

Jenkins v Astorino

2012 NY Slip Op 33738(U)

August 20, 2012

Supreme Court, Westchester County

Docket Number: 003306/12

Judge: Robert A. Neary

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**FILED
AND
ENTERED**
ON 8-20-2012
**WESTCHESTER
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
KENNETH W. JENKINS, in his Individual capacity and in his capacity as Westchester County Resident and Taxpayer, Chairman and Member of the Westchester County Board of Legislators; LYNDON WILLIAMS, in his Individual capacity and in his capacity as Westchester County Resident and Taxpayer, and Westchester Vice-Chairman and Member of the Westchester County Board of Legislators; PETER HARCKHAM, in his Individual Capacity and in his capacity as a Westchester County Resident and Taxpayer and as a Member of the Westchester County Board of Legislators; and MARY JANE SHIMSKY in her Individual Capacity and in her capacity as a Westchester County Resident and Taxpayer and as a Member of the Westchester County Board of Legislators,

Index No. 003306/12


FILED
AUG 20 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Petitioners/Plaintiffs,

- against -

DECISION AND ORDER
Seq. Nos. 1 and 2

ROBERT P. ASTORINO, in his Individual capacity and as Westchester County Executive and Member of the Westchester County Board of Acquisition & Contract, KEVIN McGUIRE, in his Individual capacity and as the Commissioner of the Department of Social Services, and GLADYS CARRION, in her official capacity as Commissioner of the New York State Office of Children and Family Services,

Respondents/Defendants.

-----X
NEARY, J.

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

The Petitioners/Plaintiffs move, by way of Order to Show Cause, for an order of this Court: (1) declaring that local laws and acts of the County Board including the finally adopted 2012 Budget Acts as it pertains to the family share and/or Act 2011-191 are presumed valid until challenged in a court of law and judicially invalidated; (2) declaring the 2012 Budget Act as it pertains to the family share and/Act 2011-191 are valid and enjoining Respondents/Defendants from interfering with the implementation of same; (3) enjoining the Respondents/Defendants from raising the family share from 20 percent (20%) without prior approval of the County Board; (4) permanently mandating that the Respondent/Defendant Astorino implement and enforce all local laws, acts and resolutions of the County Board in accordance with Section 110.11 of the Laws of Westchester County (hereinafter "LWC"); and (5) declaring that the Respondents/Defendants have violated the Doctrine of Separation of Powers.

On June 1, 2012, this Court granted the Petitioners/Plaintiffs' request for a preliminary injunction pending a disposition of this matter.

The Respondents/Defendants Astorino and McGuire oppose the Petitioners/Plaintiff's motion and have filed an Affirmation in Opposition to Temporary Restraining Order. In addition, Respondents/Defendants Astorino and McGuire have moved to dismiss the Petition/Complaint in its entirety pursuant to New York State Civil Practice Law and Rules R.406, R. 3211(a)(1), (a)(2), (a)(3), (a)(7) and §7804(f) because: (1) this Court lacks subject matter jurisdiction, (2) the Petitioners/Plaintiffs lack standing to sue, (3) the Petition/Complaint fails to state a cause of action upon which relief can be granted and (4) a

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

defense to the Petition/Complaint is founded upon documentary evidence. The Respondent/Defendant Gladys Carrion has filed a Verified Answer and Objection in Point of Law.

The Court has reviewed the following papers submitted in this matter:

Petitioners/Plaintiffs' Order to Show Cause seeking a Preliminary injunction with Verified Petition/Complaint and supporting papers and exhibits

Respondents/Defendants Astorino and McGuire's Affirmation in Opposition to Temporary Restraining Order with exhibit and Affidavit of Philippe M. Gille, First Deputy Commissioner of the Westchester County Department of Social Services in Opposition to Temporary Restraining Order

Petitioners/Plaintiffs' Supplemental Exhibits in Further Support of Order to Show Cause for Temporary Restraining Order and Preliminary Injunction with exhibits dated June 11, 2012

Affidavit of Olivia Rhodes, Director of Fiscal Affairs for the Westchester County Board of Legislators

Affidavit of Janice Molnar, Deputy Commissioner of the Division of Child Care Services for the Office of Children and Family Services with exhibit

Respondent/Defendant Carrion's Verified Answer and Objections in Point of Law

Respondents/Defendants Astorino and McGuire's Notice of Motion to Dismiss Petition/Complaint with exhibits

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

Affidavit of Lawrence C. Soule, Budget Director for
Westchester County with exhibits

Respondents/Defendants Astorino and McGuire's
Supplemental Affirmation in Further Support of
Motion to Dismiss
Petitioners/Plaintiffs' Memorandum of Law in Opposition
to Respondents/Defendants' Motion to Dismiss.

FACTUAL BACKGROUND

In December 2011, the Westchester County Board of Legislators adopted the 2012 Budget Act which provided approximately five hundred sixty-six million dollars (\$566,000,000.00) in funding for the Department of Social Services and its numerous programs. The funded programs included Title XX and child day care services for low income families. The Budget provided that the family share for these programs was to be 20 percent (20%) and funded the programs on that basis.

In separate legislation, the County Board of Legislators passed Act 2011-191 which declared in part that "no changes to policies, programs and services contained in the final adopted budget shall take place without the prior approval of the County Board of Legislators."

Shortly thereafter, Respondents/Defendants Astorino and McGuire announced that the budgeted funds would not be adequate to meet projected child day care demand during 2012 and stated that an increase in the family share percentage from 20 percent (20%) to 35 percent (35%) would be necessary to continue the child day care subsidy program for the duration of 2012. Respondent/Defendant McGuire applied to Respondent/Defendant Carrion, Commissioner of the New York Office of Children and Family Services (hereinafter "OCFS"),

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

to amend the Westchester County 2012-2016 Child and Family Services Plan to permit the increase in the family share plan. Respondents/Defendants Astorino and McGuire never sought approval from the Board of Legislators with respect to the proposed increase.

On April 6, 2012, Respondent/Defendant McGuire commenced a public notice and comment period concerning the proposed increase in the family share rate from 20 percent (20%) to 35 percent (35%) as required under state law. The public comment period ended on May 14, 2012.

The OCFS reviewed the Westchester County Amendment using the criteria specified in Social Service Law §34-a(4) and Title 18 of the New York Code of Rules and Regulations (hereinafter “NYCRR”) §407.7 and §407.10. The OCFS determined that the Amendment was in compliance with all applicable statutory and regulatory provisions. Accordingly, on May 17, 2012, Respondent/Defendant Carrion’s office approved the request to increase the family share to 35 percent (35%) effective June 1, 2012.

The Petitioners/Plaintiffs brought the present action on June 1, 2012 at which time the Court granted a temporary restraining order staying the implementation of the approved increase.

The roles of the various parties in the process, as the Court understands it, can be summarized as follows:

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

**ROLE OF COMMISSIONER OF SOCIAL SERVICES
IN INCREASING FAMILY SHARE**

New York State Social Services Law (“SSL”) states that, the Commissioner of DSS is responsible for the administration of all the assistance and care of the needy in Westchester. [See SSL §65; LWC §§143.01, 143.11]. SSL also mandates that the Commissioner “shall be the chief administrative officer of the department.” [See SSL §34.1; SSL §2(14)]. The “[s]ocial services official shall mean a county commissioner of social services . . . to whom the power or duty referred to is assigned under the provisions of this chapter. In any law where reference is made by a title to an official charged with the duty of caring for the poor in a . . . county, it shall be understood as referring to the one of the above mentioned social services officials on whom the power or duty referred to is conferred under the provisions of this chapter.”

Commissioner McGuire was appointed by the County Executive and confirmed by the County Board of Legislators (“County Board”) for a fixed five (5) year term of office. [See SSL §116; LWC §110.21]. Commissioner McGuire’s term expires December 31, 2015. The Commissioner has the “authority to give the public assistance and care for the administration of which a county social services district is responsible.” [See SSL §2(8)]. In giving the public assistance and care, “the county commissioner shall act as the agent of the [state] in all matters relating [there]to.” [See SSL §65(3)]. The Commissioner is also vested by law with the management and control of the division of family and child social services. [See LWC §253.11].

The Commissioner of DDS is the chief administrative officer of the department and is also responsible for ascertaining the budget requirements for the department and

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

administering the public assistance funds and programs for which the County of Westchester is responsible. The Commissioner has the discretion to transfer appropriations within a general classification of expenditures.

In administering public assistance funds and programs, the Commissioner acts as an agent of the New York State Office of Children and Family Services and is granted the discretion, within certain limits, to determine the percentage of family contributions toward the “Title XX” and “Low Income” day care programs. The percentage range allowable under law is between 10 percent (10%) and 35 percent (35%).

According to Respondent/Defendant McGuire, the 2012 County Budget appropriated less than one million dollars (\$1,000,000.00) for the “Title XX” day care program. This appropriation for “Title XX” is insufficient to maintain the program at a 20 percent (20%) family share until December 31, 2012. The latest projections, which were developed through DSS’ consultation with the Budget Department, indicate that in order to provide the “Title XX” day care program through December 31, 2012 while maintaining a family share of 20 percent (20%), DSS would need in excess of one million three hundred thousand dollars (\$1,300,000.00).

Unlike the “Title XX” day care program, which has its own appropriation account, the “Low Income” day care program is one of the several appropriations designated collectively as the “Indirect Social Services.” The 2012 County Budget appropriated approximately thirty-six million dollars (\$36,000,000.00) for the “Indirect Social Services” account.

Of the total appropriation for Indirect Social Services programs in 2012, approximately twenty-two million dollars (\$22,000,000.00) was designated by the County Board

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

of Legislators to be utilized in connection with the “Low Income” day care program. The latest projections indicate that in order to provide the “Low Income” day care program through December 31, 2012 while maintaining a family share of 20 percent (20%), DSS would need approximately twenty-seven million dollars (\$27,000,000.00).

In February 2012, Respondent/Defendant McGuire determined that the specific appropriation amounts designated in the 2012 Westchester County Budget for both the “Title XX” and the “Low Income” day care programs were insufficient to support the programs through December 31, 2012 if, among other factors, the parent contribution remained 20 percent (20%). In reaching that determination, the Commissioner reviewed the specific appropriations made in the 2012 County Budget under the “501 Social Services Relief” classification, assessed the current and projected caseloads and consulted with the Budget Department.

As of the end of March 2012, the “Title XX” day care program had one hundred ninety-five (195) slots, which was thirty-two (32) more than projected in the budget forecasts, and the “Low Income” day care programs had two thousand eight hundred forty-six (2,846) slots, which was one hundred eighty-seven (187) more than projected in the budget forecasts.

ROLE OF OCFS IN APPROVAL PROCESS FOR INCREASING FAMILY SHARE

OCFS is the New York State Agency charged with approving the child care portion of each county’s Plan and any Amendments in accordance with SSL §34-a and Title 18 of the NYCRR Part 407.

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

Each county submits its Plan or Amendment to OCFS for approval after verifying the Plan or Amendment has the contents required by Title 18 of the NYCRR §407.5. In addition to Title 18 of the NYCRR §407.5, Amendments must also meet the criteria in §407.10. Before submission to OCFS, the Plan or Amendment must also be approved by the chief executive officer of the county, or by the legislative body in those counties without a chief executive officer, per SSL §34-a(3)(b).

In accordance with SSL §34-a(4) and Title 18 NYCRR §407.7, OCFS reviews the Plan or Amendment to determine if the Plan or Amendment (1) complies with the requirements of the planning process, including public participation and submission dates, (2) contains all required information, including all required charts, (3) is internally consistent so that objectives, activities and projected expenditures are closely related to the district's needs, and client and expenditure estimates are consistent with objectives and activities and (4) addresses the needs identified by OCFS in regard to the district's analysis of economic and social indicators.

Once OCFS' review of the Plan or Amendments is completed, it determines, in accordance with Title 18 of the NYCRR §407.8, if it will approve the whole Plan or Amendment, approve part of the Plan or Amendment and disapprove another part of the Plan or Amendment or disapprove the whole Plan or Amendment.

A county wishing to make an Amendment to its Plan must complete a Plan Amendment in accordance with Title 18 of the NYCRR §407.10. If the Plan Amendment results in a reduction in services, a change in eligibility or a change in fees, the Plan must be published for public comment before it can be submitted to OCFS for review and approval. After OCFS

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

completes its review in accordance with Title 18 of the NYCRR §407.7, and if OCFS approves the Amendment, it will be effective upon the date designated by the county commissioner.

Section 410(1) of the SSL provides the basis for a family paying part of the cost of State subsidized child care. Section 410-x(6) of the SSL authorizes OCFS, pursuant to its regulations, to provide subsidized child care on a sliding fee scale based upon the family's ability to pay.

These regulations set a sliding fee scale criteria, known as the family share fee percentage, and are codified in Title 18 of the NYCRR §414.3(e). Title 18 of the NYCRR §415.3(e)(3) provides that the county select a percentage of between 10 percent (10%) and 35 percent (35%) and that the county's selected percentage be included in all Plans.

OCFS allows counties to set their own family share fee percentage and defers to the counties to determine what factors to use in setting their family share fee percentage.

OCFS also allows the counties to set their own family share fee percentage and to use their own criteria for setting their family share fee percentage.

On May 14, 2012, OCFS received the Westchester County Amendment for approval which sought to raise the family share fee percentage from 20 percent (20%) to 35 percent (35%).

The Westchester County Amendment was signed by the Westchester County Department of Social Services Commissioner Kevin McGuire, as the designee of the Westchester County Executive Robert P. Astorino.

OCFS reviewed the Westchester County Amendment using the criteria specified in SSL §34-a(4) and Title 18 of the NYCRR §407.7 and §407.10. OCFS determined, after its

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

review, that the Amendment was in compliance with all applicable statutory and regulatory provisions. As part of its review, OCFS verified that Westchester County selected 35 percent (35%) as its family share fee percentage.

Westchester County has a chief executive officer, and per SSL §34-1(3)(b), where a chief executive officer exists, he or she approves the county's Plan or Amendment. It is only when a county has no chief executive officer then the legislative body in such a county must approve the plan.

Given that Westchester County has a chief executive officer and that its Amendment was approved by the County Executive through his designee (Respondent/Defendant McGuire) and was in compliance with all the applicable statutory and regulatory provisions, OCFS determined that it had no legal basis to deny any part of the Amendment including the 35 percent (35%) family share fee percentage. As a result, OCFS approved the Westchester County Amendment on May 17, 2012.

ROLE OF COUNTY BOARD OF LEGISLATORS IN INCREASING FAMILY SHARE

The County Board of Legislators is the governing body of Westchester County.

[See LWC §209.1]. LWC §209.91 provides, *inter alia*:

1. The County Board shall have power to enact local laws, acts and resolutions. . . . Such local laws, acts, and resolutions as described in this section shall be in such form as the County Board shall prescribe, except as

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

otherwise specifically provided in this act or
in the County Charter.

2. Such board shall have such further powers and duties as have heretofore been or may hereafter be lawfully granted or imposed by the Constitution, County Charter, local law, act or resolution of such board, or by any provision of any act of the legislature.
3. Local Legislation relating to the property, affairs or government of the county or the welfare, safety and health of its inhabitants and the protection of their property, enacted by the County Board according to the procedure provided in Article III and pursuant to the powers conferred by Article 9 of the Constitution and under the authority granted and within the limitations imposed by statute, shall be deemed and entitled a local law.

In furtherance of their statutory duties, the County Board passed the 2012 Budget Act which allocated funds for the programs in question and provided for a family contribution rate of 20 percent (20%). In March 2012, when Respondent/Defendant McGuire announced that the funds budgeted were not adequate to meet the projected costs for 2012, a series of meetings were held between the members of the Board and Commissioner McGuire and others in an attempt to resolve the issue. Apparently, the issue was not resolved and Respondent/Defendant McGuire commenced the public notice and comment period as a necessary first step in requesting an increase in the family share percentage from OCFS.

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

The state procedure for amending the County Plan to allow for an increase in the family share provides no role for the County Board. Respondent/Defendant Carrion, in her responding papers, points out that the fact that the Westchester County Board of Legislators disagreed with the Amendment raising the family share fee percentage could have no bearing on OCFS' approval of Westchester County's Amendment as OCFS has no legal basis to deny a Plan or Amendment where it meets all the relevant statutory and regulatory provisions and is approved by the county's chief executive officer or his designee. There is no dispute that, in the present case, the County met all necessary state legal requirements for the Amendment process.

The Petitioners/Plaintiffs contend that by passing the 2012 Budget Act and Act 2011-191 they restricted Respondent/Defendant McGuire's discretionary authority to seek an amendment to the Plan to allow an increase in the family share without first obtaining the approval of the Board of Legislators. A critical issue for the Court to resolve in this matter is whether the language included in the 2012 Budget Act combined with the language of Act 2011-191 limits the discretionary authority of the Commissioner in this regard.

LEGAL DISCUSSION

STANDING

The Court finds that the Petitioners/Plaintiffs have standing to bring the present action in their capacity as members of the Westchester County Board of Legislators. In general, persons seeking to challenge governmental action must demonstrate that they are personally aggrieved by those actions in a manner "different in kind and degree from the community

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

generally.” [See *Matter of Seidel v. Prendergast*, 87 AD3d 545]. However, the Court of Appeals has held that a legislator has standing, in his capacity as a member of a legislative body, to bring a case relating to a dispute with the executive officer over the yearly budget. [See *Silver v. Pataki*, 96 NY2d 532]. Nevertheless, the Petitioners/Plaintiffs have no standing as individual tax payers as they do not stand, in that capacity, in a position different from the public at large. The motion to dismiss is **GRANTED** as it relates to the Petitioners/Plaintiffs’ acting in their individual capacity as Westchester County residents and taxpayers.

BOARD AS NECESSARY PARTY

The Petitioners/Plaintiffs also contend that the Westchester County Board of Legislators are a necessary party to these proceedings as the Court may be required to rule on the validity of a piece of legislation that is incumbent upon the Respondents/Defendants to implead them as a result of their defense to the Petition/Complaint. The Court notes that it received a letter from counsel for the Board of Legislators regarding this matter which raised concerns along these lines. However, no attempt has been made to intervene in this matter although the Board of Legislators is authorized to do so.

While it is clear that the County Board of Legislators could have moved to intervene in this matter, it has chosen not to do so. The Court does not believe that it is incumbent upon the Respondents/Defendants to implead the County Board simply because it has raised a defense to the Petitioners/Plaintiffs’ action. [See *Council of City of New York v. Bloomberg*, 6 NY3d 380].

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

MOTION TO DISMISS

Respondents/Defendants Astorino and McGuire have moved to dismiss pursuant to CPLR §3211(a)(1), (a)(2), (a)(3), (a)(7) and §7804(f) alleging that, *inter alia*, the Petition/Complaint fails to state a cause of action upon which relief can be granted and a defense to the Petition/Complaint is founded upon documentary evidence.

On a motion to dismiss pursuant to CPLR §3211(a)(7), “the standard is whether the pleading states a cause of action,” and, in considering such a motion, “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” [See *Sokol v. Leader*, 74 AD2d 1180; see also *Leon v. Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972]. However, when the moving party submits evidentiary material in support of his or her motion, “the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” [See *Sokol v. Leader*, 74 AD3d at 1181-1182, quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182]. Viewed in this light, the Petition/Complaint and papers do allege a cause of action. The motion to dismiss pursuant to CPLR §3211(a)(7) is, therefore, **DENIED**.

On a motion to dismiss pursuant to CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. [See *Leon v. Martinez, supra*]. The Court finds that the documentary evidence submitted in this matter establishes that the Respondents/Defendants have a defense to the claims asserted and are entitled to dismissal as a matter of law.

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

The Court finds that actions taken by the Commissioner in seeking the Amendment to the County Plan were proper as they were specifically authorized by state law and state regulations. Respondent/Defendant McGuire has demonstrated a rational basis for the actions taken and the Court finds that they were not arbitrary or capricious. Moreover, it has been demonstrated, to the Court's satisfaction that the Commissioner of Social Services, as an agent of the State, has the ultimate authority to seek this increase in question without the prior approval of the County. "In New York State, in the administration of public assistance funds, regardless of whether the funds come from federal, state or local source, 'the authority and responsibility is that of the county commissioners of social services, not the counties; the local commissioners act on behalf of and as agents for the State.'" [See *Westchester County Board of Legislators v. Astorino*, Index No. 21154/10 (December 17, 2010) quoting *Beaudoin v. Toia*, 45 NY2d 343]. Neither the language in the 2012 Budget Act nor Act 2011-191 can alter the role of the Commissioner of Social Services as a state agent when dealing with the administration of public assistance funds.

The Court further finds that Act 2011-191, while valid on its face, does not provide authority for this Court to direct the Respondents/Defendants to exercise their discretion in the manner sought by the Petitioners/Plaintiffs. Reading the plain language of the statute, the Court finds that its application to the family share provisions of the budget is tenuous at best. The language of the Act is extremely broad in scope. It can be read to apply to every item in the budget. However, no direct mention is made of any particular item or area of the budget where the Act is intended to apply. In addition, the following terms: "policy," "programs" and "services," as they pertain to the budget are not defined. The Act may well have some

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

application in other areas of the budget, but the Court does not read the family share percentage as a “policy,” “program” or “service” as described in the Act.

Moreover, the role that the 2012 Budget Act plays in establishing policy has not been sufficiently demonstrated to the Court. The budget reflects the policies and spending priorities which the County places on certain programs contained in the budget, but the budget itself does not create such policies, programs or services such as those referred to in the Petition/Complaint. The Budget Act of 2012 is an appropriation act which funds existing programs and not a law establishing any policy, programs or service. [See LWC §107.61(1)]. The laws establishing the programs referred to in the budget are enacted in separate legislation.

Whatever application Act 2011-191 may have with respect to other areas of the budget not addressed in this Petition/Complaint, the Court finds that it does not provide authority for this Court to grant the relief requested.

The Court will not speculate as to whether the Board could fashion a law to limit the discretionary power of the Commissioner of Social Services with respect to the percentage of the family share. It can only state the statutory language relied upon by the Petitioners/Plaintiffs does not accomplish that aim.

MANDAMUS

It is well settled that a Court cannot direct the performance of a discretionary act on the part of a public official. “The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought.” [See *Matter of Williams v. Zambelli, et al.*, 947 NYS2d 888; *Matter of Legal Aid*

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

Society v. Scheinkman, 53 NY2d 12]. In the present case, the Petitioners/Plaintiffs have failed to demonstrate a clear legal right to relief and that act in question is not ministerial in nature. Even accepting the Petitioners/Plaintiffs' allegations, Respondent/Defendant McGuire would be exercising discretionary authority in seeking approval of the Board or in any other action taken in this area. Mandamus is, therefore, not an appropriate remedy. The Petition/Complaint is, therefore, **DENIED** on this point.

DECLARATORY RELIEF

Pursuant to CPLR §3001, the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy. In the present case, the Court declines to render such a judgment as the Petitioners/Plaintiffs have failed to demonstrate, to the Court's satisfaction, their entitlement to such relief.

RESPONDENT CARRION'S REQUEST TO DISMISS

The Respondent/Defendant's Objections in Point of Law which seeks to dismiss is **GRANTED** as the Petition/Complaint fails to state a cause of action against this Respondent/Defendant. Giving the pleadings the most liberal construction and accepting the facts as alleged in the pleadings as true and according the Petitioners/Plaintiffs the benefit of every possible favorable inference, no cognizable legal theory has been advanced to support a cause of action against the Respondent/Defendant Carrion. Indeed, the pleadings provide no facts or allegations of any kind against this Respondent/Defendant beyond stating that OCFS

Kenneth W. Jenkins, et al. v. Robert P. Astorino, et al.
Index No. 003306/12

approved the Plan. Moreover, the pleadings do not even ask the Court to order any relief against this Respondent/Defendant.

It is, therefore, **ORDERED** that Respondents/Defendants Astorino and McGuire's motion to dismiss the Verified Petition/Complaint pursuant to CPLR §3211(a)(7) is **GRANTED** in its entirety.

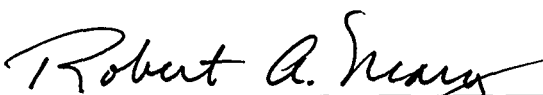
It is further **ORDERED** that Respondent/Defendant Carrion's application to dismiss the Verified Petition/Complaint for failure to state a cause of action is **GRANTED**.

The Temporary Restraining Order issued by this Court on June 1, 2012 is hereby **VACATED**.

The Petition/Complaint is, therefore, **DISMISSED**.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
August 20, 2012



ROBERT A. NEARY
ACTING SUPREME COURT JUSTICE

Alexander E. Eisemann, Esq.
Attorney for Petitioners/Plaintiffs
20 Vesey Street, Suite 400
New York, New York 10007
212 420-8338