

**Supreme Court of the State of New York
County of New York**

----- X

ROBERT BENTKOWSKI, KAREN ENGEL, MICHELLE FEINMAN, NANCY LOSINNO, JOHN MIHOVICS, KAREN MILLER, ERICA RHINE, ELLEN RIESER, and BEVERLY ZIMMERMAN, on behalf of themselves and all others similarly situated, and THE NEW YORK CITY ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Petitioners-Plaintiffs,

- against -

NOTICE OF APPEAL

Index No. 154962/2023

THE CITY OF NEW YORK, ERIC ADAMS, Mayor of the City of New York, THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, RENEE CAMPION, Commissioner of the Office of Labor Relations; THE NEW YORK CITY DEPARTMENT OF EDUCATION (a/k/a the Board of Education of the City School District of the City of New York); and DAVID C. BANKS, Chancellor of the New York City Department of Education,

Respondents-Defendants.

----- X

PLEASE TAKE NOTICE that respondents-defendants appeal to the Appellate Division, First Department, from the order of Supreme Court, New York County (Frank, J.), dated July 6, 2023 and entered on July 14, 2023 (NYSCEF No. 95).


/

/

/

Dated: New York, New York
July 17, 2023

HON. SYLVIA O. HINDS-RADIX
*Corporation Counsel
of the City of New York*

By: 
DEVIN SLACK
Assistant Corporation Counsel
100 Church Street
New York, New York 10007
212-356-0817
dslack@law.nyc.gov

To: POLLOCK COHEN LLP
111 Broadway, Suite 1804
New York, NY 10006
212-337-5361
scohen@pollockcohen.com

- and -

WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281
212-335-2965
jgardener@wmhlaw.com
Counsel for Petitioners-Plaintiffs

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

ROBERT BENTKOWSKI, KAREN ENGEL, MICHELLE FEINMAN, NANCY LOSINNO, JOHN MIHOVICS, KAREN MILLER, ERICA RHINE, ELLEN RIESER, and BEVERLY ZIMMERMAN, on behalf of themselves and all others similarly situated, and THE NEW YORK CITY ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Petitioners-Plaintiffs,

- against -

THE CITY OF NEW YORK, ERIC ADAMS, Mayor of the City of New York, THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, RENEE CAMPION, Commissioner of the Office of Labor Relations; THE NEW YORK CITY DEPARTMENT OF EDUCATION (a/k/a the Board of Education of the City School District of the City of New York); and DAVID C. BANKS, Chancellor of the New York City Department of Education,

Respondents-Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	Filing Type
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
<input checked="" type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input checked="" type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input checked="" type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input checked="" type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court	County: New York
Dated: 07/06/2023	Entered: 07/14/2023
Judge (name in full): Hon. Lyle E. Frank	Index No.: 154962/2023
Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed. By decision and order dated July 6, 2023, Supreme Court, New York County (Frank, J.), granted plaintiffs' application for a preliminary injunction to the extent of enjoining defendants "from requiring any City retirees, and their dependents from being removed from their current health insurance plan(s), and from being required to either enroll in an Aetna Medicare Advantage Plan or seek their own health coverage."	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Did Supreme Court err in preliminarily enjoining defendants, where, among other things, plaintiffs have no likelihood of success on the merits?

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	ROBERT BENTKOWSKI	Petitioner-Plaintiff	Respondent
2	KAREN ENGEL	Petitioner-Plaintiff	Respondent
3	MICHELLE FEINMAN	Petitioner-Plaintiff	Respondent
4	NANCY LOSINNO	Petitioner-Plaintiff	Respondent
5	JOHN MIHOVICS	Petitioner-Plaintiff	Respondent
6	KAREN MILLER	Petitioner-Plaintiff	Respondent
7	ERICA RHINE	Petitioner-Plaintiff	Respondent
8	ELLEN RIESER	Petitioner-Plaintiff	Respondent
9	BEVERLY ZIMMERMAN	Petitioner-Plaintiff	Respondent
10	THE NEW YORK CITY ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.	Petitioner-Plaintiff	Respondent
11	THE CITY OF NEW YORK	Respondent-Defendant	Appellant
12	ERIC ADAMS	Respondent-Defendant	Appellant
13	THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS,	Respondent-Defendant	Appellant
14	RENEE CAMPION	Respondent-Defendant	Appellant
15	THE NEW YORK CITY DEPARTMENT OF EDUCATION	Respondent-Defendant	Appellant
16	DAVID C. BANKS	Respondent-Defendant	Appellant
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Pollock Cohen LLP

Address: 111 Broadway, Suite 1804

City: New York State: NY Zip: 10006 Telephone No: 212-337-5361

E-mail Address: scohen@pollockcohen.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1-10

Attorney/Firm Name: Walden Macht & Haran LLP

Address: 250 Vesey Street, 27th Floor

City: New York State: NY Zip: 10281 Telephone No: 212-335-2965

E-mail Address: jgardener@wmhlaw.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1-10

Attorney/Firm Name: Hon. Sylvia O. Hinds-Radix, New York City Law Department

Address: 100 Church Street

City: New York State: NY Zip: 10007 Telephone No: 212-356-2500

E-mail Address: nycappeals@law.nyc.gov (for urgent matters, cc: dslack@law.nyc.gov)

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 11-16

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

ROBERT BENTKOWSKI, KAREN ENGEL, MICHELLE FEINMAN, NANCY LOSINNO, JOHN MIHOVICS, KAREN MILLER, ERICA RHINE, ELLEN RIESER, BEVERLY ZIMMERMAN, THE NEW YORK CITY ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Petitioner,

- v -

THE CITY OF NEW YORK, ERIC ADAMS, THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, RENEE CAMPION, THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS,

Respondent.

-----X

DECISION + ORDER ON MOTION

The following e-filed documents: NYSCEF document numbers 1 through 58 inclusive, 82 through 90 inclusive and 92. The Court also reviewed additional documents on sequences 3 and 4 that were relevant to the issues of this motion.

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Preliminarily, the Decision and Order of this Court dated June 6, 2023, is vacated. The following Decision and Order is limited only to the Order to Show Cause seeking injunctive relief¹.

The petitioners bring this action pursuant to Article 78, to annul the respondents’, collectively referred to as the “City”, implementation of a new healthcare plan for City retirees. Petitioners allege that the City has unlawfully tried to divest Medicare-eligible retirees and their dependents of promised healthcare benefits by attempting to switch the retirees from their existing healthcare plans to an inferior plan, the Aetna Medicaid Advantage Plan.

¹ The Court would like to thank Bani Bedi for her assistance in this matter.

Petitioners now move for a preliminary injunction enjoining the City from forcing retirees to switch from their existing healthcare benefits, and from being required to either enroll in an Aetna Medicare Advantage Plan or seek their own health coverage. The City opposes the instant application. For the reasons set forth below, the petitioners' application for a preliminary injunction is granted.

Legal Standard

A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor. (*Doe v Axelrod*, 73 NY2d 748 [1988]; *Housing Works, Inc. v City of New York*, 255 AD2d 209 [1st Dept 1998]).

Discussion

First, the Court finds that the petitioners have shown by clear and convincing evidence that there is a likelihood of success on the merits. The Court agrees that it is likely that this Court will ultimately find that the respondents are estopped from switching retirees into a Medicare Advantage Plan and that New York City Administrative Code section 12-126 does not permit the action that the City plans to take. Moreover, the Court also feels that some of the petitioners are likely to succeed on the merits based on the "Moratorium Law" and that there is too much uncertainty as to what doctors and other medical providers will accept the proposed new plan, this rendering the plan arbitrary and capricious as things presently stand. The Court finds that the petitioners have a promissory estoppel claim that is likely to succeed. Promissory estoppel requires "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise." *Odonata Ltd. v Baja 137 LLC*, 206 AD3d 567, 569 [1st Dept 2022]. The petitioners

have shown that numerous promises were made by the City to then New York City employees and future retirees that they would receive a Medicare supplemental plan when they retired, and that their first level of coverage once that retired would be Medicare.

Respondents have argued that the promises were not definite and were not forward looking. The Court respectfully disagrees. When words such as “will” are used, that is to this Court a promise that is future looking. Finally, this Court does not believe that any of the prior case law cited by the parties is entirely on point. This is a very unique set of facts.

In addition, the petitioners argue that retirees have suffered and will suffer injuries because of detrimental reliance on the City’s promise. The Court finds that this unambiguous promise is likely sufficient to ultimately find estoppel in this action.

The Court is also convinced that the action by the City will likely be found to be in violation of New York City Administrative Code Section 12-126. This section provides that “[t]he City will pay the entire cost of health insurance coverage for city employees, city retirees, and their dependents...To this Court, this wording is unambiguous and applies to this matter. Moreover, the history of section 12-126 shows that the City intended to provide all retired employees health plans and intended to assume full payment for them. Gardener Aff., Ex. H at 27-28. This section was originally enacted through the City’s expanded powers, under a 1965 amendment to General City Law § 20, passed around the same time as § 12-126, empowering the City to pay the “for premium charges for supplementary medical insurance benefits under the federal old-age, survivors and disability insurance benefit program.” New York State General City Law § 20(29-b). The 1965 Resolution announcing these health benefits stated that “it is the desire and intent of the City of New York to grant to all of its retired employees ... a choice of health plans ... and the City shall assume full payment for such health and hospital insurance

....” Gardener Aff., Ex. H at 76. The City correctly notes that section 12-126 does not require the City to provide a choice of plans. Nonetheless, to this Court, section 12-126 does appear to be a codification that the City must pay “the entire cost of health insurance coverage.” There has also been discussion that the proposed plan is premium free. The Court finds this argument unavailing, as the Court notes that section 12-126 of the Code makes no mention of the word “premium” but rather uses the word “coverage.” N.Y.C. Admin. Code § 12-126.

Lastly, this Court finds that at this stage there appear to be many retirees who are unaware of whether their doctors will accept the proposed new Aetna plan and have not received sufficient information about the plan to make an informed decision. The petitioners have presented examples of potentially misleading information made available to retirees.

Respondents have argued that retirees possess sufficient information about the switch already. However, as this involves people who are often elderly and/or infirm, this Court must enjoin the City from going ahead with this plan until such time as the City has shown this Court that those that will be affected are fully aware of the ramifications of this plan, so that they can make an informed choice of whether they will opt in.

As this Court finds that the petitioners have established a likelihood of success on the merits with these factors, the Court does not reach the other issues argued by petitioners.

To this Court, the issue of irreparable harm and balance of the equities both clearly favor the petitioners. The City argues in opposition, that petitioners have not been able to prove that the Aetna Medicare Advantage Plan is inferior and delaying this new policy will derail the City’s plans. Petitioners in turn argue that hundreds of thousands of retirees may suffer disruptions in medical care if the City is not enjoined. As this matter deals with health decisions of an ageing and a potentially vulnerable population, mostly on fixed incomes, any lapse in care for these

people could lead to deleterious impacts. Moreover, at oral argument, the attorney for Aetna acknowledged that there would very likely be situations where medical care deemed to be needed by a doctor for a retiree could be turned down, and certain medical facilities would be unavailable to retirees. To this Court, this demonstrates that should this plan go forward, irreparable harm would result. There can be no more specific irreparable harm than this. The balance of the equities to this Court clearly weight in favor of petitioners, due to their possible loss of parts of their health care coverage.

Petitioners have by clear and convincing evidence met the requisite burden for a preliminary injunction by exhibiting the likelihood of ultimate success on the merits, the prospect of irreparable injury in absence of injunctive relief, and the balance of equities weighing in the petitioners' favor. Accordingly, it is hereby

ORDERED that the Decision and Order of this Court dated June 6, 2023, is hereby VACATED; and it is further

ORDERED that the Petitioners' application for preliminary injunction is granted and Respondents are temporarily enjoined until further order of this Court from requiring any City retirees, and their dependents from being removed from their current health insurance plan(s), and from being required to either enroll in an Aetna Medicare Advantage Plan or seek their own health coverage.

20230707092552LFRANK19E9E54DB0547F69CF775B7224167A7

LYLE E. FRANK, J.S.C.

7/6/2023
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE