

Mayor of the City of N.Y. v Council of the City of N.Y.
2013 NY Slip Op 31802(U)
August 2, 2013
Sup Ct, New York County
Docket Number: 451369/12
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT
Justice

PART 62

THE MAYOR OF THE CITY OF NEW YORK,

INDEX #451369/12

Plaintiff/Petitioner
-v-

MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

THE COUNCIL OF THE CITY OF NEW YORK,

DECISION

Defendant/Respondent(s)
-and-

HECTOR FIGUEROA, As President Of Service Employees
International Union Local 32BJ and
STUART APPLEBAUM, As President Of Retail, Wholesale
Department Store Union,

Intervenors-Defendants.

The following papers, numbered 1 to 3 were read on this motion to/for confirm arbitration award

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits	3
Replying Affidavits _____	4
<u>Other</u>	
Cross-Motion: X Yes No	2

Upon the foregoing papers, it is ordered that this motion/petition by the Petitioner for summary judgment is granted, the cross-motion to dismiss the complaint is denied, a/p/o.

July 29, 2013, _____


GEOFFREY D. WRIGHT

J.S.C. AJSC

Check one: **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

-----X
THE MAYOR OF THE CITY OF NEW YORK,

Plaintiff-Petitioner(s),

-against-

THE COUNCIL OF THE CITY OF NEW YORK,

Defendant-Respondent(s),

-and-

HECTOR FIGUEROA, As President Of Service
Employees International, Union Local 32BJ and
STUART APPELBAUM, As President Of Retail,
Wholesale Department Store Union,

Intervenors-Defendants.

-----X

Index #451369/12
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of
this Motion to: grant summary judgment to the Plaintiff, cross-motion to dismiss claims
1,2,3,4 and 9 of the complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3
Replying Affidavits & Exhibits Annexed	4
Other (Cross-motion) & Exhibits Annexed	2
Supporting Affirmation	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff, the Mayor of the City of New York ("Mayor") moves for summary
judgment pursuant to CPLR 3212, against the Council of the City of New York

(“Council”) seeking a declaration that Local Law 27 for the Year 2012 (“Prevailing Wage Law” or the “Law”) is invalid. Council and Intervenor Hector Figueroa, as President of Service Employees International Union, Local 32BJ, and Stuart Appelbaum, as President of Retail, Wholesale, Department Store Union, (“Intervenors”) cross-move for summary judgment on several of the Mayor’s causes of action. For the reasons discussed below, the Mayor’s motion for summary judgment is granted and the cross-motion by the Council and the Intervenors is denied.

BACKGROUND

The Prevailing Wage Law requires that a prevailing wage (calculated annually by the Comptroller), rather than New York State’s minimum wage, be paid to three categories of workers: First, the Law covers building service workers employed by entities that receive one million dollars or more per year in discretionary economic development aid from the City or a City economic development entity as defined by the law. Second, the Law covers employees of successors, contractors, or subcontractors of entities that receive one million dollars or more per year in City economic development aid. Finally, for the third area of coverage, the Law’s City Lease Provision states that any person or entity entering into a lease with a “contracting agency” must, among other things, “ensure that all building service employees (BSEs) performing building service work at the premises to which a lease pertains are paid no less than the prevailing wage. A “contracting agency,” is defined as “a city, county, borough, or other office, institution, or agency of government, the expenses of which are paid in whole or in part from the city treasury.” “Lease” is defined under the Law to cover only commercial office space of 10,000 square feet or more in which the portion of the building leased by the contracting agency is more than 50% of the total square footage of the building, and in some geographic areas of the city, more than 80%.

Each of these three categories of coverage contains exemptions for certain specified categories, e.g., small businesses, manufacturing, non-profit, and projects of the New York City Health and Hospitals Corporation.

The Prevailing Wage Law was adopted by the Council over the Mayor’s veto by a vote of 44-4 on May 15, 2012 and took effect on November 15, 2012. The Mayor filed the complaint in this case on September 4, 2012, asserting nine causes of action and seeking a declaratory judgment that the Prevailing Wage Law is invalid.

The first cause of action asserts that the Law is preempted by the State Minimum Wage Act. The second cause of action asserts that the Law violates Municipal Home Rule Law (“MHRL”) §§ 11(1)(f) and 22(2), which provide that no local law affecting any provision of the labor law may supersede a state statute. The third and fourth causes of action assert preemption by the statutes that govern industrial development agencies (“IDA’s”), specifically Gen. Mun. Law (“GML”) §§ 850 et. Seq. (The IDA Act”), GML § 917, which created the NYCIDA, and MHRL §10(5), which prohibits local laws that impair the powers of a public corporation. The fifth cause of action alleges that the Law is preempted by State affordable housing statutes, specifically GML Article 16 and Private Housing Finance Law (“PHFL”) Articles 8-a, 11, 15 and 22. The sixth cause of action claims that the Law curtails the Mayor’s authority to dispose of city property below market rates to local development corporations, pursuant to Charter § 384(b)(4). The seventh cause of action alleges curtailment of the Mayor’s authority to lease space for the City pursuant to Charter § 824(a). The eighth cause of action alleges that the Law curtails the Mayor’s authority to enforce local laws by giving the Comptroller the power to investigate alleged violations of the Law. The ninth cause of action alleges that the provision of the Law requiring enforcement orders to be docketed with the county clerk and given the effect of a money judgment is preempted by N.Y. Const. Art. IX, §3(a)(2) and MHRL §11(1)(e), which provide that no local law shall impair the power of the court.

STANDING

As a preliminary matter, the Council argues summary judgment should be denied because the Mayor lacks standing to bring his first, second, third, fourth, and ninth causes of action and because the motion was made prematurely before discovery could be conducted. Specifically, Council argues the Mayor lacks standing because he fails to allege a threatened or actual “injury in fact” that he would suffer as a result of the Law that is different from that of the public at large. The Council argues that the Mayor’s interest is abstract and Courts have held that such an interest on the part of a public official is insufficient to confer standing or a capacity to sue.

The issue of standing and capacity to sue must be considered at the outset of any litigation. Matter of Dairylea Coop. v Walkley, 38 NY2d 6, 9 (1975). “Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria... That an issue may be one of ‘vital public concern’ does

not entitle a party to standing... a litigant must establish its standing in order to seek judicial review.” **Silver v. Pataki**, 96 N.Y.2d 532 (2001).

New York State Courts have adopted a more flexible approach to standing than the City Council suggests. In **Morgenthau v. Cooke**, 56 N.Y.2d 24, 30, 436 N.E.2d 467, 469-70 (1982), in which the Manhattan District Attorney sued the State’s Chief Judge, challenging a new system for assigning judges of one court to temporarily serve in another, the Court of Appeals reversed the trial court and held, “Under the liberalized attitude toward recognition of standing to litigate announced in **Boryszewski v. Brydges**, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579 (1975), the District Attorney qualifies under the ‘zone of interest’ test (**Matter of Dairylea Coop. v. Walkley**, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 339 N.E.2d 865 (1975)) as a proper party to initiate this litigation challenging the manner of designation of Judges to the Supreme Court in the City of New York—courts in which he, as the public officer charged with responsibility for prosecution of felony indictments in New York County, must necessarily perform the duties of his office and as to which he has a cognizable interest in assuring that the designation of the judicial officers to preside therein conforms to constitutional mandate.”

The Mayor argues that **Council v. Bloomberg**, 6 N.Y.3d 380 (2006), is the governing authority in this action. In that case, the Council brought an Article 78 proceeding to force the Mayor to implement the Equal Benefits Law. Although the Mayor was the respondent, not the petitioner, the Court strongly suggested that the Mayor would have had standing to bring a declaratory judgment action challenging the Equal Benefits Law on preemption and curtailment grounds. The Council argued that the Court should not reach the substantive preemption and curtailment questions that the Mayor raised as defenses, but rather should leave those questions to be decided in the then-pending declaratory judgment action that the Mayor had brought against the Council. The Court responded, “[a]ll that means, in this case, is that the parties would make, and the courts would resolve, exactly the same arguments the parties make here, but under a different caption. We decline to order such a purposeless exercise.” *Id.* at 390.

Both the dissent and the majority in **Council v. Bloomberg**, which concerned preemption by State and federal laws concerning competitive bidding and retirement plans, assumed that the Mayor had standing to bring the controversy before the courts.

The Council cites several state and federal cases in its memoranda on the issue of

standing. However, the Council has not cited a case in which a New York State court has dismissed on standing grounds a suit brought by one branch of a local government against a coordinate branch of that same government. New York courts, unlike Federal courts, are unbound by the U.S. Constitution's "case or controversy" clause.

This Court has reviewed the authority cited by the parties and the history on this topic and finds nothing dispositive to bar the Mayor from proceeding in this matter. Confined to the circumstances of this case, this Court holds that the Mayor, as Chief Executive Officer of the City of New York, has standing to bring his first cause of action—that the Law is preempted by the State Minimum Wage Act.

The City Council also argues that they have been given no opportunity to conduct discovery on facts essential to justify opposition to the motion. First, the Council argues that discovery is needed to determine if the Prevailing Wage Law is preempted by State housing laws. Second, the Council argues that "the Mayor fails to present any evidence supporting his allegation that the Prevailing Wage Law will impede the operation of [NYCIDA]," because "[t]he Law does not directly regulate the NYCIDA, or indeed, even refer to it." The third and final issue as to which the Council claims discovery is necessary is whether the Law curtails the Mayor's power to dispose of City property to an LDC for less than market value pursuant to Charter § 384(b)(4). These arguments are moot.

DISCUSSION

As discussed, the Mayor raises nine causes of action against the Prevailing Wage Law. However, as will be shown, it is the 1st cause of action that is determinative for the outcome of this action. As such, it is the only cause of action which will be addressed by this Court.

The Mayor argues that the Law is preempted by the State's Minimum Wage Law, codified as Labor Law Art. 19, §§ 650 et seq. In support of his argument, the Mayor cites **Wholesale Laundry Bd. of Trade v. City of New York**, 17 A.D.2d 327 (1962) ("**Wholesale**") as controlling in this action. In 1962, the New York City Minimum Wage Law (Local Laws 1962, No. 59 of City of New York) was passed. This law mandated that all employers in New York City would have to pay their employees a minimum wage of \$1.50 per hour at a time when the State minimum wage was \$1.25 per hour. In **Wholesale**, the Court held this law invalid on the ground that the State minimum wage law preempted local minimum wage regulation, even if that local minimum wage

regulation mandated a higher minimum wage than the State minimum wage law.

The Council argues **McMillen v. Browne**, 14 N.Y.2d 326 (1963), is controlling, permits the Prevailing Wage Law, and does not limit the City's wage-setting powers to city employees only. In **McMillen**, the Court of Appeals upheld a similar law, passed in 1961, that mandated a minimum wage of \$1.50 for workers employed by the City. The Court reasoned that this law was fundamentally different from the law at issue in **Wholesale Laundry** because although (as per **Wholesale Laundry**) the City Council was not empowered to create a municipal minimum wage that applied to all employees in the City, it was empowered to mandate the terms of the City's contracts with its own workers. Under the Prevailing Wage Law, certain private employers are required to pay their private employees a wage higher than the state minimum wage.

McMillen is distinguishable from this case because the **McMillen** Court dealt only with the question of the City setting a minimum wage for its own workers. **McMillen** does not sanction a City-mandated minimum wage to be honored by private employers, and **Wholesale Laundry** prevents it outright. The Prevailing Wage Law mandates that private employers (landlords and building owners) pay their private employees (building service workers) a wage higher than the State's minimum wage if one of the landlord's tenants is either financially benefitting from an investment by the City of New York or is the City of New York itself. Thus, this amounts to a citywide minimum wage increase for certain private employees, paid by their private employers, prohibited by **Wholesale Laundry** and unsanctioned by **McMillen**. The Prevailing Wage Law is invalid because it is preempted by the State's minimum wage law.

Lastly, the Mayor objects to the submission of the proposed amici brief submitted by Make the Road New York et al., ("Amici") on the grounds that it will not only further delay the resolution of this case on the merits, but also prejudice the Mayor's position by introducing new arguments premised on factual allegations that were absent when the Mayor prepared his already-submitted memoranda of law. This argument is without merit. The Court has reviewed the papers and finds nothing new was added to the issues nor does the amicus change the outcome of this Court's decision.

It is with great compunction that this Court renders this decision as this Court recognizes the benefit that such a law would provide. Additionally, this Court believes that the Prevailing Wage Law could benefit the people of New York and does not see

wisdom in the Mayor's zeal for the possibility of welcoming to New York City a business that would pay its building service employees less than the prevailing wage. However, whatever my sympathies, the overwhelming weight of authorities points in only one direction, to wit, the denial of the defense motion and the granting of the Plaintiff's motion for a declaration that the City's Prevailing Wage Law is contrary to established State law and thus invalid. I also note, in closing, that there have been occasions where similar legislation has met with approval by the Court of Appeals. For example, in City of New York v. Bloomberg, 6 N.Y.3d 380, 846 N.E.2d 433, 813 N.Y.S.2d 3, 36 Employee Benefits Case. 2732, 2006 N.Y. Slip Op. 01111, cited earlier, the Court of Appeals ruled that a project labor agreement, which bears some similarity to the Prevailing Wage Law, could meet with approval if its purpose was to forestall labor unrest, or was "designed to save the public money by causing contracts to be performed at smaller cost or without disruption." This is not the stated case here [see also L & M Bus Corp. v. New York City Dept. of Educ., 17 N.Y.3d 149, 950 N.E.2d 915, 927 N.Y.S.2d 311, 269 Ed. Law Rep. 725, 2011 N.Y. Slip Op. 05114 (2011)]. Accordingly, the Mayor's motion for summary judgment seeking a declaratory judgment is granted. The cross-motion by City Council and the Intervenors is denied.

This constitutes the decision and Order of the Court.

Dated: August 2, 2013

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court