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

Eileen Branston

Index Number : 104347/2006

BAN THE BAR COALITION

vs

BOYLE, DANIEL

Sequence Number : 002

COUNSEL FEES, EXPENSES

PART 6

INDEX NO. 104347/06

MOTION DATE 1/9/07

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for attorney's fees

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying Memorandum Decision.

Dated: 3-6-07

HON. EILEEN BRANSTEN J.S.C.

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):

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

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In the Matter of the Application of
BAN THE BAR COALITION, DANIEL HARRIS, JEANMARIE DOLAN, MARY JANE McGONEGAL, ALICE BECK-ODETTE, VIVIAN GORDON, CARL C. GORDON, EILEEN STEN, ALICE TAHAPARY, JOSEPHINE O'LEARY, SUSAN STOWENS, DORIS H. STOWENS, GLADYS DUBOVSKY, NORMAN MILLER, PAMELA STERN, LESLIE JONES, NEAL T. JONES, WINNIE BELL, LISA COWLES, NORIKO HIGURASHI, PENNY KNAPP, FREDERICK KNAPP, VICKI A. UNGAR, MICHELLE STARR, JUDITH BINNEY, OZDINCH MUSTAFA, LILLIAN S. MARKS, INA LEE SELDEN, MERRIE S. FRANKEL, PATRICIA CHAN, CAROLE PARNES, RICHARD KAUFMAN, DOROTHY S. GYGER, TERRY L. GYGER, DR. VERA MEHTA, PERRY LANGER, LINDA COMPAGNONE, MICHAEL COMSTOCK, MICHAEL SALEM, ELAYNE ADLER, ROBERTA ADLER, CAROLYN A. ZONINO, DOROTHY A. RASA, ROBERT BRODSKY, PHYLLIS BRODSKY, MADELYN TEDESCO, VIRGINIA A. WOODS, MARY CARTER, SIDNEY S. GOLDSTEIN, SUSAN B. GOLDSTEIN,

Petitioners,

-against-

Index No. 104347/06
Motion Date: 1/09/07
Motion Seq. No.: 002

THE NEW YORK STATE LIQUOR AUTHORITY, DANIEL BOYLE, in his capacity as the Chairman of the New York State Liquor Authority; and LAWRENCE J. GEDDA, as a Commissioner of the New York State Liquor Authority; and OHMSAYIN, INC., d/b/a EMBASSY,

Respondents.

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PRESENT: EILEEN BRANSTEN, J.

In this CPLR Article 78 proceeding, petitioners – Ban the Bar Coalition, Daniel Harris, Jeanmarie Dolan, Mary Jane McGonegal, Alice Beck-Odette, Vivian Gordon, Carl C. Gordon, Eileen Sten, Alice Tahapary, Josephine O'Leary, Susan Stowens, Doris H. Stowens, Gladys Dubovsky, Norman Miller, Pamela Stern, Leslie Jones, Neal T. Jones, Winnie Bell, Lisa Cowles, Noriko Higurashi, Penny Knapp, Frederick Knapp, Vicki A. Ungar, Michelle Starr, Judith Binney, Ozdinch Mustafa, Lillian S. Marks, Ina Lee Selden, Merrie S. Frankel, Patricia Chan, Carole Parness, Richard Kaufman, Dorothy S. Gyger, Terry L. Gyger, Dr. Vera Mehta, Perry Langer, Linda Compagnone, Michael Comstock, Michael Salem, Elayne Adler, Roberta Adler, Carolyn A. Zonino, Dorothy A. Rasa, Robert Brodsky, Phyllis Brodsky, Madelyn Tedesco, Virginia A. Woods, Mary Carter, Sidney S. Goldstein and Susan B. Goldstein – move pursuant to CPLR 8601 for attorney's fees and expenses from respondents the New York State Liquor Authority ("the Liquor Authority"). The Liquor Authority opposes the motion.

Background

On August 9, 2006, the Court granted petitioners' CPLR Article 78 petition to vacate the Liquor Authority's determination to approve a liquor license for Embassy, a restaurant to be located at 862 Second Avenue, New York, New York. Affirmation in Support of Motion ("Aff."), at ¶ 2. In particular, the Court remanded the proceeding to the Liquor

Authority to "make a new determination not inconsistent with [the] Determination and Judgment." Aff., Ex. A, at 34-35. The Decision was entered on August 30, 2006. Aff., Ex. A, at 2. On September 5, 2006, petitioners served a Notice of Entry of the Decision on the Liquor Authority. Affirmation in Reply ("Reply"), at ¶ 6.

Upon remand of the petition to the Liquor Authority, Embassy withdrew its application. Aff., at ¶ 3. The Liquor Authority, in turn, denied Embassy a liquor license. *Id.*

Petitioners now seek – pursuant to a motion dated November 1, 2006 – attorney's fees and expenses. Aff., at ¶ 4. They point out that the Liquor Authority did not appeal the Court's determination and that the time to perfect an appeal has passed. Aff., at ¶ 7.

In terms of attorney's fees, petitioners' counsel Barry Mallin, Esq. ("Mr. Mallin") avers that he worked on this case for 96 hours at a rate of $350 an hour, which totals $33,600.00.* Aff., at ¶¶ 9,11. He also argues that his hourly rate is reasonable because he has more than 30 years litigation experience and has handled more than 75 matters on behalf of community organizations and residents opposing liquor-license application grants. Aff., at ¶ 12. Mr. Mallin alleges, moreover, that his firm incurred $1,193.03 in expenses for court

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* Petitioners erroneously calculate that 96 hours at a rate of $350 an hour totals $32,900.00.

filing fees, process server fees, photocopying and federal express charges. Aff., at ¶ 10. In sum, petitioners submit documentation for costs totaling $34,793.03.

The Liquor Authority opposes the motion, arguing that it is time-barred pursuant to CPLR 8601(b) because it was made more than 30 days after the Liquor Authority voted not to appeal the Court's Judgment. Affirmation in Opposition ("Opp."), at ¶ 9. It states, moreover, that petitioners do not qualify for attorney's fees under CPLR 8602(d)(1) because the named petitioners have assets in excess of $50,000. Opp., at ¶ 10. Finally, the Liquor Authority avers that petitioners' counsel could not have spent 96 hours working on this case, but do not object to Mr. Mallin's hourly rate. Opp., at ¶ 13.

Petitioners reply that their motion is not time-barred pursuant to CPLR 8601 because the judgment did not become final until October 5, 2006, fewer than 30 days before they made this motion. Reply, at ¶ 7. They argue, moreover, that they are eligible for relief under CPLR 8602(d)(ii) because they are members of an organization with fewer than 100 employees. Reply, at ¶¶ 10-11. Finally, petitioners contend that their request for attorney's fees is not excessive. Reply, at ¶¶ 13-18.

Analysis

In 1989, the New York Legislature enacted the New York State Equal Access to Justice Act to "create a mechanism authorizing the recovery of counsel fees and other

reasonable expenses in certain actions against the state of New York." CPLR 8600; *see,* Governor's Mem. approving L. 1989, ch. 770, 1989 Legis. Ann., at 2436.

The statute – modeled after the federal Equal Access to Justice Act and codified at 28 U.S.C. 2412(d) – authorizes a court to award costs and attorney's fees to a petitioner who prevails in a case against the State, unless the court finds that the State's position was "substantially justified." CPLR 8601(a); *see*, Letter from State Dept. of Taxation and Fin., Sep. 25, 1989, Bill Jacket, L. 1989, ch. 770, at 27 (explaining federal origin of law); *see also*, *Wittlinger v. Wing*, 99 N.Y.2d 425, 431 (2003) (setting forth "substantial justification" test); *Apollon v. Giuliani*, 246 A.D.2d 130, 134 (1st Dept. 1998), *lv. dismissed*, 92 N.Y.2d 1046 (1999).

A "prevailing party" under the statute is one who "succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained." *New York State Clinical Lab. Assn., Inc. v. Kaladjian*, 85 N.Y.2d 346, 355 (1995).

In determining whether an agency's position is "substantially justified," courts must examine whether it is "justified to a degree that could satisfy a reasonable person" or has "a reasonable basis both in law and fact." *Crabtree v. New York Div. of Hous. and Community Renewal*, 294 A.D.2d 287, 289 (1st Dept. 2002), *affd.*, 99 N.Y.2d 606 (2003); *see also*, *Pierce v. Underwood*, 487 U.S. 552, 559 (1988) (federal basis of "substantially justified"

standard). Moreover, the court may only rely on the record before the agency or official whose act or omission gave rise to CPLR Article 78 proceeding. *Perez v. New York State Dept. of Labor*, 259 A.D.2d 161, 162-63 (3d Dept. 1999). The mere fact that an agency lost on the underlying CPLR Article 78 petition is not sufficient to determine that an award of attorney's fees is proper. *Motor Network, Ltd.*, 29 A.D.3d 911, 912 (2d Dept. 2006).

In the end, the "award of attorney's fees under CPLR Article 86 is generally left to the sound discretion of the trial court" and will not be disturbed absent an improvident exercise of discretion. *Newman v. Wing*, 12 A.D.3d 515, 516 (2d Dept. 2004).

Here, petitioners have successfully obtained vacatur of the Liquor Authority's determination to grant Embassy a liquor license. This Court will not recapitulate the numerous reasons that it granted the petition, but merely reiterate the most pertinent holdings:

> "The Liquor Authority's Statement of Public Interest, which is wholly conclusory and deficient, does not sufficiently support its determination as a matter of law * * * [because] the Authority merely copied Embassy's statement of public interest verbatim * * *." Aff., Ex. A, at 23.
>
> "The Liquor Authority's Statement of Public Interest is further unacceptable because it creates a new additional standard for license approval that has no authority and is in direct contradiction to the statute." Aff., Ex. A, at 24.
>
> "The determination must also be vacated because it violates the clear language of ABCL § 64(6-a), which requires

> consideration of community opposition in determining whether a license is 'in the public interest.'" Aff., Ex. A, at 25.
>
> "Finally, the determination must be vacated based on the glaring deficiencies in the Liquor Authority's findings of fact, which are based on suspect assertions and, at times, are erroneous." Aff., Ex. A, at 26.

In sum, the Liquor Authority had absolutely no reasonable or articulable basis to grant Embassy's liquor license, and as such, petitioners are entitled to attorney's fees and expenses.

The Liquor Authority's arguments to the contrary are without merit.

To begin, petitioners' motion is not belated.

Case law is clear that a judgment becomes final when it is no longer appealable, not when it is entered or when a party unilaterally decides not to appeal it. *See*, 21 Carmody-Wait 2d § 126:120, at FN24. Because petitioners served the Decision with Notice of Entry on September 5, 2006, the Liquor Authority had 30 days from that date – until October 5, 2006 – to appeal the order. Reply, at ¶ 7. Therefore, petitioner's November 1, 2006 motion for attorney's fees – served fewer than 30 days after October 5, 2006 – is timely.

Additionally, petitioners are a proper "party" under the statute.

CPLR 8602(b)(ii) provides that a "'party' means (i) an individual whose net worth * * * did not exceed fifty thousand dollars * * *; [or] (ii) * * * any partnership, corporation,

association real estate developer or organization which had no more than one hundred employees at the time the civil action was filed."

The Liquor Authority argues that petitioners are not eligible to receive attorney's fees pursuant to CPLR 8602(b)(i) because they may have assets in excess of $50,000. It fails to acknowledge, however, that petitioners – Ban the Bar Coalition and its members – fit under an alternate category of those who can recover under CPLR 8602, an organization with fewer than 100 employees. *See, Friends of the Northside v. New York State Liq. Auth.*, NYLJ, Feb. 5, 2002, at 18, col. 2 (Sup. Ct., New York County) (granting attorney's fees to organizational plaintiff created for purposes of suing Liquor Authority). Indeed, Ban the Bar Coalition is exactly the type of organization that the statute was created to protect. *Wittlinger v. Wing*, 99 N.Y.2d, at 431 ("By allowing victorious plaintiffs to gain attorney's fees, the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight City Hall").

Finally, the amount of petitioners' request for attorney's fees and expenses is reasonable.

Petitioners briefs were comprehensive, extensive and showed careful attention to detail. The legal analysis was superb and the cases cited were not only on point, but well outlined. Indeed, the papers reflected a great deal of thought and evidenced a lengthy

drafting process. In light of the strength of the submissions, it is not unreasonable to imagine that counsel spent 96 hours working on this case.

Respondents' attorney opines, "96 hours sounds to me like an excessive amount of time to devote to this case. * * * I know for myself that frequently when I draft an * * * appellate brief, I make use of use [*sic.*] prior answers, briefs, etc. I just change some words and paragraphs a bit, and I am finished." That much is clear. Respondents submissions, in start contrast to petitioners, were fairly conclusory and failed to address, in any reasonable detail, the particularities of this action. Surely this Court will not allow the Liquor Authority's attorney – who prepared unsuccessful and unpersuasive papers – to determine how much time petitioners' attorney should have spent preparing this action.

In the end, petitioners have demonstrated their entitlement to attorney's fees and expenses and respondents have not shown any reason why such relief should not be granted. *See, Dicent v. Wing*, 283 A.D.2d 185 (1st Dept. 2001); *Diaz v. Franco*, 257 A.D.2d 449 (1st Dept. 1999); *Mitchell v. Bane*, 218 A.D.2d 537 (1st Dept. 1995), *lv. dismissed*, 88 N.Y.2d 1003 (1996).

Accordingly, it is

ORDERED that petitioners' motion for attorney's fees and expenses is granted. Settle Order.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 6, 2007

ENTER

Hon. Eileen Bransten