

**Wallace v County of Suffolk**

2015 NY Slip Op 30638(U)

April 14, 2015

Supreme Court, Suffolk County

Docket Number: 14-9131

Judge: W. Gerard Asher

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**ORDERED** that the motion by defendants for an order, pursuant to CPLR 3211(a)(2) and CPLR 3211(a)(7), dismissing the complaint against them is denied.

Plaintiff Thomas Wallace lives at 408 West Street, Mastic Beach, in the County of Suffolk. He has lived at that address since 2011. In 2007, plaintiff was convicted of a crime that requires him to register as a level 2 Sex Offender under New York State's Sex Offender Registry (Correction Law 168 et. seq.). Plaintiff is not currently on probation, parole or supervised release. In November of 2011, the plaintiff visited the Seventh Police Precinct of the Suffolk County Police Department. He spoke with a detective there who did a search and gave plaintiff verbal permission to move to 408 West Street, Mastic Beach. Plaintiff immediately registered his new address pursuant to his continuing legal obligation under New York State's Sex Offender Registration Act. Plaintiff has resided at the above address since 2011, without incident. On or about March 14, 2014, plaintiff was served with a letter "Notice of Violation from defendant Suffolk County Police Department, stating that plaintiff was in violation of Suffolk County Law 12-2006, which appears in the Suffolk County Code as Chapter 428 3.(A) and states: "[i]t shall be unlawful for all registered sex offenders to reside within one-quarter mile of the property line of any public or private nursery, elementary, middle or high school; or a licensed day care center or a playground". The letter further stated that he would be expected to take immediate action to comply with the law by departing his home or face being arrested and charged with a misdemeanor, punishable by up to one year in jail. Plaintiff was not apprised of the location of the property which is the subject of his alleged violation. Plaintiff's complaint contains five causes of action. The first three allege due process violations. The fourth alleges that the relevant Suffolk County Code and Town of Brookhaven Local Law Chapter 55 are preempted by the New York State Penal Law and Sex Offender Registration Act and, thus, are unenforceable. The fifth alleges that plaintiff is not in violation of either code. Plaintiff seeks a preliminary injunction enjoining and restraining defendants from enforcing or attempting to enforce Suffolk County Law 12-2006, which appears in the Suffolk County Code as Chapter 428 or Town of Brookhaven Local Law Chapter 55.

Defendants oppose the motion for a preliminary injunction and move to dismiss the complaint for lack of subject matter jurisdiction and failure to state a cause of action.

In order to prevail on an application for a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; *Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791, 791–792 [2d Dept 2012]; *see also Alayoff v Alayoff*, 112 AD3d 564, 565 [2d Dept 2013], *lv to app. dismiss.* 24 NY3d 945 [2014]); *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Dixon v Malouf, supra; Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 [2006]; *Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 781 NYS2d 684 [2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see Dixon v Malouf, supra; Ruiz v Meloney, supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*see Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2d Dept 2011]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 680 NYS2d 557 [1998]; *see Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2000], *lv dismissed* 95 NY2d 919, 719 NYS2d 646 [2000]). The legal landscape affecting this

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matter has been greatly altered since this action was filed by the plaintiff. The Court of Appeals in its recent decision in *People v Diack* 24 NY3d 674, \_\_\_ NYS2\_\_\_ [2015] held that New York State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of local residency restriction laws.

The Court of Appeals set forth its reasoning in great detail:

In recent years, dozens of municipalities in this state have enacted similar laws that prohibit registered sex offenders from living within a certain distance of schools, day-care centers, parks, youth centers and other areas where children are likely to congregate. That such laws are proliferating at an accelerated rate is hardly surprising, given the significant interest involved, namely, the protection of children from sex offenders. Local governments have, understandably, relied on their police power in furthering that interest.

But a local government's police power is not absolute. When the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field. We hold that the State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law such as Local Law 4 (*People v Diack, supra* at 676-677).

. . . Although a local government is constitutionally empowered to enact local laws relating to the welfare of its citizens through its police power, it is prohibited from exercising that power through the adoption of local laws that are inconsistent with the New York State Constitution or any general law of the state (*see* N.Y. Const., art. IX, § 2[c]; Municipal Home Rule Law § 10[1][i], [ii][a][12]). This doctrine of preemption is a significant restriction on a local government's home rule powers because although localities are "invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammelled primacy of the Legislature to act ... with respect to matters of State concern' (*Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d 372, 377, 547 NYS2d 627, 546 NE2d 920 [1989], quoting *Wambat Realty Corp. v State of New York*, 41 NY2d 490, 497, 393 NYS2d 949, 362 NE2d 581 [1977]).

Beginning with enactment of the Sex Offender Registration Act (SORA) (1996), the legislature has passed and the Governor has signed a series of laws regulating registered sex offenders, including the Sexual Assault Reform Act (SARA) in 2000, the Sex Offender Management and Treatment Act (SOMTA) in 2007, and chapter 568 of the Laws of 2008 (chapter 568). Because the legislature has not expressly stated an intent to occupy the field of sex offender residency restrictions in the aforementioned laws, our focus on this appeal is whether the legislature, by implication, has shown its intent to do so" (*People v Diack, supra* at 678-679).

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Chapter 568 of the Laws of 2008 provided for the promulgation of rules and regulations regarding the placement of sex offenders by the Division of Parole, the Division of Probation and Correctional Alternatives and the Office of Temporary and Disability Assistance for the purpose of addressing the inability of those agencies to locate suitable housing for sex offenders.

In approving Chapter 568, the Governor acknowledged that

. . . this chapter recognizes that the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State, and that the chapter's guidelines would balance the competing factors of public safety and the provision of suitable housing for sex offenders, leading to a coordinated and comprehensive statewide policy that will both protect the public and ensure that there is suitable and appropriate housing available for sex offenders in every community in the State (Governor's Approval Mem., Bill Jacket, L. 2008, ch. 568 at 6, 2008 N.Y. Legis. Ann. at 388–389 (*People v Diack*, *supra* at 683).

. . . This top-down approach, with the State dictating the relevant factors that local officials are required to consider when placing such offenders in housing, plainly establishes that sex offender residency restrictions are within the exclusive bailiwick of the State and accentuates the State's intent to occupy the field.

Residency restriction laws such as Local Law 4 encroach upon the State's occupation of the field, 'inhibit the operation of [this] State's general law and thereby thwart the operation of [this] State's overriding policy concerns' relative to the identification, monitoring and treatment of sex offenders (Albany Area Bldrs. Assn., 74 N.Y.2d at 377, 547 N.Y.S.2d 627, 546 N.E.2d 920 [citation and internal quotation marks omitted])' (*People v Diack*, *supra* at 686).

While the decision in *Diack* involved Nassau County Local Law 4 (Nassau County Administrative Code 8-130.6), the Court of Appeals held that all such local residency laws, which would include those enacted by Suffolk County and the Town of Brookhaven, are preempted by the State laws regulating sex offenders. Thus, the plaintiff, based upon the newly established precedent of the Court of Appeals in *Diack*, has established a likelihood of success on the merits and a balancing of the equities is in his favor. Since the plaintiff is still subject to possible arrest, there exists a risk of irreparable injury. Plaintiff, therefore has established his right to a preliminary injunction.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Scoyni v Chabowski*, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez*, *supra*; *Ofman v Katz*, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; *International Oil Field*

*Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]. Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*AGS Marine Insurance Company v Scottsdale Insurance Company*, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; *Chan Ming v Chui Pak Hoi et al*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). However, conclusory allegations, which fail to adequately allege the material elements of a cause of action, will not withstand a motion to dismiss (*Peterec-Tolino v Harap*, 68 AD3d 1083, 1084 [2d Dept 2009]). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991], lv. denied 80 NY2d 788, 587 NYS2d 284, [1992]). Herein, plaintiff’s fourth cause of action clearly states a claim based upon the sweeping decision by the Court of Appeals finding preemption of all local laws, including the Suffolk County and Brookhaven laws, by State laws governing the identification, regulation and monitoring of registered sex offenders.

Accordingly, the Court grants the plaintiff’s motion for a preliminary injunction against the defendants pending final disposition of this action, enjoining and restraining the defendants and all persons acting on their behalf from enforcing or attempting to enforce Suffolk County Law 12-2006, which appears in the Suffolk County Code as Chapter 428 or Town of Brookhaven Local Law Chapter 55. The preliminary injunction shall be effective immediately upon service of a copy of this order with notice of entry upon the defendants. The defendants’ motion to dismiss the complaint is denied.

Dated: April 14, 2015

W. Gerard Aske  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION