Matter of Kuhn v County of Suffolk
2010 NY Slip Op 33016(U)
October 15, 2010
Sup Ct, Suffolk County
Docket Number: 48869/2009
Judge: Joseph Farneti
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SHORT FORM ORDER INDEX NO. 48869/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ORIG. RETURN DATE: JANUARY 6, 2010
FINAL SUBMISSION DATE: MARCH 18, 2010
MTN. SEQ. #: 001
MOTION: MD

In the Matter of:
HENRY KUHN,

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR and Declaratory Judgment

-against-

COUNTY OF SUFFOLK and COUNTY LEGISLATURE OF THE COUNTY OF SUFFOLK,

Defendants.

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SUFFOLK COUNTY ATTORNEY
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Upon the following papers numbered 1 to __10__ read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78. Notice of Petition and supporting papers __1-3__; Verified Answer __4__; Respondents' Affirmation in Opposition and Return __5, 6__; Memorandum of Law in Opposition to the Petition __7__; Petitioner's Affirmation in Opposition and supporting papers __8, 9__; Respondents' Reply Affirmation __10__; it is,

ORDERED that this verified petition by HENRY KUHN ("petitioner") for a judgment, pursuant to Article 78 of the CPLR, nullifying the portion of Resolution 717, adopting Local Law 29-2009, declaring the use of e-cigarettes in public places null, void and of no effect on the grounds that said Resolution: (a) was adopted in violation of lawful procedures and requirements set forth by SEQRA; and (b) was arbitrarily and capriciously pursued without sufficient scientific data or facts to support respondents' assertions and contentions therein,

is hereby **DENIED** for the reasons set forth hereinafter. Respondents have filed a verified answer, affirmations in opposition, a memorandum of law, and a return in response to the verified petition.

Petitioner has filed the instant petition asking the Court to decide whether the determination of respondents COUNTY OF SUFFOLK and COUNTY LEGISLATURE OF THE COUNTY OF SUFFOLK ("County" or "Legislature" or collectively "respondents") in finding that electronic cigarettes ("e-cigarettes") are harmful was arbitrary and capricious, because the subject Resolution allegedly lacked scientific evidentiary support, and the passage of the Resolution allegedly violated the procedural and substantive requirements of the State Environmental Quality Review Act ("SEQRA"). Petitioner alleges standing to commence this special proceeding as a person aggrieved by the Resolution, in that his right to sell e-cigarettes at four kiosks located in Nassau and Suffolk Counties was affected.

On September 1, 2009, the Suffolk County executive signed Resolution No. 717 ("Resolution"), which adopted Suffolk County Local Law 29-2009 (initially introduced as Introductory Resolution No. 1347-2009), banning the sale of e-cigarettes to individuals under the age of nineteen and the use of e-cigarettes in all public forums. The Resolution was passed following a general meeting of the Legislature and public hearings held on June 23, 2009, August 4, 2009, and August 18, 2009, and went into effect on November 15, 2009. Petitioner claims that e-cigarettes produce and emit a clean vapor release which resembles smoke but contains none of the harmful toxins present in conventional cigarettes. Petitioner further claims that e-cigarettes contain a small amount of nicotine, which in and of itself is not harmful, and that the vapor released by an e-cigarette "does not contain a single element or compound that adversely effects health or the environment." As such, petitioner contends that the Legislature's concern of health risks to both smokers and non-smokers associated with e-cigarettes is misguided. Furthermore, petitioner alleges that the Legislature had no factual basis for the finding in the Resolution that "when consumed in public places where traditional tobacco products are banned, the use of e-cigarettes causes fear, stress and confusion among patrons and workers alike." Moreover, petitioner claims that respondents failed to follow SEQRA procedures when passing the Resolution. Based upon the foregoing, petitioner seeks a judgment of this Court nullifying that portion of the Resolution banning the use of e-cigarettes in public places.

In opposition, respondents allege that the enactment of the Resolution was based primarily on a U.S. Food and Drug Administration ("FDA") press announcement, and a transcript of the FDA's media briefing on e-cigarettes, dated July 22, 2009, setting forth its concerns about the safety of e-cigarettes and the fact that it had blocked fifty shipments of e-cigarettes, as of that date, from entering into the United States. In addition, respondents indicate that the FDA's preliminary testing has shown that e-cigarettes do contain carcinogens, including nitrosamines and other toxic chemicals. However, petitioner alerts the Court that the FDA included a cautionary note about the lack of significant research to provide a definite conclusion on the use of e-cigarettes. Respondents further allege that the Legislature found that e-cigarettes "seriously compromise the County's current public health laws governing indoor smoking bans and create an enforcement nightmare for the Department of Health Services' Tobacco Enforcement Unit."

Respondents argue that the subject Local Law is a valid exercise of the County's Legislative Power under the New York Constitution and Municipal Home Rule Law to protect the safety of Suffolk County residents. Respondents query that if petitioner truly believes that e-cigarettes are safe, why does he only take issue with the ban of e-cigarettes in public places and not the ban to persons under the age of nineteen. Respondents indicate that in addition to the lack of approval by the FDA, the World Health Organization, the Centers for Disease Control, and the American Cancer Society have all expressed concerns about the safety of e-cigarettes. Thus, respondents allege that the Legislature, based upon facts both known and assumed, perceived a danger which needed regulation for the protection of its residents.

Respondents additionally argue that petitioner has failed to meet his burden of showing that the Legislature acted irrationally or arbitrarily in enacting Local Law 29-2009. With respect to petitioner's argument that the Resolution was enacted in violation of SEQRA procedures, respondents contend that the Legislature properly determined that the subject legislation was a Type II action not subject to SEQRA requirements, pursuant to 6 NYCRR § 617.5 (c). Finally, respondents argue that petitioner's instant Article 78 proceeding is an improper vehicle to challenge this legislative act; instead, petitioner was required to commence a declaratory judgment action. Therefore, respondents seek dismissal of the petition in its entirety.

In reply, petitioner has withdrawn his claim with respect to a SEQRA violation, and seeks to have the instant Article 78 petition converted to a declaratory judgment action for purposes of substantive challenges to the law's application. Petitioner alleges that there is no rational basis for respondents' determination that a prohibition on smoking in public places where traditional forms of smoking are disallowed is reasonably related to their objective of protecting public safety. As such, petitioner argues that this action constituted, beyond a reasonable doubt, an arbitrary exercise of governmental power.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681 [2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*).

Moreover, as stated by the Court of Appeals in *Lighthouse Shores, Inc. v Islip*:

> The exceedingly strong presumption of constitutionality applies not only to enactments of the legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality. The ordinance may not be arbitrary. It must be reasonably related to some manifest

> evil which, however, need only be reasonably apprehended. It is also presumed that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability of the ordinance, and, if any state of facts known or to be assumed, justifies the disputed measure, this court's power of inquiry ends. Thus, as to reasonableness, [petitioner] in order to succeed ha[s] the burden of showing that no reasonable basis at all existed for the challenged portions of the ordinance

(*Lighthouse Shores, Inc. v Islip*, 41 NY2d 7, 11-12 [1976]; *see also North Hempstead v Exxon Corp.*, 53 NY2d 747 [1981]).

Here, the Court finds that the Resolution passed by the Legislature was a valid exercise of governmental power (*see* NY Const, art IX, § 2 [c] [ii] [10]; Municipal Home Rule Law § 10 [1] [a]), had a rational basis, and was supported by the facts and information presented. While it is undisputed that e-cigarettes are less harmful than conventional cigarettes, the Legislature relied upon the existing data and literature, including the preliminary testing conducted by the FDA, which found public health concerns. In addition, the Legislature conducted public hearings on the matter on three separate occasions. Although petitioner argues that the FDA cites a lack of significant research to provide a definite conclusion on the use of e-cigarettes at this juncture, it is entirely proper for a Legislature to anticipate a danger and to provide against it before it materializes (*see North Hempstead v Exxon Corp.*, 53 NY2d 747, *supra*). Furthermore, the Court finds that the objective of the Resolution, to wit: to protect public health and safety, was within the Legislature's power and that the means adopted were reasonably calculated to achieve that objective (*Id.*).

Finally, the Court finds that petitioner failed to meet his burden of demonstrating that the Resolution had no reasonable basis at all or that the Resolution was arbitrary and capricious (*see Lighthouse Shores, Inc. v Islip*, *supra*; *Elec. Inspectors, Inc. v Vill. of Lynbrook*, 293 AD2d 537 [2002]). Petitioner has failed to submit any scientific evidence or other proof to support his position that e-cigarettes pose no second-hand smoke health risks. As noted, respondents have indicated that in addition to health concerns, e-cigarettes compromise the County's current public health laws governing indoor smoking bans and create an enforcement "nightmare."

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In view of the foregoing, the Court finds that the Legislature's passage of the Resolution had a rational basis, was neither arbitrary nor capricious, was supported by the information presented, and cannot be deemed an abuse of power or discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: October 15, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**