

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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MARGARET GODFREY, ROSEMARIE JAROSZ,  
GEORGE V. IMBURGIA, and JOSEPH ROSSINI,

Plaintiffs,

-against-

ANDREW J. SPANO, in his official capacity as the  
Westchester County Executive,

Defendant.

Index No. 06-16894

Honorable  
Joan B. Lefkowitz

**REPLY  
AFFIRMATION OF  
HILLARY J. RAIMONDI**

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HILLARY J. RAIMONDI, an attorney duly admitted to practice law in the State of  
New York, hereby affirms the following under penalty of perjury:

1. I am an Associate County Attorney in the office of Charlene Indelicato,  
Westchester County Attorney, attorney for Defendant Andrew J. Spano, Westchester County  
Executive, who is being sued in his official capacity, in the above-captioned matter. I am fully  
familiar with the facts and circumstances had herein. The source of my knowledge and  
information is records kept by Westchester County, and information furnished to me by persons  
having knowledge of the facts of this case.

2. This reply affirmation is submitted in further support of Defendant's motion to  
dismiss the instant action pursuant to Section 3211 of the New York Civil Practice Law and  
Rules.

3. As will be discussed herein, Plaintiffs have failed to overcome the fact that the  
County Executive acted within his lawful administrative discretion when he issued Executive

Order 3-2006. Indeed, this is not properly a taxpayer action pursuant to General Municipal Law Section 51 in that the Petitioners have not, and cannot show that there was some bad faith, collusion or fraud that will result or has resulted in a waste of public funds expended for entirely illegal purposes.

4. Neither can Petitioners bring a common law taxpayer action. As stated in Defendant's Memorandum of Law in Support of the instant Motion to Dismiss, the issuance of the Executive Order is not a legislative action, which is the first requirement for a common law taxpayer action. Rather, in order to challenge an administrative action of the type asserted here, Plaintiffs must have suffered specific harm different in kind than the rest of the public.

5. In addition, even where there has been some legislative action creating an arguable waste of public funds, a common law taxpayer action is not available unless there would otherwise be an impenetrable barrier to review -- not only by these particular Plaintiffs -- but by anyone. In the instant matter, as the County Executive engaged in an administrative action that could properly be subject to challenge by individuals who are specifically affected thereby, there is certainly no impenetrable barrier to judicial review.

6. Finally, the fact that these particular Petitioners do not have standing and cannot maintain the requisite elements of a Section 51 taxpayer action does not mean that a Section 51 action or another type of action would be unavailable if the requisite elements can be met.

7. For all the reasons set forth in Defendant's Memorandum of Law in Support of the Motion to Dismiss and in Opposition to the Request for a Preliminary Injunction, and the accompanying Reply Memorandum of Law, both incorporated by reference herein, and for the reasons set forth below, this action should be dismissed.

**Plaintiffs Have Not Properly Alleged the Requisite Elements of A Section 51 Claim**

8. Plaintiffs' argument regarding the pleading requirements of a Section 51 claim mischaracterize the statute as one that would merely require a showing of illegality and the potential expenditure of funds.<sup>1</sup> This reading of the statute and case law is incorrect.

9. The state of mind requirement – that the action be calculated to produce public injury, or corrupt or fraudulent – is the crux of a Section 51 claim. Courts have been clear that more is required than just illegality and potential waste; rather the waste must be affirmatively tied to corruption, fraud, collusion or bad faith in order to be actionable.

10. The allegations contained in the Amended Complaint amount to nothing more than a claim that the County Executive, in exercising his administrative discretion, has misinterpreted the law. Insofar as the alleged interpretation came in the form of a lawful Executive Order which is, by its terms, is limited by existing law, this is certainly not the type of bad faith, collusion or fraud contemplated by a statute narrowly designed to prevent intentional waste by public officials.

11. Notably, providing benefits to same gender couples is not illegal, even if their marriage is prohibited by New York law. As noted in the Memorandum of Law in Support of the instant motion, to the extent that an individual or entity wishes to challenge the issuance of an Executive Order, such a challenge would be in the form of an Article 78 proceeding by

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<sup>1</sup> Plaintiffs accord significance to the fact that Defendants submitted an affidavit of the County Finance Commissioner in connection with the Motion to Dismiss. However, a review of the Notice of Motion to Dismiss as well as the supporting papers reveal that the Affidavit of Peter Pucillo ("Pucillo Affidavit") was submitted in connection with Plaintiffs' request for a preliminary injunction, and not in order to address the sufficiency of the pleadings. The fact that there has been no expenditure and that any expenditures have been otherwise authorized and are legal, is relevant to a likelihood of success on the merits argument. Defendant believes that Plaintiffs have failed to state a Section 51 claim even in the absence of the Pucillo Affidavit, and submitted same only to the extent that the Court determines not to dismiss the Amended Complaint outright.

individuals who fall within the zone of interests sought to be protected, with a substantial adverse burden differing from the public at large.

12. A good faith interpretation of the law, even if wrong as alleged by Plaintiffs, which incidentally may cause some expenditure, cannot form the basis of a Section 51 taxpayer lawsuit. Rather, Section 51 was designed as a deterrent to official corruption. It was not designed to address the types of policy issues asserted herein.

13. For the foregoing reasons, and the reasons set forth in the Memorandum of Law in Support of the Motion to Dismiss, the Amended Complaint should be dismissed.

**Plaintiffs Have Not Demonstrated That Defendant Has Acted Illegally**

14. Plaintiffs premise their entire brief on the contention that the Executive Order attempts to fundamentally alter the definition of marriage in New York. In so doing, Plaintiffs entirely ignore Defendant's argument that an Executive Order is not legislation, has no legislative effect, and creates no new rights. Plaintiffs likewise ignore, and in fact attempt to blur, the distinction between whether individuals are permitted to legally marry in New York and whether it is permissible for New York or its political subdivisions to recognize lawful extraterritorial marriages under traditional notions of comity.

15. In fact, and as discussed in the Memorandum of Law in Support of Defendant's Motion to Dismiss, the County Executive issued an administrative directive regarding recognition of same sex marriage to the maximum extent permitted by law. He did not define marriage, create any new rights, or enable individuals who could otherwise not do so, to marry in Westchester County.

16. Since the action challenged was a good faith interpretation of existing law, and is clearly administrative in nature, it is not open to challenge via a Section 51 taxpayer action.

Further, regardless of the state of New York Law with respect to recognition of same sex marriage, as an employer, the County may lawfully extend benefits to same sex spouses or domestic partners inasmuch as the County is lawfully permitted to extend these benefits as an employer to any group of individuals it chooses through legislative enactment.

17. In their opposition papers, Plaintiffs focus on the incorrect assertion that recognition of same sex marriage is the same as establishing same sex marriage in New York. This is simply wrong, and the lower non-binding courts that have addressed this issue are likewise incorrect. This is highlighted by Plaintiffs' own argument.

18. Indeed, Plaintiffs' basic argument is that marriage in New York is confined to one man and one woman, and so New York is prohibited from recognizing valid same sex marriages performed in other jurisdictions. This contention has no basis in law, and Plaintiffs have provided none. Rather, principles of comity exist so that one state or nation can recognize what may be prohibited or unauthorized in its jurisdiction but is valid elsewhere. Plaintiffs' contention that "[i]f this Court adopts the Defendants' position, the domestic relations laws of a foreign nation will have the potential to radically change the domestic relation laws of New York State as they apply to Westchester County" utterly ignores, and in fact contradicts, the rationale as expressed by the New York State Court of Appeals for extending comity.

19. Contrary to the principles of comity, Plaintiffs are attempting to restrict recognition of same sex marriage simply because in their view, allowing such recognition would "dismantle [the] sacred institution [of marriage]." Plaintiffs' Memorandum of Law at p. 13.

20. Their personal opinion on this issue, however, does not recognize the societal interests in applying notions of comity. Paramount among these interests is the very notion that our society contains diverse views which ought to be respected and recognized. Such

recognition dismantles nothing; rather it recognizes the extraterritorial transactional decrees and determinations lawfully existing in a world of differing views and policies.

21. Exceptions to this principal lie only where such recognition is specifically prohibited by New York Law, or where it is abhorrent to the public policy of the state. Neither of these exceptions apply here. See Memorandum of Law in Support of Motion to Dismiss at p. 12. The fact that same-sex marriage may be “new” and according to Plaintiffs “radical” does not make it abhorrent to the public policy of the state. See Plaintiffs’ Memorandum of Law at p. 9. Nothing in Plaintiffs’ brief supports their supposition that such recognition would even approach meeting the abhorrence exception.

22. According to Plaintiffs, New York has an interest in promoting and preserving marriages between one man and one woman. Thus, Plaintiffs allege, recognizing any marriage between same sex couples would be contrary to the state’s interest. That is not the standard, however. Indeed, Plaintiffs blur the lines between what the state is rationally permitted to do by statute, and what it may or is required to do in terms of comity. Defendant is not claiming that same sex couples can marry in New York. The fact that the state was found to have a rational basis in statutorily confining marriage to a man and a woman does not necessitate a bar to applying principles of comity to valid out-of-state or foreign same sex marriages.

23. When examining principles of comity, a different analysis takes place. Indeed, as stated above, where the marriage is legal in the originating jurisdiction, New York will recognize the marriage as valid unless such recognition is expressly prohibited by statute or is abhorrent to the state’s public policy.

24. Although Plaintiffs point out that not all local jurisdictions have articulated a position on this issue, they cavalierly cast aside that such recognition has been sanctioned on a

state-wide basis by the Attorney General and the New York State Comptroller. Notably, applying comity principles does not require an act of the legislature, since no New York law is being enacted or amended.

25. Moreover, the state of the law in New York is that it is permissible for the legislature to exclude same sex marriage from the Domestic Relations Law. Contrary to Plaintiffs' position, there has been no finding by any binding court that recognition of marriages between same sex couples is prohibited by law or abhorrent to public policy.

26. Indeed, as discussed above, the entire purpose of applying comity is to accord lawful extraterritorial acts respect and recognition, even if not permitted within the jurisdiction. The fact that the Court of Appeals has confirmed that it is not illegal for New York to disallow same sex couples to marry, puts same sex marriages on equal footing to those other types of marriages that are not permitted by New York Law but are recognized by it.

27. Applying principles of comity, New York has historically recognized many types of marriages that are not statutorily authorized by New York law. See Memorandum of Law in Support of Motion to Dismiss at pp. 12-13. Realizing that the exceptions to application of comity are so narrow as to only disallow recognition of closely incestuous or polygamous marriages, Plaintiffs stretch to attempt to equate same-sex couples with those engaged in these types of incestuous or polygamous relationships. At the same time, Plaintiffs assert that the relevant determining factor is that one man and one woman are involved in the relationship.

28. Without any support whatsoever, Plaintiffs make the sweeping statement that the number of participants in a marriage is as significant as their sex. Plaintiffs' Memorandum of Law at 11. Plaintiffs' argument is internally inconsistent, and exemplifies why it is the nature of

the relationship that matters for purposes of the abhorrence exception, not the gender of the individuals involved.

29. Indeed, polygamous and incestuous unions involve opposite genders. That does not make them acceptable. Gender could not possibly be the bright line for purposes of the public policy analysis, and Plaintiffs' argument makes absolutely no sense. In fact, the State legislature has recognized the general acceptance of same gender couples by prohibiting discrimination based on sexual orientation. There is no such prohibition against discriminating against individuals who are engaged in sexual relationships with close family members, or for those who have several spouses.

30. Because the nature of those relationships is offensive to public policy, they are afforded no protections. However, the contrary is true with respect to same sex couples. New York has recognized these relationships exist, has validated them, and, for example, has lawfully protected individuals who openly engage in them by prohibiting discrimination based on sexual orientation.

31. Consequently, as the County Executive has not taken any action appropriately the subject of a Section 51 taxpayer action, and has not otherwise acted illegally in issuing the subject Executive Order, the request for a preliminary injunction should be denied and the Amended Complaint should be dismissed.

**Plaintiffs Lack Common Law Taxpayer Standing**

32. As discussed in the Memorandum of Law in Support of the instant Motion to Dismiss, Plaintiffs lack standing to pursue a cause of action under the New York State Constitution of the New York Municipal Home Rule Law.

33. Generally, a plaintiff cannot maintain standing to challenge governmental action simply by virtue of his status as a citizen or taxpayer. The parameters of taxpayer standing to challenge acts of local officials are found in Section 51 of the General Municipal Law. There is no general common law right to challenge governmental actions unless the individual has a special right or interest in the matter that is different than those common to all taxpayers.

34. Although in certain instances, a taxpayer can maintain standing to challenge state or local legislative action, such standing is only available if the failure to accord standing would erect an impenetrable barrier to any judicial review.

35. Here, there is no legislative enactment and no impenetrable barrier, since Section 51 of the General Municipal Law would be available to Plaintiffs if they met the requirements of that statute. Moreover, an Article 78 review would be available to any individual who was affected by this Executive Order in a way different than taxpayers generally. As stated in the Memorandum of Law in Support of the instant motion, the fact that their complaint fails to state a cause of action under Section 51 does not presumptively grant Plaintiffs the right to pursue a cause of action as taxpayers under the common law; rather, the availability of the Section 51 remedy in appropriate circumstances where the required elements can be met, is fatal to any purported common law claim.

36. Indeed, Plaintiffs' claim that if the Section 51 cause of action fails as a matter of law, they are entitled to assert a common law claim as a back-up, contradicts the purpose of the stringent requirements under Section 51. Section 51 would not be necessary at all if the failure to meet the requirements of the statute meant that an individual could obtain general taxpayer standing by default. Such an absurd result could not have been contemplated by the legislature

or the courts. Thus, Plaintiffs' purported claim under the common law should be dismissed, and Plaintiffs' cause of action must be judged under the Section 51 standards articulated above.

**The Complaint Fails to State a Cause of Action Under the New York State Municipal Home Rule Law and the New York State Constitution**

37. Plaintiffs fail to address Defendant's argument that even if they could assert some sort of general taxpayer standing, the cited provisions of the New York State Constitution and the Municipal Home Rule Law provide no basis for relief. Indeed, and as set forth in the moving papers, the Executive Order is not the equivalent of a legislative enactment and thus, not subject to a statute regarding legislative enactments. See Memorandum of Law in Support of Motion to Dismiss, Point IA, supra.

38. Moreover, even if these provisions of law were applicable, as stated previously, the Executive Order does not contradict state law, does not allow same-sex couples to marry in New York, does not purport to alter the domestic relations law or any other state or local law, and is expressly limited in its effect "to the maximum extent permitted by law." See Reply Memorandum of Law, Point I

39. Finally, Defendant respectfully refers the Court to the above discussion of why even if a cause of action is stated, the marriage recognition rule remains controlling law in the State of New York, and thus, any statement that the County will recognize valid extraterritorial same-sex marriages is consistent with state law. Consequently, Plaintiffs have failed to state a cause of action and the Amended Complaint should be dismissed.

CONCLUSION<sup>2</sup>

40. Based on the foregoing, Plaintiffs' request for a preliminary injunction should be denied, and the Amended Complaint should be dismissed in its entirety. If the Court reaches the underlying merits of Plaintiffs' argument and dismisses Plaintiffs' Amended Complaint on that basis, Defendant is entitled to a declaration that the promulgation of Executive Order 3-2006 was lawful and a proper exercise of the County Executive's authority.

Dated: White Plains, New York  
March 8, 2007

  
HILLARY J. RAIMONDI

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<sup>2</sup> With respect to the arguments opposing the granting of the preliminary injunction, Defendant respectfully refers the Court to the Affirmation of Hillary J. Raimondi and the Memorandum of Law in Support of the Motion to Dismiss and in Opposition to Request for Preliminary Injunction.