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906023-20

Empire Center for Public Policy v. New York State Department of Health

Assigned Judge: None Recorded

Documents Received on 09/28/2020 03:33 PM

Doc #	Document Type
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14	EXPARTE ORDER - ACCOMPANYING COMMENCEMENT DOC(S) (PROPOSED)
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15	EXHIBIT(S) A Brief of Proposed Amicus Curiae
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the matter of
EMPIRE CENTER FOR PUBLIC POLICY,
Petitioner,

Index No. 906023-20

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,
Respondent.

ORDER TO SHOW CAUSE

UPON READING AND FILING OF THE ANNEXED affirmation of James N. Tedisco in Support of his Motion for Leave to Appear as Amicus Curiae with the Petitioner, together with the accompanying Brief/Memorandum of Law, and;

It being sufficiently alleged that the issues raised by the Empire Center for Public Policy concerning their FOIL request to the New York State Department of Health is a matter of great public interest, and;

It being sufficiently alleged that Proposed Amicus has important contributions and additions for the Court's consideration of Petitioner's pending Petition now before this Court, it is hereby

ORDERED that Petitioner and Respondent show cause before this Court, at the Albany County Supreme Court, 16 Eagle Street, Albany, New York on the _____ day of _____, 2020 at _____ o'clock, or as soon thereafter as the parties can be heard, why an Order should not be entered granting the Proposed Amicus leave to file an amicus brief in support of Petitioner;

ORDERED that a copy of this Order to Show Cause, together with the papers upon which it is based, shall be served on counsel for Petitioner and

Respondent by _____ on or before _____
_____, 2020; and

ORDERED that answering papers, if any, shall be served by _____
on or before _____, 2020, upon the Proposed Amicus,
Senator James N. Tedisco, c/o Legislative Office Building, Room 515, Albany,
New York 12247 and the Empire Center for Public Policy, 30 South Pearl
Street, Suite 1210 Albany, New York 12207.

DATED:

Hon. _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the matter of
EMPIRE CENTER FOR PUBLIC POLICY,
Petitioner,

Index No. 906023-20

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,
Respondent.

**AFFIRMATION OF NEW YORK STATE SENATOR JAMES N.
TEDISCO IN SUPPORT OF HIS MOTION FOR LEAVE TO APPEAR
AS AMICUS CURIAE**

JAMES N. TEDISCO being duly sworn, affirm the following under penalty of perjury;

1. I submit this Affirmation in support of my Motion for Leave to Appear as Amicus Curiae in the above-referenced proceeding together with a Memorandum of Law in further support of the motion.

2. I am the duly elected New York Senator for the 49th State Senate District. My district covers portions of Schenectady County, portions of Saratoga County, portions of Herkimer County and the entire Fulton County and Hamilton County. I represent approximately 291,877 constituents in the second largest Senate District in New York State.

3. As the Court is aware, the Empire Center for Public Policy has filed a Verified Petition naming the New York State Department of Health as the Respondent.

4. The Empire Center seeks an Order declaring that the New York State Department of Health acted unlawfully in failing to produce records pertaining to COVID-19 nursing home and assisted living facility deaths.

5. My appearance in this matter would be of special assistance to this Court due to the immense current and future health implications this has on our state and the State legislature's ability to address those matters through well thought out legislation.

6. New York State ranks second, closely behind New Jersey, among states with the highest number of known deaths in nursing homes and long-term care facilities. The vast majority of those deaths occurred after being confirmed or suspected of having the virus while in a nursing homes.

7. According to the limited information that has been provided by the State Executive administration and Health Department, approximately 6,400 senior citizens died as a result of the Governor's mandate that forced nursing homes to accept COVID-19 positive patients. However, upon information and belief, that number appears to be much higher.

8. According to the Empire Center's September 18, 2020 Verified Petition, those records were FOIL'ed by them on August 3, 2020. The Department of Health has not provided those records.

9. This information is critical to not only my constituents but to all New Yorkers in order for New York State to be better prepared for any future COVID-19 outbreak and to proactively implement policies now as part of that preparation.

10. This case also has implications for the New York Legislature's authority to delegate authority to commissions and committees to write and pass laws that affect all New Yorkers.

11. In my role as State Senator I have urged my colleagues to establish an independent investigation to subpoena the Executive Administration and the Department of Health to get the real numbers of New Yorkers who have died from COVID-19 in state regulated nursing homes.

12. The Department of Health has not only stonewalled the Empire Center's efforts to obtain this data but has also acted in the same manner in response to the state legislature's efforts.

13. On August 3, 2020 and again on August 10, 2020, a Joint Hearing of the Health, Oversight and Aging Committees was held. New York State Department of Health Commissioner Howard Zucker testified before the Committee at both hearings.

14. Commissioner Zucker's testimony before the Committee was evasive. In sum and substance, Commissioner Zucker stated that the state does not have accurate data on the number of nursing home resident deaths.

15. On August 20, 2020 the Senate Chairs of the Health Committee and Aging Committee, the Senate Investigations and Government Operations Chair and the Administrative Regulatory Review Commission Chair delivered to Commissioner Zucker additional written questions that the committee members were unable to ask during his testimony due to time limits. The Senate afforded Commissioner Zucker three (3) weeks to submit his written replies. Commissioner Zucker has refused to reply to those questions.

16. I believe the issues present in this case to be of immense public interest, and the constitutional process for the Legislature to pass laws, and the constitutional right affecting all New Yorkers.

17. Granting my leave to appear as amicus curiae will not delay the case or prejudice any party in any way because it is filed prior to the next briefing deadline in the case which is October 22, 2020.

18. Counsel for The Empire Center for Public Policy consent to the filing an amicus brief.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the matter of
EMPIRE CENTER FOR PUBLIC POLICY,
Petitioner,

Index No. 906023-20

-against-

NEW YORK STATE DEPARTMENT OF HEALTH,
Respondent.

**BRIEF OF PROPOSED *AMICUS CURIAE*
JAMES N. TEDISCO**

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*Counsel for Proposed Amicus
Curiae, James N. Tedisco*

INTEREST OF AMICUS CURIAE

James N. Tedisco is the duly elected New York State Senator for the 49th Senate District. His District is comprised of all, or parts, of five (5) upstate counties: Schenectady, Saratoga, Fulton, Herkimer and Hamilton county. Senator Tedisco represents approximately 291,877 constituents. There are 622 certified Medicare and Medicaid nursing homes and 545 adult care facilities in New York State, many can be found in within the Senate District that I serve.

Senator Tedisco's is interested in this case because of the important public interest, that being the need for future preventable deaths, particularly in light of the fact that a COVID-19 "second wave" has been predicted for this Fall by health care experts. The state legislature has the unique ability to address the health and safety needs of all New Yorkers through well thought out legislation and shape state policy. However, in order to create such legislation, it is necessary to know the facts. The New York State Department of Health has lacked transparency by failing to provide those necessary facts to the state legislature during two (2) separate committee hearings in which Commissioner Zucker testified. The Department's lack of transparency is also evident in their refusal to provide this information to the Empire Center for Public Policy through their August 2020 FOIL request. The only statistic presented by the Governor's Office and/or the New York State Department of Health puts COVID-19 nursing home deaths at 6,400. However, this number fails to take into account those persons who contracted the virus in nursing homes but were later transferred out to hospitals where they later died. By all accounts the number of deaths presented does not reflect the exact number of preventable deaths. If the state legislature allows the Department to

continue to withhold this information, it is turning its back on its responsibility to all citizens of New York State to implement policy decisions in properly passed laws. Instead, the New York State Health Department, an unelected group, is creating its own public policy.

Only the Legislature by enacting legislation, subject to the Governor's veto power, as required under the New York Constitution, has the power to make such policy decisions. The Constitution provides that no law should be enacted except by bill. And each bill must state that the people of the state of New York, represented in the Senate and Assembly, enact the law. The people are not represented by an unelected State Health Commissioner. Such a scheme defies our State's Constitution. The rule of law can have no future where the supreme law of the state is defied and disregarded. As such, James N. Tedisco respectfully submits this Amicus Brief in support of the Petitioner.

ARGUMENT

I. COVID-19 nursing home deaths are a question of important public interest.

Kruger v Bloomberg, 1 Misc. 3d 192 (Supreme Court, New York County, 2003), citing Colmes v Fisher, 151 Misc. 222, 223 (Supreme Court, Erie County, 1934) held that "in cases involving questions of important public interest leave is generally granted to file a brief as amicus curia". Kruger at page 8. One of several factors noted in Kruger that a court must consider when determining if amicus curiae status is appropriate is whether the case concerns a question of important public interest. Kruger at page 14. With no less than 6400 COVID-19 nursing home deaths throughout New York State, this issue is clearly a question of important public interest.

The movant is able to present to this Court law or arguments that might otherwise escape the Court's consideration by providing to this Court that in-

formation regarding Commissioner Zucker's refusal to provide necessary details to the legislative committees charged with investigation COVID-19 deaths on 2 separate occasions. This information does not repeat the arguments presented by the Empire Center for Public Policy (Spota v County of Suffolk, 2012 N.Y. Misc. LEXIS 4633 201 NY Slip Op 32473 (U)), but rather supplements their argument with a full and adequate presentation of the matter at hand.

CONCLUSION

For the foregoing reasons, this Court should grant James N. Tedisco's Motion for Leave to Appear as amicus curiae.

Dated: Albany, New York
September 28, 2020

Respectfully submitted,

/s/ Michael P. Mansion
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*Counsel for Proposed Amicus
Curiae, James N. Tedisco*

19. Counsel for the New York State Department of Health, the Attorney General's Office, have not responded to my counsel's inquiry regarding their consent.

Dated: Albany, New York
September 28, 2020

Respectfully submitted,

/s/ James N. Tedisco
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