

**Porcari v Thomas**

2019 NY Slip Op 30710(U)

January 15, 2019

Supreme Court, Westchester County

Docket Number: 50259/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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

Plaintiffs,

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

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

Defendants.

CITY OF MOUNT VERNON,

Nominal Defendant.

-----X  
MARCUS A. GRIFFITH, 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, in her capacity as Comptroller of the City of  
Mount Vernon.

Third-Party Plaintiffs,

-against-

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

Third-Party Defendant.  
-----X

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.

DECISION & ORDER

Index No: 50259/2017

Motion Return Date:  
October 12, 2018  
Motion Seq. #2

The following papers (e-filed documents 65-101) were read on the motion by plaintiffs for an order granting summary judgment.

Notice of Motion, Affirmation (Exhibits A-G)  
Affidavit in Support (Exhibits H-J)  
Memorandum of Law in Support  
Affirmation, Affidavit in Opposition (Exhibits A-H)  
Memorandum of Law in Opposition  
Reply Affirmation  
Reply Memorandum of Law

Upon reading the foregoing papers it is

ORDERED, ADJUDGED AND DECREED the motion is granted, and the ordinance which the City Council of the City of Mount Vernon adopted on December 28, 2016, and which declared the positions in city government held by plaintiffs to be vacant, is hereby declared invalid and is of no force and effect; and it is further

ORDERED the branch of the motion seeking a permanent injunction is denied as academic; and it is further

ORDERED the branch of the motion seeking an order dismissing the third-party complaint is granted, and the third-party complaint is dismissed without prejudice to the commencement of a timely Article 78 proceeding.

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 plaintiffs to be vacant, and directed the Comptroller to stop paying and providing benefits to plaintiffs. In response plaintiffs commenced this action seeking a declaration that the ordinance was invalid and a permanent injunction enjoining enforcement of the provision of the ordinance which directed the Comptroller to "cease the payment of salary and benefits to the identified individuals." 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.

The plaintiff, Joseph Spiezio, 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. Spiezio 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."

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,<sup>1</sup> 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.

On July 5, 2017, the court (Lefkowitz, J.) granted plaintiffs' motion and issued a preliminary injunction. Two weeks later defendants filed an answer and a third-party complaint. The third-party complaint seeks a judgment declaring the Mayor exceeded his authority in making the appointments and a judgment declaring the Mayor must "deem" the relevant positions to be vacant.

Following the completion of discovery the plaintiffs move for an order granting summary judgment declaring the ordinance invalid and dismissing the third-party complaint.

The plaintiffs assert the City Council had no authority to adopt the ordinance declaring the positions vacant. The plaintiffs claim 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.

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

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<sup>1</sup> On February 15, 2017, the plaintiffs served a complaint alleging two causes of action. The first cause of action seeks a 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.

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 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 Council 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 Spiezio); Corporation Counsel (Lawrence A. Porcari, Esq.); Special Assistant to the Mayor (Maria Donovan, Esq.); 3<sup>rd</sup> 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 qualified for the positions to which they were appointed.

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 [3<sup>rd</sup> 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]).<sup>2</sup> Finally, it is not certain that an assistant corporation counsel or the Mayor's special assistant is considered 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]), and 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).

The authority of the City Council of Mount Vernon is legislative. The December 28, 2016, ordinance is not a legislative act since, in effect, it fires persons who occupy their positions pursuant to the power to appoint granted to the Mayor by the Charter. The court understands that the City Council, by its approval of the ordinance, was responding to its opinion that the plaintiffs were not entitled to their positions by operation of the City Charter, City Code and Public Officers Law. However, the Council's authority is limited to legislative acts. "The legislative power of the City is vested in a City Council and it has authority to enact ordinances, not inconsistent with 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 only" (City Charter, City of Mount Vernon, Article V, Section 32). Here, the ordinance declaring vacant certain positions which were filled by the Mayor's appointment is not designed to further the government or management of the City, and it is not designed to preserve the good order, peace, health, safety or welfare of the citizens of Mount Vernon. Thus, it is invalid as exceeding the Council's legislative authority.

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<sup>2</sup> 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 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.

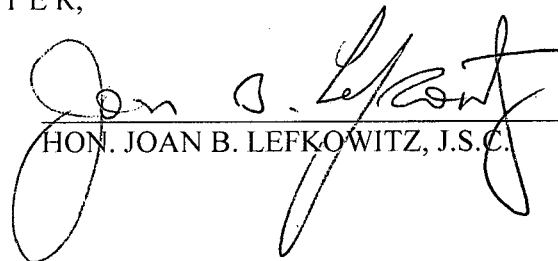
Moreover, there is a legitimate legal dispute as to whether the positions the Council attempted to declare vacant by its ordinance were governed by, or exempted from, the residency requirement of the City Charter, City Code and Public Officers Law. By making the legal determination that these positions were public offices subject to the residency requirement of the Charter, the Code, the Public Officers Law, and the case law decided thereunder, the Council was improperly performing a judicial function. The Council was improperly making the legal determination that, under *their* interpretation of the law, the plaintiffs did not qualify for the positions to which they were appointed by the Mayor. Only the judicial branch can finally determine whether or not the appointments were authorized by the City Charter, the City Code or the Public Officers Law.

Therefore, since the Council acted without authority, the December 28, 2016 ordinance is declared invalid and of no force and effect.

The Council attempted to remedy its unauthorized legislation by serving a third-party *complaint* seeking a judicial declaration that the mayor exceeded his authority and a declaration the Mayor must "deem" the positions vacant. Such declarations can only be made in an Article 78 *proceeding* (see, CPLR 7801, *et seq*). Thus, the third-party complaint is dismissed without prejudice to the commencement of a timely Article 78 proceeding.

ENTER,

Dated: White Plains, New York  
January 15, 2019



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