

21-2711

United States Court of Appeals
for the
Second Circuit

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS
STRK and SARAH BUZAGLO,

Plaintiffs-Appellants,

– v. –

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his Official
Capacity of Health Commissioner of the City of New York, and MEISHA
PORTER, in her official capacity as Chancellor of the New York City
Department of Education,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE VALERIE E. CAPRONI

**SUPPLEMENTAL DECLARATION IN SUPPORT OF
PLAINTIFFS-APPELLANTS' EMERGENCY MOTION**

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JONATHAN ROBERT NELSON, an attorney admitted to the bar of this Court, declares as follows under penalty of perjury pursuant to 28 U.S.C. Sec. 1746:

1. I am a partner in the law firm of Nelson Madden Black LLP, the attorneys for the Plaintiff-Appellants in this cause. I submit this declaration as a supplement to our clients' emergency motion for relief herein (2d Cir. 21-2711 ECF No. 17) (the "Motion"), and in compliance with Rule 8 of the Federal Rules of Appellate Procedure ("FRAP").
2. On Monday, November 1, 2021, by letter (SDNY 21-cv-08773 ECF No. 39) I asked District Judge Valerie E. Caproni, the judge in the instant matter below, for the following relief pursuant to Rule 62(d) of the Federal Rules of Civil Procedure:

Pursuant to Rule 62(d), Plaintiffs respectfully request that this Court grant an injunction as requested in our motion papers or, alternatively, a stay of enforcement of Commissioner Chokshi' s vaccine mandates dated September 15 and September 28, 2021, pending interlocutory appeal of this Court's October 28, 2021 order denying Plaintiffs' motion for a preliminary injunction. Plaintiffs rely on the papers submitted previously in support of the aforesaid motion, and note that Defendants have clearly shown their intention to fire the Plaintiffs and, on information and belief, thousands of other Department of Education employees who similarly have refused to "elect" either to take voluntary leave without pay or to accept a forced resignation beginning on December 1, 2021.

3. This morning, the Court posted Judge Caproni's order (SDNY 21-cv-08773 ECF No. 40), endorsed as a memo on Plaintiffs' letter motion, denying the above-quoted request for relief.
4. On October 28, 2021, Plaintiffs-Appellants filed their pending Motion pursuant to FRAP Rule 8. This court denied the request for a temporary restraining order but set an expedited briefing schedule for the application for a preliminary injunction, pending appeal.
5. Subsequently, a hearing was scheduled on the Motion for Wednesday, November 10, 2021.
6. Because of the emergent nature of the Plaintiffs-Appellants' litigation, and because it was impracticable and seemed likely to be fruitless, counsel for the plaintiffs-appellants did not immediately file a F.R.Civ.P. Rule 62(d) motion with the District Court when the instant Motion was filed in this Court.
7. The motion in this court requested, *inter alia*, a stay of a deadline imposed by the Defendants-Respondents that passed on October 29, 2021. Plaintiffs-Appellants filed this Motion at 4:43PM on Thursday, October 28, 2021, requesting immediate relief by 9:00AM the next morning. It was impracticable to expect the district court to rule on our Rule 62(d) motion swiftly enough to permit us to wait until then to ask this court for emergency

relief, considering that we had only a few hours before the deadline to file the instant Motion in this court.

8. It also seemed likely to be fruitless to ask the district court to grant an injunction, TRO and stay since the district court had already denied our request for a TRO and preliminary injunction and had denied a similar Rule 62(d) motion in *Kane v. De Blasio* (SDNY 21-cv-07863 ECF No. 70).
9. We respectfully submit that the above-referenced Rule 62(d) motion satisfies the requirement of FRAP Rule 8(a) requiring that the movant move in the district court. Because Plaintiffs-Appellants filed their Rule 8 Motion with this Court on October 28, 2021, we respectfully ask the Court to consider the district court motion, and the instant declaration, to have been filed *nunc pro tunc*.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: New York, New York
November 3, 2021

Respectfully submitted,

NELSON MADDEN BLACK LLP

/s/ Jonathan Robert Nelson

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TO: Counsel of Record (via ECF)