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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. SHIRLEY WERNER KORNREICH PART 54
Justice

NYC CAMPAIGN FINANCE BOARD,

Plaintiff,

- v -

CHISTOPHER R. LYNN and CHRISTOPHER R. LYNN-CITY COUNCIL - 1999,

Defendants.

INDEX NO. 405097/01

MOTION DATE 04/25/02

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	3-8
Replying Affidavits	9-13

Cross-Motion: ☒ Yes ☐ No

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/21/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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NEW YORK CITY CAMPAIGN FINANCE BOARD,

Plaintiff,

Index No.: 405097/01

-against-

DECISION, ORDER and JUDGMENT

CHRISTOPHER R. LYNN and CHRISTOPHER R. LYNN - CITY COUNCIL - 1999,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

I. FACTUAL AND PROCEDURAL BACKGROUND:

A. Parties:

Plaintiff New York City Campaign Finance Board ("CFB") is responsible for administering New York City's Campaign Finance Program. A candidate for public office who wishes to receive public matching funds must enter into an agreement with the CFB, according to which he consents to abide by the requirements of the Campaign Finance Act ("the Act"). Under those requirements, the candidate must, inter alia, (a) accept a cap on the total amount of money his committee may spend to promote his nomination or election; (b) file periodic disclosure statements reporting the contributions received by his committee, the committee's expenditures, and other transactions; and (c) respond to requests by the CFB for documentation and information to verify the committee's compliance with the requirements of the Act. See New York City Administrative Code ("Admin. Code"), Secs. 3-701 *et seq.*

According to the express language of the enabling legislation, the CFB is authorized to promulgate whatever rules and take whatever actions it deems necessary for the effective administration of the Campaign Finance Program. Admin. Code. 3-708(8), (11). Under Rule 1-08(L)(1) promulgated by the CFB, "[p]articipants shall monitor whether their total expenditures exceed the limit of 3-706(1) of the [Administrative] Code and have the burden of demonstrating that expenditures are exempt." See also Admin. Code 3-703(1).

Defendant Christopher R. Lynn was a candidate for the New York City Council, District 3, in the February 1999 Special Election ("Lynn"). Codefendant Christopher R. Lynn - City Council - 1999 was the principal committee designated by Lynn as responsible for submitting financial disclosure statements to the CFB on behalf of Lynn and his candidacy" ("the Committee"). Collectively the defendants are referred to herein as "the Lynn campaign," "Lynn," or "the defendants."

On January 8, 1999, Lynn endorsed and filed a "candidate certification" in which he agreed to abide by all of the requirements of the Act and Rules, under threat of imposition of

> such penalties as are provided in Section 3-711 of the Act and any other applicable law or rules. I further understand that I and the principal committee I designate for the 1999 special elections may be jointly and severally liable for the repayment of public funds and/or civil penalties imposed pursuant to Sections 3-710 and 3-711 of the Act.

During the months leading up to the February 1999 Special Election, the CFB disbursed $71,700 in public matching funds to Lynn's committee for his campaign to be elected to the City Council.

B. Post-election administrative proceedings:

During a routine post-election audit of the Lynn campaign, the CFB concluded that Lynn had exceeded the $137,000 spending limit for City Council candidates by $45,439. When told,

the Lynn campaign responded that many of its expenditures were exempt from the statutory limits. The CFB demanded that Lynn support his exemption claims with the required documentation pursuant to Admin. Code 3-706(4) and Rule 1-08(L). Roughly three weeks after Lynn's submissions were due, his campaign submitted evidence purportedly establishing exempt status for $20,513 in expenditures. The CFB concluded that all but $14,230 of these "exemptions" were inadequately documented. Ultimately, the CFB reduced the overage from $45,439 to $26,596 - although it gave Lynn until February 16, 2000 to submit additional proof of his exemption claims.

On March 1, 2000, Lynn responded with a letter and a chart reflecting over $10,000 in new exemptions, but no documentation supporting either the new claims or the prior overage. In preparing its "final audit report," CFB's staff rejected the newly claimed exemptions as both untimely and unsupported.

On March 8, 2000, the Lynn Campaign closed out its checking account and sent the CFB the full remaining balance of $2,451.44.

At the public session of its April 14, 2000 meeting, the Board accepted the CFB staff's final audit report and ruled that the defendants had violated the expenditure limit by $20,513. The final audit report also indicated that defendants had retained $338 in unspent campaign funds. Pursuant to Admin. Code 3-711(2), which allows the imposition of a penalty of up to three times the amount by which the expenditure limit has been exceeded, the CFB assessed a penalty of $28,614 (only one and a half times the overage).

Defendants appealed the assessment during an appearance before the Board on June 19, 2000. Although defendants once again failed to support their exemption claims, the CFB

compromised by granting in full Lynn's original request for exemptions. However, it refused to accept the Lynn campaign's new exemption claims made in March 2000, instead assessing the candidate's overage at $15,590, plus a penalty, for a total of $23,385. See Admin. Code 3-711(2). This reduction was announced at a meeting of the Board on July 12, 2000, and was communicated to the Lynn campaign in a letter, sent by both regular and certified mail, on July 17, 2000.

When the Lynn campaign did not pay the penalty, on April 24, 2001, and again on May 11, 2001, the CFB wrote to demand that it remit the $23,385, along with $338 in unspent matching funds, or the Board would post Lynn's name and the amount owed on its website and initiate a civil action to compel payment. When no response was received from the Lynn campaign, the CFB posted Lynn's name and debt on its website.

C. Prior court actions and proceedings:

On May 16, 2001, Lynn and his committee brought a CPLR Article 78 proceeding in Supreme Court, New York County, seeking to challenge the CFB's ruling. The Court (Schoenfeld, J.) dismissed the proceeding on July 13, 2001, on the ground that the four-month statute of limitations had run so that Lynn's challenge was untimely. In August 2001, the Lynn faction moved to renew the dismissal of its Article 78 proceeding, but, after the CFB had submitted opposition papers, the campaign withdrew the motion.

While the Article 78 proceeding was pending in this court, the Lynn campaign filed a separate action in the United States District Court for the Southern District of New York, based on the same facts. On July 27, 2001, the Federal Court authorized the Lynn campaign to withdraw its federal suit with the understanding that the CFB would commence an enforcement

action in State Court within thirty days.

D. The instant action:

On August 24, 2001 the CFB filed the instant complaint. The CFB asserted three causes of action against the Lynn defendants: (1) for payment of the $23,385 assessed against them on July 17, 2000, plus interest, pursuant to Admin. Code 3-706, 3-711, and Board Rule 1-08(c)(2)(i); (2) for payment of the $338 in unspent campaign funds pursuant to Admin. Code 3-710(2)(c) and Board Rule 5-03(e), plus a $10,000 penalty pursuant to Admin. Code 3-711(1); and (3) for breach of contract for failing to abide by the terms of the matching funds agreement.

In their answer, defendants, inter alia, counterclaimed for damages for "defamation," in that the CFB had published their names on its website, and so had damaged their reputations.

On August 31, 2001, defendants moved for partial summary judgment on their claim that $11,975.54 of the expenditures sued upon in the complaint were exempt, that they had more than adequately reimbursed the CFB for unspent campaign funds, and that they are not liable for a $10,000 civil penalty.

Plaintiff has cross-moved for summary judgment on the ground, inter alia, that defendants have forfeited any challenge to the CFB's assessment by failing to bring a timely CPLR Article 78 proceeding. Plaintiff additionally moves to dismiss the defendants' counterclaim, and requests that this court impose an additional penalty under Admin. Code 3-711.

For the reasons that follow, defendants' motion is denied and plaintiff's cross-motion is granted in its entirety.

II. DISCUSSION:

A. Defendants may no longer challenge the CFB's July 2000 ruling:

An agency's determination, including the assessment of a penalty, can only be challenged under New York law by means of a timely-commenced Article 78 proceeding. See CPLR 7801 *et seq.* In dismissing defendants' untimely Article 78 proceeding in its Order of July 13, 2001, this Court expressly ruled that the defendants' choice of an Article 78 challenge was procedurally correct, although their timing was not (Judgment at 10-12). While declining to predict "[w]hether and to what extent res judicata or collateral estoppel would apply in any ... future lawsuit," the Court encouraged the CFB "to institute a collection action [as] a permitted follow-up to the determination at issue" (id. at 10, 12).

Defendants have waived their objections to the CFB's ruling by not commencing a timely Article 78 proceeding, and so are without any defense to the plaintiff's complaint herein. It is well settled that failure to seek timely Article 78 review of an agency's determination precludes any collateral challenge to that determination in subsequent litigation. See Matter of Lewis Tree Serv., Inc. v. Fire Department of the City of New York, 66 N.Y.2d 667, 669 (1985); Matter of Public Service Commission of the State of New York v. Rochester Tel. Corp., 55 N.Y.2d 320, 325-6 (1982); Cahill v. Harter, 277 A.D.2d 655 (3d Dept. 2000). The preclusion is the same even though the Lynn campaign's collateral challenge is raised herein as a defense to plaintiff's lawsuit.

This result is supported by strong policy considerations. To hold that defendants may challenge an agency's penalty ruling long after an Article 78 review is time-barred would reward dilatory conduct and undermine the four-month statute of limitations mandated for Article 78 proceedings.

There is no merit to defendants' suggestion that, because CFB has raised a "breach of

contract" cause of action, this is a garden variety "breach of contract" claim that is properly before the Supreme Court. To the contrary, this case bears no resemblance to instances where a municipality has contracted to procure goods and/or services from a private vendor. Cf. Abiele Contracting, Inc. v. New York City School Constr. Auth., 91 N.Y.2d 1 (1997). Rather, the instant dispute arises out of the CFB's administration of the City's Campaign Finance Program - a purely governmental function. See Admin. Code 3-708. In assessing a penalty against defendants, the CFB acted within the scope of its responsibility to enforce a public law - namely, Admin. Code 3-711. To the extent that a "contract" was involved, the contract subjected Lynn to the same terms as the statutes did. Accordingly, a timely Article 78 proceeding was the only appropriate means by which the defendants could have challenged the CFB's determination. See CPLR 7803(3) (Article 78 is the vehicle for challenging an agency's "abuse of discretion as to the measure or mode of penalty or discipline imposed").

Accordingly, plaintiff is entitled to summary judgment on the pay-back and penalty assessed by it in July 2000.

B. Defendants may not maintain their counterclaim for defamation:

The CFB's publication of defendants' names and delinquency on its website was also subject to challenge pursuant to a timely Article 78 review. Defendants' objection to this publication has similarly been forfeited by their failure to bring an Article 78 proceeding before November 17, 2000. Indeed, courts have squarely held that where an agency decision is subject to an Article 78 challenge, failure to seek timely Article 78 review precludes a defamation claim based upon publication of the agency's decision. See Schiffer v. Tarrytown Boat Club, Inc., 219 A.D.2d 704, (2d Dept. 1995), appeal dismissed 87 N.Y.2d 916 (1996), cert. denied 519 U.S. 864

(1996).

On the merits, Lynn cannot maintain a claim for defamation because, so far as the instant record reveals, CFB's publication is true. See Schiffer v. Tarrytown Boat Club, Inc., supra. In any event, even assuming that CFB's website publication contained an inaccuracy, plaintiff's announcement of Lynn's name and delinquency is protected by a qualified privilege. Statements made in the performance of a legal duty and believed in good faith to be true are protected by a qualified privilege and are not actionable without proof of malice. See Stukuls v. State of New York, 42 N.Y. 2d 272 (1977). A showing of malice is particularly required where, as here, the alleged defamatory statement concerns a public figure. See Armstrong v. Simon & Schuster, Inc., 280 A.D.2d 430 (1st Dept. 2001), leave denied 96 N.Y.2d 717 (2001). Notwithstanding Lynn's hints and intimations that the CFB has singled him out unfairly, there is no support in the record for such a charge.

Accordingly, defendants' counterclaim sounding in defamation is dismissed.

C. Defendants are assessed an additional penalty:

Also granted is plaintiff's request that an additional penalty of $10,000 be imposed on defendants for their failure to timely submit required materials and for their violations of other provisions of the Act and Board Rules. See Admin. Code 3-711(1). The Court notes that defendants did not timely or adequately respond to plaintiff's requests for documentation. They then failed pay the assessed penalty or reimburse the unspent campaign funds when requested to do so - even though their debt had been substantially reduced notwithstanding their failure to properly prove alleged "exemptions." Their Article 78 proceeding was untimely, and they put plaintiff to the trouble of opposing a patently frivolous motion to renew after it was properly

dismissed as time-barred. The defendants additionally commenced a facially frivolous federal action, in which they alleged violations of the Fair Debt Collection Practices Act. Finally, in defense of the instant action they have contrived the strained theory that all that is at issue here is a mere "contract dispute."

Defendants are also directed to pay the withheld $338. However, plaintiff's request that the Court treble defendants' original overage pursuant to Admin. Code 3-711(2) is denied..

Plaintiff is entitled to interest on all of the above amounts from July 17, 2000.

ORDERED that defendants' motion for a declaratory judgment is denied; and it is further

ORDERED that defendants' counterclaim is dismissed; and it is further

ORDERED that all branches of plaintiff's cross-motion are granted except for its request that defendants' original overage be trebled, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of $33,723.00, together with interest as prayed for allowable by law, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: May 21, 2002
New York, New York

SHIRLEY WERNER KORNREICH