

Marciano v de Blasio
2022 NY Slip Op 30100(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 160914/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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ANTHONY MARCIANO,
Plaintiff,

- v -

BILL DE BLASIO, DAVE CHOCKSHI, DERMOT SHEA, THE
CITY OF NEW YORK, THE NEW YORK CITY BOARD OF
HEALTH

Defendant.

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INDEX NO. 160914/2021
MOTION DATE 12/01/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 19, 20, 21, 24, 25

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Petitioner seeks an order, inter alia, permanently restraining and enjoining respondents from enforcing Vaccination Orders.1 Following argument on that portion of the application seeking a temporary restraining order, the Court granted a temporary injunction on the basis that petitioner faced irreparable harm should he be terminated due to noncompliance with the Vaccination Orders (see NYSCEF Doc. No. 25 at p. 47 line 5 through p. 48 line 15); no party has appealed this Court’s decision. The Court notes that following its decision on the temporary injunctive relief, respondents filed a removal

1 “Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for City Employees and Certain City Contractors” (hereinafter referred to as “Vaccination Orders”) (NYSCEF Doc. No. 5 and 6).

petition to United States District Court for the Southern District (NYSCEF Doc. No. 23), rather than appeal this Court's determination to the Supreme Court, Appellate Division, First Department. Effectively, respondents decided to try their luck in this State Court forum, and then when faced with an interlocutory ruling which was not to their liking, respondents decided to remove the matter to federal court, essentially attempting to assert a legal mulligan. The decision to proceed, on the merits, in this state court forum is "affirmative invocation of our courts' jurisdiction" (*see generally, Belfand v. Petosa*, 196 AD3d 60 [1st Dept 2021] waiver of sovereign immunity in removal; *see also Taylor v. New Jersey Tr. Corp.*, 2021 NY Slip Op 06462 [1st Dept 2021])

Nevertheless, where a party seeks removal to federal court, "the state court is not divested of its jurisdiction, unless the petition shows the jurisdictional facts [supporting removal], and for that reason the [state] court may examine the petition and if be insufficient, it may disregard it and proceed with the action" (*Heath v. Santa Lucia Co.*, 196 AD 446 [1st Dept 1921]; *see also Phoenix Ins. Co. v. Pechner*, 95 US 183, 185 [1877] "This right of removal is statutory. Before a party can avail [them]self of it, [they] must show upon the record that [their] case ... comes within the provisions of the statute").

Here, as an initial matter, no further documents have been filed in this Court's record following respondents' Affirmation of Removal to Federal Court, excepting for the transcript of proceedings previously held in this Court, and the status of the federal proceeding, if any, is unknown here. This Court's record reflects that the matter is active and pending.

First, assuming that the federal court has not yet ruled on the removal petition, this Court analyzes the substance of the petition, which, at bottom, sounds in New York State law, to wit, whether the respondents have the authority, under state law, to issue the Vaccination Orders. The issues raised in the petition which sound in federal law are, at best, ancillary thereto. Put simply, the petition states, "[t]he legal question raised by Petitioner is very simple: Does the Health Commissioner have the legal authority to issue the Vaccination Order?" (NYSCEF Doc. No. 1, Petition at ¶ 4). Notably, petitioner does not allege that the state statute unconstitutionally provides respondents with authority to issue the Vaccination Orders. Consequently, upon review, this Court finds that petition does not allege sufficient jurisdictional grounds for removal, and therefore, disregards same (*Heath v. Santa Lucia Co.*, 196 AD 446). Furthermore, as outlined above, the Court finds that respondents' removal application, made after filing substantive opposition

on the instant petition – which effectively serves as an answer to the petition – and following this Court’s interlocutory ruling against respondents, amounts to an improper attempt to delay petitioner’s right to move forward with this matter, and is consequently abusive. Where a removal petition is without merit, or abusive, it is well established that the state court does not lose jurisdiction (*Astoria Federal Sav. & Loan Ass’n/ Fidelity New York FSB v. Lane*, 64 AD3d 454, 455 [1st Dept 2009]; accord *Motton v. Lockheed Martin Corp.*, 692 So.2cd [LA.App. 1997] improper removal petition does not divest state court of jurisdiction; *Hunnewell v. Palm Beach County Code Enforcement Bd.*, 786 So.2d 4 [Fl.App. 2000]; *Attig v. Attig*, 177 Vt. 544 [2004]; *Citizens State Bank v. Harden*, 439 NW2d 677 [Iowa App. 1989]).

As to the merits of the petition, this matter turns on whether the respondents have authority to require City employees to be vaccinated against COVID-19. While the COVID-19 pandemic is unprecedented in recent history, the issues raised by this matter are not, and indeed have been passed upon by the Appellate Division, Second Department in the year prior to commencement of this action (*C.F. v. New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020]). There, the Second Department found:

The New York City Charter empowers the City Health Department with “jurisdiction to regulate all matters affecting health in the city of New York” (NY City Charter § 556), including matters relating to “communicable and chronic diseases and conditions hazardous to life and health” (id. § 556 [c] [2]). Administrative Code of the City of New York § 17-109 delegates to the Department—and, by extension, the Board (see NY City Charter § 558 [c])—the authority to “take measures . . . for general and gratuitous vaccination” (Administrative Code of City of NY § 17-109 [b]). The Board therefore has the “authority to adopt vaccination measures” [emphasis supplied]

(*C.F. v. New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020]).

Consequently, in the absence of contrary authority from the Appellate Division, First Department, this Court follows the binding authority of *C.F. v. New York City Dept. of Health & Mental Hygiene* and denies the petition.

Second, and as an alternative finding, assuming that federal court has granted the removal petition and has not otherwise remanded the matter to this Court, the matter is dismissed on such basis.

Accordingly, it is

ORDERED that the petition is denied; and it is further

ORDERED that the temporary restraining order issued by this Court on December 14, 2021 is vacated; and it is further

ORDERED that the matter shall be marked disposed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

1/12/2022
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN


HON. FRANK P. NERVO

NON-FINAL DISPOSITION J.S.C.
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE