STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

MICHAEL LOMAS, GLENN WIGGLE,

Petitioners,

vs.

Index # 800029/2022
DECISION AND ORDER

GALE BURSTEIN, MARK POLONCARZ, TIMOTHY HOGUES

Respondents.

Appearances:

Todd J. Aldinger, Esq.
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Jeremy C. Toth, Esq.
Attorney for the Respondents
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Mark A. Montour, JSC

BACKGROUND

The matter before the Court is to consider a motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(7). The underlying action is a taxpayer lawsuit brought pursuant to General Municipal Law §51, which seeks reimbursement to Erie County from defendants for all overtime compensation paid to Health Commissioner Gail Burstein, M.D. over and above the compensation fixed by the Erie County Legislature in 2020 and 2021. Plaintiffs further seek to disgorge all income received by Dr. Burstein from other employment during the time she was required to devote all time to the duties as County Health Commissioner. Plaintiffs claim Dr. Burstein improperly received a combined total of $270,402 over the two-year span. The action was commenced by service of a summons and complaint but actual commencement of the action was delayed for a period until plaintiffs obtained and submitted the surety bond as required by GML §51. Plaintiffs allege that, under New York Public Health Law §351(6), the Health Commissioner's salary is fixed by statute and only the Erie County Legislature can approve any payment of funds for overtime. Further, plaintiffs allege that, pursuant to New York Health Law §352, the Health Commissioner must devote all of her time to the Health Commissioner's responsibilities and is prohibited from dedicating time to any outside employment. Therefore, it is plaintiffs' position that any income earned outside the duties of the Health Commissioner should be disgorged. Defendants counter that for decades preceding this action confidential managerial employees, like Dr. Burstein, have been eligible for overtime and other fringe benefits.

On April 12, 2022, defendants filed a notice of motion to dismiss the complaint, which was supported by an affidavit from Jeremy Toth, Esq., and a

Memorandum of Law. Plaintiffs submitted a Memorandum of Law in Opposition on April 26, 2022. On May 20, 2022, defendants filed a Reply Memorandum of Law. Oral argument on the motion was conducted on May 24, 2022. Attorney Todd Aldinger, Esq. appeared at oral argument in opposition to defendants' motion to dismiss and First Assistant County Attorney Jeremy Toth, Esq. argued in support of the motion to dismiss. The Court reserved its decision.

LEGAL STANDARDS

A. Standard of Review under CPLR 3211(a)(7)

When considering a motion to dismiss pursuant to CPLR 3211(a)(7), "the initial sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). For the purpose of determining a motion to dismiss a complaint, the facts alleged therein must be deemed to be true, and the plaintiff must be accorded the benefit of every possible inference. *See*, *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see also*, *Barski v Town of Aurelius*, 147 AD3d 1483 (4th Dept 2017). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations." *See*, *Sager v City of Buffalo,* 151 AD 3d 1098 (4th Dept 2017); *see also*, *Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 (4th Dept 2015).

B. New York General Municipal Law §51

It is well established that a taxpayer action pursuant to section 51 of the General Municipal Law lies "only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes." *Kaskel v Impellitteri*, 306 NY 73, 79 (1953). Gen. Mun. Law § 51 is the statutory authority for maintaining a taxpayer's action to prevent any illegal official act on the part of any such officers, agents, commissioner or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation. Generally speaking, this section sanctions court proceedings by taxpayers to prevent waste or injury to public property, and to restrain illegal official conduct. *See, Carpenter v Wise*, 155 NYS 996 (NY Sup Ct 1915); *aff'd*, 174 AD 926 (4th Dept 1916). The decisions under this section make it entirely clear that redress may be had only when the acts complained of are fraudulent or a waste of public property in the sense that they represent a use of public property for entirely illegal purposes, or where there is a total lack of power in defendants under the law to do the acts complained of. *See, Kaskel v Impellitteri*, 306 NY 73, 79 (1953).

The term "waste or injury", as used in GML §51, includes only illegal, wrongful or dishonest acts. *See, Daly v Haight*, 170 AD 469 (2d Dept 1915); aff'd, 224 NY 726 (1918); *see also, Duffy v Longo*, 207 AD2d 860 (2d Dept 1994). Section 51 contemplates more than improvident or unwise spending of public funds, and the illegal action attacked must be injurious to municipal interest so as to waste public funds or cause public injury. *See, Gaynor v Rockefeller*, 21 AD2d 92 (1st Dept 1964); *aff'd*, 15 NY2d 120 (1965). "Public injury and mischief" has a broader

concept than mere loss to the municipality in dollars and cents and personal liability arises only if the illegal acts were collusive, fraudulent or motivated by personal gain. *See*, *American La France & Foamite Corp. v New York*, 281 NYS 519 (NY Sup Ct 1935); *aff'd*, 246 AD 699 (1st Dept 1935); *see also*, *Stewart v Scheinert*, 47 NY2d 826 (1979).

FINDING OF FACTS AND CONCLUSIONS OF LAW

1. New York Public Health Law §§351(6) and 352:

Pursuant to New York Public Health Law §351(6), the County health commissioner...shall receive such compensation as may be fixed by the board of supervisor's (now County Legislature). Pursuant to New York Public Health Law §352(1), every county health commissioner shall devote his or her entire time to the duties of his office. At oral argument, plaintiffs' counsel acknowledged the basis of the action is the alleged violations of the New York Public Health Law.

> *The Court questioning attorney Aldinger: "But I guess you're basing your action, you're proceeding on these violations of the Public Health Law?"*
>
> *Mr. Aldinger: Yes.*

Plaintiffs lack taxpayer standing to bring this action pursuant to GML §51. "A taxpayer action pursuant to section 51 of the General Municipal Law lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'...[, and a] failure to observe...statutory provisions does not constitute the fraud or illegality necessary to support a taxpayer action pursuant to section 51". *Matter of Urbanski v City of Rochester*, 66 AD3d 1412 (4th Dept 2009); *see*, *Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014 (1983). To hold otherwise "would subject the discretionary action of all local officers and municipal bodies to review by the

courts at the suit of the taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local administration". *Id.* Here, plaintiffs contend the illegal acts are based in the violations of the Public Health Law, and such statutory violations are not actionable under GML §51.

2. 2010 County Resolution (January 7, 2010):

> ... RESOLVED, that all Managerial Confidential employees shall receive all other benefits in accordance with and similar to those provided by the Collective Bargaining Agreement between CSEA Local 815 and the County of Erie,...

A prior 2006 resolution likewise provided for overtime to managerial-confidential employees. In 2009, then County Comptroller Poloncarz, penned a memorandum calling for a review of the resolutions affecting various managerial-confidential employees as the existing legislative resolutions resulted in confusion and disputes between the Office of the Comptroller and affected personnel. The review by the County Legislature resulted in the 2010 resolution, which is in effect today. When the point raised is one of legality of action taken or proposed, personal and individual motives behind the determination are of no moment if the court finds that such a determination was within the powers, jurisdiction, and discretion of the particular officer or board, and the proceeding, as a taxpayers' suit, will fail. *See, Kraushaar v Zion*, 135 NYS2d 491 (NY Supt Ct 1954). The root of plaintiffs' action is that the County Legislature and not the County Executive can authorize payment of overtime monies beyond the budgeted expenditures. Clearly, the 2010 resolution of the County Legislature authorized the payment of the overtime funds to Dr. Burstein and the allowance by Poloncarz was within his authority and discretion. "A taxpayer suit is not available merely to review a discretionary determination made in violation of supposedly unlawful procedures. *See, Starburst Realty Corp. v City of New York*, 125 AD 2d 148 (1st Dept 1987).

A matter of note to support the relevancy of the 2010 resolution is the call by the present Erie County Comptroller, Hon. Kevin Hardwick, to again examine the overtime policy for top administrators. *See*, Sandra Tan, *Kevin Hardwick says Erie County OT policy for top administrators should change*, Buffalo News, March 9, 2022.

3. Collective Bargaining Agreement:

The agreement between Erie County and CSEA Local 815 pertaining to overtime reads in relevant parts.

> Section 16.6: All employees who actually work over eight (8) hours in any workday, or forty (40) hours per week shall be paid time an one-half times such employee's straight time hourly rate, for all hours worked in excess of eight (8) hours in any workday or forty (40) hours per week. ...
>
> Section 16.11: Exceptions to the payment of time and one-half overtime are as follows:
>
> 1. Employees who are required to have a Medical Degree.

The collective bargaining agreement is between the labor union, CSEA Local 815 and the County of Erie. Plaintiffs are neither a member of the union or involved in County government. Therefore, plaintiffs lack standing to pursue the matter at hand. It is in the purview of the union to seek some sort of retribution. The pursuit of these provisions is an interpretation of the contract of which plaintiffs are not a party. Because CSEA Local 815 could challenge the purported payment of overtime to Dr. Burstein, plaintiffs do not have common-law standing or taxpayer standing. *See, Matter of Transactive Corp. v New York Dept. of Social Servs.*, 92 NY2d 579 (1998); *see also, Boryszewski v Brydges,* 37 NY 2d 361 (1975). For standing to sue, plaintiffs must show that they have suffered an injury in fact, distinct from that of the general public. This is so since, under common law, a court is without power to

right a wrong where civil, property or personal rights are not affected. Moreover, plaintiffs must demonstrate that the injury claimed falls within the zone of interests to be protected by the challenged statute. This prerequisite ensures that a group or an individual whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes. *See*, *Matter of Transactive Corp.*, *supra*, at 587. As the complaint fails to articulate an injury distinct from the general public, plaintiffs lack the prerequisite standing to pursue this matter.

4. No cause of action exists for fraud:

During oral argument, Attorney Aldinger claimed the "fraud issue with respect to Dr. Burstein is irrelevant, because she was the receiver of the money". Further, in the Plaintiffs' Memorandum of Law, when referencing County Executive Poloncarz (and can be extended to Personnel Commissioner Hogues), the complaint alleges a "suspicion or claim of personal interest or gain, past, present or future". Neither Poloncarz or Hogues is alleged to have engaged in any pecuniary corruption or acted with a dishonest motive to fulfill an illegal purpose. The mere suspicion of personal gain is not actionable. *See*, *Duffy*, *supra* at 862. "While there must be specific allegations of waste tied to official corruption, it is also clear that allegations of illegality alone are insufficient and any expenditure of funds must be for entirely illegal purposes. *Matter of Sack v City of Buffalo Common Council*, 2022 NY App Div LEXIS 2672 (4th Dept 2022). "[A] municipal official...may only be held personally liable for a debt if there is fraud, collusion, bad faith amounting to fraud, or acts motivated by personal gain. *See*, *Murtha v Incorporated Vil. of Is. Park,* 202 AD2d 650, 651 (2d Dept 1994). Even if we assume that an allegation of waste could be inferred from the complaint, plaintiffs failed to allege with any specificity an illegal act or that Poloncarz or Hogues were motivated by personal gain, or the

payment of overtime was tied to a scheme of corruption to injure the public interest. Mere illegality is not enough. In the absence of allegations of corrupt motive and illegal purpose, the complaint is facially insufficient. The very nature and purpose of a taxpayer's action presume that there will be more than illegality in order to enable the action to proceed. The basic theory of such an action is that the illegal action is in some way injurious to municipal and public interests and that if permitted to continue it will in some manner result in increased burdens upon and dangers and disadvantages to the municipality and to the interests represented by it and so to those who are taxpayers. It was not the intention of GML §51 that a taxpayer shall be allowed to proceed and bring to the decision of the courts every act of a municipal officer which may be claimed to be illegal. *See*, *Duffy*, *supra*.

5. One year Statute of Limitations applies:

New York law requires that "an action to enforce a penalty or forfeiture created by statute" be brought within one year. CPLR §215(4). The complaint herein seeks the return to Erie County of all the overtime monies paid to Dr. Burstein during 2020 and 2021. The activating event was the purported illegal act to authorize payment of overtime beyond the sums set forth in the Erie County budget. As such the actions complained of occurred more than one year ago and accordingly the complaint must be dismissed as it pertains to any monies paid beyond the one year statute of limitations period.

CONCLUSION

Based upon the above, the court concludes:

A taxpayer action under New York General Municipal Law §51 "lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes".

Mesivta of Forest Hills Inst. v City of New York, 58 NY2d 1014 (1983). First, the Court finds that plaintiffs lack standing to pursue an action under GML §51. Additionally, after examining the four corners of the complaint, the Court finds no cause of action exists. Plaintiffs have failed to properly plead a cause of action for fraud. The lack of specificity is fatal.

Since the Court finds there is no sufficient fraud cause of action, plaintiffs' action only survives if they stated a claim for illegal dissipation of municipal funds. Plaintiffs claim the overtime payments are illegal as the Erie County Legislature failed to authorize the disbursements. This argument is without merit. The 2010 resolution is clear that confidential managerial employees, such as Dr. Burstein, are eligible for overtime benefits. The 2010 resolution went unchallenged. Furthermore, the allegations of illegal actions peppered throughout the complaint are couched in conclusory verbiage. While, in a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must assume the truth of the complaint's allegations, such an assumption is not required where there are conclusionary allegations lacking factual support. Should it be deemed in the future that confidential managerial employees are not subject to overtime and fringe benefits, that will be the responsibility of the Erie County Legislature to determine and the Court will not invade their province. Therefore, it is hereby

ORDERED, ADJUDGED AND DECREED, that defendants' motion to dismiss the complaint upon the ground of failure to state a cause of action, pursuant to CPLR 3211(a)(7), is GRANTED and plaintiffs complaint is hereby dismissed in its entirety.

Dated: June 2, 2022

Hon. Mark A. Montour, JSC