

Budesheim v Southampton Town Police Dept.

2014 NY Slip Op 32278(U)

August 19, 2014

Supreme Court, Suffolk County

Docket Number: 14419/2014

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 14419/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 SUPREME COURT JUSTICE

 DANIEL BUDESHEIM,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil
 Practice Law and Rules, and declaratory relief,

-against-

SOUTHAMPTON TOWN POLICE
 DEPARTMENT, TOWN OF SOUTHAMPTON
 and SUFFOLK COUNTY, NEW YORK,

Respondents.

ORIG. RETURN DATE:8/6/2014
FINAL SUBMISSION DATE: 8/13/2014
MOTION SEQ#001, 002
MOTION: MOTNDECD

PETITIONER'S ATTORNEY:

BRILL LEGAL GROUP, P.C.
 150 MOTOR PARKWAY, STE 401
 HAUPPAUGE, NY 11788
 631-204-8254

RESPONDENT'S ATTORNEY:

Attorneys for Suffolk County
 DENNIS M. BROWN, ESQ.
 BY: CHRIS GATTO
 100 VETERANS MEM HWY, POB 6100
 HAUPPAUGE, NY 11788
 631-853-4049

RESPONDENTS' ATTORNEY:

*Attorneys for Town of Southampton and
 Southampton Town Police Department*
 TIFFANY S. SCARLATO, ESQ.
 TOWN HALL-116 HAMPTON RD
 SOUTHAMPTON, NY 11968
 631-287-3065

The Court has considered the following in connection with its determination:

1. Petitioner's Order To Show Cause (J. Quinn) with supporting papers, inclusive of Exhibit 1; and
2. Respondent's (Suffolk County) Notice of Cross-Motion, inclusive of Exhibits

RR

- A and B. and Memorandum of Law in Support of Cross-Motion To Dismiss;
and
3. Respondents' (Southampton Town Police Department and Town of Southampton's) Answer.

Petitioner, Daniel Budesheim, seeks an order; (1) temporarily enjoining the enforcement of Suffolk County Local Law 12-2006, prohibiting sex offenders from living within one-quarter mile of a park or playground, until the New York Court of Appeals renders its decision in *People v. Diack*; 41 Misc. 3d 3, 974 N.Y.S. 2d 235 (App. Term 2013) and (2) an order enjoining enforcement of the law claiming it to be vague and unenforceable as written. Respondent, Suffolk County cross-petitions for an order dismissing the petition for (1) lack of subject matter jurisdiction pursuant to CPLR § 3211(a)(2); and (2) for failure to state a claim upon which relief may be granted under CPLR § 3211(a)(7), or in the alternative, for an order granting leave pursuant to CPLR § 7804(f) to serve an answer and administrative return, within thirty (30) days of the Court's decision herein.

Petitioner, Daniel Budesheim, is a registered Level III sex offender residing in Suffolk County, New York. Petitioner was convicted of Sexual Abuse in the First Degree in 1998. He was sentenced to six (6) months in the Suffolk County Jail and five years probation. From 1999 to March 2014, Petitioner resided at 29 Shore Road in Hampton Bays. His mother resided in an apartment above him at this same address. Thereafter, in March 2014, his mother purchased a home located at 197 Riverside Avenue in Flanders. Petitioner moved in with her in order to assist in her daily care, the household expenses and property maintenance. The new home is located in the vicinity of the Flanders Community Park at Iron Point. As required by law, Petitioner registered his new address with the local police department. On or about July 13, 2014, Petitioner was notified by the Southampton Town Police that he was not permitted to live at the new address based upon the restrictions of Suffolk County Local Law 12-2006, which imposes certain residency restrictions on registered sex offenders. That law, as amended, is currently codified at Suffolk County Administrative Code, Regulatory Local Law Chapter § 745. Suffolk County Sex Offender Residency Restriction, Suffolk County Code § 745-3(A), prohibits "all registered sex offenders" under New York State's Sex Offender Registration Act from residing within 1/4 mile of the property line of any school, including, but not limited, to any public or private nursery, elementary, middle or high school; or a licensed day-care center; or a playground; or an amusement park; or the residence or principal place of employment of the victim(s) of their crime(s)."

On March 18, 2011, Judge Valerie Alexander of the Nassau County District Court found Nassau County Local Law 4-2006, which prohibits sex offenders from living within 500 feet of a park invalid as preempted by New York State Penal Law § 65-10 [4-a] which provides that when certain convicted sex offenders are sentenced to probation or conditional discharge, the sentencing court must include as a mandatory condition of their sentence, that they remain away from school grounds or other facilities used primarily for the care and treatment of persons under eighteen years of age. In that case (*Diack*) the defendant was a level one sex offender and not on probation when he moved to a residence located within 500 feet of a school. On September 5, 2013, the decision was overturned by the Appellate Term. The Court of Appeals granted leave to appeal, the matter has been fully briefed and arguments are to be scheduled.

Petitioner argues that should the Court of Appeals determine that the state law preempts the local sex offender residency restriction law in Nassau County, the local sex offender residency restriction law in Suffolk County will also be preempted. Petitioner requests that the Court issue an order enjoining the Town of Southampton and its law enforcement agencies from removing Petitioner from his mother's home, pending the outcome of the Court of Appeals' decision in *People v. Diack*. Petitioner also claims that the local law is unenforceable as written. Petitioner has until August 27, 2014 to comply with the Town of Southampton's directive to relocate in order to avoid arrest.

The County of Suffolk seeks dismissal of the petition claiming:

1. The Complaint fails to state a cause of action, CPLR § 3211(a)(7);
2. The matter is time-barred because it was commenced beyond the six-year statute of limitations set forth in CPLR § 213(1);
3. The County's residency restriction does not suffer from vagueness;
4. The residency restriction does not deprive an offender of due process; and
5. The County's restriction is not preempted as a matter of State law.

The issue before the Court and pending before the Court of Appeals concerns the preemption doctrine. New York's constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens; yet, while local governments do possess broad authority to enact legislation that promotes the welfare of their citizens, they cannot adopt laws that are inconsistent with the Constitution or with any general law of the state, and, thus, the power of local governments to enact laws is subject

to the fundamental limitation of the preemption doctrine. McKinney's Const. Art. 9, § 2(c).

The laws before the Court are the New York State Penal Law § 65.10(4-a)(a) and Suffolk County Code, Chapter § 745-3A. The local law found in the Suffolk County Code states:

It shall be unlawful for all registered sex offenders to reside within 1/4 mile of the property line of any school, including, but not limited to, any public or private nursery, elementary, middle or high school; or a licensed day-care center; or a playground; or an amusement park; or the residence or principal place of employment of the victim(s) of their crime(s).

A quarter of a mile is one thousand three hundred twenty (1320) feet. The New York State Penal Law noted above imposes residency restrictions upon Level 3 sex offenders or upon convicted sex offenders where their victims are under the age of eighteen (18) by precluding such offenders from residing within one thousand (1000) feet of, among other things, a playground, as a condition to probation or conditional discharge. In the matter before the Court, the Petitioner has been designated a Level 3 sex offender and he was not on probation when he moved to a residence located within a quarter of a mile of a designated facility but beyond the range of the state penal provision.

The State's Preemption Doctrine precludes local legislation where an express conflict exists between state and local laws, or where the state has clearly evinced the desire to preempt an entire field (*see DJL Rest. Court v. City of New York*, 96 N.Y.2d 91, 95; *Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, *People v. Diack*, 41 Misc.3d 36, 974 N.Y.S.2d 235. Conflict preemption occurs when a local law prohibits that which is state law explicitly allows, or when a state law prohibits that which a local law explicitly allows.

In the matter at bar, the Petitioner finds himself outside the limits imposed by the Penal Law yet inside the limits imposed by the local law. Therefore, it is

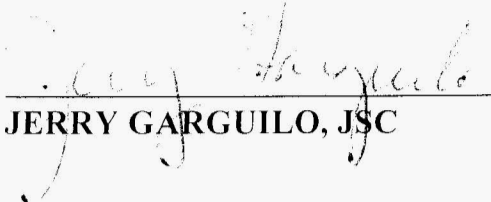
ORDERED ADJUDGED AND DECREED that the temporary restraining order allowed by the Honorable James F. Quinn shall continue. Thereafter, the parties will abide the event anticipated and/or to be found in the anticipated determination by the Court of Appeals.

BUDESHEIM v. SOUTH HAMPTON TOWN POLICE AND COUNTY OF SUFFOLK
INDEX NO.: 14419/2014
PAGE 5

Any matter not herein addressed is deemed **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: August 19 , 2014



HON. JERRY GARGUILO, JSC