

Jenkins v Astorino
2012 NY Slip Op 33935(U)
October 19, 2012
Supreme Court, Westchester County
Docket Number: 12-2584
Judge: Barry E. Warhit
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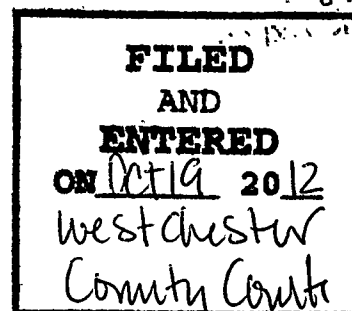
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED

OCT 22 2012

T. J. C. IDONE
COUNTY CLERK
WESTCHESTER

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



Petitioners/Plaintiffs

-against-

Decision and Order
on Motion to Dismiss

ROBERT R. ASTORINO, in his Individual capacity
and as Westchester County Executive, and Member
of the Westchester County Board of Acquisition and
Contract, JAY T. PISCO, in his Individual capacity
and as the purported Commissioner/Acting
Commissioner of the Department of Public Works
& Transportation and a purported Member of the
Westchester County Board of Acquisition &
Contract, and ROBERT F. MEEHAN, in his
Individual capacity and as Westchester
County Attorney,

Index No.: 12-2584

Respondents/Defendants.

-----X
WARHIT, A.J.S.C.

Petitioners/Plaintiffs moved, by Order to Show Cause and Amended Verified
Petition/Complaint, for an order of this court: (1) mandating Respondents/Defendants to
implement, comply with and enforce Local Law 6-2012, (2) enjoining Respondent Jay T. Pisco

("Pisco") from acting as the Commissioner of the Westchester County Department of Public Works and Transportation ("Department of Public Works" or "DPW") and from serving as one of three voting members of the Westchester County Board of Acquisition and Contract ("Board of A&C"); (3) seeking a declaration that Local Law 6-2012 is presumed valid because it was not the subject of an affirmative legal challenge; and (4) declaring all votes that Respondent/Defendant Pisco cast as a purported member of the Board of A&C null and void.¹

Respondents/Defendants have moved, by motion to dismiss, for an order dismissing Petitioners/Plaintiffs' application in its entirety, pursuant to New York State Civil Practice Law and Rules ("CPLR") §§ 406, 3211(a), subsections (1),(2),(3),(5), (7) and (8) and CPLR § 7804(f). Specifically, Respondents/Defendants allege entitlement to such relief on grounds that: (1) this court lacks subject matter jurisdiction and personal jurisdiction over Respondents/Defendants Astorino and Meehan other than in their official capacities, (2) that the Petition and Amended Petition fail to state any cause of action upon which relief can be granted, and (3) that Petitioners/Plaintiffs lack standing to bring the within action.

In consideration of Respondents/Defendants' motion to dismiss, this court read and considered the following papers and also considered papers filed in connection with Petitioners/Plaintiffs' applications for preliminary injunctive relief² to the extent references were

¹ In connection with the within Article 78 proceeding, Petitioners/Plaintiffs previously moved by Order to Show Cause for preliminary injunctive relief. By Decision and Order, rendered and entered April 11, 2012, this court denied such application. Petitioners/Plaintiffs' renewed this application by Order to Show Cause, dated July 10, 2012 which was denied absent written decision, and again by Order to Show Cause, dated August 20, 2012, which was denied by Decision and Order render and entered October 16, 2012.

² The papers filed in connection with the application for preliminary injunctive relief include: (1) Petitioners/Plaintiffs Order to Show Cause and Affirmation in Support for Temporary Restraining Order and Preliminary Injunction dated March 28, 2012, (2) Petitioners/Plaintiffs' Memorandum of Law in Support of Order to Show Cause, (3) Petitioners/Plaintiffs' Supplemental Memorandum of Law in Support of Order to Show Cause, (4) Respondents/Defendants' Affirmations in Opposition, (5)

contained in the following papers to arguments made in filings related to the prior applications for injunctive relief.

Petitioners/Plaintiffs'
Verified Petition/
Complaint and Exhibits
A-F annexed thereto

Petitioners/Plaintiffs' Amended
Verified Petition/Complaint and
Exhibits A-F annexed thereto

Respondents/Defendants'
Notice of Motion to Dismiss
and Exhibits A-HH annexed
thereto

Respondents/Defendants'
Memorandum of Law in
Support of Respondents/
Defendants' Motion to
Dismiss

Respondents/Defendants'
Supplemental Affirmation
in Further Support of
Motion to Dismiss and
Exhibit A annexed thereto

Respondents/Defendants' Affidavits in Opposition, (6) Respondents/Defendants' Memorandum of Law in Opposition, (7) Respondents/Defendants' Supplemental Affirmation and annexed exhibits, (8) Second Affirmation of Alexander E. Eisemann in Support of Order to Show Cause and Petitioners/Plaintiffs' Reply Memorandum, (8) Petitioners/Plaintiffs' Order to Show Cause, dated August 20, 2012 with supporting Affidavit of Lyndon Williams and Affirmation of Alexander E. Eisemann in Support of Second Renewed Application for Order to Show Cause for Preliminary Restraining Order, (10) another Affirmation of Alexander E. Eisemann in Further Support of Second Renewed Application for Order to Show Cause for Preliminary Injunction, (11) Respondents/Defendants' Affirmation in Opposition to Second Renewed Application for Preliminary Injunction with annexed exhibits, (12) Respondents/Defendants' Memorandum of Law in Opposition, and (13) Petitioners/Plaintiffs' Reply Memorandum in Further Support of Motion to Renew/Reargue.

Petitioners/Plaintiffs'
Memorandum in Opposition
to Respondents/Defendants'
Motion to Dismiss and
annexed Exhibit

Reply Memorandum of
Law in Further Support
of Respondents/Defendants'
Motion to Dismiss

Petitioners/Plaintiffs' letter brief,
dated August 15, 2012

Respondents/Defendants'
letter brief, dated August 20, 2012³

FACTUAL BACKGROUND

Petitioners/Plaintiffs, Kenneth W. Jenkins ("Jenkins"), Lyndon Williams ("Williams") and Peter Harckham ("Harckham") are taxpaying residents of Westchester County (the "County") and members of the Westchester County Board of Legislators ("Board of Legislators"). In his capacity as Chairman of the Board of Legislators, Jenkins is also a voting member of the Westchester County Board of Acquisition and Contract (Board of A&C"). Pursuant to the Laws of Westchester County ("LWC"), the Board of Legislators is empowered to enact local laws, acts and resolutions and to confirm the head or acting head of every County department (LWC §§ 209.91; 110.11 and 111.21).

Respondent/Defendant Robert P. Astorino ("Astorino") is the current Westchester County Executive. County Executive Astorino has the power, *inter alia*, to "see that county officers,

³ Additionally, this court has read and considered correspondence, dated June 22, 2012 and July 2, 2012, from counsel for the Board of Legislators, a non-party to the within Article 78 proceeding, and Respondents/Defendants' responses thereto.

boards, agencies, commissions, and departments faithfully perform their duties” and to “see that the laws of the State, pertaining to the affairs and government of the county, the acts and resolutions of the County Board [of Legislators] and duly enacted local laws are executed and enforced within the county” (Westchester County Charter §§ 110.11(5) and 110.11(6)). Additionally, Respondent/Defendant County Executive Astorino generally has the power to appoint members of county boards, the Charter specifically exempts the County Executive from appointing the members to the Board of A&C since the members of that board are “otherwise provided” at section 161.01 (see, Westchester County Charter §§ 110.21 and 161.01).

Respondent/Defendant Robert F. Meehan was appointed by the County Executive and confirmed by the Board of Legislators and presently serves as the Westchester County Attorney. Respondent/Defendant Astorino nominated and/or appointed Jay T. Pisco (“Pisco”) to serve as the County’s Commissioner of the Department of Public Works and Transportation (“DPW”). The Board of Legislators has not confirmed Pisco’s appointment to the position of Commissioner of DPW (cf., LWC §§ 209.91; 110.11 and 111.21). Nevertheless, Pisco has continued to serve as an alleged Acting Commissioner of DPW.

On November 29, 2011 the Board of Legislators passed local law 4115-2011 (hereafter referred to as “Local Law 6-2012”). On December 10, 2011 County Executive Astorino vetoed this law. On December 22, 2011, the Board of Legislators overrode the County Executive’s veto. In broad terms, Local Law 6-2012 modifies membership on the County’s Board of A&C by substituting the Budget Director for the Commissioner of DPW and, *inter alia*, removes inter-municipal agreements from the purview of the Board of A&C.

Respondent/Defendant County Executive Astorino did not implement Local Law 6-2012 or comply with its directives. Respondents/Defendants did not affirmatively challenge the law by

commencing a declaratory judgment action. They simply ignored the directives of Local Law 6-2012. Without interruption, Respondent/Defendant Pisco continued to serve as a purported Acting Commissioner of DPW and continued to attend meetings of the Board of A&C.⁴

In response to Petitioners/Plaintiffs having commenced the within action to compel compliance, Respondents/Defendants filed the within Motion to Dismiss alleging various procedural defenses, including alleged jurisdictional defects and a lack of standing on Petitioners/Plaintiffs' behalf. Respondents/Defendants also challenge the validity of Local Law 6-2012 and assert Pisco's right to serve as the Commissioner of DPW absent confirmation by the Board of Legislators. Petitioners/Plaintiffs have opposed the Respondents/Defendants' motion to dismiss and seek that it be denied in its entirety.

In July of 2012, after having received correspondence from the Legislative Counsel to the Board of Legislators⁵ as well as responses thereto by Respondents/Defendants, at a court conference, this court previewed its opinion that, by virtue of the substantive defenses Respondent/Defendants alleged in their Motion to Dismiss, the Board of Legislators appeared to

⁴This court previously decided successive applications commenced by Petitioners/Plaintiffs which sought preliminary injunctive relief to, *inter alia*, compel Respondents/Defendants compliance with Local Law 6-2012 and enjoin Respondent/Defendant Pisco from serving on the Board of A&C. This court's Decision on Order to Show Cause, rendered on April 11, 2012, included consideration as to Petitioners/Plaintiffs' likelihood of success on the merits. It has since become apparent that this court lacked authority to pass on the validity of Local Law 6-2012 or any other legislative act absent inclusion of the Board of Legislators as a necessary party to the action. It bears note that none of the findings of fact and determinations of law set forth in this court's April 11, 2012 order are binding, in any event, as that order expressly stated: "[a]ll of the findings of fact and determinations of law rendered herein are specific to this court's determination regarding whether Petitioners have met the legal threshold for temporary relief and all of the findings and determinations of law rendered herein shall be subject to reconsideration once the underlying Article 78 proceeding becomes fully submitted."

⁵ Legislative Counsel for the Board of Legislators sent correspondence to this court and counsel of the parties, dated June 22, 2012 and July 2, 2012, asserting the Board of Legislators is a necessary party to any challenge to the validity legislation of its legislation or its actions. Respondents responded to Legislative Counsel, with copies to this court, by letters dated June 22, 2012 and July 3, 2012 respectively.

be a necessary party. The matter was adjourned to on or about August 13, 2012 for an additional conference. On that date, Respondents/Defendants announced they had decided not to join the Board of Legislators.

LEGAL DISCUSSION

Alleged Lack of Subject Matter and Personal Jurisdiction over Astorino and Meehan in their Individual Capacities

This branch of Respondents/Defendants' motion to dismiss,⁶ which seeks dismissal on grounds that the Amended Verified Petition/Complaint is improperly brought and procedurally defective with respect to any claims against Respondents/Defendants Astorino and Meehan in their individual capacities, is denied as moot. By letter, dated August 15, 2012, lead counsel for Petitioners/Plaintiffs withdrew all claims against any of the Respondents/Defendants in their individual capacities.

Lack of Standing

Respondents/Defendants also move for a dismissal on grounds that Petitioners/Plaintiffs lack standing to bring the present action. The Court of Appeals has specifically upheld a legislator's right to bring an action against a County Executive in relation to a budget dispute (see, Silver v. Pataki, 96 NY2d 532 [2001]). Additionally, legislators have been found to have standing to bring challenges to acts concerning legislators' statutory rights or duties (see, Saratoga Co.

⁶ Respondents/Defendants motion to dismiss refers to both the Petition/Complaint dated March 27, 2012 and the Amended Petition/Complaint dated April 2, 2012.

Chamber of Commerce, Inc. V. Pataki, 275 AD2d 145 [2d Dept. 2000].

Pursuant to the Laws of Westchester County, the Board of Legislators is responsible to enact local laws, acts and resolutions (LWC §§ 110.11 and 111.21). As a corollary, in their capacity as members of the Board of Legislators, its individual members are invested in considering proposed legislation and voting upon it. Consequently, Petitioners/Plaintiffs Jenkins, Williams and Harckham have standing to bring the within action which relates directly to their responsibilities and duties as members of the Board of Legislators. A decision to the contrary would grant the County Executive carte blanche to ignore any legislative acts he or his administration disfavours without repercussion.

Nevertheless, Petitioners/Plaintiffs lack standing in their capacities as individuals, residents and taxpayers since in these roles they share the same generalized interest as the public at large and they are not aggrieved by Respondents/Defendants' actions in a manner that is "different in kind and degree from the community generally" (see, Matter of Seidel v. Pendergast, 87 AD3d 545 [2d Dept. 2011]; and see, Townsend v. Spitzer, 69 AD3d 1026, 1027 [3d Dept. 2010]). Accordingly, Respondents/Defendants motion to dismiss for lack of standing is granted solely as it relates to Petitioners/Plaintiffs Jenkins, Williams and Harckham in their capacities as individuals, residents and taxpayers.

Alleged Failure to State a Cause of Action as Against Respondent/Defendant Meehan

The Laws of Westchester County ("LWC") dictate that the County Attorney is the legal advisor to the Board of Legislators and to "each and every board, body, commission or officers of the County of Westchester and to each and every employee of the County of Westchester" (LWC § 158.11(2)). It is without dispute Respondent/Defendant Meehan, in his capacity as County

Attorney, was authorized and expected to render his legal opinion and advice concerning the validity of Local Law 6-2012 and the status of Pisco's appointment as Commissioner of DPW. It is of no legal moment that Petitioners/Plaintiffs disagree with Respondent/Defendant Meehan's assessments and counsel. Petitioners/Plaintiffs do not contend County Attorney Meehan represented that the advice he rendered was tantamount to binding law or that he forced either of the remaining Respondents/Defendants to abide by his counsel against their will.

Petitioners/Plaintiffs have not asserted a cognizable cause of action against Respondent/Defendant Meehan. Respondents/Defendants' Motion to Dismiss for failure to state a cause of action solely as it relates to County Attorney Meehan is granted.

Alleged Lack of Subject Matter Jurisdiction and All Other Allegations of Failure to State a Cause of Action Upon Which Relief Can Be Granted

Further, in support of their Motion to Dismiss, Respondents/Defendants contend alternatively that Local Law 6-2012 is invalid as it is a proper subject of mandatory referendum or that Local Law 6-2012 was subject to a permissive referendum but is invalid due to defalcations in the Board of Legislators' adherence to publication requirements⁷. Respondents/Defendants assert, as such, that mandamus to compel is not available as their failure to implement and abide by Local Law 6-2012 is justified. Additionally, as to Pisco's appointment, Respondents/Defendants' assert their failure to abide by the will of the Board of Legislators does not amount to a violation of separation of powers and, in any event, they claim no cause of action exists as against Respondent/Defendant Pisco.

⁷ Respondents/Defendants allege that Petitioners/Plaintiffs concede errors in publication. However, this contention is refuted by Petitioners/Plaintiffs in their Memorandum in Opposition to Respondents/Defendants' Motion to Dismiss.

Prior to Petitioners/Plaintiffs having filed the within Article 78 proceeding to compel compliance, Respondents/Defendants took no affirmative legal action. Specifically, Respondents/Defendants elected not to bring a declaratory action to challenge Local Law 6-2012 or the Board of Legislators' action or inaction concerning Respondent/Defendant Pisco (cf., Press v. Co. of Monroe, 50 NY2d 695, 702 [1980]). Respondents/Defendants merely raised these challenges in response to action taken by the Petitioners/Plaintiffs.

While one may question the wisdom of Respondents/Defendants' decision not to move affirmatively to declare Local Law 6-2012 invalid or to force action on the Board of Legislators' part with respect to County Executive Astorino's appointment of Pisco, nevertheless, Respondents/Defendants are entitled to raise these claims as a defense to the within Article 78 proceeding.

A respondent may defend against an Article 78 proceeding brought to compel compliance upon the ground that the legislation or act he is asked to enforce is invalid (Council of the City of NY v. Bloomberg, et. al., 6 NY3d 380 [2006]). The holding, by the Court of Appeals, in Council v. City of NY is squarely in accord with the well established principle that relief in the form of mandamus is only available in the presence of a clear legal right to the relief requested (see, Matter of Brusco v Braun, 84 NY2d 674, 679 [1994]; see also, Matter of DiBlasio v Novello, et al, 28 A.D.3d 339 [1st Dept. 2006]. Consequently, Respondents/Defendants are entitled to challenge the validity of Local Law 6-2012 in defense of the within Article 78 proceeding to compel.

Nevertheless, Council of the City of NY is not dispositive of the within motion to dismiss. In striking contrast to the case at bar, in Council v. City of NY, the legislative body that passed the law which was being ignored brought the Article 78 proceeding to compel compliance (see, Council v. City of NY, supra).

The Court of Appeals holding merely authorizes a respondent or defendant in an Article 78 proceeding brought to compel compliance to defend against the action by contesting the validity of a legislative act or law (see., Council v. City of NY, supra). Council v. City of NY does not authorize such a defense in the absence of “[p]ersons who ought to be parties to if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgement in the action shall be made plaintiffs or defendants” (see, Council v. City of NY, supra; cf., CPLR § 1001(a)).

Petitioners Jenkins, Williams and Harckham did not pass Local Law 6-2012. Rather, this law was passed and enacted by the Westchester County Board of Legislators as a body. Moreover, the full Board of Legislators passed on issues relating to Respondent/Defendant Pisco’s appointment to the position of Commissioner of DPW. Therefore, as a consequence of the defenses Respondents/Defendants proffered in their Motion to Dismiss, the Board of Legislators has become a necessary party to the within proceeding (CPLR § 1001(a); see, Stoffer v. Dep’t of Public Safety of Town of Huntington, 77 AD3d 305, 318 [2d Dept. 2010](holding, in relation to a declaratory judgment, which is the appropriate procedural mechanism to affirmatively challenge a legislative act, that the legislative body which enacted the challenged law is a necessary party); see also, Matter of Garden City Ctr. Assoc. v Incorporated Vil. of Garden City, 193 AD2d 740 [2d Dept. 1993] [“In an action seeking to declare a legislative act of a village invalid, the Board of Trustees of the Village would be necessary parties”]).

Despite this court having previewed its opinion, that the defenses Respondents/Defendants had raised required joinder of the Westchester County Board of Legislators, on or about August 13, 2012, Respondents/Defendants pronounced their decision, after consideration, that they would not move to join the Board of Legislators to the within action.

Respondents/Defendants' position is as inexplicable as it is untenable. To the extent Respondents/Defendants wish to pursue a defense or defenses which call into question the validity of Local Law 6-2012 and actions taken by the Board of Legislators with respect to Pisco's appointment, the Board of Legislators is a necessary party and must be joined as such. For absent the Board of Legislators being joined to the within proceeding, this court lacks authority to adjudicate these issues.

Contrary to assertions by Petitioners/Plaintiffs, denial of the Motion to Dismiss on grounds of failure to join a necessary party is unwarranted. Although CPLR § 1003 contemplates dismissal for failure to join a party who should be joined under CPLR § 1001(a), dismissal should be avoided where the necessary party can be joined (see, Matter of Red Hook/Gowanus Chamber of Commerce v. NY City Bd. Of Stds. & Appeals, 5 NY3d 452, 459 [2005]). "[I]f an absentee who is necessary to the action is subject to the court's jurisdiction, that absentee must be joined" (Romeo v. NY State Dep't of Education, 41 AD3d 1102, 1004 [3d Dept. 2007]). Without question, the Westchester County Board of Legislators is subject to this court's jurisdiction.

Moreover, any alleged failure of Respondents/Defendants to have timely commenced a declaratory action or asserted the proffered defenses against the Board of Legislators does not preclude joinder of the Board of Legislators. A statute of limitations does not deprive the court of jurisdiction; it is merely a defense that may, if properly asserted, deprive a party from receiving any remedy from its adversary (see, Windy Ridge Farm et. al., v. Assessor of the Town fo Shandaken, et. al, 11 NY3d 725, 727 [2008]). Further to this point, Respondents/Defendants' motion to dismiss as against Respondent/Defendant Pisco is denied. Pisco is an interested party as his interests "might be inequitably affected by a judgment in the action" (see, CPLR § 1001(a)).

Based upon the foregoing, it is hereby

ORDERED, that going forth the caption of the within proceeding is amended to reflect that Petitioner/Plaintiff Jenkins brings the within proceeding solely in his capacity as Chairman and Member of the Westchester County Board of Legislators and a member of the Westchester County Board of Acquisition and Contract; that Petitioner/Plaintiff Williams brings the within proceeding solely in his capacity as Vice-Chairman and Member of the Westchester County Board of Legislators; and Petitioner/Plaintiff Harckham brings the within proceeding solely in his capacity as a Member of the Westchester County Board of Legislators; and it is further

ORDERED, that the within proceeding is dismissed as against Robert F. Meehan and going forth the caption is amended to reflect such dismissal; and it is further

ORDERED, that the within proceeding continues as against to Robert P. Astorino, solely in his capacity as Westchester County Executive and Member of the Westchester County Board of the Westchester County Board of Acquisition and Contract; and also continues as against Jay T. Pisco solely in his capacity as the purported Commissioner/Acting Commissioner of the Department of Public Works and Transportation; and it is further

ORDERED, that in all other respects, determination of the Motion to Dismiss is held in abeyance pending an application by Respondents/Defendants to join the Westchester County Board of Legislators as a necessary party to the within action or, in the alternative, an application by Respondents/Defendants to withdraw each and every defense to the Article 78 to compel compliance which implicates the Board of Legislators as a necessary party; and it is further

ORDERED, counsel for all parties shall appear before this court for a conference on

November 13, 2012 at 3:00 p.m..

This constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
October 19, 2012

A handwritten signature in black ink, appearing to read "Barry E. Warhit", written over a horizontal line.

Hon: Barry E. Warhit
Acting Supreme Court Justice

ALEXANDER E. EISEMANN, ESQ.
Attorney for the Petitioners
20 Vesey Street, Suite 400
New York, New York 10007

ROBERT F. MEEHAN
WESTCHESTER COUNTY ATTORNEY
Attorney for the Respondents
148 Martine Avenue, 6th floor
White Plains, New York 10601
By: James Castro-Blanco, Esq.
Chief Deputy County Attorney