

Matter of Gallo v New York State Socy. of Certified Pub. Accountants
2009 NY Slip Op 30638(U)
March 16, 2009
Supreme Court, New York County
Docket Number: 103229/08
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

In the Matter of the
Application of CHARLES J.
GALLO,

INDEX NO. 103229/08

Petitioner,

- v -

MOTION DATE 1/21/09

MOTION SEQ. NO. 02

MOTION CAL. NO. 8-56

NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS
and AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS,

Respondents.

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

Notice of Motion/Order to Show Cause
Answering Affidavits - Exhibits
Replying Affidavits

PAPERS NUMBERED

1-2
3-6
7
8-9
10

Cross-Motion: Yes No *surely*

This Article 78 petition is (+ Memo of Law (2))
In accordance with the attached memorandum, decision and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1412)

HON. MICHAEL D. STALLMAN

J.S.C.

Dated: 3/16/09
New York, New York

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

-----X
In the Matter of the Application of
CHARLES J. GALLO,

Index No.: 103229/08

DECISION AND JUDGMENT

Petitioner,

- against -

NEW YORK STATE SOCIETY OF CERTIFIED
PUBLIC ACCOUNTANTS and AMERICAN
INSTITUTE OF CERTIFIED PUBLIC
ACCOUNTANTS,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

-----X
HON. MICHAEL D. STALLMAN, J.:

Petitioner, a certified public accountant, seeks, pursuant to
CPLR Art. 78, to annul a determination of respondents, rendered in
July of 2007, directing that petitioner be expelled from respondent
New York State Society of Certified Public Accountants (NYSSCPA).

BACKGROUND

NYSSCPA is a non-profit, private and voluntary organization
incorporated under the laws of the state of New York. The
determination was made by a Joint Trial Board, which respondents
state is composed of certified public accounting (CPA) professional
societies, NYSSCPA, and the respondent American Institute of
Certified Public Accountants (AICPA). AICPA is allegedly formed
under the laws of the District of Columbia, and petitioner has not
been a member of AICPA.

In order to be a member of NYSSCPA, an applicant must agree,
in writing, to be bound by the organization's by-laws. Section

[* 3] .

XIII.9 of these by-laws states, in sum and substance, that any member who fails to cooperate with the organization's disciplinary committee in any investigation of that member is deemed to be in violation of the by-laws. A failure to cooperate in such investigation includes failing to respond to interrogatories or a request for production of documents.

In September, 2000, one of petitioner's clients, Saxton Group Limited (SGL) filed a complaint against petitioner with NYSSCPA's Ethics Charging Authority (ECA), alleging that petitioner failed to file SGL's corporate income tax returns for 1998 and 1999, resulting in penalties and fees being assessed against SGL. If such charge were true, this would be a violation of the Codes of Professional Conduct.

On April 12, 2001, the ECA informed petitioner that no prima facie evidence was presented that he had violated the Codes of Professional Conduct, and so the investigation was closed. This letter also informed petitioner that the investigation could be reopened if new information became available that would warrant such action.

On April 9, 2002, the ECA sent petitioner a letter, stating that the ECA had received new information from SGL, which caused the ECA to reopen the investigation. This letter detailed which rules of the Codes of Professional Conduct petitioner was alleged to have violated, indicated the investigation procedures that the

ECA would be following, provided petitioner with an opportunity to have a personal meeting with an ECA representative, and requested 12 items, consisting of questions and document production requests, detailing petitioner's accounting activities with respect to SGL between 1996 (when petitioner was engaged by SGL) and 2000. Petitioner did not respond to this letter.

On May 15, 2003, the ECA wrote to petitioner again, this time informing him that his failure to respond to the April 9, 2002, letter constituted a violation of the by-laws. Petitioner did not respond to this letter.

On November 26, 2002, the ECA again wrote to petitioner, stating that petitioner's failure to respond to the earlier letters constituted a violation of § XII.9 of the by-laws, as well as the Codes of Professional Conduct. The letter offered petitioner the opportunity to enter into a settlement agreement with the ECA; however, petitioner's failure to sign the settlement agreement would result in the matter being referred to the Joint Trial Board for resolution. Petitioner did not respond to this letter.

On March 10, 2003, another letter was sent to petitioner, informing him that the matter had been referred to the Joint Trial Board.

The ECA staff became aware that there was a different address listed for petitioner, in addition to the addresses where the letters had been sent, and so the ECA sent copies of all of the

correspondence previously sent to petitioner to this additional address, and gave petitioner two extra weeks in which to respond. The case file indicates that this letter of March 12, 2003, was received and signed for. The letter informs petitioner that a hearing on the matter was scheduled for May 19, 2004, and that petitioner may participate in the hearing, along with counsel.

At the request of petitioner's counsel, the hearing was adjourned to August 5, 2004. On June 14, 2004, petitioner wrote to the ECA chair, indicating his willingness to resolve the matter, and so the August 5, 2004, hearing was cancelled.

On July 9, 2004, petitioner sent the ECA chair a letter answering some of the questions appearing in the letter of April 9, 2002, but he failed to provide any of the requested documents.

On August 24, 2005, the ECA wrote to petitioner, stating that his answers were incomplete. Petitioner did not respond to this letter, and a follow-up letter was sent on November 11, 2005. The ECA investigator attempted to set up a conference call with petitioner, so that some of the questions could be answered orally, but petitioner wrote back saying that it was a busy time for him, and that he hoped to talk to the ECA representative soon. After several months of back and forth voice-mail messages, the ECA investigator wrote to petitioner on July 12, 2006, describing all of the attempts that were made to try to speak with petitioner, and stating that petitioner's failure to cooperate was a violation of

[* 6] .

the NYSSCPA by-laws. This letter was returned unclaimed, even though it was sent to the address at which petitioner had been receiving the ECA correspondence.

On August 21, 2006, the un-opened letter was resent to petitioner, with a cover letter indicating that unless a response was received, the matter would be sent to the Joint Trial Board with a recommendation that petitioner be expelled from NYSSCPA. The ECA received no response from petitioner.

On June 6, 2007, a letter was sent to all of petitioner's addresses, summoning petitioner to appear at a hearing of the Joint Trial Board on July 10, 2007.

On July 10, 2007, the Joint Trial Board held its hearing, the petitioner having failed to attend, and the Joint Trial Board determined to expel petitioner from NYSSCPA. This decision was sent to petitioner in writing on July 11, 2007. The July 11, 2007, correspondence informed petitioner that he had a right to a copy of a transcript of the hearing and to request a review of the decision by submitting a written request, detailing the reasons for requesting a review, within 30 days of the July 10, 2007, hearing.

On August 3, 2007, petitioner's counsel wrote to the Joint Trial Board requesting that the determination be reviewed on the basis that petitioner could prove that he was innocent of the charges filed against him be SGL, thereby rendering petitioner's failure to cooperate moot.

On August 31, 2007, the ECA responded to petitioner's request for a review, stating that the reason for the expulsion was petitioner's failure to cooperate with the investigation, and that the determination to expel petitioner had nothing to do with the underlying substantive charges asserted by SGL. On September 5, 2007, petitioner's counsel replied, stating that petitioner would respond to the requests, provided that the information is actually relevant to the investigation.

On November 5, 2007, a committee of the Joint Trial Board rejected petitioner's request for review.

Petitioner asserts that, between May 15, 2002 and May 19, 2004, he orally requested that NYSSCPA specify the particulars of the "new information" that formed the ECA's decision to re-open the investigation. Petitioner's position is that, until he was informed of what constituted this "new information," he would be unable to provide relevant answers to the questions posed.

NYSSCPA is a voluntary organization, and petitioner's expulsion does not interfere with his ability to practice as a CPA, nor does it in any way effect his license.

Previously, respondents moved to dismiss this action, asserting that, Article 78 relief is not available to petitioner to challenge the acts of a voluntary, private organization. Respondents further argued, in their reply brief to that motion, that the other members of the Joint Trial Board should be joined in

* 8]
the action.

This Court, in its decision dated April 22, 2008, determined that respondents' actions are judicially reviewable, pursuant to Article 78, but that the issue of joining other parties was raised only in reply papers, and, therefore, was not properly before the Court. Respondents were ordered to answer the petition, and the matter was restored to the motion part on December 4, 2008, to address that portion of respondents' motion seeking summary judgment.

DISCUSSION

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The test* is whether the action taken is justified and thus to be sustained; or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

In the instant matter, the action of the Joint Trial Board in expelling petitioner from NYSSCPA was neither arbitrary nor capricious. Rather, the Joint Trial Board acted reasonably; it had

a rational basis well-founded on the facts. Petitioner was expelled for his failure to cooperate with an investigation of his unprofessional conduct, such non-cooperation being a direct violation of NYSSCPA's by-laws. This determination is well substantiated by all of the correspondence discussed above and attached to respondents' motion papers as exhibits.

Petitioner does not dispute that he failed to provide the information requested by the ECA, but asserts in his petition, for the first time in writing, that his failure to respond emanated from the ECA's unwillingness to indicate the exact nature of the "new information" that formed the basis of reopening the investigation against him. However, there is no legal requirement that such information be divulged in the notices sent to petitioner in which the subject information was requested.

There is no violation of the due process to which petitioner alludes, because petitioner was afforded both notice, an opportunity to be heard and a hearing prior to any final action being taken. There is no denial of due process in this instance, in which petitioner was informed of the charges against him, the reasons for the action taken, and was given ample and multiple opportunities to correct the situation and rebut the charges. *Lindemann v American Horse Shows Association, Inc.*, 222 AD2d 248 (1st Dept 1995); *Matter of Greenwald v Board of Regents of the State University of New York*, 144 AD2d 841 (3d Dept. 1988).

"It is well settled that the requirements of due process are satisfied where notice [is] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. Due process is a flexible concept requiring a case-by-case analysis ... [internal quotation marks and citations omitted]. "

Matter of Harner v County of Tioga, 5 NY3d 136, 140 (2005).

Furthermore, the notices sent to petitioner were adequate and sufficient, because, by following the procedures detailed in those notices, the petitioner had an opportunity "to discover the specifics of the charges, refute, confront and cross-examine witnesses and be represented by counsel." *Hall v Municipal Housing Authority for the City of Yonkers*, 57 AD2d 894, 895 (2d Dept 1977). The mandates of due process do not require that all of the information that petitioner would like to have appear in the notice, just that the notice inform him of his rights and the charges against him. Indeed, it was petitioner who did not avail himself of the process to which he was due, process which had been made available to him.

Neither can it be said, under all of the circumstances, that the penalty is too severe or that it shocks the Court's conscience. The penalty is lawful under NYSSCPA's rules and under law.

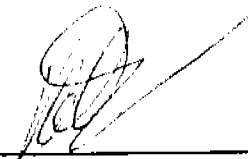
Based on the foregoing, the arguments presented by respondents regarding the joinder of additional parties and/or the dismissal of the action as against AICPA is rendered moot.

CONCLUSION

Based on the foregoing, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: March 16, 2009
New York, New York

ENTER: 

Michael D. Stallman, J.S.C.

BY MICHAEL D. STALLMAN

This judgment shall be entered by the Clerk of the Court and notice of entry shall be entered by the Clerk of the Court. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Office (Room 141B).