Doe v. Axelrod

Court of Appeals of New York

Argued October 19, 1988 ; November 22, 1988, Decided

[No number in original]

Reporter

73 N.Y.2d 748 *; 536 N.Y.S.2d 44 **; 1988 N.Y. LEXIS 3328 ***; 532 N.E.2d 1272

JANE DOE et al., Respondents, v. DAVID AXELROD, as Commissioner of Health of the State of New York, Appellant

Prior History: [***1] APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered April 28, 1988, which modified, on the law, and, as modified, affirmed an order of the Supreme Court (Edith Miller, J.), entered in New York County, converting plaintiffs' action for a declaratory judgment to a CPLR article 78 proceeding and granting plaintiffs' motion for a preliminary injunction enjoining the enforcement of 10 NYCRR 80.67. The modification consisted of restoring the matter to a declaratory judgment action. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the order of the Supreme Court, properly made?"

Plaintiffs, a coalition of various members of the medical and pharmaceutical communities, commenced this action to declare unconstitutional the aforementioned regulation, which required that certain frequently prescribed tranquilizing medicines officially known as benzodiazepines be subjected to the strict prescription control reserved for drugs of the greatest abuse, under the provisions of New York's Controlled Substances Act (Public Health [***2] Law §§ 3300-3397).

Supreme Court granted a preliminary injunction and the Appellate Division affirmed, concluding that questions as to the legality of the regulation, as well as the impact of its imposition on millions of New York citizens and the practice of medicine, warranted a delay until a final determination is made on the merits.

Doe v Axelrod, 136 AD2d 410, modified.

Disposition: Order modified, with costs to appellant, in accordance with the memorandum herein and, as so modified, affirmed. Certified question answered in the negative.

Counsel: *Robert Abrams, Attorney-General (Darren O'Connor, O. Peter Sherwood* and *Andrea Green* of counsel), for appellant.

Sheldon D. Camhy and *George G. Nelson,* for respondents.

Leslie Salzman, Marilyn A. Kneeland and *Herbert Semmel* for Public Health Association of New York City and another, *amici curiae.*

Opinion

[*750] [**44] MEMORANDUM.

The order of the Appellate Division should be modified, with costs, by reversing so much of that order as affirmed the Supreme Court order granting plaintiffs a preliminary injunction; the certified question should be answered [***3] in the negative. [**45]

The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused (*James v Board of Educ.,* 42 NY2d 357, 363-364). In this case, there was an abuse of discretion, and, as a consequence, reversal is required.

A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of

irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*Grant Co. v Srogi,* 52 NY2d 496, 517). Here, plaintiffs can succeed on the merits of their claim only if they show either that in promulgating [***4] the challenged regulations (10 NYCRR 80.67) respondent Commissioner acted outside of the authority constitutionally delegated to him under the Public Health Law (*compare, Boreali v Axelrod,* 71 NY2d 1, *with Matter of Levine v Whalen,* 39 NY2d 510; and *Chiropractic Assn. v Hilleboe,* 12 NY2d 109) or that the regulation was "'so lacking in reason for its promulgation that it is essentially arbitrary'" (*Ostrer v Schenck,* 41 NY2d 782, 786). On this record, plaintiffs have not demonstrated that they can make [*751] such a showing. * Thus, the first prong of the test for preliminary injunctive relief -- likelihood of success on the merits -- was not satisfied, and, as a matter of law, a preliminary injunction should not have been issued.

Judges SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK, JR., and BELLACOSA concur; [***5] Chief Judge WACHTLER taking no part.

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* At this early stage in the litigation, the record consists only of plaintiffs' complaint and the papers submitted in connection with their motion for a preliminary injunction. Respondent Commissioner has not yet served an answer or made a motion to dismiss under CPLR 3211 or 3212.