UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATION OF CAR WASH OWNERS INC., *et al.*,

Plaintiffs,

-against-

CITY OF NEW YORK, *et al.*,

Defendants.

ORDER RESOLVING POST-TERMINATION MOTIONS

15 Civ. 8157 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Both plaintiffs and defendants move for reconsideration of my Amended Order of June 20, 2017 (the "June 20 Order") granting plaintiff Association of Car Wash Owners Inc., Zoom Car Spa LLC, and Five Star Hand Wash LLCs' summary judgment motion invalidating Section 20-542(b)(1) of N.Y.C. Local Law 62 ("Local Law 62"). I held in that order that Local Law 62 was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*. and that plaintiffs' equal protection under the law, due process of law, and 42. U.S.C. Section 1983 claims should be dismissed.

The parties now ask the Court to provide relief that they failed to argue in their original motions. Defendants seek to sever part of the law, severing Section 20-542(b)(1) from Local Law 62. Plaintiffs ask the Court to reinstate their Section 1983 claim under the theory that a right provided by the NLRA to organize was violated under color of law. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989). In order to prevent manifest injustice, I grant both motions.

I. FACTS

My June 20 Order states at length the facts that underlay this case, which I briefly reiterate here:

> New York City Local Law 62 for the Year 2015 ("Local Law 62"), codified at N.Y.C. Admin. Code §§ 20-539-546, was passed by the New York City Council on June 10, 2015. It was signed into law by Mayor Bill de Blasio on June 29, 2015. Although scheduled to take effect 180 days thereafter, or on December 26, 2015, the parties, by agreement, postponed the effective date.
>
> Local Law 62 makes it unlawful for a car wash business to operate without a license. N.Y.C. Code § 20-541(a). The condition for such a license is the posting of a surety payment bond in the amount of $150,000. However, if the car wash license applicant satisfies either of two conditions, the amount of the bond is reduced to $30,000. One condition is to be a party to a collective bargaining agreement that provides for the timely payment of wages and an expeditious process to resolve wage payment disputes. The second condition is to be covered by an active monitoring agreement that provides for the timely payment of wages, at least monthly monitoring by an independent monitor, and an expeditious process to resolve wage payment disputes, including a mechanism to ensure that funds are available to satisfy any award for unpaid wages. N.Y.C. Admin. Code § 20-542(b).

June 20 Order, at 2–3. Plaintiffs challenged Section 20-542(b)(1), alleging, *inter alia*, that the provision was preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*, and asserted a claim under Section 1983 for alleged violations of plaintiffs' constitutional rights to Equal Protection and Due Process. After dispositive motions were filed, I held that the NLRA preempted Section 20-542(b)(1), but dismissed plaintiffs' Section 1983 claim. *See* June 20 Order, at 11. An amended judgment was entered the same day. *See* ECF 86, Clerk's Judgment.

Defendants now ask the Court to amend the judgment to reflect that Section 20-542(b)(1) is severable from Local Law 62, and plaintiffs ask that their Section 1983 claim be reinstated.

II. DISCUSSION

For the reasons below, defendants' motion to sever is granted and plaintiffs' motion to reinstate its Section 1983 is also granted.

a. Defendants' Rule 59(e) Motion

"Rule 59(e) allows a district court 'to alter or amend a judgment.'" *ING Glob. v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 96 (2d Cir. 2014) (quoting Fed. R. Civ. P. 59(e)). Such a motion may be granted, *inter alia*, "[to] prevent manifest injustice." *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 153 (2d Cir. 2008) (quoting *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004)). "Rule 59(e) covers a broad range of motions, and the only real limitation on the type of the motion permitted is that it must request a substantive alteration of the judgment, not merely the correction of a clerical error, or relief of a type wholly collateral to the judgment." *Id.* (quoting 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice & Procedure* § 2810.1 (2d ed.2008) (footnote omitted)).

Accordingly, I consider defendants' motion to sever now, and I must determine whether the New York City Council intended that Section 20-542(b)(1) should be a severable part of Local Law 62. *See Gen. Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1460 (2d Cir. 1991) ("[T]he intent of the [legislative body] in originally enacting the statute is the touchstone in determining whether the remainder of the statute is severable and may be spared from the unconstitutional taint."). As Justice Cardozo, then of the New York Court of Appeals, explained:

> The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule

> will function if the knife is laid to the branch instead of at the roots.

People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 60 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921) (Cardozo, J.).

The evidence presented by defendants in their motion for rehearing shows that Section 20-542(b)(1) was intended to be severable from the rest of Local Law 62. The law contains numerous provisions in which the bond provision has no bearing, including that car wash companies be in compliance with any rules promulgated by the New York City Commissioner of Environmental Protection, that they maintain certificates of insurance for workers' compensation, unemployment insurance and disability insurance coverage, and that they keep detailed logs documenting complaints of damages to vehicles. *See, e.g.*, N.Y.C. Code §§ 20-541(d)(4), 20-544. Furthermore, Section 20-542(b)(2) authorizes the reduced $30,000 bond in the presence of an active monitoring agreement without need to enter into a collective bargaining agreement. These provisions are strong indications that the City Council intended for the existence of some regulations over the car wash industry, independent of the existence of the bond provision, and warrant severance. *Gen. Elec. Co.*, 936 F.2d at 1460 ("[L]egislative policy should be given effect unless application of the portion of a statute remaining after partial invalidation yields results . . . [that] make it likely that the legislature would prefer either no provision or the opportunity to craft a new one." (quoting *Doyle v. Suffolk Cty.*, 786 F.2d 523, 527 (2d Cir. 1986))).

Section 3 of Local Law 62 also contains a clear and unambiguous severability clause:

> If any portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable,

> and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this local law, which remaining portions shall continue in full force and effect.

Local Law 62, § 3. The inclusion of this clause indicates the New York City Council's "general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid." *Greater N.Y. Metro. Food Council*, 195 F.3d at 110 (citing *National Adver. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (noting that "the preference for severance is particularly strong when the law contains a severability clause"))). Enforcing the remainder of Local Law 62 will thus give effect to the City Council's express legislative intent. *See Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 88 (2d Cir. 2015) (enforcing remainder of law although one provision was held preempted). Defendants' motion is therefore granted.

b. Plaintiffs' Motion to Reinstate Plaintiff's Section 1983 Claim

In their moving brief, plaintiffs explicitly argued that their rights to equal protection of the laws and due process were violated and that these violations gave them the right to sue for damages pursuant to 42 U.S.C. Section 1983. *See* Pl. Reply Brief, ECF 56, at 32–33 ("There can be no question that . . . if a violation of either the Equal Protection or Due Process clauses is proven, that would constitute a deprivation of a federal right. In their Complaint, Plaintiffs specifically identified constitutional violations of Equal Protection and Due Process, which Defendants concede may be asserted via a § 1983 claim." (internal citations omitted)). Accordingly, in my June 20 Order dismissing the claim, I held "that Local Law 62 does not infringe plaintiffs' equal protection and due process rights, there is no underlying violation of a federal right on which plaintiffs can base a Section 1983 claim." June 20 Order, at 9.

Plaintiffs now file a motion for reconsideration, arguing that their federal right that was violated was not their constitutional rights to equal protection or due process, but a right conferred by the NLRA, 29 U.S.C. § 151 *et seq.*, not to be compelled to recognize a union in their workers exclusive bargaining agreement. Plaintiffs argue that the Court "erred" in not considering this theory. It did not. Plaintiffs did not prosecute their case under this new theory, and it is well established that "[n]ew arguments which could have been raised previously may not be raised on a motion for reconsideration." *CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 2014 WL 4961769, at *1 (S.D.N.Y. Oct. 3, 2014) (quoting *Thypin Steel Co. v. Certain Bills of Lading,* 1999 WL 108728, at *1 (S.D.N.Y. Mar. 3, 1999)).

However, in light of my decision to entertain defendants' motion to sever Section 20-542(b)(1) despite my finding that defendants "failed to properly raise [that] issue before the Court", and to prevent manifest injustice, I extend that same courtesy to plaintiffs now. Order Regulating Post-Termination Motions and Proceedings, ECF 85, at 2; *see United States v. Diallo*, 40 F.3d 32, 35 (2d Cir. 1994) ("Turnabout is fair play, even in the federal courts."). I do not, however, consider plaintiffs' motion as a motion for reconsideration, but rather, I exercise my discretion to consider it as a motion to reinstate plaintiffs' Section 1983 claim.

Plaintiffs motion is granted. In *Golden State Transit Corp. v. City of Los Angeles*, the Supreme Court held that the NLRA "gives [] rights enforceable against governmental interference in an action under § 1983." 493 U.S. 103, 109 (1989). Therefore, an actionable Section 1983 claim arises when the government interferes with the collective-bargaining process in violation of the NLRA. *Id.* Having held that Section 20-542(b)(1) impermissibly intrudes on the labor-management bargaining process, I now find that plaintiffs Section 1983 claim is reinstated.

Plaintiff, however, does not allege that it, or its members, suffered damages other than the cost of this litigation. It is unlikely that any damages were suffered because, by agreement, Local Law 62 never became effective.[1] Plaintiffs' apparent reason for seeking to allege a Section 1983 claim is to be able to recover attorneys' fees. *See* 42 U.S.C. § 1988. However, an award would be discretionary, and the Court need not go so far in this order. *See Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 228 (2d Cir. 2004) ("The statute governing the award of attorneys' fees in § 1983 actions, 42 U.S.C. § 1988(b), provides that 'the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.' (quoting 42 U.S.C. § 1988(b)) (emphasis added)).

The issues related to attorneys' fees have not been briefed. The parties shall submit a briefing schedule to the Court by September 8, 2017 to address this issue, with submissions to be completed by October 16, 2017.

III. CONCLUSION

For the reasons stated on the record, defendants' motion to amend the judgment to provide that Section 20-542(b)(1) is severed from Local Law 62 is granted.

The parties shall settle an amendment to the amended judgment of June 20, 2017 to accomplish the severance. Plaintiffs' motion to reinstate their Section 1983 is also granted. The Clerk shall terminate the pending motions (ECF 77 and 79).

SO ORDERED.

Dated: New York, New York
August 31, 2017

ALVIN K. HELLERSTEIN
United States District Judge

[1] The parties to this case stipulated that Local Law 62 would not take effect until plaintiffs' motion for summary judgment was decided and that this case would be stayed pending adoption of implementing rules by the New York City Department of Consumer Affairs. See ECF 18, Ex. 1 (Stipulation).