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--- N.Y.S.2d ----, 2010 WL 2519990 (N.Y.A.D. 3 Dept.), 2010 N.Y. Slip Op. 05649

(Cite as:)

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LEE BORDELEAU et al., Appellants,

v.

STATE OF NEW YORK et al., Respondents.

508604

Supreme Court, Appellate Division, Third Department,
New York.

Decided and Entered: June 24, 2010

MEMORANDUM AND ORDER

Calendar Date: April 26, 2010

Before: Mercure, J.P., Peters, Spain, Rose and
Kavanagh, JJ.

James Ostrowski, Buffalo, for appellants.

Andrew M. Cuomo, Attorney General, Albany
(Paul Groenwegen of counsel), for State of New
York, respondent.

Alec S. Berman, International Business Machines
Corporation, White Plains (Teena-Ann V.
Sankoorikal of Cravath, Swaine & Moore, L.L.P.,
New York City, of counsel), for International Busi-
ness Machines Corporation, respondent.

Greenberg Traurig, L.L.P., Albany (Victoria P.
Lane of counsel), for Advanced Micro Devices,
Inc., respondent.

Lippes, Mathias, Wexler & Friedman, L.L.P., Buf-
falo (Kevin J. Cross of counsel), for West Genesee
Hotel Associates, respondent.

Rose, J.

Appeal from an order of the Supreme Court
(Lynch, J.), entered March 5, 2009 in Albany
County, which granted defendants' motions to dis-
miss the complaint.

In this declaratory judgment action, plaintiff tax-

payers challenge the constitutionality of the appro-
priation of state funds to the Department of Agri-
culture and Markets (hereinafter Department) and
two public benefit corporations (hereinafter PBCs)
for ultimate distribution to private entities for the
avowed purpose of fostering economic develop-
ment. The complaint alleges that this funding viol-
ates [N.Y. Constitution, article VII, § 8\(1\)](#), which
prohibits the giving or loaning of state money to
any private entity, and [N.Y. Constitution, article
VII, § 7](#), which requires that every new appropri-
ation distinctly specify the object or purpose of the
funds appropriated. Defendants made preanswer
motions to dismiss the complaint pursuant to [CPLR
3211\(a\)\(1\) and \(7\)](#).^{FN1} Supreme Court granted de-
fendants' motions and dismissed the complaint.
Plaintiffs now appeal.

FN1. Although some defendants also based
their motions upon [CPLR 3211\(a\)\(3\) and
\(10\)](#), they abandoned any claim for dis-
missal based upon an alternate ground by
failing to address it in their briefs on ap-
peal (*see Jock v Landmark Healthcare Fa-
cilities, LLC*, 62 AD3d 1070, 1074 n 2
[2009]).

“When assessing the adequacy of a complaint in
light of a [CPLR 3211\(a\)\(7\)](#) motion to dismiss, the
court must afford the pleadings a liberal construc-
tion, accept the allegations of the complaint as true
and provide plaintiff ... ‘the benefit of every pos-
sible favorable inference’ ” (*AG Capital Funding
Partners, L.P. v State St. Bank & Trust Co.*, 5
NY3d 582, 591 [2005] [citation omitted]; *see EBC
I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19
[2005]; *Crepin v. Fogarty*, 59 AD3d 837, 838
[2009]). On such a motion, the court's proper func-
tion is to determine whether the facts alleged fit
within any cognizable legal theory (*see Leon v.
Martinez*, 84 N.Y.2d 83, 87-88 [1994]). Alternat-
ively, to obtain dismissal pursuant to [CPLR
3211\(a\)\(1\)](#), defendants were required to “ ‘show
that the documentary evidence upon which the mo-

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tion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim' ” (*Adamkiewicz v. Lansing*, 288 A.D.2d 531, 532 [2001], quoting *Unadilla Silo Co. v. Ernst & Young*, 234 A.D.2d 754, 754 [1996]; see *Angelino v Michael Freedus, D.D.S., P.C.*, 69 AD3d 1203, 1205 [2010]).

Here, the complaint can be read to allege that certain appropriations in the 2008-2009 budget indirectly gave state funds to private entities in violation of N.Y. Constitution, article VII, § 8(1) by passing the funds through the Department and the PBCs before disbursement. While defendant State of New York can validly appropriate funds to public entities such as its departments and PBCs (see *Schulz v. State of New York*, 84 N.Y.2d 231, 246 [1994], cert denied 513 U.S. 1127 [1995]; *Matter of Palmateer v Greene County Indus. Dev. Agency*, 38 AD3d 1087, 1089 [2007]), the N.Y. Constitution prohibits gifts or loans of state funds to private entities. Article VII, § 8(1) provides that “[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking.” This provision was added in 1846 “in reaction to the [Legislature's] prior practices of subsidizing private railroad and canal companies through long-term State debt obligations, which the State ultimately was forced to pay when many of those private enterprises failed during the depression of 1837-1842. Thus, subsidization by gifts of public funds to private undertakings, or by pledging public credit on their behalf, was banned, irrespective of how beneficent or desirable to the public the subsidized activity might seem to be” (*Matter of Schulz v. State of New York*, 86 N.Y.2d 225, 233-234 [1995] [citations omitted], cert denied 516 U.S. 944 [1995]; see *People v. Ohrenstein*, 77 N.Y.2d 38, 50-51 [1990]; *Wein v. State of New York*, 39 N.Y.2d 136, 142-143 [1976]).

Defendants do not dispute plaintiffs' allegation that the challenged funds were ultimately distributed by the Department and the PBCs to private entities. Instead, they contend that, as a matter of law, the ap-

propriations did not violate the N.Y. Constitution because the grant of state funds to the Department and to the PBCs was permissible, those entities then disbursed the funds for proper public purposes with only incidental private benefits and, in any event, the private recipients agreed to perform services or provide other consideration in exchange for the funds. In response, plaintiffs argue that the complaint states a viable cause of action under the N.Y. Constitution because the challenged appropriations subsidize private entities.

First, we cannot accept defendants' premise that passing state funds through the hands of the Department or a PBC before distribution to private entities will avoid the constitutional proscription. Giving the funds to private entities by channeling them through authorized public entities will not shield these appropriations from challenge, for the State may not do “ ‘indirectly that which cannot be done directly’ ” (*Wein v. State of New York*, 39 N.Y.2d at 145, quoting *People ex rel. Burby v. Howland*, 155 N.Y. 270, 280 [1898]; accord *Schulz v. State of New York*, 84 N.Y.2d at 241). An analogous circumvention was rejected by the Court of Appeals when it stated: “If the gift of the bonds of the state to a railroad corporation would be such a gift-and it undoubtedly would be-then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation. The evasion of the constitutional prohibition would be palpable and it could not and should not be permitted” (*People v Westchester County Natl. Bank of Peekskill, N.Y.*, 231 N.Y. 465, 476 [1921]).

Nor can we accept defendants' argument that proof of a public purpose for the funds that were disbursed by the intermediaries here establishes the legitimacy of the appropriations. The Court of Appeals has made clear that the existence of a public purpose for an appropriation that aids a private undertaking is not the test of whether it is lawful. “However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual

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or to a corporation. It will not do to say that the character of the act is to be judged by its main object—that because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be to make meaningless the provision adopted by the [constitutional] convention of 1846. Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited” (*id.* at 475).

Defendants next contend that the state funds here were not gifts because they were disbursed by the Department and the PBCs in exchange for services or other valuable consideration. In support of this contention, the State produced an attorney's affirmation on behalf of the Department asserting that its funds were expended for activities designed to increase the production, marketing and consumption of certain agricultural products grown and distributed by private interests. The record also contains an affidavit of a senior vice-president of defendant Empire State Development Corporation which alleges that public benefits were derived from its expenditures to private business enterprises, such as reduction of their costs, promotion of their growth and retention of their jobs in New York. These submissions regarding consideration are unavailing, however, because they “do not constitute documentary evidence upon which a proponent of dismissal can rely” (*Crepin v. Fogarty*, 59 AD3d 837, 838 [2009], *supra*; see *Realty Invs. of USA v Bhaidaswala*, 254 A.D.2d 603, 605 [1998]).

In any event, defendants' submissions do not establish, as a matter of law, that the appropriations challenged here pass constitutional muster. Defendants' argument that the public benefits received constitute adequate consideration for disbursing public funds to private entities is premised on our observation in *Matter of La Barbera v. Town of Woodstock* (29 AD3d 1054 [2006], *lv dismissed* 7 NY3d 844 [2006]) that the consideration for the transfer of public property to a private entity “may take the form of public benefits or services rendered pursu-

ant to a contract” (*id.* at 1056). In that case, however, we found that a town's grant of a conservation easement to a not-for-profit conservation organization in exchange for the preservation of the land as an undeveloped public park provided a clear public benefit in perpetuity and, as a matter of law, constituted adequate consideration (*id.* at 1056). We did not consider whether N.Y. Constitution, article VII, § 8 would permit state funds to be given to private entities in exchange for the sort of benefits alleged here.

Nor do the other cases cited by defendants support their argument that, as a matter of law, there was adequate consideration here. We have held that a public entity's expenditure of public funds for promotional activities, such as advertising and marketing, will meet the constitutional requirement that a corresponding benefit be received where, unlike here, the activities promote the public entity itself (see *Matter of Schulz v Warren County Bd. of Supervisors*, 179 A.D.2d 118, 122 [1992], *lv denied* 80 N.Y.2d 754 [1992]). And while we have also found that payments made by the Commissioner of Agriculture and Markets for publicity designed to create new markets for apples did not violate N.Y. Constitution, article VII, § 8(1) in *Wickham v. Trapani* (26 A.D.2d 216 [1966]), there the moneys disbursed were the proceeds of assessments against the parties to be benefitted and not public funds (*id.* at 219-220). In the other cases cited by defendants, the public funds were given to PBCs that disbursed them to build facilities and for other proper public purposes that only incidentally benefitted private entities (see *Comereski v. City of Elmira*, 308 N.Y. 248 [1955]; *Matter of Palmateer v Greene County Indus. Dev. Agency*, 38 AD3d 1087 [2007], *supra*; *Tribeca Community Assn. v New York State Urban Dev. Corp.*, 200 A.D.2d 536 [1994], *lv denied* 84 N.Y.2d 805 [1994]). In the very different circumstances present here, defendants' submissions do not establish that the public benefits of the appropriations were so dominant and their private benefits so incidental as to constitute adequate consideration as a matter of law.

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Accordingly, inasmuch as plaintiffs allege that the Department and the PBCs passed the appropriated funds on to private entities, and that allegation must be accepted as true, we find that the complaint indeed states a cause of action for violation of [N.Y. Constitution, article VII, § 8](#). Thus, it should not have been dismissed under [CPLR 3211\(a\)\(7\)](#). Similarly, since the propriety of the appropriations challenged here depends upon whether their public benefits constitute sufficient consideration while the private benefits are merely incidental, defendants' submission of documentary evidence showing their public purposes fails to resolve any material issue in their favor as a matter of law and dismissal is not warranted under [CPLR 3211\(a\)\(1\)](#) (see [Weston v. Cornell Univ.](#), 56 AD3d 1074, 1076, [2008]; [Heslin v. Metropolitan Life Ins. Co.](#), 9 AD3d 581, 583 [2004]).

We turn next to plaintiffs' additional cause of action alleging violations of [N.Y. Constitution, article VII, § 7](#). [Article VII, § 7](#) prescribes that “[n]o money shall ever be paid ... except in pursuance of an appropriation by law [which] shall *distinctly specify* the sum appropriated, and *the object or purpose* to which it is to be applied” (emphases added). Plaintiffs allege in their complaint that numerous appropriations in the 2008-2009 budget merely provide that the money appropriated will be spent according to some future agreement between the Governor, Speaker of the Assembly and Majority Leader of the Senate. They contend that these appropriations are not only insufficiently specific as to their object or purpose, but that they also improperly delegate legislative control over expenditures, promote secrecy and reduce public accountability for cash grants to favored private interests. Many of these challenged appropriations refer to memoranda of understanding to be executed in the future. Others refer to a past memorandum that granted sole and largely unfettered discretion to the Governor, the Majority Leader of the Senate and the Speaker of the Assembly to designate, in the future, the ultimate recipients of funds for the undefined purpose of “economic development.” In ad-

dition, neither the appropriations nor the referenced memoranda of understanding state the recipients, projects or specific purposes of the funding. Nonetheless, we are constrained by the decision of the Court of Appeals in [Saxton v. Carey](#) (44 N.Y.2d 545 [1978]) to conclude that plaintiffs' allegations that the appropriations lack specificity fail to state a justiciable controversy. In [Saxton](#), the Court of Appeals held: “[T]he degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget. This is a decision which is best left to the Legislature, for it is not something which can be accurately delineated by a court. It is, rather, a function of the political process, ... [and] the remedy lies not in the courtroom, but in the voting booth” ([Saxton v. Carey](#), 44 N.Y.2d at 550; see [Pataki v. New York State Assembly](#), 4 NY3d 75, 97 [2004]). Accordingly, we cannot say that Supreme Court erred in dismissing plaintiffs' cause of action for violations of [N.Y. Constitution, article VII, § 7](#).

Finally, we find no merit in the argument by defendants International Business Machines Corporation and West Genesee Hotel Associates that this action was properly dismissed as against them because plaintiffs lack standing to sue them. Since the complaint alleges that state funds were unlawfully disbursed to those defendants and they do not deny that they have received at least some of the funds, plaintiffs have standing to join them as recipients of the funds pursuant to [State Finance Law § 123-b \(2\)](#) (see [Huron Group, Inc. v. Pataki](#), 5 Misc.3d 648, 686-687, *affd* 23 AD3d 1051 [2005], *appeal dismissed* 6 NY3d 803 [2006]; *cf.* [Matter of Quigley v. Town of Ulster](#), 66 AD3d 1295, 1297 [2009]).

Mercure, J.P., Peters, Spain and Kavanagh, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendants' motions to dismiss the first cause of action; motions denied to that extent and matter remitted to the Supreme Court to permit defendants to serve answers within 30 days of the date

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of this Court's decision; and, as so modified, affirmed.

ENTER:

Michael J. Novack

Clerk of the Court

N.Y.A.D. 3 Dept.,2010.

Bordeleau v. State

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