| **Myers v Schneiderman** |
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| 2015 NY Slip Op 31931(U) |
| October 16, 2015 |
| Supreme Court, New York County |
| Docket Number: 151162/15 |
| Judge: Joan M. Kenney |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

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SARA MYERS, STEVE GOLDENBERG, ERIC A. SEIFF, HOWARD GROSSMAN, M.D., SAMUEL C. KLAGSBRUN, M.D., TIMOTHY E. QUILL, M.D., JUDITH K. SCHWARTZ, PhD., CHARLES A. THORNTON, M.D., and END OF LIFE CHOICES NEW YORK,

Plaintiffs,

-against-

ERIC SCHNEIDERMAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant.

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Index #151162/15

**DECISION & ORDER**

**KENNEY, JOAN, M., J.S.C.**

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Papers considered in review of this motion seeking an Order dismissing the complaint:

| Papers | Numbered |
|---|---|
| Notice of Motion, Exhibits and Memorandum of Law | 1-18 |
| Affirmation in opposition, Exhibits, Affidavits in Opposition, Exhibits and Memorandum of Law in Opposition | 19-34 |
| Reply Memorandum of Law | 35 |

Defendant, the State of New York (the State), moves for a pre-answer Order dismissing plaintiffs' complaint, pursuant to,

[1]The action was originally commenced against the following District Attorneys: Janet DiFiori (Westchester County), Sandra Doorley (Monroe County), Karen Heggen (Saratoga County), Robert Johnson (Bronx County), and Cyrus Vance, Jr. (New York County). The Attorney General's Office and plaintiffs' counsel voluntarily discontinued the action against the District Attorneys.

CPLR 3211(a)(7).

**Factual Background**

The following facts are not in dispute. Plaintiffs are three terminally ill patients (the patients); five medical professionals (the professionals) who regularly treat terminally ill individuals, and an advocacy group.

Plaintiffs seek, *inter alia*, two forms of equitable relief, (1) a declaration that a professional who provides "aid-in-dying" to a mentally competent, terminally ill patient, who has requested such assistance, is not criminally liable under New York Penal Law New York Penal Law §§120.30 and 125.15 (the penal law); and (2) an injunction prohibiting prosecution of the professionals who aid mentally competent, terminally ill patients with the means and/or methods to end their lives.

The patients allege that they are mentally competent, and seek "aid-in-dying," from their personal physicians. The patients wish to legally obtain prescriptions from their doctors, presumably for narcotics, that they would use to "achieve a peaceful death." The professionals assert that they have all treated terminally ill patients, who have sought their assistance in ending their lives.

The patients state that they want to be able to determine their fates when their respective diseases cause suffering that is too much for them to bear. The professionals assert that providing such assistance is both medically and ethically acceptable.

The concern of the professionals is obvious given the current definition of "assisted suicide," within the context of the penal law. The professionals do not wish to risk their exposure to a potential second degree manslaughter prosecution. However, the professionals all agree that their mentally competent terminally ill clients/patients should have the right to die with dignity at a time of their own choosing.

**Arguments**

The State argues that (1) plaintiffs have failed to plead a justiciable claim; (2) the penal law cannot be construed to prohibit physician-assisted suicide; (3) the penal law does not violate the equal protection clause of the New York State Constitution and (4) the penal law does not violate due process.

Plaintiffs contend that (1) they have been deterred from providing aid-in-dying "due to fear of potential prosecution under the [penal law,] if the patient did ultimately self-administer life-ending medication;" (2) a determination of whether the penal law should apply to plaintiffs' proposed actions is a legal question that may be determined by this Court; (3) the penal law violates the due process clause of the New York State Constitution.

**Discussion**

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the

benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept., 2013]).

The motion should be denied if 'from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]; and *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (Id.)

Moreover, "[w]hen the moving party [seeks dismissal] ..., the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

Plaintiffs plead three causes of action: (1) a declaration that the penal law does not provide a valid statutory basis to prosecute them for seeking or providing aid-in-dying (declaratory and injunctive relief); (2) lack of equal protection and (3) denial of right to due process (privacy).

CPLR 3001 states in its entirety as follows:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a *justiciable controversy* whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds (emphasis added).

The threshold issue to be determined is whether this Court has a justiciable question before it. This court must first determine if it has the power, conferred by either the Constitution or statute, to entertain the case before it. *Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278, 280 (1st Dept 2006). Defendants contend that there is no justiciable case or controversy before this Court.

A controversy is justiciable when the plaintiff in an action for a declaratory judgment has "an interest sufficient to constitute standing to maintain the action [and if] plaintiff is seeking an impermissible advisory opinion, the courts must decline" (*American Ins. Assn. v. Chu*, 64 NY2d 379, 383 [1985]; *Police Benevolent Assn. of N.Y. State Troopers, Inc. v New York State Div. of State Police*, 40 A.D.3d 1350, 1352 [3d Dept 2007]). The lack of a justiciable issue implicates the subject matter jurisdiction of a court. The question of subject matter jurisdiction is a question of judicial power. Id. The parties in this matter have more than just a passing interest in the outcome of this case.

The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking

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relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution, *Sec. Pac. Nat. Bank v Evans*, at 279. Plaintiffs have raised issues of public importance that are of a recurring nature.

Finally, in *Babbitt v. United Farm Workers Nat'l Union*, 442 US 289 (1979), the Court stated that when contesting the constitutionality of a criminal statute it is not necessary that the plaintiff first expose himself to actual prosecution. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution, a sufficient controversy is presented. Plaintiffs have successfully plead that they are entitled to judicial review of the statutes in question.

Plaintiffs' challenge, *inter alia*, the following sections of the penal law:

> Section 125.15(3) of the New York Penal Law provides in relevant part:
>
> A person is guilty of manslaughter in the second degree when: 3. He intentionally ... aids another person to commit suicide.
>
> Section 120.30 provides: A person is guilty of promoting a suicide attempt when he intentionally ... aids another person to attempt suicide.
>
> Violation of either statute is a felony.

Plaintiffs' complaint alleges that the entire statutory scheme need not be re-written, merely a portion of the language, as it relates to mentally competent terminally ill patients. In New York, as in most States, it is a crime to aid another to commit or attempt suicide, but patients may refuse lifesaving medical treatment.

The starting point for any case of statutory interpretation must always be the statutory text itself, which is the "clearest indicator of legislative intent" *In re Baby Boy C., Jeffrey A., et al., v Tohono O'odham Nation, et al.*, 27 AD3d 34 [1st Dept 2005].

The Courts of the State of New York are the ultimate arbiters of our State Constitution (see *Cohen v State of New York*, 94 NY2d 1, 11 [1999]). Yet, in fashioning specific remedies for constitutional violations, the Court must avoid intrusion on the primary domain of another branch of government. *Id.*

Judicial inquiry into legislative intent is appropriate as an aid to statutory interpretation when the law is doubtful or ambiguous. Where the language of a statute is ambiguous, and there is doubt as to the meaning intended to be expressed thereby, the courts look behind the words of the statute and use established rules of construction to assist in ascertaining the true intention of the law. 97 NY Jur 2d Statutes §105.

In *Cohen, infra*, the Court of Appeals spoke to the tension between the Court's responsibility to safeguard rights and the

necessary deference of the Courts to the policies of the legislature. "While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute ... the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239-240 [1984] [citations omitted]). The Court of Appeals has also refused to review the acts of the legislature and the executive, because it's role is to protect rights, not to make policy. *Campaign for Fiscal Equity, Inc. v. State,* 8 NY3d 14 (2006).

It has been said that the courts may not resort to legislative history in order to ascertain legislative intent when the statute is not ambiguous and its meaning unequivocal. (*Sega v State*, 60 NY2d 183 (1983); *Matter of Estate of Devine*, 126 AD2d 491 (1st Dept 1987). However, other authority states that although the unambiguous language of a statute is alone, generally, determinative of the legislative intent, the legislative history of an enactment may also be relevant and is not to be ignored even if the words are clear. (*Riley v County of Broome*, 95 NY2d 455 [2000]). The penal law as written is clear and concise, therefore analysis of the legislative intent is irrelevant.

"The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions" (*Matter of Maron v Silver*, 14 NY3d 230, 258 [2010]).

A prosecutor has the discretion (subject to the grand jury) not only to determine whether to bring charges, but which charges to bring. *People v Eboli*, 34 NY2d 281 (1974). Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions (see *Matter of Cantwell v Ryan*, 3 NY3d 626, 628 [2004]). Such a right is solely within the broad authority and discretion of the district attorneys' executive power to conduct all phases of criminal prosecution (*People v Cajigas*, 19 NY3d 697, 703 [2012]).

It is within the sole discretion of each district attorneys' executive power to orchestrate the prosecution of those who violate the criminal laws of this state (N.Y. Const., art. XIII, §13). Where the court assumes the role of the district attorney by compelling prosecution, it has acted beyond its jurisdiction. *Soares v Carter*, 25 NY3d 1011 [2014]. Conversely, to prohibit a district attorney from prosecuting an alleged violation of the penal law, would similarly exceed this Court's jurisdiction. See *Soares, supra*.

Plaintiffs' equal protection contentions were recently

analyzed in *Bezio v Dorsey*, 21 NY3d 93, 101 (2013). The Court of Appeals stated that the right to refuse medical treatment is not the equivalent of a right to commit suicide, observing that the State will intervene to prevent suicide ..., or the self-inflicted injuries of the mentally deranged (citation omitted) or the starvation of an incarcerated individual engaged in a hunger strike. *Id.* In *Bezio, infra*, the Court of Appeals restated the reasoning that merely declining medical care, even essential treatment, is not considered a suicidal act and further explained that, "the State has long made a constitutionally-permissible distinction between a right to refuse medical treatment and a right to commit suicide (or receive assistance in doing so)," citing *Vacco, et al., v Quill* et al. 117 US 2293 (1997)[2].

The case at bar is factually and legally indistinguishable from *Vacco, infra*. The United States Supreme Court in *Vacco,* held that the penal law is not arbitrary under the due process standard and does not violate equal protection. Notably, *in Vacco*, the patients and physicians brought an identical action challenging the constitutionality of the statutes being challenged herein. The United States District Court, Southern District of New York, 870 FSupp. 78, entered summary judgment dismissing action, and the physicians appealed. The Court of Appeals for the Second Circuit,

[2]Timothy E. Quill, M.D. one of the physicians herein is in fact the same Dr. Quill in *Vacco v Quill, infra*.

80 F3d 716, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that New York's prohibition on assisting suicide did not violate the mentally competent terminally ill plaintiffs' civil rights.

> "New York physicians assert that, although it would be consistent with the standards of their medical practices to prescribe lethal medication for mentally competent, terminally ill patients who are suffering great pain and desire a doctor's help in taking their own lives, they are deterred from doing so by New York's assisted-suicide ban . . . . The New York statutes outlawing assisted suicide neither infringe fundamental rights nor involve suspect classifications, (citations omitted), and are therefore entitled to a strong presumption of validity, . . . [t]he distinction between letting a patient die and making that patient die is important, logical, rational, and well established: It comports with fundamental legal principles of causation (citations omitted); has been recognized, at least implicitly, by this Court (citations omitted); and has been widely recognized and endorsed in the medical profession, the state courts, and the overwhelming majority of state legislatures, which, like New York's, have permitted the former while prohibiting the latter."
>
> New York's reasons for recognizing and acting on the distinction between refusing treatment and assisting a suicide - - including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference,

> prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide toward euthanasia - - are valid and important public interests that easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end (citations omitted).

In conclusion, there is not any easy way to free oneself from the horns of a dilemma, but it is baffling to this Court how the significance of the ancient holding in *Union P.R. Co. v Botsford*, 141 US 250 (1891), has apparently become convoluted. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." *Union P.R. Co. V Botsford, infra*.

In view of the determination of the Court, any facts or arguments raised by the parties, not specifically addressed herein, are deemed unavailing.

Defendant's motion is granted and the action is dismissed.

Dated: October 16, 2015

E N T E R:

Hon. Joan M. Kenney
J.S.C.