

Lewin K-9 Inc. v State of New York
2024 NY Slip Op 35132(U)
December 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 629611/2024
Judge: Frank A. Tinari
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. FRANK A. TINARI
Acting Justice of the Supreme Court

MOT. DATE 12/13/24
Mot. Seq. #002 MD

-----X
LEWIN K-9 INC. d/b/a THE PUPPY
EXPERIENCE, CITIPUPS NYC CORP.,
WESTCHESTER PUPPIES & KITTENS, INC.,
MANHATTAN PUPPIES & KITTENS, INC.,
CROSBY PET CENTER, INC., BEST
QUALITY FENCE LLC d/b/a PET CITY, and
PET INDUSTRY JOINT ADVISORY
COUNCIL d/b/a PET ADVOCACY
NETWORK,

Plaintiffs,

- against -

STATE OF NEW YORK,

Defendant.
-----X

ORDER

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Upon the following papers read on this e-filed motion for a restraining order: Notice of Motion/Order to Show Cause and supporting papers by plaintiffs, filed December 5, 2024; Answering Affidavits and supporting papers by defendants, filed on December 13, 2024; Replying Affidavits and supporting papers _____; Other oral argument conducted on December 10, 2024; it is

ORDERED, that the plaintiffs' application for an order pursuant to CPLR § 6301 enjoining and restraining defendant and/or its agents, and anyone acting on its behalf from enforcing and/or implementing Legislation S.1130/A.4283 is denied.

This is an action commenced by plaintiffs seeking to declare as unconstitutional, and to enjoin the implementation and enforcement of, S.1130/A.4283, codified at NY Gen. Bus. Law § 753-f ("Statute") which was passed and enacted by the New York State Legislature, signed by Governor Hochul on December 15, 2022, and which will take effect on December 15, 2024. Plaintiffs commenced this action by the filing of a summons and complaint on November 27, 2024.

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Plaintiffs allege that the Statute is overbroad, arbitrary, and economically destructive, targeting compliant businesses rather than addressing the alleged misconduct of unethical breeders. In support of their application, plaintiffs submit, among other things, an affirmation of Keith Lewin.

Defendant opposes the motion arguing that the Statute does not violate the Due Process Clause of the New York State Constitution, does not effectuate a taking of plaintiffs' properties, that plaintiffs cannot sustain a viable Contract Clause violation, the Statute does not offend the Dormant Commerce Clause, and that plaintiffs have not sustained their burden in demonstrating their right to a preliminary injunction. Defendant submits, among other things, the legislative history for the Statute.

The Humane Society of the United States and the American Society for the Prevention of Cruelty to Animals submit Amicus Curiae briefs.

In support of plaintiffs' motion, Keith Lewin submits an affirmation which states that he is the owner of Lewin K-9 Inc., doing business as The Puppy Experience (one of the named plaintiffs). The Puppy Experience is a New York State licensed pet dealer specializing in the sale of healthy, humanely raised puppies, sourced exclusively from USDA-licensed breeders who meet stringent animal welfare standards. Lewin affirms that without a temporary restraining order he will suffer the immediate loss of revenue and the inability to meet financial obligations, be forced to terminate employees, the need to dispose of the puppies currently in its care, and an inability to invest in the decades long business.

"It is well settled that legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (*White v Cuomo*, 38 NY3d 209, 216, 172 NYS3d 373 [2022] [internal quotations and citations omitted]). "While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt" (*LaValle v Hayden*, 98 NY2d 155, 746 NYS2d 125 [2002] [internal quotations and citations omitted]).

The ultimate determination regarding the constitutionality of the Statute is not presently before the court. The present issue to be determined by the court is whether the plaintiffs have sustained their heavy burden demonstrating their entitlement to a preliminary injunction, enjoining enforcement of the Statute while the matter proceeds through the litigation process.

"Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly" (*Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 1123, 53 NYS3d 157 [2d Dept 2017]; see *Armanida Realty Corp. v Town of Oyster Bay*, 126 AD3d 894, 3 NYS3d 612 [2d Dept 2015]; *Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 916 NYS2d 177 [2d Dept 2011]). In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate

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success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*see* CPLR §6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 53 NYS3d 157; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief under the law and the undisputed facts upon the moving papers (*Blake Agency v Leon*, 283 AD2d 423, 723 NYS2d 871 [2d Dept 2001]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see also, Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2000]). Failing to establish even one required element of a preliminary injunction mandates denial of the relief requested (*see generally Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918; *Schweizer v Town of Smithtown*, 19 AD3d 682, 798 NYS2d 99 [2d Dept 2005]).

“To constitute a regulatory taking the challenged actions must be such that they fail substantially to advance a legitimate State interest or deprive the owner of the economically viable use of his property. The property owner who challenges government action as a regulatory taking bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt” (*Dawson v Higgins*, 197 AD2d 127, 135-136, 610 NYS2d 200 [1st Dept 1994] [internal quotations and citations omitted]). Regulatory takings are either categorical, or non-categorical, in nature. “A reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property's value to be substantially reduced, or because it deprives the property of its most beneficial use” (*Putnam County Natl. Bank v City of New York*, 37 AD3d 575, 577, 829 NYS2d 661 [2d Dept 2007] [internal quotations and citations omitted]). Whether a non-categorical taking has occurred may be determined by an examination of the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action (*Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d 603, 657 NYS2d 555 [1997]).

Plaintiffs claim the Statute has the net effect of rendering plaintiffs' long term leases for their premises a nullity. Plaintiffs further argue that to the extent that their long term leases restrict the use of the premise to that of a pet store, the previously valuable commercial leases become voidable and the business model that generated revenue to maintain such lease becomes inoperable.

Defendant argues that plaintiffs have not established either a categorical or non-categorical regulatory taking as the Statute does not prevent plaintiffs' from selling other types of pets, pet based items, or shifting their business model to another pet-based business. Defendant argues that plaintiffs have not been prevented from making any or all economic use of their businesses and further claims that

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due to the regulated nature of the pet industry, plaintiffs cannot argue that they could not expect to be subject to additional governmental restrictions. Defendant contends the Statute is reasonably related to the State's interest in protecting the safety and welfare of animals and the consumers who purchase them.

“The purpose of the Contract Clause is to prevent the government from changing [] the relative position of two parties to an existing contract after the parties have assigned their own contractual rights and duties. To show a Contract Clause violation, a plaintiff must show that the challenged law substantially impairs an existing contractual relationship. If the law does create a substantial impairment, it will nonetheless be valid as long as it is appropriate for, and necessary to, the accomplishment of a legitimate public purpose” (*Perfect Puppy, Inc. v City of East Providence*, 98 F Supp 3d 408, 423-424 [D RI 2015] [internal quotations and citations omitted]).

Plaintiffs' counsel claims that the plaintiffs possess evidence demonstrating that they have contracts with lessors for long-term commercial leases that restrict the use of their premises to that of a pet shop. Plaintiffs argue that the Statute substantially impairs their contractual relationships with their lessors which could lead to complete loss of the pet store businesses and their leased premises.

Defendant argues that plaintiffs' Contract Clause claim fails because these claims have already been examined and rejected by other courts, there is no basis for plaintiffs to argue that the Statute has impaired their commercial leases, and that even if there was impairment, it cannot be considered substantial. Defendant further argues that if plaintiffs are correct in arguing the commercial leases form the basis for a Contracts Cause claim, the Statute serves a legitimate public purpose through means that are reasonable and necessary.

“The Court has often described the Commerce Clause as conferring a ‘right’ to engage in interstate trade free from restrictive state regulation” (*Dennis v Higgins*, 498 US 439, 448 [1991]). “To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless congress should see fit to interpose some contrary regulation on the subject” (*Crutcher v Kentucky*, 141 US 47, 57 [1891]). The United States Supreme Court has said “that the Commerce Clause prohibits the enforcement of state laws driven by ... economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors” (*National Pork Producers Council v Ross*, 598 US 356, 369 [2023] [internal quotations and citations omitted]).

Plaintiffs argue that the Statute impermissibly impedes their ability to trade with others in interstate commerce, discriminates between in-state rescues/shelters and out-of-state breeders/dealers, unduly burdens interstate commerce incommensurate with the local benefits allegedly secured, and has the potential to annihilate the entire pet market.

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Defendant argues that plaintiffs lack standing to assert a Dormant Commerce Clause injury, that the Statute does not burden interstate commerce, places no restrictions on a breeder's ability to sell directly to New York consumers, confers no benefit on in-state shelters/rescues at the expense of out-of-state breeders, and that such arguments have already been rejected by other states.

“Economic regulation will violate an individual's substantive due process property interest only in those situations, vanishingly rare in modern jurisprudence, where there is absolutely no reasonable relationship to be perceived between the regulation and the achievement of a legitimate governmental purpose; the regulation, to be actionable, must be arbitrary in the constitutional sense—which is to say so outrageously arbitrary as to constitute a gross abuse of governmental authority” (*Brightonian Nursing Home v Daines*, 21 NY3d 570, 576, 977 NYS2d 147 [2013] [internal quotations and citations omitted]). “[L]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data” (*Heller v Doe by Doe*, 509 US 312, 320 [1993]).

Plaintiffs claim the Statute violates their rights to due process by arbitrarily depriving them of economic liberty and property without due process of law, fails to meet even the deferential rational basis standard for economic regulation, and does not effectively address the issues it purports to remedy.

Defendant argues that the Statute easily satisfies a rational review basis as the Legislature was concerned with eliminating an avenue through which puppy mills supply unhealthy animals raised in deplorable conditions to New Yorkers, curbing the emotional and financial burdens on New Yorkers who unwittingly buy such pets, and encouraging adoptions from overcrowded shelters and rescues. Defendants argue that the Statute is a reasonable means for furthering this stated interest and that similar prohibitions have been upheld in other states.

Plaintiffs do not submit any admissible evidence sustaining their burden of showing, by clear and convincing evidence, that the Statute constitutes a regulatory taking, violates prohibitions against impairing contractual rights, violates the Dormant Commerce clause or violates state due process. The conclusory affirmation of counsel who has no personal knowledge of the facts of the matter is insufficient to satisfy such a burden. The affirmation submitted by only one of the plaintiffs to the matter, which includes bare assertions with nothing more, is likewise insufficient to satisfy plaintiffs' burden. As such, at this juncture, plaintiffs fail to sustain their burden in proving a likelihood of success on the merits.

The claims of a plaintiff that harm is imminent and irreparable must be clearly demonstrated to the court. When claims “are wholly speculative and conclusory,” they “are insufficient to satisfy the burden of demonstrating irreparable injury” (*Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 271 AD2d 656, 657, 706 NYS2d 192 [2d Dept 2000]). In *Golden v Steam Heat, Inc.*, 216 AD2d 440, 442, 628 NYS2d 375 [2d Dept 1995], the court instructed that “the irreparable harm must be shown by the moving party to be imminent, not remote or speculative” (*see also Village/Town of Mount Kisco v Rene Dubos Ctr. for Human Envts., Inc.*, 12 AD3d 501, 784 NYS2d [2d Dept 2004]; *Neos v*

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Lacey, 291 AD2d 434, 737 NYS2d 394 [2d Dept 2002]; *Kurzban & Son v Board of Educ. of City of N.Y.*, 129 AD2d 756; 514 NYS2d 749 [2d Dept 1987]).

In an attempt to demonstrate that it would suffer irreparable injury if the preliminary injunction were not granted, plaintiff Lewin submits his own an affirmation which states, among other things, that he will immediately lose revenue and be unable to meet financial obligations, including lease payments and payroll, will be forced to terminate employees, will need to dispose of the puppies currently in his care and will be unable to invest in his business. No other plaintiff to this action filed an affidavit/affirmation on their own behalf. No financial statements, copies of the purported commercial leases or other evidence are submitted to substantiate plaintiffs' claims. These bare, conclusory allegations are insufficient to satisfy the plaintiffs' burden of demonstrating irreparable injury (see *Kurzban & Son v Board of Educ. of City of N.Y.*, 129 AD2d 756; 514 NYS2d 749; *L & J Roost v Department of Consumer Affairs of City of N.Y.*, 128 AD2d 677, 128 AD2d 677 [2d Dept 1987]).

The court notes (as in the companion case of *OMG Enterprises USA LLC, et al. v Hochul and the State of New York*, Index Number 629891, decided this date) the sympathetic nature of plaintiffs' arguments in this regard. However, the court is constrained to apply the law to the established facts before it, regardless of how sympathetic plaintiffs' claims may be, and an application of the law necessarily determines that plaintiffs have not sustained their burden in proving irreparable harm if the preliminary injunction were not granted, by admissible, clear and convincing evidence.

The court also notes the time that has passed between the signing of the legislation and the filing of the instant action. The Statute was enacted into law on December 15, 2022 with an effective date of December 15, 2024. Plaintiffs waited until December 5, 2024, ten days before the Statute takes effect, to file the instant application.

As the plaintiffs have not met their burden of demonstrating a likelihood of success on the merits or that it would suffer irreparable harm in the absence of a preliminary injunction, it is unnecessary to reach plaintiffs' remaining contentions.

Accordingly, plaintiffs' application is denied.

Dated: December 13, 2024
Riverhead, New York


HON. FRANK A. TINARI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION