

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

CHARLES P. KUHAR, ET AL. :
: August Term 2022
v. :
: No. 1916
CITY OF PHILADELPHIA, ET AL. :
: Control Nos. 22082985, 22083680,
: 22100071, 22101510

ORDER

AND NOW, this 19th day of October, 2022, upon consideration of Plaintiffs' Motion for Preliminary Injunction, the City of Philadelphia's Response, the Abortion Liberation Fund's Response, and after a hearing and oral argument, it is **ORDERED** that the Motion is **DENIED** for *inter alia* the reasons set forth in the accompanying Memorandum Opinion.

BY THE COURT:

J. 

ORDMM-Kuhar Etal Vs City Of Philadelphia Etal



22080191600089

2022 OCT 19 PM 12:04

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

| | | |
|------------------------------|---|------------------------------------|
| CHARLES P. KUHAR, ET AL. | : | |
| | | : August Term 2022 |
| v. | : | |
| | | : No. 1916 |
| CITY OF PHILADELPHIA, ET AL. | : | |
| | | : Control Nos. 22082985, 22083680, |
| | | : 22100071, 22101510 |

MEMORANDUM OPINION

In June 2022, the City of Philadelphia, through Mayor James F. Kenney, authorized a contribution in the amount of \$500,000 from the City’s General Fund to the Abortion Liberation Fund of Pennsylvania, a non-profit. The contribution was one of several contributions to non-profit organizations the City made at the end of its fiscal year.

On August 16, 2022, Charles and Theresa Kuhar filed a Complaint and “Emergency” Motion for Preliminary Injunction seeking (i) to enjoin the contribution the City had already made, and (ii) a declaration that the contribution violated federal and state law. At the time the Kuhars filed their initial verified Complaint and Motion, they apparently were unaware that the City had previously made the contribution at least 6 weeks earlier.

The Kuhars proceeded to file a series of amended complaints and updated motions, based on the “new” facts they had learned regarding the contribution. The Kuhars named the ALF as a Defendant in the Amended Complaint. In the Third Amended Complaint, Pro-Life Coalition of PA, Inc. was added as a Plaintiff. The

20220819 12:44

City and ALF filed responses to the motions and preliminary objections to the complaints.

On October 14, 2022, this Court held a hearing and oral argument on the pending motions and, to the extent appropriate, on the preliminary objections.¹

At the hearing, Plaintiffs made certain offers of proof regarding the alleged standing of the Kuhars and the Pro-Life Coalition. The parties agreed that the Kuhars are residents of Philadelphia. The parties agreed that the Kuhars are affiliated with the Pro-Life Coalition, but they are not officers of the organization. The Kuhars consider themselves members, although the organization does not keep a membership list or maintain any other proof of membership beyond an email distribution list.

Marisa Waxman, the City of Philadelphia's Budget Director, testified regarding the City's contribution to ALF and the City's budget generally. Ms. Waxman confirmed that the contribution was made in June 2022, at the end of the City's 2021 fiscal year. She noted that the contribution was a donation, which is a no-strings-attached contribution, as opposed to a grant, which typically involves a contribution for a specified purpose.

Ms. Waxman explained the process through which the Mayor authorized the contribution to ALF. City Council approved the City of Philadelphia's operating

¹ The Court writes briefly for the benefit of the parties to provide a short explanation for the contemporaneous order denying the request for a preliminary injunction. Should there be an appeal, the Court may, in its discretion, supplement this explanation in a 1925(a) Opinion.

budget for fiscal year 2022 on or about June 24, 2021, pursuant to the Home Rule Charter. From the City's General Fund, which exceeded \$5 billion for 2021, the budget appropriated \$16,069,700 to the Director of Finance for "Contributions, Indemnities and Taxes."² Contributions from this fund are authorized by the Mayor in consultation with the Director of Finance. The specific contribution to ALF was made at the end of fiscal year 2021, in June 2022. It was one of seven or eight contributions made at that time, totaling several million dollars. Ms. Waxman noted that at the end of fiscal year 2022, the City had recognized an unexpected increase (compared to budget) in locally recognized tax revenue.

Ms. Waxman acknowledged that the City's General Fund, for the most part, includes all money the City receives from (i) its local tax revenue, and (ii) grants from the federal government and the Commonwealth of Pennsylvania. While the City accounts for all of the money that goes into the General Fund, and the City accounts for how the money from the General Fund is spent, the City does not track the path of a specific dollar. All of the tax revenue and grants received are commingled in the City's General Fund.

It is based on this factual backdrop, together with the procedural history of the case, that the Court concludes that Plaintiffs are not entitled to the issuance of a preliminary injunction.

² Contributions means, in this context, donations to non-profit organizations. Indemnities are essentially reserves to cover legal obligations, and taxes are any money required to cover tax liabilities that may be owed to foreign jurisdictions.

A. Preliminary Injunction Standard

In order to obtain the extraordinary remedy of a preliminary injunction pursuant to Pa. R. Civ. P. 1531, a plaintiff must show that each of the six essential prerequisites is satisfied: (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (5) the injunction it seeks is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (internal citations omitted).

The purpose of a preliminary injunction is “to preserve the status quo and prevent imminent and irreparable harm that might occur before the merits of the case can be heard and determined.” *Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 151 (Pa. Commw. 2015). A trial court properly denies a request for preliminary injunction if the movant fails to satisfy any one of the essential prerequisites. *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004).

B. Immediate and Irreparable Harm

When the Kuhars initially filed their “emergency” action, the City had already made its contribution to ALF. And the contribution was not merely a few days old – it was at least 6 weeks old. Thus, as of August 18, 2022, with respect to the City, there was no status quo to preserve, and the Kuhars were under no threat of immediate or irreparable harm (and certainly the Pro Life Coalition, added as a Plaintiff in the Third Amended Complaint, is situated no differently than the Kuhars).

As a result, the only possible claim for preliminary injunctive relief was against ALF. Thus, on this basis alone, the motion with respect to the City must fail. The Court will, nevertheless, review and analyze the merits of the City’s defenses to the motion together with ALF’s defenses.

C. Likelihood of Success on the Merits

The City and ALF raise a number of defenses to the motion (and, via preliminary objections, to the Third Amended Complaint). Broadly speaking, the City and ALF (i) challenge Plaintiffs’ standing to bring their claims;³ (ii) argue that the statutes relied upon by Plaintiffs do not confer a private right of action; and (iii) Plaintiffs cannot demonstrate that the contribution involved federal or state funds.

³ The Court accepts, based on the offer of proof, that the Pro-Life Coalition has associational standing, to the extent the Kuhars may have standing. But as the Court concludes, *infra*, the Kuhars do not have “taxpayer” standing.

First, even if Plaintiffs may have taxpayer standing to assert a claim against the City, an assertion which this Court finds dubious, at best, for Plaintiffs,⁴ Plaintiffs have no such standing to assert a claim against ALF. ALF is a private 501(c)(3) non-profit that provides financial assistance to women to obtain healthcare, including abortions. Taxpayer standing may only exist when a taxpayer is challenging “obligations placed on the general public or emoluments given through the exercise of governmental power imposed or given by general ordinances or statutes.” *Drummond v. Univ. of Pennsylvania*, 651 A.2d 572, 577-78 (Pa. Commw. 1994).

The money at issue has, at all times during this litigation, been in possession of ALF. Plaintiffs have no right to challenge how ALF may use the funds. If Plaintiffs are ultimately successful in obtaining a declaration that the City

⁴ Plaintiffs seek to rely on taxpayer standing, a limited exception to the general rule that for a party to have standing, they must allege a substantial, direct, or immediate interest in the outcome. *Americans for Fair Treatment, Inc. v. Philadelphia Fed’n of Teachers, Local 3, AFL-CIO*, 150 A.3d 528, 536-37 (Pa. Commw. 2016). Five requirements must be satisfied for taxpayer standing: (1) the government action that the plaintiff challenges would otherwise go unchallenged; (2) those directly and immediately affected are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) there are no other persons better situated to assert the claim. *Id.* Even assuming *arguendo* that the statutes at issue confer a private right of action, there are other governmental entities better situated to assert the claims. For example, the various state and federal administrative agencies tasked with distributing funds to the City are better situated to seek redress if those agencies believe the City may have improperly allocated the funds. Or legislative committees at both the federal and state level charged with oversight of the distribution of funds to the City. Simply because these agencies may be slower to act than private individuals, as Plaintiffs argue, does not mean that private individuals are better situated. Thus, the Court concludes that Plaintiffs do not have taxpayer standing to assert their claims against the City.

improperly or illegally donated money to ALF, the Court would craft an appropriate remedy at that time. This Court can discern no basis that would allow Kuhars, private citizens, and the Pro-Life Coalition, an organization, to control how a non-profit spends its own money.

Second, the statutes Plaintiffs rely upon – the federal Hyde Amendment and Pennsylvania’s Abortion Control Act – do not confer a private right of action. Where a statute does not expressly provide for a private remedy, such a remedy may only be implied if: (i) the statute creates a right in favor of plaintiff; (ii) there is explicit or implicit legislative intent to create a private remedy; and (iii) a private right of action is consistent with the legislative purpose of the statute. *Estate of Witthoeft v. Kiskaddon*, 733 A.2d 623, 626 (Pa. 1999) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). A plaintiff must satisfy all three elements to proceed with a private right of action.

Here, Plaintiffs have offered no argument, citation, evidence of legislative intent, or any other authority whatsoever that the Hyde Amendment or Abortion Control Act implicitly provide them with a private right of action. Thus, the Court concludes that Plaintiffs may not maintain a private right of action with respect to the federal or state statute.

Third, Plaintiffs’ reliance on the Pennsylvania constitution fares no better, because Plaintiffs conflate the terms “appropriation” and “expenditure.” In this case, the City’s donation to ALF was an expenditure, not an appropriation. An appropriation is “act by which the legislative department of government designates

a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure.” *Common Cause of Pennsylvania v. Commonwealth of Pennsylvania*, 668 A.2d 190, 206 (Pa. Commw. 1996). Thus, while the legislature (here, the City Council) is not permitted to appropriate money to private entities either directly or through a City agency, the executive (here, the Mayor) is free to lawfully spend money that was appropriated to him. *Id.* In sum, there simply is no merit to Plaintiffs’ argument that the City’s contribution to ALF violated Pennsylvania’s constitution.

Fourth, Plaintiffs are unable to demonstrate in any credible manner whatsoever that the City used federal or state funds for the donation. To the contrary, the facts developed at the hearing strongly support the City’s argument that it used its own local tax revenue to fund the donation. Ms. Waxman testified that the contribution to ALF was one of seven or eight contributions the Mayor authorized at the end of fiscal year 2021. The contributions were, in part, the result of an unexpected increase in locally generated tax revenue.

Plaintiffs presented no evidence of any connection between the contribution to ALF and the funds the City received from the federal and state governments. In order to prevail in this action, the burden is on Plaintiffs to show that the federal and state funds were not merely commingled in the City’s own General Fund, but that the federal and/or state funds were specifically used to fund the donation to ALF.

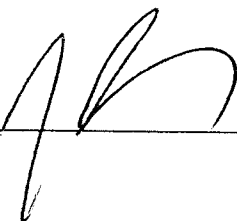
At oral argument, Plaintiffs attempted to meet their burden by retroactively looking at the City's 2021 fiscal budget. After engaging in basic math, Plaintiffs concluded that in the absence of the federal and state components of the budget, the City would not have had the money to make its donation to ALF. This is spurious logic. As this Court noted during oral argument, the City's 2021 budget was created in reliance on the City receiving the federal and state contributions. If the City knew before finalizing the 2021 budget that it would not be receiving those contributions, then the City would obviously have made different choices as to how to raise revenue and allocate funding.

Plaintiffs also attempted to argue that once *any* federal or state money was commingled in the City's General Fund, then the City was restrained from spending the money in a manner contrary to the federal and state laws at issue. Plaintiffs posited, without any citation to any legal authority, that once they established that federal and state funds are included in the City's General Fund, the burden shifted to the City to show that the federal and state funds were not used as part of the donation to ALF. Quite simply, there is zero authority to support Plaintiffs' rationale. Plaintiffs chose to bring this suit. Plaintiffs have the burden of proof at all times. Plaintiffs have the burden to establish the elements of their claims. Plaintiffs have the burden to establish a likelihood of success on the merits as part of this preliminary injunction inquiry. *Warehime*, 860 A.2d at 47. Plaintiffs produced no affirmative proof in support of their claims. In sum, Plaintiffs' commingling argument is without merit.

D. Conclusion

For the foregoing reasons, the Court concludes that Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction because (i) the claim for injunctive relief as to the City of Philadelphia is moot; (ii) Plaintiffs have no standing with respect to either the City or ALF; and (iii) Plaintiffs have not demonstrated a likelihood of success on the merits on the substantive claims as to either the City or ALF.

BY THE COURT:

J. 

Dated: October 19, 2022