Matter of Evans v Town of Irondequoit
2025 NY Slip Op 35226(U)
September 5, 2025
Supreme Court, Monroe County
Docket Number: Index No. E2025003873
Judge: Elena F. Cariola
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the matter of

ANDRAE EVANS,

Index No. E2025003873

Petitioner,

for a judgment and or pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE TOWN OF IRONDEQUOIT, NEW YORK and PETER WEHNER, ANN CUNNINGHAM, GRANT MALONE and JOHN PERTICONE, in their official capacities as TOWN BOARD MEMBERS,

Respondent.

Elena F. Cariola, J.

Petitioner, the Town Supervisor of the Town of Irondequoit, commenced this proceeding pursuant to CPLR Article 78, seeking to reverse, annul, set aside and/or modify the actions taken by Respondents in response to the findings of an Investigation Report which concluded that he violated the Town of Irondequoit's anti-harassment and sexual harassment policies. Specifically, Petitioner challenges a reprimand letter issued by Respondents wherein they demanded his resignation, and subsequently, passed a censure resolution at a public Town Board meeting. In the main, Petitioner contends that

Respondents violated Open Meetings Law § 103 (a) by privately convening with an attorney for the purpose of discussing the Investigation Report. Additionally, Petitioner alleges that Respondents violated the Town's procurement policy when they appointed a new law firm to serve as town attorney, and thus, the appointment was arbitrary and capricious and in violation of the law.

Respondents filed a pre-answer motion to dismiss[1] alleging that the instant proceeding must be dismissed as the communications between Respondents and Attorney Mancuso are protected by attorney-client privilege, and thus, are exempt from the provisions of the Open Meetings Law. Further, Respondents allege that Petitioner lacks standing to complain of a violation of the Town's procurement policy inasmuch as he has failed to demonstrate an injury in fact which falls within the zone of interest. Petitioner opposes. Now, upon due consideration of NYSCEF Docket Nos. 1-5, 12-23 and 25-29 and the oral arguments proffered by counsel at a special term of this Court, the following constitutes the decision and order of the Court.

By way of background, Petitioner and the individually named Respondents constitute the Irondequoit Town Board: the Petitioner serves as Town Supervisor, and Wehner, Cunningham, Malone and Perticone serve as Town Board members. In August 2024, a non-party Town employee raised certain concerns regarding Petitioner's behavior

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[1] Respondents abandoned the branch of their motion seeking dismissal pursuant to CPLR § 3211 (a) (8) inasmuch as Petitioner filed an affidavit of service at the directive of the Court (*see* NYSCEF Docket No. 30) and Respondents declined to object thereto.

in the workplace, and she ultimately resigned from her employment with the Town of Irondequoit. Thereafter, the Town retained the law firm of Nearpass & Koegel, PLLC for the purpose of conducting an investigation into the allegations against Petitioner. The Investigation Report concluded that several allegations against Petitioner were substantiated. It found that Petitioner's comments and actions were sexually inappropriate, creating a hostile and intimidating work environment for one or more employees, and Petitioner took adverse actions against individuals with protective activity, thereby demonstrating retaliatory behavior.

The Town Board, by the four 'aye' votes of Wehner, Cunningham, Malone and Perticone, passed a resolution appointing the law firm Mancuso Brightman, PLLC as special counsel to provide "services related to the review of the workplace investigation." Wehner, Cunningham, Malone and Perticone met with Attorney Mancuso for the purposes of discussing the Investigation Report and actions to be taken relative to its findings. It is undisputed that no notice for these meetings was given.

On or about January 16, 2025, the Respondents issued a reprimand letter demanding that Petitioner resign from his position as Town Supervisor. The letter further indicated that in the event Petitioner refused to resign, further action may be pursued against him including public censure, mandatory training and correction and ongoing monitoring. The Petitioner refused to resign. A censure vote was scheduled and properly noticed for February 20, 2025. At the meeting, where Petitioner was present, a censure

resolution which ratified the reprimand letter was adopted by the four 'aye' votes of Wehner, Cunningham, Malone and Perticone. In relevant part, the resolution ("Resolution") directed Petitioner to (1) complete certain comprehensive trainings on appropriate professional conduct; (2) work remotely; it (3) prohibited him from interacting with Town employees through personal text messages and imposed ongoing monitoring of his interactions with Town employees; (4) precluded him from entering non-public areas of the Town Hall or other Town buildings; (5) restricting him from participating in the evaluation of Town employees; (6) prohibited him from using the Town's social media account; and (7) granted the Town Board access to his email.

On January 23, 2025, the Town Attorney, Brown Hutchinson LLP, communicated to Respondents its belief that a violation of the Open Meetings Law had occurred, and shortly thereafter, it resigned from the position. At a special meeting on February 10, 2025, the law firm of McConville, Considine, Cooman & Morin PC was appointed to serve as Town Attorney.

The instant proceeding commenced on February 20, 2025. Petitioner also filed a separate proceeding on or about February 24, 2025 wherein he sought a temporary restraining order staying the Resolution[2].

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[2] For purposes of judicial economy, the Court heard both matters together as many of the arguments overlapped. With respect to Petitioner's request for a temporary restraining order, in the main, Petitioner argued that the Resolution was unlawful as it inappropriately curtailed the powers of the Town Supervisor, which may only be accomplished by way of local law, not a Town Board resolution. The Court ultimately denied Petitioner's application finding

Open Meetings Law

On a motion made pursuant to CPLR § 3211, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). On a motion to dismiss for failure to state a cause of action, the court "merely examines the adequacy of the pleadings" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [citations and quotations omitted]). "The plaintiff's ultimate ability to prove those allegations is not relevant" (*Nouveau El. Indus., Inc. v Glendale Condominium Town and Tower Corp.*, 107 AD3d 965, 966 [2d Dept 2013] [citations and quotations omitted]); rather, the "sole consideration" … is whether the complaint sufficiently states a cause of action" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 206 [1st Dept 2013]). Factual allegations normally presumed to be true on a motion pursuant to CPLR § 3211 (a) (7) may properly be negated by affidavits and

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that he failed to meet his burden of demonstrating immediate and irreparable harm in the absence of a temporary restraining order, and the likelihood of success on the merits. To the extent Petitioner intended to incorporate the arguments relative to the propriety of the Resolution in support of the instant application, the Court remains unpersuaded. Simply stated, there is insufficient support for Petitioner's contention that his powers were curtailed. To the contrary, Petitioner's authority remains intact; he is merely prohibited from entering and accessing non-public areas of the Town Hall. To be sure, there is nothing within the Resolution which prevents Petitioner from carrying out his statutory duties or administering Town government. He is permitted to remotely access work-related files, software, databases that are needed to fulfill his duties from home. While the Court certainly appreciates the challenges associated with remote work, these inconveniences do not rise to a level of restraint so as to render the Resolution invalid.

documentary evidence (*see Wilhemlina Models, Inc. v Fleisher*, 19 AD3d 267 (1st Dept 2005). Moreover, evidentiary material may be considered (*see generally Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

"The Open Meetings Law . . . was intended—as its very name suggests—to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities. Thus, the statute provides generally that every meeting of a public body shall be open to the general public" (*Gordon v Vil. of Monticello, Inc.*, 87 NY2d 124, 126-27 [1995] [internal citations and quotations omitted].) "[A] public body may conduct an executive session" provided that business is conducted in comportment with Public Officers Law § 105.

"However, section 108 (3) [of the Public Officers Law] clarifies that nothing contained in the Open Meetings Law shall be construed as extending the provisions [] to ... any matter made confidential by federal or state law. Because communications made pursuant to an attorney-client relationship are considered confidential under the CPLR ..., communications between a ... board ... and its counsel, in which counsel advises the board of the legal issues involved in a determination ..., are exempt from the provisions of the Open Meetings Law. When an exemption under section 108 applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by § 105

(1) that relates to entry into an executive session." (*Sindoni v Bd. of Educ. of Skaneateles Cent. School Dist.*, 202 AD3d 1457, 1458 [4th Dept 2022].)

Here, contrary to Petitioner's contention, the Open Meetings Law is inapplicable inasmuch as the communications between Attorney Mancuso and Respondents were for the purpose of obtaining legal advice in connection with the Investigation Report, and as such, they were privileged and confidential. Attorney Mancuso was retained for the limited purpose of providing legal services with respect to the Investigation Report, and it is clear that the subject communications between Respondents and Attorney Mancuso fall within the protected guise of an attorney-client relationship. The nature of the communications between Attorney Mancuso and the Respondents is best evidenced by the scope of the reprimand letter which followed the private meeting. The letter discusses the findings of the Investigation, calls for Petitioner's resignation as Town Supervisor, and further explains that the Town Board will take further action should Petitioner refuse to resign – all of which support a finding that Attorney Mancuso provided legal advice and counsel relative to the Investigation Report. Stated another way, such a letter was not the result of formal Board action. As the attorney-client privilege applies, the Open Meetings Law is inapplicable, and thus, Respondents were under no duty to notice and convene an open meeting for the purposes of obtaining legal counsel from Attorney Mancuso. Furthermore, assuming arguendo that Petitioner was entitled to participate in

the subject discussions with Attorney Mancuso,[3] as duly noted by Respondents, any challenge to the reprimand letter is moot as it was later ratified by the Town Board at a duly noticed meeting open to the public when the Resolution was adopted. Lastly, Petitioner's contentions that the communications or portions thereof fall outside the scope of attorney-client privilege, or that Respondents continued discussions and deliberations before deciding to issue Petitioner a formal written reprimand are wholly speculative and based upon conjecture. Based upon the foregoing, Petitioner's first cause of action must be dismissed.

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[3] In 1999, the NYS Department of State Committee on Open Government issued an advisory opinion wherein it found that a meeting with the Town Attorney and four Board members, excluding one member, was subject to attorney-client privilege and thus exempt from the Open Meetings Law. In that case, the excluded Board member was the subject of a lawsuit brought by a Town employee alleging sexual harassment. The opinion went on to state that although the Town and the excluded Board member were named as co-defendants in the action, their interests were at odds with each other, and thus, the four Board members were permitted to convene with counsel to obtain legal advice. (*See generally* OML-AO-3100 [December 28, 1999].)

While this Court is aware that there is no outside litigation pending, it is nevertheless persuaded by the reasoning employed by the Committee. In this case, as in the one considered by the Committee, the interests of Petitioner and the Respondents are certainly at odds. Along those lines, it is widely understood that counsel often provides legal advice to assist clients in deciding how to best order their affairs, including what action, if any, to take in order to avoid litigation (*see generally Appellate Advocates v New York State Dept. of Corrections and Community Supervision*, 40 NY3d 547 [2023]). Thus, given the adverse interests of the parties and the Respondents' sound bases to pursue legal counsel in the wake of sexual harassment and retaliatory allegations made against Petitioner in his official capacity, in this Court's view, Petitioner was properly excluded from the meeting between Respondents and Attorney Mancuso.

Standing

With respect to a motion made pursuant to CPLR § 3211 (a) (3), a pleading may be dismissed on the ground that "the party asserting the cause of action does not have legal capacity to sue" (CPLR § 3211 [a] [3]). "Where a CPLR § 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*Palmieri v Sunharbor Acquisition I, LLC*, 79 Misc 3d 1220[A] [Sup Ct 2023] [citations and quotations omitted]).

"The two-part test for determining standing is a familiar one. First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action (*New York State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and that the party has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural, but is, instead, sufficiently concrete and particularized to warrant judicial intervention. An alleged injury will not confer standing if it is based on speculation about what might occur in the future or what future harm might be incurred." (*Greco v Syracuse ASC, LLC*, 218 AD3d 1156 [4th Dept 2023] [internal citations and quotations omitted].) "Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*New York State Ass'n of Nurse Anesthetists*, 2 NY3d at 211). "[A] private citizen who does not show any special rights or

interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue" (*Matter of Meehan v County of Westchester*, 3 AD3d 533, 534 [2d Dept 2004] [citations omitted]).

In the instant case, Respondents allege that Petitioner has failed to sufficiently articulate an injury in fact that falls within the zone of interest protected by the Town's procurement policy and further, he has not established common-law taxpayer standing. The Court agrees. To that end, Petitioner has not raised any arguments in opposition to these contentions; rather, he avers that standing is conferred pursuant to Municipal Law § 51. Yet, the Petition and supporting documents are bereft of allegations to support this theory of standing. Assuming arguendo Petitioner properly alleged he is a taxpayer as statutorily defined, the vague and conclusory allegations fail to set forth that the complained of acts are "fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (*Warren v Dickson*, 239 AD3d 1277, 1278 [4th Dept 2025] [internal citations and quotations omitted]). Merely stating that Respondents did not adhere to the Town's procurement policy is insufficient to constitute the fraud or illegality necessary to support a taxpayer action pursuant to General Municipal Law § 51. As such, Petitioner's second cause of action must be dismissed.

The Court considered both Petitioner and Respondents' remaining contentions and finds them to be without merit and any such requested relief not specifically granted in this Decision is denied.

Accordingly, it is hereby

ORDERED that Respondents' motion to dismiss is GRANTED in part, in conformance with this Decision; and it is further

ORDERED that Petitioners' Petition is DENIED and DISMISSED.

This constitutes the Decision and Order of the Court.

Dated: September 5, 2025

HON. ELENA F. CARIOLA
Justice of the Supreme Court