

**Roberts v Paterson**

2011 NY Slip Op 30096(U)

January 18, 2011

Supreme Court, New York County

Docket Number: 116602/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN  
*J.S.C.*  
*Justice*

PART 52

LILIAN RUBENS

- v -

DAVID PATRICKSON

INDEX NO. 116602/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the annexed decision.

**UNFILED JUDGMENT**

his judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
11B)

Dated: 1/18/11

e9k  
CYNTHIA S. KERN *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X

LILLIAN ROBERTS, as Executive Director of  
District Council 37, American Federation of State,  
County and Municipal Employees, AFL-CIO,  
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,  
LEONARD ALLEN, as President of Local 2021,  
District Council 37, AFSCME, AFL-CIO and  
individually, PAULETTE SHER, as Vice President  
of Local 2021 of District Council 37, AFSCME,  
AFL-CIO and individually, LOCAL 2021 of  
District Council 37, AFSCME, AFL-CIO, and  
LARRY LEIBOWITZ, BRIAN MATARRESE,  
LILLIAN SANTOS, WILLIAM LARRY WALKER,  
LILLIAN ROBERTS, as Chair of DC 37 BENEFITS  
FUND TRUST and DC37 BENEFITS FUND TRUST,

**UNFILED JUDGMENT**

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Plaintiffs,

Index No. 116602/10

-against-

DAVID A. PATERSON, as Governor of the State of  
New York, THE STATE OF NEW YORK,  
MICHAEL BLOOMBERG, as Mayor of the City  
of New York and THE CITY OF NEW YORK,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2, 3</u>
Replying Affidavits.....	<u>        </u>
Exhibits.....	<u>4</u>

Plaintiffs seek injunctive and declaratory relief directing defendants to fund health

insurance benefits to retirees of the New York City Off-Track Betting Corporation (“NYC OTB”). Justice Martin Shulman issued a temporary restraining order in this case, dated December 27, 2010 (the “TRO”), ordering defendant the City of New York (the “City”) to continue to pay for these health insurance benefits through December 31, 2010. At a hearing on Wednesday, January 5, 2011, this court ordered that the TRO remain in place until a subsequent hearing on January 12, 2011. For the reasons set forth below, plaintiffs’ motion is denied and the TRO is vacated as of January 12, 2011, as per the telephone conference held on that date.

The relevant facts are as follows. NYC OTB is a public benefit corporation, created pursuant to statute. NYC OTB is an off-track pari-mutuel system for betting on certain horse races and was established by the New York Racing, Pari-Mutuel Wagering and Breeding Law (“PML”). In 2008, NYC OTB was insolvent and facing closure. In response, the state legislature passed the “OTB Act” which gave NYC OTB additional funding sources and gave the governor authority to appoint five members to its board of directors. This Act did not alter NYC OTB’s status as a public benefit corporation. Such a corporation is independent of the State of New York (the “State”) and may, among other things, make its own by-laws, sue and be sued, acquire personal and real property, and enter into contracts, leases and joint ventures, just like any other corporation. NY PML §604; *Schuulz v State*, 84 N.Y.2d 231, 244 n.4 (1994). In December 2009, NYC OTB filed for bankruptcy and in late 2010 determined it would cease operating. As a result, the City informed NYC OTB that its retirees would no longer be eligible for insurance coverage which until then had been paid for by the City and reimbursed by NYC OTB, pursuant to statute. NYC OTB Act §30.

To prevail on a motion for a preliminary injunction, the movant must demonstrate: (1)

probability of success on the merits; (2) danger of irreparable injury in the absence of the preliminary injunction; and (3) a balancing of the equities in its favor. *See Coinmach Corp. v Fordham Hill Owners Corp.*, 3 A.D.3d 312, 314 (1<sup>st</sup> Dept 2004).

In the instant case, plaintiffs cannot demonstrate a likelihood of success on the merits. There are three statutes or constitutional provisions that provide that NYC OTB is responsible for funding its retirees health benefits, two of which specifically prohibit the State from assuming those obligations. First, the PML states unequivocally that any obligations of NYC OTB “shall not be a debt of either the state or the city.” NY PML § 614. Second, the State Constitution expressly provides that the State shall not be liable for any obligations of a public corporation. Article X, Section 5. Finally, the OTB Act provides that the City is only to pay for the relevant health insurance benefits *provided* NYC OTB reimburses the City for its “actual costs.” NYC OTB Act §30 (emphasis added). Thus, the State is not only not liable for funding these benefits but is specifically *precluded*, not once but twice, from assuming such obligations and the City is obligated to fund them only providing it is reimbursed by NYC OTB.

Plaintiffs’ argument that the State was a “joint employer” with OTB and that the “joint employer” doctrine overrides these statutory prohibitions is without basis. “A joint employer relationship may be found to exist where there is sufficient evidence that [one party] had immediate control over the other company’s employees.” *Nat’l Labor Relations Board v Solid Waste Services, Inc.*, 38 F.3d 93 (2<sup>nd</sup> Cir. 1994). The joint employer doctrine is generally applied in the contexts of collective bargaining and Title VII or state human rights laws, neither of which is the context here. In Title VII cases, which constitute the majority of cases plaintiffs cite, “employer” is construed particularly broadly, rendering them irrelevant in the instant case. *See*

*Gyrge v Ganzman*, 991 F.Supp. 105, 108 (E.D.N.Y. 1998). In none of the cases cited by plaintiffs was the joint employer doctrine held to override an applicable statute. Moreover, the Second Circuit has explicitly held that extending the joint employer doctrine “to cases involving the complex relations between levels of government would be impracticable and would implicate... constitutional concerns...” *Gulino v NYS Education Department*, 460 F.3d 361, 378 (2<sup>nd</sup> Cir. 2006). Therefore, the “joint employer” doctrine is inapplicable in the instant case. That doctrine does not and cannot provide for an end run around the statutory and constitutional prohibitions on the State assuming NYC OTB’s liabilities and obligations.

Plaintiffs’ claim that the State is estopped from refusing to fund the health benefits is equally unavailing. Although estoppel can generally not be invoked against the government, there is an exception to prevent “manifest injustice.” *Prospect Plaza Tenant Ass’n, Inc. v New York City Housing Auth.*, 11 A.D.3d 400, 401 (1<sup>st</sup> Dept 2004). However, plaintiffs “cannot rely on the conduct of government agents contrary to law as a basis for ‘manifest injustice’ claims.” *New York State Medical Transporters Ass’n v Perales*, 77 N.Y.2d 126, 131 (1990). Plaintiffs claim that statements by then-Governor Paterson and other government officials that a shutdown of OTB would “push \$600 million in pension obligations to OTB employees back to the state” estop the State from now refusing to finance those benefits. Although the court is sympathetic to the retirees who will lose their health insurance coverage if this court finds the State and the City need not finance such benefits, plaintiff may not rely on such statements, which are contrary to the statutes and constitutional provisions cited above, to create a claim for estoppel. Even if those statements could be the basis for an estoppel argument, plaintiffs have failed to establish a key element of estoppel: detrimental reliance on their part. *See Agress v Clarkstown Cent.*

*School Dist.*, 69 A.D. 769, 770 (2<sup>nd</sup> Dept 2010). They have chosen to receive their OTB health benefits for as long as they can and there is no evidence they would have done otherwise while these benefits were still being provided to them.

Plaintiffs also fail to establish their claim that the State breached a fiduciary duty to them by causing NYC OTB to plunge into “deepening insolvency.” They have not established that defendants had any such fiduciary duty or that the State committed any action resulting in deepening insolvency. As noted above, NYC OTB is a public benefit corporation, which is an entity independent of the State. The OTB Act did not alter NYC OTB’s status as a public benefit corporation. As such, defendants did not and do not have any fiduciary duty to the retired employees of NYC OTB. Moreover, although the OTB Act sought to supplement NYC OTB’s revenue and may have extended its lifetime, merely “prolonging an insolvent corporation’s life, without more, will not result in liability.” *In re Global Serv. Group*, 316 B.R. 451, 458 (S.D.N.Y. 2004).

Finally, plaintiffs’ argument that they are “City retirees” pursuant to NYC Administrative Code 126(a)(ii) is without merit. NYC OTB retirees are just that -- retirees of NYC OTB. They were never employed by the City, which is required if they are to be City retirees pursuant to the statute.

In summary, both the City and the State have no statutory obligation to fund these benefits and the State is actually prohibited from doing so. Moreover, plaintiffs’ arguments that the State is liable under the “joint employer” doctrine or as a fiduciary of plaintiffs both fail. Because plaintiffs cannot succeed on any of these theories, they do not have a “likelihood of success” on the merits of their action. Since plaintiffs must establish all three elements of

entitlement to a preliminary injunction (*see Coinmach*, 3 A.D.3d 312, 314), their failure to establish any one element means that the injunction must be denied.

For the aforementioned reasons, plaintiffs' motion seeking a preliminary injunction requiring defendants to fund plaintiffs' health insurance benefits is denied. This constitutes the decision, judgment and order of the court.

Dated: 1/18/11

  
\_\_\_\_\_  
J.S.C.

CYNTHIA S. KERN  
J.S.C.

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