

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL T. WARREN,

Plaintiff

-v-

DECISION and ORDER
Index No. 2004/12768

JOEL A. GIAMBRA, as County Executive of the
County of Erie, New York;
JOSEPH PASSAFIUME, as Director of the Erie
County Division of Budget, Management &
Finance;
DAVID J. SWARTS, as Clerk of the County of
Erie, New York;
COUNTY LEGISLATURE, COUNTY OF ERIE,
NEW YORK;
KEVIN M. KELLEY, as Clerk of the Legislature
of the County of Erie, New York; and
COUNTY OF ERIE, NEW YORK,

Defendants.¹

BEFORE: HON. JOHN P. LANE
Justice of Supreme Court

APPEARANCES: DANIEL T. WARREN, Pro Se

FREDERICK A. WOLF, ERIE COUNTY ATTORNEY
and James L. Tuppen, Esq., Assistant County Attorney

HARTER, SECREST & EMERY, LLP
Attorneys for Respondents and Counsel to
Frederick A. Wolf,
County Attorney
By Kenneth W. Africano, Esq., and John G. Horn, Esq.

MAGAVERN, MAGAVERN & GRIMM, LLP
Special Counsel to Harter, Secrest & Emery, LLP
By James L. Magavern, Esq. and Aven Rennie, Esq.

¹By stipulation of the parties, this action has been discontinued as against Nancy Naples, Erie County Comptroller.

In this action, plaintiff Daniel Warren seeks a judgment declaring, among other things, that action taken by the Erie County Legislature on December 8, 2004 adopting a budget with amendments for 2005 and seeking action by the State Legislature authorizing Erie County to increase its share of the sales tax by one percent was in violation of the County Charter and the Open Meetings Law (Public Officers Law, article 7). Plaintiff has moved by order to show cause for a preliminary injunction enjoining defendants from presenting the home rule message to the State Legislature seeking permission to increase the county's share of sales tax adopted by the County Legislature and from expending any funds in excess of those provided for in the tentative budget submitted by the County Executive on November 5, 2004. In *Matter of Mohr v Giambra* (Erie County Index No. 2004/12707 decided December 31, 2004), a related case, this Court held that the Erie County Legislature had validly adopted the sales tax home rule resolution and that it was in full force and effect and may be presented to the State Legislature and Governor.²

Plaintiff has requested that his motion for a preliminary injunction be converted to a motion for summary judgment. Defendants have opposed plaintiff's application for a preliminary injunction and have cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (2) and/or (7), or, in the alternative, for summary judgment. Converting an application for a preliminary injunction to a motion for summary judgment is appropriate in some cases (*see e.g. Rochester City School Dist. v County of Monroe*, ___ AD3d ___, 2004 NY Slip Op 09768 [4th Dept, Dec. 30, 2004]). In view of the outcome in the *Mohr* case and the limited record here, I decline to consider the parties' requests for summary judgment at this time. For the reasons that follow, plaintiff's motion for a preliminary injunction is denied as is defendants'

²The *Mohr* case did not involve the Open Meetings Law claim asserted here. Other issues concerning the County's budget for 2005 found in the complaint in this action were raised and decided in the *Mohr* case. At plaintiff's request, judicial notice is taken of the proceedings and outcome in the *Mohr* case.

cross motion to dismiss the complaint pursuant to CPLR 3211.

Under the Civil Practice Law and Rules, for plaintiff to obtain a preliminary injunction in this case, he must show that he will likely succeed in obtaining a judgment voiding the sales tax resolution and budget amendments adopted by the County Legislature on December 8 based on a violation of the Open Meetings Law (CPLR 6301, 6312). In an action involving a violation of the Open Meetings Law, a declaration voiding action taken by a county legislature at a subsequent public meeting must be based on a showing of good cause (Public Officers Law §107). The Court of Appeals has stated “not every breach of the ‘Open Meetings Law’ automatically triggers its enforcement sanctions” (*Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]). The burden is on plaintiff Warren as the challenger to the action taken by the Erie County Legislature to show good cause for such judicial relief (*id.*).

In support of his motion, plaintiff submitted the affidavit of Albert DeBenedetti, an enrolled Democrat and a duly elected member of the Erie County Legislature. During the evening of December 8, 2004, as a member of the County Legislature, DeBenedetti participated in attempts to reach a number of funding compromises to pass a timely budget for 2005.³ As a part of those activities, he participated in a private meeting of legislators with County Executive Joel A. Giambra at the office of attorney Anthony J. Colucci, III. Attending the meeting were seven other Democratic members and two Republican members of the County Legislature and defendant Giambra, as well as some staff employees. During the meeting,

³December 8 was the deadline for the County Legislature to present a budget amended to include added or increased items of expenditures to the County Executive (Erie County Charter §1803[c]).

there was “considerable discussion and deliberation” regarding items in the tentative budget proposed by the County Executive and legislative amendments (DeBenedetti Aff). The meeting ended “when no agreement could be reached [on] patronage jobs for the County Executive in the budget” (*id.*).

In response to plaintiff’s motion for a preliminary injunction, defendants have submitted an affidavit of Anthony J. Colucci, III in which he states that on December 8, 2004 at about 5:40 p.m. he received a telephone call from County Executive Joel Giambra asking if he could use Colucci’s law office so that “some Republicans could talk to some Democrats” later that day (Colucci Aff). Colucci agreed to make his offices available for such a meeting, and his guests started arriving sometime after 6:15 p.m., both singly and in small groups. By about 8:00 p.m., approximately 20 people, including the County Executive, members of his staff, and some members of the Erie County Legislature had arrived. The group was dispersed throughout the office for a period of time, and eventually they assembled together in a large conference room for about an hour. At times he heard loud voices coming from the conference room, and from what he heard “it did not appear that any agreement was reached” (*id.*). The meeting broke up sometime between 9:00 and 9:30 p.m. when those attending departed individually and in small groups.

At a hearing held on his application for the preliminary injunction, plaintiff called Legislator DeBenedetti, who had served as chairman of the County Legislature’s Budget Committee in 2004. DeBenedetti testified that he attended a legislative session held on December 8, 2004. Informal meetings were held in the morning and a formal meeting convened later in the day and recessed at about 3:30 p.m. About three hours later, he was told by other members of the Legislature, whose names he could not recall,

that a meeting was to be held outside of the Legislature's chambers. According to DeBenedetti, he and other members of the Legislature left through a back entrance and went to the law offices of Anthony J. Colucci, III, in downtown Buffalo. The meeting included ten members of the Legislature, the County Executive, and some of his staff, who assembled together in a conference room. The topic of the meeting was the budget and pending amendments, the need to increase the county's share of the sales tax to fund the budget, and restoring patronage jobs. Following a heated exchange between another legislator and the County Executive, the meeting broke up.

According to DeBenedetti, when the public meeting of the County Legislature resumed later that night, resolutions were adopted seeking action by the State Legislature permitting the County to increase its share of the sales tax by one percent, deleting four packages of amendments to the budget recommended by the Budget Committee and adopting two new amendments proposed by Legislator Charles Swanick. DeBenedetti also testified that previously the County Legislature had held four public hearings in local communities on the proposed 2005 budget prior to December 8 in order to permit full public comment. Those budget issues were also discussed at a week-long session of the Legislature's Budget Committee and debated at sessions of the Legislature on December 7 and 8.

Joseph Passafiume, Erie County's Budget Director, testified for defendants concerning the history of the county's financial rating, how that rating is affected by revenues estimated in the annual budget and the use of reserve funds to balance a spending plan, and how that rating will likely be affected if the County is

unable to raise its share of the sales tax. He also testified to the additional costs the County might incur if a preliminary injunction is granted and the negative effect an injunction may have on the fiscal stability of the County. Finally, Passafiume testified that the County Executive did not return from the meeting at Colucci's office with any changes to the proposed budget. He stated his department staff kept running projections until 11:30 p.m. for the County Executive's use regarding the fiscal impacts of an increase in the sales tax and the failure to increase fees.

Joseph Maciejewski, the Director of Real Property Tax Services, testified concerning the manner in which tax bills are prepared for the various municipalities in the County and the cost of producing those bills. He estimated that if the bills, which have already been prepared, have to be re-run, the cost to the County will be at least \$174,000.

Plaintiff urges the Court to draw an inference against defendants for their failure to call any member of the County Legislature or the County Executive to testify that, had they been called, they would have testified in line with the proof he presented. Defendants do not dispute that a majority of the members of the Legislature were present at the meeting and that those assembled represented two political parties. Plaintiff's evidence, in the form of the testimony and affidavit of DeBenedetti, which is unchallenged, establishes that a two-thirds majority of the County Legislature consisting of both Democratic and Republican members met privately with the County Executive and his staff to discuss and attempt to reach an agreement on budget issues pending before the County Legislature. On its face, such a meeting was in violation of the Open Meetings Law.

The Open Meetings Law provides in part:

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

(Public Officers Law §100). Every meeting of a public body, such as the Erie County Legislature, must be open to the general public, except when an executive session is authorized by law (Public Officers Law §103[a]). Upon the facts of this case, the County Legislature was not authorized to hold an executive session and did not attempt to do so. While the Public Officers Law contains an exemption allowing members of a county legislature “who are members or adherents of the same political party” to meet in caucuses to discuss public business (Public Officers Law §108), the exemption does not extend to the meeting held in the Colucci law office where a two-thirds majority of the County Legislature consisting of members of two political parties assembled with the County Executive and his staff to discuss and attempt to reach an agreement on budget issues. In an action such as this, the Court “has the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of the [Open Meetings Law] void in whole or in part” (Public Officers Law §107[1]).

“[T]he legislature, by enacting the Open Meetings Law, intended to affect the entire decision-making process and not merely formal vote taking as it is the ‘deliberative process which is at the core of [that law]’ (*Matter of Goodson Todman Enterprises, Ltd. v City of Kingston Common Council*, 153 AD2d 103, 105 [1990]; see also *Matter of Sciolino v Ryan*, 81 AD2d 475 [1981]). Where, as here, more than a quorum of the County Legislature assembled with the purpose of discussing a topic that had

already arisen at an earlier meeting required to be open to the public, there is a violation of the Open Meetings Law (*Goodson*). However, there is no evidence supporting an inference that the legislators who attended the meeting in the private law office with the County Executive reached an agreement to raise the county's share of the sales tax or how to amend the budget. Instead, according to Legislator DeBenedetti, the meeting broke up after a heated exchange between the County Executive and another legislator. Furthermore, in his affidavit, DeBenedetti stated unequivocally that the meeting ended without an agreement, a fact that plaintiff has not challenged or contradicted. Plaintiff is bound by the evidence presented through the affidavit and testimony of DeBenedetti, his witness. In the absence of evidence contradicting DeBenedetti's statement that the meeting at Colucci's office concluded without an agreement, any inference to the contrary would be speculative and unreliable as a matter of law.

Whether the legislators, talking informally among themselves after they left the Colucci office, reached some understanding concerning how they would proceed when the legislative session resumed, cannot be determined. Even if that were the case, plaintiff would not be entitled to the preliminary injunction he seeks as discussions among individual legislators are not barred by the Open Meetings Law.

The fact that a two-thirds majority of the County Legislature held an inconclusive meeting in violation of the Open Meetings Law prior to finally taking action on the 2005 budget, without more, is not sufficient cause for overturning the resolutions adopted later at a public session of the full Legislature (*see Matter of Malone Parachute Club v Town of Malone*, 197 AD2d 120 [1994]). In the absence of aggravating factors, the courts of New York do not routinely award injunctive relief and impose sanctions

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for purely technical and non-prejudicial violations of the Open Meetings Law (*see e. g. Matter of Gordon v Village of Monticello*, 87 NY2d 124 [1995] [repeated violations, lack of candor, prejudice to plaintiff]; *Matter of Roberts v Town Bd. of Carmel*, 207 AD2d 404, *lv denied* 84 NY2d 811 [1994] [formal vote taken]; *Matter of Goetschius v Board of Educ. of Greenburgh Union Free School Dist.*, 281 AD2d 416, 417 [2001] [repeated violations]; *Goodson* [no prior violations]).

Finally, before granting a preliminary injunction in any case, the court must engage in a balancing test, weighing the potential harm to the parties if the injunction is granted or denied. Plaintiff has not established that either he or the public, whose rights under the Open Meetings Law he seeks to enforce, will suffer irreparable harm if a preliminary injunction is not granted. However, it is clear that the issuance of a preliminary injunction will likely affect the County's investment rating and thereby undermine its ability to borrow necessary funds. It might also cause the County to incur significant costs if the reprinting of real property tax bills is necessary as well as cause taxpayers concern about their ability to timely pay those bills when due.

In the absence of evidence that defendants have attempted to mislead the Court in describing what happened at the meeting in the private law office, any prejudice to the public (*cf. Gordon*), or "a persistent pattern of deliberate violation of the letter and spirit of the Open Meetings Law" by the County Legislature (*Goetschius at 417; see also Sciolino*), a preliminary injunction is not warranted in this case (*see Matter of Griswald v Village of Penn Yan*, 244 AD2d 950 [1997]).

While the Court is mindful that the Open Meetings Law should be liberally construed (*see Gordon*)

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and that its objective to maintain openness of the legislative sessions of public bodies is of utmost importance in our society, this Court is unwilling to impose a sanction for an isolated violation in the absence of any aggravating factors and where no substantive agreement was reached. Defendants shall serve and file their answer to the complaint within ten days from the granted date of this order. All discovery shall be completed by March 31, 2005, and plaintiff shall file and serve a note of issue and certificate of readiness by April 15, 2005. Following completion of discovery, the parties may, if so inclined, renew their motions for summary judgment.

SO ORDERED.

Dated: Buffalo, New York
January 21, 2005

John P. Lane, J.S.C.