

Matter of Harbeth, LLC v City of New York
2021 NY Slip Op 30378(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 150039/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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In the Matter of HARBETH, LLC, BORYK &
KESSEMAN, LTD., CASK AND CAVE, INC., d/b/a
TOP HOPS BEER SHOP, 98 ALLEN REALTY, INC.,
CHARLES GLIWA, and LIAM MCDERMOTT

DECISION AND ORDER

Index No.
150039/2021

Petitioners,

-against-

THE CITY OF NEW YORK, BILL DE BLASIO, in his
capacity as the Mayor of the City of New York, THE
CITY OF NEW YORK DEPARTMENT OF HOMELESS
SERVICES, STEVEN BANKS, in his capacity as the
Commissioner of the New York City Department of
Homeless Services; and NOT ON MY WATCH, INC.,

Respondents.

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NERVO, J.:

In this Article 78 proceeding, petitioners seek to enjoin respondents from operating a “Stabilization Bed Program” (hereinafter “the Program”) at the Blue Moon Hotel (hereinafter “the hotel”), pursuant to a contract between the City of New York and Not On My Watch, a nonprofit that would operate the Program. Petitioners contend that the City has abused Emergency Executive Order 101, which suspends the City’s procurement rules for contracts that are necessary to address the COVID-19 pandemic, in executing the Program’s contract. Petitioners further contend that the respondents lack a rational basis for opening a temporary emergency stabilization bed program. Respondents oppose, contending petitioners lack standing to maintain this action and the determination to open the Program facility both complies with Executive Order 101 and has a rational basis.

STANDING

The Court first addresses petitioners' standing, as it must. It is well established that a petitioner challenging a government contract award must demonstrate "an injury in fact, distinct from that of the general public" (*Transactive Corp. v. New York State Dept. of Social Services*, 92 NY2d 579, 586 [1998]). Additionally, the petitioner must demonstrate the alleged injury is within the interests intended to be protected by the challenged statute (*Society of Plastics Indus. v. County of Suffolk*, 77 NY 2d 761 [1991]). Where a petitioner has not bid on the contract at issue, no injury-in-fact exists and the petitioner lacks standing (*id.* at 774; *see also Transactive Corp. v. New York State Dept. of Social Services*, *supra* at 587). Here it is undisputed that petitioners have not bid on the contract at issue, and therefore have not suffered an injury-in-fact, distinct from an injury to the general public. Consequently, petitioners are without standing.

To the extent that petitioners allege they have standing as taxpayers, their contention is misplaced. To be sure, where a petitioner alleges standing as a taxpayer, they need not demonstrate an injury-in-fact, instead they may bring suit to "prevent the unlawful expenditure of state funds 'whether or not such person is or may be affected or specially aggrieved' by the challenged action" (*Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 813 [2003]; State Finance law § 123-b[1]). However, they must challenge the expenditure of government funds in general (*id.*). "Us[ing] the expenditure of money as a pretense to challenge a governmental decision" is inappropriate and lacks "sufficient nexus to fiscal activities of the State" to provide standing (*Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801; *Rudder v. Pataki*, 93 NY2d 273, 281 [1999]).

Here, petitioners challenge the City’s determination to contract with Not On My Watch to operate the Program at Blue Moon Hotel based upon the hotel’s location and the respondents’ lack of experience in operating a shelter (“NOMW has no experience whatsoever running a homeless shelter” [bold emphasis removed] NYSCEF Doc. No. 23 at p. 18 [petitioners’ numbering] p. 23 [NYSCEF numbering]; *id. passim*). Although these claims are stylized as a challenge to the City’s expenditure in operating any stabilization bed program, petitioners’ claims challenge the City’s expenditure in letting *this* contract to *these* respondents. Such claims amount to a challenge of a governmental decision and are insufficient to create taxpayer standing. This finding is consistent with this Court’s recent decision in the matter of *Downtown New Yorkers v. City of New York*, raising similar issues (2020 NY Slip Op 33891 [Sup. Ct. NY. County; James, J.]).

To the extent petitioners allege standing on the basis of their close proximity to the hotel, that is to say as neighbors, the cases cited by petitioners in support of this claim are distinguishable on their facts (*see e.g. Matter of West 58th St. Coalition, Inc. v. City of New York*, 188 AD3d [Singh, J. 1st Dept 2020] [challenging City’s operation of a shelter on the basis of building code violations]). In those cases, zoning or building code variances triggered land use and environmental impact reviews, not present in the instant matter (*id.*, discussing ULURP and CEQR/SEQRA processes).

Assuming, *arguendo*, the Court were to determine petitioners had standing to maintain this action, it would find as follows.

EXECUTIVE ORDER 101

The Mayor issued Executive Order 101 on March 17, 2020, declaring in pertinent part, “the risk of community spread [of COVID-19]... impacts the life and health of the public” and suspending Chapter 13 of the City Charter and the Procurement Policy Board Rules where the agency determines, in writing, that a procurement is necessary to respond to the COVID-19 emergency (NYSCEF Doc. No. 36). On August 6, 2020 the DSS Commissioner declared, via an Amended Emergency Declaration, additional stabilization beds were necessary, as a result of nightly closures of the subway for disinfection, and these beds could not be procured through normal procurement methods (NYSCEF Doc. No. 34).

Petitioners contend that the City respondents’ decision to operate the Program at Blue Moon Hotel does not address any COVID-related concerns or otherwise respond to emergency circumstances. As such, petitioners contend, the Program is an abuse of Executive Order 101.

Here, the Commissioner has issued a written determination that procurement of stabilization beds is necessary to respond to the COVID-19 emergency, in that nightly cleaning of mass transit in New York City has resulted in an increased need for temporary housing for individuals experiencing homelessness. Contrary to petitioners’ position that this determination is not related to the COVID emergency, it is beyond cavil that there is an increased risk of person-to-person transmission of COVID-19 in dense congregate shelter settings, (*see* Guidance for Operators of Congregate Facilities Providing to Shelter to Individuals Who are Homeless - NYSCEF Doc. 41), and the Court

takes judicial notice of the CDC guidelines related to risks of COVID transmission in homeless shelters and unsheltered individuals on the street (United States Centers for Disease Control and Prevention - *Interim Guidance for Homeless Service Providers to Plan and Respond to Coronavirus Disease 2019*, which provides, “non-group housing options [such as hotels/motels] that have individual rooms should be considered for the overflow, quarantine, and protective housing sites [for individuals experiencing homelessness]”; *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease [COVID-19] for Homeless Service Providers and Local Officials*). The Commissioner’s determination that procuring additional stabilization housing is necessary to address community spread of COVID-19 is within the authority granted by Executive Order 101, and is therefore not an abuse of discretion, arbitrary or capricious, or an error of law.

Petitioners also speculate that the Program at Blue Moon Hotel will become a permanent shelter, without the requisite review and community input, and therefore, petitioners contend the decision to operate the Program is arbitrary and capricious. However, the Program’s contract is not permanent, but rather for a limited term as a temporary emergency site. Should the Program at Blue Moon Hotel become permanent, petitioners may challenge such plan; however, that issue is not currently before the Court.

PRELIMINARY INJUNCTION

Petitioners seek a preliminary injunction enjoining respondents from operating the Program at Blue Moon Hotel. A preliminary injunction serves to maintain the status

quo, and is appropriate only where the movant: will suffer irreparable harm if the injunction is withheld, has demonstrated a likelihood of success on the merits, and the balance of equities favors movant (CPLR § 6301; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]).

Petitioners' claims of harm are entirely speculative, and in any event, petitioner has not established, via admissible evidence, that any harm they may suffer during the pendency of this matter is irreparable. Petitioners' contention that the area surrounding the hotel is inappropriate for a shelter, and the operation of the Program there will cause irreparable harm, is contradicted by their own papers on this motion stating that the area "where the Blue Moon Hotel is located is already home to seventeen (17) shelters" (NSYCEF Doc. No. 23 at p. 15 [petitioners' numbering] p. 20 [NSYCEF numbering]). Consequently, petitioners have not established a likelihood of success on the merits, nor have they established they will suffer irreparable harm if an injunction is not issued. Furthermore, and given the foregoing, the Court finds equity does not favor petitioners. Accordingly, there is no basis for an injunction.

CONCLUSION

Petitioners are without standing to maintain this action. Assuming, *arguendo*, that petitioners had standing, they have failed to establish they face irreparable harm, a likelihood of success on the merits, or that equity favors issuing an injunction, and the Court would deny their application on that basis.

Accordingly, it is

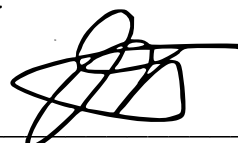
ORDERED that the petitioners lack standing to maintain this action; and it is further

ORDERED that the action is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 8, 2021

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