At a Special Term Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, at 360 Adams St, Brooklyn, New York, on the 12th day of September, 2013

PRESENT:

HON. JOHNNY L. BAYNES
Justice

---x

Index No. 13007/13

BILL DE BLASIO, INDIVIDUALLY, AND IN HIS CAPACITY AS PUBLIC ADVOCATE OF THE CITY OF NEW YORK,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION

-against-

STATE UNIVERSITY OF NEW YORK, TRUSTEES OF STATE UNIVERSITY OF NEW YORK, NEW YORK STATE DEPARTMENT of HEALTH and NIRAV SHAH, As Commissioner of the New York State Department of Health,

Respondents.

---x

On July 19, 2013, the Petitioners, Bill De Blasio, as Public Advocate of the City of New York and individually ("De Blasio"); Boerum Hill Association; Brooklyn Heights Assocation; Carroll Gardens' Neighborhood Association; Cobble Hill Association; Riverside Tenants' Assocation; Wyckoff Gardens Assocation, Inc. (incorrectly named herein as Wyckoff Gardens Association, Inc.); and Kate MacKenzie (collectively, the "Petitioners"), commenced this article 78 proceeding against the Respondents New York State Department of Health and its Commissioner (collectively, "DOH") and State University of New York and Trustees of State

University of New York (collectively, "SUNY"). On the same day, De Blasio obtained a TRO (the "July 19th TRO") that restrained SUNY from taking an action or issuing any order that would interrupt, hamper, or curtail medical professionals duly employed by or working within Long Island College Hospital ("LICH") from providing medical care, including emergency-medical services, to actual or prospective patients at LICH" (Petition, ¶ 52).

The Papers

The operative pleading is the Second Amended Verified Article 78 Petition, dated August 2, 2013 (the "Petition"). The Petition is supported by the affidavit of Elsie Rosario, a LICH nurse, sworn to on July 21, 2013; the undated affirmations of Robert Levey, M.D., Alice Garner, M.D., and Saul Melman, M.D., the current or former LICH physicians; the affidavit of Shelly Ann Burke, a LICH surgical technician, dated July 21, 2013; the affidavit of Howard Kolins, President of Boerum Hill Assocation, dated July 31, 2013; the affidavit of Judy Stanton, Executive Director of Brooklyn Heights Association, sworn to August 1, 2013; the affidavit of Maria Pagano, President of Carroll Gardens' Neighborhood Association, sworn to July 30, 2013; the affidavit of Roy Sloane, President of Cobble Hill Association, sworn to August 1, 2013; the affidavit of William Ringler, member of the Riverside Tenants' Assocation, sworn to July 30, 2013; the affidavit of Charlene Nimmons, President of Wyckoff Gardens Assocation, Inc., sworn to August 1, 2013; and the affidavit of Kate MacKenzie, sworn to July 30, 2013; the memorandum of law, dated August 2, 2013; and the Stipulation Granting Leave to File Second Amended Petition, dated August 13, 2013.

The Respondents have jointly moved to dismiss the Petition. They have submitted the Affirmation of Frank V. Carone with exhibits annexed thereto, dated July 24, 2013; the Affidavit

of John F. Williams ("Williams Affidavit"), sworn to July 24, 2013; and the memorandum in support of the motion to dismiss, dated July 24, 2013.

Discussion

This suit, and a companion action decided on this same date, September 12, 2013, *New York State Nurses Association, et al. v New York State Department of Health, et al.*, index No. 5814/13 (the "Companion Action"), both challenge the partial approval by DOH of SUNY's latest (by now, its third) announced plan to close LICH; and SUNY's de facto wind-down of LICH without DOH's approval by discharging or transferring patients from LICH, diverting ambulances coming to LICH, and otherwise thwarting the ability of the existing and the prospective patients to obtain emergency and non-emergency medical care at LICH. Because the Petitioners, with slight variations, raise the same questions in this suit that are addressed in a contemporaneous decision issued in the Companion Action, the Court here will only focus on the questions that are unique to this suit.

The first issue before the Court is whether De Blasio, either as the Public Advocate for the City of New York or as an individual, has standing to maintain the instant action. The answer to this question must be in the negative. De Blasio's powers derive from, and are circumscribed by, the City Charter. His powers under the City Charter are limited to those over the City agencies and may not extend to encompass State agencies. *Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth.*, 19 AD3d 284, 285 [1st Dept 2005], *lv den'*d, 5 NY3d 878 [2005] In that case, the Court held that the Public Advocate had no capacity to bring a proceeding challenging a disputed MTA determination. Nor does De Blasio, in his individual capacity,

possess the requisite standing because he has failed to show that he will suffer harm that, in some way, is different from that suffered by the public at large. He is not a LICH employee or patient and has no exceptional stake in the matters being complained of. His standing to protest the inadequacy of medical services provided to others at LICH cannot be divorced from the fact that he himself has never been a LICH employee or patient.

By parity of reasoning, the Court denies standing to Mrs. MacKenzie, whose husband contemplated going to, but never went, to the emergency room at LICH to address his emergent medical condition. The facts set forth in Mrs. MacKenzie's affidavit are too tenuous to support her husband's standing to participate in this action. *Rudder v Pataki*, 93 NY2d 273, 279 [1999].

In contrast, the Court finds that Boerum Hill Assocation, Brooklyn Heights Assocation, Carroll Gardens' Neighborhood Association, Cobble Hill Association, Riverside Tenants' Assocation, and Wyckoff Gardens Assocation, Inc. (collectively, the "Community Associations") each possess the requisite standing under the three-part test of organizational standing, which is discussed at length in the contemporaneously issued decision in the Companion Action. Well-established precedent accords organizational standing to community associations to raise issues that are critical to their neighborhoods' functioning. *Grasmere Homeowners' Assoc. v Introne*, 84 AD2d 778, 778-779 [2d Dept 1981]. In *Grasmere Homeowners Association*, a civic association had standing to contest establishment of two community residence facilities by the State Office of Mental Retardation and Developmental Disabilities because the members of the civic association lived near the proposed sites. *See also*, *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775-76 [1991]. Accordingly, the branch of the Respondents' motion to dismiss for lack of standing is granted as to De Blasio, as Public Advocate and in his individual

capacity and in regard to MacKenzie, and is denied as to each of the Community Associations.

In essence, only two causes of action (denominated as the Twelfth Cause of Action and the First Cause of Action) are unique to this suit. The Twelfth Cause of Action alleges that the Respondents violated the temporary restraining orders in this suit and in the Companion Action and, therefore, are guilty of civil and criminal contempt under the Judiciary Law. Whether that's true or false is not currently before the Court. The Court will address the issue of contempt separately when, and if, appropriate.

The First Cause of Action alleges that SUNY violated various statutes by "diverting" ambulances from LICH. Reliance is initially placed on Penal Law § 195.05, which prohibits, among other things, the intentional obstruction of governmental administration by interfering with emergency medical service. However, because not one of the Petitioners is alleged to have been a victim of such diversion, no basis exists to support a private cause of action under the Penal law (*accord Sugarman v Equinox Holdings, Inc.*, 21 Misc 3d 1147[A], 2008 NY Slip Op 52530[U] [Sup Ct, NY County 2008], *affd on other grounds* 73 AD3d 654 [1st Dept 2010] [even if the injured plaintiff established that defendants violated Penal Law § 195.05, he has failed to establish that he was among the class of persons this statute was designed to benefit, giving rise to a cause of action in his favor]). Rather, the enforcement of this statute on behalf of the public lies with the Kings County District Attorney's Office. In fact, at the Petitioners' request, the Court has made a referral of this and similar allegations to the Kings County District Attorney's Office, by order dated July 23, 2013.

The ten remaining causes of action in this suit significantly overlap, if not duplicate, the causes of action advanced in the Companion Action. The merit of the ten remaining causes of

action in this suit is governed by the Court's contemporaneously issued decision in the Companion Action. The Court declines to separately address and apply those determinations to the Petition in this suit. The reasons for the Court's refusal are twofold. First, the Court strives to avoid any conflict or inconsistency between the determinations in this suit and those it has made in the Companion Action. The contemporaneously issued decision in the Companion Action is paramount and governs, to the extent applicable, the merits of all of the claims asserted in this suit. Second, this suit is not in a proper form. Despite the Petition's sweeping allegations of improprieties and violations, this suit is shoehorned into the narrow framework of an article 78 proceeding instead of having been brought as a plenary action. Under CPLR 103(c), the Court is empowered, in the interests of justice, to convert a civil proceeding into one which is proper in form, making whatever order is necessary for its proper prosecution. Pursuant to CPLR 103(c), the Court *sua sponte* converts this suit into a plenary action for declaratory and injunctive relief (*see Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 347 [1976]; *Scarano v City of N.Y.*, 86 AD3d 444, 445 [1st Dept 2011], *appeal dismissed, lv denied* 17 NY3d 901 [2011]).

Conclusion

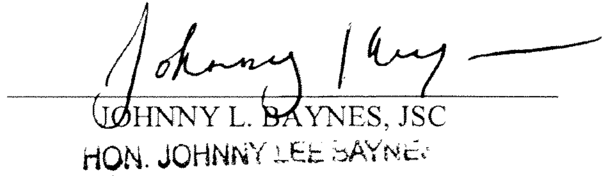
The Respondents' motion to dismiss is granted to the extent that De Blasio, both as Public Advocate and individually, and MacKenzie are dismissed from this suit for lack of standing; and the First Cause of Action is dismissed in its entirety for failure to state a cause of action, and the remainder of their motion is denied. The balance of this Motion is decided in accordance with this Court's Decision and Order, signed on this date, in the related matter of The New York State Nurses Association, et al., v New York State Department of Health, et al, Supreme Court, Kings County, Index No. 5814/13

Petitioners to Settle Order on Notice within ten (10) days of the date hereof.

The foregoing constitutes the Decision of the Court.

E N T E R:

SEP 1 2 2013



JOHNNY L. BAYNES, JSC

HON. JOHNNY LEE BAYNES