

Charles v Butler

2007 NY Slip Op 34298(U)

May 11, 2007

Supreme Court, New York County

Docket Number: 0600884/2003

Judge: Karla Moskowitz

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: Hon. KARLA MOSKOWITZ
Justice

PART 03

FBEM

-----x
CARMEN CHARLES, as President of Local 420,
American Federation of State, County & Municipal
Employees, on behalf of LOCAL 420, AMERICAN
FEDERATION OF STATE, COUNTY &
MUNICIPAL EMPLOYEES, and L 420, INC.,

Plaintiffs,

- v -

JAMES BUTLER, KENDRETH SMITH, ENRIQUE
CAMPBELL, SARAH KENNEDY, and AURORA
SANTIAGO,

Defendants.
-----x

INDEX NO. 600884/2003 E

MOTION DATE _____

MOTION SEQ. NO. 003 005

MOTION CAL. NO. _____

NYS SUPREME COURT
REVIEWED
JUL 24 2007
E-FILING DEPT.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| |
| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: May 11, 2007

Ky

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

DISP
SD

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS Part 3

-----X
 CARMEN CHARLES, as President of Local 420,
 American Federation of State, County & Municipal
 Employees, on behalf of LOCAL 420, AMERICAN
 FEDERATION OF STATE, COUNTY &
 MUNICIPAL EMPLOYEES, and L 420, INC.,

Index No. 600884/2003

Plaintiffs,

DECISION and ORDER

- v -

JAMES BUTLER, KENDRETH SMITH, ENRIQUE
 CAMPBELL, SARAH KENNEDY, and AURORA
 SANTIAGO,

Defendants.

-----X
Karla Moskowitz, J.:

This case involves the diversion of union funds for payroll increases and expenditures that lacked authorization and were without a legitimate union purpose. The plaintiffs, Carmen Charles, as President of Local 420, American Federation of State, County & Municipal Employees, on behalf of Local 420, American Federation of State, County & Municipal Employees, and L 420, Inc. (collectively “plaintiff” or “the Union”) seek to recover these improper payments. By this motion, plaintiff moves for summary judgment, pursuant to CPLR 3212, and to dismiss the defendants’ affirmative defenses pursuant to CPLR 3211(b).

Background

Defendants James Butler (“Butler”) and Kendreth Smith (“Smith”), along with defendants Enrique Campbell (“Campbell”), Sarah Kennedy (“Kennedy”) and Aurora Santiago (“Santiago”) (Campbell, Kennedy and Santiago are collectively referred to herein as “defendants”), were all former officers of a labor union, Local 420. Butler was Local 420’s president. Campbell was its treasurer from March 2001-May 2002. Kennedy became Local

420's Executive Vice President in 1997. Santiago became Local 420's Corresponding Secretary in 1996. Each officer was also a member of the Executive Board that was Local 420's governing body.

Local 420's Constitution, the American Federation of State, County and Municipal Employees' ("AFSCME") Constitution, and the AFSCME Financial Standards Code govern expenditures of Local 420's funds. Under these documents, union members are entitled to an accounting of union funds. (*See* Affidavit of Carmen Charles, sworn to July 10, 2006, at ¶15 ["Charles Aff."]; *see also* Ex A, pg. 2 ¶ 5, to the Complaint that is attached as Exhibit A to the Affidavit of Larry Carey, sworn to July 8, 2006 ["Cary Aff."]). In particular, the AFSCME Financial Standards Code requires the approval of the Executive Board or the general membership for expense advances and for union credit card charges. (*See* Affidavit of Peter Leon ["Leon Aff."], sworn to June 15, 2006, Ex. A, Article V, section 4).

The AFSCME Financial Standards Code also requires meeting minutes to memorialize the Executive Board's or the general membership's authorization for expenditures of union funds. (Leon Aff. Ex A, Article V, § 4 [D]). These meeting minutes are the financial records of the union. (*Id.*). If the minutes are lost, the expenditures no longer have approval because "[t]he authorizations remain in effect only as long as the minutes are retained." (*Id.*). Article III, § 2 of the AFSCME Financial Standards Code requires retention of the minutes of all membership meetings for a minimum of six years. (Leon Aff. Ex A, Article V, § 4).

Local 420's Constitution requires general membership approval for expenditures in excess of \$5,000. (Complaint [Cary Aff. Ex. A], Ex. C, Article VIII, § 5). Finally, any expenditure Local 420 pays with a check must bear the signature of two officers (usually the President and

the Secretary-Treasurer of the union). (See AFSCME Financial Standards Code, Article VI, §1, attached as Ex. A to the Leon Aff.).

The plaintiff union alleges that the defendants here breached their contractual and fiduciary duties to it by disbursing or receiving unauthorized payments or expenditures as follows:

- salary and expense stipend increases;
- retroactive salary and expense stipend payments;
- “unused vacation” payments that gave defendants more than 52 weeks of pay in a year;
- improperly charging personal items to Local 420's American Express card; and
- retaining amounts advanced for expenses that exceeded documented expenditures for union purposes.

Plaintiff has sued Campbell as Treasurer both for improperly disbursing funds as well as receiving them. Plaintiff seeks to recover from defendants Kennedy and Santiago what they improperly received.

Plaintiff claims that defendant Campbell received \$62,621.23 without proper authorization, including \$18,835.44 in retroactive pay in 2002; \$40,807.01 in payments for unauthorized raises in 2002; and \$2,978.78 for one extra week of salary payment in 2001. (Leon Aff. ¶ 13).

Plaintiff claims that defendant Kennedy received \$109,999.84 without proper authorization, including \$11,944.63 in retroactive pay in 1997 and 2002; \$75,328.03 for unauthorized raises; and \$22,727.18 for seventeen extra weeks of salary payments. (Leon Aff. ¶ 14).

Plaintiff claims that defendant Santiago received \$43,597.25 without proper authorization, including \$7,058 in retroactive payments in 2002 and 1997; \$34,749.08 for unauthorized raises; and \$1,790.63 for three extra weeks of salary payments. (Leon Aff. ¶ 15).

Plaintiff also claims that all defendants are liable for the expenses they incurred on Local 420's corporate American Express card and for undocumented expense advances each received from Local 420.

Procedural History

This case has a tangled procedural history. On March 20, 2003, plaintiff commenced this action against the defendants. Plaintiff sought damages of \$1,602,658.79. On September 25, 2003, I rendered default judgments against defendants Smith and Butler. On October 16, 2003, rather than participating in a traverse hearing because defendants Kennedy and Santiago raised service of process issues, plaintiff commenced a second action under index no. 603249/2003. On November 17, 2003 defendant Campbell answered the original complaint. On February 26, 2004, I consolidated the second action with the earlier action. Upon completion of discovery, plaintiff made this motion for summary judgment against Campbell, Kennedy and Santiago and to dismiss the defendants' affirmative defenses. For the foregoing reasons, plaintiff's motion is granted in its entirety.

Discussion

I. Plaintiff's Prima Facie Case

Plaintiff has attached to its motion papers numerous documents supporting its position that defendants did indeed receive the salary increases and expense payments the complaint describes. For example, Exhibit B to the Leon Affidavit contains a copy of Local 420's payroll

records for the years 1997, 1999-2001, and March 2002 through December 2002. A payroll record spreadsheet, attached as Exhibit C to the Leon Affidavit, summarizes the information contained in the payroll records. These documents support the amounts that plaintiff claims defendants owe that I discussed earlier. In addition, Exhibits E-J to the Charles Affidavit, encompassing particular payroll records, show that defendants received the expense stipend and salary increases that plaintiff claims they received.

II. Defendant's Opposition

The defendants do not offer any opposition to plaintiff's motion that creates an issue of fact. With the exception of Campbell, the defendants do not challenge that they received the funds plaintiff has delineated in its initial motion papers. Instead, all defendants claim entitlement to the money they received for a variety of reasons. First, defendants claim that they were entitled to the salary increases and retroactive pay because certain collective bargaining agreements, that the general membership of Local 420 ratified, authorized the salaries. However, defendants have not explained how these agreements cover them. In addition, defendants seemingly admit that the salary increases violated provisions of the Local 420's constitution governing authorization of payments to employees. Further, it is undisputed that, except for the salary and expense stipend increases in December 1997, defendants show no attempt to obtain approval for these payments at any meeting of the Executive Board. (*See* Charles Aff. ¶ 26-27).

In his affidavit, Campbell also asserts that Carmen Charles destroyed the records that would exonerate him and the other defendants, or that the minutes of the meetings where the expenditures and the salary increases were approved simply disappeared. To the contrary, the plaintiff produced all the Executive Board meeting minutes and general membership meeting

minutes for the period 1997 through 2002 that currently exist. (*See* Ex. N to the Charles Aff.). There is nothing in these minutes indicating approval for the expenses and salary payments at issue in this case. As for the few missing minutes and any possibility they might contain the illusory approvals, because the defendants were admittedly fiduciaries and because the AFSCME Financial Standards code makes clear that appropriate documentation of authorization and legitimate union purpose are necessary, the defendants must bear the risk associated with the lack of documentation. Also the defendants, as officers, had the responsibility of maintaining the books and records. The plaintiff turned over in discovery whatever was turned over to the union. Defendants, who had the responsibility to maintain these books and records, cannot fail to turn them over and then rely on that failure to create an issue of fact, speculating that the approval for their overreaching was somewhere contained in those missing documents. Defendants' implications that the documents are missing because Carmen Charles destroyed them or the police took them are mere conjecture that cannot defeat summary judgment. (*See Cello v Reseal Corp.*, 16 AD3d 339, 340 [1st Dept 2005] [failure to defeat motion for summary judgment regarding future lost earnings where infant plaintiff offered nothing more than mere speculation or conjecture]).

Defendants also contend that they repaid everything that was personal in nature, but that they cannot prove this repayment, again, because the documentation has disappeared. This is also conjecture. Moreover, defendants have not even bothered to speculate about any specific documents despite claiming their existence. As such, defendants attempt to defeat summary judgment by claiming missing records is unsupported. Therefore, the court rejects defendants' speculative argument that there are missing documents that would exonerate them.

Defendants also claim that the audits that the New York District Attorney and the accounting firm KPMG performed following the DC 37 corruption scandal in 1999 clear them of any wrongdoing. This is not true. In fact, the KPMG report forms one of the bases for the complaint. (See Complaint, Ex J, "Report on Particular Financial Activities of Local 420, AFSCME and L 420, Inc" [the "KPMG Report"]). The KPMG Report indicates numerous instances of improper expenses. For example, the KPMG report states that defendants Kennedy and Santiago had \$6,804.56 and \$5,258.71 respectively in restaurant charges on the Union's American Express card that did not have sufficient documentation. (See KPMG Report at 17).

Campbell alone challenges the amounts he received, but the documentation that Charles has submitted on this motion refutes these assertions. For example, Campbell acknowledges receiving only \$8,240.44, but documentary evidence indicates that he did indeed receive 18,835.44 in retroactive pay on April 18, 2002. (See Second Affidavit of Carmen Charles in Support of Plaintiffs' Motion for Summary Judgment, sworn to November 8, 2006, Ex. B or Leon Aff., Exhibit B, Volume 9).


Finally, defendants make various arguments revolving around waiver and ratification, claiming that defendant Charles Butler, when he was president of Local 420, waived the restrictions in Local 420's constitution. As a result, defendants contend that they were "misled into acting upon the belief that such enforcement would not be sought." (Def. Opp. Mem. at 27). This argument is without merit. Obviously, waiver requires more than relying on a union president, who may be in cahoots with the other officers, to grant those officers pay increases or other payments without proper authorization. Otherwise, there would be no limitations on any set of officers freely helping themselves to the union's money.

Conclusion

Defendants fail to refute plaintiff's clear evidence showing that defendants received the union funds at issue and the amounts they received. Nor have defendants proffered any evidence that the expenditures and salary increases had authorization. Thus, there are no issues of fact to resolve with respect to liability or damages. Accordingly, the court grants summary judgment to plaintiff for the amounts it seeks and dismisses defendants' affirmative defenses.

Settle order and judgment.

Dated: May 11, 2007



J.S.C.