

Matter of DeSantis v Pfau
2011 NY Slip Op 31604(U)
June 14, 2011
Sup Ct, NY County
Docket Number: 106649/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

Rocco DeSantis, Et Al.

INDEX NO. 106649/11

MOTION DATE 6/14/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Ann PFAU, Et Al.

The following papers, numbered 1 to 4 were read on this motion to/for a preliminary injunction

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This 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 141B).

Dated: 6/14/11
JUN 14 2011

[Signature]
BARBARA JAFFE J.S.C.
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 5

-----X
In the Matter of the Application of ROCCO DESANTIS,
as President of the NEW YORK STATE COURT
CLERKS ASSOCIATION,

Index No.: 106649/11
Motion Date: 6/14/11
Motion Seq. No.: 001

Petitioner,

DECISION & JUDGMENT

For a Preliminary Injunction in Aid of Arbitration
Pursuant to Article 75 of the Civil Practice Law and Rules,

-against-

UNFILED JUDGMENT

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ANN PFAU, as Chief Administrative Judge of the State
of New York -- Unified Court System and the OFFICE
OF COURT ADMINISTRATION OF THE STATE
OF NEW YORK UNIFIED COURT SYSTEM,

Respondents

-----X
BARBARA JAFFE, JSC:

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By petition dated June 7, 2011, petitioner moves pursuant to CPLR 7502(c) for a preliminary injunction in aid of arbitration preventing respondents from implementing new work schedules for court clerks assigned to the arraignment parts of night court in the Criminal Court of the City of New York (night court clerks). Respondents oppose.

I. BACKGROUND

In March of 2011, respondents were notified that they would be required to cut \$170,000,000 from the court system's budget as a result of the enactment of the 2011-2012 State

Budget. (Affidavit of the Honorable Lawrence K. Marks in Opposition, dated June 13, 2011). As a result, respondents sought to save costs by, *inter alia*, altering night court clerk work schedules. (*Id.*).

Traditionally, night court clerks have worked eight hours a day, five days a week, earning one hour of overtime each day. (Affidavit of Justin Barry in Opposition, dated June 13, 2011). Under the new schedule, they must work nine hours a day, three days a week, and twelve hours a day, one day a week, with one hour of unpaid meal time each day. (*Id.*). Although night court clerks work a total of 35 hours a week under both schedules, the new schedule eliminates their ability to earn the additional five hours of overtime pay a week that they earned under the old schedule. (Respondents' Mem. of Law).

By letter dated May 24, 2011, respondents notified petitioners that the changes were to be implemented on June 9, 2011. (Affidavit of James P. Welch in Opposition, dated June 13, 2011). On June 6, 2011, pursuant to its 2007-2011 Collective Bargaining Agreement (CBA) with respondents, petitioner initiated a grievance procedure challenging the schedule changes on the grounds that they violated the CBA, past practice, and a 1982 letter agreement between the parties. (Pet., Exh. C). Petitioner intends to proceed to arbitration if its grievance is denied. (*Id.*).

By order to show cause dated June 7, 2011, petitioner sought a temporary restraining order enjoining respondents from implementing the work schedule changes on June 9, 2011 as planned. On June 8, 2011, I issued a temporary restraining order to the extent of ordering respondents to pay night court clerks for "four (4) hours of time per week presently designated as unpaid meal time" but permitting them to implement the new work schedules pending hearing of the petition on June 14, 2011.

II. CONTENTIONS

Petitioner claims that the night court clerks are entitled to a preliminary injunction because the CBA and the 1982 letter agreement clearly state that the night court clerks are entitled to a 35-hour workweek spread across five days, the night court clerks will lose the opportunity to earn overtime pay and will be deprived of their contractual rights under the new schedule, the schedule changes harm the night court clerks more than a preliminary injunction would harm respondents, and the relief sought through arbitration will be rendered entirely ineffectual if respondents are permitted to implement the changes, as the night court clerks cannot be compensated for their loss of overtime and their contractual rights. (Pet.).

In opposition, respondents argue that the schedule changes violate neither the CBA nor the 1982 letter agreement such that petitioner has failed to demonstrate a likelihood of success on the merits, that petitioner's injury may be compensated by money damages and is thus not irreparable, and that petitioner has failed to show that the equities weigh in its favor or that the relief sought through arbitration will be rendered ineffectual in the absence of preliminary injunctive relief as a result. (Respondents' Mem. of Law). They specifically rely on the Marks affidavit, paragraph 16:

However, in the event that a judicial determination might ultimately disagree with this view at some time in the future, and conclude that the clerks were wrongly deprived of overtime for the hour allotted for meals under the current schedule, *the clerks will be compensated for those services pursuant to such a determination.*

At oral argument, petitioner denied that the damages are compensable, arguing that respondents will resist paying them under the guise of "public accountability."

III. ANALYSIS

A party seeking a preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury in the absence of injunctive relief; and (3) a balance of the equities in his favor. (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Also, pursuant to CPLR 7502(c), a party seeking a preliminary injunction to maintain the status quo pending arbitration must show that “the award to which the applicant may be entitled may be rendered in effectual without such provisional relief.”

Loss of income does not constitute an irreparable injury, as it may be compensated by money damages. (*Sampson v Murray*, 415 US 61 [1974]). Here, although petitioner claims he will sustain irreparable injury insofar as the night court clerks will be deprived of the overtime pay to which they were previously entitled, irreparable injury is not shown. As money damages may be awarded, petitioner’s prediction that respondents will find a way to avoid paying the night court clerks is too speculative to warrant the relief sought. (*See, e.g., Farmer v D’Agostino Supermarkets, Inc.*, 144 Misc2d 631, 544 NYS2d 943 [employee seeking back pay and reinstatement failed to show irreparable injury, as he could be compensated for loss of wages with money damages]; *see also DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2d Dept 2009] [economic loss not irreparable injury as it can be compensated with money damages]; *U.S. Re Cos., Inc. v Scheerer*, 41 AD3d 152 [1st Dept 2007] [same]).

In light of this determination, there is no need to consider whether petitioner has established a likelihood of success on the merits or a balance of the equities in his favor or that the relief sought through arbitration will be rendered ineffectual in the absence of preliminary injunctive relief.

The administrative law judge decision provided by petitioner, *Civil Service Employees Association, Inc. v County of Nassau*, is neither binding nor persuasive, as it pertains to a management rights clause and past practices, and not to the nature of an injury required for entitlement to a preliminary injunction.

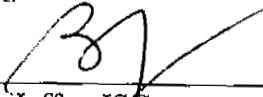
IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding dismissed, and it is further

ORDERED, that the temporary restraining order issued by this court on June 8, 2011 is lifted and vacated.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 14, 2011
New York, New York
JUN 14 2011

UNFILED JUDGMENT

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