Matter of Brodsky v New York City Campaign Fin. Bd.
2007 NY Slip Op 31850(U)
June 21, 2007
Supreme Court, New York County
Docket Number: 0118316/2006
Judge: Eileen A. Rakower
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SCANNED ON 6/27/2007

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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART 5

Brodsky. M

INDEX NO. 118316/06

MOTION DATE

- v -

MOTION SEQ. NO. 01

NYC Campaign

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6, 7, 8 + 9
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 27 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: June 21, 2007

EILEEN A. RAKOWER J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

--X

In the Matter of the Application of MERYL BRODSKY, MARK FEINSOT, and ELECT MERYL BRODSKY TO CITY COUNCIL 2005,

Petitioners,

- against -

NEW YORK CITY CAMPAIGN FINANCE BOARD,

Respondent.

--X

Index Number 118316/06

Decision and Order

FILED
JUN 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Petitioner Meryl Brodsky ("Brodsky") was a candidate for the New York City Council in the 2005primary election. Brodsky participated in the voluntary public matching funds program established by the New York City Finance Act (the "Act"). Petitioner, Elect Meryl Brodsky to City Council 2005 ("Committee"), is a political committee formed by Brodsky pursuant to the Act. Petitioner Mark Feinsot ("Feinsot") is the treasurer of the Committee and a certified public accountant. Respondent New York City Campaign Finance Board ("Board") is a five-member board which administers the Act.

The Committee, in preparation for the 2005 election, received contributions and qualified to receive public matching funds pursuant to the Act. The Board disbursed a total of $55,776 in matching funds to Brodsky's campaign. Following the September 2005 primary elections, the Board conducted a post-election audit and issued a draft audit report ("report") on February 6, 2006. The Board's preliminary determination was that the Committee might be required to repay $47,310. This amount represents $25,975.44 in unspent funds plus certain post-election expenditures that appeared to be improper "due to timing, amount, and purpose." These expenditures included five payments to Feinsot totaling $14,500, and a payment to Staples in the amount of $1,045.

On February 20, 2006, the Committee responded to the draft report by submitting to the Board a letter of engagement and invoices in an attempt to

substantiate fees paid to Feinsot after the election and documentation of its expenditures to Staples for a holiday card mailing. On April 28, 2006, the Board issued a "Notice of Alleged Violation, Proposed Penalty and Opportunity to Respond" proposing a $777 penalty for making improper post-election expenditure of $14,500 to Feinsot and $1,045 to Staples. On May 10, 2006 the Board issued a letter to petitioners " as a last opportunity" to respond to the Board's assessment that the Campaign must repay unspent funds in the amount of $41,565 (a different amount than that stated in the preliminary determination). On the same date the Committee submitted both additional documentation to substantiate Feinsot's services and lists of contributors, volunteers and staff to whom the holiday cards were mailed. Subsequently, the penalty was reduced from $777 to $650.

Brodsky and Feinsot appeared before three members of the Board on July 12, 2006 to offer further evidence in response to the recommended penalties. By letter dated August 10th, the Board issued its final determination which was followed by its August 17th final audit report further reducing the penalty against the Committee from $650 to $470. The final audit report determined that the unspent campaign funds plus $9,395 worth of post-election expenditures ($8,350 of the payments to Fiensot and the $1,045 payment to Staples) were improper, a total of $35,415. Thereafter, Petitioners filed a Freedom of Information Request with the Board to obtain a copy of the transcript from the July 12th meeting. The written transcript was received by the Board on August 28, 2006 and was available to the Petitioners on August 31, 2007.

Counsel for Petitioners, by letter dated September 15, 2006, wrote to dispute the Board's final determination. That letter, entitled "Elect Meryl Brodsky to City Counsel 2005- Proposed Settlement of Admin Code § 3-710(2)(c) Reimbursement; Alternatively, CFB Rule 5-02 (a) Petition," informed the Board that the Committee had determined that Petitioners repayment obligation was not $35,415 as the Board had determined but $26,010. Enclosed with the letter was a check for $34.56, the difference between the $25,975.44 unspent campaign funds and the $26,010 that the Committee believes it owes. The Committee further informed the Board that on August 20, 2006, Petitioners, who were aware that they were expected to repay the Board by September 11, 2006, had deposited the $25,975.44 in an eight month interest bearing certificate of deposit, scheduled to mature on April 20, 2007. By letter dated November 8, 2006, the Board informed the Committee that it had received the Committee's submission but the settlement offer/ Rule 5-02(a) Petition

was rejected. Additionally, it stated that if the Committee did not remit the full $35,380 by December 11, 2006, "the Board may initiate a civil action" against the Petitioners.

Petitioners commenced this Article 78 proceeding in December, 2006, seeking an order declaring arbitrary, capricious and contrary to law Respondent's determination that the Committee must repay $35,415. Further it seeks to have this court declare that the proper reimbursement obligation is $25,975.44; that the Committee was denied due process during the determination process; that Feisnot is not personally liable for Petitioners' reimbursement obligations; and finally declaring that petitioner is entitled to petitioners' attorneys fees.

Respondent Board cross moves for an order from this Court directing Petitioners to pay the $470 penalty plus interest; re-pay $35,380 in public funds plus interest; immediately remit the principle and interest accumulated from the $25,975.44 eight month certificate of deposit; and declare that Feinsot is personally liable for the Committee's debt to the Board.

Petitioners argue that the $14,500 in payments to Feinsot was permissible under Campaign Finance Board (CFB) Rule 5-03(e)(2)(ii) which allows reasonable staff salaries and consultancy fees for responding to a post-election audit. They argue that the letter of engagement entered into with Feisnot before the election stated that the majority his fees would be issued after the election, implying that the post-election audit would be the most time consuming element of his work.

Petitioners also argue that the $1,045 payment to Staples was reasonable under CFB Rule 5-03(e)(2)(ii) because a holiday card mailing to contributors, volunteers, and staff is a permissible post-election expense. They state that there is no requirement that a candidate must not identify her current position or that the card must make reference to her recent candidacy or latest election. Additionally, Petitioners argue that the Board's final determination was arbitrary and capricious because it was made by three Board members, only one of whom was actually present at the July 12th meeting. They state that the transcript from the July 12th meeting was not available to the Board until August 28th, eighteen days after Board members, two of whom were not present for the hearing, made their determination. Petitioners also challenge the Board's determination that they are not permitted to appeal a penalty determination via the Campaign Finance Board's Rule 5-02. Finally,

Petitioners' argue that the Act "requires the reimbursement of unspent funds, not of improperly spent funds." (Emphasis in the Petitioner's original.)

Respondent argues that there are limited types of proper campaign related post-election expenditures and that $9, 395 of Petitioners' expenditures were improper. Respondent asserts that for more than one year prior to the election the committee paid Feisnot a total of $2,700, that no payment exceeded $500 and most were for $250. During that year, Feinsot was required to submit six disclosure statements, contribution documentation, respond to the board's inquiries and maintain contemporaneous documentation of financial transactions. After the election, Feinsot received monthly payments of $2,500 for September, 2005 and $3,000 payments for each of October, November and December, 2005 and $3,000 for January 2006 for a total of $14,500. The Board states that during this time period the Campaign needed to file only two disclosure statements and gather documentation for the Board's inquiries. Additionally, although the Committee claimed that its letter of engagement with Feinsot anticipated much of his work would be on the post campaign audit, these large payments began and ended before the post-election audit report was issued in February, 2006.

Respondent argues that the post-election payment to Staples for the holiday card mailing was also an improper expenditure. Respondent states that the holiday card said nothing about Brodsky and her campaign for City Council. Rather, the card made reference to Brodsky being District Leader, a position that she held since 2000. Thus, Respondent argues, the card was paid for with campaign funds for a non-campaign related expenditure. Additionally, Respondent states that while it is true that two people who were not present for the July 12th meeting and who did not have access to the written transcript did participate in the Board's final determination, those Board members did listen to the audio recording of the meeting before participating in the final determination process.

The New York City Campaign Finance Act, Administrative Code § 3-710 states, in pertinent part,

> 1. The Campaign Finance Board is hereby empowered to audit and examine all matters relating to the performance of its functions and any other matter relating to the proper administration of this chapter . . ..

> 2.(a) If the board determines that any portion of the payment made to the principle committee of a participating candidate from the fund was in excess of the aggregate amount of payments which such candidate was eligible to receive pursuant to this chapter, it shall notify such committee and such committee shall pay to the board an amount equal to the amount of excess payments.
>
> (b) If the board determines that any portion of the payment made to a principle 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.
>
> (c)If the total amount of contributions, other receipts, and payments from the fund received by a participating candidate and his or her principle committee exceed the total campaign expenditures of such candidate and committee for all covered elections held in the same calendar year . . . such candidate and committee shall use such excess funds to reimburse the fund for payments received by such committee from the fund . . .. Such reimbursement shall be made not later than ten days after all liabilities have been paid and in any event, not later than either the closing date of the disclosure date report, or the day on which the campaign finance board issues its final audit report for such participating committee, for such covered election, as shall be set forth in rules promulgated by the campaign finance board.

New York City Campaign Finance Rule 5-03(e)states, in pertinent part,

> (1) Pursuant to § 3-710 of the Code, the participants shall pay to the Board unspent campaign funds from an election not later than 10 days after all liabilities for the election have been paid and, in any event, not later than the day on

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> which the Board issues its final audit report for the participant's committee . . .. Unspent campaign funds determinations made by the Board shall be based on the participants receipts and expenditures (including any outstanding bills). The Board may also consider information revealed in the course of an audit or investigation in making an unspent campaign funds determination, including, but not limited to, the fact that campaign expenditure were made in violation of the law, that expenditures were made for any purpose other than the furtherance of the participant's nomination or election, or that the participant has not maintained or provided requested documentation.
>
> (2)(ii)Before repaying unspent campaign funds, a participant may make post-election expenditures only for routine activities involving nominal cost associated with winding up a campaign and responding to the post-election audit. Such expenditures may include . . . reasonable staff salaries and consultancy fees for responding to a post election audit . . . a holiday card mailing to contributors, campaign volunteers and staff . . .. Routine post-election expenditures that may be paid for with unspent campaign funds do not include such items as post-election mailings other than as specifically provided for in this subparagraph . . . making bonus payments or gifts to staff or volunteers . . ..

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248, 250 [1st Dept. 1995]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. V. Board of Elections of the City of New York,* 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser,* 30 N.Y. 2d 269 [1972]). The court may only declare an agency's determination "arbitrary and

capricious" if it finds that there is no rational basis for the determination. If the administrative body has acted within its lawful authority, the court has no alternative, but must confirm the determination.(*Matter of Pell v. Board of Education,* 34 N.Y.2d 222 [1974]).

Here, the Committee does not dispute that it was required to repay $25,975.44 in unspent campaign funds. It summarily concludes in its September 15, 2006 letter that it additionally owes $34.56. The Board, by contrast, repeatedly revisited its own February 6, 2006 preliminary audit which required the Committee to repay $47,310. There was continuous exchange of information between the Committee and the Board over the following six months which included written submissions and an appearance before the Board by Brodsky and Feinsot. The Campaign has the burden of producing sufficient contemporaneous documentation to support its contention that its expenditures were reasonable. (Administrative Code §§ 3-701, *et seq.*) and the Board's Rules only permit certain nominal expenditures after a campaign is over.

Respondent explains the process by which it came to its final determination in great detail. Specifically, for example, after the Board initially disallowed the $14,500 post election payments to Feinsot, the Committee was permitted to submit evidence to substantiate the necessity and reasonableness of that expenditure. The Board explains that it considered the Committee's minimal $ 2,700 pre-election payments to Feinsot for completion of numerous pre-election reports verses the $14, 500 in post-election payments to Feinsot for what the board assessed was a minimal amount of work. After considering the evidence presented, the Board believed that, given the timing, amount and purported purpose of these payments, "the payments bore the indicia of being bonuses, gifts, or compensation for services rendered as a volunteer." Additionally, the Board explains it was not swayed by Feinsot's letter of engagement, which anticipated that the majority of Feinsot's billable time would be incurred during the post-election audit. The Board noted that the Committee failed to adequately explain why the payments in question began before the Board's October request for audit information and ended before the Committee received the draft audit report in February. Moreover, after examination of the "sample data" provided as documentation to substantiate these expenditures, the Board concluded that it contained "myriad incongruities that belied their reliability and alleged contemporaneity, as well as the Campaign's representation that the magnitude of compliance work was reasonable between September 2005 and December 2005." In fact, in her testimony before the Board on July 12, 2006, the Board heard that

Brodsky was saving money from her primary because she was anticipating a difficult general election in which she might be facing a candidate wealthy enough to "not opt into campaign finance." Brodsky completed her testimony regarding payments to Feinsot by stating, "So either you are in a bonus situation which I have questions about or you're in another situation where no matter what you do you've got a very tough - - a tough stretch, the home stretch is - - and as I said before, he was not only paid because we were saving - - I was saving money for a primary and he went along with it and I don't know why. And then I felt that remuneration was absolutely necessary and that he ought to get paid his billing and professional rates." Weighing all of the above, the Board did find certain tasks on the log sheet appeared plausible, and allowed $6,150.

Regarding the $1,045 post-election expenditure on holiday cards, the Board found that it too did not fall within the very limited parameters permitted by the CFB Rules. Specifically, the card was a mailing from "Meryl Brodsky, District Leader" a position that Brodsky held since her 2000 election. The card made no mention of the 2005 primary campaign for City Council, the campaign to which these funds were distributed and which paid for the mailing. Additionally, the Campaign did not comply with the Board's request for a list of recipients for the mailing but rather stated in a conclusory fashion that "the vast majority, if not all" of the cards were sent to residents of the District where Brodsky had run for City Counsel. The Board stated that the documentation provided to substantiate what the 2005 campaign purpose was for the mailing also raised questions as to the scope of the mailing. It concluded that the Campaign's proof was unavailing.

Throughout this process the Board re-evaluated its original findings. After considering the information revealed in the course of the audit and investigation (CFB Rule 5-03(e)(1)), the Board first reduced the Campaign's fine from $777 to $650, and eventually reduced it again to $450. Additionally, the Board reduced the amount of Feinsot's payments that the Campaign was required to return from $14,500 to $8,350. Moreover, even after the Board issued its final audit report, the Committee sought again to negotiate with the Board in its September 15, 2006, "Proposed Settlement of Admin. Code § 3-710(2)(c) Reimbursement ; Alternatively, CFB Rule 5-02 (a) Petition." As evidenced by the Board's November 8, 2006, letter in response, the Board once again revisited its determinations and ultimately denied the Committee's request for further relief.

Contrary to Plaintiff's contention, it is the role of the Board, in its final audit process, to determine if the Committee's choices were reasonable and lawful. The above quoted portions on Administrative Code § 3-710 clearly state that the Board has the authority to require a candidate to both repay any unspent campaign funds and repay funds that were used for expenditures that have been disqualified. The Campaign Finance Board Rules clearly state that routine post-election expenses do not include making bonus payments or gifts to staff, nor should they include post election mailings to anyone other than campaign contributors, volunteers and staff.

Additionally, the Committee's arguments regarding the unavailability of the July 12, 2006 Board meeting transcript and the fact that the Board's determination was made by a committee of three, two of whom were not present at that meeting, are without merit. The use of the audio recording in lieu of the transcript of the July 12, 2006 meeting by the three members who actually made the determination was sufficient to satisfy the Committee's due process considerations. (See, *Taub v. Pirnie,* 3 N.Y.2d 188, 194 [1957], stating, "It is enough if the [Board members] . . . have the means to make an informed decision, one that is based on knowledge sufficient for 'wise and proper judgment' " *citations omitted).*

The Committee's due process complaints regarding the unavailability of a CFB Rule 5-02 appeal as to the penalty imposed by the Board is equally unavailing. It is plain that the Committee had more than one opportunity, albeit by way of other administrative avenues, to challenge the penalty imposed. Indeed, the Committee was successful in those appeals, first having the penalty reduced from $777 to $670, and eventually having it further reduced to $470. Accordingly, there is no reason for the Court to disturb the Board's penalty determination.

Respondent petitions this Court for an order declaring that Feinsot is jointly and severally libel for the Committee's repayment obligations to the Board. However, as the Appellate Division, First Department has recently reiterated in *Mossa, et al. v. New York City Campaign Finance Board, (*-- A.D.3d – , 2007 WL 1674211[N.Y.A.D. 1st Dept.], 2007 Slip Op. 05158), a treasurer is not personally liable for the repayment of public funds owed by a candidate's election committee. Administrative Code §3-710 (unlike Administrative Code §3-711) imposes liability for any repayment to the Board on the Committee and not on any individual in the campaign.(*New York City Campaign Finance Board v. Ortiz,* 28 N.Y.3d 75 [1st Dept. 2006]).

Respondent also seeks an order directing the Committee to immediately remit to the Board the money that it has been directed to reimburse and to pay interest on the monies owed. Administrative Code §3-710(2)(c) requires that the Committee repay the Board and that "reimbursement shall be made not later than ten days after all liabilities have been paid. . . or the day on which the campaign finance board issues its final audit report for such participating committee . . .." The Committee was aware since the Board's draft audit in February, 2005, at the very least, that it was in possession of $25, 975.44 in unspent campaign funds that it concedes were to be reimbursed to the Board. Additionally, pursuant to the Board's final determination in August, 2006, it was ultimately required to reimburse the Board a total of $35, 415. Rather than comply with the Board's rules, the Committee placed the campaign funds in an interest bearing certificate of deposit and informed the Board that it would reimburse it when the certificate of deposit matured in April, 2007. The Board is empowered to impose civil penalties for what appears to be a violation of the Board's rules. Thus, this matter is remanded back to the Board for the limited purpose of further proceedings to determine civil penalties consistent with Administrative Code §§ 3-710.5, 3-711 and the Campaign Finance Board Rules.

The court finds that the Board conducted an extensive audit and investigation, made numerous re-evaluations of its own earlier determinations, and ultimately reduced the Committee's repayment and penalty amount from $47,310 to $35,415. The court finds that the Board's decision was not arbitrary nor capricious. Instead, the Board issued a considered and rational decision and, as such, it cannot be disturbed. (See, *Pell v. Board of Education, supra; Matter of Sullivan County Harness Racing Association, Inc. v. , supra).* Wherefore, it is hereby

ORDERED that Petitioners' application seeking an order from the Court declaring as arbitrary and capricious and in violation of due process the Respondent Board's determination in that the Committee must pay $470 in penalties due to disqualified post-election expenditures is denied; and it is further

ORDERED that Petitioners' application seeking an order from the Court declaring as arbitrary and capricious and in violation of due process the Respondent Board's determination that the Committee must reimburse the Board $35, 415 is denied; and it is further

ORDERED that Petitioners' application to declare that Feinsot is not

personally liable for its pending reimbursement obligations to the Board is granted; and it is further

ORDERED that Respondent's application that the Court order Petitioners to pay interest on their pending reimbursement obligations is denied; and it is further

ORDERED that respondent's application that the Court order Petitioners to immediately remit the monies that they are required to reimburse the Board is granted; and it is further

ORDERED that this matter is remanded back to the Board for the limited purpose of further proceedings to determine civil penalties consistent with Administrative Code §§ 3-710.5, 3-711 and the Campaign Finance Board Rules.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: June 21, 2007

Eileen A. Rakower, J.S.C.

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JUN 27 2007
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