

Perez v Levy

2011 NY Slip Op 30472(U)

February 17, 2011

Supreme Court, Suffolk County

Docket Number: 45318/2010

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
NILSA PEREZ, KATHLEEN REEVES, JEANNE
MELNIK and MACHERIE GOADY,

Plaintiffs,

-against-

STEVE LEVY, SUFFOLK COUNTY EXECUTIVE,
THE SUFFOLK COUNTY DEPARTMENT OF
HEALTH SERVICES and THE COUNTY OF
SUFFOLK,

Defendants.
-----X

INDEX NO.: 45318/2010
MOTION DATE: 1/6/2011
MOTION NO.: 001 MD

COPY

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Upon the following papers numbered 1 to 57 read on this motion for preliminary injunction ; Notice of Motion/ Order to Show Cause and supporting papers 1-6 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 7-57 ; ~~Replying Affidavits and supporting papers~~ ; ~~Other~~ ; (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that the motion (motion sequence no. 001) of plaintiffs, brought on by order to show cause (SWEENEY, J.) dated December 21, 2010, for an order preliminarily enjoining defendants from proceeding with their plans to close the John J. Foley Skilled Nursing Facility in Yaphank, New York, is denied.

The John J. Foley Skilled Nursing Facility (the "Facility") is a 264-bed nursing home owned and operated by the defendant County of Suffolk (the "County"). The widespread legislative and community concern and debate regarding the financial viability of the Facility over the last several years is a matter of public record, as is the Suffolk County Executive's longstanding advocacy for County divestiture of the Facility, which assertedly operates at an annual deficit of \$6-10 million.

In April 2010, at the behest of the Suffolk County Executive, Steve Levy (the "County Executive"), a resolution was submitted to the Suffolk County Legislature (the "Legislature") authorizing the sale of the Facility to a private nursing home operator for the sum of \$36 million. Under the proposal, the assets, operation and management of the Facility would be taken over by the new owner, the existing patients would remain, and the current County employees would be offered employment by the new owner on terms consistent with those prevailing in the nursing home industry. The Legislature, whose ongoing debate about the future of the Facility had focused on concerns about the fate of the patients and of the County employees who work there, took no action on the resolution for several months. Accordingly, in September 2010, the County Executive submitted to the Legislature a proposed County operating budget for 2011 that provided for closure of the Facility by eliminating funding for its continued operation beyond the first quarter of the year. The Legislature voted to amend the budget to restore funding to the Facility but the amendments were vetoed by the County Executive. Legislative efforts to override

the veto failed by one vote, and the proposed budget providing for “de-funding” and closure of the Facility was thereafter adopted by the Legislature in accordance with the provisions of the County Charter (the “Budget”).¹

In November 2010, with closure of the Facility imminent, a resolution authorizing the sale of the Facility to the private nursing home operator was reintroduced in the Legislature. After vigorous debate, the resolution was voted down on December 7, 2010, and the County began implementing plans to close the Facility, to discharge and transfer the residents to other facilities, and to abolish positions and layoff employees as of March 30, 2011 in accordance with the adopted Budget.

On December 21, 2010, the plaintiffs – three patients and an employee of the Facility – commenced this action for a declaratory judgment and permanent injunction. The instant order to show cause (SWEENEY, J.) was obtained which granted a temporary restraining order (“TRO”) restraining defendants from proceeding with their plans to, *inter alia*, terminate skilled nursing services and close the Facility pending the return date of the order to show cause, January 6, 2011. The matter was thereafter assigned to the undersigned justice and on the return date the parties convened before the undersigned to argue for and against the continuation of the TRO. Upon reviewing the parties’ submissions and hearing the arguments of counsel, the Court declined to extend the TRO, which expired by its terms on that date (and which has since been reinstated in part by the Appellate Division, Second Department).² The Court now proceeds to determine plaintiffs’ motion for a preliminary injunction.

The gravamen of plaintiffs’ verified complaint, dated December 21, 2010, is the defendants’ alleged failure to comply with Suffolk County Administrative Code (the “Administrative Code”) §A9-6, the so-called “Mary Hibberd Law.” In particular, plaintiffs allege that defendants failed to hold public hearings as assertedly required by the law, and further failed to comply with additional reporting and documentation requirements imposed by the law. They seek a judgment declaring the Budget null and void to the extent that it eliminates funding for the Facility in 2011 and a permanent injunction enjoining defendants from terminating the County’s provision of skilled nursing services at the Facility and closing the Facility until such time as the “Mary Hibberd Law” has been complied with.

Administrative Code §A9-6, entitled “Procedures for review of privatization initiatives,” was enacted in 1997 (Local Law No. 20-1997) predicated on the Legislature’s finding that the provision by the Suffolk County Department of Health Services (“SCDHS”) of essential health services “represents the most fundamental exercise of municipal power in protecting the public health and safety of its residents.” The law was enacted to ensure that “any initiative to provide the delivery of [essential health services] through an alternative entity [would] be subject to the

¹ Several years before, in 2008, the County Executive had attempted to shut down the Facility by “de-funding” it in the proposed budget for 2009, but the Legislature succeeded in blocking that earlier attempt.

² The decision and order of the Appellate Division, Second Department, dated January 25, 2011 provides that “[R]espondents are stayed from closing the John J. Foley Nursing Facility or terminating nursing services at that facility, pending hearing and determination of the appeal or pending the final determination by the Supreme Court, Suffolk County, of the underlying order to show cause dated December 21, 2010...”

highest and strictest level of scrutiny available to ensure that an informed decision-making process is applied to the examination of any privatization initiative..." (L.L. No. 20-1997, §1). The law established "a procedure for consideration of any initiatives to replace services provided by the Suffolk County Department of Health Services with services provided by another entity (quasi-public or private) that will ensure the highest level of scrutiny to any such proposal," and was made applicable to "any plan, initiative or proposal designed to provide services which are being provided by County employees as of the effective date of this law [June 24, 1997] through the use of noncounty employees..." (Local Law No. 20-1997, §3).

Administrative Code §A9-6 provides that:

"In the event that a proposal or plan to provide any of the services identified in Article IX of the Suffolk County Charter or Article IX of the Suffolk County Administrative Code, including but not limited to...a skilled nursing facility... is submitted to the County Executive and/or County Legislature for the purpose of providing these services through entities other than Suffolk County government and/or the County Department of Health Services, using employees other than employees of the County of Suffolk, then the following procedures shall apply:"

The law then goes on to enumerate detailed requirements that must be complied with in the event such a proposal or plan is presented: Subsections A through H provide that the proposal or plan must be submitted in writing and subjected to a series of public hearings conducted by the County Executive and by the Legislature. The proposal must be accompanied by a written evaluation of the cost and quality of services to be provided under the plan as compared to that being provided by the County, written documentation from the appropriate state governmental entity approving the proposal, a report identifying expenditures for services under the proposal and identifying the precise level of services to be provided under the proposal as compared to that provided by the County, and a certification that the cost savings to the County will be at least 10% in each of the first five years. The law further requires that the specifics of the plan be explicitly approved by the Legislature (§A9-6 (A) through (H)). Finally, the law provides that "No such plan or proposal shall be made part of a recommended operating budget ...unless and until such public hearings have been concluded and the items in Subsections A through H have been complied with" (§A9-6 (I)).

Plaintiffs allege that because the County's closure of the Facility and cessation of skilled nursing services will necessarily mean that the current residents of the Facility must relocate to alternate facilities where their care will be provided by non-County employees, Administrative Code §A9-6 is applicable and the public hearing and other procedural requirements of the law must be complied with. They seek to preliminarily enjoin defendants from proceeding with their closure plans pending the final determination of this action.

It is well established that a preliminary injunction is a drastic remedy which may be granted only where the movant has demonstrated a clear legal right to the relief demanded based upon the undisputed facts (*Scotto v Mei*, 219 AD2d 181, 182 [1st Dept 1996]). The applicant for a preliminary injunction must show a probability of success, the danger of irreparable injury in

the absence of an injunction, and a balance of the equities in its favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). In the absence of any one of these elements, a preliminary injunction may not be issued.

While it appears from the record that public hearings were held during 2010 in connection with the County Executive's proposal to sell the Facility to a private nursing home operator, it is undisputed that no hearings were held in connection with the County Executive's alternate plan to close the Facility. Defendants concede that they made no efforts to comply with Administrative Code §A9-6 prior to submitting the 2011 Budget to the Legislature, contending that the law is inapplicable to the "de-funding" and closure of the Facility. Plaintiffs acknowledge that there is no dispute regarding the essential facts, and recently submitted a motion for summary judgment on their claims, without, however, having withdrawn the instant motion for a preliminary injunction. In light of the foregoing, it appears that the sole issue presented on this motion for a preliminary injunction is whether, as argued by plaintiffs, Administrative Code §A9-6 is applicable to the Budget provisions pertaining to the Facility, and whether the law was violated when the Budget was submitted without complying with the procedural requirements of Administrative Code §A9-6.

In interpreting a statute, which has at its root the discernment of the intent of the legislature, the Court looks first to the plain meaning of the statute (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577 [1998]). If a statute is unambiguous and clear on its face, the Court must give effect to its plain meaning (*Pultz v Economakis*, 10 NY3d 542 [2008]). Upon a close reading of the law, and the legislative intent as set forth therein, the Court is constrained to agree with defendants that Administrative Code §A9-6 is not, on its face, applicable to the closure of the Facility and the cessation of its operations. Although closure of the Facility was certainly one of the options contemplated by Suffolk County legislators in the ongoing debate about its future, the word "closure" does not appear anywhere in the law, and the law does not in terms address the scenario where a County-run health facility is closed and the services formerly provided by the County cease to be provided.

The express language of the law refers exclusively to proposals, the *purpose* of which is to provide health services that are currently being provided by the SCDHS through another, non-public or quasi-public, entity, a purpose obviously not intended by the Budget mandating the cessation of County-provided services at the Facility. While New York State law and regulations mandate that the County plan for the relocation of discharged residents to alternate facilities, such a mandate is not the equivalent of a purpose or intent to provide services through an alternate entity. Plaintiffs' attempt to equate the transfer of patients to other facilities as an incidental consequence of closure of the Facility with an intentional initiative to provide services through another entity is a tortured, insupportable construction of the law. Indeed, the title of the law (*see McKinney's Cons Laws of NY, Book 1, Statutes, §123*) is indicative of the narrow scope of the activity intended to be regulated, referring exclusively to "privatization initiatives." "Privatization" may only be understood to mean the transfer from public to private ownership and control, which closure of the Facility does not implicate.

Moreover, the specific requirements set forth in §A9-6 subsections A through H, which require detailed comparisons of the cost and quality of the services to be provided under any submitted plan or proposal, appear singularly directed at the "public versus private" scenario.

The closure of the Facility, which entails the prospective relocation of more than 200 patients to an indeterminate number of as-yet-undesignated facilities, subject to numerous variables including patient and family preferences, does not lend itself to the kind of comparative cost-quality analysis required by the law.

Indeed, the record reflects the recent closure of a half dozen County-operated health service programs without the public hearings detailed in Administrative Code §A9-6 and without objection by the Legislature or any party for alleged non-compliance with §A9-6. The closed facilities include the Bay Shore Health Center, the Central Islip Health Center, the Babylon Methadone Treatment Clinic, the Young Adult Methadone Program, the High Impact Incarceration Program, Digital Mammography and the HIV Primary Care Unit. Notably, the County's alleged failure to comply with Administrative Code §A9-6 was never raised in the Legislative colloquy and debate on the proposed Budget, and the record reflects that it was generally understood by the legislators that failure to approve the sale of the Facility or to amend the Budget would result in closure of the Facility. The belated invocation of the Mary Hibberd Law appears to be an attempt to accomplish by judicial intervention what the Legislature was unable to accomplish via the legislative process.

In sum, plaintiffs have failed to establish that Administrative Code §A9-6 is applicable in these circumstances and that it was violated by the defendants' submission of a budget that provided for closure of the Facility. Accordingly, they have not demonstrated the probability of success on the merits.

Plaintiffs similarly have not demonstrated that they will suffer irreparable injury if a preliminary injunction is not granted. While the three plaintiff-patients are understandably concerned and fearful about their futures should the Facility close, their unsubstantiated concerns that they will be unable to relocate to another facility, or that they will not receive a comparable level of care, or that they may be forced to relocate far from their friends and families are speculative and do not rise to the level of "irreparable injury" (*McKinney v Commissioner of N.Y. State Dep't of Health*, 15 Misc.3d 743 [Sup Ct 2007]). Moreover, pursuant to New York State statutes and regulations, the County is obligated to prepare a detailed closure plan that identifies and provides for the medical, vocational, rehabilitative and social needs of each of the Facility residents who are being discharged from the Facility as a result of the closure. Approval of the plan by the New York State Department of Health Services is required before the plan may be implemented. (By correspondence, counsel for the defendants has apprised the Court that such approval has been received.) Accordingly, the plaintiff-patients have failed to establish that their needs and concerns will not be adequately met by the County's closure plan and that they will suffer irreparable injury if the plan is implemented.

With respect to the plaintiff-employee, a registered nurse employed at the Facility for eight years, such plaintiff's speculative concern that if her employment at the Facility is terminated she will be unable to be hired someplace else, while reflecting a potential personal hardship, does not establish an "irreparable injury" for purposes of granting a preliminary injunction. As a member of a collective bargaining unit, plaintiff enjoys certain protections with regard to her employment by the County, including potential "bump and retreat" rights according

to her level of seniority. Notably, the record reflects that plaintiff's collective bargaining unit has not taken a position with respect to the closure of the Facility, notwithstanding the prospective staff layoffs, as the budgetary action does not appear to violate the parties' collective bargaining agreement. Moreover, where a loss of employment is potentially remediable by reinstatement and/or back pay, an adequate remedy at law exists, and an irreparable injury cannot be established (*Suffolk County Ass'n of Municipal Employees, Inc. v County of Suffolk*, 163 AD2d 469 [2d Dept 1990]).

Finally, plaintiffs fail to establish that the balance of the equities favors plaintiffs. The 2011 adopted operating Budget, in providing for the imminent closure of the John J. Foley Skilled Nursing Facility, implicitly balances the interests of several hundred Facility residents and a like number of County employees against the interests of the taxpayers of Suffolk County who bear the burden of financing the continued operation of the Facility at a multimillion dollar deficit annually. The Court, on this motion for a preliminary injunction, must balance the interests of these four plaintiffs – who do not represent the other Facility residents and employees – against those of the defendants and ultimately their constituents. The Court is mindful that in this action, plaintiffs nominally seek only to compel defendants' compliance with the Mary Hibberd Law – not any ultimate claimed right to continued residence or employment at the Facility. The Court finds accordingly that the interests of the four plaintiffs do not outweigh those of the defendants in implementing a duly adopted budget in accordance with the Suffolk County Charter.

In light of all of the foregoing, the Court finds that plaintiffs have not established their entitlement to a preliminary injunction and accordingly the motion is denied.

In the interim since plaintiffs' motion for a preliminary injunction was submitted, the plaintiffs have interposed a motion for summary judgment. Because the issues raised in plaintiffs' subsequent motion are substantially similar to those addressed herein, and in the interest of avoiding duplicative submissions and effort, the Court will consider the affidavits and exhibits submitted by defendants in opposition to the instant motion as defendants' partial opposition to the summary judgment motion, and hereby adjourns the summary judgment motion to March 1, 2011 in order to allow defendants to submit such additional proofs as they deem appropriate for the motion for summary judgment.

The foregoing constitutes the decision and order of the Court.

Dated: February 17, 2011

PAUL J. BAISLEY, JR.

J.S.C.