

Perez v Levy

2011 NY Slip Op 31990(U)

June 30, 2011

Supreme Court, Suffolk County

Docket Number: 45318/2010

Judge: Paul J. Baisley Jr

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

COPY

PRESENT:

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

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

INDEX NO.: 45318/2010

MOTION DATE: 4/21/2011
MOTION NO.: 002 MD
003 MD
004 MG

Plaintiffs,

-against-

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

Defendants.

PLAINTIFFS' ATTORNEY:

LAW OFFICE OF
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PROPOSED INTERVENOR'S ATTORNEY:

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DEFENDANTS' ATTORNEY:

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Garden City, New York 11530

Upon the following papers numbered 1 to read on this motion and cross-motion for summary judgment and motion to intervene; Notice of Motion/ Order to Show Cause and supporting papers 1- ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; ~~and after hearing counsel in support of and opposed to the motions~~: it is

ORDERED that the motion (motion sequence no. 002) of plaintiffs Nilsa Perez, Kathleen Reeves, Jeanne Melnik and Macherie Goady, brought on by order to show cause (BAISLEY, J.) dated February 2, 2011, for an order pursuant to CPLR R. 3212 granting plaintiffs summary judgment is denied; and it is further

ORDERED that the motion (motion sequence no. 003) of William J. Lindsay, brought on by order to show cause (BAISLEY, J.) dated February 8, 2011, for an order pursuant to CPLR §1012(a) and/or §1013 granting leave to intervene as plaintiff in this action in his individual capacity as Member and Presiding Officer of the Suffolk County Legislature and on behalf of the Suffolk County Legislature is denied; and it is further

ORDERED that the cross-motion (motion sequence no. 004) of defendants Steve Levy, Suffolk County Executive, the Suffolk County Department of Health Services and the County of Suffolk for an order pursuant to CPLR R. 3212 granting defendants summary judgment dismissing plaintiffs' complaint, is granted.

This action arises out of the alleged failure of Suffolk County Executive Steve Levy (the "County Executive") to comply with §A9-6 of the Suffolk County Administrative Code (the so-called "Mary Hibberd Law") prior to submitting to the Suffolk County Legislature (the "Legislature") a proposed 2011 budget that provided for closure of the John J. Foley Skilled Nursing Facility (the "Facility") for budgetary reasons by "de-funding" it after the first quarter of

2011. The history of this litigation – and the protracted public and legislative debate regarding the future of the Facility – was set forth in the order of this Court (BAISLEY, J.) dated February 17, 2011, and will not be repeated here. However, because subsequent events and developments potentially bear on the Court’s determination herein, they are detailed at length as follows:

The Court’s February 17, 2011 order denied plaintiff’s motion for a preliminary injunction enjoining the County Executive from proceeding with his plans to close the Facility. The Court found that plaintiffs failed to establish that Administrative Code §A9-6 is applicable to the closure, as opposed to the “privatization,” of the Facility, or that they would be irreparably harmed by the closure, or that their interests in compelling compliance with the law outweigh those of the defendant in implementing a duly adopted budget in accordance with the Suffolk County Charter. While their motion for a preliminary injunction was *sub judice*, the plaintiffs moved, by order to show cause dated February 8, 2011, for summary judgment on their claims. Defendants thereafter cross-moved for summary judgment dismissing plaintiffs’ complaint, and those motions, together with a motion by William J. Lindsay, Presiding Officer of the Suffolk County Legislature, for leave to intervene in the action as plaintiff, were deemed fully submitted as of March 3, 2011.

The record reflects that on February 18, 2011, plaintiffs filed a notice of appeal from the Court’s February 17, 2011 order and moved in the Appellate Division, Second Department, for a preliminary injunction pending the determination of the appeal. On March 3, 2011, the Appellate Division issued a decision and order staying defendants “from taking any further action to close [the Facility] or to terminate nursing services at [the Facility], including implementation of a New York State Department of Health Approval of Course [*sic*] Plan dated January 21, 2011” pending hearing and determination of the appeal. The stay was conditioned on plaintiffs’ filing their brief and record on appeal on or before March 24, 2011.

Although the Legislature had previously (on December 7, 2010) voted down a resolution authorizing the sale of the Facility to private nursing home operator Kenneth Rozenberg through his companies Foley Operating LLC and Foley Land LLC, on March 3, 2011, faced with the imminent closure of the Facility, the Legislature adopted a resolution (Resolution 47-2011) authorizing the County Executive to proceed with the sale. The Legislature specifically found that “operating a municipal skilled nursing home is no longer in the best fiscal interest of the County,” that the Facility’s “uninsured and underinsured patients can be cared for at any of Suffolk’s 40+ nursing homes,” and that “the Facility could be operated at the same high level of care, but more efficiently by individuals or entities that do not face the operational restrictions particular to municipalities.” The Legislature also specifically found that the proposed sale had already been subjected to review pursuant to Suffolk County Administrative Code §A9-6, including four separate public hearings, and that adoption of the local law authorizing the sale was “conclusive evidence of full compliance” with Administrative Code §A9-6. The Legislature also adopted a second resolution (Resolution 48-2011) which provided for a severance package for the County employees whose employment at the Facility would be terminated as a result of the sale. Pursuant to a decision and order dated March 18, 2011, the Appellate Division, Second Department, determined that the proposed sale does not violate the stay it imposed in its March 3, 2011 order. On March 21, 2011, the County Executive signed Resolutions 47-2011 and 48-2011 into law.

Immediately thereafter, by letter dated March 21, 2011, plaintiffs' attorney advised the Court and defendants' attorney of plaintiffs' intention to discontinue the instant action. By letter dated March 24, 2011, defendants' attorney objected to the discontinuance of the action and requested that the Court decide the pending motions for summary judgment. The basis for defendants' objection was that, "if for any reason, the sale of Foley was not to close pursuant to the terms of the Contract, the County would again be in the position of having to close the projected budget deficit by declining to provide operating funds in the 2012 Operating Budget." According to defendants' counsel, "the very issue presented in this action (whether the failure to provide funds for Foley's operation pursuant to an adopted budget is permitted under A9-6) remains in controversy and can not be finally resolved until such time as the sale is closed." Plaintiffs' counsel then responded, by letter dated March 25, 2011, characterizing defendants' request that the Court decide the motions as "nothing more than a request for an advisory opinion with respect to an action that has not taken place (i.e., the submission of the recommended operating budget for 2012) and on terms not yet reduced to writing and on legislative and administrative proceedings that may or may not occur." Plaintiffs requested that the Court order the discontinuance of the action "given the recent action taken by the County Legislature."

In response to the parties' letters, the Court directed a telephone conference, which was scheduled to be held on April 11, 2011. On April 4, 2011, defendants' counsel wrote the Court to advise it of "recent developments relating to the sale and/or closure of the John J. Foley Nursing Home." Specifically, counsel was referring to the defendants' receipt of a letter from the purchaser purporting to terminate the contracts relating to the sale of the Facility and demanding the return of its \$1.8 million down payment. Counsel opined that the purchaser's attempt to terminate the contract was "patently defective" and reiterated the intent of the County to enforce the contract and close the sale before the end of the year. However, counsel noted that if the sale does not close, "the County would again be in the position of having to close the projected budget deficit by declining to provide operating funds in the 2012 Operating Budget" and again urged the Court to decide the motions for summary judgment as "the issues presented in this action remain in controversy."¹

On April 11, 2011, the Court held the telephone conference to discuss plaintiffs' request to discontinue the litigation, as well as the foregoing developments, which had also been widely reported in the press and were a matter of public knowledge. The events related in the April 4, 2011 correspondence from defendants counsel appeared to the Court to have dramatically altered the posture of the litigation that was commenced in December 2011 under vastly different circumstances, and potentially rendered plaintiffs' action moot. In the course of the conference, and apparently as a result of the prospective purchaser's purported cancellation of the contract, plaintiffs' counsel abruptly back-pedaled from his previous insistence on discontinuing the litigation, and joined in defendants' request that the Court proceed to determine the parties' summary judgment motions. Because the Court believed that the intervening events may have a significant bearing on the matters that were initially presented for the Court's determination, the Court directed that the parties supplement the record to reflect the post-submission events, and

¹ The Court notes that the validity of the purported cancellation of the contract of sale is apparently now the subject of litigation between the purchaser and the County (*Foley Operating LLC and Foley Land LLC v The County of Suffolk, et al.*, commenced in this Court under Index No. 12840/2011).

adjourned the summary judgment motions (as well as the motion to intervene) to April 21, 2011. The parties thereafter made their respective submissions and the motions were deemed fully submitted on April 21, 2011.

The Court's records reflect that on April 28, 2011, on its own motion, the Appellate Division, Second Department, vacated the stay granted by its March 3, 2011 decision and order as clarified by its March 18, 2011 decision and order, predicated on plaintiffs' failure to timely perfect its appeal of this Court's February 17, 2011 order. On June 10, 2011, the Appellate Division denied defendants' motion to dismiss plaintiffs' appeal for failure to timely perfect, however, and enlarged defendants' time to serve and file a brief until July 11, 2011.

Pursuant to a resolution adopted by the Legislature and approved by the County Executive, continued operation of the Facility is funded through June 30, 2011 (Res. No. 324-2011, adopted April 26, 2011, approved May 5, 2011). Recent news reports and public records reflect, however, that the Legislature's recent effort to amend the 2011 budget to provide funding for the Facility through the end of 2011 was vetoed by the County Executive (*Newsday*, June 28, 2011, p. A11; Res. No. 426-2011, adopted June 7, 2011, vetoed June 27, 2011).

It is well established that the function of courts is to determine actual controversies between litigants with a genuine stake in the outcome (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801 [2003]). It is not the function of the Court to render advisory opinions, and the Court will not rule on academic, hypothetical, moot or otherwise abstract questions (*id.*) Where changed circumstances "prevent the court from rendering a decision which would effectually determine an actual controversy between the parties involved," the action must be dismissed as moot (*id.*)

Upon a careful review of the motion papers, the parties' correspondence referred to above, and the parties' supplemental submissions, all of which the Court deems to comprise the record on these motions (exclusive of the affidavit of William J. Lindsay, sworn to April 8, 2011, purportedly in further support of plaintiffs' summary judgment motion, the submission of which was not authorized), together with an analysis of the applicable law, the Court is constrained to conclude that the events that transpired after the summary judgment motions were interposed have not rendered this action moot. Although defendants' expressed concern is that the issues presented herein may recur in connection with the submission of the 2012 budget, it is apparent that, if the County elects not to enforce the contract of sale, and in light of the Appellate Division's vacatur of the stay prohibiting closure of the Facility, defendants may proceed to close the Facility in 2011 in accordance with the 2011 budget which (at least at present) provides no funds to operate it beyond June 30, 2011. Accordingly, the issues presented by plaintiff's complaint, which are addressed solely to the 2011 budget adoption process, remain viable and are not moot. Accordingly, the Court will determine the motions on the merits.

With respect to the motions for summary judgment, it is undisputed that defendants did not hold public hearings or otherwise attempt to comply with Administrative Code §A9-6 prior to submitting the 2011 budget and that accordingly there are no factual issues to be determined. The fundamental issue to be determined on these motions for summary judgment is whether Suffolk County Administrative Code §A9-6 is applicable to the County Executive's plan to "defund" and close the Facility, which may be determined as a matter of law. The Court previously analyzed the

purpose, history and language of the statute in connection with plaintiffs' prior motion for a preliminary injunction, which presented substantially identical issues to those posed in connection with the current motions for summary judgment. Accordingly, the Court herein reiterates its prior analysis, as set forth in its February 17, 2011 order, as follows:

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 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 sets forth 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.

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.

The parties' submissions on the instant motions for summary judgment, as on plaintiffs' prior motion for a preliminary injunction, establish, as a matter of law, that Administrative Code §A9-6 is not applicable in the circumstances presented here and that it was not violated by the defendants' submission of a budget that provided for de-funding and closure of the Facility. In light of the foregoing, the plaintiffs' motion for summary judgment is denied, defendants' motion for summary judgment is granted, and it is declared that the County Executive did not act unlawfully by submitting to the Suffolk County Legislature a Recommended 2011 Operating Budget that "de-funded" and provided for the closure of the John J. Foley Skilled Nursing Facility, that the Approved 2011 Operating Budget is not null, void and unlawful to the extent it provided for de-funding and closure of the Facility, and that Suffolk County Administrative Code §A9-6 does not apply to so much of the Recommended 2011 Operating Budget as provided for de-funding and closure of the Facility.

In light of all of the foregoing, the motion of William J. Lindsay for leave to intervene as plaintiff in this action is denied as moot.

Dated: June 30, 2011

PAUL J. BAISLEY, JR.

J.S.C.