

**New York State Assn. for Affordable Hous. v
Council of the City of N.Y.**

2014 NY Slip Op 32504(U)

September 23, 2014

Sup Ct, New York County

Docket Number: 158093/2013

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK STATE ASSOCIATION FOR AFFORDABLE
HOUSING, STERLING FLOOR DESIGNS, LTD.,
BROOKLYN WEST SUPPLY CORP., SMEDCO INC.,
DEUTSCHER & DAUGHTER, INC. LIS CONSTRUCTION, INC.
PPEE CONSTRUCTION, INC., AMR CONSTRUCTION & MGT
CORP., and MASTERCRAFT MULTICOLOR INC.,

DECISION AND ORDER
Index Number
158093/2013

Plaintiffs,

-against-

COUNCIL OF THE CITY OF NEW YORK, CITY OF NEW YORK
and NEW YORK CITY DEPARTMENT OF HOUSING PRESER-
VATION AND DEVELOPMENT,

Defendants.

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FRANK P. NERVO, J:

Defendants move for summary judgment dismissing the complaint. Plaintiff's cross-move for summary judgment declaring New York City's Local Law 44 invalid as preempted by State statutes, Labor Law §§ 650-665, Municipal Home Rule Law §§ 11, 12, and because it is unconstitutional.

Local Law 44, enacted over Mayor Bloomberg's veto. The law imposes certain requirements for developers involved in constructing affordable housing in New York City

Local Law 44 requires development employers, contractors and sub-contractors that receive discretionary government subsidies to report their salary payment practices to the City. The law establishes a website that publicly identifies the scope and location of publicly funded housing development projects. It identifies complaints, such as sub-standard workmanship or construction, against those companies. The publicly disclosed information under the law gives the selection criteria for developers and contractors and lists those entities that the City has disqualified from receiving funds. Although the law requires that developers document and report wages paid to their employees, it does not require employers to pay a particular wage or wage rate. If a developer or contractor fails furnish the necessary information, that entity may not receive financial assistance from the New York City Department of Housing Preservation and Development (HPD). The disqualified entity will be identified on a list available to the public.

New York State Labor Law §661, which plaintiffs refer to, requires every employer to keep accurate records of the hours worked by each employee covered by hourly minimum wage rate the wages paid

to all employees and other such information as the Commissioner of the New York State Department of Labor may require. Employers, under this statute, must make the information available to the Commissioner on demand.

Labor Law § 661 does not contain the public disclosure or disqualification provisions that Local Law 44 contains. However, under Labor Law § 662, an employer who pays an employee less than the lawful minimum wage, or who fails to comply with the disclosure requirements in § 661, shall be guilty of a class B misdemeanor. The latter criminal penalty increases if there is a subsequent violation within five years. Labor Law § 663 gives employees and the Commissioner civil remedies against an employer violating the statute.

Plaintiffs also rely on New York Municipal Home Rule Law §11(1)(f). That statute prohibits local authorities from adopting laws that supersede a state statute, in particular, the labor Law.

Plaintiffs next refer to various provisions of the General Municipal Law and the Private Housing Finance Law. They argue that the statutes, "taken together, authorize the City to provide financial assistance to private developers and others for the construction and rehabilitation of affordable housing in New York City."

Plaintiffs, in their memorandum of law, concede that there is no direct conflict between Local Law 44 and State statutes; they do not argue that the doctrine of conflict preemption applies. Rather, plaintiffs urge that the doctrine of field preemption makes the law invalid.

A municipal corporation's lawmaking authority may be exercised only to the extent that authority has been delegated by the state. Field preemption applies where the State has evidenced its intent to occupy the field its law encompasses. (see *Albany Area Builders Association v. Town of Guilderland*, 74 NY2d 372, 377)

Where the State has preempted the field, the local law regulating the same subject matter is deemed inconsistent with the State's interest whether or not the terms of the local law actually conflict with the statute. If the local law were permitted to stand, it would inhibit the operation of the State law and thwart the State's overriding policy concerns. The statutory intent to preempt the field may be implied from the nature of the subject matter being regulated and the purpose and scope of the State regulatory scheme, including the need for State-wide uniformity in the given area. (*id.* at 377.)

Contrary to plaintiffs' argument, the local law does not conflict with the State's authority to set the minimum wage. (cf. *Matter of Council of the City of New York v. Bloomberg*, 6 NY3d 380). The local law does not mandate a wage that is greater than the State mandated minimum. Therefore, it does not impose a duty that thwarts the State's exclusive authority to regulate the minimum wage.

The reporting requirement is not inconsistent with the State statute; that statute does not demonstrate an intent to occupy the area of reporting. The statute mandates that the wage reports must be made to the Department of Labor; however, the statute does not say the information cannot

be disclosed to the public. There is nothing in New York's Freedom of Information Law (Public Officer's Law § 84, *et seq.*) that exempts the information from public disclosure.

While both the Local Law 44 and Labor Law § 661 contain provisions requiring wage information, the local law goes beyond this. It prohibits entities that have not complied with it from receiving certain funds. Non-compliance with the State statute can bring a different penalty, criminal prosecution. The question is whether this difference is a conflict between the statute and local law that shows a legislative intent to preempt the field.

The fact that the State statute and local law in the instant case deal with the same subject matter, reporting, does not, in and of itself give rise to a conflict that would preempt the local law. A local law is inconsistent with a State statute if it prohibits conduct that is acceptable under the State or imposes additional restrictions on rights granted by the State. (see *Jancyn Manufacturing Corp. v. County of Suffolk*, 71 NY2d 91, 97) The fact that the local law imposes a penalty that differs from the State statute does not mean that the former is invalid; rather, the invalidity occurs when the local law prohibits conduct permissible under State law. (see *Wholesale Laundry Board of Trade v. City of New York*, 17 AD 2d 327, 329-330; see also *Zakrzewska v. New School*, 14 NY3d 469,480-481)

The penalty under the local law differs from the State law by barring various entities from receiving certain funds if they do not comply with the law, while State imposes a criminal penalty for non-compliance. However, the local penalty addresses a matter the State is not concerned with. The local law was enacted to compel the disclosure of construction complaints and violations for HPD selected developers. This is a matter of purely local concern. The State statute concerns itself with an entirely different interest. Therefore, the local law neither intrudes on an area the State law involves nor impedes its operation. Therefore, the fact that both involve wage reporting is of no moment.

The court has examined plaintiff's constitutional arguments and finds them to be without merit. There is a rational basis for the local law; therefore, it is subject to the least strict standard of review. The local law passes scrutiny under that standard.

The court notes also that persons or entities have a remedy, an Article 78 proceeding, if they believe they are aggrieved by any action taken under the law. Plaintiffs' argument that compliance with the local law or a challenge to it is costly or otherwise burdensome is, from the papers submitted on this motion, purely speculative.

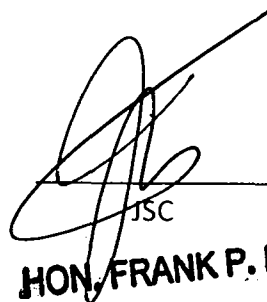
Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted; and it is further ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is further ORDERED that the clerk is directed to enter judgment dismissing the complaint.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: September 23, 2014

ENTER:



JSC
HON. FRANK P. NERVO