To be argued by
CAMILLA HSU
(15 minutes requested)

New York Supreme Court

Appellate Division -- Second Department

IN THE MATTER OF LUIS ALVAREZ,

Petitioner-Appellant,

Appellate Division
Dkt. No. 2019-04287

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONER-APPELLANT

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IN THE MATTER OF LUIS ALVAREZ

Petitioner-Appellant,

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ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION

Respondent-Respondent.

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INTRODUCTORY STATEMENT

Appellant submits this brief in reply to Respondent's Brief, and in further support of his appeal from the order of the Supreme Court, Queens County, entered on November 29, 2018, dismissing his Article 78 petition as moot (Pineda-Kirwan, J.). As to Respondent's arguments not addressed herein, Mr. Alvarez relies on his opening brief.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DECLINING TO REVIEW MR. ALVAREZ'S MERITORIOUS, NOVEL, AND SUBSTANTIAL CLAIM THAT THE QUEENSBORO CORRECTIONAL FACILITY COULD NOT FUNCTION AS A RESIDENTIAL TREATMENT FACILITY FOR ANYONE WITH A SEX OFFENSE CONVICTION.

Respondent asserts that Mr. Alvarez's claim about Queensboro Correctional Facility ("Queensboro") should not be reviewed under the exception to mootness doctrine, because he has not shown that the underlying issue is likely to recur as to other members of the public. See Resp. Br. at 21-24.[1] Respondent argues that Mr. Alvarez has attempted for the first time on appeal to make a "broader claim" about the unsuitability of Queensboro to serve as a Residential Treatment Facility ("RTF") than the individual claim he pled in his petitions. Resp. Br. at 25. In fact, Mr. Alvarez laid out clearly for the Supreme Court the fact that this same issue would affect any individual with a sex offense conviction who was detained at the Queensboro RTF during his term of post-release supervision. R.363-64 (describing as substantial and novel and therefore appropriate for review under the exception to mootness doctrine the question of "whether Queensboro can function as an RTF for sex offenders when its own rules

[1]Hereinafter, citations preceded by "Resp. Br." are drawn from Respondent's Brief, "Br." from Appellant's Brief, and "R." from the Record on Appeal.

explicitly make them ineligible to participate in RTF programming"). His argument for review of his Queensboro claim is therefore properly before this Court.

Respondent contends that Mr. Alvarez's claim was "fact-specific" and therefore unlikely to recur. Resp. Br. at 21-22. But that contention is belied by the categorical ban on sex offenders participating in the Queensboro RTF program, a ban whose existence Respondent tellingly does not dispute. There was nothing idiosyncratic about Mr. Alvarez's exclusion from the educational and professional programming from which true Queensboro RTF residents benefit. It stemmed simply and only from his sex offense conviction. Indeed, Respondent's own filings below amply illustrate the kafkaesque mundanity that now attends the continued confinement of indigent people like Mr. Alvarez. Respondent submitted affirmations wearily reciting that, in spite of Respondent and DHS having entered into an agreement years ago to place ten people subject to SARA restrictions per month into DHS Shelters, and then worked up to a placement rate of around twenty per month, there were still "many others" in Mr. Alvarez's position, and it was "highly unlikely ... [they would find a bed for Mr. Alvarez] ...any time soon." R.96, R.151-53. For these reasons, the likelihood of recurrence prong of the exception to mootness test is satisfied in this case.

As Respondent does not refute, the evading-review prong of the test is likewise satisfied here, since Respondent voluntarily ceased detaining Mr. Alvarez before a decision could be rendered on his petition and could do the same with future litigants,

precluding them from obtaining review of these critical issues. As to the substantial-and-novel prong of the test, Respondent likewise does not refute that no appellate court has reviewed the question of whether Queensboro can function as an RTF for people with sex offense convictions in spite of the existence of a directive prohibiting those same people from partaking in RTF programming. This claim should be reviewed under the exception to mootness doctrine.

As to the merits of the Queensboro claim, Respondent contends that Mr. Alvarez's exclusion from the RTF program at Queensboro does not demonstrate that he did not nonetheless receive services sufficient to meet the statutory requirements of an RTF. Resp. Br. at 24-25. In fact, Mr. Alvarez received inadequate programming. Respondent's own exhibit below described how he worked on a "manual labor" crew that "frequently performed [work] on the grounds of Queensboro" but was "sometimes taken off grounds to perform particular duties." R.335. That same exhibit drew one distinction between Mr. Alvarez's circumstances at Queensboro and those of a general population inmate: Mr. Alvarez was paid "more." Id. As such, he did not receive the programming for which the legislature provided when it created RTFs. Among other things, he did not receive any community-based opportunities to assist with his reintegration into society. See Alcantara v. Annucci, – N.Y.S.3d –, 2019 N.Y. Slip Op. 29407 (Sup. Ct. Albany County 2019)(granting summary judgment on an insufficient RTF programming claim to plaintiffs who were permitted to participate in a DOCCS

work crew that performed loading and unloading tasks at a storehouse outside the limits of the correctional facility, but were not afforded opportunities to work, train, or study in the surrounding communities themselves). The lower court erred in declining review, which would have shown that Queensboro cannot serve as an RTF for people, like Mr. Alvarez, who have been convicted of sex offenses.

POINT II

THE LOWER COURT ERRED IN DETERMINING THAT SARA APPLIES TO PEOPLE WHO HAVE SERVED THEIR FULL INCARCERATORY SENTENCES BEFORE COMMENCING POST-RELEASE SUPERVISION

Respondent makes several unavailing arguments about the posture of Mr. Alvarez's Sexual Assault Reform Act ("SARA") claim. First, Respondent argues that Mr. Alvarez conceded mootness before the lower court. In fact, Mr. Alvarez argued that the lower court should review the claim whether or not it found it to be moot. See R.367 (arguing that the court should proceed to review "irrespective of mootness"). This Court should likewise consider the claim regardless of its finding as to mootness.

Respondent's second argument imagines a request for relief that Mr. Alvarez never made. Insisting that Mr. Alvarez must be requesting relief from the imposition of the SARA condition, Respondent claims that he should have served the Board of Parole. See Resp. Br. at 18. Contrary to Respondent's contention, Mr. Alvarez seeks a declaratory judgment, which is an appropriate form of relief, since the question at hand

is the scope of the applicability of a statute. See Skelos v. Paterson, 65 A.D.3d 339, 344 (2nd Dept. 2009), rev'd on other grounds, 13 N.Y.3d 141 (2009)(declaratory judgment appropriate to decide question of law where there existed no disputed issues of fact); Froelich v. Town of Huntington, 159 A.D.2d 606, 606-07 (2nd Dept. 1990)(in action for a declaratory judgment as to the constitutionality and application of a zoning restriction on a particular property, plaintiffs' transfer of property interests did not necessarily render action moot, since transferees continued to be affected by the restriction); Dooley v. DeMarco, 106 A.D.3d 27, 38 (4th Dept. 2013)(declaratory relief appropriate to clarify to which defendants a diversion statute applied). Respondent's contention that the Board is a necessary party even to a declaratory judgment action again misconstrues the nature of the question at hand. Respondent's reliance on Matter of Garden City Ctr. Assoc. v. Incorporated Vil. Of Garden City, 193 A.D.2d 740, 740 (2nd Dept. 1993) is misplaced. That case stands for the proposition that where a legislative act is challenged, the legislating body is a necessary party. Here, because Mr. Alvarez does not challenge any act of the Board of Parole, but instead seeks a declaratory judgment on a question of law, the Board is not a necessary party. For these reasons, there is no impediment to this Court deciding the SARA claim.

According to Respondent, in order to make SARA applicable to people who have completed their full incarceratory sentences before commencing post-release supervision, the plain language of the SARA statute should be disregarded, and language

from a provision of the penal law grafted on. See Resp. Br. at 27-28. This approach ignores the fundamental principles of statutory interpretation, which must always be rooted in "the language itself, giving effect to the plain meaning thereof." Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583 (1998). Respondent would reach to another statute entirely to contrive a new meaning for Executive Law § 259-c(14), but these contortions are not warranted, because the language of the SARA provision is clear, and it does not extend to cover people on post-release supervision like Mr. Alvarez. The lower court erred in determining that SARA applies to a group of people not named in the statute.

POINT III

THIS CASE SHOULD BE REMANDED FOR THE LOWER COURT TO DECIDE MR. ALVAREZ'S EQUAL PROTECTION CLAIM

Respondent contends that Mr. Alvarez failed to show that the exception to mootness doctrine applied to his equal protection claim. See Resp. Br. at 29. This argument is unavailing because it assumes the existence of a determination of mootness that was in fact never made with respect to the equal protection claim. Since the lower court made no determination whatsoever on the equal protection claim, the question about the applicability of an exception to mootness doctrine was never ripe. See R.2.

Moreover, Respondent's argument overlooks how the filings unfolded in this case. The original petition, affirmation and return, and reply all dealt with Mr. Alvarez's equal

protection claim. See R.31-32, 96-97, and 167-68. The parties' subsequent filings–Mr. Alvarez's two supplemental petitions (both filed on consent) and Respondent's July 25, 2018 affirmation and return–were styled as supplements to, not supersessions of, the original petition, affirmation and return, and reply. See R.237-38, 246-47, 256-66, 272, and 318. As such, the equal protection arguments on both sides were laid out in the filings submitted in Duchess County and, in Respondent's own words, "incorporate[d]" into the filings submitted in Queens County. R.318. This Court's holding in People ex. rel. McCurdy v. Warden Westchester County Corr. Facility, 164 A.D.3d 692 (2nd Dept. 2018), which was the subject of subsequent letters from the parties to the lower court, did not touch on equal protection, and so was not determinative of this claim. It should have been reviewed.

As to the merits of the claim, Respondent argues that Mr. Alvarez's term of incarceration was not extended as a result of his indigence because after his maximum expiration date, he was housed at an RTF, not in a prison. See Resp. Br. at 30 n.10. Respondent contends that Mr. Alvarez therefore cannot show a violation of his right to equal protection of law. See id. This argument overlooks two critical facts: (1) Mr. Alvarez was held in prison and not an RTF between his conditional release and maximum expiration dates as a result of his inability to find housing that he could afford and which would comply with the conditions Respondent imposed on him, Br. at 3; and (2) for the reasons outlined in Mr. Alvarez's brief, while nominally placed at an RTF, he

did not receive RTF services as defined in the Correction Law and so was in fact incarcerated even past his maximum expiration date. Since Mr. Alvarez can show an infringement on his very right to freedom as a result of his poverty, this Court should remand for the lower court to make a decision on his equal protection claim.

Respondent goes on to argue that Mr. Alvarez's equal protection claim should be denied because his continued detention was not as a result only of his indigence, but also, among other things, of the number of places in which he had community ties, and the number of communities in which he was willing to live, and the availability of affordable housing in those areas. See Resp. Br. At 31. This argument does not defeat an equal protection claim because it does not show that a similarly situated, not indigent person would have suffered the same consequences as Mr. Alvarez. A person of means could, for example, pay for housing not classified as affordable, or pay to travel between his home community and a new community. Moreover, Respondent's contention that Mr. Alvarez chose to remain in a prison rather than be released to a community other than New York City finds no support in the record. Indeed, his prayers for relief asked for release to suitable housing without regard to geographical proximity to his family members and home community. See R.8, 238, 265. For these reasons, the equal protection claim was properly laid out and should be reviewed.

Courts "should not refrain from deciding serious constitutional issues ... where the controversy is of public importance and is of a character which is likely to recur ... with

respect to others." Phelan v. City of Buffalo, 54 AD2d 262, 265-66 (4th Dept. 1976). Mr. Alvarez's claims go to the heart of the right to be free from illegal incarceration under circumstances that Respondent's own filings show are destined to recur. They should be reviewed.

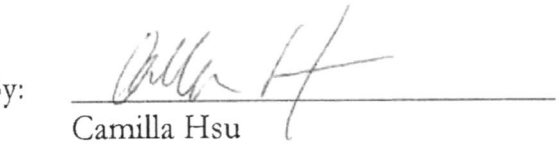
CONCLUSION

FOR THE REASONS STATED ABOVE AND IN HIS OPENING BRIEF, THE COURT SHOULD REVIEW MR. ALVAREZ'S QUEENSBORO, SARA, AND SIX MONTH LIMITATION CLAIMS AND REMAND FOR A DETERMINATION ON HIS EQUAL PROTECTION CLAIM.

Dated: New York, NY
January 22, 2020

Respectfully submitted,

ROBERT S. DEAN
Attorney for Defendant-Appellant

By: 

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Matter of Garden City Ctr. Assoc. v Incorporated Vil. of Garden City

Supreme Court, Appellate Division, Second Department, New York • May 17, 1993 • 193 A.D.2d 740 • 598 N.Y.S.2d 62 (Approx. 2 pages)

193 A.D.2d 740, 598 N.Y.S.2d 62

In the Matter of Garden City Center Associates, Appellant, v. Incorporated Village of Garden City, Respondent.

Supreme Court, Appellate Division, Second Department, New York

91-06374

(May 17, 1993)

CITE TITLE AS: Matter of Garden City Ctr. Assoc. v Incorporated Vil. of Garden City

HEADNOTE

PROCEEDING AGAINST BODY OR OFFICER WHEN REMEDY AVAILABLE

(1) CPLR article 78 proceeding is not proper vehicle to challenge legislative acts of governmental entity; thus, Supreme Court properly dismissed petition seeking to compel respondent Village to purchase certain parcel of

real property to convert to municipal parking; acquisition of real property involves judgments, including fiscal appropriations, which must be left to executive branch --- Moreover, Supreme Court did not err in failing to convert petition to declaratory judgment action; although CPLR 103 (c) gives courts power to treat CPLR article 78 proceeding as action for declaratory judgment, this power is conditioned on court's jurisdiction over necessary parties; in action seeking to declare legislative act of village invalid, Board of Trustees of Village would be necessary parties; therefore, CPLR 103 (c) is not available, since Village Trustees are not parties to proceeding.

In a proceeding pursuant to CPLR article 78, *inter alia,* to compel the **Incorporated** Village of **Garden City** to purchase a certain parcel of real property to convert to a public parking lot, the petitioner appeals from a judgment of the Supreme Court, Nassau County (Becker, J.), entered March 11, 1991, which dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

It is well settled that a CPLR article 78 proceeding is not the proper vehicle to challenge legislative acts of a governmental entity *(see, Bryant Ave. Tenants' Assn. v Koch,* 71 NY2d 856; *Jones v Beame,* 45 NY2d 402; ***Matter** of Lakeland Water Dist. v Onondaga County Water Auth.,* 24 NY2d 400, 407). Thus, the Supreme Court properly dismissed the petition seeking to compel the respondent, the **Incorporated** Village of **Garden City**, to purchase a certain parcel of real property to convert to municipal parking. The acquisition of real property involves judgments, including fiscal appropriations, which must be left to the

executive branch *(cf., **Matter** of Town of Mentz v Department of Transp.,* 106 AD2d 870).

Moreover, the Supreme Court did not err in failing to convert the petition to a declaratory judgment action. Although CPLR 103 (c) gives the courts the power to treat a CPLR article 78 proceeding as an action for a declaratory judgment, this power is conditioned on the court's jurisdiction over the necessary parties. In an action seeking to declare a legislative act of a village invalid, the Board of Trustees of the Village would be necessary parties *(see, **Matter** of Overhill Bldg. Co. v Delany,* 28 NY2d 449, 458; *cf., **Matter** of Watt v Town of Gaines,* 140 AD2d 947; *but cf., Goldwin-Kent, Inc. v County of Broome,* 107 Misc 2d 722, 725). Therefore, in the ***741** instant proceeding CPLR 103 (c) is not available, since the Village Trustees are not parties to this proceeding.

We have considered the petitioner's remaining contentions and find them to be without merit.

Mangano, P. J., Thompson, Balletta and Lawrence, JJ., concur.

End of Document

Related documents

Selected topics | Secondary Sources | Briefs | Trial Court Documents

Nature and Grounds
Writ of Mandamus Compelling State Adult Parole

Declaratory Judgment
Proceedings
Urban Redevelopment Corporation Absent Joinder of Necessary Parties

--- N.Y.S.3d ----, 2019 WL 7496373
(N.Y.Sup.), 2019 N.Y. Slip Op. 29407

***1** Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera and David Sotomayor, Plaintiffs,
v.
Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, Tina M. Stanford, Commissioner, New York State Board of Parole, Defendants.

Supreme Court, Albany County
2534-16
Decided on December 20, 2019

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OPINION OF THE COURT

Denise A. Hartman, J.

Plaintiffs commenced this proceeding against defendants Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS), and Tina M. Stanford, Commissioner of the New York State Board of Parole (collectively, State defendants), claiming that they were illegally confined at the Fishkill Correctional Facility, designated a Residential Treatment Facility (RTF), beyond the six-month period prescribed by Penal Law § 70.45 (3); that DOCCS provided inadequate assistance in finding suitable post-release housing; and that the Fishkill RTF is not a community-based facility that provides programming and reintegration opportunities required by Correction Law § 73.

In its decision and order dated February 24, 2017, this Court denied plaintiff's claims that DOCCS unlawfully detained them at the Fishkill RTF and provided them inadequate assistance in finding suitable post-release housing. But the Court held that plaintiffs raised material questions of fact regarding their claim that the Fishkill RTF is not community-based and does not offer programming and reintegration opportunities in compliance with Correction Law § 73. The Court also held that, while moot as to the named plaintiffs, the claim qualifies as an exception to the mootness doctrine. It converted the proceeding to a declaratory judgment action and allowed the remaining claim to proceed to discovery. [1]

The parties have now completed discovery. According to plaintiffs, the State defendants produced thousands of pages of documents responsive to their interrogatories and document requests. And plaintiffs deposed thirteen current or former DOCCS employees, including offender rehabilitation counselors (ORCs), parole officers, program directors, and deputy commissioners. Plaintiffs Alcantara and Sotomayor were also deposed. On November 27, 2018, the Court of Appeals decided *Matter of Gonzalez v Annucci*, 32 NY3d 461 [2018]), which addressed and rejected a similar claim that the Woodbourne RTF failed to comply with statutes governing residential treatment facilities. Plaintiffs have filed a certificate of trial readiness.

Now pending before the Court is the State defendants' motion for summary judgment, which plaintiffs oppose. The Court heard oral argument on the motion on September 25, 2019. For the reasons discussed below, the Court grants the State defendants partial summary judgment. Plaintiffs have not shown that the conditions and program opportunities within the Fishkill RTF are non-compliant with the statute. However, after searching the record, the Court grants partial

summary judgment to plaintiffs and declares that DOCCS is failing to provide for RTF parolees adequate community-based work and educational opportunities outside the Fishkill Correctional Facility environs as required by statute.

BACKGROUND

Plaintiffs Richard Alcantara, David Sotomayor, Jackson Metellus, Cesar Molina, Carlos Rivera, and Lester Classon were convicted of sex offenses that resulted in determinate prison sentences followed by post-release supervision. After completing their determinate terms of imprisonment, they were detained in DOCCS's custody at the Fishkill RTF pursuant to Penal Law § 70.45 (3). Plaintiffs contend that while they were residents in the Fishkill RTF, they were treated as inmates in a prison-like setting, far from the communities where they intend to return; that they were not offered meaningful programming or work opportunities; and that their mandated programs merely repeated the classes offered in prison. They aver that RTF parolees are subject to the same institutional rules and disciplinary proceedings as inmates in general confinement, and share the same gym, exercise yard and mess hall. Plaintiffs assert that the only employment offered to RTF parolees is a "porter pool," where they can perform menial janitorial jobs and a limited ability to work at the Correctional Facility Storehouse. They claim they have no opportunities to participate in work assignments in a community setting.

The State defendants counter that they are committed to providing education and training to RTF parolees, and they point to Directive No. 0051, which lists the programs available at the facility. Defendants assert that they offer RTF parolees work opportunities not available to inmates, where RTF parolees are paid $10 per day, a rate far higher than that paid to inmates. Specifically, they argue, RTF parolees are eligible to participate in a work assignment at the Correctional Facility Storehouse located outside the facility confines and are transported from the facility once each week to visit parole officers.

Statutory Background

The relevant statutes are as follows. Correction Law § 2 (6) defines "residential treatment facility" as:

> "6. A correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released."

And Correction Law § 73 (1), (2), and (3) provide:

> "1. The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her. While outside the facility he or she shall be at all times in the custody of the department and under its supervision."
>
> "2. The department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility."
>
> "3. Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established. Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her."

DOCCS has designated the Fishkill Correctional Facility, a medium security facility located in the City of Beacon in Dutchess County, as a "general confinement facility," a "work release facility," and a "residential treatment facility" (7 NYCRR 100.90 [c] [3]; Directive No. 0051). DOCCS officials have stated that Fishkill Correctional Facility was designated a residential treatment facility based on its relative proximity to New York City and other communities where offenders intend to return, programming availability, and the adequacy of staffing for work crews.

The State Defendants' Summary Judgment Motion

In support of their motion for summary judgment, the State defendants argue that the Court of Appeals decision in *Matter of Gonzalez v Annucci* (32 NY3d 461 [2018]) is dispositive of plaintiffs' claims. They also proffer evidence in support of their position that the Fishkill RTF provides adequate educational and rehabilitative services geared toward helping RTF parolees reintegrate into the community. The State defendants rely heavily on the affirmation of Beverly Lockwood, [2] an ORC who works at the Fishkill RTF, and the deposition testimony of plaintiffs Alcantara and Sotomayor.

Ms. Lockwood averred that DOCCS offers RTF parolees a 28-day RTF Program, attaching the official 2014 Residential Treatment Facility Curriculum. The RTF Program consists of nine modules, entitled: (1) Sex Offender Registration Act Procedures, (2) Employment, (3) Healthy Relationships and Activities, (4) Life Skills, (5) Available Community Resources, (6) Core Values and Beliefs, (7) Understanding Feelings, (8) Problem-Solving, and (9) Relapse Prevention. She explained that the RTF program is delivered in a 16-participant group setting during a three-hour session, four days per week. ORCs provide worksheets, teach techniques, and facilitate discussions in furtherance of each module. Parolees are paid to participate in the Program. The RTF Program is not available to DOCCS inmates and, according to Ms. Lockwood, it differs from other correctional re-entry programs in that it is "tailored to the challenges that sex offenders are likely to face when released to the community." Plaintiffs Alcantara and Sotomayor testified that they attended portions of the 28-day Program, but they found it not useful, not tailored to sex offenders, and duplicative of a re-entry program that they attended before being paroled to the Fishkill RTF.

Ms. Lockwood further averred that some RTF parolees are assigned to crews that work outside the facility at the Facility Storehouse. RTF parolees are paid $50 per week for their work there, 80% of which is automatically saved in a housing fund and cannot be garnished. Only RTF parolees, not inmates, may participate in this work assignment. Parolees who participate in the Facility Storehouse work assignment are transported weekly to meet with their parole officers in Poughkeepsie. Plaintiff Sotomayor admitted that during his confinement at the ***2** Fishkill RTF, he worked on a crew at the Facility Storehouse five days per week from 8 a.m. to 2 p.m., was transported to meet with his parole officer in Poughkeepsie, and was paid $10 per day for his work at the Facility Storehouse. Plaintiff Alcantara testified at his deposition that while he was confined at the Fishkill RTF he worked as a porter five days per week for 3 ½ to 7 hours per day, and that he was paid at a rate higher than prison inmates. He did not apply to work on the Storehouse work crew because working outside of the facility would have caused him to feel frustrated at his lack of freedom.

Plaintiffs oppose the State defendants' motion claiming that the evidence proffered by defendants about the 28-day RTF Program and RTF work opportunities fall far short of demonstrating compliance with the statutes. Regardless, plaintiffs argue, disputed issues of fact about how these programs are implemented preclude summary judgment at this stage of proceedings. Plaintiffs submitted deposition testimony of numerous DOCCS employees, including ORCs, program managers, parole officers, and deputy superintendents, as well as other evidence in support of their claims of non-compliance.

Plaintiffs submitted the deposition testimony of Stephen Urbanski, Deputy Superintendent of Security at Fishkill Correctional Facility, and Mark Heady, a supervising ORC at the Fishkill RTF, who stated that there are virtually no opportunities for RTF parolees for employment, training, or programming outside the facility in Poughkeepsie, Beacon, or other nearby communities. The only exception is a work assignment at the Facility Storehouse, located less than one-tenth of a mile outside the prison fence, but on the Fishkill Correctional Facility property. The work at the Facility Storehouse mainly involves loading and unloading deliveries to the Correctional Facility and groundskeeping. Only eight RTF parolees are assigned to work there at any time, generally from 8 a.m. to 2 p.m. RTF parolees assigned to the Storehouse work crew were being transported to visit parole officers in Poughkeepsie, but that practice may have diminished because parole officers from Poughkeepsie now come to the RTF to meet with them. According to Urbanski, RTF parolees are not permitted to participate in work release or furlough programs in the nearby communities, even though such programs are available to the general inmate population. As for work programs within the Correctional Facility, plaintiffs produced deposition testimony showing limited work opportunities for RTF parolees. Some RTF parolees are assigned porter jobs, which pay $5 per day, but RTF parolees are effectively excluded from many work-related opportunities within the facility available to the general inmate population.

Plaintiffs acknowledge that DOCCS offers a 28-day RTF Program for RTF parolees. But they argue that the deposition testimony shows that the 28-day Program is inadequate and

redundant of programming provided to inmates before their release to the RTF as parolees. While the first module of the 28-day Program is specifically designed for sex offenders, plaintiffs submitted the deposition testimony of several ORCs who stated that the other modules were not particularly tailored to issues encountered by sex offender parolees. These and other depositions provided to the Court suggest that discussion of the RTF Program topics as they relate to sex offender paroles is uneven, and depends on the training and orientation of the ORC conducting the classes and facilitating the group discussions, as well as the interests of the attending RTF parolees in discussing the topics during the assigned classes. Relying on the deposition testimony of Jeff McCoy, Deputy Commissioner of Program Services, and Shelly Mallozzi, both of whom were involved in the creation of the RTF Program, plaintiffs contend that the 28-day Program is a duplicative, "condensed version" of the sex offender programs offered to those serving their sentences. Plaintiffs argue further that the modules related to ***3** employment and housing do not include up-to-date materials reflecting current housing and employment opportunities in the communities where RTF parolees intend to reside. According to Ms. Mallozzi, the original housing and employment ads used to facilitate exercises in the relevant modules should have been updated but have not been since the Program's creation in 2014.

Finally, plaintiffs contend that the general conditions of confinement for RTF parolees are the same as inmates. In their words, the Fishkill RTF "is a prison in all but name only." According to the deposition testimony provided by Deputy Superintendent Urbanski and Mark Heady, Supervising ORC, RTF parolees wear green uniform pants, dine and exercise with general population inmates, and are subject to the same rules regarding visitation, discipline, and grievance processes as general population inmates. Although there is a designated dorm that provides housing for about 28 RTF parolees, most RTF parolees live in dorms also housing the general inmate population. According to Mr. Heady, about 85 to 100 RTF parolees were assigned to the Fishkill RTF at the time of his deposition. But the deposition testimony shows that there are few distinctions between the designated sex offender dorm and the dorms occupied by general population inmates.

Analysis

The proponent of a summary judgment motion must "ma[k]e a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 196 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[T]he facts must be viewed in the light most favorable to the non-moving party, and every available inference must be drawn in the non-moving party's favor" (*id.* [internal quotation marks, brackets, and citations omitted]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "If the moving party meets this burden, 'the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action'" (*id.* [internal quotation marks and citations omitted]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Vega v Restani Constr. Corp.*, 18 NY3d at 503). And, as plaintiffs suggest, the Court has the authority to search the record and grant summary judgment to the nonmoving party (*see* CPLR 3212 [b]; *Digesare Mech., Inc. v U.W. Marx, Inc.*, 176 AD3d 1449, __, 2019 NY Slip Op 07668, *4 [3d Dept 2019]; *Matter of Shambo*, 138 AD3d 1215, 1216 [3d Dept 2016]).

Matter of Gonzalez v Annucci Is Instructive,

But Not Dispositive of Plaintiffs' Claims.

The State defendants contend that the Court of Appeals decision in *Matter of Gonzalez v Annucci* (32 NY3d 461 [2018]) is dispositive of this case. This Court disagrees. In *Gonzalez*, petitioner similarly claimed that he was being incarcerated in a facility "that was not community-based as it was well outside of the Manhattan community to which he planned to return"; that "he was confined under the same restrictions as inmates who were serving their prison sentences at that same medium security facility"; and that "he did not receive any rehabilitative programming directed toward his reintegration into the community while at Woodbourne as required by Correction Law § 73" (*Matter of Gonzalez v Annucci*, 32 NY3d at 467-468). Petitioner conceded that he participated in Woodbourne's RTF Program for a portion of his stay at that facility, but claimed that "the program was no different from the 'Phase Three' program he had already completed as part of his sentence of imprisonment -- a program that was required to ***4** be completed by all inmates prior to their release from incarceration" (*id.* at 468). Petitioner also admitted that he was assigned to an outside work crew for some period of time. The majority at the Court of Appeals concluded that petitioner had not shown a violation of DOCCS's statutory obligations:

> [W]e agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations. Notably, the record adequately establishes that, based on institutional considerations, Woodbourne was the closest available RTF in which to place petitioner. Additionally, the record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate (*id*. at 475).

Importantly, however, the majority acknowledged in a footnote that "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court," citing this case (*id.* at 475 n 6). This Court construes the majority's footnote as permitting, not foreclosing, a fuller development of the record in this case concerning conditions and programming at the Fishkill RTF.

The State defendants further argue that the *Alcantara* plaintiffs "concede[d] that *Gonzalez* is dispositive" of their claim in their submissions amici curiae to the Court of Appeals in *Gonzalez*. It is true that plaintiffs argued that the available evidence establishes that the conditions at the two facilities are "almost the same" and that a decision in one would "inevitably" apply to both. But in its prior decision, this Court held, at the State defendants' urging, that petitioners lacked standing to raise their RTF-compliance with regard to the Woodbourne RTF, either individually or in a representative capacity, because the petition lacked allegations that any of the petitioners were confined to the Woodbourne RTF. The Court reasoned that factual questions about conditions at each facility undermine any argument that a decision regarding their Fishkill RTF-compliance claim would be determinative of the Woodbourne RTF-compliance claim and, therefore, dismissed all claims related to the Woodbourne RTF.

In short, preclusion principles do not apply because the *Alcantara* plaintiffs were not parties to the *Gonzalez* litigation, only amici, and because the factual record in this case differs from the record before the Court in *Gonzalez* (*see Matter of Dunn*, 24 NY3d 699, 704 [2015]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]). While the Court of Appeals decision in *Gonzalez* is not dispositive, however, it constitutes highly instructive authority for analyzing plaintiffs' Fishkill RTF-compliance claim, as discussed below.

Plaintiffs' Claim that DOCCS Unlawfully Treats RTF Parolees

as Inmates Still Serving Their Sentences Lacks Merit.

Correction Law § 2 (6) defines "residential treatment facility" as a "*correctional facility* consisting of a community-based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for released on parole who intend to reside in or near that community when release" (emphasis added). The Legislature plainly contemplated that a residential treatment facility be a "correctional facility," or an area within a "correctional facility" (*see also* Correction Law § 70 [6] [b] [ii] [RTF serves a "function" within a correctional facility]). Given the express authorization to locate residential treatment facilities at correctional facilities, the fact that RTF parolees are treated much the same ***5** as general population inmates, particularly within the confines of a medium security correctional facility where parolees are afforded more freedoms than more secure correctional facilities, does not violate the statute.

The record discloses that Fishkill Correctional Facility is a medium security facility. RTF parolees are required to wear the same clothing and are subject to the same disciplinary rules and procedures and constraints as inmates who reside at the medium security facility. Plaintiffs and similarly situated sex offender parolees may, upon notifying appropriate correction officials, visit the library and gym facilities without escort. And while Fishkill contains only 28 beds in the sex offender dorm, the entire facility is classified as medium security and plaintiffs testified at their depositions that some sex offenders prefer to live in the general population to avoid the stigma associated with sex offenders. These facts do not demonstrate that plaintiffs were not accorded the rights of a resident of an RTF (*see Matter of Gonzalez v Annucci*, 32 NY3d at 474 [finding with respect to similar factual allegations about conditions at Woodbourne RTF that "the record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate"]; *Matter of Allen v Annucci*, Sup Ct, Albany County, May 8, 2018, Platkin, J., index No. 8224-17 at p 9 [holding conditions plaintiffs complain about "are inherent in DOCCS's lawful

decision to co-locate an RTF within a medium security correctional facility"]).

Nor does the fact that the RTF at Fishkill Correctional Facility is located 60 miles from New York City violate the statute's command that the RTF be "community-based." In *Matter of Gonzalez v Annucci*, the Court of Appeals rejected petitioners' similar argument that the Woodbourne RTF was not "community-based as it was well outside of the Manhattan community to which he planned to return" (32 NY3d at 468, 474). The Woodbourne RTF is located more than 100 miles from New York City, where most RTF parolees plan to return. Perforce, the Fishkill RTF, which is nearer to New York City than Woodbourne RTF, is not non-compliant merely because of its distance from New York City. Thus, the Court rejects plaintiffs' claim that the RTF at Fishkill Correctional Facility is not community-based in the sense that it is too far from New York City, where RTF parolees intend to return.

Plaintiffs Have Not Raised a Question of Material Fact

as to Whether DOCCS Is Failing to Provide Adequate

Programming to RTF Parolees Within the Facility.

Correction Law § 73 (3) requires DOCCS to establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility." Each inmate must be "assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her." Plaintiffs have not established otherwise or raised a question of fact as to whether DOCCS offers programming for RTF parolees within the Correctional Facility in compliance with the statute.

The evidence provided shows that, upon arriving at the Fishkill RTF, RTF parolees participate in an orientation program and meet with their ORC to discuss program assignments. The ORC then coordinates with programming staff to finalize a program for each parolee. RTF parolees are generally assigned to the 28-day RTF Program for 7 or 8 weeks, simultaneously with or followed by a work assignment. RTF parolees, upon request, may also be assigned to educational programming for college or high school equivalency courses. The evidence shows that working as a porter or on the Facility Storehouse crew are the primary job assignments for RTF parolees. But the testimony shows that RTF parolees can also be assigned to other ***6** vocational programming inside the Fishkill Correctional Facility, although these assignments appear to be available only upon request and some programming available to general population inmates may not be available to RTF parolees. These opportunities provide some amount of training for soon-to-be-released parolees to learn or reinforce their skills related to employment, such as being on time, taking direction, and completing tasks as directed. RTF parolees are paid at significantly higher rates than general population inmates for their participation in programming. Their earnings are set aside for use upon release and not subject to garnishment, reinforcing the value of earning and saving money. And the evidence shows that RTF parolees have access to ORCs and local parole officers, who in turn coordinate with parole officers in the communities where RTF parolees intend to live upon release to the community.

Viewing the programming as a whole, the Court finds that the State defendants have met their burden, prima facie, of establishing that the programs offered to RTF parolees within the facility or on facility grounds are at least minimally adequate and do not violate DOCCS's obligations under the Correction Law. DOCCS must be given substantial leeway to develop and implement programs in furtherance of penological and rehabilitative objectives for inmates and parolees in its custody (*see Turner v Safley*, 482 US 78, 84-85 [1987]; *Matter of Bezio v Dorsey*, 21 NY3d 93, 104 [2013]; *Matter of Griffin v Coughlin*, 88 NY2d 674, 710 [1996], *cert denied* 519 US 1054 [1997]). And the programming opportunities must be evaluated in the context of the short-term and indefinite duration of most RTF residencies, notwithstanding plaintiffs' evidence that some are required to stay longer when they have difficulty finding SARA compliant housing. The courts are ill-equipped to micromanage the programming offered in correctional facilities. Nor are the courts in a position to oversee the management and training of ORCs and parole officers. Nothing in the Correction Law requires programming tailored to sex offenders, or the use of current newspaper ads for teaching RTF parolees how to find jobs and housing when they are released to the community, or as tools to teach budgeting in a more abstract sense. Thus, plaintiffs' complaints about the efficacy of the 28-day RTF Program, even taken as true, do not raise a question of fact about whether DOCCS is complying with its statutory obligations to establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility" (Correction Law § 73 [3]).

DOCCS Does Not Provide Adequate Opportunities

for Reintegration Programs Outside the Facility

The State defendants have not established that DOCCS complies with its statutory obligation to provide community-based opportunities for RTF parolees to help them reintegrate into the community. Reading the controlling sections of the Correction Law together, they reflect an unmistakable legislative intent to provide community-based programming for RTF parolees in furtherance of the statutory objective to help them reintegrate into the community. Correction Law § 2 (6) expressly defines "residential treatment facility" as a correctional facility consisting of a "community-based residence in or near a community where employment, educational and training opportunities are readily available." Correction Law § 73 (1) provides that a person who has been transferred to an RTF "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him," albeit in "the custody of the department and under its supervision." And Correction Law § 73 (2) provides that DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment for ***7** inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility."

The State defendants argue that the opportunity for RTF parolees to work at the Facility Storehouse satisfies its obligation to provide "community-based" job training and employment. This Court disagrees. The Facility Storehouse is located on the Fishkill Correctional Facility grounds, less than one tenth of a mile outside of the correctional facility fence. Except for the drivers of the delivery trucks, the work crew has no opportunity to interact with non-facility personnel, and certainly not in a community setting. And only eight of the nearly 100 RTF parolees can be assigned to the Facility Storehouse work crew at a time. Assuming a two-month assignment, a maximum of 24 RTF parolees can be assigned to work at the Facility Storehouse in any six-month period -- the maximum period of residency unless SARA-compliant housing is not found.

Even if the Facility Storehouse work crew could be considered "community-based," the State defendants have proffered no evidence that RTF parolees can avail themselves of other "employment, educational and training opportunities" in the communities of Fishkill, Beacon, Poughkeepsie, or other nearby communities. According to Mr. Urbanski, the Deputy Superintendent of Security at Fishkill, who oversees the work program for RTF parolees, RTF parolees are never "permitted to work off of the prison grounds" and he has "never seen anybody with official work outside the community project storehouse." The fact that DOCCS must supervise RTF parolees who work or train in the community does not mean that DOCCS has the authority to deny all supervised program assignments. The deposition testimony submitted by both parties shows that RTF parolees cannot even participate in work or training assignments or work furloughs available to the general inmate population.

The Court of Appeals' decision in *Matter of Gonzalez* does not require the Court to resolve this issue in the State defendants' favor. There, Gonzalez himself had worked on an "outside work crew" (*Matter of Gonzalez v Annucci*, 32 NY3d 461, 468 [2018]). He claimed that he and the other RTF parolees assigned to the "outside work crew" were stigmatized because it also included inmates serving their original sentences who were aware that RTF parolees were sex offenders being paid at a higher rate than the general population inmates (*see Matter of Gonzalez v Annucci*, 56 Misc 3d 1203[A], at * 3 [Ct Cl 2015], *mod* 149 AD3d 256 [3d Dept 2017], *affd as mod* 32 NY3d 461 [2018]). Gonzalez further alleged that he was never allowed to leave the Woodbourne RTF, but DOCCS replied that he never asked to leave (*see Matter of Gonzalez v Annucci*, 32 NY3d at 486-487 [Wilson, J., dissenting]). Thus, the record in *Gonzalez* is factually distinct from the record before this Court, and appears to have been incomplete about the nature and location of the "outside work crew" and the availability of other true, community-based opportunities (*see id.*). On the other hand, the record here is clear and unequivocal that RTF parolees are not permitted to leave facility grounds for employment and the vast majority of RTF parolees have absolutely no opportunity for community-based "employment, educational and training opportunities."

In short, the State defendants have not met their burden on a motion for summary judgment of showing compliance with their statutory obligation to provide community-based assignments that would further RTF parolees' post-release reintegration into the community where they intend to live. And searching the record, the Court agrees with plaintiffs that summary judgment should be granted in their favor on this aspect of their claim.

Accordingly, it is

Ordered and Adjudged that the State defendants' motion is granted to the extent that the Court declares that plaintiffs have not shown that DOCCS is failing to comply with its obligations under Correction Law § 73 concerning the location, conditions of confinement, and rehabilitative programming within the Fishkill Correctional Facility; and it is

Ordered and Adjudged that the State defendants' motion is denied and summary judgment is granted to plaintiffs to the extent the Court declares that plaintiffs have demonstrated that DOCCS is failing to comply with its obligations under Correction Law § 73 to provide community-based programming and educational, vocational and employment opportunities in the communities outside the Fishkill Correctional Facility environs.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to plaintiffs' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute entry or filing under CPLR 2220 or 5016, and counsel is not relieved from the applicable provisions of those rules respecting filing and service.

Dated: December 20, 2019

Albany, New York

_____

Denise A. Hartman

Acting Supreme Court Justice

Papers Considered

1. Notice of Motion, dated May 30, 2019;

2. Attorney Affirmation in Support of Defendants' Motion for Summary Judgment, dated May 30, 2019, with Exhibits 1-8;

3. Affidavit of Beverly Lockwood, dated May 30, 2019, with Exhibit A;

4. Memorandum of Law in Support of Defendants' Motion for Summary Judgment, dated May 30, 2019;

5. Affirmation of Christopher J. McNamara, Esq. in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, dated July 17, 2019, with Exhibits A-X;

6. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated July 17, 2019;

7. Reply Affirmation of Mark G. Mitchell, Esq., dated July 31, 2019, with Exhibits 1-5;

8. Reply Memorandum of Law, dated July 31, 2019;

9. Examination Before Trial of Shelley M. Mallozzi, received September 30, 2019.

FOOTNOTES

1 The Court in its February 24, 2017 decision and order also denied the petition insofar as it sought relief against the New York City respondents for their failure to provide enough SARA-compliant housing at shelter locations in New York City to accommodate the release of sex offender parolees.

2 Plaintiffs complain that DOCCS did not disclose the identity of Ms. Lockwood during discovery, and they had no opportunity to depose her. Defendants assert that Ms. Lockwood was recently hired, and her identity was disclosed during another ORC's deposition testimony well before plaintiffs filed their notice of trial readiness, but plaintiffs chose not to depose her. The Court will consider Ms. Lockwood's affidavit, along with the deposition testimony of other ORCs submitted by plaintiffs and defendants in reply.

106 A.D.3d 27, 962 N.Y.S.2d
546, 2013 N.Y. Slip Op. 01937

**1 In the Matter of Sandra Doorley, Petitioner-Plaintiff
v
John L. DeMarco et al., Respondents-Defendants.

Supreme Court, Appellate Division,
Fourth Department, New York
March 22, 2013

CITE TITLE AS: Matter of Doorley v DeMarco

SUMMARY

Proceeding pursuant to CPLR article 78 and declaratory judgment action (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondents Honorable John L. DeMarco and Honorable John R. Schwartz to comply with CPL 216.00 (1), and for other relief.

HEADNOTES

Limitation of Actions
Four-Month Statute of Limitations
Hybrid CPLR Article 78 Proceeding and Declaratory Judgment Action

([1]) Petitioner District Attorney's hybrid CPLR article 78 proceeding and declaratory judgment action, which sought mandamus, prohibition and a declaratory judgment, in effect, to prohibit respondent judges from allowing respondent criminal defendants and other criminal defendants not meeting the eligibility requirements to participate in the judicial diversion program, was timely. The statute of limitations for proceedings seeking mandamus or prohibition is four months (CPLR 217). In regard to the declaratory judgment action, if the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then that period applies. Because petitioner properly sought a writ of prohibition, the four-month statute of limitations also applied to the declaratory judgment action. Here, each of the decisions by respondent judge with regard to admitting respondent criminal defendants to the judicial diversion program was rendered within four months of the commencement date.

Proceeding against Body or Officer
Mandamus
When Remedy Appropriate

([2]) Mandamus to compel was not an appropriate remedy in petitioner District Attorney's proceeding seeking an order directing respondent judges to deny respondent criminal defendants' participation in the judicial diversion program on the ground that they did not meet the eligibility criteria of CPL 216.00 (1). The remedy of mandamus is available to compel a government entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion. Under the statutory scheme of CPL article 216, a court has discretion in determining whether to allow a defendant into the judicial diversion program, as is indicated by the language in CPL 216.05 (4) providing that "an eligible defendant may be allowed to participate." Thus, the court's duties under article 216 are not ministerial in nature.

Proceeding against Body or Officer
Prohibition
When Remedy Available

([3]) Petitioner District Attorney had a clear legal right to the relief of prohibition in a proceeding seeking to prohibit respondent judges from allowing respondent *28 criminal defendants to participate in the judicial diversion program on the ground that they did not meet the eligibility criteria of CPL 216.00 (1). Prohibition is available in cases where judicial authority is challenged when a court acts or threatens to act either without jurisdiction or in excess of its authorized powers. An action in excess of the court's power is one that impacts the entire proceeding. The appealability of the issue is a factor for consideration when determining whether the remedy is appropriate. Here, the judicial diversion program eligibility determination was not appealable. Moreover, the judge's determinations affected the entire proceedings inasmuch as the criminal defendants were diverted from the normal criminal proceedings.

Proceeding against Body or Officer
Prohibition
Trial Judge's Failure to Comply with Criminal Procedure Statute

([4]) Respondent judge acted in excess of his authority in a matter over which he had jurisdiction when he allowed respondent criminal defendants to participate in the judicial diversion program notwithstanding that the defendants did not meet the eligibility criteria of CPL 216.00 (1). Where language of a statute is clear and unambiguous, courts must give effect to its plain meaning. Section 216.00 (1) identifies an "[e]ligible defendant" for acceptance into the judicial diversion program as a person charged with any controlled substance offenses under Penal Law articles 220 or 221 or offenses specified in CPL 410.91 (5) and neither of the criminal defendants was charged with any of those offenses. Here, despite the unambiguous language of the statute, the judge chose to examine the nature and purpose of the statute and concluded that the proper interpretation was to permit the criminal defendants entry into judicial diversion. The judge specifically found that because the defendants were not ineligible for the program based on the exclusions provided in CPL 216.00 (1) (a) and (b), it was within his discretion to determine whether they were eligible. However, had the legislature intended all nonviolent offenders who committed crimes because of their drug addiction to be eligible for judicial diversion, it could have easily so stated. CPL 216.00 (1) was not rendered ambiguous by its reference to a subdivision that had been repealed prior to the effective date of section 216.00 (1). The reference was simply a typographical error and courts have uniformly interpreted the reference as citing to the subdivision following the repealed one. Moreover, that a plain reading leaves prosecutors with the discretion to indict individuals only for crimes that render them ineligible for judicial diversion is not a basis for a court to exceed its legal authority.

Declaratory Judgments
When Remedy Appropriate
Trial Judge's Failure to Comply with Criminal Procedure Statute

([5]) Petitioner District Attorney was entitled to a judgment declaring that only criminal defendants who meet the criteria of CPL 216.00 (1) are eligible for participation in the judicial diversion program. A declaratory judgment is available in cases where a constitutional question is involved or the legality of the meaning of a statute is in question and no question of fact is involved. In a case involving a criminal court ruling, the ruling must have an obvious effect extending far beyond the matter pending before the court so that it is likely that the issue will rise again with the same result in other cases. Here, respondent judge relied on the same reasoning in determining that two unrelated criminal defendants were entitled to participate in the judicial diversion program notwithstanding that they did not meet the eligibility criteria of CPL 216.00 (1).

*29 RESEARCH REFERENCES

Am Jur 2d, Criminal Law § 867; Am Jur 2d, Declaratory Judgments §§ 14, 15, 37, 48, 68, 185; Am Jur 2d, Mandamus §§ 2, 6, 19, 25, 45, 46, 51, 52; Am Jur 2d, Prohibition §§ 3, 6, 8, 10, 11, 27, 41, 45, 49, 80.

Carmody-Wait 2d, Proceeding Against a Body or Officer §§ 145:14, 145:19, 145:81, 145:136, 145:144, 145:164–145:168, 145:182, 145:806, 145:807, 145:812, 145:813, 145:882; Carmody-Wait 2d, Declaratory Judgments §§ 147:3, 147:7, 147:17, 147:32, 147:131.

LaFave, et al., Criminal Procedure (3d ed) §§ 26.2, 26.6.

McKinney's, CPLR 217; CPL 216.00 (1); 216.05 (4); 410.91.

NY Jur 2d, Article 78 and Related Proceedings §§ 81, 115, 118–121, 139–141, 147, 160, 164, 166, 173, 174, 184; NY Jur 2d, Criminal Law: Procedure §§ 2991, 2998, 3023, 3062; NY Jur 2d, Declaratory Judgments and Agreed Case §§ 18, 58, 155, 159; NY Jur 2d, Penal and Correctional Institutions § 273.

Siegel, NY Prac §§ 436, 437, 558, 559, 566.

ANNOTATION REFERENCE

See ALR Index under Criminal Procedure Rules; Declaratory Judgments or Relief; Limitation of Actions; Mandamus; Prohibition Writ; Sentence and Punishment.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: article /2 78 /s declaratory /p limitation & decision /p timely

APPEARANCES OF COUNSEL

Sandra Doorley, District Attorney, Rochester (*Kelly Christine Wolford* of counsel), petitioner-plaintiff pro se.
Honorable John L. DeMarco, Rochester, respondent-defendant pro se.
Timothy P. Donaher, Public Defender, Rochester (*James Eckert* of counsel), for respondents-defendants Dalana J. Watford and another.
Cyrus R. Vance, Jr., New York City (*Victoria M. White* of counsel), for District Attorneys Association of the State of New York, amicus curiae.

***30 OPINION OF THE COURT**

Centra, J.P.

I

Petitioner-plaintiff, the District Attorney of Monroe County (petitioner), commenced this original hybrid CPLR article 78 proceeding and declaratory judgment action against respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz (respondent judges), as ****2** well as against respondents-defendants Dalana J. Watford and Annie Pearl Pugh, both criminal defendants (respondent defendants). Respondent defendants were charged by indictments with various criminal offenses and, after arraignment, were accepted in the judicial diversion program by Judge DeMarco. Respondent defendants' cases were thereafter transferred to Judge Schwartz. Petitioner opposes judicial diversion for respondent defendants and seeks, inter alia, mandamus to compel respondent judges to comply with CPL 216.00 (1), a judgment prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program, and a judgment declaring that only defendants meeting the criteria set forth in CPL 216.00 (1) are eligible for the judicial diversion program. The criminal matters concerning respondent defendants were stayed pending the outcome of this proceeding/action. We now conclude that the petition/complaint should be granted in part.

II

As part of the Drug Law Reform Act of 2009, the New York State Legislature enacted CPL article 216, which created a judicial diversion program allowing selected felony offenders, whose substance abuse or dependence was a contributing factor to their criminal conduct, to undergo alcohol and substance abuse treatment rather than be sentenced to a term of imprisonment. After the arraignment of an "eligible defendant," an authorized court determines whether to allow the defendant to participate in judicial diversion (CPL 216.05 [1]; *see* CPL 216.05 [4]; *People v DeYoung*, 95 AD3d 71, 73-74 [2012]).

CPL 216.00 (1) defines an " '[e]ligible defendant' " for judicial diversion as

> "any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law ***31** or any other specified offense as defined in subdivision four of section 410.91 of this chapter . . . ."

Subdivisions (1) (a) and (b) of CPL 216.00, which do not apply here, list certain defendants who are not eligible for judicial diversion, such as defendants with a previous violent felony conviction. Penal Law articles 220 and 221 relate to controlled substances offenses and offenses involving marihuana, respectively, and CPL 410.91 sets forth the parameters for a sentence of parole supervision. Notably, CPL 410.91 (4) was repealed as of April 7, 2009, prior to the effective date of CPL 216.00; that subdivision of CPL 410.91 had imposed a requirement that the People consent to a sentence of parole supervision for a specified offense that was a class D felony. It appears that the reference to CPL 410.91 (4) was merely a typographical error and that the legislature meant to cite CPL 410.91 (5), which lists the specified offenses (*see* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70). The specified offenses listed in CPL 410.91 (5) include offenses such as burglary in the third degree (Penal Law § 140.20) and criminal mischief in the second degree (§ 145.10).

In Monroe County, Judge DeMarco arraigns all felony indictments containing charges that are not expressly excluded by CPL 216.00 (1) (a) or (b). If Judge DeMarco determines that a defendant is eligible for judicial diversion and the defendant wishes to participate in that program, the case is transferred to Judge Schwartz, who monitors compliance with the alcohol or substance abuse treatment.

III ****3**

Watford was charged by an indictment with four counts of falsifying business records in the first degree (Penal Law § 175.10), three counts of identify theft in the second degree (§

190.79 [1]), and one count of identify theft in the third degree (§ 190.78 [1]). The People alleged that Watford, on various dates in 2010, assumed the identities of four individuals in order to obtain cable services. After arraignment, Judge DeMarco ordered Watford to undergo a substance abuse evaluation over the People's objection. Watford thereafter moved for admission into judicial diversion, which the People opposed. On April 25, 2012, Judge DeMarco granted the motion and allowed Watford to be admitted into judicial diversion (*People v Watford*, 36 Misc 3d 456, 461-462 [2012]). Watford thereafter pleaded guilty to the charges in the indictment and signed a judicial diversion ***32** contract. Watford was promised a misdemeanor conviction and a sentence of no more than three years of probation if she successfully completed judicial diversion. In the event that Watford failed to complete judicial diversion, she would be sentenced to an indeterminate term no greater than 2 to 4 years' incarceration. Watford's case was then transferred to Judge Schwartz to monitor her compliance with her judicial diversion contract.

In May 2012, Watford was charged by a second indictment with identity theft in the second degree (Penal Law § 190.79 [1]). The People alleged that "on or about and between" January 5 and 9, 2012, Watford assumed the identity of another individual and obtained in excess of $500. After arraignment, Judge DeMarco on June 20, 2012 again allowed Watford into judicial diversion. She pleaded guilty to the charge and signed a judicial diversion contract with the same terms as the prior contract.

Pugh was charged by an indictment with promoting prison contraband in the first degree (Penal Law § 205.25 [1]), assault in the third degree (§ 120.00 [1]), and petit larceny (§ 155.25). The People alleged that, on May 12, 2012, Pugh stole property from a grocery store, caused physical injury to a security guard, and knowingly and unlawfully introduced a cell phone into the Monroe County Jail. On August 8, 2012, Judge DeMarco accepted her into judicial diversion for the reasons he had outlined in his decision in the Watford matter. Pugh thereafter pleaded guilty to the charges and signed a judicial diversion contract. If successful in judicial diversion, Pugh would receive a misdemeanor conviction and a sentence of three years' probation. If unsuccessful, she would receive a sentence of one year in jail.

IV

Petitioner commenced this original proceeding/action on August 24, 2012 seeking, inter alia, (1) a judgment pursuant to CPLR 7803 (1), i.e., mandamus to compel, directing respondent judges to deny respondent defendants' participation in the judicial diversion program; (2) a judgment pursuant to CPLR 7803 (2), i.e., writ of prohibition, prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program; and (3) a judgment pursuant to CPLR 3001 declaring that only defendants who meet the criteria of CPL 216.00 (1) are eligible for participation in the judicial diversion program. Petitioner contended that respondent defendants were not eligible for judicial diversion because they did not meet the criteria of CPL 216.00 (1).

***33** Respondent defendants submitted answers, in which they asserted that a determination that a defendant is eligible for judicial diversion is never a ministerial act, and always involves the exercise of the court's discretion; the respondent judges did not act in excess of their jurisdiction or authorized powers; and the outcome of each case is fact-specific. Watford alleged as an affirmative defense that the proceeding/action was untimely. Judge DeMarco submitted an answer and raised three objections: the petition/complaint failed to state a claim; the claims were not the proper subject of a CPLR article 78 proceeding; and the proceeding/action was time- ****4** barred. Judge Schwartz has elected not to appear.

V

([1]) Initially, we reject the timeliness objection. Petitioner commenced this hybrid proceeding/declaratory judgment action pursuant to CPLR article 78 and CPLR 3001, respectively. The statute of limitations for a proceeding seeking mandamus to compel is four months (*see* CPLR 217; *Town of Webster v Village of Webster*, 280 AD2d 931, 933-934 [2001]), as it is for a proceeding seeking prohibition (*see* CPLR 217; *Matter of Holtzman v Marrus*, 74 NY2d 865, 866 [1989]; *Matter of Holtzman v Goldman*, 71 NY2d 564, 568 n 1 [1988]). To determine the statute of limitations for a declaratory judgment action, we must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]; *see Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 66 [1998]). If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then we must use that period (*see Solnick*, 49 NY2d at 229-230). As explained below, petitioner properly seeks a writ of prohibition, and thus that four-month statute of limitations also applies to the declaratory judgment action (*see Matter of Riverkeeper, Inc. v Crotty*, 28 AD3d 957,

960 [2006]; *see generally Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

Judge DeMarco's decision granting Watford's motion for admission into judicial diversion on the first indictment was issued April 25, 2012, and his decision granting her admission into judicial diversion on the second indictment was made on June 20, 2012. His decision granting Pugh admission into judicial diversion was made on August 8, 2012. Petitioner commenced this original proceeding/action in this Court on August ***34** 24, 2012, which was within the four-month statute of limitations, and this proceeding/action is therefore timely.

VI

"[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Matter of Maron v Silver*, 14 NY3d 230, 249 [2010], *rearg dismissed* 16 NY3d 736 [2011]). A party seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the [judge] to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 765 [1997]).

([2]) We conclude that the remedy of mandamus to compel is not appropriate here, and thus that part of the petition/complaint seeking that relief should be denied. The statutory scheme of CPL article 216 establishes that a court has discretion in determining whether to allow a defendant into the judicial diversion program. For example, CPL 216.05 (4) provides that when an authorized court determines "that an eligible defendant should be offered alcohol or substance abuse treatment . . . , an eligible defendant *may* be allowed to participate in the judicial diversion program offered by this article" (emphasis added). Inasmuch as a court's duties under CPL article 216 are not ministerial in nature, mandamus to compel does not apply.

VII

Because of its extraordinary nature, a writ of prohibition lies only where there is a clear legal right to that relief (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]). Prohibition is available when "a court—in cases where judicial authority is challenged—acts or threatens to act ****5** either without jurisdiction or in excess of its authorized powers" (*Holtzman*, 71 NY2d at 569; *see Pirro*, 89 NY2d at 355). Prohibition does not lie to correct trial errors; the difference between a trial error and an action in excess of the court's power is that the latter impacts the entire proceeding (*see Holtzman*, 71 NY2d at 569).

> "When a petitioner seeks relief in the nature of prohibition pursuant to CPLR 7803 (2), the court must ***35** make a two-tiered analysis. It must first determine whether the issue presented is the type for which the remedy may be granted and, if it is, whether prohibition is warranted by the merits of the claim" (*id.* at 568).

Whether to grant prohibition is within the discretion of the court (*see Matter of Soares v Herrick*, 20 NY3d 139, 145 [2012]; *Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]).

([3]) Here, petitioner alleges that Judge DeMarco lacked the power to grant respondent defendants acceptance into judicial diversion and seeks to prohibit enforcement of his orders. Although the appealability or nonappealability of an issue is not dispositive (*see Holtzman*, 71 NY2d at 570), it is a factor to consider when determining whether prohibition is an appropriate remedy (*see Rush*, 68 NY2d at 354; *Matter of Doe v Connell*, 179 AD2d 196, 198 [1992]). Here, the People are unable to appeal a judicial diversion eligibility determination (*see generally* CPL 450.20). Moreover, Judge DeMarco's determinations affected the entire proceedings inasmuch as respondent defendants were diverted from the normal criminal proceedings. We therefore conclude that petitioner has a clear legal right to the relief of prohibition.

We now consider whether Judge DeMarco acted in excess of his authorized powers in a matter over which he has jurisdiction. CPL 216.00 (1) provides as follows:

> " 'Eligible defendant' means any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter, provided, however, a defendant is not an 'eligible defendant' if he or she:
>
> "(a) within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, has

previously been convicted of: (i) a violent felony offense as defined in section 70.02 of the penal law or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision ***36** one of section eight hundred three of the correction law, or (iii) a class A felony offense defined in article two hundred twenty of the penal law; or

"(b) has previously been adjudicated a second violent felony offender pursuant to section 70.04 of the penal law or a persistent violent felony offender pursuant to section 70.08 of the penal law. ****6**

"A defendant who also stands charged with a violent felony offense as defined in section 70.02 of the penal law or an offense for which merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law for which the court must, upon the defendant's conviction thereof, sentence the defendant to incarceration in state prison is not an eligible defendant while such charges are pending. A defendant who is excluded from the judicial diversion program pursuant to this paragraph or paragraph (a) or (b) of this subdivision may become an eligible defendant upon the prosecutor's consent."

Thus, the first paragraph of CPL 216.00 (1) lists who is an " '[e]ligible defendant' " for acceptance into judicial diversion. It is undisputed that respondent defendants were not charged with any offenses under Penal Law article 220 or 221, or any specified offense in CPL 410.91. In our opinion, that ends the inquiry, and respondent defendants are not eligible for judicial diversion. It is well settled that " '[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*People v Kisina*, 14 NY3d 153, 158 [2010]; *see People v Williams*, 19 NY3d 100, 103 [2012]). Likewise, "statutory interpretation always begins with the words of the statute" (*People v Levy*, 15 NY3d 510, 515 [2010]).

Despite the unambiguous language of the statute, Judge DeMarco chose to examine the nature and purpose of the statute and concluded that the proper interpretation of the statute was to permit respondent defendants entry into judicial diversion (*Watford*, 36 Misc 3d at 457-461). Specifically, Judge DeMarco found that, because respondent defendants were not ineligible for judicial diversion pursuant to CPL 216.00 (1) (a) and (b), it was within his discretion to determine whether they were eligible for judicial diversion, even though they also did not qualify for that program pursuant to the criteria set forth in ***37** CPL 216.00 (1) and 410.91 (5) (*Watford*, 36 Misc 3d at 458). That was error. " '[C]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of the statutes' " (*People v Pagan*, 19 NY3d 368, 370 [2012]). "Because the clearest indicator of legislative intent is the statutory text . . . , and the text of [CPL 216.00 (1)] is clear and unambiguous with respect to the matter in question, we need not explore the legislative history behind that statute . . . in an attempt to discern a contrary intent" (*People v Skinner*, 94 AD3d 1516, 1518 [2012] [internal quotation marks omitted]).

Simply put, had the legislature intended all nonviolent offenders who committed crimes because of their drug addiction to be eligible for judicial diversion, it could have easily so stated. "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning . . . Courts cannot correct supposed errors, omissions or defects in legislation" (*Meltzer v Koenigsberg*, 302 NY 523, 525 [1951] [internal quotation marks omitted]).

Respondent defendants contend that the statute is ambiguous because it refers to CPL 410.91 (4), which was repealed at the time CPL 216.00 was enacted, and thus the statute must be interpreted by examining the purpose of the legislation. It is true, as pointed out earlier, that the statute contains what appears to be simply a typographical error. Instead of referring to CPL 410.91 (5), which lists specified offenses, it refers to CPL 410.91 (4), which as respondent defendants correctly note was repealed prior to the effective date of this statute. We conclude, however, that the defect does not render the statute ambiguous. Courts have uniformly interpreted the citation to CPL 410.91 (4) to be a citation to CPL 410.91 (5) (*see e.g. People v DeYoung*, 95 AD3d 71, 73 [2012]; *People v Caster*, 33 Misc 3d 198, 200 [2011]; *see also* Peter Preiser, ****7** Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70).

Respondent defendants also object to a plain reading of the statute because such a reading would give prosecutors sweeping authority to indict individuals only for crimes that would render them ineligible for judicial diversion, and the intent of the legislature was to give courts the discretion to decide who should be allowed into judicial diversion. Judge DeMarco was also troubled by that prospect (*Watford*, 36 Misc 3d at 460 ["it is ***38** incomprehensible

that the legislature intended to give prosecutors, rather than judges, the final say as to who gets considered for the program and who does not"]). It is well settled, however, that prosecutors have "broad discretion to decide what crimes to charge" (*People v Urbaez*, 10 NY3d 773, 775 [2008]; *see People v Lawrence*, 81 AD3d 1326, 1326 [2011], *lv denied* 17 NY3d 797 [2011]). There is no indication in this case that the prosecutor sought to indict respondent defendants with only non-eligible offenses. In any event, even if we disagreed with the People's exercise of discretion, that is not a basis for a court to "exceed its legal authority and base [its determination of] eligibility [for judicial diversion] upon an unindicted charge" (*Caster*, 33 Misc 3d at 204).

([4]) Thus, we conclude that, by refusing to comply with the plain language of CPL 216.00 (1), Judge DeMarco acted in excess of his authority in matters over which he has jurisdiction (*see Matter of Green v DeMarco*, 87 AD3d 15, 20 [2011]; *Matter of Cosgrove v Ward*, 48 AD3d 1150, 1151 [2008]).

VIII

([5]) Finally, we agree with petitioner that she is also entitled to declaratory relief (*see Green*, 87 AD3d at 20). "Although a declaratory judgment often revolves around a particular set of facts, [t]he remedy is available in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 150 [1983], *cert denied* 464 US 993 [1983] [internal quotation marks omitted]). Additionally, the "criminal court's ruling must have an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases" (*id.* at 152). Judge DeMarco relied on his decision in *Watford* in similarly determining that Pugh was entitled to judicial diversion even though she was not charged with an eligible offense. Thus, "it can be assumed that the issue presented here will recur in other prosecutions and that [Judge DeMarco] will decide the issue in the same way" (*Green*, 87 AD3d at 20).

IX

Accordingly, we conclude that those parts of the petition/complaint seeking relief in the nature of a writ of prohibition and declaratory relief should be granted and that part ***39** of the petition/complaint seeking relief in the nature of mandamus to compel should be denied. Consequently, respondent judges should be prohibited from granting respondent defendants' motions to be allowed to participate in judicial diversion, from accepting their guilty pleas and their judicial diversion contracts, and from taking any further action on respondent defendants' cases in judicial diversion. Further, a judgment should be entered declaring that respondent judges admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

Peradotto, Carni, Sconiers and Whalen, JJ., concur.

It is hereby ordered that said petition/complaint insofar as it seeks relief in the nature of a writ of prohibition and declaratory relief is unanimously granted without costs, the petition/complaint insofar as it seeks relief in the nature of mandamus to compel is denied, and it is ordered, adjudged and decreed that respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz shall admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

159 A.D.2d 606, 552 N.Y.S.2d 660

Francis B. Froehlich et al, Appellants-Respondents,
v.
Town of Huntington, Respondent-Appellant

Supreme Court, Appellate Division,
Second Department, New York
1525E
March 19, 1990

CITE TITLE AS: Froehlich v Town of Huntington

HEADNOTE

APPEAL
ACADEMIC AND MOOT QUESTIONS

([1]) Plaintiffs commenced action in 1980, alleging that Town Zoning Code violated State law by failing to provide zoning districts for multifamily housing sufficient to meet community's needs and that zoning classifications of subject parcels were unconstitutional and confiscatory; following trial in 1982, Supreme Court declared that zoning classifications were unconstitutional and confiscatory with respect to two of five parcels and granted judgment in favor of Town on all other issues; in 1987, plaintiffs sold subject property; new owners were never substituted in action --- Plaintiffs' transfer of their interest in property did not render appeal moot; as original parties, plaintiffs can continue action even though their interest in property was transferred while appeal was pending; issues are not academic since judgment is binding on new owners --- Contention that appeal should be dismissed and matter remitted to trial court to determine impact of property's designation in 1987 as special groundwater protection area under Sole Source Aquifer Protection Act (see, ECL 55-0113 [1] [c]) is not persuasive; at this stage of litigation, concerns about enforcement of protections afforded this property under statute should be addressed initially to appropriate governmental agencies.

In an action, *inter alia*, for a declaration that the zoning classifications of five parcels of land in the defendant Town of Huntington are unconstitutional, the plaintiffs appeal, as limited by their brief, from stated portions of a judgment of the Supreme Court, Suffolk County (Cohalan, J., on decision; Cromarty, J., on judgment), entered July 27, 1984, which, *inter alia*, declared that the Zoning Code of the Town of Huntington "is constitutional with regard to providing a proper well-ordered plan to meet community and regional housing needs" and the Town of Huntington cross-appeals from so much of the same judgment as declared that the zoning classifications of two of the parcels is unconstitutional and confiscatory and barred enforcement of the existing zoning classifications as to those parcels.

Ordered that the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements, for reasons stated by the late Justice John P. Cohalan at the Supreme Court.

The property involved in this action consists of five parcels totaling about 208 acres in the defendant Town of Huntington (hereinafter the Town) which were zoned primarily for single-family homes on one-acre lots. The plaintiffs commenced this action in 1980, alleging, *inter alia*, that the Town of Huntington Zoning Code violated State law by failing to provide zoning districts for multifamily housing sufficient to meet the community's needs and that the zoning classifications of theseparticular ***607** parcels were unconstitutional and confiscatory. Following a trial in 1982, the Supreme Court declared that the zoning classifications were unconstitutional and confiscatory with respect to two of the five parcels and granted judgment in the favor of the Town on all the other issues. In 1987, the plaintiffs sold the subject property. The new owners were never substituted in the action.

This court granted permission to the Huntington United Civic Associations (hereinafter HUCA) to submit an *amicus curiae* brief on the issue of whether the plaintiffs' transfer of their interest in the property rendered the appeal moot. We conclude that this contention is without merit. As the original parties, the plaintiffs can continue the action even though their interest in the property was transferred while the appeal was pending *(see*, CPLR 1018; *Udell v Haas*, 20 NY2d 862). The issues are not academic since the judgment is binding on the new owners *(see, Bova v Vinciguerra*, 139 AD2d 797; *Collins v Tashjian*, 124 AD2d 629, *appeal dismissed* 69 NY2d 947).

In its brief, HUCA raises the additional contention that the appeal should be dismissed and the matter remitted to the trial court to determine the impact of the property's designation in 1987 as a special groundwater protection area under the Sole Source Aquifer Protection Act *(see*, ECL 55-0113 [1]

[c]). We find that, at this stage of the litigation, HUCA's concerns about enforcement of the protections afforded this property under the statute should be addressed initially to the appropriate governmental agencies.

Bracken, J. P., Lawrence, Harwood and Balletta, JJ., concur.

91 N.Y.2d 577, 696 N.E.2d 978, 673
N.Y.S.2d 966, 1998 N.Y. Slip Op. 04556

Thomas Majewski, Respondent,
v.
Broadalbin-Perth Central School District,
Defendant and Third-Party Plaintiff-
Respondent. Adirondack Mechanical
Corporation, Third-Party Defendant-Appellant.

Court of Appeals of New York
51
Argued March 26, 1998;
Decided May 12, 1998

CITE TITLE AS: Majewski v
Broadalbin-Perth Cent. School Dist.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered July 10, 1997, which (1) reversed, on the law, an order of the Supreme Court (Stephen A. Ferradino, J.; opn 169 Misc 2d 429), entered in Fulton County, granting a motion by third-party defendant for summary judgment dismissing the third-party complaint, and (2) denied the motion. The following question was certified by the Appellate Division: "Did this court err as a matter of law in reversing the order of the Supreme Court and denying the third-party defendant's motion for summary judgment?"

Majewski v Broadalbin-Perth Cent. School Dist., 231 AD2d 102, affirmed.

HEADNOTES

Statutes
Retroactive Application of Statute
Omnibus Workers' Compensation Reform Act of 1996

([1]) Certain amendments to the Workers' Compensation Law, which relieve an employer of liability for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a grave injury (Workers' Compensation Law § 11; L 1996, ch 635), should not apply to actions pending on the effective date of the amendments. Rather, the provisions should be applied prospectively to actions filed postenactment. That a statute is to be applied prospectively is strongly presumed and, here, nothing is found that approaches any type of "clear" expression of legislative intent concerning retroactive application. Moreover, the discernible legislative purpose does not mandate a particular result. Thus, irrespective of the date of the accident, a prospective application of the subject legislation to actions by employees for on-the-job injuries against third parties filed after the effective date of the relevant provisions is eminently consistent with the over-all and specific legislative goals behind passage of the Act.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Statutes, §§ 347, 350. ***578**

McKinney's, Workers' Compensation Law § 11.

NY Jur 2d, Statutes, §§ 225, 228, 234, 239.

ANNOTATION REFERENCES

See ALR Index under Retrospective Operation and Laws.

POINTS OF COUNSEL

Thuillez, Ford, Gold & Johnson, L. L. P., Albany (*Michael J. Hutter, Dale M. Thuillez* and *Debra J. Schmidt* of counsel), and *James P. O'Connor,* New York City, for third-party defendant-appellant.
I. The amendment of Workers' Compensation Law § 11 effected by section 2 of the Omnibus Act, eliminating *Dole* claims against employers with limited exceptions, was intended by the Legislature to apply to *Dole* claims pending at the time of the amendment's effective date. (*Becker v Huss Co.,* 43 NY2d 527; *Simonson v International Bank,* 14 NY2d 281; *Matter of Duell v Condon,* 84 NY2d 773; *Gleason v Gleason,* 26 NY2d 28; *Woollcott v Shubert,* 217 NY 212; *Floyd v New York State Urban Dev. Corp.,* 41 AD2d 395; *Engle v Talarico,* 39 AD2d 362; *Matter of Four Maple Dr. Realty Corp. v Abrams,* 2 AD2d 753, 2 NY2d 837, 355 US 14; *Bay Ridge Air Rights v State of New York,* 44 NY2d

49; *Johnson v Space Saver Corp.,* 172 Misc 2d 147.) II. There is no bar, constitutional or otherwise, that prevents the Legislature from eliminating *Dole* claims against employers that are asserted in pending third-party complaints as such claims do not involve vested rights. (*Gange Lbr. Co. v Rowley,* 326 US 295; *Gleason v Gleason,* 26 NY2d 28; *People ex rel. Le Roy v Foley,* 148 NY 677; *People ex rel. Reibman v Warden,* 242 App Div 282; *Sochor v International Bus. Machs. Corp.,* 90 AD2d 442, 60 NY2d 254; *Pearsall v Great N. Ry. Co.,* 161 US 646; *Becker v Huss Co.,* 43 NY2d 527; *Westchester Light. Co. v Westchester County Small Estates Corp.,* 278 NY 175; *Dole v Dow Chem. Co.,* 30 NY2d 143; *McDermott v City of New York,* 50 NY2d 211.) III. The amendment of Workers' Compensation Law § 11, effected by section 2 of the Act, effective September 10, 1996 is a prospective statute and by that prospective operation, the school district's pending *Dole* claim is barred. (*Tetens v Elston Realty Corp.,* 108 AD2d 981; *Massella v Partners Indus. Prods.,* 171 Misc 2d 812; *Forti v New York State Ethics Commn.,* 75 NY2d 596.)

Richard T. Aulisi, Gloversville, and *Thorn and Gershon,* Albany (*Robert F. Doran* and *Paul D. Jureller* of counsel), for respondent.

I. The right to commence a *Dole* third-party action ***579** for indemnification and/or contribution is a vested right such that due process precludes retroactive elimination of the right to commence such *Dole* third-party actions where the main action involves a nongrave injury. (*Westchester Light. Co. v Westchester County Small Estates Corp.,* 278 NY 175; *Dole v Dow Chem. Co.,* 30 NY2d 143; *Morales v Gross,* 230 AD2d 7; *Gleason v Holman Contract Warehousing,* 170 Misc 2d 668; *Knapp v Consolidated Rail Corp.,* 171 Misc 2d 597; *Jacobus v Colgate,* 217 NY 235.) II. The Omnibus Workers' Compensation Act was not intended to apply retroactively. (*Jacobus v Colgate,* 217 NY 235; *Matter of Deutsch v Catherwood,* 31 NY2d 487; *Matter of Rudin Mgt. Co. v Commissioner of Dept. of Consumer Affairs of City of N. Y.,* 213 AD2d 185; *County of Rensselaer v City of Troy,* 120 AD2d 796, 64 NY2d 856; *People v Oliver,* 1 NY2d 152; *Murphy v Board of Educ.,* 104 AD2d 796, 64 NY2d 856; *People v Munoz,* 207 AD2d 418; *People v Korkala,* 99 AD2d 161; *Matter of Miller,* 110 NY 216; *Matter of Matthews,* 255 App Div 80, 279 NY 732.)

Maynard, O'Connor, Smith & Catalinotto, L. L. P., Albany (*Leslie B. Neustadt* and *Michael E. Catalinotto* of counsel), for defendant and third-party plaintiff-respondent.

I. Sections 2 through 9 of the Act, which allow *Dole v Dow* claims where there is a grave injury or a contractual agreement for indemnification or contribution, were not intended to abrogate pending third-party claims. (*Matter of State of New York [Abrams] v Ford Motor Co.,* 74 NY2d 495; *Matter of Monarch Elec. Contr. Corp. v Roberts,* 70 NY2d 91; *Matter of Capital Newspapers v Whalen,* 69 NY2d 246; *35 Park Ave. Corp. v Campagna,* 48 NY2d 813; *Matter of Moynihan v New York State Employees' Retirement Sys.,* 192 AD2d 913; *Matter of Lusardi v Lusardi,* 167 AD2d 3; *Fuerst v Fuerst,* 131 AD2d 426; *County of Rensselaer v City of Troy,* 120 AD2d 796; *Murphy v Board of Educ.,* 104 AD2d 796, 64 NY2d 856; *Matter of Lloyd v Grella,* 83 NY2d 537.) II. Broadalbin has a substantial interest in pursuing its third-party action against Adirondack which should not be eliminated retroactively. (*Sommer v Federal Signal Corp.,* 79 NY2d 540; *Garrett v Holiday Inns,* 58 NY2d 253; *Gange Lbr. Co. v Rowley,* 326 US 295; *Gleason v Gleason,* 26 NY2d 28; *Matter of Valstrey Serv. Corp. v Board of Elections,* 2 NY2d 413; *Knapp v Consolidated Rail Corp.,* 171 Misc 2d 597; *Gleason v Holman Contract Warehousing,* 170 Misc 2d 668; *Matter of Chrysler Props. v Morris,* 23 NY2d 515.)

Dennis C. Vacco, Attorney-General, Albany (*Barbara G. Billet,Peter* ***580** *H. Schiff* and *Michael S. Buskus* of counsel), for State of New York, *amicus curiae.*

I. The Legislative intent was to apply the *Dole* repeal to all pending cases. (*Morales v Gross,* 230 AD2d 7; *Post v 120 E. End Ave. Corp.,* 62 NY2d 19; *Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment,* 103 AD2d 453, 67 NY2d 783, 479 US 801; *Becker v Huss Co.,* 43 NY2d 527; *Matter of Mealing v Hills,* 132 AD2d 759, 70 NY2d 612; *Matter of Kass v Club Mart,* 160 AD2d 1148; *Matter of Pettinelli v Degnon Contr. Co.,* 218 App Div 7; *Matter of Goerl v Charles H. Darmstadt, Inc.,* 257 App Div 872; *Matter of Metzger v Metzger Press,* 276 App Div 936, 301 NY 781; *Matter of Volpe v Fireman's Fund Ins. Co.,* 54 Misc 2d 212.) II. Parties do not acquire "vested rights" to substantive tort rules absent a final judgment. (*Demorest v City Bank Co.,* 321 US 36; *Commissioner of Internal Revenue v Estate of Church,* 335 US 632; *Hymowitz v Eli Lilly & Co.,* 73 NY2d 487, 493 US 944; *Slater v American Min. Spirits Co.,* 33 NY2d 443; *Matter of Greene,* 55 App Div 475, 166 NY 485; *Matter of Kelly v State Ins. Fund,* 60 NY2d 131; *Klinger v Dudley,* 41 NY2d 362; *Raquet v Braun,* 90 NY2d 177; *Montgomery v Daniels,* 38 NY2d 41.)

Menagh, Trainor, Mundo & Falcone, P. C., New York City (*Christopher A. Bacotti* of counsel), for Electrical Employers Self Insurance Safety Plan, *amicus curiae.*

The Omnibus Act is applicable to pending claims. (*Riegert Apts. Corp. v Planning Bd.,* 57 NY2d 206; *Oden v Chemung County Indus. Dev. Agency,* 87 NY2d 81; *Giblin v Nassau County Med. Ctr.,* 61 NY2d 67; *Sega v State of New York,*

60 NY2d 183; *New Amsterdam Cas. Co. v Stecker,* 3 NY2d 1; *Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.,* 79 AD2d 516, 52 NY2d 895; *Matter of Daniel C.,* 99 AD2d 35, 63 NY2d 927; *Patrolmen's Benevolent Assn. v City of New York,* 41 NY2d 205; *Eaton v New York City Conciliation & Appeals Bd.,* 56 NY2d 340; *Preferred Mut. Ins. Co. v State of New York,* 196 AD2d 384.)

Schneider, Kleinick, Weitz, Damashek & Shoot, New York City (*Brian J. Shoot, Harry Steinberg* and *John C. Cherundolo* of counsel), for New York State Trial Lawyers Association, *amicus curiae.*

I. Application of the Omnibus Act so as to bar preexisting claims and preexisting actions would constitute a "retroactive" application of a substantive statutory amendment. (*Ruotolo v State of New York,* 83 NY2d 248; *Forti v New York State Ethics Commn.,* 75 NY2d 596.) II. Settled law dictates that substantive statutes be applied prospectively unless ***581** there is clear and plainly manifested legislative intent to the contrary. (*Jacobus v Colgate,* 217 NY 235; *Matter of Deutschv Catherwood,* 31 NY2d 487; *Matter of Mulligan v Murphy,* 14 NY2d 223; *Autocar Sales & Serv. Co. v Hansen,* 270 NY 414; *Waddey v Waddey,* 290 NY 251; *Matter of Rudin Mgt. Co. v Commissioner of Dept. of Consumer Affairs of City of N. Y.,* 213 AD2d 185; *People v Oliver,* 1 NY2d 152; *Murphy v Board of Educ.,* 104 AD2d 796, 64 NY2d 856; *Coane v American Distilling Co.,* 298 NY 197; *Weisman v Town of Brookhaven,* 197 AD2d 617.) III. There is not one scintilla of evidence that the Legislature intended the tort immunity to apply retroactively, and, moreover, the legislative history conclusively shows that the Legislature intended that these provisions *not* apply to pending cases. (*Matter of Daniel C.,* 99 AD2d 35, 63 NY2d 927; *Woollcott v Shubert,* 217 NY 212; *Matter of Delmar Box Co. [Aetna Ins. Co.],* 309 NY 60; *People v Glubo,* 5 NY2d 461.) IV. The special assessment, and in particular its modest size, further confirms that the provisions could not have been intended to apply retroactively. (*Methodist Hosp. v State Ins. Fund,* 64 NY2d 365; *Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N. Y.,* 72 NY2d 753; *Morales v Gross,* 230 AD2d 7.) V. Apart from all other factors, retroactive application would not advance the statute's intended purposes, and would unfairly penalize parties who had spent thousands of dollars in reliance upon the prior law.

OPINION OF THE COURT

Smith, J.

This case requires this Court to examine whether certain amendments to the Workers' Compensation Law should be construed as retroactively applicable to pending actions. We conclude that the Appellate Division properly held that the relevant provisions of the new legislation should not apply to actions pending on the effective date of the amendments. Rather, the provisions should be applied prospectively to actions filed postenactment. Thus, the order of the Appellate Division should be affirmed and the certified question should be answered in the negative.

I

As alleged in the complaint, plaintiff was employed by third-party defendant Adirondack Mechanical Corporation (AMC). On October 26, 1994, plaintiff was assigned by AMC to perform certain repair work at a school operated and maintained by defendant ***582** Broadalbin-Perth Central School District. AMC had contracted with defendant for the completion of this work.

While performing the assigned repair work on the school's premises, plaintiff fell from an allegedly defective ladder which had been provided by defendant. Plaintiff commenced a lawsuit on December 20, 1995 against defendant to recover for his personal injuries based upon claimed violations of Labor Law §§ 200 and 240 (1). On January 29, 1996, defendant commenced a third-party action against AMC which alleged that AMC had negligently supervised and failed to protect its employee. Defendant further claimed that AMC owed defendant a duty of contribution and/or indemnification for damages plaintiff might recover.

On July 12, 1996, new legislation, commonly referred to as the Omnibus Workers' Compensation Reform Act of 1996, was passed which amended Workers' Compensation Law § 11 to provide that:

"[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' " (L 1996, ch 635, § 2).

However, the amendments did not affect the power of a third party to recover under express contractual obligations between the employer and the third party (*id.*). The legislation was signed into law by Governor Pataki on September 10, 1996 with the relevant portions of the Act designated to

"take effect immediately." Thereafter, on September 20, 1996, AMC filed a motion for summary judgment against the third-party complaint arguing that the action for contribution and/or indemnification was now barred by the recent enactment. [1]

[1] Not at issue is whether the plaintiff's injuries qualify as "grave" within the meaning of the newly amended Workers' Compensation Law § 11.

Finding that the legislation was to have retroactive application to pending actions, Supreme Court granted AMC's summary judgment motion and dismissed the third-party complaint. In reversing and denying AMC's motion, the Appellate Division concluded "that the clear legislative intent underlying sections 2 through 9 of the Omnibus Act was that those provisions ***583** apply prospectively only" (231 AD2d 102, 111). That Court certified the following question to this Court: "Did this court err as a matter of law in reversing the order of the Supreme Court and denying the third-party defendant's motion for summary judgment?" We answer that question in the negative, and affirm the Appellate Division order.

II

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. v City of New York,* 41 NY2d 205, 208; *see also, Longines-Wittnauer v Barnes & Reinecke,* 15 NY2d 443, 453). As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:

"In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Tompkins v Hunter,* 149 NY 117, 122-123; *see also, Matter of Raritan Dev. Corp. v Silva,* 91 NY2d 98).

Here, the Act says only that the subject provisions are to "take effect immediately" (L 1996, ch 635, § 90). However, the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence (*see, Shielcrawt v Moffett,* 294 NY 180 [separately analyzing retroactive or prospective application of a statute enacted to "take effect immediately"]).

While the fact that a statute is to take effect immediately "evinces a sense of urgency," "the meaning of the phrase is equivocal" in an analysis of retroactivity (*Becker v Huss Co.,* 43 NY2d 527, 541). In fact, we noted in *Becker* that "[i]dentical language in other acts has not been enough to require application to pending litigation" (*id.,* at 541). Here, the significance of the effective date upon our analysis of the reach of the subject provisions is further obscured because the Legislature explicitly designated prospective or retroactive application for other provisions of the Act not at issue here (L 1996, ch 635, § 90). Under the circumstances, the proviso that the subject provisions were ***584** to "take effect immediately" contributes little to our understanding of whether retroactive application was intended on the issue presented.

It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it (*see, Jacobus v Colgate,* 217 NY 235, 240 [Cardozo, J.] ["It takes a clear expression of the legislative purpose to justify a retroactive application"]; *Landgraf v USI Film Prods.,* 511 US 244, 265 ["the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"]). An equally settled maxim is that "remedial" legislation or statutes governing procedural matters should be applied retroactively (*see, Matter of OnBank & Trust Co.,* 90 NY2d 725, 730; *Becker v Huss Co., supra,* 43 NY2d, at 540).

However, such construction principles are merely navigational tools to discern legislative intent. Classifying a statute as "remedial" does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to "supply some defect or abridge some superfluity in the former law" (McKinney's Cons Laws of NY, Book 1, Statutes § 321). As we have cautioned, "General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available" (*Shielcrawt v Moffett, supra,* 294 NY, at 189; *see also, Matter of OnBank & Trust Co., supra,* 90 NY2d, at 730; *Becker v Huss Co., supra,* 43 NY2d, at 540). To that end, we turn to legislative history to steer our analysis.

It is clear that one of the key purposes of the Act was the legislative modification of *Dole v Dow Chem. Co.* (30 NY2d

143) insofar as that case related to third-party actions against employers. That intention was repeatedly expressed by all sides during the legislative debates and is included in the official statement of intent (*see,* L 1996, ch 635, § 1 ["It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and repealing *Dole* liability except in cases of grave injury."]). In *Dole,* this Court examined the share of losses to be apportioned between joint tortfeasors. Notwithstanding which tortfeasor was sued by an injured plaintiff, this Court concluded that the defendant, if found liable, could recover a proportionate share from a joint tortfeasor. ***585** As we stated, "where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party" (*Dole v Dow Chem. Co., supra,* 30 NY2d, at 148-149; *see also, Raquet v Braun,* 90 NY2d 177, 182). Such equitable principles are codified in article 14 of the CPLR.

In *Dole,* the plaintiff was the employee of the third-party defendant so no recovery could be had against the employer by the employee or "anyone otherwise entitled to recover damages ... on account of such injury or death" under Workers' Compensation Law § 11. Nevertheless, we extended our reasoning concerning the apportionment of liability to allow contribution or indemnification from an employer even though the employer could not have been liable directly to a plaintiff who had chosen to sue the joint tortfeasor. It was this part of the decision that proved most controversial.

With the recent passage of the Act, the Legislature endeavored to clarify and restore

"the force of 'exclusive remedy' (or 'no fault') provisions. Specifically, amendments would protect employers and their employees from other than contract-based suits for contribution or indemnity by third parties (such as equipment manufacturers which have been deemed liable for causing employees injuries or deaths)--in effect, repealing the doctrine of *Dole*" (Assembly Mem in Support, 1996 McKinney's Session Laws of NY, at 2562).

Memoranda issued contemporaneously with the passing and signing of the Act provided that "the exclusive remedy" would be "restored and reinforced" (*id.,* at 2565; *see also,* Governor's Approval Mem, 1996 McKinney's Session Laws of NY, at 1915). In an analysis of retroactive application, we have found it relevant when the legislative history reveals that the purpose of new legislation is to clarify what the law was always meant to say and do (*see, Matter of OnBank & Trust Co., supra,* 90 NY2d, at 731). However, labeling the legislation as "remedial" in this regard is not dispositive in light of other indicators of legislative intent.

For example, legislators made declarations during floor debates that conclusively state that the Act was not intended to be applied retroactively (231 AD2d, at 109). Moreover, a report entitled "New York State Assembly Majority Task Force ***586** on Workers' Compensation Reform" explicitly states (at 25) that the provisions would apply only to "accidents that occur [after the effective] date forward," and was "not intended to limit the rights of parties to a lawsuit filed after the law takes effect, but involving a claim arising from an accident that occurred before the law took effect." Although these averments "may be accorded some weight in the absence of more definitive manifestations of legislative purpose" (*Schultz v Harrison Radiator Div. Gen. Motors Corp.,* 90 NY2d 311, 318), such indicators of legislative intent must be cautiously used (*see, Woollcott v Shubert,* 217 NY 212, 221 ["statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes"]). As the Supreme Court has noted:

"it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other" (*United States v Freight Assn.,* 166 US 290, 318).

On the same footing are statements contained in the Governor's Memorandum issued with the signing of the Act. In it, the Governor states his view that the legislation was intended to be retroactive (1996 McKinney's Session Laws of NY, at 1912 ["(o)f primary importance is the retroactive repeal" of *Dole*]). The Governor further stated that:

"This new system, which takes effect immediately, is enacted with the specific intent of maximizing savings in workers' compensation premiums through its application to all cases currently pending in the courts of our State wherein the primary action has neither been settled nor reduced to judgment" (*id.,* at 1913).

Although postenactment statements of the Governor may be examined in an analysis of legislative intent and statutory purpose (*see, e.g., Crane Neck Assn. v New York City/Long Is. County Servs. Group,* 61 NY2d 154 [relying upon gubernatorial memoranda]; *see also,* Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History,* 48 Ark L Rev 239), such statements suffer from the same infirmities as those made during floor debates by legislators. ***587** Here, the reports and memoranda simply indicate that various people had various views. [2]

2 Under the circumstances, little weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation (*see,* Mem of Workers' Compensation Board, Susan Gravlich, Secretary, dated Aug. 8, 1996, Bill Jacket, L 1996, ch 635, at 2; Letter of Department of Insurance, Edward Muhl, Superintendent, dated Aug. 9, 1996, Bill Jacket, L 1996, ch 635, at 8).

Importantly, we note that the initial draft of the Act expressly provided that it would apply to *"lawsuit[s] [that have] neither been settled nor reduced to judgment"* by the date of its enactment (231 AD2d, at 107). That language does not appear in the enacted version. A court may examine changes made in proposed legislation to determine intent (*see, United States v St. Paul, Minneapolis & Manitoba Ry. Co.,* 247 US 310, 318; *Woollcott v Shubert, supra,* 217 NY, at 221; *People v Korkala,* 99 AD2d 161, 166 ["rejection of a specific statutory provision is a significant consideration when divining legislative intent"]). Here, such evidence is consistent with the strong presumption of prospective application in the absence of a clear statement concerning retroactivity.

Appellant points to the general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided (*Matter of OnBank & Trust Co., supra,* 90 NY2d, at 731; McKinney's Cons Laws of NY, Book 1, Statutes § 98 [a]). In this regard, appellant argues that sections 87 and 88 of the Act would be rendered meaningless if the provisions concerning third-party contribution claims were not applied retroactively. We disagree.

Section 88 of the Act mandates an audit of all workers' compensation insurance carriers and the State Insurance Fund to determine "the value as of December 31, 1996 of any reduction in reserves, hereinafter referred to as the reserve adjustment, required to be established for losses or claims pursuant to section 1303 of the insurance law and, concerning the state insurance fund, section 88 of the workers' compensation law that result from the application" of the Act's provisions related to *Dole* liability (L 1996, ch 635, § 88 [a]). Section 87 of the Act imposes a $98 million "special assessment" on all licensed workers' compensation insurance carriers that is to be deposited in the general fund of the State (L 1996, ch 635, § 87). There is nothing in the law itself indicating the reason ***588** for the assessment or the intent behind these sections of the Act.

Section 88 refers to "reserves ... required to be established for losses or claims pursuant to section 1303 of the insurance law." The referenced provision states that:

"[e]very insurer shall ... maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, *whether reported or unreported,* which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims" (Insurance Law § 1303 [emphasis supplied]).

Plainly, the statute requires insurers to set aside "reserves" for losses or claims that have been incurred but not reported to the company. Such reserves are calculated actuarially based upon a statistical analysis of the insurance company's loss experience (*see, Matter of Stewart [Citizens Cas. Co.],* 23 NY2d 407, 414-415). Examined under the circumstances presented, workers' compensation carriers are required to maintain reserves for (1) reported and expected *Dole* losses on pending actions; and (2) anticipated *Dole* losses on claims already incurred but not yet reported or asserted. If the new amendments were applied prospectively, the second category of *Dole* losses would, by and large, never materialize and the reserves set aside to cover such claims would be reduced.

However, that "reduction" is mathematically related to monies already collected by carriers via the payment of premiums. The Legislature apparently decided that the State should receive such "reduction in reserves" rather than permit insurers to retain the monies. As noted in the "New York State Assembly Majority Task Force on Workers' Compensation Reform" report (at 31):

"As a result of the changes in employer liability enacted (*Dole*), carriers would be collecting more premium than

actuarial [*sic*] needed. As a result, the legislation provides that this money be returned to the State."

While the elimination of pending *Dole* claims might lead to a maximum reduction in insurance reserves, there is some reduction in reserves even upon a prospective application of the ***589** legislation. Thus, sections 87 and 88 of the Act would not be rendered meaningless in the absence of retroactive application. Indeed, it is impossible to determine from the record provided how the Legislature actually derived $98 million as the amount of the "special assessment." As for whether these accounting provisions necessitate the wholesale dismissal of pending *Dole* claims, we are reluctant to assume that the Legislature would choose such a vexing and circuitous means of conveying that intent.

We further note our agreement with the statement made by the Appellate Division in *Morales v Gross* (230 AD2d 7) that the "purpose of the subject provisions was to abolish most third-party actions so as to enhance the exclusivity of the Workers' Compensation Law, thereby reducing insurance premiums and decreasing the cost of doing business in New York" (*id.*, at 12). An extensive subject of discussion in the floor debates surrounding the subject legislation was how employers of New York have been forced to pay the highest insurance premiums in the country due, in part, to the possibility of third-party contribution/indemnification claims.

Prospective application of the legislation would still accomplish the legislative purpose of reducing insurance premiums and workers' compensation costs for employers and, in that way, assist "our State's ability to attract and maintain businesses and jobs" (Governor's Approval Mem, 1996 McKinney's Session Laws of NY, at 1912). Current employers would presumably realize future savings through the elimination of *Dole* claims and the consequent reduction in insurance premiums.[3] Moreover, prospective application still enables the payment of substantial sums to the State by insurance companies who have, indirectly, benefitted from the reduction of reserves.

[3] The Compensation Insurance Rating Board estimated that the change in employer liability will save employers approximately 3.2% in premium (*see,* Report of "New York State Assembly Majority Task Force on Workers' Compensation Reform", at 31).

That a statute is to be applied prospectively is strongly presumed and here, we find nothing that approaches any type of "clear" expression of legislative intent concerning retroactive application. Indeed, other than the Governor's statements, the direct evidence concerning retroactivity is either against that view or equivocal. Moreover, the discernible legislative purpose does not mandate a particular result. "In the end, it is in ***590** considerations of good sense and justice that the solution must be found" (*Matter of Berkovitz v Arbib & Houlberg,* 230 NY 261, 271 [Cardozo, J.]) in the specific circumstances of each case.

We conclude that, irrespective of the date of the accident, a prospective application of the subject legislation to actions by employees for on-the-job injuries against third parties filed after the effective date of the relevant provisions is eminently consistent with the over-all and specific legislative goals behind passage of the Act.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Chief Judge Kaye and Judges Titone, Bellacosa, Levine, Ciparick and Wesley concur.
Order affirmed, etc. ***591**

164 A.D.3d 692, 83 N.Y.S.3d
520, 2018 N.Y. Slip Op. 05777

**1 The People of the State of New York
ex rel. Chance McCurdy, Respondent,
v
Warden, Westchester County Correctional Facility,
Respondent, and New York State Department of
Corrections and Community Supervision, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2016-01838, 3585/15
August 15, 2018

CITE TITLE AS: People ex rel. McCurdy v
Warden, Westchester County Corr. Facility

HEADNOTE

Crimes
Sex Offenders
Postrelease Supervision—Placement in Residential Treatment Facility Housing

Barbara D. Underwood, Attorney General, New York, NY (Anisha S. Dasgupta, Holly A. Thomas, Karen W. Lin, and Ester Murdukhayeva of counsel), for respondent-appellant.
The Legal Aid Society, New York, NY (Elon Harpaz of counsel), for petitioner-respondent.

In a habeas corpus proceeding, which was converted into a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Corrections and Community Supervision, which placed the petitioner, a level three sex offender, in a residential treatment facility during the period of his postrelease supervision, the New York State Department of Corrections and Community Supervision appeals from a judgment of the Supreme Court, Westchester County (Barbara Gunther Zambelli, J.), dated January 11, 2016. The judgment granted the petition to the extent of directing the New York State Department of Corrections and Community Supervision to arrange for the petitioner's transfer to the Queensboro Correctional Facility and to assign him to a wait list for a New York City Department of Homeless Services facility that is compliant with the requirements of the Sexual Assault Reform Act.

Ordered that the judgment is reversed, on the law, without costs or disbursements, the petition is denied, and the proceeding is dismissed on the merits.

In 2014, the petitioner was convicted of attempted sexual abuse in the first degree and was sentenced to three years in prison, followed by five years of postrelease supervision. By the time the petitioner was received into state custody, he had already accrued sufficient time in a local jail to satisfy the full determinate term of his three-year sentence. He was subsequently adjudicated a level three sex offender pursuant to the Sex Offender Registration Act (hereinafter SORA) (*see* Correction Law art 6-C). While residing in the community, the petitioner violated his curfew, and his postrelease supervision *693 status was revoked. As an alternative to incarceration, the Department of Corrections and Community Supervision (hereinafter DOCCS) agreed to re-release the petitioner to postrelease supervision upon his successful completion of a 90-day DOCCS drug treatment program. However, upon the petitioner's completion of the program, he failed to identify any housing that complied with the requirement of the Sexual Assault Reform Act (hereinafter SARA) that level three sex offenders reside more than 1,000 feet from any school grounds (*see* Executive Law § 259-c [14]; Penal Law § 220.00 [14] [b]; **2 *People v Diack*, 24 NY3d 674, 681-682 [2015]; *People ex rel. Green v Superintendent of Sullivan Corr. Facility*, 137 AD3d 56, 58 [2016]; *Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 151 [2016]). As a result, DOCCS placed the petitioner in a DOCCS residential treatment facility at the Fishkill Correctional Facility and thereafter at an residential treatment facility at the Queensboro Correctional Facility.

In October 2015, while residing at the Queensboro Correctional Facility, the petitioner was arrested on a parole warrant for violating the terms of his postrelease supervision by absconding from a community work program and was thereafter incarcerated in the Westchester County Correctional Facility. In November 2015, the petitioner commenced a habeas corpus proceeding challenging his incarceration at the Westchester County Correctional Facility pending a final parole revocation hearing. The petitioner contended that his violation of his postrelease supervision while residing at the Queensboro Correctional Facility was a nullity because DOCCS lacked authority under SARA, Correction Law § 73 (10), or Penal Law § 70.45 (3) to place him in a residential treatment facility upon his completion of the DOCCS drug treatment program. The Supreme Court, based upon its determination that the petitioner was not

entitled to immediate release given the petitioner's lack of community-based SARA-compliant housing, converted the writ to a proceeding pursuant to CPLR article 78, and granted the petition to the extent of directing DOCCS to arrange for the petitioner's transfer to the Queensboro Correctional Facility and to assign him to a wait list for a New York City Department of Homeless Services facility that is compliant with the requirements of SARA. DOCCS appeals, and we reverse.

To resolve the issues raised in this case, we turn to "familiar principles of statutory construction" (*Matter of County of Orange [Al Turi Landfill, Inc.]*, 75 AD3d 224, 234 [2010]). " 'Statutes which relate to the same subject matter must be ***694** construed together unless a contrary legislative intent is expressed' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153 [2001]). "The courts must 'harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Aaron J.*, 80 NY2d 402, 407 [1992]). "In the case of a conflict between a general statute and a special statute governing the same subject matter, the general statute must yield" (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234; *see Matter of Brusco v Braun*, 84 NY2d 674, 681 [1994]). "Finally, '[a] construction rendering statutory language superfluous is to be avoided' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]).

Applying these principles here, no conflict arises between the three statutes at issue regarding DOCCS's authority to place the petitioner, a level three sex offender, into a residential treatment facility housing pending his identification of SARA-compliant community housing during the period of his postrelease supervision. By its terms, Penal Law § 70.45 (3) permits DOCCS to require an offender subject to a term of postrelease supervision to spend the first six months of his or her postrelease supervision in residential treatment facility housing as a transitional period prior to re-entry into the community.

The six-month limitation on residential treatment facility housing imposed by Penal Law § 70.45 (3) does not conflict with, or limit, the application of DOCCS's authority under Correction Law § 73 (10) "to use any residential treatment facility as a residence for persons who are on community supervision." The term "community supervision" is defined as "the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post release supervision or medical parole" (Correction Law § 2 [31]).

Thus, construing the relevant statutes together, DOCCS has authority to temporarily place a level three sex offender who has already completed more than six months of his or her postrelease supervision, as did the petitioner in this case, into residential treatment facility housing in the event such offender is unable to locate SARA-compliant community housing. Moreover, it is clear that DOCCS's authority to keep such an offender in residential treatment facility housing ends when the offender successfully identifies or otherwise obtains SARA- ***695** compliant community housing. Mastro, J.P., Roman, Barros and Iannacci, JJ., concur.

65 A.D.3d 339, 885 N.Y.S.2d
92, 2009 N.Y. Slip Op. 06265

**1 Dean G. Skelos et al., as Duly Elected Members of the New York State Senate, Respondents
v
David Paterson, as Governor of the State of New York, et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
August 20, 2009

CITE TITLE AS: Skelos v Paterson

SUMMARY

Appeal from an order of the Supreme Court, Nassau County (William R. LaMarca, J.), entered July 22, 2009. The order, insofar as appealed from as limited by defendants' brief, granted plaintiffs' motion for a preliminary injunction enjoining defendant Richard Ravitch from exercising any of the powers of the office of lieutenant governor and denied defendants' cross motion to dismiss the complaint.

Skelos v Paterson, 25 Misc 3d 347, affirmed.

HEADNOTES

Declaratory Judgments
When Remedy Appropriate
Challenge to Governor's Appointment of Lieutenant Governor to Fill Vacancy

([1]) An action for a declaratory judgment and injunctive relief brought by members of the New York State Senate was a permissible way to challenge the constitutionality of the Governor's appointment of an individual to fill a vacancy in the office of lieutenant governor. A quo warranto proceeding brought by the Attorney General (Executive Law § 63-b) was not the exclusive method by which the lawfulness of the Governor's appointment could be challenged inasmuch as there were no disputed issues of fact to be tried and only an issue of law was presented.

Parties
Standing
Challenge to Governor's Appointment of Lieutenant Governor to Fill Vacancy

([2]) Plaintiffs, members of the New York State Senate, had standing to maintain an action for a declaratory judgment and injunctive relief challenging the Governor's appointment of an individual to fill a vacancy in the office of lieutenant governor. Plaintiffs adequately alleged an injury-in-fact that fell within their zone of interest and showed an actual legal stake in the matter sufficient to establish their standing in view of the lieutenant governor's role as the Senate's presiding officer (*see* NY Const, art IV, § 6) and because the lieutenant governor also has a casting vote in the Senate to break a tie on certain matters.

Trial
Place of Trial
Challenge to Governor's Appointment of Lieutenant Governor to Fill Vacancy—Injunctive Relief

([3]) An action for a declaratory judgment and injunctive relief challenging the Governor's appointment of an individual to fill a vacancy in the office of lieutenant governor could properly be maintained in Supreme Court, Nassau County. CPLR 6311 (1), which provides that a "preliminary injunction to restrain a public officer . . . from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer ***340** . . . is located or in which the duty is required to be performed," did not require that the action be brought in the Supreme Court at a term in the Third Judicial Department. If the Governor's appointment was not lawful, CPLR 6311 would not apply because the appointee would not be a public officer. If the appointee was lawfully appointed, plaintiffs proffered no grounds to restrain his performance of the duties of that office.

Governor
Powers of Governor
Authority to Appoint Lieutenant Governor to Fill Vacancy

([4]) The Governor lacked authority pursuant to Public Officers Law § 43 to appoint an individual to fill a vacancy in the office of lieutenant governor. NY Constitution, article IV, § 6 provides that where a vacancy occurs in the office of lieutenant governor, the temporary president of the Senate shall perform all the duties of that office. Consequently, Public Officers Law § 43, which authorizes the Governor to fill a vacancy in an elective office until the vacancy is filled by election, could not be constitutionally applied with respect to a vacancy in the office of lieutenant governor. The Governor's purported appointment was unlawful because no provision of the Constitution or of any statute provides for the filling of a vacancy in the office of lieutenant governor other than by election, and only the temporary president of the Senate is authorized to perform the duties of that office during the period of the vacancy.

RESEARCH REFERENCES

Am Jur 2d, Declaratory Judgments §§ 21, 22, 26, 92, 204, 206, 213; Am Jur 2d, Governor §§ 4–6; Am Jur 2d, Injunctions §§ 8, 162, 163; Am Jur 2d, Quo Warranto §§ 3, 8, 11–15, 24, 25, 33; Am Jur 2d, States, Territories, and Dependencies § 61.

Carmody-Wait 2d, Courts and Their Jurisdiction § 2:124; Carmody-Wait 2d, Provisional Remedies in General § 75:2; Carmody-Wait 2d, Injunctions §§ 78:13, 78:91, 78:118, 78:147; Carmody-Wait 2d, Actions By or Against the State §§ 126:20–126:23, 126:31, 126:32; Carmody-Wait 2d, Declaratory Judgments §§ 147:18–147:21, 147:59.

McKinney's, CPLR 6311 (1); Executive Law § 63–b; Public Officers Law § 43; NY Const, art IV, § 6.

NY Jur 2d, Article 78 and Related Proceedings §§ 412, 413, 417, 425; NY Jur 2d, Declaratory Judgments and Agreed Case §§ 21–23, 171, 172, 179; NY Jur 2d, Injunctions § 46; NY Jur 2d, State of New York §§ 11, 12, 18, 19.

Siegel, NY Prac §§ 136, 330, 436, 437.

ANNOTATION REFERENCE

See ALR Index under Declaratory Judgments or Relief; Governors; Injunctions; Quo Warranto; Venue.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

***341** Query: appoint! /s lieutenant /2 governor & quo /2 warranto

APPEARANCES OF COUNSEL

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York City (*Kathleen M. Sullivan, Faith E. Gay* and *Robert C. Juman* of counsel), and *Jaspan Schlesinger Hoffman LLP*, Garden City, for appellants (one brief filed).

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Arthur N. Eisenberg, New York City, for New York Civil Liberties Union Foundation, amicus curiae.

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OPINION OF THE COURT

Per Curiam.

The principal issue presented on this appeal concerns whether the Governor has the authority, acting entirely on his own, to select and appoint an otherwise qualified individual to fill a vacancy in the office of lieutenant governor.

In November 2006, David Paterson was elected Lieutenant Governor of the State of New York on a ticket with Eliot Spitzer, who was elected Governor. On March 17, 2008, Governor Spitzer resigned and, by operation of law, Lieutenant Governor Paterson became Governor for the remainder of Governor Spitzer's term (*see* NY Const, art IV, § 5). Paterson's ascension to the office of governor created a vacancy in the office of lieutenant governor, and the parties agree that the office remained unfilled until ***342** July 8, 2009. On that date, responding to the State's severe financial crisis and a continuing political dispute that deadlocked the State Senate and brought the operation of the legislative

branch to a virtual halt, Governor Paterson appointed Richard Ravitch to be Lieutenant Governor. Mr. Ravitch accepted the appointment and delivered his oath of office for filing to the First Deputy Secretary of State that night.

The next day, the plaintiffs, Dean G. Skelos, a State Senator elected from the 9th Senatorial District, and Pedro Espada, Jr., a State Senator elected from the 33rd Senatorial District (hereinafter together the Senators), commenced this action in the Supreme Court, Nassau County. The complaint named as defendants David Paterson as Governor, Lorraine Cortes-Vazquez as Secretary of State, and Richard Ravitch as "putative nominee" for Lieutenant Governor. The Senators sought a judgment (1) declaring that the "acts" of Governor Paterson in appointing Mr. Ravitch were unconstitutional, and that the appointment itself was unconstitutional in all respects; (2) directing Ms. Cortes-Vazquez not to accept for filing any oath of office executed by Mr. Ravitch; and (3) enjoining the three defendants from taking any action to fill the office of lieutenant governor. The Senators also moved for a preliminary injunction prohibiting Mr. Ravitch from exercising any of the powers of the office of lieutenant governor, including presiding over the State Senate. The Governor, Ravitch, and Cortes-Vazquez jointly cross-moved to dismiss the complaint on the grounds that the matter was not justiciable, that the Senators lacked standing, and that a quo warranto proceeding by the Attorney General was the only permissible way to challenge the appointment of Mr. Ravitch. In the alternative, the defendants also moved to change the venue of the action from Nassau County to Albany County. The Supreme Court granted the Senators' motion and preliminarily enjoined Mr. Ravitch from exercising any of the powers of the office of lieutenant governor (25 Misc 3d 347 [2009]). The court also denied the defendants' cross motion to dismiss the complaint and their motion to change venue.

The Governor, Ravitch, and Cortes-Vazquez (hereinafter collectively the Governor) filed a notice of appeal and, by order to show cause, moved this Court for, among other things, a stay of enforcement of the Supreme Court's order pending the resolution of the appeal. By decision and order on motion dated July 30, 2009, this Court, inter alia, granted that branch of the motion which was for a stay to the extent of limiting the preliminary ***343** injunction so as to enjoin Mr. Ravitch only from presiding over, or exercising a casting vote in, the State Senate during the pendency of the appeal. *

We turn first to the threshold and related questions of whether a challenge to the Ravitch appointment may be brought by way of an action for a declaratory judgment and injunctive relief, whether the Senators have standing to bring such an action, and whether CPLR 6311 (1) presents a jurisdictional bar preventing the Supreme Court, Nassau County, from granting the requested relief.

([1])The Governor contends that a quo warranto proceeding, brought by the Attorney General, is the exclusive method by which the lawfulness of the Ravitch appointment may be challenged. The common-law writ of quo warranto is now codified in Executive Law § 63-b (*see Matter of Delgado v Sunderland*, 97 NY2d 420, 424 [2002]). That statute provides in pertinent part that "[t]he attorney-general may maintain an action, upon his own information or upon the complaint of a private person, against a person who usurps, intrudes into, or unlawfully holds or exercises within the state . . . a public office" (Executive Law § 63-b [1]). Here, although the Attorney General issued a public statement on July 6, 2009, calling the Governor's proposed appointment of a lieutenant ****2** governor "not constitutional" (*Statement of Attorney General Andrew Cuomo Regarding Lieutenant Governor Appointment Proposal*, http://www.oag.state.ny.us/media_center/2009/july/july6a_09.html [Office of the Attorney General, Jul. 6, 2009]), "there is nothing in the record to show that the Attorney-General has taken or intends to take an active role in the resolution of this dispute . . . [and] we believe that the public interest requires that we address the issues now rather than await a quo warranto proceeding brought by the Attorney-General" (*Matter of Dekdebrun v Hardt*, 68 AD2d 241, 244 [1979], *lv dismissed* 48 NY2d 882 [1979]; *see Matter of Cullum v O'Mara*, 43 AD2d 140, 145 [1973], *affd* 33 NY2d 357 [1974]; *cf. Matter of Delgado v Sunderland*, 97 NY2d at 425). Moreover, it has long been recognized that a determination of the title to a public office may be made by way of "mandamus, prohibition and quo warranto as the circumstances of the case and the mode of procedure may require" ***344** (*People ex rel. Corscadden v Howe*, 177 NY 499, 506 [1904]; *see Ex parte Heath*, 3 Hill 42 [1842]). A quo warranto proceeding is traditionally seen as the exclusive remedy where there are facts in dispute that must be tried (*see Greene v Knox*, 175 NY 432 [1903]; *Morris v Cahill*, 96 AD2d 88, 90 [1983]; *Matter of Ahern v Board of Supervisors of County of Suffolk*, 7 AD2d 538, 543-544 [1959], *affd* 6 NY2d 376 [1959]). However, when only an issue of law is presented, entitlement to an office may be tested by mandamus in a CPLR article 78 proceeding (*see Ellis v Eaton*, 136 AD2d 890, 891 [1988]; *Matter of Dykeman*

v Symonds, 54 AD2d 159, 161 [1976]; *Matter of Cullum v O'Mara*, 43 AD2d at 145). And, "so long as [a] declaratory judgment action is limited to resolving a question of law, it is an appropriate alternative to an article 78 proceeding and does not thwart the policies underlying the restriction of the remedy of quo warranto to actions brought by the Attorney-General" (*LaPolla v De Salvatore*, 112 AD2d 6, 8 [1985]). Inasmuch as there are no disputed issues of fact to be tried here and the controversy turns entirely on the resolution of a question of law, we hold that the instant action for a declaratory judgment and injunctive relief is a permissible way to challenge the Ravitch appointment.

The Governor contends that, even if an action for a declaratory judgment and injunctive relief can be brought, the Senators are without standing to bring it. It has long been a core principle of our system that a court has no inherent power to right a wrong unless the rights of the party requesting relief are affected by the challenged action (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]; *Schieffelin v Komfort*, 212 NY 520, 530 [1914]). Thus, a plaintiff must allege an injury-in-fact that falls within his or her zone of interest and, if suing in the capacity of a legislator, must demonstrate that injury by showing, for example, a nullification of his or her vote or a usurpation of power, and not merely a lost political battle (*see Silver v Pataki*, 96 NY2d 532, 539 [2001]; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 24-25 [2006], *appeal dismissed* 8 NY3d 958 [2007]).

([2])When performing his or her constitutional duty as president of the Senate (*see* NY Const, art IV, § 6), a lieutenant governor, as the Senate's presiding officer, is responsible, inter alia, to "ensure that debate is germane to the question under discussion" (Rules of Senate of State of New York 2009, rule III, § 1). The lieutenant governor also has a "casting vote" in the Senate (NY Const, art IV, § 6) by which he or she may break a ***345** tie vote on any matter "not involving the passage of a bill, and requiring only a majority vote, including the determination of election contests, senate rules, the choice of its officers, including the temporary president, resolutions, either separate or concurrent, adjournments, confirmations of appointments by the governor, and removals from office" (4 Lincoln, Constitutional History of New York, at 482). The Senators allege that they may be subject to the effects of a usurpation of power and have their votes nullified if Mr. Ravitch is not enjoined from assuming the position of lieutenant governor because, acting as president of the Senate, Mr. Ravitch may rule the Senators' remarks on the floor of the Senate not germane, or may nullify their votes on important matters by exercising casting votes to break ties. We note that although Mr. Ravitch has been preliminarily enjoined from presiding over the Senate or exercising a casting vote and, therefore, no usurpation of power affecting the Senators and no nullification of their votes could yet have occurred, the very purpose of a declaratory judgment action "is to adjudicate the parties' rights before a wrong actually occurs in the hope that later litigation will be unnecessary" (*Klostermann v Cuomo*, 61 NY2d 525, 538 [internal quotation marks omitted]; *see James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). We conclude that the Senators have adequately alleged an injury-in-fact that falls within their zone of interest, and showed an actual legal stake in the matter sufficient to establish their standing (*see Silver v Pataki*, 96 NY2d at 539-541; *Coleman v Miller*, 307 US 433 [1939]).

([3])The Governor further contends that, even if the Senators have standing to seek injunctive relief, CPLR 6311 (1) presents a jurisdictional bar to their obtaining it from the Supreme ****3** Court, Nassau County. The statute provides in pertinent part that "[a] preliminary injunction to restrain a public officer . . . from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer . . . is located or in which the duty is required to be performed" (CPLR 6311 [1]). The Governor contends, in effect, that the Lieutenant Governor is "located" in Albany where his duties are required to be performed and, therefore, a preliminary injunction restraining him from performing his statutory duties may be granted only by the Supreme Court at a term in the Third Judicial Department. We disagree. Either Mr. Ravitch is the lawfully appointed Lieutenant Governor or he is not. If he is not, then CPLR 6311 does not apply because he is not a public ***346** officer. If he is the lawfully appointed Lieutenant Governor, then the Senators have proffered no grounds to restrain his performance of the duties of that office. In sum, we find no procedural impediment to the granting of the relief sought by the Senators, and we therefore turn to the merits of the Governor's claim that the Supreme Court improperly granted the preliminary injunction.

A preliminary injunction may issue if the movant demonstrates, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of the equities favors the moving party (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Gluck v Hoary*, 55 AD3d 668 [2008]). Amici curiae supporting the Governor

focus principally on the third prong, arguing that recognition of the Governor's authority to fill a vacancy in the office of lieutenant governor is essential to allow the orderly and effective administration of both the executive and legislative branches, to restore the constitutional promise of a republican form of government, to provide both the business community and the state's working men and women with a stable political environment, to provide the Governor with an able second-in-command to spearhead the State's response to the current economic crisis, and to ensure a clear line of succession. Indeed, in their joint amicus brief, the United Federation of Teachers, the Uniformed Sanitationmen's Association, Local 831 IBT, and the City Employees Union, Local 237 IBT, invoke the maxim of "salus populi est suprema lex" (the welfare of the people is the highest law) to argue that "[t]ime and again, courts have reiterated their approval of an exercise of power (albeit not an unfettered power) in each of the three branches of government to stem a crisis, provided only that no explicit statutory bar exists and that the action taken can be viewed as reasonable and necessary to serve an important public purpose." Thus, these amici argue, given the State's dire financial straits and the absence of an explicit bar to Mr. Ravitch's appointment, it must be upheld.

([4])We have no quarrel with those who say that having a man of Mr. Ravitch's stature, knowledge, and experience in the office of lieutenant governor would promote the public interest by providing help and counsel to the Governor in difficult times and by bringing much-needed stability to the government of this State. We conclude, however, that the Governor simply does not have the authority to appoint a lieutenant governor, that ***347** his purported appointment of Mr. Ravitch cannot be reconciled with an unambiguous and contrary provision in the State Constitution, and that no considerations of the State's financial difficulties or of political strife in the Senate allow us to find authority for Mr. Ravitch's appointment where none exists.

Section 3 of article XIII of the State Constitution provides in pertinent part that "[t]he legislature shall provide for filling vacancies in office." Pursuant to that authority, the Legislature enacted Public Officers Law §§ 41, 42 and 43. Section 41 authorizes the Legislature to appoint a person "to fill" a vacancy in the office of attorney general or comptroller. Section 42 provides for the filling of vacancies in certain other offices, with a specific exception for the "offices of governor or lieutenant-governor" (Public Officers Law § 42 [1]).

The Governor here relies entirely on Public Officers Law § 43 which, as a catchall provision, reads in pertinent part: "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election." The plain language of this statute indicates that the vacancy in the elective office in question is to be "filled," not by a gubernatorial appointment, but "by an election," and that the Governor's appointee merely "execute[s] the duties [of the vacant office] until the vacancy [is] filled." Thus, Public Officers Law § 43 does not authorize the Governor to fill a vacancy, but only to appoint a person to execute the duties of the vacant office until the vacancy is filled by election. Public Officers Law § 43, therefore, provides no authority for the Governor's purported appointment of Mr. Ravitch to fill the office of lieutenant governor. Moreover, the statute cannot be constitutionally applied even to support an appointment of Mr. Ravitch to execute the duties of the office of lieutenant governor. ****4**

Article IV, § 6 of the Constitution provides that where a vacancy occurs in the office of lieutenant governor, "the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy." Thus, under the Constitution, until the vacancy in the office of lieutenant governor is filled, the temporary president of the Senate is charged with the responsibility of "perform[ing] all the duties of lieutenant-governor" (NY Const, art IV, § 6). "Executing" the duties of the lieutenant governor, as provided in the statute, cannot mean something different from "performing" the duties ***348** of the lieutenant governor, as provided in the Constitution. It could not have been within the contemplation of the drafters of the Constitution and the statute that, upon a vacancy in the office of lieutenant governor, there would be two caretakers—one, the temporary president of the Senate, who would "perform" the duties of the office, the other, an appointee of the Governor, who would "execute" the duties of the office.

In our view, therefore, Public Officers Law § 43 cannot be constitutionally applied with respect to a vacancy in the office of lieutenant governor because it does not authorize the Governor to fill the vacancy and it would permit an appointee of the Governor to do what the Constitution mandates be done by the temporary president of the Senate. Inasmuch as the statute as applied to the office of lieutenant governor cannot be reconciled with the Constitution (*cf. Matter of Wolpoff v Cuomo*, 80 NY2d 70, 78 [1992]), it must yield (*see People*

v Allen, 301 NY 287, 290 [1950]). Thus, the Governor's purported appointment of Mr. Ravitch was unlawful because no provision of the Constitution or of any statute provides for the filling of a vacancy in the office of lieutenant governor other than by election, and only the temporary president of the Senate is authorized to perform the duties of that office during the period of the vacancy. We hold, therefore, that the Supreme Court properly granted the Senators' motion for a preliminary injunction.

The parties' remaining contentions are without merit.

Accordingly, the order is affirmed insofar as appealed from. Because we recognize that this matter is one of great public import and ought to be resolved finally and expeditiously by the Court of Appeals, we dispense with the need for the Governor to move for leave to appeal to that Court and, on our own motion, grant leave.

Fisher, J.P., Angiolillo, Dickerson and Eng, JJ., concur.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

On the Court's own motion, it is ordered that the aggrieved parties are granted leave to appeal to the Court of Appeals, if they be so advised, pursuant to CPLR 5602 (b) (1), from the opinion and order of this Court affirming the nonfinal order of the Supreme Court, Nassau County (LaMarca, J.), entered July 22, 2009, and the following question is certified to the Court of ***349** Appeals: Was the opinion and order of this Court properly made? Questions of law have arisen which, in our opinion, ought to be reviewed by the Court of Appeals (*see* CPLR 5713); and it is further ordered that so much of the decision and order on motion of this Court dated July 30, 2009, as limited the preliminary injunction to the extent of enjoining the defendant Richard Ravitch only from presiding over, or exercising a casting vote in, the New York State Senate during the pendency of the appeal is vacated forthwith.

Fisher, J.P., Angiolillo, Dickerson and Eng, JJ., concur.

FOOTNOTES

* By letter dated August 11, 2009, counsel for the plaintiff Pedro Espada, Jr., advised the Court that Senator Espada "would not be filing a brief on appeal and . . . did not wish to participate in the appeal at this juncture." Senator Skelos has filed a brief and continues to participate in the appeal.

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Vacated by Devine v. Annucci, N.Y.A.D. 2 Dept., May 24, 2017

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated Executive Law (Refs & Annos) Chapter Eighteen. Of the Consolidated Laws Article 12-B. State Board of Parole (Refs & Annos)

McKinney's Executive Law § 259-c

§ 259-c. State board of parole; functions, powers and duties

Effective: October 1, 2018
Currentness

The state board of parole shall: 1. [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 below.] have the power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole, or on medical parole pursuant to section two hundred fifty-nine-r or section two hundred fifty-nine-s of this article, and when and under what conditions;

1. [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 above.] have the power and duty of determining which inmates serving an indeterminate sentence of imprisonment may be released on parole, or on medical parole pursuant to section two hundred fifty-nine-r of this article, and when and under what conditions;

2. [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 below.] have the power and duty of determining the conditions of release of the person who may be presumptively released, conditionally released or subject to a period of post-release supervision under an indeterminate or determinate sentence of imprisonment;

2. [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 above.] have the power and duty of determining the conditions of release of the person who may be conditionally released or subject to a period of post-release supervision under an indeterminate or reformatory sentence of imprisonment and of determining which inmates serving a definite sentence of imprisonment may be conditionally released and when and under what conditions;

3. determine, as each inmate is received by the department, the need for further investigation of the background of such inmate. Upon such determination, the department shall cause such investigation as may be necessary to be made as soon as practicable, the results of such investigation together with all other information compiled by the department and the complete criminal record and family court record of such inmate to be filed so as to be readily available when the parole of such inmate is being considered;

4. establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision;

5. through its members, officers and employees, study or cause to be studied the inmates confined in institutions over which the board has jurisdiction, so as to determine their ultimate fitness to be paroled;

6. have the power to revoke the community supervision status of any person and to authorize the issuance of a warrant for the re-taking of such persons;

7. Deleted by L.2011, c. 62, pt. C, subpt. A, § 38-b, eff. March 31, 2011.

8. have the power and perform the duty, when requested by the governor, of reporting to the governor the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of inmates under consideration by the governor for pardon or commutation of sentence and of applicants for restoration of the rights of citizenship;

9. for the purpose of any investigation in the performance of duties made by it or any member thereof, have the power to issue subpoenas, to compel the attendance of witnesses and the production of books, papers, and other documents pertinent to the subject of its inquiry;

10. have the power to authorize any members thereof and hearing officers to administer oaths and take the testimony of persons under oath;

11. make rules for the conduct of its work, a copy of such rules and of any amendments thereto to be filed by the chairman with the secretary of state;

12. to facilitate the supervision of all inmates released on community supervision the chairman of the state board of parole shall consider the implementation of a program of graduated sanctions, including but not limited to the utilization of a risk and needs assessment instrument that would be administered to all inmates eligible for parole supervision. Such a program would include various components including the use of alternatives to incarceration for technical parole violations;

13. transmit a report of the work of the state board of parole for the preceding calendar year to the governor and the legislature annually. Such report shall include statistical information regarding the demographics of persons granted release and considered for release to community supervision or deportation, including but not limited to age, gender, race, ethnicity, region of commitment and other relevant categories of classification and commitment;

14. notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such

sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

15. Notwithstanding any other provision of law to the contrary, where a person is serving a sentence for an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law or the internet was used to facilitate the commission of the crime, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as mandatory conditions of such release, that such sentenced offender shall be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the board may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a "commercial social networking website" shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

15-a. Notwithstanding any other provision of law, where a person is serving a sentence for a violation of section 120.03, 120.04, 120.04-a, 125.12, 125.13 or 125.14 of the penal law, or a felony as defined in paragraph (c) of subdivision one of section eleven hundred ninety-three of the vehicle and traffic law, if such person is released on parole or conditional release the board shall require as a mandatory condition of such release, that such person install and maintain, in accordance with the provisions of section eleven hundred ninety-eight of the vehicle and traffic law, an ignition interlock device in any motor vehicle owned or operated by such person during the term of such parole or conditional release for such crime. Provided further, however, the board may not otherwise authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of the vehicle and traffic law.

16. determine which inmates serving a definite sentence of imprisonment may be conditionally released from an institution in which he or she is confined in accordance with subdivision two of section 70.40 of the penal law.

17. within amounts appropriated, appoint attorneys to serve as its legal advisors. Such attorneys shall report directly to the board, provided, however, that administrative matters of general applicability within the department shall be applicable to such attorneys.

Credits

(Added L.1977, c. 904, § 3. Amended L.1989, c. 79, § 4; L.1992, c. 55, § 287; L.1995, c. 3, § 38; L.1998, c. 1, §§ 22, 23, eff. Aug. 6, 1998; L.2000, c. 1, § 8, eff. Feb. 1, 2001; L.2001, c. 62, § 14, eff. June 25, 2001; L.2003, c. 62, pt. E, § 7, eff. May 15, 2003, deemed eff. April 1, 2003; L.2005, c. 544, § 2, eff. Sept. 1, 2005; L.2006, c. 96, § 1, eff. June 7, 2006, deemed eff. Oct. 1, 2005; L.2006, c. 320, § 23, eff. Nov. 1, 2006; L.2008, c. 67, § 9, eff. April 28, 2008; L.2009, c. 56, pt. J, § 8, eff. April 7,

2009; L.2009, c. 56, pt. N, § 2, eff. April 7, 2009, deemed eff. March 1, 2009; L.2009, c. 496, § 11, eff. Dec. 18, 2009; L.2010, c. 56, pt. A-1, § 14, eff. June 22, 2010; L.2011, c. 62, pt. C, subpt. A, § 38-b; L.2018, c. 292, § 1, eff. Oct. 1, 2018.)

McKinney's Executive Law § 259-c, NY EXEC § 259-c
Current through L.2019, chapter 752. Some statute sections may be more current, see credits for details.

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