

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE : CIVIL TERM**

**BENJAMIN MILLER-JACOBSON, DOROTHY PAIGE,
RYAN ACUFF and SHIRLEY THOMPSON, as members
of Occupy Rochester,**

Plaintiffs,

Index No. 2012/02404

- vs -

CITY OF ROCHESTER,

Defendant.

APPEARANCES: Michael S. Steinberg, Esq.
109 Rutgers Street
Rochester, New York 14607-2840
Appearing on behalf of the plaintiffs

Robert J. Bergin, Corporation Counsel
400A City Hall
Rochester, New York 14614
Appearing on behalf of the defendant
By: Jeffrey Eichner, Esq., of Counsel

DECISION

FRAZEE, J.

Plaintiffs, as members of Occupy Rochester,¹ brought this action for a declaratory judgment seeking determination of their rights under a written agreement dated November 10, 2011 (Agreement) between the City of Rochester (City) and Ryan Acuff, on behalf of Occupy Rochester. Plaintiffs further seek a

¹Occupy Rochester is part of the occupation movement that began on or about September 17, 2011 with Occupy Wall Street.

declaration that City of Rochester Code §79-2 is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution and under Article One, Sections 8 and 9(1) of the New York State Constitution. Before the Court for decision are plaintiffs' application by order to show cause for a preliminary injunction enjoining the City from requiring plaintiffs to remove its structures and cease use of Washington Square Park (Park) after the hours of operation established in City Code §79-2, and the defendant's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7).

By way of brief background, individual plaintiffs and others, as members of Occupy Rochester, began in late October, 2011 to remain in the Park beyond the closing hours set forth in the City Code. This resulted in a number of arrests and then negotiations between representatives of the City and Occupy Rochester leading to the Agreement. Based upon the Agreement, which allows overnight tent camping under terms and conditions enumerated therein, Occupy Rochester and those associated with this movement maintain tents and other structures in the south end of the Park. The City recently advised those associated with Occupy Rochester that the overnight use of the Park and the presence of tents and other structures in the Park would no longer be allowed after March 11, 2012. Plaintiffs brought this action and order to show cause to challenge the City's determination and enjoin any enforcement action by the City.

In order to obtain a preliminary injunction, plaintiffs must show a likelihood of success on the merits in the underlying action, that they would be irreparably harmed if the injunction is not granted, and a balance of equities in their favor

(CPLR §6301; *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). The Court will first address the likelihood of success on the merits under the Agreement and on the constitutional challenge.

NOVEMBER 10, 2011 AGREEMENT

In addition to setting forth the terms and conditions for use of the Park for camping and outside normal hours of operation, the Agreement contains the following language:

This Agreement shall extend through January 11, 2012 and shall be renewable for additional periods of two months upon substantial compliance with the terms contained herein and continued safe operation of the Park.

Plaintiffs' first argument is that under the terms of the Agreement, Occupy Rochester is entitled to automatic two month renewals provided it is in substantial compliance with the terms of the Agreement and continued safe operation.

In January, 2012, plaintiffs sent the City a formal renewal of the Agreement. The City declined to sign the renewal but verbally indicated to plaintiffs that it would not take any action against their use of the Park prior to March 11, 2012. The City has now declared it will not renew the Agreement and plans to implement enforcement of the City Code provisions which provide closing hours for all City parks and prohibit camping. The City asserts that the lawn in the Park needs to be repaired and re-seeded and that the tent encampment restricts public access to and enjoyment of the Park. Plaintiffs assert that Occupy Rochester is in substantial compliance with the terms of the Agreement and that there is continued safe operation of the Park. The City argues that (1) renewal of the Agreement is not

mandatory under the plain language of the Agreement; (2) plaintiffs' contract interpretation would be unlawful alienation of park land by the City; and (3) even if the City were required to renew the Agreement upon substantial compliance with the terms of the Agreement, the City should be allowed to decline to renew the Agreement because Occupy Rochester has not substantially complied with the terms of the Agreement.

The Court's primary objective in contract construction is to give effect to the intent of the contracting parties as reflected in the language they have utilized (see *South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005]). Contractual terms are to be given their plain meaning (see *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (see *Greenfield*, 98 NY2d at 569). The proper interpretation of an unambiguous contract is a question of law for the Court, and the Court is not free to alter the contract to reflect its personal notions of fairness and equity (see *Thompson v McQueeney*, 56 AD3d 1254, 1257 [4th Dept 2008]).

Applying the above stated principles, the Court concludes that the Agreement is clear and unambiguous and permits the City to deny any renewal. The plaintiffs' assertion that the Agreement must be interpreted to provide Occupy Rochester repeated automatic renewals, essentially in perpetuity, if they are in substantial compliance with the terms contained therein, is without merit. If such was the parties' intention, the Agreement could have simply stated that Occupy Rochester

could remain in the Park as long as there was substantial compliance with the terms contained within the Agreement. Rather, by providing that the Agreement ended on January 11, 2012, and that it was renewable for additional periods of two months, the language indicates the intention that the City retains the right to deny additional two month renewals beyond January 11, 2012. Therefore, the Court declares that the City has the contractual right under the Agreement to deny additional periods of overnight use and camping and to require the removal of structures in the Park by plaintiffs and those associated with Occupy Rochester.

This conclusion is further supported in that the interpretation urged by plaintiffs could result in an impermissible alienation of the Park without legislative authority from the New York State Legislature. The public trust doctrine provides that dedicated parklands are "impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes" (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630 [2001] [footnote omitted]; NY Gen City Law §20[2]). Alienation occurs "when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored" (*Friends of Van Cortlandt Park*, 95 NY2d at 630).

It can be argued that the encampment, as an expression of the views of the members of the Occupy Rochester movement and protected free speech, constitutes a park purpose. While parks can be sites for the exercise of First Amendment rights, and, indeed the Park has been used on occasion for this

function, such is not their primary function nor is their use for such purposes unfettered (see *Clark v Community for Creative Non-Violence*, 468 US 288 [1984]). The Park is an urban park with no sanitary facilities and only one electrical source. Clearly, the Park is not intended as a camping park, but rather as a place for urban dwellers and workers, as well as others, to find respite. Were plaintiffs' interpretation of the Agreement adopted, the result could be a permanent encampment in the Park, to cease only when Occupy Rochester and its members decide to leave. Such a situation would impair use of the entire Park by all members of the public. Sustained camping, even if in furtherance of free speech, is clearly not an intended use of the Park and such activity could constitute an unlawful alienation (see *Williams v Gallatin*, 229 NY 248 [1920]). Therefore, the plaintiffs' interpretation of the Agreement is unsupportable.

Based upon the Court's ruling, it is unnecessary to reach the alternative argument raised by the City that there has not been substantial compliance with the terms and conditions of the Agreement.

ROCHESTER CITY CODE

The Court will now address plaintiffs' second argument that Rochester City Code §79-2(C) is unconstitutional. Relevant sections of the Rochester City Code are set forth as follows:

§79-2. Purpose; use of paths and walks; hours.

- A. The parks of the City of Rochester are for the benefit and pleasure of the public, and every person shall use said parks subject to the ordinances of the Council. The specific purpose of