

Gessin v Throne-Holst

2012 NY Slip Op 30235(U)

January 12, 2012

Sup Ct, Suffolk County

Docket Number: 10-41686

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-01-10 (#001)
MOTION DATE 1-18-11 (#002)
MOTION DATE 1-20-11 (#003)
ADJ. DATE 1-27-11
Mot. Seq. # 001 - Mot D # 003 - Mot D
002 - Mot D

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HARVEY GESSIN, LAURA FABRIZIO,
MICHAEL CRAIG and CLAIRE VEGLIANTE,

for a judgment and order pursuant to section 51
of the New York General Municipal Law, and
Articles 30 and 61 of the Civil Practice Law and
Rules,

Plaintiffs,

- against -

ANNA THRONE-HOLST, BRIDGET
FLEMING, NANCY S. GRABOSKI, JAMES
MALONE and CHRISTOPHER R. NUZZI in
their official capacities as members of, and
constituting, the TOWN BOARD OF THE
TOWN OF SOUTHAMPTON, TAMARA
WRIGHT, in her official capacity as Comptroller
of the Town of Southampton, and FRED
HAVEMEYER, WILLIAM PELL, JON
SEMLEAR, ERIC SHULTZ and ED WARNER,
JR., each individually, and in their official
capacities as members of, and constituting, the
TRUSTEES OF THE FREEHOLDERS AND
COMMONALTY OF THE TOWN OF
SOUTHAMPTON,

Defendants.

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J. LEE SNEAD, ESQ.
Attorney for Plaintiff
144 So Country Road, P.O. Box 489
Bellport, New York 11713

CAHN & CAHN, LLP
Attorney for Plaintiffs
22 High Street, Suite 3
Huntington, New York 11743

OFFICE OF THE TOWN ATTORNEY
By: Joseph Lombardo, Sr. Asst. Town Attorney
Attorney for Town of Southampton
116 Hampton Road
Southampton, New York 11968

(Handwritten initials)

Gessin v Throne-Holst
Index No. 10-41686
Page 2

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated November 17, 2010, and supporting papers (including Memorandum of Law dated January 17, 2011); (2) Notice of Motion by the defendant trustees, dated December 13, 2010, and supporting papers; (3) Notice of Motion by the defendant Town, dated December 14, 2010, and supporting papers; (4) Affirmation in Reply by the plaintiffs, dated January 17, 2011, and supporting papers; (5) Reply Affirmations by the defendant Town, dated January 27, 2011, the defendant trustees, dated January 28, 2011, and the plaintiffs, dated February 1, 2011 and supporting papers; (5) Other (the summons and verified complaint, dated November 15, 2010) ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the portion of the motion of the plaintiffs which requests the court to issue an injunction preventing the defendants, Fred Havemeyer, William Pell, Jon Semlear, Eric Shultz and Ed Warner, Jr., individually and in their capacities as members of and constituting the Trustees of the Freeholders and Commonalty of the Town of Southampton, from disbursing any public funds held by them in various bank accounts without prior consent of the defendants Anna Throne-Holst, Bridget Fleming, Nancy S. Graboski, James Malone, and Christopher R. Nuzzi in their official capacities as members of, and constituting the Town Board of the Town of Southampton, and without prior audit and approval from the Town Comptroller of the Town of Southampton is denied; and, it is further

ORDERED that the portion of the motion of the plaintiffs which requests the court to issue an order compelling the defendant Trustees of the Freeholders and Commonalty of the Town of Southampton to produce within a reasonable time certain resolutions of the Town Board of the Town of Southampton, or of the Trustees of the Freeholders and Commonalty of the Town of Southampton, and other documentation establishing each and every bank account now held by and for the Trustees of the Freeholders and Commonalty of the Town of Southampton is denied as moot, the items requested having been produced to the plaintiffs by the defendants prior to the final submission of the within motion; and, it is further

ORDERED that the motion of the defendant Trustees of the Freeholders and Commonalty of the Town of Southampton, individually and as trustees, requesting the court to issue an order pursuant to CPLR 3211 dismissing the plaintiffs' complaint against them is granted to the extent that plaintiffs' complaint is dismissed except for those portions of the first and second causes of action which refer to gifts, donations, or bidding on contracts; and, it is further

ORDERED that the motion of the defendants Anna Throne-Holst, Nancy S. Graboski, Bridgett Fleming, James Malone, Christopher R. Nuzzi, the Town Board of the Town of Southampton, and Tamara Wright, requesting the court to issue an order pursuant to CPLR 3211(a)(1) and (7) dismissing plaintiffs' complaint against them is granted to the extent that plaintiffs' complaint is dismissed except for those portions of the first and second causes of action which refer to gifts, donations or bidding on contracts.

Plaintiffs move for injunctive relief in the form of an order prohibiting defendant Trustees of the Freeholders and Commonalty of the Town of Southampton (“the Trustees”) from disbursing any of the public funds held by them without first obtaining consent of the Town Board of the Town of Southampton (“the Town Board”) and audit and approval from the Town Comptroller of the Town of Southampton (“the Comptroller”) as to the nature, form and procedure of incurring the obligation for which the disbursement is intended. (The second part of plaintiffs’ motion requests that defendants produce certain books and records in connection with the establishment of certain bank accounts. However, upon reading the papers submitted in connection herewith it appears that the items demanded have been produced to plaintiffs by defendants prior to the final submission of the within motion.)

Plaintiffs, as taxpayers, bring their action pursuant to General Municipal Law (“GML”) section 51 and for declaratory relief pursuant to CPLR article 30. In their first cause of action under GML section 51, plaintiffs seek to restrain the access by the Trustees of certain trustee accounts without having first approval of the Town Board; an accounting of all monies which have come into “their hands”; a disgorgement (or turning over to the Town Board and Comptroller) of public funds now held in any Trustee account; a prohibition of payments to private counsel in connection with the engagement of counsel to litigate matters that affect the interests of the Trustees; recovery of funds unlawfully expended by the Trustees; and, an award of attorneys fees. In their second cause of action pursuant to CPLR article 30, plaintiffs request the Court to declare the legal status of the funds held within the Trustee accounts; whether the Trustee accounts were established lawfully; whether certain “donations” from the Trustee accounts were made in violation of the New York Constitution; whether the Trustees are required to follow the municipal purchasing and bidding statutes; and, whether the engagement, retention, and payment to outside counsel without the approval of the Town Board is authorized.

The Trustees and the Town Board each move for an order dismissing the complaint of the plaintiffs pursuant to CPLR 3211. The Trustees move for dismissal on the grounds that they are not a municipal corporation nor a “governing board” within the meaning of General Municipal Law, and thus, they claim that an action pursuant to General Municipal Law section 51 may not be maintained against them. In addition, the Trustees claim that the action must be dismissed on the merits. They claim that the issues presently before the Court (*i.e.* the ability of the Trustees to manage and control funds provided to it) were resolved in a Stipulation of Settlement “so ordered” by the Honorable Alan D. Oshrin on March 9, 1994 in connection with the matter known as Warner v Thiele, Index No. 93-26288. The Town Board alleges that plaintiffs’ complaint must be dismissed against it on the grounds that the methodologies used by them to oversee and ensure that the budgeting and disbursement procedures utilized by the Trustees conforms to State law, are proper and in conformity with Justice Oshrin’s order of March 9, 1994.

“The town of Southampton, Suffolk county, N.Y., was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. The Dongan patent, after vesting all the undivided land within the town limits in twelve trustees, provides as follows: ‘and that they and their Successors by the name of Trustees of the freeholders and commonalty of the town of Southampton be and shall be forever in future times, persons able and Capable in law to have perceive receive and possess not only all and singular the premises but other

messuages lands Tenements Privileges Jurisdictions franchises and hereditaments of whatsoever kind or species ... to plead and be impleaded answer and to be answered unto defend and be defended they are and may be Capable in whatsoever place and places and before whatsoever Judges and Justices or other persons or officials of his said Majesty his heirs and Successors in all & all manner of actions.'... The trustees named in the patent, and their successors in office, became, were and now are trustees of the town in the execution of the trust thus created, being vested by the patent with all the powers necessary for the proper discharge of their duties. ... The trustees have power under the charters to employ counsel when in the proper discharge of their duties the aid of counsel may be deemed to be necessary. ... The doctrine...to the effect that the town board alone can employ an attorney, has no application to this case where, as has been pointed out, the patent expressly empowers the trustees 'to plead and be impleaded,' etc." (*People v Lister*, 106 AD 61, 62 - 65, 93 NYS 830 [2d Dept 1905]). "[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power" (*Knapp v Fasbender*, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees have the status of trustees and that of public officials, making them accountable and responsible and subject to the remedies of section 51 of the General Municipal Law with respect to all actions involving public interest; however, the exercise of their powers in relation to the making of contracts does not require a resolution or approval of the Town Board (*see id* at 234). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see People v Lagana*, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied*, 8 NY3d 882, 832 NYS2d 494 [2007]).

Although "[i]t is well established that a taxpayer action pursuant to section 51 of the General Municipal Law lies 'only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'" (*Mesivta of Forest Hills Inst., Inc. V City of New York*, 58 NY2d 1014 1016, 462 NYS2d 433 [1983] [*citations omitted*]), it is clear that the law should not be used as a tool to review or correct technical or procedural irregularities by governmental bodies (*see Council of the City of New York v Giuliani*, 5 AD3d 330, 773 NYS2d 557 [1st Dept 2004]; *Starburst Realty Corp. v City of New York* 125 AD2d 148, 512 NYS2d 60 [1st Dept 1987]. Unless such lawsuits are limited to those acts done without power or involving corruption, fraud or bad faith amounting to fraud, the discretionary acts of all local officials and municipal bodies would be subject to review by the courts at the suit of the taxpayers, "a result which would burden the courts with litigation, without increasing the efficiency of local administration" (*Talcott v The City of Buffalo*, 125 NY 280, 288, 1891 NY Lexis 1482 [1891]; *see Mesivta of Forest Hills Inst., Inc. V City of New York, supra*).

To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see CPLR 6301; Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; *Dixon v Malouf*, 61 AD3d 630, 630, 875 NYS2d 918 [2d Dept 2009]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643, 808 NYS2d 418 [2d Dept 2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Dixon v Malouf*, 61 AD3d at 630; *Ruiz v Meloney*, 26 AD3d 485, 486, 810 NYS2d 216 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the

Gessin v Throne-Holst

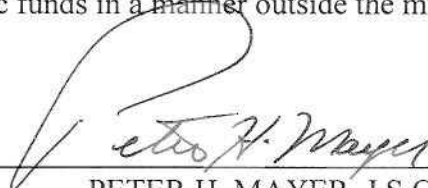
Index No. 10-41686

Page 5

sound discretion of the Supreme Court (*see Dixon v Malouf*, 61 AD3d at 630; *Ruiz v Meloney*, 26 AD3d at 486).

Plaintiffs are not entitled to an injunction preventing the Trustees from spending money without prior approval of the Town Board. It is clear that the Trustees are permitted to enter into contracts, take action necessary to preserve the interests of the public they serve, and hire counsel to defend or commence lawsuits in furtherance of preserving the interests of the public as a result of the patent and subsequent legislative action or "non-action". Plaintiffs have not sufficiently established that they will be successful on the merits since the hiring of outside counsel by the Trustees and the budgeting and disbursement procedures employed by the Town Board comply with the law as is indicated herein above, nor does a balancing of the equities favor plaintiffs. Accordingly, an injunction is denied and the complaint is dismissed except for those portions of it which refer to allegations of unauthorized expenditures for "donations in lieu of flowers", the purchase of "funeral arrangements", the donation of public funds to not-for-profit organizations, gifts of public funds to private entities, and contracts with vendors for the purchase of goods and services with public funds in a manner outside the municipal bidding requirements.

Dated: 1/12/12



PETER H. MAYER, J.S.C.