

**Borelli v Town of Clarkstown**

2023 NY Slip Op 31750(U)

March 31, 2023

Supreme Court, Rockland County

Docket Number: Index No. 031181/2023

Judge: Amy S. Puerto

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
FRANK BORELLI and PATRICK CARROLL,

Petitioners,

DECISION and  
ORDER

vs.

INDEX NO.:  
031181/2023

THE TOWN OF CLARKSTOWN and  
THE TOWN BOARD of the TOWN OF CLARKSTOWN,

Respondents.

-----X  
PUERTO, J.S.C.

The following papers (e-filed documents 1-3, 7, 11, 13, 15, 16, & 18) were read on the e-filed petition by FRANK BORELLI and PATRICK CARROLL (“Petitioners”) for an order declaring Local Law 1 of 2023 illegal, invalid, null and void and enjoining, restraining and prohibiting THE TOWN OF CLARKSTOWN and THE TOWN BOARD of the TOWN OF CLARKSTOWN (“Respondents”) from repealing Local Law #9-2014 Chapter 263 of the Town Code, and the e-filed motion by Respondents to dismiss the action:

Papers

Petition (Exhibits 1 & 2), Order to Show Cause

Answer

Notice of Motion, Statement of Material Facts, Affirmation in Support

Opposition by Letter

Upon reading the foregoing papers, it is hereby

ORDERED that Respondents' motion to dismiss pursuant to sections 3211(a)(7) and 3212 of the Civil Practice Law and Rules ("CPLR") is denied in its entirety; and it is further

ORDERED that the petition seeking an order declaring Local Law 1 of 2023 illegal, invalid, null and void and enjoining, restraining, and prohibiting Respondents from repealing Local Law #9-2014 Chapter 263 of the Town Code is granted; and it is further

ORDERED that Local Law 1 of 2023 is declared to be illegal, invalid, null and void; and it is further

ORDERED that Respondents are enjoined, restrained, and prohibited from repealing Local Law #9-2014 Chapter 263 of the Town Code by way of Local Law 1 of 2023.

On December 22, 2022, an action was filed by GEORGE HOEHMANN, DONALD FRANCHINO, and THOMAS FOLEY against the same Respondents in this action, seeking a declaratory judgment finding Chapter 263 of the Town Code of the Town of Clarkstown invalid (Index Number 035405/2022). Said local law was enacted in 2014 and limited the number of years any Clarkstown official elected after January 1, 2015, could serve to eight consecutive years. The argument asserted by Hoehmann, Franchino, and Foley was that Chapter 263 should have been put to a public referendum since it required a super-majority vote of the board in order to be repealed and such referendum was never held. Accordingly, they argued, the law was invalid.

Respondents filed an answer to the earlier action and asserted several affirmative defenses, including that Petitioners in that matter failed to state a claim for which relief could be granted and that Chapter 263 was "not affected by error of law" (Index # 035405/2022, Document #4).

Ultimately, this Court dismissed the action, finding that it was precluded by the statute of limitations, and that requirement that Chapter 263 could only be repealed with a super-majority vote did not violate Town Law § 63 and Municipal Home Rule Law (“MHRL”) § 20.

While the aforementioned petition was pending, Respondents passed Local Law 1 of 2023, which repealed Chapter 263, by a simple majority, in direct contravention of the super-majority requirement contained in Chapter 263. Petitioners now seek a judgment from this Court declaring Local Law 1 of 2023 invalid.

All parties appeared in court on this matter on Monday, March 27, 2023. At that time, Petitioners requested that the Court issue its decision forthwith, given the impending due date for the submission of nominating petitions. Respondents requested until Wednesday, March 29, 2023, to submit opposition to the Order to Show Cause and their request was granted.

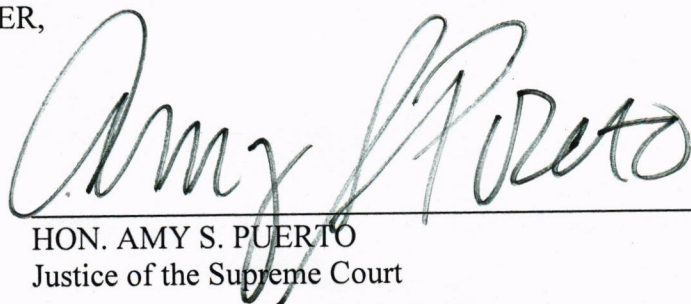
Rather than filing opposition papers on March 29, 2023, Respondents filed a Notice of Motion to dismiss the action, with a return date of March 31, 2023, despite the time frames set out in CPLR 2214(b). Petitioners filed a letter in opposition to the motion, which this court has considered given Petitioners’ limited time in which to oppose the application. CPLR 2214(b) requires that a notice of motion be served at least eight days before the time at which the motion is noticed to be heard and allowing answering affidavits to be served at least two days before the return date (CPLR 2214[b]). Accordingly, Respondents’ motion to dismiss is denied as procedurally defective.

In any event, the court finds Respondents’ position to be without merit for two reasons. First, this Court’s decision in Index # 035405/2022 found that the super-majority requirement contained in Chapter 263 did not render the law invalid. Hence, the law cannot be repealed by a simple majority.

Additionally, the court finds Respondents' position in this action to be barred by the doctrine of inconsistent positions, which "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (Prudential Home Mortgage Company, Inc. v. Neildan Construction Corp., 209 A.D.2d 394, 395 [2d Dept. 1994]; see also, Piedra v. Vanover, 174 A.D.2d 191 [2d Dept. 1992]; Neumann v. Metropolitan Med. Group, 153 A.D.2d 888 [2d Dept. 1989]). This doctrine is utilized by courts to estop parties from adopting obvious contrary positions and to discourage parties from "playing fast and loose with the courts" (Environmental Concern v. Larchwood Constr. Corp., 101 A.D.2d 591, 594 [2d Dept. 1984]). Thus, Respondents' argument are rejected.

ENTER,

Dated: New City, New York  
March 31, 2023



HON. AMY S. PUERTO  
Justice of the Supreme Court

Via E-filing to the attorneys of record