NY Slip Op 02127 at *17-22). *Regina* dealt with a law that clearly involved retroactive effect predicated on past conduct. The basis for treble damages would potentially arise from acts (overcharging tenants) that occurred years before the HSTPA was enacted. In other words, HSTPA provided for potentially greater liability against landlords based on landlords' past conduct; that situation presents an obvious example of retroactive application.

That is not the case here, where the legislature eliminated certain projects from eligibility for tax benefits going forward (and even included a grace period). The Court also observes that simply because an act is retroactive does not mean that the law automatically violates due process rights (*id*. at 13-14; *see also see MSK Realty Interests, LLC v Dept. of Fin. of City of New York*, 170 AD3d 459, 95 NYS3d 191 [1st Dept 2019][finding that retroactive elimination of plaintiff's eligibility for a tax abatement did not violate due process rights]).

And, of course, the retroactive issues raised by plaintiff are closely related to the question of whether plaintiff's substantive due process rights were violated. The Court of Appeals has "set out the two-part test for substantive due process violations. First, claimants must establish a cognizable property interest, meaning a vested property interest, or more than a mere expectation or hope . . .they must show that pursuant to State or local law, they had a legitimate claim of entitlement. . . Second, claimants must show that the governmental action was wholly without legal justification" (*Bower Assocs. v Town of Pleasant Valley*, 2 NY3d 617, 627, 781 NYS2d 240 [2004]).

Plaintiff's attempt to distinguish *Bower* as inapposite because it was a land use case is misplaced. The test elucidated in *Bower* has been utilized in substantive due process cases

involving other issues (*e.g., Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59, 936 NYS2d 63 [2011] [applying the *Bower* two-prong test in a workers' compensation case]).

Plaintiff failed to meet either prong of the two-part test. It has not shown that it has a vested property interest in the ICAP benefits it has yet to receive for the five projects at issue. Rather, it had a "mere expectation" that it was going to receive ICAP benefits. In fact, the preliminary application for ICAP benefits states, in bold, that the application "does not confer the right to any benefit" (NYSCEF Doc. No. 62 at 1). The Court is unable to conclude that plaintiff obtained a cognizable property interest by submitting a preliminary application.

And defendants had a legitimate justification for eliminating tax abatements. They attach a copy of press release concerning the passage of the state budget (which included the changes at issue here), which notes that the "state's financial situation has been thrust into a true economic crisis due the coronavirus pandemic" (NYSCEF Doc. No. 54). It does not matter whether the Court agrees with the elimination of these tax abatements. The standard is whether changing the law was "wholly without legal justification" and "not supported by a rational legislative basis" (*Raynor*, 18 NY3d at 59). The fact is that the legislature decided to end tax abatements for self-storage projects as part of an effort to address the dire financial situation facing the state. That is a rational basis for ending ICAP benefits for self-storage properties.

And it bears pointing out that the status quo ante is that property taxes have to be paid. The ICAP program was used to incentivize certain projects through tax abatements, but it did not eliminate property taxes. There is no doubt that a state can choose to eliminate a tax benefit; simply because plaintiff expected that the tax abatement would continue in perpetuity is not a ground to block its application.

Moreover, a review of plaintiff's investment proposals reveals that investors were told that "the site *will* benefit from certain real estate tax incentives ("ICAP")" (NYSCEF Doc. Nos. 13, 17, 22, 28, 32 [emphasis added]). It was not defendants' decision to represent to investors that the site was going to benefit from tax incentives despite the fact that it was receiving analyses from NYRETS that the law could change (*e.g.*, NYSCEF Doc. No. 14). Obtaining ICAP benefits was anticipated by plaintiff but it was not guaranteed. The fact that plaintiff had received these benefits in other projects does not make its application to its current projects a retroactive application. Plaintiff readily admits it has not received a permit yet for these projects.

Plaintiff failed to show that it would likely succeed on the merits of its claims, that it would suffer irreparable harm caused by defendants or that a balancing of the equities is in plaintiff's favor. Instead, the record before this Court demonstrates that plaintiff is unhappy that it will not be able to receive ICAP benefits for certain projects and that *investors* may pull out. While that outcome is unfortunate, unhappiness with the state's action is not a ground to impose injunctive relief.

**Cross-Motion to Dismiss**

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

Plaintiff's complaint alleges two causes of action. The first, brought pursuant to 42 USC § 1983, seeks declaratory and injunctive relief based on the due process clause of the Fourteenth

Amendment to the United States Constitution. The second claim seeks similar relief predicated on defendants' violation of the due process clause of New York State's Constitution. Both claims fail to state a cognizable cause of action. As stated above, plaintiff does not have a vested property interest in tax benefits it has not yet received. The mere expectation or anticipation that a tax abatement program would continue is not an interest that implicates substantive due process concerns, especially where the elimination of those tax benefits is implemented prospectively.

**Summary**

In times of financial crisis, it is understandable that the state might end tax abatement programs. That plaintiff's investors might back out of these projects does not constitute a due process violation nor is it a guarantee that it won't be able to find alternative financing that incorporates having to pay taxes that plaintiff would ordinarily be required to pay. These properties might be less profitable but the parade of horribles advanced by plaintiff is, at this point, mere speculation. Under plaintiff's theory, simply because it had secured financing and was moving towards getting permits, ending ICAP before it received any benefits somehow constitutes retroactive application. That interpretation would eviscerate the text of the statute and force the state to give benefits based on agreements to which it was not a party.

Plaintiff decided to take a risk; it predicated its entire business model on receiving a tax abatement. It told investors that it *was* going to get the ICAP benefits and it did not factor in the possibility that the state might end ICAP for self-storage properties. That was plaintiff's strategic choice to make but it does not constitute a vested property interest in projects that had yet to receive ICAP benefits. There is no question that the state can, at any time, decide to end a program as it did here. Although plaintiff is certainly correct that state actions that have

retroactive effect are closely scrutinized, its effort to characterize the state's actions here as retroactive defy a plain reading of the statute. In fact, the law specifically indicated it had immediate effect and even included a grace period. Unfortunately for plaintiff, its projects were not far enough along to obtain the necessary permits to qualify for the abatement within the grace period.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for a preliminary injunction is denied; and it is further

ORDERED that the cross-motion by defendants to dismiss is granted, the Clerk is directed to enter judgment when practicable, with costs and disbursements, upon presentation of proper papers therefor.

06/30/2020
DATE

ARLENE P. BLUTH, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | | GRANTED | | DENIED | GRANTED IN PART | X | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |