SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DOUGLAS ARMER, ANGIE BILOTTI, TANYA BONNER, ROBERT CAMACHO, ERIC CASIMIRO, MEREDITH CASIMIRO, FAI CHU, EMMA CULBERT, ELIZABETH DEMAYO, ELIZABETH DWORKIN, MARY EVANCHO, DEBORAH FARLEY, DEBORAH GONZALEZ, DAVID GRUBER, CHHAYA KAPADIA, MICHAEL KENNA, NORA KILLORAN, ELLEN KOENIGSBERG, DASHIELL KUPPER, CHERI LEON, BETSY MAK, WALTER NASH, RICARDO PACHECO, SHANNON PHIPPS, DANIEL PREBUTT, LARRY ROBERTS, MARCELL ROCHA, INA SELDEN, TRINA SEMORILE, MICHAEL SIMON, ANTHONY STROPOLI, PATRICK WALSH, JOHN WETHERHOLD, RUSSEL WHITEHOUSE, JUDITH ZABOROWSKI

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

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INDEX NO. 156328/2022

MOTION DATE 09/07/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 82, 85-89 were read on this motion to/for AMENDED PETITION-ARTICLE 78
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The amended petition is denied as moot.

Background

This dispute concerns the various executive orders that permitted the use of public spaces by restaurants and bars. This program, referred to as New York's Temporary Open Restaurant Program ('TORP") or outdoor dining, was initially designed to assist bars and restaurants which were then struggling to cope with the effects of the COVID-19 pandemic. Petitioners commenced this proceeding to challenge respondent's executive orders upon which TORP operated.

This Court previously granted petitioners' motion for leave to amend their petition and for a temporary injunction preventing respondent from relying upon Executive Order 459 to support TORP during the pendency of this action (NYSCEF Doc. No. 78 at 14). This Court observed that the justifications for the subject executive order cited by respondent were inapplicable (*id*. at 10). The Court concluded that there was no emergency, at least as defined under the Executive Law (and particularly section 24), to support the temporary suspension of certain laws necessary to allow outdoor dining (*id*. at 9).

Subsequently, the City enacted legislation (Local Law 121) that provides for outdoor dining (NYSCEF Doc. No. 87). Respondent also insists that it let the applicable executive orders expire and so this proceeding is now moot.

Petitioners contend that this proceeding is not moot although they acknowledge that the mayor failed to renew the challenged executive order at issue in this case. They complain that the new law authorizing outdoor dining, Local Law 121, permits TORP to continue without a lawful environmental review. Petitioners point to a decision from another justice in New York County Supreme Court in 2022 that involved whether SEQRA (an environmental statute) applies to TORP.

They maintain that the proceeding is not moot and that this Court should "delimit executive authority in a manner which can inform the city's chief executives and put them on notice that our courts are a co-equal branch of government and shall enforce the law" (NYSCEF Doc. No. 89 at 9). Petitioners insist that this is precisely the type of situation that is capable of repetition and will evade final review (factors to be considered as part of the exception to the mootness doctrine).

Discussion

As a preliminary matter, it appears that petitioners' effort to file a new sequence number for their amended petition was rejected by the clerk's office. Rather than wade into the morass of the clerk's office in an attempt to fix this issue, which will only delay this matter, the Court will decide this application under motion sequence 002. However, this decision should not be considered as an amended or modified opinion with respect to the opinion already filed under motion sequence number 002 as NYSCEF Doc. No. 78.

The central issue on this motion is whether the petitioners' requested relief is moot. "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties. An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts" (*Coleman ex rel. Coleman v Daines*, 19 NY3d 1087, 1090, 955 NYS2d 831 [2012] [citations omitted]).

Here, there is no question that the City enacted Local Law 121, which permits outdoor dining, and that the executive order that forms the basis of the amended petition expired. Local Law 121 is not mentioned at all in the amended petition. And no party argues that Executive Order 459 is being used to allow outdoor dining; in fact, Local Law 121 provides for a transition period for establishments that currently have outdoor dining as the permitting process in the law comes into effect. Accordingly, the relief demanded by petitioner is moot.

The question, then, is whether an exception to the mootness doctrine applies such that the Court could consider petitioners' claims. The Court finds that petitioners failed to satisfy the

standard cited above. The issue of whether respondent will rely upon the cited executive order, or a similar one, to justify outdoor dining is unlikely to recur because of the passage of Local Law 121. And while the issue may be substantial and novel, the Court has no doubt that challenges will arise relating both to an executive's reliance on Executive Law § 24 and outdoor dining. There is little chance such actions would evade judicial review.

This analysis also highlights additional reasons why this Court finds that the exception to the mootness doctrine does not apply in this situation. Petitioners ask this Court to set some sort of limit on executive authority. But, in this Court's view, that would amount to an impermissible advisory opinion. What would be the limits or confines of such a decision? If it were to apply only to the outdoor dining executive orders, then that would serve little purpose given the passage of Local Law 121. If petitioners seek a broader declaration about the limits of executive power more generally in the context of an emergency[1], then that is well beyond the scope of this proceeding or this Court's role. Such a theoretical discussion is better suited for a law review article.

This Court can only decide the cases and controversies before it—not some imagined future situation in which Executive Law § 24 might be invoked. This Court has no doubt that when, and if, such a circumstance arises, there will be many challenges to those executive orders. A Court will have to evaluate such an order under the facts and circumstances then present; this Court cannot predict the future. Here, petitioners admit that the legality of Local Law 121 is not before this Court (NYSCEF Doc. No. 89 at 12). Because the executive order that *was* before this Court is no longer in effect, this proceeding is moot.

[1] Petitioners' memorandum of law insists that "if times radically change and a new emergency executive order is required, this court's guidance will be most critical in setting its lawful parameters and elements" (NYSCEF Doc. No. 89 at 12).

Accordingly, it is hereby

ADJUDGED that the amended petition is denied and the petition is dismissed, without costs and disbursements to respondent.

9/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

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