STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MICHAEL DIEDERICH, JR., individually and on behalf of all taxpayers of the County of Rockland, and JOHN DOE,

Plaintiffs,

-against-

CHRISTOPHER ST. LAWRENCE, HOLLAND & KNIGHT LLP, THE NEW YORK STATE COMPTROLLER, AND THE ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY,

Defendants.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST8757 Index No. 2737-08

Appearances:

Michael D. Diederich, Jr.
Plaintiff/Petitioner Pro Se
361 Route 210
Stony Point, New York 10980

Bosworth, Gray & Fuller
Attorneys for Defendants St. Lawrence and Rockland County Solid Waste Management Authority
(Kimberlea Shaw Rea, Esq., of Counsel)
116 Kraft Avenue, Suite 11
Bronxville, New York 10708

Holland & Knight, LLP
Defendant Pro Se
(Christopher G. Kelly and Robert J. Burns, Esqs., of Counsel)

195 Broadway, 24th Floor
New York, New York 10007

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action for a declaratory judgment in Rockland County. Portions of the complaint were converted to an article 78 proceeding and the hybrid action/proceeding was transferred to Albany County Supreme Court. The third and eighth causes of action asserted in the complaint which sought relief from the New York State Comptroller have been dismissed. The parties have also stipulated to discontinue all claims against defendant St. Lawrence. The fifth cause of action, which seeks relief only with respect to defendant St. Lawrence pursuant to General Municipal Law § 51 is thus withdrawn[1].

Defendants Holland & Knight and the Rockland County Solid Waste Management Authority (hereinafter Authority) have each moved for summary judgment dismissing the remaining claims on the grounds that they are without merit and that plaintiff does not have standing to raise such claims. Plaintiff has cross moved for an order granting him partial summary judgment determining that the payment of fees for attorneys services was

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[1] To the extent that the fifth cause of action could be construed as seeking relief against the Authority, General Municipal Law § 51 does not authorize a tax payer action against a public benefit corporation (see Kadish v Roosevelt Raceway Assoc., 183 AD2d 874 [2d Dept 1992]). As such, the fifth cause of action fails to state a cause of action against the Authority.

unauthorized and illegal and granting leave to serve an amended complaint adding a *qui tam* cause of action pursuant to State Finance Law § 190.

The complaint herein challenges the payment of in excess of $100,000 in legal fees for the preparation of an *amicus curiae* brief in an action before the United States Supreme Court relating to flow control of refuse. The remaining causes of action seek a declaration that the payment was unlawful, recovery of the funds, damages for failure to comply with competitive procurement procedures and judicially ordered elimination of the Authority.

With respect to the proposed *qui tam* action, State Finance Law § 190 (2) (b) requires that the complaint be filed in Supreme Court *in camera* and under seal. While the statute does not state where the proposed complaint must be filed, the proposed *qui tam* action is venued in Rockland County. Such venue is clearly appropriate, as following dismissal of all claims against the Comptroller there is no basis for venue in Albany County. It is doubtful whether submission of a copy of a proposed complaint as an exhibit to a cross motion in a county other than the county of venue constitutes compliance with the statute.

State Finance Law § 190 (2) (b) also requires personal service of a copy of the complaint together with "written disclosure of substantially all material evidence and information the person possesses" upon an Assistant Attorney General at an office of the Attorney General or upon the Attorney General. Plaintiff has submitted an affidavit alleging "I am serving the Attorney General's Office with a copy of the proposed *qui tam* complaint." There is no affidavit of service stating when and how the complaint was actually served and

no indication that the supporting evidence was served with the complaint.

State Finance Law § 190 (2) also provides for a 60 day waiting period after service upon the Attorney General's Office to allow the Attorney General to determine whether he wishes to prosecute the action or intervene in the action. The instant cross-motion appears to have been made contemporaneously with service upon the Attorney General with no compliance with the waiting period.

Furthermore, State Finance Law § 190 (9) (a) provides that no court shall have jurisdiction over a *qui tam* action "based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or a local government is already a party." Pursuant to State Finance Law § 188, the state or local government is defined to include any public authority or local public benefit corporation such as the defendant Authority. The proposed *qui tam* action is clearly based upon the same allegations and transactions as the instant action. As such this Court does not have jurisdiction over the proposed *qui tam* action. Accordingly, the cross-motion for leave to serve an amended complaint adding a *qui tam* cause of action shall be denied.

The Authority seeks summary judgment dismissing the action on the ground that plaintiff does not have standing to challenge the actions of the Authority. Analysis of this issue requires consideration of whether standing is based upon common law principles or statutory standing as well as the nature of the claims involved. With respect to statutory standing, the complaint alleges causes of action pursuant to State Finance Law § 123-b and

General Municipal Law § 51. The latter claim has been withdrawn and in any event, as noted above, General Municipal Law § 51 is inapplicable to actions against a public benefit corporation.

State Finance Law § 123-b (1) grants standing to any person who is a citizen taxpayer to maintain an action "against an officer or employee of the state" concerning "a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds." There is no standing under the statute if no officer or employee of the state (see Matter of Schulz v De Santis, 218 AD2d 256, 259 [3d Dept 1996]) or funds which can be directly traced to the state (see Matter of East End Prop. Co. #1, LLC v Kessel, 46 AD3d 817, 824-825 [2d Dept 2007]) are involved. It has also been held that an action which challenges the manner in which a law firm has been retained "does not in any way implicate the wrongful expenditure, misappropriation or misapplication of State funds" (Gordon v Urbach, 252 AD2d 94, 96-97 [3d Dept 1998]).

The Authority is a public benefit corporation entirely separate and distinct from the state. As such the provisions of State Finance Law § 123-b are not applicable to provide statutory taxpayer standing to plaintiff (see Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth., 19 AD3d 284, 286 [1st Dept 2005]; Matter of Lancaster Dev. v Power Auth. of State of N.Y., 145 AD2d 806, 807 [3d Dept 1988]; Pier 59 Studios L.P., v Hudson River Park, 2007 NY Slip Op. 30845(U) [Sup Ct, New York County 2007]; Freefall Express, Inc. v Hudson River Park Trust, 2006 WL 4568296 [Sup Ct, New York County 2006]).

There are also no allegations that the Authority used state funds to pay the legal fees challenged herein and much of the complaint is addressed to the process or manner in which defendant Holland & Knight was retained. It is therefore determined that plaintiff does not have statutory standing to maintain this action.

With respect to common law standing, plaintiff must allege and prove an actual injury which is different from that experienced by the public in general (see Diederich v Rockland County Police Chiefs' Assn., 33 AD3d 653, 654 [2d Dept 2006]; Concerned Cooper Gramercy Tenants' Assn. v New York City Educ. Constr. Fund, 304 AD2d 412 [1st Dept 2003]; Matter of Schulz v State of New York, 180 AD2d 42, 44 fn 1 [3d Dept 1992]). To the extent that plaintiff relies upon a minor increase in his real property tax bill resulting from the challenged payments, his injury is indistinguishable from that experienced by the general public.

Plaintiff also alleges a competitive injury based upon the fact that he was not retained to prepare the *amicus curiae* brief. Plaintiff contends that such competitive injury is sufficiently distinct from the injury sustained by the general public to support standing. However, "[m]ere competitive injury does not suffice as injury in fact" sufficient to confer standing (Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Dev. Corp., 36 AD3d 234, 247 [1st Dept 2006]). Rather, plaintiff must establish that he "could have prevailed as the successful responder" (id.). To the extent that the complaint alleges that retention of counsel to prepare an *amicus curiae* brief was ultra vires and/or

unauthorized plaintiff can not establish that he could have been retained as his retention would have been similarly unauthorized.

To the extent that plaintiff alleges a failure to comply with competitive procurement practices, the documentary evidence also precludes plaintiff from establishing that he could have been retained to prepare the *amicus curiae* brief. His letter to the Authority, dated less than one month before final submissions were due, merely invited the Authority to join in a brief which plaintiff was already preparing for another client. Such proposal can not be construed as a request to be retained to prepare an independent brief. Moreover, the letter expressly advised against submitting an independent brief on the theory that it might emphasize a connection between a prior Supreme Court decision finding a flow control law unconstitutional and the issues to be raised in the *amicus curiae* brief. It is thus clear that plaintiff never sought to be retained to prepare an independent brief and therefore could not reasonably be found to have sustained an injury.

Even if plaintiff had properly alleged that he could have been retained to prepare an independent *amicus curiae* brief, the claims of failure to comply with required competitive procurement practices are without merit. Plaintiff relies upon General Municipal Law §§ 104-b and 120-w. By its terms, § 104-b is only applicable to political subdivisions and districts, which are defined in General Municipal Law § 100. The definition does not include public benefit corporations. In general, the Authority, as a public benefit corporation, is not required to follow competitive bidding practices (see Hunts Point Term. Produce Coop.

Assn., Inc. v New York City Economic Dev. Corp., 36 AD3d at 246; Matter of Lancaster Dev. v Power Auth. of State of N.Y., 145 AD2d 806, 807 [3d Dept 1988]). While General Municipal Law § 120-w does indicate an intent to promote competitive procurement practices by solid waste disposal authorities, on its face it is applicable only to contracts for the design, construction, operation and maintenance of physical solid waste management facilities and not contracts for legal services. In any event, general competitive bidding requirements are not applicable to professional service contracts, which have regularly been excepted based upon policy (see Zack Assoc., Inc. v Setauket Fire Dist., 12 AD3d 439, 440 [2d Dept 2004]; Giustino v County of Nassau, 306 AD2d 376, 377 [2d Dept 2003]; Matter of Fawcett v City of Buffalo, 275 AD2d 954, 955 [4th Dept 2000]; Matter of Schulz v Warren County Bd. of Supervisors, 179 AD2d 118, 123 [3d Dept 1992]). As such, plaintiff has failed to establish an actual injury separate and distinct from that sustained by the general public.

It is therefore determined that plaintiff does not have standing to maintain the instant action. Such determination renders plaintiff's request for class action status academic and requires denial of his cross-motion for partial summary judgment.

Accordingly it is hereby,

ORDERED and ADJUDGED, that the complaint/petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. All papers together with the original of this Decision/Order/Judgment are returned to the attorney for

defendant Authority who is directed to enter this Decision/Order/Judgment without notice and to serve the remaining parties with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: Troy, New York
June 4 , 2009

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated March 3, 2009; Affirmation of Teno A. West, Esq., dated March 2, 2009, with Exhibits 1-6 annexed;
Memorandum of Law dated March 3, 2009;
Complaint dated November 19, 2007;
Answer of Defendant Holland & Knight dated December 18, 2007;
Answer of Defendants St. Lawrence and the Authority dated February 28, 2008;

Notice of Motion dated March 6, 2009; Affidavit of Christopher P. St. Lawrence dated the blank day of March, 2009, with Exhibits 1-4 annexed; Affirmation of Bridget Gauntlett, Esq., undated;
Memorandum of Law dated March 6, 2009;

Notice of Cross-Motion dated March 27, 2009; Affidavit of Michael D. Diederich, Jr., Esq., dated March 27, 2009, with Exhibits 1-6 annexed;
Plaintiff's Memorandum of Law dated March 27, 2009;

Reply Affirmation of Bridget Gauntlett, Esq., dated April 9, 2009, with Exhibit 5 annexed;
Reply Memorandum of Law dated April 16, 2009;

Memorandum of Law of Holland & Knight dated April 15, 2009;

Reply Affidavit of Michael D. Diederich, Jr., Esq., dated April 19, 2009.