

New York City Campaign Fin. Bd. v Tapper
2010 NY Slip Op 30411(U)
March 1, 2010
Supreme Court, New York County
Docket Number: 400489/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

NEW YORK CITY CAMPAIGN
FINANCE BOARD

INDEX NO. 400489/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

MARLENE J. TAPPER +
FRIENDS OF TAPPER

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/1/10

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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 10

-----X
New York City Campaign Finance Board
Plaintiff,

Decision/Order

Index No.: 400489/09

Seq. No. : 001

-against-

Present:

Hon. Judith J. Gische

Marlene J. Tapper and Friends of Tapper,
Defendants.

----- X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Notice of Motion, PH affirm	1
Exhibits	2
Answer and Request for Stay	3
HW affirm	4
Verified Complaint	5
Answer	6

FILED
MAR. 03. 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff New York City Campaign Finance Board ("NYCCFB") is a New York City agency that was established to administer the Voluntary Campaign Finance Program.

The program provides public matching funds to candidates running for election to the office of Mayor, Comptroller, Public Advocate, Borough President or City Council.

Defendant, Marlene Tapper ("Tapper"), was a City council candidate in 2005.

Defendant Friends of Tapper ("Friends") was Tapper's campaign committee.

Plaintiff commenced this action seeking a monetary judgment against defendants for fines and penalties it imposed based on defendants' failure to comply

with the laws, rules and regulations applicable to participating in its matching funds program. Tapper acting on behalf of herself and Friends interposed an answer with a counterclaim. The counterclaim consists of various allegations of improper practices and procedures in connection with the administration of the matching funds program. Defendants seek \$300,000 in compensatory damages (for actual damages and emotional distress) and punitive damages.

NYCCFB now moves for summary judgment on the complaint and to dismiss the counterclaim. Defendants oppose the motion on its merits and also seek a stay of this action until a federal action known as Ognibene v. Parkes, (08 Civ 01335) ("federal action") pending in the Southern District of New York is resolved.

CPLR 2201 permits a court in which an action is pending to grant a stay of proceedings in a proper case, upon such terms as may be just. Although Tapper is a named plaintiff in the federal action which seeks to challenge certain aspects of the Campaign Finance Law ("CFL"), none of the challenges have any bearing on the application of the CFL in the instant action. Thus, in the federal action the named plaintiffs challenge changes to the CFL that were enacted in 2007. The events underlying this action occurred in 2005. Consequently there is no basis to stay the instant action.

Issue has been joined on the complaint in chief and no note of issue has yet been filed. Thus, request of summary judgment on the complaint will be decided on the merits. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

The following facts are either undisputed, undisputable or otherwise established from the submissions made to the Court on this motion.

Tapper declared herself a candidate for the office of City Council from district 21 in 2005. In connection with her candidacy she submitted a Certification Form to NYCCFB in order to participate in the matching funds program. She designated Friends as her principal campaign committee authorized to receive the matching public funds. The Certification Form expressly provides that defendants will comply with all applicable laws, rules and regulations applicable to participating in the matching funds program. It further expressly provides that the signatory understands that failure to comply with the laws, rules and regulations may result in the imposition of penalties for which the candidate and the principal committee may be jointly and severally liable.

August 4, 2005 was the first date that candidates for the 2005 elections could qualify for matching funds. In order to qualify, the candidate was required to show that she had received at least \$5,000 in matchable contributions from individual New York City residents and at least 75 contributions of \$10 or more from residents of the candidate's council district. NYC Admin Code §3-703(2)(a)(iv). NYCCFB determined that defendants were not eligible for matching funds because they failed to substantiate the validity of their matching claims. Defendants claimed that the NYCCFB had not properly evaluated its documentation.

In any event, further documentation was, thereafter, provided and two weeks later defendants received \$78,375 in public funds. By September 9, 2005, defendants had received a total of \$82,500 in public matching funds, which was the maximum amount any candidate for City council was eligible to receive in 2005. NYC Admin Code §3-703(2)(b).

After the elections NYCCFB conducted a routine audit. Defendants were given a detailed draft report dated January 27, 2006 that identified multiple potential violations of the CPL. The report, most significantly, included a claim that Tapper had made an over the limit contribution to her own campaign. She was restricted to contributing only \$ 8,250 in order to be eligible to receive public funds but has actually contributed. NYC Admin. Code §3-703. Other paperwork violations were also identified.

On March 17, 2006 defendants provided a detailed response to the draft audit. Insofar as the contributions limit violation was concerned defendants stated: "The campaign in no way intentionally failed to comply with the contribution limit and is currently attempting to resolve this issue of overage in an expedient manner."

On May 1, 2006 NYCCFB sent defendants a Notice of Alleged Violations, Proposed Penalties and Opportunity to Respond. The May 1, 2006 Notice explicitly identified the claimed CFL violations and the penalties that were being sought. The Notice expressly indicated that the violations would be considered by NYCCFB at a June 5, 2006 public meeting. The Notice further informed defendants that they could respond either in person or writing.

Defendants provided a written response on May 18, 2006. Insofar as the over-the limit violation, defendants claimed that "extenuating circumstances" required that the over the limit contribution be made "in an emergency capacity." Defendants further stated that the NYCCFB mistakenly told them their "threshold requirement had not been met."

The claimed violations were not considered by the NYCCFB on June 5, 2006.

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Instead the NYCCFB issued a Revised Notice of Alleged Violations, Proposed Penalties and Opportunity to Respond on June 5, 2006. The June 5, 2006 Notice explicitly identified further claimed violations of the CFL and the penalties that were being sought. Defendants were notified that the newly identified claimed violations and the previously identified claimed violations would be considered by the NYCCFB would be considered at the July 12, 2006 public meeting. The NYCCFB acknowledged that defendants had already informed it that they would appear at the July 12, 2006 meeting.

Tapper appeared at the July 12, 2006 meeting. The meeting was transcribed. A staff attorney for the NYCCFB presented recommendations that fines be levied against defendants for the claimed violations. Tapper spoke in opposition thereto. With respect to the over the limit contribution she argued that NYCCFB failures had resulted in a two week delay in public monies that created an emergency need to make additional contributions to meet expenses. Tapper also asked and was given the opportunity to and did subsequently submit additional documentation.

On August 10, 2010, at the next NYCCFB public meeting, it assessed \$12,100 in fines against defendants. Notice of the final NYCCFB was sent to both defendants in a letter dated August 10, 2006. The letter detailed the fines and the reasons therefore. Additional notification of the fines was sent to defendants as part of a final Audit Report dated August 22, 2006. These notifications were sent to defendants at the addresses provided in the Certification Form submitted as their initial agreement to participate in the matching public funds program.

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Over four months elapsed and defendants did not challenge NYCCFB's decision nor did it pay the fine. The underlying action seeks to enter a money judgment for the unpaid fines. Defendants' answer and counterclaim (dated almost three years after the decision interposing the fines was made) seeks to substantively challenge the determination by NYCCFB.

While NYCCFB believes that defendants have no grounds to substantively challenge the fines, the sole basis for the instant motion is that defendants' time to have challenged the merits of the determination has elapsed.

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept. 2003).

At bar the only issue to be considered is one of law, to wit: has the statute of limitations to challenge the underlying decision by the NYCCFB passed. The court holds that it has so passed. In the decision of NYC Campaign Finance Board v. Lynn (index # 405097/01) the Hon. Shirley W. Kornreich held:

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“An agency’s determination, including the assessment of a penalty, can only be challenged under New York Law by means of a timely - commenced Article 78 proceeding. ... Defendants have waived their objections to the [NYCCFB]’s ruling by not commencing a timely Article 78 proceeding, and so are without any defense to the plaintiff’s complaint herein. It is well settled that failure to seek timely Article 78 review of an agency’s determination precludes any collateral challenge to that determination in subsequent litigation.” (Citations omitted).

This court adopts Justice Kornreich’s reasoning in this case, which is legally indistinguishable from the case before her. Similar reasoning has been adopted in New York City Campaign Finance Board v. Clarke, (index # 402487/01, dec. dated 12/06/02); New York City Campaign Finance Board v. Treasurer for Sergio ‘97 (index # 405076/01, dec. dated 1/24/03); New York City Campaign Finance Board v. Lewis, (index # 400626/04, dec. dated 10/27/04); and New York City Campaign Finance Board v. Seeman, (index #402657/04). Defendants’ substantive challenges to the underlying determination of fines is time barred. Defendants failed to challenge the August 10, 2006 NYCCFB determination in an Article 78 proceeding. Even were the court to consider the counterclaim interposed in this case as the functional equivalent of an Article 78 proceeding, the counterclaim was interposed approximately 34 months after the defendants received notification of the NYCCFB determination. Article 78 proceedings must be commenced within four (4) months of the final determination. CPLR §217[1].

CONCLUSION

In accordance herewith it is hereby:

ORDERED that plaintiff’s motion for summary judgment and to dismiss the counterclaim is granted and it is further

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ORDERED that the Clerk of the Court shall issue a money judgment on the complaint in favor of plaintiff and against defendants, jointly and severally, in the amount of \$12,100 and it is further


ORDERED that the Clerk of the Court shall issue a judgment in favor of the plaintiff and against the defendants dismissing the counterclaim and it is further

ORDERED that the plaintiff is awarded the costs and disbursement of this action and it is further

ORDERED that any requested relief not otherwise granted herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, New York
March 1, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE