Prudenti v County of Suffolk
2014 NY Slip Op 30600(U)
February 27, 2014
Supreme Court, Suffolk County
Docket Number: 32551-2012
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX NO. 32551-2012

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

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-15-13
ADJ. DATE 7-2-13
Mot. Seq. # 005 MotD

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ANTHONY PRUDENTI, individually and as President of the Suffolk County Deputy Sheriffs Police Benevolent Association, and the SUFFOLK COUNTY DEPUTY SHERIFFS POLICE BENEVOLENT ASSOCIATION,

Plaintiff(s),

- against -

COUNTY OF SUFFOLK, STEVEN BELLONE, in his official capacity as County Executive of Suffolk County, the SUFFOLK COUNTY LEGISLATURE, the SUFFOLK COUNTY POLICE BENEVOLENT ASSOCIATION, INC., and SUFFOLK COUNTY SHERIFF'S OFFICE, VINCENT DEMARCO, in his official capacity as Sheriff of Suffolk County, and the SUFFOLK COUNTY SUPERIOR OFFICERS ASSOCIATION, INC.,

Defendant(s).

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Upon the reading and filing of the following papers in this matter: (1) Notice of Cross-Motion by the defendant Suffolk County Superior Officers Association, dated January 3, 2013, and supporting papers, including Memorandum of Law); (2) Order to Show Cause by the defendants County of Suffolk, Steven Bellone and the Suffolk County Legislature, dated June 14, 2013, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated June 17, 2013, and supporting papers; (4) Further Affirmation in Opposition by the plaintiff, dated July 1, 2013, and supporting papers; and now

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

ORDERED that the plaintiff's application by Order to Show Cause (005), which seeks an order, *inter alia* enjoining the defendants and interveners from enforcing Paragraph 9(a) of a 2012 Memorandum of Agreement, mandating that "Suffolk County PBA members shall resume highway patrol, enforcement and all 911 responses (all duties and responsibilities as prior to 2007) within 5 days of full ratification of [that 2012 MOA]," and declaring that the September 20, 2011 MOA and all of its terms and conditions are in full force, is hereby decided to the extent set forth herein; and it is further

ORDERED that the temporary stay of arbitration is hereby vacated and the parties are directed to proceed to arbitration in accordance with the plaintiffs' October 17, 2012 Demand for Arbitration; and it is further

ORDERED that counsel for the plaintiffs shall promptly serve a copy of this Order upon counsel for all parties via First Class Mail, and shall promptly thereafter file the affidavit(s) of such service with the County Clerk.

The plaintiffs have filed a complaint alleging 3 causes of action against the defendants. In the complaint, the plaintiffs seek an order from the Court granting a preliminary injunction, a declaratory judgement seeking a judicial determination that a certain memorandum of agreement between the plaintiffs and the County defendants in September 2011 is valid and enforceable, and a permanent injunction based upon an allegation that the defendants' actions in entering a new Memorandum of Agreement in September 2012 with codefendant Suffolk County PBA constituted an unconstitutional impairment of their September 2011 contract with the County defendant.

Prior to September 15, 2008, patrolling of highways within the Suffolk County police district, the Long Island Expressway (LIE) and Sunrise Highway, was performed by members of the Suffolk County Police Department, which consisted of members of the Patrolmans Benevolent Association (PBA), members of the Superior Officers Association (SOA), together with members of the Suffolk County Sheriff's Office represented by the Deputy Sheriff's PBA (DSPBA). Other county police units patrolled these highways, albeit to a much lesser extent.

On September 15, 2008, the County disbanded the Suffolk County Police Department's Highway Enforcement Unit, which had been charged with patrol of the LIE and Sunrise Highway within the police district. All officers associated with these functions were reassigned. At the same time, the Sheriff's office expanded its patrol and enforcement-related highway functions and subsequently established its own highway enforcement section. The unions representing the police officers immediately filed petitions with the New York State Public Employment Relations Board (PERB) alleging that the County unilaterally transferred exclusive PBA and SOA unit work in violation of Section 209-a 1(d) of the Taylor Law.

On October 8, 2009, the PBA entered into a Memorandum of Agreement (MOA) with the County in which both parties agreed to abide by the decision of the PERB Administrative Law Judge and to not file any appeal or exceptions to that decision. On August 12, 2010, the PERB judge dismissed the petitions, concluding that they could not establish that the work was exclusively performed by either of them.

Beginning September 15, 2008 and thereafter, the patrol and enforcement functions on these highways have been performed solely and exclusively by the DSPBA members. On September 20, 2011, then-DSPBA President Matthew Mullins, then-Suffolk County Executive Steve Levy, and Suffolk County Sheriff Vincent DeMarco entered into a 2011 MOA whereby the DSPBA agreed to defer certain monies they were owed, pursuant to a prior compulsory arbitration interest award, until December 31, 2015 or until separation from service. In turn, the County agreed not to assign any official DSPBA duties and responsibilities, as enumerated in the MOA, to any other County employee who is a sworn police officer or peace officer, through December 31, 2017. The main duties and responsibility that was preserved, and for which the consideration of deferring previously-owed money was given, was the maintenance of exclusivity of enforcement duties on these highways by the DSPBA through 2017. Subsequently, the Suffolk County Legislature voted for the County budgets in 2012 and 2013, which included approximately $4,000,000 in deferred savings to be realized by the 2011 MOA. Thereafter, DSPBA unit members actually deferred the $4,000,000 owed to them as provided in the MOA.

Despite the previously-negotiated terms of the 2011 MOA, on or about September 6, 2012, the Suffolk County Police PBA and the County entered into a 2012 MOA which set forth a contract for PBA members for the period January 1, 2011-December 31, 2018. On September 13, 2012, the Suffolk County Legislature, at the request of Suffolk County Executive Steve Bellone, passed a resolution essentially authorizing this new MOA with the PBA. This new MOA with the PBA covers the terms and conditions of employment, including increased wages, for the PBA members for the period January 1, 2011 through December 31, 2018. Notably, this MOA transfers all highway patrol duties of the highways in question from the DSPBA to the Suffolk County Police PBA members.

The 2011 MOA with the DSPBA provided that the union members would defer half of the members' retroactive payments due them pursuant to the award. Since total retroactive payments were approximately $8,000,000, the deferral amounted to $4,000,000. The deferred amounts were to be paid to individual members when separated from service, with the entire balance of the deferral to be paid no later than December 31, 2015. Also, the 2011 MOA required that the payments deferred until 2015 were to be made at the rate of pay in effect for the DSPBA members as of December 31, 2013. Again, these monies were owed by the County pursuant to the compulsory interest arbitration award covering the 3-year period from January 1, 2008 to December 31, 2010. The consideration for this deferral was the County's agreement not to assign any official DSPBA duties and responsibilities regarding highway patrol enforcement to any other County employee who is a sworn police officer until December 31, 2017.

The defendants argue that the 2011 MOA is not valid and is, therefore, unenforceable as it was not ratified by the County Legislature. They contend that by providing for the payment of deferred wages covering the period between January 2008 and December 31, 2010 at the rate of pay for all members as per their status on December 31, 2013, the agreement necessarily required additional funding to cover the arguably higher wage rate in effect on December 31, 2013. Such additional funding would require an appropriation which, by law, can not be accomplished without Legislative approval. Indeed, contracts which require the expenditure of money or the incurring of any pecuniary liability are prohibited unless an amount has been appropriated by the legislature and is available therefor (see County Law §362(3); *Assoc. of Surrogates & Supreme Court Reporters v State of New York*, 78 NY2d 143, 573 NYS2d 19 [1991]). Further, the failure to obtain approval from the Legislature does not bind the County to appropriate the

additional funds necessary to satisfy an inseparable term of the agreement and, therefore, the agreement as a whole, it is argued, is invalid and unenforceable.

Article 14 of the New York State Civil Service Law sets forth The Public Employees Fair Employment Act, more commonly known as the "Taylor Law," which defines the rights and limitations of unions for public employees in New York, specifically with regard to negotiated agreements.

Section 201(12) of the Taylor Law defines an agreement as follows:

> The term "agreement" means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval (NY Civ Serv Law §201[12]).

Thus, agreements are made upon an exchange of mutual promises between a CEO and a union. It is binding upon the parties for the period set forth except as to any provisions which require legislative approval and, as to those provisions, will become binding with the appropriate legislative approval.

Section 204-a(1) of the Taylor Law states:

> Any written agreement between a public employer and employee organization determining the terms and conditions of employment of public employees shall contain the following notice in type not smaller than the largest type used elsewhere in such agreement:
>
> > It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given its approval.

The requirement of notice mandated by Taylor Law §204-a(1) was not contained in the 2011 MOA.

Section 204-a of the Taylor Law was added two years after the Taylor Law was enacted as one of a number of amendments to that law. The legislative intent of the amendments was to "obviate confusion as to the effect of an agreement between an employer and employee organization by making clear . . . that legislative action is needed before the agreement becomes effective as to those provisions requiring legislative approval such as, for example, the appropriation of funds for salaries" (*Assoc. of Surrogates & Supreme Court Reporters v State of New York*, 78 NY2d 143, 150, 573 NYS2d 19, 21 [1991], citing 1969 McKinney's Session Laws of NY at 2365). Clearly, therefore , the mandates of Section 204-a would be required in any collective bargaining agreement that, amongst other work conditions, sets increased salary schedules, such as the 2012 MOA with the SCPBA.

Paragraph 8 of the 2011 DSPBA MOA states as follows:

> Nothing herein shall be construed as diminishing in any way, shape or form, any salary or other contractual benefit set forth in the current Collective Bargaining Agreement and enjoyed by DSPBA unit members, except in accordance with this agreement.

Paragraph 9 states, in pertinent part:

> In the event there is a dispute of any kind related to the interpretation and/or implementation of any provision of this Agreement, the DSPBA has the option to proceed directly to expedited binding arbitration.

Paragraph 10 of the 2011 MOA states:

> This Agreement is subject to and shall become effective upon DSPBA ratification.

The language in Paragraph 8 clearly separates the 2011 MOA from a Collective Bargaining Agreement and, more importantly, does not incorporate the 2011 MOA into the then-existing Collective Bargaining Agreement. The 2011 is also not subject to the grievance/arbitration provisions of the parties' Collective Bargaining Agreement, as it has its own provision for dispute resolution as set forth in Paragraph 9. Finally, it provides for full implementation on sole approval of the DSPBA members as seen in paragraph 10.

In this matter, the exchange of mutual promises between the Sheriff (CEO), the County and the unit members (Union) was an agreement under Taylor Law §201(12). These promises were made to effectuate the payment of certain remuneration mandated by an interest arbitration award covering the three-year period between 2008 and 2010, and such an interest arbitration award "shall not be subject to the approval of any local legislative body or other municipal authority" (see Civ Serv Law §209[4][c][vi]). Therefore, while the 2011 MOA is an agreement under Section 201(12), it is not, as the County suggests, an agreement anticipated under Section 204-a, designed to describe the "terms and conditions of employment," which would require Legislative approval.

The County's sole claim is that the 2011 MOA had no validity as the requirement that the $4,000,000 that was to be paid on December 31, 2015 based on the wage rate in effect on December 31, 2013 (and not 2008-2010) necessarily mandated increased funding, which triggered the need for a legislative appropriation. DSPBA responds by arguing that any wage increases that would affect this analysis are presently unknown, in that the increases would have to be the subject of a new Collective Bargaining Agreement and are, therefore, speculative and not judicially ripe. The County replies that such an argument fails to take into account "step increases."

A thorough review of the pleadings, all exhibits connected therewith, as well as that which was proffered to the Court during oral argument causes the Court to conclude that the record is insufficiently developed on this question. Indeed, there is no evidence of wage increases for 2012 or 2013 and although the County claims that "step increases" would trigger the need for increased funding, there is no evidence submitted that they exist, when and how they are triggered, for whom and how long, and whether they can be or, indeed are, frozen.

Notwithstanding this unresolved question, it is without dispute that the County entered the 2011 MOA with the DSPBA and subsequently utilized the $4,000,000 savings in at least two budgets. Moreover, County Attorney Malafi, in a response to an inquiry by Sheriff DeMarco represented to him in a letter dated October 25, 2011 the following:

> Terms and conditions of the Agreements not involving an appropriation, such as the Memorandum of Agreement between the County and the Deputy Sheriff's Police Benevolent Association dated September 20, 2011, are reached through negotiation by the Director of Labor Relations and do not undergo Legislative approval.

Pursuant to the 2012 MOA, the County did not pay the $4,000,000 which would have been due, absent the agreement. Notably, the County still has not paid the $4,000,000, notwithstanding its claim that the contract under which it received this consideration is, in all respects, invalid. The County entered the MOA in September of 2012 with the SCPBA, which gave the exclusive right to perform the disputed work, which had previously been performed by the DSPBA, to the SCPBA. Before the 2012 MOA with the SCPBA, the County abided by its commitment to the DSPBA by assigning to the DSPBA the disputed work duties pursuant to the 2011 MOA, and by continuing to pay the DSPBA.

By these actions the County relieved itself of a $4,000,000 obligation in its 2012 and 2013 budgets, as it paid only half of the required $8,000,000 awarded in the interest arbitration award. By partially performing under the 2011 MOA – and benefitting from the DSPBA's performance – the County's conduct constituted a ratification and de facto approval of the 2011 MOA. Moreover, under these circumstances, the County's argument that Sheriff DeMarco should not have relied on the representations of County Attorney Malafi is without merit.

A contract that is not approved by a relevant municipal or governmental body, as required by law, rule, or regulation may, nevertheless, be ratified by the municipality or government body by subsequent conduct (*East Hampton Union Free School District v. Sandpebble Bldrs. Inc.*, 90 AD3d 815, 935 NYS2d 139 [2d Dept 2011]). Although generally not available against a governmental unit or entity, estoppel may sometimes be used where extraordinary circumstances exist, particularly where the municipality acts wrongfully (see *JRP Old Riverhead Ltd. v Town of Southampton,* 44 AD3d 905, 844 NYS2d 132 [2d Dept 2007]; *Hendrick Hudson Cent. School Dist. v Falinski,* 71 AD3d 769, 896 NYS2d 435 [2d Dept 2010]).

In *Hendrick*, a school board tried to evade a settlement agreement by claiming it was not ratified. It was determined that the respondent was entitled to rely on a letter written by the Superintendent of Schools advising her that all actions were ratified by the petitioner. Here, not only did County Attorney

Malafi represent that the 2011 MOA was not in need of legislative approval, the defendants continued to abide by its terms. Sheriff DeMarco and the DSPBA unit members had every right to rely on the agreement as both parties were performing the duties and responsibilities required.

Accordingly, the Court declares that the 2011 MOA is a valid agreement. Since such Agreement is valid through ratification and approval by conduct, the question of whether additional funding may be necessary to effectuate the Agreement is irrelevant.

On October 9, 2013, the Court granted a temporary stay of arbitration pending the Court's determination of the relief seeking a declaratory judgement regarding the validity of the 2011 MOA. That issue having now been determined, the temporary stay is lifted and the parties are directed to proceed to arbitration.

Settle Judgment on notice.

Dated: February 27, 2014

PETER H. MAYER, J.S.C.

[X] FINAL DISPOSITION

[ ] NON FINAL DISPOSITION