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

Plaintiff Daniel T. Warren ("Plaintiff" or "Mr. Warren") has moved for summary judgment pursuant to CPLR 3212. Defendants Joel Giambra; Joseph Passafiume; David J. Swarts; County Legislature, County of Erie, New York; Kevin M. Kenney; and County of Erie, New York ("Defendants") hereby oppose Mr. Warren's motion and cross-move for summary judgment.

On or about December 15, 2004, Mr. Warren filed an application for a preliminary injunction by Order to Show Cause granted December 29, 2004. He contemporaneously filed a Summons with Verified Complaint. In and by these initial papers, Mr. Warren sought the nullification of the Erie County budget, which had been adopted on December 8, 2004, as well as the imposition of sanctions for an alleged violation of Article 7 of the Public Officers Law ("Open Meetings Law"). He also requested at that time that the Court preliminarily enjoin the Defendants from taking certain actions in connection with the budget.

Following motion practice and an evidentiary hearing, this Court denied Mr. Warren's application for a preliminary injunction by Order dated January 21, 2005.[1] Significant for present purposes are two aspects of that Order. First, the Court declined Mr. Warren's request to convert his preliminary injunction application to a motion for summary judgment at that time in part because of "the limited record." *See* Order at 2-3. This decision by the Court is important because, notwithstanding the Court's directive that all discovery be completed by March 31, 2005, Mr. Warren has failed to conduct any discovery whatsoever. Thus, the record presently is no less "limited" today than it was on January 21, 2005.

The second significant aspect of the Court's January Order is that therein the Court declined to impose any sanctions in connection with the December 8, 2004 ("Colucci meeting") Open Meetings Law claim because it regarded that meeting to have been a "purely technical and non-prejudicial violation." *Id.* at 9. This same reasoning must continue to apply with equal force at this time because the record has not changed one iota since the date of the Court's Order. As for the subsequent meetings that Mr. Warren alleges violated the Open Meetings Law (January 6, 2005, February 12, 2005, February 13, 2005 and/or February 14, 2005), Mr. Warren has failed to put forth any evidence in support of his allegations. Thus, the "record" with regard to these latter allegations is not only "limited," it is non-existent.

For these reasons, the Court should deny Mr. Warren's motion for summary judgment and grant the Defendants' cross-motion for summary judgment.

STATEMENT OF FACTS

This Court has previously held that "more than a quorum of the County Legislature

[1] The Court also denied Mr. Warren's request that the budget be nullified on the grounds that it had previously found in a related matter that the December 8, 2004 budget had been lawfully adopted. *See* January 21, 2005 Order at 2.

assembled [on December 8, 2004] with the purpose of discussing a topic that had already arisen at an earlier meeting required to be open to the public." *See* Order at 8. Such finding is the law of the case. Apart from this finding, however, the Court has no other credible facts before it.

Consistent with his having conducted no discovery in this case, Mr. Warren has failed to put forth any evidence to support his motion. The only source of information – other than his own pleadings – on which Mr. Warren relies is a February 15, 2005 article from The Buffalo News. Even taking Mr. Warren's indisputably non-evidentiary newspaper article at face value, however, the Plaintiff has failed to establish either that a majority of the Legislature was present for the January and February 2005 meetings at issue or that any consensus was reached at said meetings. Accordingly, this Court has no facts before it other than those it considered prior to its January 21, 2005 Order.

ARGUMENT

POINT I
MR. WARREN'S MOTION SHOULD BE DENIED BECAUSE HE HAS FAILED TO DEMONSTRATE HIS ENTITLEMENT TO SUMMARY JUDGMENT

In support of his motion, Mr. Warren was required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Cox v. Kingsboro Med. Group*, 88 N.Y.2d 904 (1996) (citations omitted); *see also Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). He has done no such thing.

As stated above, Mr. Warren has submitted no new evidence in support of his motion. Instead, he has submitted a memorandum of law, premised exclusively on evidence and arguments previously considered and disposed of by this Court. Tellingly, the memorandum of law contains no "statement of facts." Moreover, it is unaccompanied by an affidavit, deposition

testimony or other evidentiary submission demonstrating Mr. Warren's entitlement to judgment as a matter of law. As for the purported "formal judicial admissions" set forth at page two of the memorandum of law, the first (regarding the December 8, 2004 Colucci meeting) is of no consequence in light of this Court's January 21, 2005 Order, and the second (regarding the January 6, 2005 and February 12, 13 and 14, 2005 meetings) is wholly inaccurate because the Defendants' Fourth Affirmative Defense contains no admissions whatsoever. It merely provides that the meetings which took place in January and February 2005 bore the imprimatur of Justice Joseph G. Makowski as part of that Court's efforts to resolve budget-related lawsuits pending before it. Thus, for the sole reason that the Plaintiff has failed to introduce any evidence to support his claims, the Court should deny his motion in its entirety.

POINT II
EVEN WERE THE COURT TO CONSIDER PLAINTIFF'S CONTENTIONS, THERE EXISTS NO BASIS FOR THE IMPOSITION OF SANTIONS UNDER THE OPEN MEETINGS LAW

In the Amended Verified Complaint, Mr. Warren seeks a declaration that "the meetings of December 8, 2004, January 6, 2005, February 12, 2005, February 13, 2005 and/or February 14, 2005 was [*sic*] in violation of [the Open Meetings Law]." 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.

For Mr. Warren to establish entitlement to sanctions under the Open Meetings Law, 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) ("*Whalen*"); *see also McGovern v. Tatten*, 213 A.D.2d 778, 781, 623 N.Y.S.2d 370, 372 (3d Dept. 1995). Indeed, as this Court opined in its January 21, 2005 Order, "[i]n the absence of aggravating factors, the courts of New York do not routinely . . . impose sanctions for purely technical and non-prejudicial violations of the Open Meetings Law." *Id.* at 9. Rather, "[j]udicial relief is warranted only upon a showing of good cause." *Whalen*, 46 N.Y.2d at 734, 413 N.Y.S.2d at 637 (citing statute). Put another way, Mr. Warren's conclusory broad strokes are insufficient "to place the validity of the legislative process in question." *Devitt v. Heimbach*, 109 Misc. 2d 463, 466, 440 N.Y.S.2d 465, 467 (Orange Cty. 1981); *see also MCI Telcoms. Corp. v. PSC*, 231 A.D.2d 284, 290, 659 N.Y.S.2d 563, 569 (3d Dept. 1997) (rejecting conclusory allegations supported only by pleadings).

Whether good cause for imposing sanctions has been shown most often turns on whether a plaintiff has been prejudiced by the alleged violation. *See, e.g., Inner-City Press v. New York State Banking Board*, 170 Misc.2d 684, 693, 657 N.Y.S.2d 275, 281 (New York Cty. 1996) (holding 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"); *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).

In this case, Mr. Warren has failed to demonstrate any prejudice suffered by anyone as a result of the allegedly unlawful meetings. In point of fact, he has failed even to allege what happened at the purportedly unlawful meetings in January and February or what resulted therefrom. It is undisputed, and indisputable, that the public has played a profoundly important role in the ongoing Erie County budget crisis. At the same time, it is a matter of public record

that the County Budget has evolved dramatically since the time of the allegedly unlawful meetings between legislators and Court-appointed mediators. As set forth in the accompanying affirmation of John G. Horn, dated May 31, 2005, and exhibits annexed thereto, the County Legislature modified the 2005 Budget via budget resolution during its February 14, 2005 (indisputably public) session. *See* Horn Affirmation, Exhibit A. This enactment admittedly followed closely the Court-directed negotiations of which Mr. Warren complains. Nevertheless, there is nothing in Mr. Warren's papers to demonstrate that what ultimately was adopted by the Legislature was the spawn of any improper meeting. More importantly, the February 14, 2005 resolution was altered dramatically by the Legislature's February 17, 2005 resolution, which further cut funding across all levels of County operations. *See* Horn Affirmation, Exhibit B. The cuts went yet deeper two weeks later, as reflected in the March 4, 2005 resolution, attached as Exhibit C to the Horn Affirmation. Thus, even if Mr. Warren could proximately link the allegedly improper meetings with the action taken by the Legislature during its February 14, 2005 session, he can demonstrate no resultant prejudice as the budget was modified just three days later, and once again two weeks after that. And there has been no suggestion that these later actions stemmed from violations of the Open Meetings Law.

Under similar circumstances, New York courts uniformly have refused to void or declare illegal legislative action. For example, 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 was unable to demonstrate prejudice. Similarly, in the case of *Inner-City Press v. New York State Banking Board*, 170 Misc.2d 684, 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. 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).

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 to nullify the challenged legislative action. In so doing, the Court deemed it significant that, as here, the public did have notice and an opportunity to provide input in the overall decision being made at various public meetings, irrespective of any private sessions held beforehand. *Id.* at 290, 659 N.Y.S.2d at 569; *see also Smithson v. Ilion Housing Authority*, 72 N.Y.2d 1034, 534 N.Y.S.2d 930 (1988) (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).

In this case, the Court should deny Mr. Warren's motion and dismiss his lawsuit because he has failed to allege, much less prove, any prejudice suffered as a result of the allegedly unlawful meetings of which he complains. Moreover, on the record before the Court, there simply is no showing of good cause to warrant the relief Mr. Warren seeks. The record – consisting of the previously considered DeBenedetti and Colucci affidavits, an evidentiary hearing and the resolutions appended to the Horn Affirmation – clearly establishes that the

budget process was – and continues to be – subject to lengthy open meetings providing public input and access.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's motion for summary judgment and grant their cross-motion for summary judgment and such other and further relief as to the Court seems just and proper.

DATED: Buffalo, New York
May 31, 2005

Respectfully submitted,

HARTER, SECREST & EMERY LLP

By: _____

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