

Jenkins v Astorino

2012 NY Slip Op 33936(U)

April 11, 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
AND
ENTERED
ON 4/11 2012

-----x
KENNETH W. JENKINS, in his capacity as 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 capacity as Vice-Chairman and Member of the
Westchester County Board of Legislators, and
PETER HARCKHAM, as Member of the Westchester
County Board of Legislators
Plaintiffs/Petitioners,

-against-

Decision and Order
On Order to Show
Cause

ROBERT R. ASTORINO, in his capacity as
Westchester County Executive, and Member of the
Westchester County Board of Acquisition and
Contract, JAY T. PISCO, Individually and in his
capacity 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 P. MEEHAN, in his
capacity as Westchester County Attorney,
Respondents.

Index No.: 12-2584

FILED
APR 11 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

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WARHIT, A.J.S.C.

Petitioners filed an Article 78 proceeding pursuant to New York Civil Practice Rules and Law ("CPLR") and moved, by Order to Show Cause, dated March 25, 2012, for a Temporary Restraining Order and Preliminary Injunction requiring Respondents to comply with, implement and enforce Westchester County Local Law 6-2012. By Decision and Order, rendered March 29, 2012, this court declined to grant the specific temporary relief requested, which was to direct Respondents "to comply with, to implement and to enforce Westchester County Law 6-2012", but did order postponement of a meeting of the Board of Acquisition and Contract ("Board of A&C"),

then scheduled for March 29, 2012, and ordered the parties, pending further legal submissions and order of the court, to only award contracts necessary to serve the immediate health and safety needs of the citizens of Westchester County. On April 3, 2012, the Appellate Division, Second Department expanded this court's order to permit the Board of A&C to also enter into contracts upon which the County Executive and the Chairman of the Board of Legislators mutually agreed.

Petitioners have filed an Amended Verified Petition/Complaint seeking relief pursuant to CPLR Article 78. Additionally, Petitioners filed an Order to Show Cause, a Supplemental Memorandum of Law in Support of the Order to Show Cause and supporting Affidavits seeking an order of this court awarding temporary relief pending final determination of the issues raised in the pending Article 78 proceeding. Solely with respect to the application for temporary relief, Petitioners have filed a Memorandum of Law in Opposition to Petitioner's Order to Show Cause and Affirmations, Affidavits and Exhibits thereto. Petitioners also filed a Reply Memorandum of Law. Upon consideration of these papers, the court makes the following findings of fact and determinations of law regarding the issue of temporary relief. All other issues raised in Petitioner's petition, pursuant to CPLR Article 78, are not ripe for consideration at this juncture and shall be determined after the matter is fully submitted.

A preliminary injunction or temporary restraining order shall issue if a petitioner demonstrates the presence of four factors. Petitioner must have a likelihood of success on the merits of the underlying claim, show irreparable injury will result in the absence of injunctive relief, demonstrate that the hardships or equities favor them and that the requested relief is not outweighed by public policy considerations (CPLR § 6301, et. seq.; see, Albini v. Solork Assoc., 37 AD2d 835 [2d Dept. 1971]).

Accordingly, even at this premature juncture, it is incumbent upon this court to consider

whether Petitioner is entitled to the ultimate relief request, namely implementation and enforcement of Local Law 6-2012 by Respondents. The content of Local Law 6-2012 has historically been a subject of dispute between the parties.

The County Board of Legislators ("Board of Legislators") passed Local Law 6-2012 on November 29, 2011. The County Executive used his veto power on December 10, 2011. On December 22, 2011, the Board of Legislators overrode the County Executive's veto. Certified copies of Local Law 6-2012 were filed with the Westchester County Clerk and New York State. Receipt of same was confirmed by the County Clerk on February 27, 2012 and by New York State on February 29, 2012. Local Law 6-2012 was posted on the website maintained by the Board of Legislators, but was not published in a local newspaper.

In response to Petitioners' claim that Respondents are willfully failing to enforce Local Law 6-2012, Respondents have countered that their refusal to enforce the law is grounded in a belief that, since provisions of the law should have been subject to mandatory referendum, it is not valid. At this juncture, where only the issue is whether Petitioners are entitled to temporary relief, this court need not determine the propriety, or lack thereof, of Respondents' decision to simply ignore Local Law 6-2012, which they apparently disfavored, rather than mount a proper legal challenge to it.

However, as this court must consider Petitioners' likelihood of success, this court must determine whether Respondents correctly concluded Local Law 6-2012 is invalid. Respondents submit Local Law 6-2012 which, *inter alia*, removes the Commissioner of Public Works and Transportation as a member of the Board of A&C and replaces him/her with the Budget Director and removes inter municipal agreements from the purview of the Board of A&C, curtails the power of the County Executive and, therefore, was subject to mandatory referendum. Petitioners

disagree.

Municipal Home Rule Law and the Laws of Westchester County (“LWC” or “Charter”) state that legislation, which abolishes, transfers or curtails any power of an elective official, is subject to mandatory referendum. In 2007, the Court of Appeals recognized that these laws cannot be sensibly read to subject all local laws to mandatory referendum since the result would be more referendums than any community could manage (see, Mayor of the City of New York v. Council of the City of New York and Lillian Roberts, as Executive Director of DC 37, AFSCME, AFL-CIO, et.al, 9 NY3d 23, 33 [2007]). Accordingly, the Court of Appeals limited the breadth of the mandatory referendum requirement of Municipal Home Rule Law and county law to legislative acts which “abolish, transfer or curtail” a power conferred upon the elected official as part of the framework of local government” (Mayor of the City of New York v. Council of the City of New York and Roberts, et.al, supra). Where an elected official has enjoyed a particular power as a mere consequence of legislative policy-making, curtailment of that power does not require a mandatory referendum (Mayor of the City of New York v. Council of the City of New York and Roberts, et al., supra, p. 33).

While what became Local Law 6-2012 was merely a proposal, the Westchester County Attorney rendered a legal opinion that the proposed changes would require mandatory referendum. Thereafter, and at the express direction of the Board of Legislators, Westchester County Attorney Robert F. Meehan sought a legal opinion from the New York State Attorney General on the issue of whether substituting the Budget Director as a member of the Board of A&C for the Commissioner of Public Works and Transportation would require a mandatory referendum (Respondents’ Supplemental Affirmation, Exhibit “L”). The New York State Attorney General declined to render the ultimate opinion but, relying upon the Court of Appeals 2007 decision,

instructed that: “[t]he question ultimately is whether the County Executive’s ability to change the composition of the Board of Acquisition and Contract, through exercising his power to unilaterally remove the Assistant Commissioner of Public Works and appoint a new commissioner (who by virtue of his office, comprises 1/3 of the Board), is a power conferred (sic) on the County Executive as ‘part of the framework’ of the county’s government or, in contrast, ‘is merely a consequence of legislative policymaking’ (Respondent’s Supplemental Affirmation, Exhibit “N”).

Accordingly, in considering whether Local Law 6-2012 should have been put to a mandatory referendum, this court must consider whether it curtails a power conferred upon the County Executive within the framework of the Westchester County government or merely a power he has had as a consequence of legislative policymaking .

To resolve this question, this court has looked to the Charter. Section 161.01 of the Charter establishes the Board of A&C, its membership and its duties (Charter § 161.01). The Charter set forth the membership of the Board of A&C to include the County Executive, the Commissioner of Public Works and Transportation and the Chairman of the County Board. As above discussed, Local Law 6-2012 seeks to alter the membership of the Board of A&C such that the Budget Director will sit rather than the Commissioner of Public Works and Transportation.

Respondents assert this substitution curtails the County Executive’s power since, under the Charter he has unilateral authority to remove his appointee to the position of Commissioner of Public Works and Transportation whereas his appointee to the position of Budget Director is for a fixed term and may only be removed with approval of 2/3 of the Board of Legislators. In short, Respondents contend that altering the composition of the Board of A&C as Local Law 6-2012 does curtails the County Executive’s authority to “control who the third member of the A&C is.” (Respondent’s Memorandum of Law, p. 18).

The Charter grants the County Executive power , *inter alia*, to “see that county officers, 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” (Charter §§ 110.11(5) and 110.11(6)). While the County Executive generally has the powers to appoint members of county boards, the Charter specifically exempted 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, Charter § 110.21 and § 161.01).

While the County Executive has enjoyed the ability to unilaterally control the third member of the Board of A&C, this occurred merely by coincidence, rather than by intention of the framework of the Charter. Of import, Chapter 161 of the Charter envisions co-equal members of the Board of A&C as evidenced by the fact that a head of the board is not specified or contemplated (see, Charter § 161.01). There is no evidence that any member of the Board of A&C was intended to have control over the functioning of that board.

The County Executive retains the authority given to him by the Charter to appoint the Commissioner of Public Works and Transportation and to appoint the Budget Director. The County Executive’s ability to remove either the Commissioner of the Public Works and Transportation and the Budget Director remains as authorized by the Charter and is unaffected by Local Law 6-2012. Merely because Local Law 6-2012 replaces an appointee over whom the County Executive had unilateral removal authority with an appointee whose removal requires Board of Legislator approval does not “impair a power conferred on the [County Executive] as part of the framework of local government” (see, Mayor of the City of New York v. Council of the City of New York and Roberts, supra, p. 33). There is simply no evidence that the Laws of Westchester

County were crafted with the intention of giving the County Executive a controlling interest on the Board of Acquisition and Contract. A mandatory referendum is not required to preserve that apparent coincidence.

It bears note that, under the framework of the Charter, the Board of Legislators is specifically empowered to: “[c]reate, organize, *alter*, or abolish departments, commissions, *boards*, bureaus, offices and employments *and/or transfer their functions and duties* (Charter § 107.21(1)(emphasis added); and see, Charter § 107.01). Local Law 6-2012 is not inconsistent with the framer's intent. Alteration of the membership of the Board of A&C falls squarely within this grant of authority.

Upon consideration of the Charter, this court finds the provision of Local Law 6-2012 which amends the membership of the Board of A&C to include the Budget Director and remove the Commissioner of Public Works and Transportation does not curtail any power delegated to the County Executive within the framework of Westchester County government (see, Mayor of the City of New York v. Council of the City of New York and Roberts, et. al, supra, p. 33; see also, Mayor of the City of New York v. Council of the City of New York, et. a.; 280 AD2d 380, appeal denied, 96 NY2d 713 [2001]).

This court is not persuaded by the opinions rendered by two of County Attorney Meehan's esteemed predecessors that substituting the Budget Director for the Commissioner of Public Works would be subject to a mandatory referendum, since these opinions, rendered respectively in 1997 and 2002, were authored prior to the 2007 Court of Appeals decision and, thereby, could not have considered the present status of the law (see, Matter of the City of New York v. Council of the City of New York and Roberts, supra).

Additionally, Respondents contend a mandatory referendum is required for Local Law 6-

2012 because a provision thereof removes inter municipal agreements from its purview, which historically have been considered by the Board of A&C.

According to the Charter, the Board of A&C "shall contract for and acquire by purchase or condemnation all lands, buildings and other real property, the acquisition of which has been authorized by the County Board, and shall award on behalf of the county all contracts, including but not limited to contracts for the construction, reconstruction, repair or alteration of all public works or improvement, and excepting contracts authorized under section 161.11 to be executed by the Bureau of Purchase and Supply, and excepting also contracts authorized under section 161.11 to be made by the head of any department, board or commission for matters relating to the maintenance and/or operation of such department, board of commission" (Charter § 161.01). Chapter 161 does not refer specifically to inter municipal agreements.

Unlike contracts which the Board of A&C is free to award on behalf of the County without further approval, inter municipal agreements must be approved by the Board of A&C (see, General Municipal Law § 119-o[1]). Accordingly, removing these agreements from the consideration of the Board of A&C merely deletes an unnecessary step in the approval process (see, General Municipal Law § 110-o[1]). The Charter grants the Board of Legislators authority to transfer the functions and duties of county boards (Charter § 107.21(1)(emphasis added); and see, Charter § 107.01). The Board of A&C is not exempted from this authority.

Respondents contend the County Executive's power has been curtailed because, pursuant to Local Law 6-2012, contracts will not first pass through the Board of A&C, where the County Executive would have had a vote as to whether to send the inter municipal agreement to the Board of Legislature for consideration. In defining the duties of the County Executive, the Charter does not specify that his participation is required with respect to inter municipal agreements (Charter Ch.

110). Moreover, inter municipal agreements are not specifically discussed within Chapter 161 of the Charter. This court finds there is a dearth of support for the position that the County Executive was intended, by the framework of county government, to have input as to whether these agreements are or are not presented to the Board of Legislators for approval.

Accordingly, this court finds that with respect to inter municipal agreements, Local Law 6-2012 merely regulates the operation of government and does not curtail a specific power intended for the County Executive within the framework of government (see, Mayor of the City of New York v. Council of the City of New York and Roberts, supra, p. 33). It cannot be ignored that under New York State Law, inter municipal agreements require approval by a county or municipality's governing body (General Municipal Law § 119-o[1]).

Nevertheless, although Local Law 6-2012 is not subject to a mandatory referendum, as it “[c]hanges a provision of law relating to public bidding, purchases or contracts”, it is subject to the provisions of section 209.171(2) of the Westchester County Administrative Code and Municipal Home Rule Law § 24(2)[b]) (see, Charter § 209.171(2)).

Where a matter is the subject of referendum on petition, commonly referred to as a permissive referendum, the Clerk of the Westchester County Board of Legislators is required, as soon as practicable after the adoption of the local law, to publish notice of that law, on at least one occasion, in at least one newspaper and is further required to publish a statement that the local law is subject to a permissive referendum (Westchester County Administrative Code § 209.211). Subsequent to the adoption of Local Law 6-2012 by the Board of Legislators, the Clerk of the Board did not publish notice of the law and did not publish a statement that the local law was subject to a permissive referendum (Westchester County Administrative Code § 209.211).

Petitioners assert they relied upon legal advice of the County Attorney's Office in

determining publication was not necessary. This court finds, regardless of whether this statement is correct or incorrect, and despite whether the lack of publication resulted from misunderstood advice, mis-communication or was due to any other reason, the failure to publish constitutes a violation of New York State County Law section 214(2) and the result is a fatal flaw in the law's enactment (see, County Law § 214; cf., Charter § 209.211). A determination to the contrary would deprive the public of its right to notice and right to petition and would render meaningless the law concerning permissive referendums

Adherence to procedural steps in the enactment of municipal legislation is mandatory and failure to comply with required procedure invalidates enactment of the local law (see, Keeney v. Village of LeRoy, 22 AD2d 159 (4th Dept. 1964), citing Barry v. Town of Glenville, 8 NY2d 1153). The publication requirement associated with enactment of legislation has been found to be mandatory and is strictly enforced (Krug v. County of Lewis, 296 AD2d 834 (4th Dept. 2002).

Having found that Local Law 6-2012 has not been properly enacted, this court finds that Petitioners cannot meet their burden to show they are entitled to a declaratory judgment mandating Respondents to comply with Local Law 6-2012. Accordingly, Petitioners application for further temporary relief is denied and the Board of A&C is to resume meetings in accordance with the ordinary course of business. Nothing in this decision precludes Petitioners from following the proper procedure to enact Local Law 6-2012.

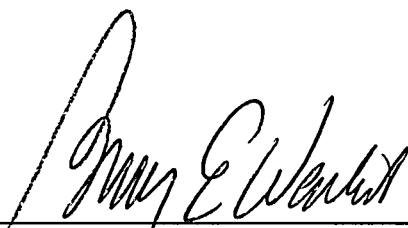
With respect to any issues raised regarding whether, at this juncture, Jay T. Pisco may serve as a member of the Board of A&C absent the confirmation of his appointment by the Board

of Legislators, as this matter is unrelated to the request for temporary relief, this issue will not be determined until the underlying Article 78 proceeding is fully submitted.

All 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.

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

Dated: White Plains, New York
April 11, 2012



Hon: Barry E. Warhit
Acting Supreme Court Justice

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