

Long Is. Pine Barrens Socy., Inc. v County of Suffolk

2023 NY Slip Op 34956(U)

June 29, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 600050/2022

Judge: Carmen Victoria St. George

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

**LONG ISLAND PINE BARRENS SOCIETY, INC.,
KINGS PARK COMMUNITY ASSOCIATION, INC.,
RICHARD AMPER, as Executive Director and
Individually, THOMAS CASEY, ROBERT MCGRATH,
DAN BURKE, FRANCIS LOMBARDO, JOHN VENIR
and RICHARD COGGINS,**

**Index No.
600050/2022**

Plaintiffs,

**Motion Seq:
001 MD**

-against-

**COUNTY OF SUFFOLK, SUFFOLK COUNTY
LEGISLATURE, SUFFOLK COUNTY EXECUTIVE
STEVE BELLONE and SUFFOLK COUNTY KINGS
PARK SEWER DISTRICT #6,**

Defendants.

x

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	4-13
Answering Papers.....	18-69
Reply.....	70-71; 72-73; 74

The plaintiffs commenced this action on January 3, 2022 seeking declarations that Suffolk County Local Law (LL) 50-2020 and Suffolk County Resolutions 247 and 971 are illegal, null, and void insofar as they relate to relieving the County of their obligations to obey a 2019 Judgment and/or Stipulation of Settlement and violate the Drinking Water Protection Plan (DWPP). Plaintiffs also seek permanent injunctions directing the defendants to return all funds allegedly diverted by LL 50-2020 to the Sewer Tax Stabilization Trust Account /Assessment Stabilization Reserve Fund (ASRF/Fund 404) and enjoining defendants from taking any action to implement or enforce LL 50-2020. Plaintiffs also request that the defendants be directed to refund the Kings Park Sewer District #6 the charges paid that exceed the 3% cap established and prescribed by the DWPP.

The defendants seek to dismiss the complaint pursuant to CPLR §§ 3211 (a)(1), (a)(5), and (a)(7). Specifically, the defendants contend that the claims challenging Resolution 247 related to the Kings Park Sewer District #6 is time barred, that the challenge to LL 50-2020 and Resolution 971 fail to state a claim and are time barred, and that the claims challenging the defendants' actions with regard to the 2019 Judgment/Stipulation of Settlement are demonstrated to be false based upon publicly available documentary evidence. The defendants also seek to disqualify plaintiffs' counsel.

Disqualification of Plaintiffs' Counsel

Defendants assert that the Law office of Anton J. Borovina should be disqualified because his representation of the plaintiffs in this action against the County violates the terms of Borovina's 2017 contract with the County and the terms of the Conflicts Statement he signed on December 8, 2020. In connection with litigation entitled *Ray v. County of Suffolk*, et al. (Index No. 06116/17), the County determined that it had a conflict of interest with respect to the Department of Law's representation of defendant County Comptroller John M. Kennedy in that action; therefore, Anton J. Borovina, Esq. was retained as outside counsel to represent the County Comptroller. The written retainer agreement states that the term thereof is from December 8, 2017 until the termination of the *Ray* litigation or professional legal services to be rendered. Paragraph 12 of that written agreement provides that, "[w]ithout the prior written approval of the County Attorney, the CONSULTANT shall not simultaneously represent other private clients in actions or proceedings against the COUNTY, its agencies or COUNTY employees in their official capacity. The representation of any individual in a dispute concerning the legal relationship between the individual and the COUNTY or its agencies would also create a conflict which will require disqualification. Any CONSULTANT retained by this office is charged with the duty to disclose to this office the existence of any such adverse interests whether existing or potential. This duty shall continue so long as the CONSULTANT is retained on behalf of the COUNTY or its employees. The determination as to when a conflict exists shall ultimately be made by the County Attorney after full disclosure is obtained" (capitalization in original).

The Conflicts Agreement that was signed in connection with that agreement that was extended in December 2020 provides that, "I hereby affirm, under the penalties of perjury, that I have conducted the appropriate conflicts check in my office, and I attest to the fact that neither I, nor my law firm, have any pending matters in which I am in adversarial position with the County of Suffolk. I further affirm that neither I, nor my law firm, will prosecute any actions or claims against the County of Suffolk during the pendency of representation of the County of Suffolk in this matter." Mr. Borovina signed and dated that Conflicts Agreement. The 2020 Conflicts Agreement signed in connection with the extended contract contains the exact same language, and it is signed by Mr. Borovina on December 8, 2020.

It is undisputed that this action against the County defendants was commenced by Mr. Borovina on January 3, 2022, while the *Ray* action was still pending, and the contract, retainer agreement, and the 2020 Conflict Agreement were in effect. The defendants' motion to dismiss this complaint and to disqualify counsel was made on January 24, 2022, while the *Ray* action

was still pending. The **Ray** action was not concluded until the Appellate Division, Second Department rendered its written decision dated April 13, 2022. It is also undisputed that Mr. Borovina did not make any notifications required under the existing contract, nor did he seek permission to represent the plaintiffs in this action. The mere fact that the **Ray** matter has since concluded does not serve to erase the fact that Mr. Borovina apparently violated the terms of the contract he had with the County and the terms of the Conflicts Agreement when he filed the summons and complaint here.

Mr. Borovina's affirmation in opposition does not address the Conflicts Agreements that he signed, and his opposition engages in a tortured and inaccurate reading of paragraph 12 cited above. Mr. Borovina claims that, "[p]ursuant to paragraph 12 of the Ray Retainer, my obtaining the County Attorney's approval with respect to my representing third parties only arises in situations where '[t]he representation of any individual in a dispute concerning the legal relationship between the individual and the County or its agencies would also create a conflict which will require disqualification.'" Mr. Borovina's "interpretation" completely disregards the first, clear sentence of paragraph 12 that says, "[w]ithout the prior written approval of the County Attorney, the CONSULTANT shall not simultaneously represent other private clients in actions or proceedings against the COUNTY, its agencies or COUNTY employees in their official capacity." The Conflicts Agreement reads, "I further affirm that neither I, nor my law firm, will prosecute any actions or claims against the County of Suffolk during the pendency of representation of the County of Suffolk in this matter." The language of the retainer agreement and of the Conflicts Agreement is clear and unambiguous and no amount of "interpretation" can hide the fact that Mr. Borovina is essentially asking this Court to excuse his breaches since the **Ray** matter is now disposed. The Court will not do that.

Moreover, in an attempt to minimize the fact that he breached his agreements with the County, Mr. Borovina "note[s] that defendants' disqualification motion made against me is based on a contract and upon no other ground." Ironically, Mr. Borovina requests that this Court excuse his breaches of contract while simultaneously arguing that the County defendants should be held to the terms of the stipulation that he characterizes as a contractual obligation.

That branch of the County defendants' motion seeking disqualification of Mr. Borovina is granted.

Defendants maintain that Mr. Sabatino must also be disqualified as counsel for the plaintiffs. They base this contention on the fact that Mr. Sabatino advised and counseled the Legislature and County Executive for at least two if not three decades, and that he was instrumental in drafting, implementing, and amending the DWPP. The defendants also claim that Sabatino must be disqualified because he has violated his duties to the County, who is a former client of his, under RPC Rule 1.11.

A party's right to choose his or her counsel is a treasured right in New York; accordingly, counsel should not be disqualified unless the movant demonstrates a clear entitlement to such relief (*Falk v Gallo*, 73 AD3d 685, 901 NYS2d 99 [2d Dept 2010]; *Goldstein v Held*, 52 AD3d 471, 859 NYS2d 707 [2d Dept 2008]). The issue of disqualification is "committed to the sound

discretion of the trial court” (*Bentvena v Edelman*, 47 AD3d 651, 651, 849 NYS2d 626 [2d Dept 2008]).

There is no question that Mr. Sabatino commenced his employment with Suffolk County in 1976, that he served as Counsel to the Legislature from 1984 through 2003, that he served as Chief Deputy County Executive from 2004 through 2007, and that he left the County’s employ in 2007. During his tenure, it is also no secret that Mr. Sabatino had significant involvement in the drafting of the DWPP that was first enacted in 1987. This action, however, seeks declarations that Suffolk County Local Law (LL) 50-2020 and Suffolk County Resolutions 247 and 971 are illegal, null, and void insofar as they relate to relieving the County of their obligations to obey a 2019 Judgment and/or Stipulation of Settlement and violate the DWPP. Plaintiffs also seek permanent injunctions directing the defendants to return all funds allegedly diverted by LL 50-2020 to the Sewer Tax Stabilization Trust Account /Assessment Stabilization Reserve Fund (ASRF/Fund 404), and to direct that the defendants be directed to refund the Kings Park Sewer District #6 the charges paid that exceed the 3% cap established and prescribed by the DWPP.

After he left the County employ, Mr. Sabatino was involved in the lawsuits that culminated in the Judgment/Stipulation of Settlement directing the County to repay the DWPP fund at issue here. LL 50-2020 was first proposed and ultimately adopted approximately thirteen (13) years after Mr. Sabatino left the employ of Suffolk County, and it is undisputed that Mr. Sabatino had no involvement with the drafting of LL 50-2020, or with the 2020 proposition related to the sewer rate cap. Plaintiffs seek to invalidate LL 50-2020 since it is their position that the local law abrogates the Judgment issued by the Court (Farneti, J.) in 2019 and the Stipulation of Settlement reached with the County in 2014 requiring the County to pay back the monies taken from the fund dedicated to water quality preservation. The Court agrees that Sabatino, by representing the plaintiffs in this action, is seeking only to uphold the Judgment and Stipulation of Settlement consistent with the DWPP. The local law and the sewer rate cap issues were all implemented well after Mr. Sabatino left County employment. The mere fact that the plainiffs in this action maintain that these actions taken 13 years later violate legislation that Mr. Sabatino drafted in the late 1980’s (the DWPP) does not involve the same transaction or set of transactions, nor did Mr. Sabatino have substantial responsibility for LL 50-2020 or the sewer rate increase; in fact, he had no responsibility therefor. The defendants’ claim that the matters are “substantially related” is unfounded and attempts to cast so wide a net that Mr. Sabatino can never again represent plaintiffs seeking to preserve water quality in Suffolk County (*cf. Matter of Town of Oyster Bay v. 55 Motor Avenue Co., LLC*, 109 AD3d 549 [2d Dept 2013] [attorney represented condemnees against Town and later represented the Town as part of a different law firm but in in the very same matter]; *Walden Federal Savings and Loan Association v. Village of Walden*, 212 AD2d 718 [2d Dept 1995] [counsel disqualified because challenge was to the very provisions that the firm had drafted and helped to enact during its previous representation of the Village]). Accordingly, since Mr. Sabatino is not herein challenging any legislation that he drafted, disqualification is not warranted.

Timeliness (CPLR § 3211 (a)(5))Kings Park Sewer District/Resolution 247

A public hearing was held by the Suffolk County Legislature on March 16, 2021 concerning the modification of the plan of service to the Kings Park Sewer District No. 6. As alleged in the complaint (paragraphs 51, 52), “[o]n April 20, 2021, the County Legislature adopted and the County Executive later approved Resolution 247-2021 entitled ‘A Resolution Making Certain Findings and Determinations and issuing an Order in Relation to the Modification of the plan for Service for the Suffolk County Sewer District #6 - Kings Park.’ . . . Res. 247 authorized the County to impose and collect a Sewer Rate against each sewer district ratepayer to pay for the operation and maintenance of KPSD #6 and its infrastructure expenses pursuant to a Sewer Rate formula prescribed therein.”

Resolution 247 is dated April 20, 2021 and approved by County Executive Bellone on April 23, 2021. It is undisputed that the resolution was sent to the office of the Suffolk County Clerk for recording on April 27, 2021. The plaintiffs having commenced this action on January 3, 2022, leads the defendants to maintain that the claims related to the Sewer District are time-barred.

The defendants maintain that whether measured by a thirty-day statute of limitations pursuant to County Law § 260, or the four-month statute of limitations applicable to Article 78 proceedings, the claim asserted with respect to Resolution 247 is time barred.

Plaintiffs argue that the limitations period found in County Law § 260 is inapplicable, and that since the Legislature did not adopt its Fiscal Year 2022 budget until December 2021, the fixing of the sewer rate did not become final and binding until that time, thereby making this action timely pursuant to Article 78.

It appears to this Court that the catch-all provision of CPLR § 213 (1) does not apply here, or that it automatically governs all declaratory judgment actions. Rather, applying the limitations period for an Article 78 proceeding is appropriate (*see Solnick v. Whalen*, 49 NY2d 224, 229 [1980]). The four-month statute of limitations applies to this declaratory judgment claim related to Resolution 247 because the Legislature’s action was reviewable by an Article 78 proceeding only after that action was made final and binding by adoption of the Fiscal Year 2022 budget in December 2021 (*Press v. County of Monroe*, 50 NY2d 695, 701-702 [1980]). “Here, as in *Solnick*, the issues sought to be raised by plaintiffs in the declaratory judgment action could have been raised by them in a proceeding instituted under article 78” (*Id.* at 703). Inasmuch as this action was commenced on January 3, 2022, dismissal of the claims related to this Resolution as time barred pursuant to CPLR § 3211 (a)(5) is denied.

Challenge to LL 50-2020/Resolution 971

In an alternative argument advanced by the defendants, they contend that the plaintiffs’ challenge to LL 50-2020/Resolution 971 is untimely because the plaintiffs “are challenging the substance of the 1993 law allowing the public to amend the DWPP by referendum [therefore,] the applicable six-year statute of limitations has long since expired.” This claim is spurious. The

plaintiffs are not challenging the 1993 law. As discussed herein below, and it is clear to this Court, that the plaintiffs are challenging the lawful right in the first instance to repudiate alleged contractual obligations by adopting a local law via public referendum. That branch of defendants' motion to dismiss this claim as time-barred is also denied.

Dismissal Pursuant to CPLR §§ 3211 (a)(1) and (a)(7)

Essentially, the plaintiffs allege that this Local Law and Resolution were enacted to avoid complying with the December 12, 2019 Judgment of the Hon. Joseph Farneti, A.J.S.C. directing the Suffolk County defendants, including former County Executive Levy, to "immediately take all actions and make all budgetary adjustments as are necessary to transfer \$29,409,109 from the Suffolk County General Fund (Fund 001) to the Suffolk County Assessment Stabilization Reserve (Fund 404) and to conform all future Suffolk County operating budgets to article XII of the Suffolk County Charter as adopted via mandatory public referendum." As alleged, the plaintiffs maintain that the LL and Resolution should be declared null and void for being in violation of the DWPP. The 2019 Judgment was issued in connection with the action commenced by the Pine Barrens Society against the County and former County Executive Levy.

The DWPP was enacted in 1987 by the Legislature and approved by the electorate of the County. In 1993, an amendment to the County Charter included a provision in the DWPP that from 1993 forward, the DWPP was only to be amended or repealed after approval by a public referendum. In 2011, LL 44-2011 providing for the transfer of certain funds dedicated for purposes of the DWPP to retire bonded indebtedness or for retirement contributions unrelated to the protection of the drinking water supply was enacted without ever having been submitted to the electorate for a referendum, resulting in that LL being declared illegal, null, and void (*Long Island Pine Barrens Society v. County of Suffolk*, 122 AD3d 688 [2d Dept 2014]).

The December 12, 2019 Judgment at issue here resulted from the ruling by the Appellate Division, Second Department that the Judgment issued by Justice Farneti should have contained provisions directing the defendants to take all actions and make all budgetary adjustments as are necessary to transfer \$29,409,109 from the Suffolk County General Fund (Fund 001) to the Suffolk County Assessment Stabilization Reserve (Fund 404) (*Long Island Pine Barrens Society v. County of Suffolk*, 173 AD3d 1154 [2d Dept 2019]). This Judgment has not been vacated or overturned.

LL 50-2020 was adopted by the Legislature on July 21, 2020 and by the County Executive. The LL was thereafter submitted to the voters of Suffolk County via public referendum on Election Day in 2020. The LL was approved by the electorate on November 3, 2020. By passing that referendum, the public approved the transfer of \$44,409,109 from the DWPP into the Suffolk County Taxpayers Trust Fund for general property tax relief in the wake of the Covid-19 pandemic for fiscal year 2021. That total sum included the \$29,409,109 that was required to be paid into the ASRF/Fund 404 by the December 12, 2019 Judgment issued by Justice Farneti. Various clauses of Resolution 971 adopted and approved on December 15, 2020 authorized the County Comptroller to transfer the funds, namely, to transfer \$29,409,109 (the amount of the Judgment) from the General Fund (Fund 001) to the ASRF/Fund 404 in the fiscal

year 2020, and then in fiscal year 2021 to transfer \$44,409,109 from the ASRF/Fund 404 to the General Fund (Fund 001).

Accordingly, the defendants maintain that they complied with the December 2019 Judgment, but when put to the public in 2020, the electorate determined that property tax relief during a pandemic was crucial enough to warrant transfer of the funds into the General Fund. The defendants further maintain that they went about the process of transferring the funds in compliance with the Appellate Court's opinion requiring amendment of the DWPP to be accomplished by public referendum, as articulated in *Long Island Pine Barrens* (*supra* at 122 AD3d 688). In their complaint, the plaintiffs allege that these procedural steps were taken, so the defendants claim that the plaintiffs have failed to allege a cause of action against the defendants that the funds were illegally diverted.

The Stipulation of Settlement, also at issue here, was reached in a 2014 action brought by the Long Island Pine Barrens Society, et al. against the County and County Executive Bellone. The copies submitted to the Court by the plaintiffs and the defendants bear a date of "2014," but neither copy is signed, yet there does not seem to be any dispute that the County made two payments into the ASRF/Fund 404, one in 2018 and a second in 2019, and that a third payment was made in 2020 but was later withdrawn. The defendants argue that the plaintiffs' claim that the defendants violated this Stipulation of settlement are demonstrated to be incorrect as evidenced by the terms of the stipulation itself and publicly available information cited by defendants. Specifically, the stipulation imposed the requirement of a public referendum to approve any amendment or repeal of the DWPP (County Charter Amendment I) and required a budget line in the recommended and adopted operating budget to restore monies transferred from the ASRF/Fund 404 in 2014, 2015, 2016, and 2017 commencing in 2018 (County Charter Amendment II). Charter Amendment I allows the electorate to amend the DWPP, which is what the electorate chose to do on November 3, 2020.

Moreover, the Stipulation required the defendants to take further action only if the Charter Amendments were not adopted by the Legislature and/or approved by the electorate. It is undisputed that both Charter Amendments were approved, and so the defendants argue that they do not have the additional obligations set forth in the Stipulation of Settlement and plaintiffs' claims should be dismissed as alleged. Notably, the Stipulation did not prohibit the County from amending its Charter, as provided for in Charter Amendment I, nor does the stipulation divest the County, through the process of public referendum, to restructure/alter the DWPP, or prohibit the County or the electorate from further amending the DWPP.

Plaintiffs allege that LL 50-2020 should never have been put to the electorate in the first place because it repudiates the 2019 Judgment and violates the Stipulation that required annual installment payments into Fund 404 via the County's annual budget making process such that the full amount of the funds withdrawn from Fund 404 would be restored no later than the end of Fiscal Year 2029.¹ The annual payments were to be made as a separate line item in each of the subsequent budgets as provided for in subdivisions L and M of the Charter Law §§ C4-6 and C4-

¹ LL 50-2020 was first adopted by the County defendants on July 21, 2020 and then put on the November 2020 ballot.

10. There is no question that subdivisions L and M were part of the Charter Law until they were repealed on November 3, 2020.²

Plaintiffs maintain, *inter alia*, that adoption of LL 50-2020 by Resolution 971 is “in direct defiance and disobedience of the Judgment’s mandate” that is a “lawful command of the State’s judiciary,” and that the electorate cannot ratify unauthorized municipal action. As alleged in their complaint, “LL 50-2020 and so much of Res. 971 as contained in its Fourth Resolved Clause are illegal, null and void inasmuch as the implementation of said local law and the Fourth Resolved Clause of Res. 971 would relieve the County of its obligations to obey the Judgment’s mandate and to perform those obligations on its part to be performed in accordance with the Stipulation of Settlement,” and the “adoption, implementation and enforcement of LL 50-2020 and the Fourth Resolved Clause of Res. 971 are illegal official acts taken or to be taken by defendants which imperil and threaten to imperil the public interests and are calculated to work public injury and produce some public mischief.”

The 2019 Judgment is clear in its language that “defendants are directed to immediately take all actions and make all budgetary adjustments as are necessary to transfer \$29,409, 109 from the Suffolk County General Fund (Fund 001) to the Suffolk County Assessment Stabilization Reserve (Fund 404) and to conform all future Suffolk County operating budgets to Article XII of the Suffolk County Charter as adopted via mandatory public referendum.”

The Stipulation entered into in 2014 was as the result of actions taken in 2013 whereby approximately \$32.8 million was taken from Fund 404 and transferred to Fund 001. According to the plaintiffs, the settlement was reached because plaintiffs agreed that the County would not have to restore the funds in one lump sum but could restore the monies to Fund 404 by annual payments memorialized in each fiscal year’s operating budget as a line item.

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see Marcantonio v Picozzi III*, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Miglino v Bally Total Fitness of Greater New York, Inc.*, 20 NY3d, 342, 351 [2013]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]).

“A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a)(7) [citation omitted]”

² NYSCEF Doc. No. 18, Article IV County Budget and Capital Program contains two footnotes that read, “18. Editor’s Note: Former Subsection L, added 7-29-2014 by L.L No.31-2014, which required an interfund transfer from the County’s general fund to the Suffolk County sewer Assessment Stabilization Fund, was repealed 7-21-2020 by LL No.50-2020. Local Law No. 50-2020 was approved at referendum 11-3-2020.

19. Editor’s Note: Former Subsection M, 7-29-2014 by LL No.31-2014, which required the confirmation of the outstanding balance of the sewer Assessment stabilization Fund as part of the consensus forecast, was repealed 7-21-2020 by LL No.50-2020. Local Law No. 50-2020 was approved at referendum 11-3-2020.”

(*Sokol, supra* at 1181). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it...dismissal should not eventuate” (*Guggenheimer, supra* at 275; see also *Vertical Progression, Inc. v. Canyon Johnson Urban Funds*, 126 AD3d 784 [2d Dept 2015]; *YDRA, LLC v. Mitchell*, 123 AD3d 1113 [2d Dept 2014]; *Korsinsky v. Rose*, 120 AD3d 1307 [2d Dept 2014]).

Based upon the submissions of the respective parties, this Court cannot conclude that any material facts as alleged are not facts at all. The Judgment, Stipulation, partial payments, Charter Amendments, LL 50-2020 and its attendant resolution are all documented facts; yet there is significant dispute as to whether the defendants can abrogate the Judgment and the Stipulation by putting forth a referendum that controverts a judicial mandate and an agreement between the parties. The Court cannot make that determination on this motion, at this juncture, and the Court does not convert this motion into one for summary judgment pursuant to CPLR § 3211 (c).

The defendants’ motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 29, 2023
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]