

Porcari v Thomas
2017 NY Slip Op 32980(U)
July 5, 2017
Supreme Court, Westchester County
Docket Number: 50259/2017
Judge: Joan B. Lefkowitz
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SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
LAWRENCE A. PORCARI, JOSEPH SPIEZIO, RALPH
UZZI, MARIA DONOVAN, LA'TEEA GOINGS,

Plaintiffs,

RICHARD THOMAS, as Mayor of the City of Mount
Vernon,

DECISION & ORDER

Index No: 50259/2017

Nominal Plaintiff,

-against-

MARCUS A. GRIFFITH, individually and as president of
the City Council of the City of Mount Vernon; ANDRE
WALLACE, ROBERTA L. APUZZO, LISA COPELAND
and J. YUHANNA EDWARDS, in their capacity as
members of the City Council of the City of Mount Vernon;
MAUREEN WALKER, individually and in her capacity as
Comptroller of the City of Mount Vernon

Motion Return Date:
March 21, 2017
Motion Seq. #1

Defendants.
-----X

The following papers (e-filed documents 4-21; 25; 40-42; 44-46) were read on the **E-filed** motion by plaintiffs for an order granting a preliminary injunction enjoining defendants from suspending, terminating or interfering with plaintiffs' salary, wages and employment benefits, and enjoining defendants from disrupting, obstructing or interfering with plaintiffs' ability to perform their employment obligations and the provision of municipal services.

Order to Show Cause, Affirmation (Exhibits A-C)
Affidavit (Exhibits A-C)
Affidavit (Exhibit A)
Affidavit (Exhibits A-B)
Affidavit (Exhibit A)
Affirmation (Exhibits A-B)
Memorandum of Law in Opposition
Affirmation in Opposition (Exhibit A)
Reply Affirmation (Exhibit A)
Reply Affidavit

Upon reading the foregoing papers it is

ORDERED the motion is granted, and defendants are preliminarily enjoined from suspending, terminating or interfering with plaintiffs' salary, wages and employment benefits, and enjoined from disrupting, obstructing or interfering with plaintiffs' ability to perform their employment obligations and the provision of municipal services; and it is further

ORDERED the parties are directed to appear on August 7, 2017, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 800, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

On December 28, 2016, the City Council of the City of Mount Vernon adopted an ordinance which declared the positions in city government held by plaintiffs¹ to be vacant, and directed the Comptroller to stop paying and providing benefits to plaintiffs. In response plaintiffs commenced this action and at the same time moved for an order granting a preliminary injunction enjoining enforcement of the ordinance. The plaintiffs claim the City Council had no authority to declare the positions vacant.

Section 14 of the Charter of the City of Mount Vernon (City Charter) provides, "[t]here shall be appointed by the Mayor, to hold office during his pleasure, a Commissioner of Public Works, . . . a Commissioner of Public Safety, [and] a Corporation Counsel."

Section 15 of the Charter provides, "[e]very person . . . appointed to office shall possess qualifications prescribed by §3 of the Public Officers Law."

Public Officers Law §3 of the State of New York provides "[n]o person shall be capable of holding civil office who shall not, . . . if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he or she shall be chosen."

Public Officers Law §3(2) provides that a member of the police force of a municipal corporation does not have to be a resident of that municipal corporation if he or she resides in the county in which the municipal corporation is located or in a contiguous county.

Public Officers Law §Section 3(2-a) provides that a member of the sanitation department of a municipal corporation does not have to be a resident of that municipal corporation if he or she resides in a county contiguous to the municipal corporation.

The plaintiff, Lawrence Porcari, was appointed Corporation Counsel by the Mayor of the City of Mount Vernon. Mr. Porcari does not reside in the City of Mount Vernon.

¹ The positions were Deputy Commissioner of Public Safety, held by plaintiff, Joseph Spiezio; Corporation Counsel, held by plaintiff, Lawrence Porcari; Special Assistant to Mayor, held by plaintiff, Maria Donovan; 3rd Assistant Corporation Counsel, held by plaintiff, La'Teea Goings; and Commissioner of Public Works, held by plaintiff, Ralph Uzzi.

The plaintiff, Joseph Spezio, was appointed Deputy Commissioner of Public Safety of the City of Mount Vernon. The record does not state who appointed him but presumably it was the Commissioner of Public Safety pursuant to City Charter §114. Mr. Spezio does not live in the City of Mount Vernon, but he does live in Westchester County, the county in which Mount Vernon is located.

The plaintiff, Ralph Uzzi, was appointed Commissioner of Public Works by the Mayor. The record does not disclose where Mr. Uzzi resides. The court has been advised that Mr. Uzzi has resigned his position after the filing of the motion for a preliminary injunction.

The plaintiff, Maria Donovan, was appointed as Special Assistant to the Mayor by the Mayor. The record does not disclose where Ms. Donovan resides.

The plaintiff, La'Teea Goings, was appointed Assistant Corporation Counsel, presumably by the Corporation Counsel. Ms. Goings submitted an affidavit stating that she resides in the City of Mount Vernon. Defendants submitted no evidence that Ms. Goings does not reside in Mount Vernon.

On December 28, 2016, plaintiff, Lawrence Porcari, was the Corporation Counsel of the City of Mount Vernon.

On December 28, 2016, plaintiff, Joseph Spiezio, was the Deputy Commissioner of the Department of Public Safety Department of the City of Mount Vernon.

On December 28, 2016, plaintiff, Ralph Uzzi, was the Commissioner of the Department of Public Works for the City of Mount Vernon.

On December 28, 2016, plaintiff, Maria Donovan, was a Special Assistant to the Mayor for the City of Mount Vernon.

On December 28, 2016, plaintiff, La'Teea Goings, was an Assistant Corporation Counsel for the City of Mount Vernon.

On December 28, 2016, the City Council of the City of Mount Vernon, acting under the belief that the plaintiffs were not entitled to their positions because they were public officials who did not reside in the City of Mount Vernon, passed an ordinance over the veto of Mayor Richard Thomas which declared that the positions held by plaintiffs were vacant pursuant to Chapter 50, Article III, Section 50-38 of the Code of the City of Mount Vernon, and directed the Comptroller to "cease the payment of salary and benefits to the plaintiffs." The plaintiffs claim the action of the City Council was motivated, not by a desire to uphold a residency requirement, but by the political animus held by the Council for the Mayor. Plaintiffs claim the City of Mount Vernon has never abided by a residency requirement before the action taken here by the Council.

On December 29, 2016, the defendant, Maureen Walker, Comptroller for the City of

Mount Vernon wrote to each plaintiff and advised that the Department of Finance must stop paying his or her salary and wages effective immediately.

On January 6, 2017, plaintiffs filed a summons with notice,² and moved by order to show cause for a preliminary injunction enjoining enforcement of the ordinance. The court (Ruderman, J.) signed the order to show cause temporarily enjoining defendants from suspending, terminating or interfering with plaintiffs' salary, wages and benefits and enjoining any interference with the plaintiffs' performing their duties to the City of Mount Vernon pending determination of the motion for a preliminary injunction.

"Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly. As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction" (*Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 149 A.D.3d 1121, 1122 [2d Dept 2017] [citations omitted]).

Here, the plaintiffs demonstrated their entitlement to a preliminary injunction.

Likelihood of Success on the Merits

Plaintiffs demonstrated a likelihood of success on the merits.

The defendants cited Chapter 50, Article III, Section 50-38 of the Code of the City of Mount Vernon as authority for its adoption of the ordinance which declared the positions held by plaintiffs to be vacant and directing the Comptroller to cease paying salary and benefits to plaintiffs.

Chapter 50, Article III, Section 50-38 of the Code of the City of Mount Vernon provides:

"In accordance with Section 15 of the Charter of the City of Mount Vernon no person shall be appointed as an officer of the City of Mount Vernon unless he complies with the residence requirements contained in the Public Officers Law of the State of New York pertaining the appointment of local public

² On February 15, 2017, the plaintiffs served a complaint alleging two causes of action. The first cause of action seeks judgment declaring the ordinance passed on December 28, 2016, null and void. The second seeks a permanent injunction enjoining defendants from terminating the plaintiffs' employment, from stopping plaintiffs' salary and benefits and from interfering with the performance of plaintiffs' employment duties.

officers. Every local office of the City of Mount Vernon shall become vacant if the person holding such office shall cease to be an inhabitant of the City of Mount Vernon.”

The ordinance passed by the City Counsel on December 28, 2016, states:

“The City of Mount Vernon, in City Council convened, does hereby ordain and enact:

Section 1. The following offices are declared ‘vacant’ pursuant to Chapter 50, Article III, Section 50-38 of the Code of the City of Mount Vernon; Deputy Commissioner of Public Safety (Joseph Spezio); Corporation Counsel (Lawrence A. Porcari, Esq.); Special Assistant to the Mayor (Maria Donovan, Esq.); 3rd Assistant Corporation Counsel (La’Tea Goings, Esq.); and Commissioner of Public Works, (Ralph Uzzi).

Section 2. The Comptroller is hereby authorized and directed to cease the payment of salary and benefits to the individuals identified in Section 1 above,

Section 3. This ordinance shall take effectively immediately.”

By passing this ordinance the City Council implicitly determined as a matter of law that the plaintiffs were not residents of the City of Mount Vernon, or that, under the residency requirements of the City of Mount Vernon and the Public Officers Law, they were not entitled to the positions to which they were appointed. In passing the ordinance the Council is likely to have exceeded its authority. The authority of the City Council is set forth in Section 32 of the Charter of the City of Mount Vernon. It provides the City Council “has authority to enact ordinances, not inconsistent with the law, for the government of the City and the management of its business, for the preservation of good order, peace and health, for the safety and welfare of its inhabitants and the protection and security of their property; and its authority, except as otherwise provided in this chapter or by law, is legislative.”

The positions the Council declared vacant are positions to which the Mayor, or the Mayor’s appointee, has the sole authority to make appointments (City Charter §15). Moreover, City Charter §15 provides that the Mayor’s appointees hold office at his pleasure. Thus, the City Charter gives the Mayor exclusive authority to terminate the employment of his or her appointees. The City Charter does not give its legislative body, the City Council, the executive authority to terminate the employment of the Mayor’s appointees.

While it is true that the City Charter incorporates the provisions of Public Officers Law which mandate that local officers be residents of the municipality, there are exceptions to that requirement. For example, Public Officers Law §3(2) provides that members of its police force do not need to reside in Mount Vernon as long as they reside in the County of Westchester or in a contiguous county; and Public Officers Law §3(2-a) provides that members of a municipality’s sanitation department (Department of Public Works in Mount Vernon) are not required to live in Mount Vernon as long as they reside in the County of Westchester. Moreover, there is authority for the proposition that the Corporation Counsel is not a public officer within the meaning of the

Public Officers Law, and thus not required to live in the City of Mount Vernon (*see, Matter of Dawson v Knox*, 231 App. Div. 490 [3rd Dept 1931], *aff'd* 267 NY 565 [1935]; *Rappel v Roberts* (79 Misc2d 201 [1973]; *Senecal v City of Cohoes* 27 AD2d 773 [3d Dept 1967]).³ Finally, it is not certain that an assistant corporation counsel or the Mayor's special assistant is a public officer within the meaning of the Public Officers Law.

Accordingly, under the law it is possible, depending on circumstances, that the positions the City Council declared vacant (Deputy Public Safety Commissioner and Public Works Commissioner) are *not* public offices subject to the residency requirement of the Public Officers Law (*see*, Public Officers Law §3[2] and §3[2-a] [exceptions for members of a police force and members of the sanitation department]), or that the positions are *not* considered public offices under the Public Officers Law (Corporation Counsel and his assistants pursuant to case law holding a corporation counsel is not a public officer). By making the legal determination that these positions were public offices subject to the residency requirement of the City Charter, the Public Officers Law and the case law decided thereunder, the City Council was likely improperly performing a judicial function since the Council purported to determine as a matter of law that the positions held by plaintiffs were vacant.

Irreparable Harm

The plaintiffs established they may suffer irreparable harm in the absence of a preliminary injunction by demonstrating they would lose benefits which cannot be replaced in the event it is finally determined that plaintiffs are entitled to the relief they seek.

Balancing of Equities

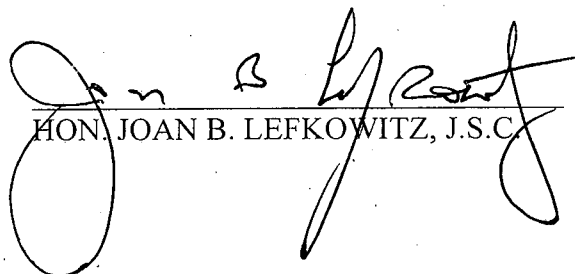
The equities favor the plaintiffs. It is likely that the City Council may have exceeded the authority granted to it by the City Charter in declaring positions, to which the Mayor has exclusive power to appoint and which may *not* be subject to the residency requirement of the City Charter and the Public Officials Law, vacant. In addition, defendants failed to demonstrate

³ The court notes that the question whether a corporation counsel is a public officer is not settled. There is authority for finding that a corporation counsel is a public officer (*see, e.g., Thompson v Hofstatter*, 265 NY 54 [1934]; *DesPres v Niagra County Supervisors*, 37 Misc 2d 1087 [1963]). Several factors must be examined before making a determination whether the corporation counsel of a municipality is a public officer within the meaning of the Public Officers Law, including, but not limited to, whether an oath is taken, whether the appointee exercises some portion of sovereign power, and whether the duties of the appointee are continuing in nature or occasional and intermittent. The court here makes no finding whether or not the Corporation Counsel of the City of Mount Vernon is a public officer because it need not reach the issue in the context of this proceeding in which the court finds it is likely that the City Council lacked the authority to make the judicial determination that the Corporation Counsel was a public officer within the meaning of the Public Officers Law.

that the plaintiffs pose a risk of harm to the City if they continue to perform their duties. Finally, the plaintiffs may be denied the benefits and the salary to which they ultimately may be entitled.

ENTER,

Dated: White Plains, New York
July 5, 2017


HON. JOAN B. LEFKOWITZ, J.S.C.