

<b>New York City Campaign Finance Board v Villaverde</b>
2002 NY Slip Op 30100(U)
November 27, 2002
Supreme Court, New York County
Docket Number: 405076/01
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN

PART 5

*Justice*

Nyc Campaign Finance Board

INDEX NO.

405 076-01

MOTION DATE

10/16/02

MOTION SEQ. NO.

01

MOTION CAL. NO.

021 91

Sergio Villaverde

The following papers, numbered 1 to 5 were read on this motion to/for Disc

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Notice of x m - psj

Answering Affidavits – Exhibits

Replying Affidavits

Add'l Villa Verde Affidavit

city's letter - memos & fax

Cross-Motion:  Yes  No

PAPERS NUMBERED

1  
**SCANNED**

3  
DEC 10 2002

4  
5

Upon the foregoing papers, it is ordered that this motion

**"is determined in accordance with the annexed memorandum decision and order."**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/27/02



J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5**

-----X  
New York City Campaign Finance Board,

**Index No. 405076/01**

Plaintiff,

**Decision and Order**

-against-

Sergio Villaverde, Irene Thomas, Adolph Montgomery,  
Adolph Montgomery as Treasurer for Sergio '97,  
and Sergio '97,

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

Defendant Villaverde moved, inter alia, to dismiss the complaint, or in the alternative for an order transferring this case to Civil Court, New York County pursuant to CPLR 325(d). Plaintiff cross-moved for partial summary judgment based upon the first and second causes of action in the verified complaint against defendant Villaverde in the sum of \$6,708 plus interest and penalties.

By interim order dated August 22, 2002 this Court converted the instant motion to dismiss the complaint to a motion for summary judgment pursuant to CPLR 3211(c). The Court permitted the parties to submit additional proof and restored this case for final submission on October 16, 2002. Defendant Villaverde submitted an affidavit<sup>1</sup> in which he states, inter alia, that he represents only himself; plaintiff submitted a memorandum of law and a recent case, NYC Campaign Finance Bd. v. Lynn, Index Number 405097/01, n.o.r.

In 1997, Villaverde was a candidate for the District 14 seat of the New York City Council. He joined the New York City Campaign Finance Program, a voluntary government reform program that provides matching funds to candidates running for various city office's, including City Council

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<sup>1</sup> While Villaverde is an attorney, he is a party to this action and as such, must submit an affidavit, not an affirmation. See CPLR § 2106.

member, which is administered by the New York City Campaign Finance Board, and received \$7,764 in public funds to help run his political campaign. The Board determined that Villaverde was required to repay these public funds pursuant to the terms and conditions of the New York City Campaign Finance Act because (1) he failed to adequately document how his campaign spent these public funds, and (2) he had unspent campaign funds remaining after the 1997 elections.

Villaverde joined the Program on April 2, 1997 by submitting a Certification form required under Admin. Code § 3-703(1)(c) and Rule 2-01. By signing and submitting the Certification, Villaverde agreed to “abide by the terms and conditions of the Act and the Rules applicable to the 1997 elections,” including “the repayment of public funds and/or civil penalties imposed pursuant to Administrative Code §§ 3-710 and 3-711.”

Villaverde’s campaign designated defendant “Sergio ‘97” as the principal campaign committee required to file financial disclosure statements with the Board and designated defendant Irene Thomas as the treasurer of Sergio ‘97. On August 8, 1997, the campaign submitted an amended Principal Committee Designation form which replaced Thomas with defendant Adolph Montgomery as the treasurer of Sergio ‘97.

Based on contributions reported in financial disclosure statements that Villaverde filed with the Board, he received \$7,764 in public funds from the Board.

Thereafter, the Board performed a routine post-election audit of Villaverde’s campaign. The Board issued a draft audit report on March 31, 1999 and a further request for information and documentation on August 11, 1999. Both of these documents requested that the campaign submit documentation demonstrating that the \$7,764 in public funds received by Villaverde were spent on qualified campaign expenditures. Villaverde failed to submit satisfactory documentation for his

expenditures. In addition, both documents set forth the Board's preliminary finding that the campaign had funds which it did not spend following the 1997 elections, and requested that Villaverde submit an explanation and supporting documentation if he disagreed with this finding.

On February 3, 2000, the Board issued a final determination and a Final Audit Report for Villaverde's campaign which stated that the Villaverde campaign "must repay \$7,764 in public funds." That repayment obligation is also explained in the first paragraph of the cover letter to the Final Audit Report, and pages 3-5 and appendix 2 of the report.

Following the February 3, 2000 final determination and Final Audit Report, the Board attempted to collect the \$7,764 repayment of public funds by sending to Villaverde eight letters dated August 31, 2000 through May 9, 2001. The Board permitted the candidate to satisfy \$1,056 of this repayment obligation through the belated submission of documentation of his expenditures. The Board's letter of May 9, 2001 demanded the immediate repayment of the balance of \$6,708 in public funds. Villaverde did not respond to the letter by submitting documentation or by repaying the \$6,708 balance.

The first cause of action of the Board's verified complaint seeks the repayment of public funds in the amount of \$6,708 pursuant to NYC Adm. Code § 3-710(2)(b) and Rule 5-03(d) on the ground that Villaverde failed to document that public funds that he received were spent on qualified campaign expenditures, in addition to a civil penalty of up to \$10,000 pursuant to Admin. Code § 3-711(1).

The second cause of action demands the repayment of the \$6,708 balance due pursuant to Admin. Code § 3-710(2)(c) and Rule 5-03(e) on the ground that Villaverde had unspent campaign funds following the 1997 elections, and the imposition of a civil penalty of up to \$10,000 pursuant to Admin. Code § 3-711(1) because of Villaverde's refusal either to produce requested

documentation or to repay these funds.

The Board commenced this plenary action on or about August 31, 2001; Villaverde was personally served on September 4, 2001. Plaintiff concedes that while Villaverde and Montgomery were served personally, Thomas was never served.

Villaverde, a practicing attorney, did not commence an Article 78 proceeding or any other court action to challenge the Board's February 3, 2000 final determination. An agency's determination, including the assessment of a penalty, can be challenged only by a timely –commenced Article 78 proceeding. See CPLR 7801, et seq. Pursuant to CPLR § 217(1), any challenge to an agency determination must be filed within four months of that determination. By this motion, served on April 5, 2002 – approximately seven months after the complaint and more than two years later after that determination, Villaverde seeks to challenge the determination for the first time.

Failure to seek timely Article 78 review of an agency's determination precludes a collateral challenge to that determination in subsequent litigation. See e.g., Lewis Tree Service v. Fire Department of the City of New York, 66 NY2d 667, 669. See Cahill v. Harter, 277 AD2d 655 (defendants may not collaterally attack the propriety of the orders in an enforcement proceedings having failed to avail themselves of Article 78 review).

In this motion to dismiss the complaint, Villaverde is apparently arguing that the Board erroneously determined that the documentation submitted was insufficient and that the Board lacks the legal authority to demand the repayment of public funds. Because Villaverde failed to raise these objections to the Board's February 3, 2000 determination – his exclusive means of contesting that determination – he waived any right to dispute the repayment determination in this enforcement proceeding.

Villarverde has not raised any triable issue of fact concerning whether the Board's February 3, 2000 determination was a final determination, or that the Board acted arbitrarily or capriciously.

The Act provides that civil penalties of up to \$10,000 may be imposed for violations of its provisions. Admin. Code § 3-711(1). In this case, Villarverde: (1) failed to submit documentation requested by the Board that would verify compliance with Program requirements (in violation of Admin. Code § 3-703(1)(d)); (2) failed to demonstrate that his public funds were spent on qualified campaign expenditures (in violation of Admin. Code § 3-704); and (3) refused to repay unspent campaign funds and public funds that were not spent on qualified campaign expenditures (in violation of Admin. Code § 3-710(2)(b) and (c)). The record discloses an undisputed pattern of Villarverde's lack of compliance and stone walling. Because of the violations of the Act, and the pattern of evasion, the Court imposes a penalty of \$6,708, equivalent to the improper gain Villarverde attempted to use for his individual benefit, for these violations pursuant to Admin. Code § 3-711(1). Retention of these public monies was a violation of the public trust. It is appropriate that the penalty equal defendant's attempted gain at public expense.

**As** for plaintiffs motion seeking dismissal of defendants' committee treasurers, Adolph Montgomery and Irene Thomas, it is undisputed that Thomas was never served with the summons and complaint. Montgomery is in default. They each signed an agreement with the Board different from the form Villarverde signed, the Principal Committee Designation form, in which they explicitly agreed to abide by the requirements of the Program and to be liable for civil penalties. This agreement provided in pertinent part:

I accept and agree to abide by the terms of the Certification submitted by the candidate and understand that those terms apply to all political committees authorized by the candidate that have been or will be involved in the 1997 elections. I understand that failure to abide by

the requirements of the Act or Rules may result in the imposition of such penalties as are provided in Section 3-711 of the Act and any other applicable law or rules.

Additionally, Admin. Code § 3-710(1) expressly states that “any principal committee treasurer ... shall be subject to a civil penalty” if a violation of the Act or Board Rules is committed. Rules 5-03(d) and (e) specifically state that “the participant” shall repay public funds if there are unspent campaign funds after an election or if the participant has not demonstrated that public funds were spent on qualified campaign expenditures. The definition of “participant” in Rule 1-02 explicitly includes the committee treasurer: “Unless otherwise noted, ‘participant’ ... include[s] the candidate and every political committee authorized by the candidate, the treasurer of each such committee, and any other agent of the candidate.” (Emphasis added). However, Thomas was never served, and there is no evidence that she was party to any wrongdoing.

Accordingly, it is **ORDERED** that branch of the main motion to dismiss the complaint as against Thomas is granted and that branch to dismiss as against Montgomery is denied. Defendant shall move to enter a default judgment or discontinue against Montgomery without delay.

Accordingly, since the Board has demonstrated entitlement to partial summary judgment as a matter of law on the first two causes of action of the complaint, it is

**ORDERED** that plaintiff may recover judgment against defendant Villaverde in the sum of \$6,708 plus interest accruing from February 3, 2000; and \$6,708 penalty plus interest accruing from the date of judgment, plus costs and disbursements.

The balance of the relief sought in the main motion, disqualification of the Board’s staff attorneys and transfer to Civil Court is denied as moot.

This constitutes the decision and order of the Court.

**Dated: November 27, 2002**

**ENTER:**



**MICHAEL D. STALLMAN, J.S.C.**