

**Fulton Housing Tenants Assn. v Daines**

2011 NY Slip Op 32810(U)

October 17, 2011

Sup Ct, NY County

Docket Number: 105184/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

**FULTON HOUSES TENANTS ASSOCIATION,  
MIGUEL ACEVEDO, Individually, on behalf of a  
Class of Persons Similarly Situated, and as  
President of the Fulton Houses Tenants Association,  
and the ASSOCIATION OF COMMUNITY  
ORGANIZATIONS FOR REFORM NOW, INC.,**

Index No.: 105184/10

SEQ #002

Petitioners,

-against-

**RICHARD DAINES, as NEW YORK STATE  
COMMISSIONER OF HEALTH,**

Respondent.

**FILED**

**OCT 24 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

**BACKGROUND**

Motion sequence numbers 002 and 003 are consolidated for disposition.

Petitioner Association of Community Organizations for Reform Now, Inc. has discontinued its action against respondent, and has stipulated that it be dismissed with prejudice.

In motion sequence number 002, petitioners seek a temporary restraining order (TRO) and preliminary injunction to enjoin respondent: (1) from entering into a contract with any provider which has the potential of encumbering some or all of the funds available to provide replacement services for those lost as a result of the closure of St. Vincent's Hospital in a manner which would prevent those funds, or other funds, from being utilized to establish a Level I Trauma Center and Critical Care Center with a fully functioning emergency room and the

ability to admit patients for surgery, childbirth, HIV services, and detoxification in the St. Vincent's service area; and petitioners further seek a permanent injunction enjoining respondent: (2) from entering into a contract for an "urgent care center," with any applicant to open such a center responding to Request for Grant Applications, RGA No. 1004071212, issued by the New York State Department of Health and the Dormitory Authority of the State of New York, unless such contract would not preclude or inhibit funding and opening a Level I Trauma and Critical Care Center in the St. Vincent's service area; and (3) from failing to take appropriate action to open a Level I Trauma and Critical Care Center in the St. Vincent's service area, with a fully functioning emergency room and the ability to admit patients for surgery, childbirth, HIV services, and detoxification, and a visiting doctors program designed to serve the homebound elderly living in lower Manhattan; and (4) issue a declaratory judgment that by its misfeasance, nonfeasance, and inaction, respondent has violated Article XVII sections 1 and 3 of the New York State Constitution and violated petitioners' procedural and substantive due process right to emergency health care.

In motion sequence number 003, petitioners move, pursuant to CPLR 3025 (b), for leave to file a second amended and supplemental petition. Respondent has cross-moved to dismiss petitioners' motion for leave to file a second amended and supplemental petition, which includes respondent's opposition to the first amended petition.

Oral argument was held on these motions on May 4, 2011.

#### **Petitioners' contentions (motion sequence 002)**

On April 21, 2010, the parties appeared before the Court to hear the order to show cause. At that time, the Court declined to issue a temporary restraining order (TRO) because respondent had not yet reviewed the responses. On April 27, 2010, respondent put out a press release stating that it had signed contracts worth approximately \$15 million to allow, among other things, Lenox Hill Hospital to open an "urgent care center" on the St. Vincent's hospital

premises. Petition, Ex. B.

Petitioners claim that if a preliminary injunction is not issued, it will suffer irreparable harm. Petitioners contend that, pursuant to Article VII §§ 1 and 3 of the New York State Constitution, the State is obligated to "protect and promote the health of the inhabitants," and to provide "aid, care and support of the needy," which respondent is failing to do in connection with the closing of St. Vincent's hospital. Petitioners claim that an "urgent care center" is no more than a clinic designed to provide nonemergency care that does not require hospitalization. The instant petition seeks to have respondent place an "acute care center" at the St. Vincent's location.

Petitioner Miguel Acevedo (Acevedo) represents petitioner Fulton Houses Tenants Association (FHTA), an unincorporated association consisting of all of the residents of the Fulton Houses, a development of the New York City Housing Authority (NYCHA), which houses low-income individuals and persons living on public assistance, social security, social security disability benefits, and other governmental programs designed to assist persons in need. Fulton Houses has 2,200 residents; 30% of whom receive public assistance, 15% of whom receive Social Security Disability benefits, 20% of whom are senior citizens, and over 35% of whom are under the age of 18. Acevedo Aff. The average income of the Fulton House residents is between \$15,000.00 and \$20,000.00 per year. *Id.*

Until the closure of St. Vincent's hospital, the residents of Fulton House, as well as the residents of Elliot Chelsea Houses, a 4,000-resident NYCHA project located between 25<sup>th</sup> and 28<sup>th</sup> Streets on Tenth Avenue, used St. Vincent's hospital as their primary hospital, because, among other things, it was the closest hospital in the area. *Id.* Since St. Vincent's closed, residents in acute states requiring ambulances are routed to Bellevue Hospital, located on the east side of Manhattan, which takes approximately 15-to-30 minutes longer to reach. *Id.*

Acevedo asserts that, as a community, the residents of Fulton Houses suffer from high

rates of asthma, diabetes and lupus, and heavily rely on a Level I hospital with an emergency room for health care.

According to the amended verified petition, St. Vincent's, while active, provided the following health care facilities and services: Level I trauma and critical care center; comprehensive cardiovascular center; Level III neonatal ICU; comprehensive cancer center; comprehensive HIV center; full emergency services; inpatient and outpatient psychiatric addiction services; one of the largest mental health and substance abuse programs in the Northeast; visiting doctor services for the elderly; extensive HIV/AIDS testing, treatment and education programs; and Chinese-speaking inpatient units. Amended Verified Petition, ¶¶ 7-10.

On April 13, 2005, the New York State Legislature created the Commission of Health Care Facilities in the 21<sup>st</sup> Century (the Berger Commission), which was to select hospitals and nursing homes across the state for downsizing and closure. *Id.*, ¶ 13. In addition, this legislation authorized the Berger Commission to authorize the necessary investments to implement its plan, and to expend funds available under the HEAL-NY capital grant program to that same end. *Id.*

The final report of the Berger Commission recommended that St. Vincent's in Greenwich Village stay open. Petition, Ex. G. According to the Berger Commission's findings, the Fulton Houses area had a serious shortage with respect to primary care provider ratio for the medicaid eligible population, and the sensitive admission rates in the area served by St. Vincent's were 150-200% of the overall New York City admission rates. *Id.*

In 2005, St. Vincent's filed for bankruptcy protection, and started a reorganization program of attempting to sell money-losing facilities and focusing on developing St. Vincent's hospital in Greenwich Village, which resulted in St. Vincent's emerging from bankruptcy in 2007. Amended Verified Petition, ¶ 19. The plan developed by St. Vincent's called for selling the hospital's property on the east side of Seventh Avenue and using the money so acquired to

build a modern facility on the west side of Seventh Avenue. *Id.*

A hearing was held by the Landmarks Commission on October 7, 2008, at which various witnesses testified as to the need to keep St. Vincent's open as a full-service medical facility. *Id.*, ¶ 21. The Landmarks Commission approved St. Vincent's plan to build a new hospital, which decision then resulted in an Article 78 proceeding. *Id.*, ¶ 22. In its answer to the Article 78 petition, the City stated that St. Vincent's emergency department saw 60,000 patients per year, 20% of whom were admitted to the hospital; 10,000 homeless patients were treated each year, with 55,000 patient visits; its primary service area includes 440,000 residents, 815,000 private sector workers, and millions of tourists; 25% of the hospital's service population has a household income of under \$25,000.00 per year, and, in 2007, St. Vincent's provided \$40 million in unreimbursed charity care to the poor. *Id.* Further, the City stated that no other Manhattan hospital has more zip codes in its service area and is so lacking in primary care doctors. *Id.*; Ex. K.

St. Vincent's filed for bankruptcy protection for the second time on April 14, 2010. *Id.*, ¶ 25. On April 18, 2010, respondent issued a Request of Grant Application (RGA) under New York's "Heal Capital Grant Program," administered pursuant to section 2818 of the Public Health Law. Petition, Ex. B. According to petitioners, the RGA proposes a program that would utilize St. Vincent's facilities for two years and would result in the elimination of emergency and inpatient hospital services in the Lower West Side of Manhattan during this period. Petition, ¶ 27. Moreover, petitioners assert that, prior to the RGA, respondent did not issue an Environmental Assessment or an Environmental Impact Statement in the form mandated by 6 NYCRR 617 and 10 NYCRR 97.4. *Id.*, ¶ 28.

Petitioners argue that the RGA will not provide the medical care needed for the residents of the community, and that respondent has failed to assess the need to replace St. Vincent's services as a hospital. *Id.*, ¶ 25-26.

The Amended Verified Petition asserts three causes of action: (1) violations of the New York State Constitution and the New York Public Health Law; (2) violations of 10 NYCRR §§ 97.13 (4), (7) and (8), and 97.410 in issuing the RGA without doing an Environmental Assessment or an Environmental Impact Statement; and (3) violation of petitioners' due process rights.

**Petitioners' contentions (motion sequence 003)**

According to the proposed second amended and supplemental petition, the only significant difference between it and the first amended petition appears to be the relief sought, which dispenses with the request for the TRO and preliminary injunction but otherwise seeks the same permanent injunction and declaratory relief previously sought, adding additional factual support for its prayer, including community health assessment studies, a press release, and a fact sheet prepared on March 10, 2011.

According to petitioners, the purpose of seeking leave to file a second amended petition is to bring the record up to date and to shift the focus of the litigation from a real estate deal that would allow North Shore-Long Island Jewish Hospital to open up a stand-alone emergency room in one of St. Vincent's buildings on West 20<sup>th</sup> Street. Petitioners maintain that such facility will not be a Level I Trauma Center and will be unable to treat heart attack victims and those with life-threatening injuries or maladies. Petitioners state that the new studies indicate that, since the closure of St. Vincent's, the use of medical facilities by the residents of the St. Vincent's service area has decreased by 20%.

**Respondent's contentions (cross motion and opposition)**

Richard M. Cook (Cook), the Deputy Commissioner for the Office of Health Systems Management of the New York State Department of Health, has provided an affidavit in support of respondent's cross motion in which he affirms that, contrary to petitioners' assertions, the Berger Commission did not make any findings or recommendations with regard to any of the

hospitals that it did not recommend for closure or reconfiguration, which would include St. Vincent's.

Cook also states that the RGA indicates that the proposed health care project would include the following:

- \* Creation, maintenance or expansion of comprehensive ambulatory care in the SVCHMC [St. Vincent's Catholic Hospital Medical Center] service area, at existing SVCHMC sites or other locations, including:
  - \*providing services without a required appointment,
  - \*expanded hours of accessibility (preference for 24 hours a day, 7 days a week hours),
  - \*basic medical imaging, including x-rays,
  - \*laboratory services, including point of care services and phlebotomy,
  - \*performing minor medical procedures (e.g., sutures, cyst removal, incision and drainage, splinting, etc.);
  - \*use of electronic medical records;
  - \*use of protocol-based care,
  - \*accessibility to or the ability to provide rapid transit to a full-service emergency room available for life-threatening conditions, and
  - \*any other appropriate services.

Cook Aff., at 4-5.

Further, according to Cook, the RGA project will demonstrate one or more of the following elements:

- a) creation of an urgent care capacity in the SVCHMC service area and/or;
- b) renovation and expansion of existing facilities to improve efficiency and increase service capacity and/or;
- c) expansion of hours and/or days of service by ambulatory and primary care clinics within underserved communities and/or;
- d) expansion of hours and/or days of service by ambulatory and primary care clinics within underserved communities and/or [sic];
- e) transition of services from emergency departments to ambulatory settings in order to reduce reliance on emergency rooms for primary care and/or;
- f) services to reduce barriers to primary care encountered by under served populations.

*Id.*

Cook asserts that, since no contract is imminent to fulfill the RGA, the grant of a preliminary injunction would delay such agreement and deprive the community of the urgent

care center and additional primary care capacity. *Id.* at 6. Further, Cook maintains that using the funds to construct a new hospital is absurd, and would cost more than \$830 million. *Id.*

Respondent asserts that petitioners lack standing to bring this action, since the alleged injury is not distinct to them and is legally insufficient and speculative. In addition, respondent maintains that petitioners' claims are outside the zone of interest of the governing statute (Public Health Law) and are not justifiable. Moreover, respondent claims that the matter before the Court is not justiciable because it involves discretionary acts of the legislative and executive branches of government, which is beyond the Court's ability to adjudicate. Respondent also says that the petition fails to state a cause of action, and that the requested relief is not compelled by the New York State Constitution.

In further support of its motion, respondent has provided the affirmation of Seth J. Farber (Farber), an Assistant Attorney General in the office of the New York State Attorney General, and the attorney for respondent. Farber provides the order approving the entry into the amended and restated contract of sale for the real estate and personal property of St. Vincent's to RSV, LLC and North Shore-Long Island Jewish Health Care System (Farber Aff., Ex. A), and the objection to the entry of such order by petitioners. *Id.*, Ex. B.

**Petitioners' Reply (motion sequence numbers 002 and 003)**

Petitioners state that they have standing to maintain this action, that they are able to demonstrate a distinct injury, and that their claims are legally sufficient and justifiable.

**Respondent's Reply (motion sequence numbers 002 and 003)**

Respondent's reply reiterates its earlier arguments regarding petitioners' standing, individual and distinct injury, sufficiency of the petition, and the argument that the relief sought is not compelled by State law.

## DISCUSSION

Before the court can address the underlying issues with respect to the request for a preliminary injunction, as a threshold matter it must be determined whether petitioners have standing to maintain this action. *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, *cert denied* 540 US 1017 (2003).

In order for an organization to have standing to sue, the organization

"must demonstrate: (1) that one or more of its members has standing to sue; (2) that the interests advanced here are sufficiently germane to petitioner's purposes to satisfy the court that petitioner is an appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert this claim or to afford petitioner complete relief."

*Matter of Aeneas McDonald Police Benevolent Association v City of Geneva*, 92 NY2d 326, 331 (1998).

To have standing to challenge a governmental act, an individual must show injury-in-fact that is more than conjectural, that is distinct from that of the general public, and that the administrative action would adversely affect him or her. *Matter of McAllan v New York State Department of Health*, 60 AD3d 464 (1<sup>st</sup> Dept 2009) (petitioners lacked standing because the alleged injury was speculative and shared by millions of New Yorkers).

Respondent argues that petitioners' alleged injuries are both indistinct, as petitioners themselves assert in the petition that the challenged action will affect all residents in the St. Vincent's service area, and that petitioners are outside of the zone of interest of Article 28 of the Public Health Law. *Matter of Hoston v New York State Department of Health*, 203 AD2d 826 (3d Dept 1994).

Section 2800 of the Public Health Law provides:

"Declaration of policy and statement of purpose. Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of

the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article."

Section 2803 (1) (a) of the Public Health Law provides, in pertinent part::

"Commissioner and council; powers and duties. 1. (a) The commissioner shall have the power to inquire into the operation of hospitals and to conduct periodic inspections of facilities with respect to the fitness and adequacy of the premises, equipment, personnel, rules and by-laws, standards of medical care, hospital service, including health-related service, system of accounts, records, and the adequacy of financial resources and sources of future revenues."

The court disagrees with respondent's contentions. FHTA meets the requirements to institute the present action as an organizational petitioner because at least one of its residents, petitioner Acevedo (as well as his daughter), was a patient at St. Vincent's and utilized the hospital's services for himself and his family. Moreover, the individuals who are allegedly injured by respondent's action are a discrete, albeit large, segment of the population, not the "public at large": the finite residents of the St. Vincent's service area, a distinct section of New York City. FHTA represents thousands of those inhabitants, mostly low-income individuals, and, as such, FHTA and Acevedo demonstrate sufficient distinct injuries to withstand this challenge to their standing.

Similarly, the Court is unpersuaded by respondent's challenge to petitioners' standing based on the argument that they are not within the statute's zone of interest. In support of its contentions, respondent cites to two primary cases in which petitioners were found to lack standing. The first case, *Matter of Lettko v New York State Department of Health* (195 AD2d 781 [3d Dept 1993]), concerned an individual who was held to lack standing to challenge

approval to add abortion services to Upper Hudson Planned Parenthood because she only alleged that she *could* be a client at the facility and alleged only generalized harm to the community. In this respect, that case is distinguishable from the instant matter. Acevedo has affirmed that both he and his family were patients at St. Vincent's Hospital, and the documentary evidence submitted supports an allegation that medical services to both Acevedo and the Fulton Houses' residents have been curtailed. In addition, there is support for the argument that the proposed urgent care facility will not provide the services that petitioners used to receive from a full-service hospital.

The second judicial decision relied upon by respondent is found to be similarly unpersuasive. In *Matter of Hoston v New York State Department of Health* (203 AD2d 826, *supra*), the petitioners made what the court described as vague and undocumented claims regarding the alleged increased health care costs that was the gravamen of that action. In contrast, the instant petitioners have provided sufficient documentation, such as testimony at public hearings, reports and evaluations, that support their assertions that, among other things, ambulance travel time to the now nearest full-service hospital has increased 15-to-30 minutes over what it was when St. Vincent's was operating, presenting a significant danger to the health of the residents.

As a consequence of the foregoing, the Court concludes that petitioners have standing to maintain this action. See *Matter of State Farm Mutual Automobile Insurance Company v Levin*, 263 AD2d 233 (3d Dept 2000).

However, respondent has argued that the matter before the court is not justiciable, and the Court must agree. "Justiciability ... refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions." *Jiggetts v Grinker*, 75 NY2d 411, 415 (1990). "[W]hen the Legislature creates a duty ... it is within the courts' competence to ascertain whether [the State] has satisfied [that]

duty ... and, if it has not, to direct that the [State] proceed forthwith to do so [internal quotation marks and citation omitted].” *New York County Lawyers Association v State of New York*, 294 AD2d 69, 72 (1<sup>st</sup> Dept 2002).

In the instant matter, petitioners base their claims on sections of the Public Health Law, some of which were noted above, and certain sections of the New York State Constitution.

Section 206 (1) of the Public Health Law states:

“The commissioner shall (a) take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law ... (f) enforce the public health law.”

Article XVII section 1 of the New York State Constitution

provides:

“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”

Article XVII section 3 of the New York State Constitution

provides:

“The protection and promotion of the health of the inhabitants of the state are matters of public concern and provisions therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.”

In analyzing Article XVII section 1, the Court in *Tucker v Toia*, 43 NY2d 1 (1977), quoted the Legislative history of this provision, which states:

“While the obligation expressed in this recommendation is mandatory, in that the Legislature shall provide for the aid, care and support of persons in need, the manner and the means by which it shall do so are discretionary.”

In order for petitioners to present the Court with a justiciable question, it must be determined that the statute or Constitutional provision upon which their claims are based command that the Executive or Legislative branch of government act in a specific manner. Absent such mandate, the courts are not empowered to second-guess the discretionary acts of

the other branches of government. *Brownley v Doar*, 12 NY3d 33 (2009).

New York is not required to meet every legitimate need of every needy person. Rather, the Legislature may determine how to allocate the public dollar according to its own discretion. Therefore, what the Constitution prohibits is a complete legislative failure to aid those in need, not a failure to allocate funds in a specified manner. *Matter of Aliessa v Novello*, 96 NY2d 418 (2001).

The New York courts

"have consistently recognized the broad discretionary power vested in the Legislature by article XVII (§ 1) with regard to the provision of ... assistance to the needy, and that article XVII does 'no more than authorize the legislature to provide funds for the care of the needy,' and does not mandate the provision of any particular care [internal citation omitted]."

*Matter of Crawford v Perales*, 205 AD2d 307, 308 (1<sup>st</sup> Dept 1994).

Similarly, a close reading of the Public Health Law provisions cited by petitioners indicates a grant of discretionary authority, not a precise command to act in a specified manner. Therefore, since neither the New York Constitution nor the Public Health Law requires a specific type of health care facility be provided to every community, the Court is not empowered to grant petitioners' request that the State provide a Level I health care center in the St. Vincent's service area.

As stated by the court in *Jones v Beame*, 45 NY2d 402, 409 (1978):

"In the instant case[] much effort was expended in detailing the concern of the plaintiffs with the issues presented, avowedly to demonstrate that if anyone has standing to litigate these issues, plaintiffs do. In this, plaintiffs are probably correct. The difficulty is not, however, whether plaintiffs are the wrong ones to present and litigate the issues; the point is that the courts are the wrong forum for resolution of the disputes. The proper forums are the Legislature and the elected officials of the State and local government. It is there that accommodations can be made in determining priorities and allocating resources. In short, resolution of the ultimate issues rests on policy, and reference to violations of applicable statutes is irrelevant except in recognized separately litigable matters brought to enforce them."

The Court is not persuaded by the court decisions cited by petitioners that its

determination that the matter before it is not justiciable is incorrect. In *McCain v Koch*, 70 NY2d 109 (1987), the court was called upon to see that specific legislatively enacted minimum standards were met; no such minimum standard of health care has been legislated in the statutes upon which petitioners base their claims. In *Tucker v Toia*, 43 NY2d 1, *supra*, the court found that the Social Services Law required aid be given to needy persons and that the agency authorized to implement that mandate impermissibly denied all aid to a specific group of individuals based on criteria that had nothing to do with need (denied benefits to persons under the age of 21 who were neither married nor living with a legally responsible person). There is no such mandate for specific health care facilities in the Public Health Law sections relied upon by petitioners. In *Hurrell-Harring v State of New York*, 15 NY3d 8 (2010), the court found that only some of the plaintiffs were denied counsel at significant stages in their criminal proceedings, which was a direct violation of their Constitutional right to counsel. Even though the court indicated that such relief might necessitate the appropriation of funds in a time of monetary scarcity, the overwhelming Constitutional infringement outweighed fiscal concerns. In the case at bar, there is no such infringement of a guaranteed Constitutional right.

Lastly, in *State of New York v Local 1115 Joint Board Nursing Home & Hospital Employees Division*, 56 AD2d 310 (2d Dept 1977), the matter involved the State seeking to enjoin hospital workers from going on strike, which is a direct violation of the Norris-LaGuardia Act, and so is immediately distinguishable from petitioners' instant action as private individuals seeking to have the government exercise its discretion in a manner favored by them.

Therefore, based on the foregoing, petitioners' motion seeking a preliminary injunction as well as other relief is denied on the grounds that the matter is not justiciable, because petitioners cannot compel performance of a specific duty that involves the exercise of discretion. *Matter of Maron v Silver*, 14 NY3d 230 (2010).

Having determined that the matter is nonjusticiable, the Court need not address

petitioners' other arguments. Also, based on the foregoing, petitioner's other motion, seeking leave to file a second amended complaint, is denied.

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

*Seidman v Industrial Recycling Properties, Inc.*, \_\_\_ AD3d \_\_\_, 2011 NY Slip Op 3581, 2011 WL 1601586, \*1, 2011 NY App Div Lexis 3549, \*1-\*2 (2d Dept 2011).

Since petitioners have stated that the purpose of the second amended petition is merely to bring the record up-to-date, they have failed to provide any new basis for the relief requested that would be found justiciable.

**CONCLUSION**

Based on the foregoing, it is hereby

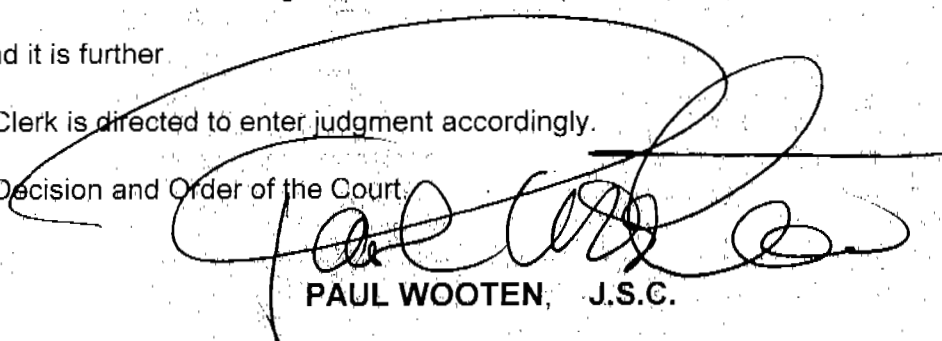
ORDERED that the amended verified petition is dismissed (motion sequence 002), with costs and disbursements to respondent as taxed by the Clerk upon submission of appropriate bill of costs; and it is further

ORDERED that petitioners' motion seeking leave to amend the petition (motion sequence 003) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10-17-11



PAUL WOOTEN, J.S.G.

**FILED**

**OCT 24 2011**

**NEW YORK COUNTY CLERK'S OFFICE**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST