

Biro v Adams

2023 NY Slip Op 32349(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 100937/2022

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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INDEX NO. 100937/2022

ANDREA BIRO, JEANNIE VEGA, GRAIG YOUNG,
RAYMOND VELEZ, JOY NEWBALL, JOSEFINA TAVERAS,

MOTION DATE 01/24/2023

Petitioners,

MOTION SEQ. NO. 001 002

- v -

ERIC LEROY ADAMS, ALVING BRAGG,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 20, 21, 22, 23, 24

were read on this motion or DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion for DISMISSAL

Petitioners Andrea Biro, Jeannie Vega, Graig Young, Raymond Velez, Joy Newball and Josefin Tavares, members of an organization called the "New York de jure Assembly," petition the Court for an order convening a summary judicial inquiry, pursuant to New York City Charter §1109¹. Specifically, petitioners seek an inquiry into the conduct of New York City Mayor Eric Leroy Adams in issuing Executive Order No. 1—which continued in effect all executive orders issued by former Mayor Bill de Blasio that were in effect as of December 31, 2021—and Emergency Executive Order No. 1, which continued former Mayor Bill de Blasio’s “Key to NYC” emergency executive orders (i.e., Emergency Executive Order Nos. 334, 317, and 225) which

¹ This action was converted to e-filing on February 23, 2023. While petitioners were directed by the Court to file their petition and order to show cause on NYSCEF, they have not done so.

required COVID-19 vaccination for indoor entertainment, recreation, dining, and fitness settings. Petitioners assert that these executive orders were unlawful and violated 18 USC §4, 5 USC § 7311, and 19 USC §210.267.

Petitioners also seek to investigate Mayor Adams's failure to respond to certain notices sent by petitioners which purportedly informed Mayor Adams of his "violations of duty and overreach of authority while acting in the capacity of Mayor of New York City" as well as interrogatories attached thereto. Although these interrogatories are not submitted in connection with the petition, counsel for Mayor Adams avers that these interrogatories sought answers to the following questions:

- (1) Do you have an Oath of Office for the position of Mayor of the City of New York, et al.? If yes – provide an official copy of your most recent Oath of Office with affidavit
- (2) What information was provided by the Commissioner of the Department of Health and Mental Hygiene as "sufficient proof to authorize a declaration of such peril" as per the Charter of the City of New York et al., §563? Provide documentation used for the declaration
- (3) Did you and the Department of Health and Mental Hygiene "arrange, with the approval of the mayor, for the rendition of services and operation of facilities by other agencies of the city" as required by the Charter of the City of New York, et al., § 556(5)? If so, provide evidence of arrangements and approvals
- (4) Does 48 CFR 52.212-5 exist between the men and women of New York City and the City of New York? If so, provide proof
- (5) Were all men and women informed that they were participants in a clinical trial as per 21 CFR § 50.24 when they received the EUA/EUI products for the claimed prevention of COVID-19/SARS-CoV-2? If so, provide the evidence
- (6) What documentation was compiled to substantiate that "...While tens of thousands of new COVID-19 were detected daily during the outbreak's peak, hospitalizations and deaths did not skyrocket in a similar manner due to vaccinations and new treatments?" Provide the evidence to support the claim
- (7) What is your definition of "common law authority"?

(8) From where do you derive this claimed “common law authority”? Provide proof of claim; and

(9) Do you have a public official, surety, liability, fidelity, faithful performance, insurance, certificate, blanket bond, et al.? If so, provide an unaltered copy (identifying the company name, policy number, primary and beneficiary names) that was obtained before taking office as Mayor of the City of New York, et al. If the above referenced was not obtained, provide documentation that allows you to bypass this requirement.

Petitioners also assert that respondent New York County District Attorney Alvin Bragg violated his duty as a public servant and 18 USC §4 in failing to act after receiving a carbon copy of the notices they sent to Mayor Adams, as such notices alerted District Attorney Bragg to a crime being committed by Mayor Adams.

Both respondents cross-move, separately, to dismiss this petition, on largely overlapping grounds. For the reasons set forth below, these motions are granted and the petition is denied and dismissed, with prejudice.

DISCUSSION

Section 1109 of the New York City Charter provides as follow

A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district on application of the mayor, the comptroller, the public advocate, any five council members, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district. Such justice may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answers given by a witness in such inquiry shall not be used against such witness in any criminal proceeding, except that for all false answers on material points such witness shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first, second or eleventh judicial district as the justice may direct, and shall be a public record.

(NY City Charter §1109 [emphasis added]).

“Although inquiries into financial corruption may have been a primary reason for enacting the summary inquiry provision, the language of the current section 1109 ... applies to all forms of official misconduct provided they involve violation or neglect of duty” (Carr v De Blasio, 197 AD3d 124, 136 [1st Dept 2021] [internal citations and quotations omitted]) “‘Violation of duty’ means an infraction or contravention of the law or a duty, while ‘neglect of duty’ means the outright omission of performance of a duty (Id.). Generally, courts consider three factors in assessing whether to hold a summary inquiry: (1) the importance of the issue that would be the subject of the inquiry; (2) the pendency of ongoing investigations or lack thereof; and (3) whether the violations and neglect of duties had been fully explored in public (Id.).

In this case, it is neither necessary or appropriate to engage in this analysis. As a threshold matter, petitioners have failed to establish that they are taxpayers or that one or more of them have specific “knowledge or information concerning such alleged violation or neglect of duty,” required by section 1109, mandating dismissal. In addition, petitioners have not alleged a violation of duty or neglect of duty by either respondent. The basis for their conclusion that Mayor Adam’s response to the COVID-19 pandemic were unlawful and improper appears to be based solely on their disagreement with these actions as a matter of policy. In fact, both Mayor de Blasio and Mayor Adams had authority to issue these Executive Orders pursuant to, inter alia, Executive Law §§20 and 24 as well as Section 8 of the New York City Charter.

The statutes cited by petitioners do not support a contrary conclusion: 18 USC §4 provides that “[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title

or imprisoned not more than three years, or both,” while 5 USC § 7311 prohibits an individual who advocates or participates in a strike against or the overthrow of the federal government from holding a position in the federal government of the government of the District of Columbia, and 19 USC §210.267 outlines the procedure for motion practice in administrative proceedings concerning international trade.

The cases petitioners cite are also irrelevant. Evans v. Berry, 262 NY 61 (1933), involved the question of “whether the city of New York may constitutionally assume a liability for the act of a police officer who, with or without fault on his part, injures an innocent bystander while engaged in his governmental duty of making an arrest” while in Cooper v Aaron, 358 US 1 (1958), the United States Supreme Court declined to suspend enforcement of desegregation resulting from the Supreme Court’s decision in Brown v Bd. of Ed. of Topeka, Shawnee County, Kan., 347 US 483, 488 (1954) to permit Arkansas additional time to attempt to “upset or nullify” that ruling through legislation or litigation.

In light of the foregoing, it is

ORDERED and **ADJUDGED** that the petition is denied, respondents’ cross-motions are granted and the petition is dismissed, with prejudice; and it is further

ORDERED that within five days of the date of this decision and order, counsel for respondent Eric Leroy Adams shall serve copy of this decision and order, with notice of entry, on petitioners through NYSCEF and by first class mail; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for respondent Eric Leroy Adams shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119), in accordance with the procedures set forth in the *Protocol on Courthouse and County*

Clerk Procedures for Electronically Filed Cases (accessible at the "E filing" page on this court's website at the address www.nycourts.gov/suptmanh).

This constitutes the decision and order of the Court.

7/13/2023

DATE


HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE