

New York City Campaign Finance Board v Lewis

2004 NY Slip Op 30308(U)

October 27, 2004

Supreme Court, New York County

Docket Number: 400628/04

Judge: Debra A. James

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

NEW YORK CITY CAMPAIGN FINANCE BOARD,
Plaintiff,

Index No.: 400628/04

- v -

Motion Date: 07/20/04

EDWARD J. LEWIS, JACQUELINE E. THOMPSON,
JACQUELINE E. THOMPSON as Treasurer of
FRIENDS OF EDWARD J. LEWIS, and FRIENDS OF
EDWARD J. LEWIS,

Motion Seq. No.: 01

Motion Cal. No.: 75

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 3

4 - 6

7, 8

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff New York City Campaign Finance Board (CFB) commenced this action seeking to compel reimbursement of \$19,226 and penalties of \$500 assessed against defendants Edward J. Lewis, Jacqueline Thompson and the Friends of Edward J. Lewis Committee for violations of campaign finance laws governing acceptance of public matching funds. The CFB also seeks a civil penalty of up to \$10,000 against defendants under Administrative Code §3-711 (1). CFB now moves for summary judgment on its complaint and to dismiss defendants' counterclaims.

FILED

NOV - 8 2004

NEW YORK COUNTY CLERK'S OFFICE

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Chapter 46 of the New York City Charter established CFB to administer the City's Campaign Finance Program, which provides public matching funds to candidates who comply with certain requirements. A candidate for public office who wishes to receive public matching funds must enter into an agreement with the CFB to which he consents to abide by the requirements of the Campaign Finance Act ("the Act"). Among the requirements are that the candidate must, inter alia, (i) accept a cap on the total amount of money the candidate's committee may spend to promote the candidate's nomination or election; (b) file periodic disclosure statements reporting the contributions received by the candidate's 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 Administrative Code of the City of New York Secs. 3-701 et seq.

The CFB is "empowered to audit and examine all matters relating" relating to the Act. Administrative Code §3-710 (1). "If the board determines that any portion of the payment made to a principal committee of a participating candidate from the fund was used for purposes other than qualified campaign expenditures, it shall notify such committee of the amount so disqualified and such committee shall pay to the board an amount equal to such disqualified amount." Administrative Code §3-710 (2) (b). "Any

participating candidate whose principal committee . . . violates any other provision of this chapter or rule promulgated [by the CFB], and any principal committee treasurer or any other agent of a participating candidate who commits such a violation, shall be subject to a civil penalty in an amount not in excess of ten thousand dollars." Administrative Code §3-711 (1).

The CFB's rules specifically provide that "Payment is not final determination. Payments of public funds pursuant to this rule shall not constitute the Board's final determination of the amount, if any, for which the participant qualifies. The Board shall provide specific notice of any such final determination." Rules of City of NY Campaign Finance Board (52 RCNY) §5-01 (g). "All determinations by the Board of eligibility and payment are subject to post-payment audit and final readjustment." 52 RCNY §5-01 (k). "After the Board determines that . . . public funds must be repaid, the participant may submit to the Board a written petition for review of the determination. A participant who submits such a petition may also submit at the same time a written request for an opportunity to appear before the Board on the subject of the petition. Such a petition for review shall be submitted within 30 days after the determination." 52 RCNY §5-02 (a).

Defendant Edward J. Lewis was a candidate for City Council in District 31 in 2001. City Councilperson is one of the offices

covered by the public campaign financing program. Lewis submitted a certification form designating the defendant Committee as his principal committee for the 2001 elections, and designating defendant Jacqueline S. Thompson as treasurer of the committee. Both Lewis and Thompson certified that they would comply with CFB rules and that they and the Committee would be jointly and severally liable for the repayment of any public funds and civil penalties the CFB imposed. CFB paid the defendants \$30,135 in public funds for the primary and general elections.

Following the 2001 elections, the CFB conducted an audit of defendant Committee. Thereafter, the CFB issued a draft report which was sent to defendants on October 1, 2002. That draft report stated among other matters that defendants had failed to adequately document certain expenditures and that if the defendants did not provide further documentary support they would be required to repay to the CFB the amount of \$20,648. The defendants responded to the draft report by submitting further documentation to the CFB on October 30, 2002.

On June 6, 2003, the CFB sent to defendants a final audit report seeking repayment of \$19,226 to the CFB plus a penalty of \$140 (pursuant to a Final Board Determination dated June 4, 2003) against the Committee in addition to \$360 of penalties (\$216 of which was outstanding as the CFB had failed to withhold such

amount from its payments to the Committee) previously assessed. By further letter dated June 16, 2003, the CFB stated that "Issuance of the final audit report marks the completion of the Board's post-election audit of the Committee and the findings in the Report are final. . . However, the Board will permit the Committee to submit documentation to the Board in an attempt to settle all, or a portion of the obligation to return the \$19,226 to Board." Finally, the CFB stated in a July 18, 2003, letter to the defendants that the additional documentation submitted in an attempt to settle the defendants' outstanding obligation was insufficient and that the full amount owed had to be paid by August 1, 2003.

Defendants oppose plaintiff's motion arguing that there are issues of fact as to plaintiff's determination and cross-move to have this court direct the controversy to a referee to hear and report the issues raised in this litigation.

In their memorandum of law in opposition to the motion, defendants withdraw "their defense to the matters adjudicated by the Board on December 6, 2001 and June 4, 2003 which resulted in the service on them of a 'Final Board Determination,'" i.e. respectively, the \$360.00 and \$140.00 penalties. Defendants sole argument on this motion is that the final audit report dated June 6, 2003, did not constitute a final CFB determination that would be subject to review under CPLR Article 78 and that the

defendants are entitled to either a hearing before the CFB on the merits of the audit or the right to contest the final audit report in this action.

Defendants assert that pursuant to CFB Rule (52 RCNY) §7-02 (c) the CFB is required to give a campaign notice of a finding of a violation, an opportunity to submit relevant information in rebuttal, and prior to a final finding of violation and determination of civil penalty, an opportunity for a hearing before the CFB. Defendants further argue that under CFB Rule (52 RCNY) §7-02 (f) the Board may either (i) mail the participant a notice of hearing pursuant to the administrative procedures of the New York City Charter or (ii) commence a civil action in an appropriate court. Defendants assert that because the CFB denied defendants the right to a hearing on the June 6, 2003, final audit report, they are entitled to challenge the findings contained therein in this action because those findings were not final under the CFB Rules. Defendants also make the substantive argument that plaintiff failed to take into account expenditures advanced by candidate Edward J. Lewis of \$10,000 in cash paid for bulk mailing to the United States Postal Service and \$6,000 in petty cash expenditures that financed street operations on primary days that took place on September 11, 2001, when the election was aborted, and on September 24, 2001.

CFB points out that neither expenditures made in cash nor those advanced by the candidate are qualified under Administrative Code §3-704(2), regardless of the purpose of the underlying expense, and must be returned to CFB.

With regard to defendants' due process arguments, the CFB counters that Rule (52 RCNY) §7-02 is applicable only to penalty determinations and does not affect the finality of its final audit report for Article 78 purposes. The CFB asserts that its audits are final determinations made pursuant to Administrative Code §3-710. In support of its position the CFB cites unreported decisions of this court which hold that CFB findings in a final audit report may only be challenged in an Article 78 proceeding. In New York City Campaign Finance Board v Lynn, (Sup Ct, NY County, May 21, 2002, Kornreich, J., Index No. 405097/2001), the CFB brought an action seeking recovery of overages and penalties based on defendants violation of campaign spending restrictions. The court held that "[d]efendants 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." Id. at *6. See also, New York City Campaign Finance Board v Clarke, (Sup Ct, NY County, December 6, 2002,

DeGrasse, J., Index No. 402487/2001), New York City Campaign Finance Board v Villaverde, (Sup Ct, NY County, January 29, 2003, Stallman, J., Index No. 405076/2001).

This court is persuaded by the decisions of its coordinate courts. Defendants are precluded from challenging the June 6, 2003 final audit report in defense of this action because defendants' failure to timely seek Article 78 review of the CFB determination bars the collateral challenge attempted by defendants here. CPLR § 217 establishes a four month statute of limitations for such a proceeding, which for review of the June 6, 2003 final audit report expired on October 7, 2003.

Defendants' argument that the final audit report did not constitute a final agency determination is unsupported by the regulations applicable to the CFB. CFB Rule (52 RCNY) §7-02 is by its terms applicable only to penalty determinations and does not grant a right to a hearing on the findings made in a CFB final audit report. As the defendants no longer challenge the CFB's penalty determinations, they fail to raise any triable issue of fact precluding summary judgment.

Administrative Code §3-711 (1) provides that any participant who violates a provision of the Act is liable for a penalty of up to \$10,000. As early as October 1, 2002, by way of the draft report, defendants were made aware that CFB determined that it had failed to document \$20,648 in qualified expenditures and that

unless documented defendants would have to repay such amount to CFB. Plaintiff first notified defendants on June 6, 2003 of their obligation to repay \$19,226 of public funds they received. CFB notified the defendants of their obligation to pay penalties on June 4, 2003, which defendants neither contested nor paid when due. By letter dated July 18, 2003, the CFB extended the due date for payment of the amounts owed to August 1, 2003. It was only then that defendants' attorney by letter dated September 13, 2003 "requested a hearing." By subsequent letter dated October 27, 2003, the CFB notified defendants that Lewis' name and the amounts owed would be posted on its website if the amounts owed were not paid. Even after the CFB posted Lewis' name and the amount and penalties owed to its website on November 3, 2003, defendants remitted no payments.

The defendants have failed to pay the amounts owed to the CFB and failed to timely challenge the CFB's final determinations in an Article 78 proceeding. As a result, the CFB has had to incur the time and expense of bringing this litigation in order to recover improperly used public funds. The court shall grant the CFB's request to impose an additional penalty upon defendants but only to the extent of \$4,000 for their failure to timely repay public funds and for their violation of other provisions of the Act and the CFB Rules. See New York City Campaign Finance

Board v Lynn, (Sup Ct, NY County, May 21, 2002, Kornreich, J., Index No. 405097/2001, *8).

Accordingly, it is

ORDERED and ADJUDGED that plaintiff's motion for summary judgment against defendants is GRANTED; and it is further

ORDERED and ADJUDGED that the Clerk of the Court is directed to enter judgment against defendants EDWARD J. LEWIS, JACQUELINE E. THOMPSON, JACQUELINE E. THOMPSON as Treasurer of FRIENDS OF EDWARD J. LEWIS, and FRIENDS OF EDWARD J. LEWIS, in the amount of \$19,226.00 on the first cause of action together with interest of \$ _____ at the statutory rate as prayed for from the date of June 6, 2003, until the date of entry of judgment, as calculated by the Clerk together with a penalty of \$4,000 pursuant to Administrative Code §3-711 (1), plus the amount of \$216.00 on the second cause of action, together with interest of \$ _____ at the statutory rate as prayed for from the date of June 6, 2003, until the date of entry of judgment, as calculated by the Clerk, plus the amount of \$100.00 on the third cause of action, together with interest of \$ _____ at the statutory rate as prayed for from the date of June 4, 2003, until the date of entry of judgment, as calculated by the Clerk, plus the amount of \$40.00 on the fourth cause of action, together with interest of \$ _____ at the statutory rate as prayed for from the date of June 4, 2003, until the date of entry of

judgment, as calculated by the Clerk, together with costs and disbursements in this action as taxed by the Clerk upon the submission of an appropriate bill of \$ _____, for a total of \$ _____.

This is the decision and order of the court.

Dated: October 27, 2004

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES

FILED
NOV - 8 2004
COUNTY CLERK'S OFFICE