DECISION NO 200910-A-0164
ATTORNEY FKR
FILE NO. 952732-N145
DATE REC'D 5/28/10

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN F. SULLIVAN, as President of the Empire State Supervisors and Administrators Association; LARRAINE GEGERSON, Individually and as President of the Baldwin Supervisors Association,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.: 2460-10
RJI No.: 01-10-100064

DAVID PATERSON, in his official capacity as Governor of the State of New York, and THOMAS P. DiNAPOLI, in his official capacity as the New York State Comptroller and Sole Trustee of the New York State and Local Retirement System and the NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,

Defendants,

RICHARD C. IANNUZZI, as President of the NEW YORK STATE UNITED TEACHERS,

Defendant-Intervenor.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

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O'CONNOR, J.:

Plaintiffs John Sullivan, as president of the Empire State Supervisors and Administrators Association ("ESSAA"), and Larraine Gegerson, individually and as president of the Baldwin Supervisors Association ("BSA"), commenced the instant declaratory judgment action to challenge a recently enacted statute, Chapter 45 of the Laws of 2010, which provides an early retirement incentive to certain members of the New York State Teachers' Retirement System ("TRS") and the New York State and Local Employees' Retirement System ("ERS"). Plaintiffs argue that the legislation unconstitutionally limits eligibility for the incentive to TRS and ERS employees who, *inter alia*, "hold[ ] a position represented by the recognized collective bargaining units affiliated with the New York state united teachers employee organization . . ." (L. 2009, ch. 45, § 3[e]). Plaintiffs contend that the failure to include all TRS and ERS members in the early retirement incentive violates the equal protection clause and their right to freedom of association as guaranteed by the First and Fourteenth Amendments of the United States Constitution and the New York State Constitution.

By Order to Show Cause (McNamara, J.), plaintiffs have moved for an order temporarily enjoining implementation and enforcement of Chapter 45 of the Laws of 2010. Plaintiffs also seek

an order striking, as unconstitutional, the sentence of the statute limiting eligibility for the incentive to members of TRS and ERS who belong to recognized collective bargaining units that are affiliated with the New York State United Teachers ("NYSUT") and enforcing the remainder of the law in accordance with the severability clause contained therein, or, in the alternative, an order striking the entire statute as violative of the First and Fourteenth Amendments of the United States Constitution as well as the Constitution of the State of New York. Defendants and defendant-intervenor oppose the motion. Oral argument was held on May 21, 2010. The papers are fully submitted, and all issues have been briefed.

The decision to grant or deny provisional relief is a matter ordinarily committed to the discretion of the trial court, and requires consideration of a variety of factors (*see Doe v. Axelrod*, 73 N.Y.2d 748, 750 [1988]). In order to obtain a preliminary injunction, the moving party must demonstrate: (1) a likelihood of success on the merits of the underlying action; (2) danger of irreparable injury in the absence of injunctive relief; and (3) a balance of equities in his or her favor (*see Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 [2005]; CPLR § 6301). The purpose of a preliminary injunction "is to preserve the status quo pending resolution of the underlying dispute" (*Bonnieview Holdings v. Allinger*, 263 A.D.2d 933, 934 [3d Dep't 1999]; *see Matter of Elmore v. Mills*, 296 A.D.2d 704, 705 [3d Dep't 2002]). Where the status quo would be disturbed and the movant would be granted the ultimate relief sought in the action *pendente lite*, preliminary injunctive relief should not be granted absent a showing of extraordinary circumstances (*see Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 [2d Dep't 2007]; *see also Jamie B. v. Hernandez*, 274 A.D.2d 335, 336 [1st Dep't 2000]; *Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601 [3d Dep't 1999]).

Applying these principles, the Court finds that plaintiffs have failed to sustain their burden

on the motion and, thus, are not entitled to preliminary injunctive relief. Initially, the Court notes that other than fleeting references to a likelihood of success on the merits and irreparable harm in the Order to Show Cause, their attorney's affirmation, and the supporting affidavits, plaintiffs have failed to address the showing necessary to obtain a preliminary injunction. Instead, plaintiffs rely on their memorandum of law, affidavits, and the pleadings to support their application. Plaintiffs' papers, however, do nothing more than to state, in conclusory terms, that plaintiffs have a likelihood of success on the merits and will be irreparably harmed in the absence of equitable relief.

Turning to the merits of the application, "[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*DiFabio v. Omnipoint Communications, Inc.*, 66 A.D.3d 635, 636-637 [2d Dep't 2009][internal quotation marks and citations omitted]; *see McCall v. State of New York*, 215 A.D.2d 1, 5 [3d Dep't 1995]). Indeed, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 [2d Dep't 2007]; *McCall v. State of New York*, 215 A.D.2d at 5). "Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative" (*Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 [2 Dep't 1995]).

Plaintiffs contend that failure to enjoin implementation and enforcement of Chapter 45 of the Laws of 2010, or to strike the language limiting eligibility for the early retirement incentive to TRS and ERS employees in bargaining units affiliated with NYSUT, will prevent plaintiffs' members and other TRS and ERS employees from retiring years early without significant financial penalty. Plaintiffs also argue that without injunctive relief, ESSAA and BSA will lose members who will join the "governmentally favored" NYSUT in order to be eligible for the "value benefits" of the early retirement incentive. However, other than the alleged economic harm that their members may suffer

from being unable to take advantage of the early retirement incentive and their speculative assertion that ESSAA and its affiliated bargaining units, including BSA, will lose members to bargaining units affiliated with NYSUT who wish to take advantage of the incentive, plaintiffs have not demonstrated, and there is nothing in the record to show, that they will suffer an imminent and irreparable injury of a noneconomic nature which would warrant the granting of equitable relief. As such, their application must be denied.

Any remaining contentions raised by the parties need not be considered in light of the foregoing determination.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion is, in all respects, denied; and it is further

ORDERED, that the parties shall appear for a conference in Chambers on **June 2, 2010 at 10:00 a.m.** at 112 State Street, Room 1360, Albany, New York.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to the attorneys for the defendants for filing. A copy of the Decision and Order together with all papers on the motion are being retained by the Court pending a final determination in this action. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: May 27, 2010
Albany, New York

HON. KIMBERLY O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause (McNamara, J.), dated April 16, 2010; Affirmation of Robert Saperstein, Esq., dated April 15, 2010, with Exhibits 1-4 & A annexed;
2. Plaintiffs' Memorandum of Law, dated April 15, 2010;
3. Affidavit of James DeWan, sworn to May 19, 2010, with Exhibits 1-7 annexed;
4. Affidavit of David Weinstein, Esq., sworn to May 19, 2010, with Exhibit 1 annexed;
5. Defendants' (Paterson and DiNapoli) Memorandum of Law, dated May 20, 2010;
6. Affirmation of Wayne Schneider, Esq., dated May 19, 2010, with unmarked exhibit annexed;
7. Affidavit of Mark Chaykin, sworn to May 20, 2010, with Exhibit A annexed;
8. Affidavit of Stephen Allinger, sworn to May 20, 2010, with Exhibits A-E annexed; *and*
9. Defendant-Intervenor's Memorandum of Law, dated May 20, 2010.