

13-598-cv

Eric M. Berman, P.C., et al. v. City of New York, et al.

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2013

6
7 (Argued: December 13, 2013

Decided: August 5, 2015)

8
9 Docket No. 13-598-cv

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13 ERIC M. BERMAN, P.C., LACY KATZEN, LLP,

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16 *Plaintiffs-Appellees,*

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18 v.

19
20 CITY OF NEW YORK, NEW YORK CITY COUNCIL,
21 NEW YORK CITY DEPARTMENT OF CONSUMER
22 AFFAIRS, JULIE MENIN, in her official capacity
23 as the Commissioner of the New York City
24 Department of Consumer Affairs,

25
26 *Defendants-Appellants.**

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30 Before: POOLER, PARKER, and CHIN, *Circuit Judges.*

* The Clerk of the Court is directed to amend the caption as above. Julie Menin is automatically substituted for Jonathan Mintz pursuant to Fed. R. App. P. 43(c)(2).

1 Defendants-Appellants the City of New York, the New York City Council,
2 the New York City Department of Consumer Affairs, and Commissioner of the
3 New York City Department of Consumer Affairs Julie Menin appeal from the
4 February 14, 2013 judgment of the United States District Court for the Eastern
5 District of New York (Eric N. Vitaliano, *J.*) granting, in relevant part, Plaintiffs-
6 Appellees Eric M. Berman, P.C. and Lacy Katzen, LLP's motion for summary
7 judgment. The district court concluded that New York State's authority to
8 regulate attorney conduct preempted a New York City law regulating certain
9 debt collection activities of attorneys ("Local Law 15"). In our previous opinion in
10 this case, we certified two questions underlying the district court's preemption
11 analysis to the New York Court of Appeals. The Court of Appeals subsequently
12 concluded that New York State's authority to regulate attorney conduct does not
13 preempt Local Law 15. Consistent with the Court of Appeals' opinion, we vacate
14 the judgment of the district court in relevant part and remand for further
15 proceedings consistent with this opinion.

16 Vacated and remanded.

17 _____

1 JANET L. ZALEON, Assistant Corporation Counsel
2 (Michael A. Cardozo, Corporation Counsel of the City
3 of New York, Kristin M. Helmers, Nicholas R.
4 Ciappetta, *on the brief*), New York, NY, *for Defendants-*
5 *Appellants.*

6
7 MAX S. GERSHENOFF, Rivkin Radler, LLP (Evan H.
8 Krinick, Cheryl F. Korman, Michael P. Versichelli, *on the*
9 *brief*), Uniondale, NY, *for Plaintiffs-Appellees.*

10
11 Carolyn E. Coffey, MFY Legal Services, Inc., New York,
12 NY; Theodora Galacatos, Feerick Center for Social
13 Justice, New York, NY; Claudia Wilner, New Economy
14 Project, Inc., New York, NY, *counsel for amici curiae in*
15 *support of Defendants-Appellants.*

16
17 PER CURIAM:

18 This case returns to us following certification to the New York Court of
19 Appeals. Defendants-Appellants the City of New York, the New York City
20 Council, the New York City Department of Consumer Affairs, and Commissioner
21 of the New York City Department of Consumer Affairs Julie Menin appeal from a
22 judgment of the United States District Court for the Eastern District of New York
23 (Eric N. Vitaliano, *J.*), entered on February 14, 2013. In relevant part, the district
24 court granted Plaintiffs-Appellees Eric M. Berman, P.C. and Lacy Katzen, LLP's
25 motion for summary judgment, deeming New York City's Local Law 15 void as
26 applied to law firms that seek to collect debts. Finding Local Law 15's regulation

1 of certain attorney debt collection practices in conflict with New York State's
2 authority to regulate attorney conduct, the district court concluded that the
3 provision was preempted by State law. *Eric M. Berman, P.C. v. City of New York*,
4 895 F. Supp. 2d 453, 469–73 (E.D.N.Y. 2012) (“*Berman I*”).

5 In our prior opinion, recognizing that Plaintiffs’ challenge “raise[d]
6 unresolved and significant issues concerning the scope of New York State’s
7 regulatory authority over attorneys,” we certified two questions underlying the
8 district court’s preemption analysis to the New York Court of Appeals. *Eric M.*
9 *Berman, P.C. v. City of New York*, 770 F.3d 1002, 1003 (2d Cir. 2014) (“*Berman II*”).
10 In response to our certified questions, the Court of Appeals has now held that
11 Local Law 15 is “not preempted” by New York State’s authority over attorney
12 conduct. *Eric M. Berman, P.C. v. City of New York*, --- N.E.3d ----, 2015 WL 3948182,
13 slip. op. at 2 (N.Y. June 30, 2015) (“*Berman III*”). Given the Court of Appeals’
14 holding, we vacate the district court’s judgment in relevant part and remand for
15 further proceedings consistent with this opinion.

16 BACKGROUND

17 The background of this case is set forth in greater detail in our previous
18 opinion. See *Berman II*, 770 F.3d at 1003–05; see also *Berman I*, 895 F. Supp. 2d at

1 458–65. We assume familiarity with the prior opinions in this case, offering an
2 abbreviated recitation of the facts and procedural history.

3 New York City Local Law 65 regulates debt collection agencies, and, inter
4 alia, requires such agencies to obtain a license prior to engaging in debt collection
5 activities. As originally enacted, the law excluded from its definition of debt
6 collection agencies “any attorney-at-law collecting a debt as an attorney on behalf
7 of and in the name of a client.” App’x at 166.

8 In 2009, New York City enacted Local Law 15, amending Local Law 65.
9 Local Law 15 changed the definition of “debt collection agencies,” stating that the
10 term does not include:

11 *any attorney-at-law or law firm collecting a debt [as an attorney] in*
12 *such capacity on behalf of and in the name of a client solely through*
13 *activities that may only be performed by a licensed attorney, but not any*
14 *attorney-at-law or law firm or part thereof who regularly engages in*
15 *activities traditionally performed by debt collectors, including, but not*
16 *limited to, contacting a debtor through the mail or via telephone with the*
17 *purpose of collecting a debt or other activities as determined by rule of the*
18 *commissioner*

19
20 N.Y.C. Admin. Code § 20-489(a)(5) (newly added language in italics and omitted
21 language in brackets). Local Law 15 also re-defined debt collection agency to
22 include:

1 a person engaged in business the principal purpose of which is to
2 regularly collect or attempt to collect debts owed or due or asserted
3 to be owed or due to another *and shall also include a buyer of delinquent*
4 *debt who seeks to collect such debt either directly or through the services of*
5 *another by, including but not limited to, initiating or using legal processes*
6 *or other means to collect or attempt to collect such debt.*

7
8 *Id.* § 20-489(a) (newly added language in italics).

9 Plaintiffs are law firms that attempt to collect debts. They brought this
10 action seeking, inter alia, a declaratory judgment that Local Law 15 violates New
11 York State law and the New York City Charter. Plaintiffs argue that “it is the
12 New York State Judiciary, not municipal governments, that has the sole authority
13 to regulate attorney admissions, practice, and conduct,” App’x at 22 ¶ 41. They
14 contend that by policing attorney conduct related to debt collection, Local Law 15
15 intrudes upon New York State’s authority to regulate the practice of law.

16 The parties cross-moved for summary judgment, and, as relevant here, the
17 district court granted Plaintiffs summary judgment on their claim that Local Law
18 15 conflicted with New York State’s authority to regulate attorneys. The district
19 court concluded that Local Law 15 was invalid, as its restrictions on debt
20 collection activity constituted an impermissible attempt to regulate attorney
21 conduct and the practice of law. *See Berman I*, 895 F. Supp. 2d at 469 (concluding

1 that Local Law 15 was “in direct conflict with New York Judiciary Law §§ 53 and
2 90”). The district court also concluded summarily that Local Law 15 violated
3 Section 2203(c) of the New York City Charter. *Id.* at 470. By providing the
4 Commissioner of the City Department of Consumer Affairs with the effective
5 authority to license attorney conduct, Local Law usurped a function reserved to
6 the State. *See id.* Defendants appealed the district court’s decision.

7 In our prior opinion, we determined that Plaintiffs’ challenge to Local Law
8 15 “raise[d] unresolved and significant issues concerning the scope of New York
9 State’s regulatory authority over attorneys.” *Berman II*, 770 F.3d at 1003. Thus, we
10 certified the following two questions to the New York Court of Appeals:

- 11 1. Does Local Law 15, insofar as it regulates attorney conduct,
12 constitute an unlawful encroachment on the State’s authority to
13 regulate attorneys, and is there a conflict between Local Law 15 and
14 Sections 53 and 90 of the New York Judiciary Law?
15
- 16 2. If Local Law 15’s regulation of attorney conduct is not preempted,
17 does Local Law 15, as applied to attorneys, violate Section 2203(c) of
18 the New York City Charter?

19 *Id.* at 1009–10. The Court of Appeals accepted certification, and in an opinion
20 issued June 30, 2015, answered the first question in the negative, finding “no
21 conflict between Local Law 15 and the State’s authority to regulate attorneys.”

1 *Berman III*, slip. op. at 10; *but see id.* at 11 (Fahey, J., dissenting) (concluding that
2 Local Law 15 “is preempted by State law pursuant to the doctrine of field
3 preemption”). The Court of Appeals reformulated the second question as
4 follows: “If Local Law 15’s regulation of attorney conduct is preempted, does
5 Local Law 15, as applied to attorneys, also violate Section 2203(c) of the New
6 York City Charter?” *Id.* at 10. Having reformulated the second question as
7 conditional on an affirmative answer to the first, the Court of Appeals declined to
8 reach the issue. Rather, the Court of Appeals instructed that the second question
9 “should be answered in accordance with [its] opinion.” *Id.*

10 DISCUSSION

11 The Court of Appeals’ opinion resolves this appeal in favor of Defendants.
12 With respect to our first certified question, the Court of Appeals “conclude[d]
13 that there is no conflict between Local Law 15 and the State’s authority to
14 regulate attorneys,” as set out in Sections 53 and 90 of the New York Judiciary
15 Law. *Id.* Although Local Law 15 regulates certain debt collection activities that
16 may be performed by attorneys, “it does not purport to regulate attorneys as
17 such” and specifically excludes “attorneys who are engaged in the practice of law
18 on behalf of a particular client.” *Id.* at 7. Thus, according to the Court of Appeals,

1 “[t]here is no express conflict between the broad authority accorded to [New
2 York State] courts to regulate attorneys under the Judiciary Law and the licensing
3 of individuals as attorneys who are engaged in debt collection activity falling
4 outside of the practice of law.” *Id.* In addition, the New York State Judiciary’s
5 “authority to regulate attorney conduct does not evince an intent to preempt the
6 field of regulating nonlegal services rendered by attorneys.” *Id.* at 9. Accordingly,
7 consistent with the Court of Appeals’ opinion, we conclude that the district court
8 erred in finding that Local Law 15 impermissibly interferes with the State’s
9 authority to regulate attorney conduct.

10 The Court of Appeals’ analysis also effectively resolves our second
11 question – whether Local Law 15 runs afoul of Section 2203(c) of the New York
12 City Charter. The Court of Appeals instructed that this question “should be
13 answered in accordance with [its] opinion,” *id.* at 10, and as we recognized
14 previously, “[t]his issue is substantially intertwined with the issues . . .
15 concerning the scope of the State’s authority to regulate attorneys,” *Berman II*, 770
16 F.3d at 1009. Section 2203(c) grants the Commissioner of the Department of
17 Consumer Affairs power over the issuance of licenses, “except . . . to the extent to
18 which any of said powers are conferred on other persons or agency by laws.”

1 N.Y.C. Charter § 2203(c). Having determined that Local Law 15’s restrictions
2 inappropriately regulated the practice of law, the district court concluded that
3 any associated licensing regime *also* violated Section 2203(c), as licensing of the
4 practice of law is a power vested with the State. However, the Court of Appeals’
5 opinion removes the logical premise for this conclusion. Given “the absence of” a
6 “conflict between Local Law 15 and the State’s authority to regulate attorneys,”
7 *Berman III*, slip. op. at 10, the licensing provisions of Local Law 15 do not usurp
8 the State’s authority to license the practice of law. Consequently, Local Law 15
9 does not conflict with Section 2203(c) of the City Charter.

10 Because the district court erred in rejecting Local Law 15 on preemption
11 grounds, we vacate its judgment in relevant part. We decline Plaintiffs’ invitation
12 to affirm on grounds not reached below. Before the district court, Plaintiffs also
13 challenged Local Law 15’s regulation of attorney conduct as unconstitutionally
14 vague, both on its face and as applied. In light of its preemption analysis, the
15 district court never decided this question. *See Berman I*, 895 F. Supp. 2d at 501
16 (deeming it “unnecessary for the Court to address plaintiffs’ vagueness claim
17 insofar as it relates to the regulation of attorneys or law firms”). Though Plaintiffs
18 reiterate their vagueness challenge on appeal, “[i]t is this Court’s usual practice to

1 allow the district court to address arguments in the first instance." *Dardana Ltd. v.*
2 *Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir. 2003). Consistent with our typical
3 practice, we leave Plaintiffs' vagueness challenge to be addressed on remand.¹

4 CONCLUSION

5 For the foregoing reasons, the judgment of the district court is vacated in
6 relevant part. We remand for further proceedings consistent with this opinion.

¹ Although the district court explicitly declined to address Plaintiffs' present vagueness arguments, it noted in addressing a related vagueness question that "it is doubtful that plaintiffs have standing to assert either their facial or as applied claim." *Berman I*, 895 F. Supp. 2d at 502. While we take no position on this issue, we note similar concerns regarding Plaintiffs' present vagueness challenge. On remand, consistent with its "independent obligation to examine [its] own jurisdiction," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), the district court should assure itself of Plaintiffs' standing to assert their facial and as applied challenges, including by exploring how any alleged vagueness relates to Plaintiffs' conduct.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: August 05, 2015
Docket #: 13-598cv
Short Title: Eric M. Berman, P.C. v. City of New
York

DC Docket #: 09-cv-3017
DC Court: EDNY (BROOKLYN)
DC Judge: Pollak
DC Judge: Vitaliano

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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Date: August 05, 2015
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DC Judge: Pollak
DC Judge: Vitaliano

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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York

DC Docket #: 09-cv-3017
DC Court: EDNY (BROOKLYN)
DC Judge: Pollak
DC Judge: Vitaliano

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website <http://www.ca2.uscourts.gov>.

Judgment was entered on August 5, 2015; and a mandate will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to 212-857-8523.