

Cattaraugus County v New York State Dept. of Health

2021 NY Slip Op 34037(U)

October 12, 2021

Supreme Court, Albany County

Docket Number: Index No. 908382-21

Judge: Roger D. McDonough

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

CATTARAUGUS COUNTY,

Petitioner/Plaintiff,

DECISION and ORDER

Index No. 908382-21

RJI No. 01-21-ST1960

-against-

NEW YORK STATE DEPARTMENT OF HEALTH; NEW YORK
STATE PUBLIC HEALTH AND HEALTH PLANNING COUNCIL;
HOWARD ZUCKER, in his official capacity as the Commissioner of
Health for the State of New York; and KATHLEEN COURTNEY
HOCHUL, in her official capacity as Governor of the State of New York,

Respondents/Defendants.

(Supreme Court, Albany County Article 78 Term)

Appearances:

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Roger D. McDonough, J.:

Petitioner seeks a preliminary injunction: (1) restraining the respondents, and those acting in concert with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance by petitioner's nursing homes with 10 NYCRR § 2.61. Respondents

oppose the requested injunctive relief. The underlying proceeding appears to be hybrid in nature, seeking relief under Article 78 and/or declaratory relief.

Procedural Background

Petitioner, via Order to Show Cause, sought a temporary restraining order (“TRO”) restraining the respondents, and those acting in concert with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance by petitioner’s nursing homes with § 2.61 until such time as a preliminary injunction hearing may be had. This Court (Justice Ryba) partially denied the TRO request, but did restrain respondents from enforcing any requirement preventing the covered entities from considering or granting an application for a religious exemption from § 2.61’s vaccination mandate. The Court was advised that the parties wanted the preliminary injunction matter to be considered on submission. The matter is fully submitted as to the preliminary injunction issue.

Background

Petitioner is the owner and operator of The Pines, two nursing homes licensed by the New York State Department of Health. Respondent New York State Department of Health (“NYSDOH”) is a state agency responsible for, *inter alia*, public health. Respondent New York State Public Health and Health Planning Council (“Council”) is an entity within NYSDOH that is tasked with advising respondent Commissioner on issues related to the preservation and improvement of public health. The Council’s functions also include the approval of regulations related to health codes. The remaining respondents’ roles are self-explanatory.

Respondents adopted § 2.61 in late August of 2021. As an emergency rule, § 2.61 went into effect immediately and is effective for 90 days. § 2.61 applies to “covered entities” including the hospitals and nursing homes where the petitioners work. The rule requires certain personnel to be fully vaccinated against COVID-19. § 2.61 further requires that the first dose be received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities.

The rule was promulgated under § 202.6 of the New York State Administrative Procedure Act (“SAPA”). Said section constitutes the emergency rule procedures for SAPA. The notice accompanying the rule cites the following statutes as authority: Public Health Law §§ 225(5),

2800, 2803(2), 3612 and 4010(4), and Social Services Law §§ 461 and 461-e.

Petitioner argues that the vaccine mandate will imperil public health and safety because it will result in a severe shortage at their two nursing homes. Specifically, petitioner points to approximately 30% of the two nursing homes employees refusing vaccination. Further, petitioner cites the existence of staffing shortages that existed even prior to § 2.61's mandates. Petitioner also describes the adequacy of existing COVID-19 protocols at their two nursing homes.

Legally, petitioner expresses concern that § 2.61 violates its employees' constitutional rights. In support, petitioner cites the arguments raised in various federal and state actions challenging § 2.61. Additionally, they rely on Judge Hurd's findings in granting injunctive relief as to religious exemptions. Similarly, they proffer claims by other parties regarding § 2.61's potential Title VII implications.

Petitioner also argues that it has standing as a unit of municipal government that is arguably obligated to comply with a State mandate that will violate a constitutional proscription. Alternatively, petitioner cites a Supremacy Clause issue for the proposition that it has standing to bring this action. Lastly, as to standing, petitioner cites its proprietary capacity as a nursing home operator. In this vein, petitioner argues that it has a cognizable right in the specific funds derived from fees generated from nursing home care.

Respondents provided an affidavit from NYSDOH's Medical Director of the Bureau of Immunization. Dr. Rausch-Phung indicates that her affidavit is based on her medical expertise, personal experience, review of NYSDOH's records, guidance from the Centers for Disease Control & Prevention ("CDC"), the executive orders issued by New York's Governor, and studies and publications related to COVID-19. She indicates that § 2.61 was adopted based on determinations from respondents that the mandate was necessary to immediately address an ongoing and rapidly worsening public health crisis. In particular, she notes the Delta variant's impact in terms of significantly increased transmissibility and the 10-fold increase in COVID-19 cases. Dr. Rausch-Phung also cites to CDC findings that the Delta variant may cause more severe illnesses than previous variants in unvaccinated individuals. Due to the Delta variant's impact, respondents sought to avoid a return to the heights of the pandemic when hospitals were

overwhelmed.

She contends that § 2.61 is necessary to protect New York's frontline healthcare workers and the vulnerable patient populations in certain healthcare sectors like nursing homes. Dr. Rausch-Phung also asserts that the regulation is tailored to focus on healthcare facilities that pose a unique risk of COVID-19 transmission. She cites statistical findings that patient facing healthcare professionals and their household members have threefold and twofold increased risks, respectively, of contracting COVID-19. The Doctor also notes that these types of healthcare workers tend to care for vulnerable individuals who are elderly, sick, possibly immunocompromised, etc. She cites the significant support for vaccine mandates for health care employees from such medical organizations as the American Medical Association, the American Nurses Association, the American Academy of Pediatrics and the Association of American Medical Colleges. In addition to certain federal vaccine mandates related to healthcare, she notes that the CDC has recommended that healthcare personnel all receive COVID-19 vaccination, particularly in vulnerable healthcare settings.

She opines that any staffing shortages attributable to resignations over the vaccine mandates pales in comparison to the potential staffing shortages that could be caused by a deadly outbreak among unvaccinated healthcare personnel. Dr. Rausch-Phung also notes that New York's Governor has put measures in place to address potential healthcare worker staffing shortages. She also notes that § 2.61 has already been successful, in terms of increasing vaccination rates, as nursing home staff vaccination levels had risen to 92% (for at least one dose) as of September 27th as compared to 71% as of August 24th (prior to the emergency rule). For adult care facilities the numbers were 89% as of September 27th as compared to 77% as of August 24th. Finally, the level for fully vaccinated hospital staff has risen to 85% as of September 27th as compared to 77% as of August 24th. She also advises that, based on preliminary self-reported data, the percentage of hospital staff receiving at least one dose as of September 27th is 92%. The Doctor stresses that time was and is of the essence in terms of the fall and winter weather and the holiday seasons. Additionally, she notes the importance of vaccination during the flu and cold season when similar Covid-19 symptoms could be mistaken for cold and flu.

Dr. Rausch-Phung also points to CDC and FDA findings that serious side effects from the vaccinations have been extremely rare despite the administration of nearly 380 million doses. Similarly, she points to CDC's findings regarding vaccine effectiveness in protecting vaccinated individuals against severe disease and death from the Delta variant and the other known variants. In her affidavit she also focuses and discusses the rarity of specific side effects including: (1) anaphylaxis; (2) vaccine induced thrombosis; and (3) Guillain-Barre Syndrome. Her affidavit also addresses the consideration and rejection of alternatives to the mandate including: (1) acceptable face coverings; and (2) constant testing.

As to religious/philosophical objections, she relies on the AMA's position that such nonmedical exemptions endanger the health of the unvaccinated medical care worker and those with whom the medical care worker comes in contact. Dr. Rausch-Phung also notes that existing regulations for hospitals, nursing homes and other medical entities already require that persons working therein be immune to measles and rubella. Said regulations contain no religious exemption. Additionally, she points to the absence of any religious exemptions from school vaccination requirements. Finally, she notes that all of the manufacturers of COVID-19 vaccines authorized in the United States have indicated that they not contain fetal cell lines nor human-derived materials. However, she does note that fetal cell lines, consistent with the development of other medical technologies, were used in the development of the Moderna and Pfizer vaccines as well as the production of the Johnson and Johnson vaccine.

The Doctor also stresses that § 2.61 is specifically limited to only those medical and healthcare personnel who have direct contact with other covered personnel, patients and residents. Finally, she cites multiple medical studies that refute the proposition that natural immunity is equal to or greater than the immunity afforded by the vaccines.

Respondents also provided an affidavit from a NYSDOH representative with updated vaccination rates for petitioner's two nursing homes. Therein, NYSDOH indicates that one of the nursing homes has risen to 92.5% of its employees receiving at least their first dose. The second has risen to an 85.1% first dose level.

Preliminary Injunction Standard

Petitioner bears the burden of showing: (1) a likelihood of success on the merits; (2) that

it will suffer irreparable harm if the injunction is not granted; and (3) a balance of equities in its favor (*see, STS Steel, Inc. v Maxon Alco Holdings, LLC*, 123 AD3d 1260, 1261 [3rd Dept. 2014]). The “likelihood of success” standard does not require conclusive proof (*see, Ying Fung Moy v. Hoho Umeki*, 10 A.D.3d 604, 605 [2nd Dept. 2004]). Irreparable harm requires an injury for which money damages are insufficient (*see, DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2nd Dept. 2009]). Additionally, the petitioner must establish that such harm is neither remote nor speculative (*see, Golden v Steam Heat*, 216 AD2d 440, 442 [2nd Dept. 1995]). Finally, the moving party must show that the irreparable injury it will suffer is greater than the harm caused to the opposing party via imposition of the temporary relief (*see, Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 [3rd Dept. 1979]).

A preliminary injunction is a form of “drastic relief” and accordingly should be issued cautiously (*see, Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d 1092, 1095 [3rd Dept. 2014]). A preliminary injunction ruling does not constitute “law of the case” nor does it represent an ultimate adjudication on the merits (*see, Id.*).

Discussion

Petitioner argues: (1) that § 2.61 lacks statutory authority; (2) that there was no necessity for the adoption of § 2.61 on an emergency basis; (3) that the vaccine mandate is arbitrary and capricious; and (4) that the vaccine mandate may force petitioner to violate the Constitution and federal law. Based on those arguments, petitioners advanced a single cause of action seeking to vacate, void and annul § 2.61.

Likelihood of Success¹

Sole Cause of Action

Petitioner argues that respondents failed to comply with the procedures for adopting emergency regulations. Specifically, petitioner argues that respondents failed to properly set forth a finding of an emergency. In particular, petitioner points to: (1) the absence of an explanation why immediate adoption was necessary to prevent transmission at the covered entities; (2) the absence of data or statistics to support their conclusory assertions; (3) the timing

¹ As a preliminary matter, the Court finds that petitioner has made a sufficient showing as to standing and capacity at this stage of the proceeding.

of the adoption in relation to the dropping of the state of emergency and the effectiveness of existing masking and testing procedures.

Additionally, petitioner argues that § 2.61 is arbitrary, capricious and without a rational basis. Petitioner again cites to the absence of statistical data as to risks of spreading COVID-19 in health care settings as well as for the conclusion as to the efficacy of antigen testing. Further, petitioner argues that § 2.61 will actually create staffing shortages rather than preventing them. Petitioner describes the ripple effect on other healthcare industries that this staffing shortage will result in. The petitioner also points to the illogical nature of respondents administratively creating a staffing shortage during a pandemic. Further, petitioner questions why § 2.61 does not address natural protection/immunity as well as the risks that vaccine-related complications might detrimentally impact otherwise healthy staff.

Respondents contend that controlling case law holds that they were not required to include a religious exemption in § 2.61. Specifically, they note the longstanding principles that constitutional religious freedoms simply do not include the freedom to expose the community to communicable diseases. Further, in their expert's affidavit, they rely on the absence of any religious exemption in existing regulations as to measles and rubella in healthcare settings.

They also stress that the promulgation of § 2.61 satisfies the standard of review this Court must utilize in considering SAPA compliance. Specifically, they contend that respondents' determination that an emergency existed was in no way irrational, arbitrary or capricious. Further, respondents rely upon the information provided in the notice of the emergency adoption as to the increase in COVID-19 cases, emergence of the Delta variant, the dangers posed by unvaccinated individuals and the effective and safe nature of the vaccines. Respondents also cite in detail how § 2.61 complies with every requirement set forth in SAPA § 202(6)(d).

As to the separation of powers issue, respondents maintain that the factors set forth in the Boreali decision favor respondents in this matter (Matter of Boreali v Axelrod, 71 NY2d 1 [1987]). They argue that respondents adopted an across the board requirement as opposed to weighing competing or special interests unrelated to the public health goal. Respondents further note that there is no evidence of the Legislature ever voting and rejecting any legislation barring religious exemptions from vaccine mandates for healthcare workers. Additionally, respondents

contend that they are simply executing policy decisions already articulated by the Legislature via a comprehensive statutory scene. In particular, respondents rely upon Public Health Law § 225 which empowers the Council to issue regulations concerning the control of communicable diseases and ensuring infection control at healthcare facilities and other premises. Respondents also contend that the Governor's former emergency powers related to the ability to issue certain Executive Orders as opposed to any curtailment of respondents' statutory authority to issue rules and regulations. Based on the foregoing, and the Legislature's previous determination to eliminate exemptions to vaccine requirements for schoolchildren, respondents argue that § 2.61 was promulgated within a statutory scheme and is consistent with pre-existing legislative policy decisions.

As to the third factor, respondents again note that there is no prior legislative bill (at any stage of the legislative proceeding) concerning a vaccine mandate for healthcare workers. The respondents also contend that § 2.61 represents the implementation of legislatively-expressed policies while responding to a public health crisis that was directly impacting regulated healthcare and nursing home entities. Finally, respondents note that the fourth factor clearly weighs in respondents' favor and should not be in meaningful dispute.

In terms of the irrational/arbitrary and capricious standard, respondents argue that § 2.61 was the result of a thorough and well-reasoned determination to protect New York's public health in response to the COVID-19 spread and the impact of the Delta variant.

In reply, petitioner re-stresses the absence of direct and controlling statutory authority for the promulgation of § 2.61. Petitioner also distinguishes the impact of the measles and rubella requirements versus the greater number of staff impacted by § 2.61. Additionally, petitioner maintains that the Boreali analysis is unavailing because petitioner's focus is more upon the scientific support for the regulation as well as the freedom and liberty issues implicated here. Additionally, petitioner reiterates that § 2.61 does not address an emergency situation but actually created one in terms of a staffing shortage.

The Court has not been persuaded as to petitioner's likelihood of success as to the sole cause of action. As a subset of these findings, the Court concludes that petitioner is unlikely to succeed on their claim that the lack of a religious exemption renders § 2.61 unconstitutional or in

any way illegal. § 2.61 is neutral, has general applicability and respondents have proffered a sufficiently rational basis for its promulgation (*see, F.F. v State*, 194 AD3d 80, 84 [3rd Dept. 2021]). Accordingly, the Court finds that petitioners are unlikely to succeed on their claims as they pertain to the religious exemption. As such, no preliminary injunction will be issued as to the lack of the religious exemption, and the TRO on the issue is therefore lifted.

The Court also finds that petitioners are unlikely to succeed as to their SAPA challenge. The promulgation of the rule, and its supporting documentation, adequately established the necessity of the immediate adoption of the rule for the preservation of New York's public health, safety and general welfare (SAPA § 202(6)). The record also reflects that the rule was promulgated during the continuing and significant impact of the Delta variant and only after FDA approval of the Pfizer vaccine. Additionally, § 2.61 was promulgated at a time when the federal government was advising that a condition of participating in Medicare and Medicaid programs would be requiring nursing homes to mandate the COVID-19 vaccination for workers. Further, respondents' expert's affidavit adequately established the threats from the Delta variant to the impacted workers and entities as well as the success of the vaccines in combating these threats. Accordingly, the Court finds that respondents clearly satisfied the requirements of SAPA § 202(6) as to the necessity for the immediate adoption of an emergency rule.

Additionally, again as to the likelihood of success issue, the Court finds that Public Health Law § 225(5) provides sufficient statutory authority for the promulgation of § 2.61. The remaining cited statutes, to varying degrees, serve to buttress respondents' compliance with the emergency rule statutory requirements set forth in SAPA § 202(6). Specifically, Public Health Law § 225(5) broadly authorizes respondent Council to deal with any matters affecting the improvement of public health in the state of New York. More specifically, the statute authorizes the Council to establish regulations for the maintenance of hospitals for communicable diseases as well as to establish regulations regarding the methods and precautions to be observed in addressing premises that have been vacated by persons suffering from a communicable disease. Public Health Law § 2800 specifically authorizes NYSDOH to exercise comprehensive responsibility related to hospitals and related services in terms of the prevention, diagnosis or treatment of human disease. Additionally, respondents have adequately established that Public

Health Law §§ 2803, 3612 and 4010 authorizes promulgation of rules and regulations to establish minimum standards for the covered entities as to the care and services provided to patients/residents. In sum, the Court finds that the full statutory scheme embodied in the cited Public Health Law sections provides adequate statutory authority to satisfy SAPA's emergency procedure requirements for § 2.61 (*see*, Matter of Hague Corp. v Empire Zone Designation Bd., 96 AD3d 1144, 1145-1146 [3rd Dept. 2012]).

Moreover, the Court concludes that all four factors proffered and discussed in Boreali support the legality of respondents' promulgation of § 2.61. As to the first factor, respondents have adequately established that § 2.61 does not in any way represent a balancing of competing interests between for example the public health and any particular industry or group (*see*, Garcia v New York City Dept. of Health & Mental Hygiene, 31 NY3d 601, 612-613 [2018]). Rather, the Court finds that respondents adequately balanced the relevant costs, benefits and considerations according to their preexisting obligations set forth by the Legislature in the Public Health Law. As to the second factor, for the reasons cited above in discussing statutory authority, the Court finds that respondents adequately established that they were executing policy decisions already articulated by the Legislature concerning public health, communicable diseases and the covered entities (*see*, Matter of Spence v Shah, 136 AD3d 1242, 1245-1247 [3rd Dept. 2016]). Analysis of the third factor also supports respondents' positions. Respondents have adequately established the complete absence of any prior legislative attempt concerning vaccine mandates for healthcare workers. Accordingly, there is insufficient proof that respondents have acted in an area where the Legislature repeatedly, or ever, tried and failed to reach agreement in the face of substantial public debate (Boreali v Axelrod, *supra* at 12-14). Finally, as noted above, the fourth factor is not in dispute. Based on the foregoing, and regardless of the particular weight affixed to any of the four factors, the Court finds that the relevant Boreali analysis adequately supports respondents' promulgation of § 2.61.

Finally, petitioners have not made an adequate showing that § 2.61 is unreasonable and unsupported by any evidence (Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health, 85 NY2d 326, 331-332 [1995]). In particular, as to respondents' showing, the Court finds that respondents have provided significant documented medical studies and

findings in support of the promulgation of § 2.61 (*see, Id.* at 332).

Based on all of the foregoing, and reviewing the cause of action through the prism of a preliminary injunction standard, the Court finds that petitioners have not adequately established a likelihood of success as to their sole cause of action.

Irreparable Harm

Petitioner points to the potential of violating constitutional rights and federal law as one example of potential hardships. A second is the staffing shortage that may impact public health. Conversely, petitioner argues that the respondents would not be significantly impaired by the status quo in light of the current protections in place to reduce the risk of COVID-19 transmission.

Respondents argue that, based on the caselaw regarding religious freedom and communicable diseases, petitioner will not be in a position of violating any constitutional or statutory provisions. They also argue that petitioner's economic and staffing shortage claims are too remote and speculative to merit injunctive relief.

In a reply affidavit, petitioner points to specific harm in terms of the halting of admissions at the nursing homes. The halt in admissions has led to a loss in revenue in lost patient care as well as in overtime payments and additional payments of higher hourly wages to vaccinated workers.

Having reached the above conclusion on likelihood of success, the Court need not reach the issue of irreparable harm (*see, Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Balancing of the Equities

As to the final prong, petitioner again relies on the absence of any actual emergency necessitating mandatory vaccinations for the covered entities. Petitioner maintains that, absent an emergency, any delay occasioned by injunctive relief would not prejudice respondents. For this point, petitioner again points to the adequacy of existing testing and masking procedures to continue to halt the transmission of COVID-19. As to petitioner's employees, petitioner notes the impact of: (1) staffing shortages; and (2) potential violations of their constitutional and statutory rights.

Respondents argue that the public health crisis exacerbated by the Delta variant means

that the public interest in battling the pandemic cannot be understated. They further note that petitioners' speculative and conclusory claims of constitutional lawsuits, staffing shortages and financial shortfalls, simply do not outweigh the pressing public interest. In reply, petitioner restresses its original arguments.

Having reached the above conclusion on likelihood of success, the Court need not reach the issue of balancing of equities(*see, Doe v Axelrod, supra*).

Based on all of the foregoing, the Court finds that preliminary injunctive relief is not appropriate here.

Petitioner's remaining arguments and requests for relief as to the preliminary injunction, have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings. Respondents' remaining arguments and requests for relief have been considered and found to be unnecessary to reach in light of the Court' findings.

Based upon the foregoing it is hereby

ORDERED that petitioners' request for a preliminary injunction is hereby denied in its entirety; and it is further

ORDERED that this Court's September 24, 2021 temporary restraining order is hereby lifted in its entirety.

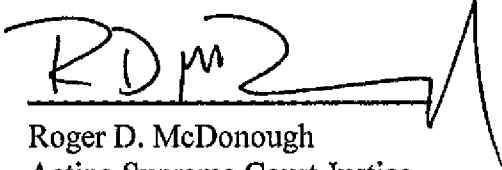
SO ORDERED.

This shall constitute the Decision and Order of the Court. This Decision and Order will be forwarded to the Albany County Clerk by the Court. A copy of the Decision and Order is being forwarded to counsel for all parties. The signing of this Decision and Order and delivery

of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the respondents is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order. As this is an E-FILED case, there are no original papers considered for the Court to transmit to the County Clerk.

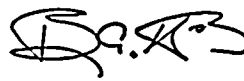
ENTER

Dated: Albany, New York
October 12, 2021



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered²:



10/12/2021

1. Verified Petition and Complaint, verified on September 24, 2021, with annexed exhibits;
2. Two Attorney Affirmations of Service regarding TRO by Sean W. Costello, Esq., dated September 27, 2021;
3. Affidavit of Valerie A. Deetz, sworn to September 30, 2021;
4. Affidavit of Dr. Elizabeth Rausch-Phung, M.D., M.P.H., sworn to September 30, 2021, with annexed exhibits;
5. Affidavit of Kelly Reed, sworn to October 1, 2021, with annexed exhibits;

² The parties also submitted memoranda of law in support of their respective positions. Petitioner served a reply memorandum of law as well. Petitioner's request to file a reply memorandum of law that exceeded the designated word count is hereby granted by the Court. The Court notes that similar relief was previously granted to the respondents.