STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL T. WARREN,

PLAINTIFF,

v.

JOEL GIAMBRA, JOSEPH PASSAFIUME, NANCY NAPLES, DAVID J. SWARTS, COUNTY LEGISLATURE, COUNTY OF ERIE, NEW YORK, KEVIN M. KELLEY AND COUNTY OF ERIE, NEW YORK,

DEFENDANTS.

MEMORANDUM OF LAW

INDEX NO. 2004-12768

PRESIDING JUSTICE: JOHN P. LANE

PRELIMINARY STATEMENT

Petitioner Daniel T. Warren ("Plaintiff" or "Warren") has filed an application for a preliminary injunction by an order to show case granted December 29, 2004.[1] Defendants Joel Giambra; Joseph Passafiume; David J. Swarts; County Legislature, County of Erie, New York (except Legislator Denise E. Marshall); Kevin M. Kenney; and County of Erie, New York ("Defendants") hereby oppose Warren's application for injunctive relief and move to dismiss pursuant to CPLR 3211(a)(1), (2) and (7) or, in the alternative, for summary judgment pursuant to CPLR 3212.

Plaintiff Warren, claiming standing as a citizen-taxpayer pursuant to Public Officer Law § 107(1) and General Municipal Law § 51, has challenged the actions taken by Defendants in connection with the passage of the 2005 Erie County Budget on December 8, 2004. All of his claims, save an alleged violation of Article 7 of the Public Officers Law ("Open Meetings

[1] Warren also filed a Summons with Verified Complaint on December 15, 2004. Such was served on December 29, 2004.

Law"), mirror those previously raised by the petitioners in two actions recently brought before this Court. Those actions, consolidated under Index Number 2004/12707 and captioned *In the Matter of the Application of Mohr, Adamczyk, Marshall, Naples and Pawarski v. Giambra, Passafiume, Greenan, Erie County Legislature, County of Erie and Pawarski* (the "Mohr case"), were disposed of by a decision of this Court dated December 31, 2004 ("December 31 Decision") and Judgment and Order dated January 4, 2004.

The December 31 Decision granted partial summary judgment in favor of the respondents[2] dismissing many of the petitioners' claims and resolving others through additional actions to be taken by the County Executive and County Legislature over the next several weeks. The Defendants respectfully request that the Court similarly dispose of the identical claims in this case, namely paragraphs A through E and H through J found on pages 5 and 6 of the Verified Complaint, which is attached as Exhibit A to the accompanying affidavit of Kenneth W. Africano, Esq., sworn to January 5, 2004.

This Memorandum of Law will address only Warren's request for relief based upon an alleged violation of the Open Meetings Law. It is submitted in opposition to Warren's application for a preliminary injunction and in support of Defendants' motion to dismiss and/or summary judgment.

STATEMENT OF FACTS

Warren's Open Meetings Law claim is premised exclusively on his assertion – by his own admission based only upon information and belief – that "8 to 10 legislators" met in secret

[2] The respondents in those actions were practically identical to the instant Defendants. John W. Greenan was a respondent in the Mohr case and is not a named defendant herein. Nancy Naples, Kevin M. Kelley and David J. Swarts, Defendants herein, were not respondents in the previous actions. In all other respects, the respondents in the previous actions are identical to the Defendants in this case.

at the offices of a local attorney and that, "[s]hortly after the meeting at the Liberty Building ended the 10 legislators present at that meeting voted in favor of the tax increase agreed to vote in favor of it [*sic*] in exchange for certain concessions on the part of the County Executive." Verified Complaint, ¶ 7. Such is the extent both of Warren's allegations and of his evidence that the Open Meetings Law was violated. As the following recitation demonstrates, the 2005 budget process was an eminently public affair.

As set forth in the Affidavit of James L. Tuppen, sworn to December 21, 2004, the Erie County Legislature began its publicly announced annual budget meeting on Tuesday, December 7, 2004. That meeting was recessed on December 7 and reconvened on December 8, 2004. On the second day, the Legislature amended an item identified as Comm. No. 26E-4, a resolution, which *inter alia*, memorialized to the State Legislature that Erie County was respectfully requesting authority to impose an additional 1% Erie County sales tax (subject to a $12.5 million revenue-sharing formula incorporated in the amendment). Following such amendment, the Legislature approved said resolution, as amended, by a vote of 10 Ayes and 5 Noes. Tuppen Affidavit, ¶ 16(A).

As the announcements appended as Exhibit R. to the Tuppen Affidavit make plain, the 2005 budget process was the subject of considerable public participation and debate. Public hearings were held regarding specific portions of the County Executive's proposed budget on November 15, 2004 and November 16, 2004 at Erie County Hall. Additional public hearings designed to "allow for community input on the County Executive's 2005 Proposed Budget" were held on November 22, 2004, November 23, 2004, November 29, 2004 and November 30, 2004 at various sites throughout Erie County. Most importantly, the adoption by the County Legislature of the sales tax resolution on December 8, 2004 took place at a public and duly

noticed meeting of the County Legislature at Erie County Hall. Indeed, Warren makes no allegation to the contrary.

The only admissible factual evidence submitted by Warren in support of his application is the affidavit of Albert DeBenedetti.[3] Therein, DeBenedetti states that there was a meeting at the law offices of Anthony J. Colucci, III, Esq. on the evening of December 8, 2004, attended by a quorum of county legislators, including members of both parties, the County Executive and others. DiBenedetti Affidavit, ¶ 7. This meeting, which apparently occurred in between the properly noticed open sessions of the Legislature on December 8, 2004, is not alleged by DeBenedetti to have resulted in any votes or resolution of legislative action. More importantly, there is no mention in the affidavit of any particular discussions had, agreements reached or votes taken. To the contrary, DeBenedetti avers that the meeting ended in disputes.

In support of their motion/opposition papers, Defendants submit the accompanying affidavit of Anthony J. Colucci, III, Esq., sworn to January 5, 2005. Present for the entirety of the allegedly improper meeting, Mr. Colucci attests that "for much of the time that the members of the Erie County Legislature were present, they did not meet together in the same room." Colucci Affidavit, ¶ 8. Rather, "the Legislators, their staff members, County Executive Giambra and his staff dispersed in a variety of small groups and settings, including the reception area, two hallways, two conference rooms, a kitchen, a lunchroom and offices." *Id.*, ¶ 9. "The small groups were not static; people moved about the offices, and many stopped in the kitchen for dinner." *Id.*, ¶ 10. The only gathering that could reasonably be construed to have been a meeting took less than an hour and was characterized by loud voices, apparent lack of any consensus and the

[3] Newspaper accounts of the events attached to Warren's motion papers do not constitute admissible evidence and should not be considered by the Court on this application or on the cross-motions.

storming out of at least one legislator. *Id.*, ¶¶ 13-15.

For these reasons, in tandem with the arguments set forth below, Warren's application for preliminary injunctive relief should be denied and this action should be dismissed in its entirety.

ARGUMENT

POINT I
PRELIMINARY INJUNCTIVE RELIEF SHOULD BE DENIED BECAUSE PLAINTIFF HAS NOT, AND CAN NOT, POST AN UNDERTAKING

Pursuant to CPLR 6312(b), a party seeking a preliminary injunction must post an undertaking in an amount sufficient to protect the Defendants in the event that it is determined that the injunction was not warranted. *Schwartz v. Gruber,* 261 A.D.2d 526, 690 N.Y.S.2d 641 (2d Dept. 1999) (court erred in granting preliminary injunction without requiring plaintiffs to give an undertaking). Indeed, this court is without discretion to dispense with the undertaking required by CPLR 6312(b). *Ziankoski v. Simmons,* 140 A.D.2d 1007, 529 N.Y.S.2d 718 (4th Dept. 1988). In this case, Plaintiff is seeking injunctive relief that would thrust the county into fiscal chaos. As detailed in Point IV below, the pecuniary effects of such a ruling are so far-reaching and monumental that a meaningful undertaking is simply inconceivable. In any event, Warren has failed to demonstrate either a willingness or an ability to comply with this essential ingredient of preliminary injunctive relief.

POINT II
PETITIONER WARREN WILL NOT BE ABLE TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

In the Verified Complaint, which is incorporated by reference into the application for preliminary injunctive at paragraph 5 of the December 22, 2004 Warren affidavit, Warren seeks a declaration that "the vote and passage of the sales-tax increase was in violation of Article 7 of

the Public Officers Law." Verified Complaint, ¶ 14(f).[4] In the following paragraph of his Prayer for Relief, Warren seeks a declaration that the "vote and passage of the sales tax increase is null and void." This relief is wholly unjustified under the facts before the Court and well-established New York law.

Section 107 of the Open Meetings Law provides in relevant part as follows:

> In any such action or proceeding [to enforce the provisions of this article against a public body], the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part. An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken any meeting of the public body.

A preliminary injunction is an equitable remedy permitting the Court broad discretion in weighing and determining the relative harms that can be caused to various parties and the public. For Warren to establish a likelihood of success on his Open Meetings Law claim, he must do more than establish a technical or unintentional violation. *See Matter of New York University v. Whalen*, 46 N.Y.2d 734, 413 N.Y.S.2d 637 (1978), (holding that "not every breach of the Open Meetings Law automatically triggers its enforcement sanctions"). Moreover, the relevant case law demonstrates that courts will not exercise their discretion to nullify an act of a public body absent "good cause shown." *Id.* ("Judicial relief is warranted only upon a showing of good cause.").

In *Sanna v. Lindenhurst Board of Education*, 58 N.Y.2d 626, 458 N.Y.S.2d 511 (1982), the court found a violation of the Open Meetings Law but upheld the Appellate Division's exercise of discretion in refusing to declare void the action taken in violation of the statute. Central to the Appellate Division's unwillingness to annul the action taken behind closed doors

[4] This paragraph appears on page 5 of the Verified Complaint. While the paragraphs of the pleading are numbered,

was the fact that, while it was indisputable that the public body had deviated from the technical requirements of the Public Meetings Law, the violations were unintentional. *Sanna v. Lindenhurst Bd. of Education*, 85 A.D.2d 157, 162, 447 N.Y.S.2d 733, 736 (2d Dept. 1982). So it is in this case. There is no evidence before the Court that anyone, including Legislator DeBenedetti, intended to violate the Open Meetings Law. Nor is there any evidence in the record that what was at most a technical violation led in any way to the admittedly public action Warren now wants this Court to nullify. To the contrary, the DeBenedetti and Colucci affidavits warrant just the opposite conclusion.

Under the facts of this case, the law militates a denial of the requested relief. In the case of *Griswald v. Village of Penn Yan*, 244 A.D.2d 950, 665 N.Y.S.2d 177 (4th Dept. 1997), the court found a violation of the Open Meetings Law, but found a lack of good cause as to why it should exercise its discretion to void the challenged resolution. Particularly important for present purposes, the *Griswald* court deemed significant that the public body at issue had adopted the challenged resolution at a public meeting despite having allegedly discussed the matter previously at a private meeting. *Id.* at 951, 665 N.Y.S.2d at 179.

Also instructive is the case of *MCI Telecommunications v. Public Service Commission*, 231 A.D.2d 284, 659 N.Y.S.2d 563 (3d Dept. 1997). In that case, the Third Department found that the petitioners had failed in their burden of demonstrating good cause warranting the exercise of discretion to nullify the action taken. In so doing, the Court deemed it significant that the public did have notice and an opportunity to provide input in the overall decision being made at the various public meetings which were held, regardless of any private sessions held. *Id.* at 291; *see also Smithson v. Ilion Housing Authority*, 72 N.Y.2d 1034, 534 N.Y.S.2d 930 (1988)

(..continued)
there are multiple paragraphs bearing the same number.

(upholding the Appellate Division's discretion to conclude that violation of the Open Meetings Law did not require annulment of the public body's determination). As stated above and as set forth in Exhibit R. to the Tuppen Affidavit, the 2005 Erie County budget process was the subject of great public discourse. Moreover, the challenged sales tax increase was itself an agenda item of a public meeting.

In the case of *Malone Parachute Club, Inc. v. Town of Malone*, 197 A.D.2d 120, 610 N.Y.S.2d 686 (3d Dept. 1994), the Court found that a violation of the Open Meetings Law did not warrant overturning of the Town Board's resolution. In language directly applicable to this case, the Court opined as follows:

> Lastly, inasmuch as the resolution at issue was duly adopted at a regular, publicized meeting of the Town Board on July 9, 1992, the mere fact that the Town Board may have undertaken previous discussions or held prior meetings in violation of the Open Meetings Law does not, without more, constitute "good cause" for overturning that resolution.

197 A.D.2d at 124.

Many cases have refused to render void the legislative action after a violation of the Open Meetings Law absent a showing of prejudice. In the case of *Roberts v. Town Board of Carmel*, 207 A.D.2d 404, 615 N.Y.S.2d 725 (2d Dept. 1994), the court found that the record did not contain good cause to nullify the action of the Town Board, noting that no vote had been taken at the private session. Accordingly, that petitioner, like Warren, was unable to demonstrate prejudice. Similarly, in the case of *Inner-City Press v. New York State Banking Board*, 170 Misc.2d 648, 657 N.Y.S.2d 275 (1996), the court refused to declare void the actions of the Banking Board even though a closed session was held immediately prior to the public session at which the challenged act took place. The court held that "a demonstration of prejudice from the Open Meetings Law violation for example, is required to constitute the requisite good cause to

declare the action void." *Inner-City Press*, 170 Misc.2d at 693. Importantly for purposes of the Court's analysis in this case, the *Inner-City Press* Court held that the failure to take a vote at the private session demonstrated the lack of good cause shown. *See also Town of Moriah v. Cole-Layer-Trumble Company,* 200 A.D.2d 879, 606 N.Y.S.2d 822 (3d Dept. 1994) (ruling that a violation of the Open Meetings Law did not justify declaring the actions of the Board void where no prejudice was shown); *MFY Legal Services, Inc. v.Toia,* 93 Misc. 2d 147, 402 N.Y.S.2d 510 (1977) (refusing to declare void the action of the Social Services Department where there was no prejudice to petitioner shown). In this case, Warren has failed to allege, much less prove, any prejudice suffered as a result of the meeting at the Colucci offices. Accordingly, he has failed to warrant the relief he requests.

In the rare case where courts have exercised their discretion to annul action taken based upon a violation of the Open Meetings Law, the courts have found a persistent and intentional pattern of deliberate violations of the letter and spirit of the Open Meetings Law. *See Goethschius v. Board of Education of the Greenburgh Eleven Union Free School District*, 281 A.D.2d 416, 721 N.Y.S.2. 386 (2001) ("the board of education engaged in a persistent pattern of deliberate violation of the letter and spirit of the Open Meetings Law . . ."). Not only has Warren failed to identify such a pattern, the only case he cites in support of his position is the Fourth Department decision in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 208 A.D.2d 139; 622 N.Y.S.2d 395 (4th Dept. 1995). That decision was reversed by the Court of Appeals, in part because the court found no violation of the Open Meetings Law where the plaintiff had failed to establish that what allegedly took place at the private meeting related in any meaningful way to the challenged act of the public body. *See Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996).

On the record before the Court, there simply is no showing of good cause to warrant the use of this Court's discretion in voiding the sales tax resolution adopted by the County Legislature on December 8, 2004. There is no evidence, nor even an allegation, of persistent and repeated violations of the Open Meetings Law. The record clearly establishes that the budget process was subject to lengthy open meetings providing public input and access. There are no facts before the Court to indicate that any type of vote was conducted at the discussions between members of the Legislature and the County Executive at the offices of Mr. Colucci. To the contrary, the record indicates that the discussions broke down after a fight between certain representatives of the Legislature and the County Executive. In fact, the record does not establish that this gathering even constituted a "meeting" of the County Legislature. All that is before the Court are two accounts of an informal, heated and ultimately fruitless debate between certain legislators and the County Executive. Accordingly, Warren has demonstrated no likelihood of success on the merits.

POINT III
PETITIONER WARREN HAS FAILED TO SHOW IRREPARABLE INJURY

The record before the Court fails to demonstrate how Petitioner Warren will suffer irreparable injury absent a granting of a preliminary injunction enjoining enforcement of the resolutions adopted by the County Legislature on December 8, 2004. The only assertion in this regard is paragraph 6 of Mr. Warren's affidavit:

> I verily believe that the County will be irreparably harmed and any judgment rendered in this action may be ineffectual if this temporary restraining order and preliminary injunction is [*sic*] not issued.

Of course, this speaks not to any threatened irreparable injury on Warren's part, but rather to an injury he perceives will befall the County absent intervention by this Court. However, well-

established case law teaches that the injury to the County would likely be caused by that very intervention. Accordingly, most courts have – as this Court should – declined such invitations. As the Respondents in the Mohr case argued in their papers, this longstanding judicial reluctance can be seen as well in the line of so-called "Pay First, Litigate Later" cases. The Court of Appeals explained the rationale for this approach in *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 438 N.Y.S.2d 761 (1981), as follows:

> The reason for the rule is readily apparent. A government must function and to that end it must have funds. Restraints on the exercise of the taxing power would impede the progress of government and deprive it of the moneys it needs to provide essential services to the public. Thus, a municipality ordinarily should not be denied or delayed in the enforcement of its right to collect the revenues upon which its very existence and the general welfare depends.

Id. at 516, 438 N.Y.S.2d at 770-771.

The Court of Appeals put it even more succinctly in *County of Fulton v. State of New York*, 76 N.Y.2d 675, 563 N.Y.S.2d 33 (1990). Citing the United States Supreme Court, the New York high court wrote:

> The rule rests on a recognition that "taxes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259, 55 S. Ct. 695, 699 (1935).

Id. at 679, 563 N.Y.S.2d at 35.

Underscoring the "Pay First, Litigate Later" line of cases is the time-honored notion that courts should be exceedingly wary of encroaching on the legislative process, especially where such involves stanching the flow of taxes and grinding government to a halt. Put another way,

> [c]ourts may not impeach the validity of [a] law, by showing that in its enactment some form or proceeding had not been properly followed or adopted by the legislature, the supreme law-maker. [Respect] for the basic policy of distribution of powers in our State government, and the exercise of a proper restraint on the part of the judiciary in responding to invitations to intervene in the internal

> affairs of the Legislature as a co-ordinate branch of government [are most important] – it is not the province of the courts to direct the legislature how to do its work. Judicial review of every internal dispute between the members of the Legislature would frustrate the legislative process and violate the constitutional principle of separation of powers.

Heimbach v. State, 89 A.D.2d 138, 148-149, 454 N.Y.S.2d 993, 999 (2d Dept. 1982) (internal citations omitted).

Thus, to the extent Warren claims irreparable injury on behalf of the County, he swims against the current of overwhelming contrary case law. At the same time, he has failed to come forth with any proof of irreparable injury of his own.

POINT IV
THE BALANCING OF THE HARDSHIPS CLEARLY FAVORS DEFENDANTS

In deciding whether to grant the preliminary injunction, the Court must weigh the relative hardship caused by the granting of a preliminary injunction against the purported benefit to the Plaintiff. In connection with his Open Meetings Law claimed, Warren seeks annulment of the sales tax resolution adopted by the County Legislature on December 8, 2004. If Warren's relief is granted, even on a preliminary basis, the budget appropriations for approximately 3,000 County employees would be eliminated, and funding to non-state mandated services would be curtailed. Clearly, the harm to these 3,000 employees and to the public overall greatly outweighs the harm that would be caused Plaintiff as a result of paying the so-called Medicaid Penny Sales Tax. Accordingly, Warren fails this essential third prong of the preliminary injunction test.

CONCLUSION

For the foregoing reasons and those stated in the accompanying affidavits, with exhibits, submitted by Defendants and incorporated into the record, Defendants respectfully request that

this Court deny Plaintiff's application for a preliminary injunction and dismiss this action in its entirety.

DATED: Buffalo, New York
January 5, 2005

Respectfully submitted,

HARTER, SECREST & EMERY LLP

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