

Matter of Knapp v Haight

2013 NY Slip Op 34155(U)

September 24, 2013

Supreme Court, Dutchess County

Docket Number: 6431-11

Judge: Robert M. DiBella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X
In the Matter of:
Frances A. Knapp,
As Dutchess County Democratic Commissioner
and Dutchess County Board of Elections,

Decision & Order

Index # 6431-11

Petitioners,

-against-

Erik J. Haight
As Dutchess County Republican Commissioner
and Dutchess County Board of Elections

Respondents.

2013 OCT - 2 P 2:48
DUTCHESS COUNTY
CLERK'S OFFICE
RECEIVED

-----X
DIBELLA, J.

The following papers were read and considered on this motion to reargue and renew a prior order of the Court

1) Notice of Motion; Affirmation in support by Kathleen O'Keefe, Esq; and Exhibits A-N annexed thereto.

The Petitioner Frances A. Knapp moves for an order pursuant to CPLR 2221 granting reargument and renewal of this Court's Decision and Order dated June 5, 2013 which denied her attorney's request for attorney's fees. There is no opposition to the motion. The motion is denied.

In support of petitioner's motion to reargue, Petitioner's attorney contends that this court "overlooked" a "memo" drafted by Assistant Court Attorney Keith Byron, "misapprehended the proper procedure created by Dutchess County to recover attorney fees", and "instead...relied on Public Officers Law §18" (see Affirmation by Kathleen O'Keefe, Esq. dated July 1, 2013 at paragraphs 29 and 30). In addition, Petitioners attorney contends that this court also overlooked payments it previously ordered made to

Knapp v. Haight
Ind # 6431/2011

two other attorneys who were previously involved in the case. Since the first contention is false and the second is irrelevant, reargument must be denied. Petitioner relies on the same "memo" and "payments previously ordered," in support of her motion to renew. However, since these documents are not newly discovered and would not have warranted a change in the court's earlier determination renewal must also be denied.

Petitioner's counsel concedes that she previously provided a copy of Mr. Byron's memo to the court. The memo is general in nature and expressly states that it is submitted to provide "guidance" to the Commissioners of the Board of Election. It also states that "the award of reasonable counsel fees is within the sound discretion of the trial court" (citation omitted). It is inconceivable to this court that counsel believed Mr. Byron's memo was either intended or empowered to alter state statutes. In any event, the court did not overlook Mr. Byron's memo, but merely concluded that it is irrelevant to the requirements contain in state statutes which authorize county officials to be reimbursed for legal fees under certain circumstances. Public Officers Law §18 is the controlling state statute, and the "memo" drafted by Mr. Byron does not and could not, as a matter of law, alter the application of the statute to this or any other case. As noted in the Court's earlier Decision and Order, pursuant to Public Officers Law §18 a county officer "shall be entitled to be represented by private counsel of his choice in any civil action or proceeding whenever the chief legal officer of the public entity...determines that a conflict of interest exists, or whenever a court...determines that a conflict of interest exists..." (emphasis added).

In the instant case, it is uncontroverted that neither the chief legal officer nor the

Knapp v. Haight
Ind # 6431/2011

court determined that a conflict existed. Instead, petitioner's attorney contends upon reargument that, "[g]iven the adversarial nature of the proceedings...it is entirely reasonable to conclude that the Dutchess County Attorney presumed that a conflict of interest is created if his office chose to represent one Board of Elections Commissioner against the other." (Petitioner's Memorandum of Law, p.3). The court disagrees that such a conclusion is "reasonable" or that it may be "presumed." Even assuming a conflict the County Attorney is authorized to represent one commissioner in a proceeding to resolve the dispute (Elgin v. Smith, 10 AD3d 483 [4th Dept 2004]; also see Williams v. Rensselaer County Board of Elections, 118 AD2d 966 [3rd Dept 1986] appeal dismissed 68 NY2d 809.

The view that the County Attorney's office should be "presumed" to have refused to represent either Commissioner and thereby saddle the taxpayer with the cost of two private attorneys (and the County Attorney) is overly presumptuous to this Court.

In an earlier decision of this court involving the underlying controversy between the two Commissioners of the Dutchess County Board of Elections, the Court noted the long and unfortunate history of litigation between these two county officials. The court further stated, "[s]ince both commissioners choose to hire private counsel at taxpayer expense and without proper authority, their chronic inability to get along is more than just a minor inconvenience for the taxpayers of Dutchess County". The Court went on to fully examine the law and facts relevant to the issue of attorney's fees and concluded that, "[w]ithout notifying the County Attorney and obtaining his/her permission, neither commissioner was authorized to retain private counsel at taxpayer expense."

Knapp v. Haight
Ind # 6431/2011

While that matter was sub judice the movant herein filed her first application seeking attorney's fees. In its Decision and Order dated June 5, 2013 the court reiterated its position as to the applicable law and the facts and again concluded that, "the movant has wholly failed to provide any evidence that the County Attorney was notified, provided an opportunity to determine whether a conflict of interest existed, or that the county attorney "refused to act or was incapable of, or was disqualified from acting before private counsel was retained."

Now, upon reargument and renewal, the court has been provided a third opportunity to opine on the same issue. But the court's opinion has not changed. The Byron memo does not reflect any case specific "determination" made by the county attorney as to whether a conflict exists or whether he/she is competent to represent either of the two commissioners. This court remains unwilling to direct the expenditure of taxpayer monies to further the partisan bickering between the two Commissioners of the Dutchess County Board of Elections.

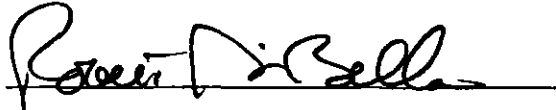
Finally, the motion for renewal must also be denied. The Byron "memo" was provided and considered on the earlier Decision and Order and the prior court orders providing payment to prior attorneys are not "newly discovered evidence" which would support renewal.¹

¹ Instead the prior orders were based on ex parte unopposed applications made at a time when the history of ligation between these parties and facts of the case were not fully before the Court. If the court had the power to vacate the prior award of fees it would. But the court lacks the power to vacate a prior order where, as here, the error is one of substance (see *Herpe v Herpe*, 225 NY 323; *Vailes v. Marine Basin Co.*, 224

Knapp v. Haight
Ind # 6431/2011

In accordance with the foregoing the motion to renew and/or reargue is denied.

Dated: White Plains, New York
September 24, 2013

A handwritten signature in black ink, appearing to read "Robert M. DiBella", written over a horizontal line.

HON. ROBERT M. DIBELLA, SCJ

NYS2d 852; Lane v. Merit Enterprises, 4 Misc2d 137, Strauss v. Tacon, 116 NYS2d 250).