

New York City Campaign Fin. Bd. v Testaverde

2018 NY Slip Op 32910(U)

November 13, 2018

Supreme Court, New York County

Docket Number: 450431/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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NEW YORK CITY CAMPAIGN FINANCE BOARD,
Plaintiff,

INDEX NO. 450431/2018

MOTION DATE 10/30/2018

MOTION SEQ. NO. 001

- v -

ANTHONY TESTAVERDE, VICTORIA TESTAVERDE,
TESTAVERDE FOR CITY COUNCIL

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22

were read on this motion to/for DISMISSAL

The motion to dismiss by defendants is denied.

Background

This action arises out of defendant Anthony Testaverde’s campaign for City Council in 2013. Defendant Victoria Testaverde served as treasurer for the campaign. Mr. Testaverde’s campaign utilized public funds under the city’s campaign finance program. In 2017, plaintiff determined that Mr. Testaverde, Ms. Testaverde and the campaign violated the New York City Campaign Finance Act. Plaintiff ordered defendants to repay \$18,846.36 in public funds and \$2,949 in penalties. Plaintiff then commenced this action to recover these monies.

Defendants move to dismiss for lack of proper service. Defendants claim that service was allegedly effectuated at 2088 Bragg Street in Brooklyn, an address where neither Mr. or Ms. Testaverde reside. Defendants deny that plaintiff exercised due diligence before engaging in “nail and mail” service.

Mr. Testaverde submits an affidavit in which he states that he does not live or work at 2088 Bragg Street nor was this address his business or residence on the dates of plaintiff's attempted service (NYSCEF Doc. No. 10, ¶ 3). Mr. Testaverde adds that "During all these times and presently I have lived and live at another address in Brooklyn" (*id.* ¶ 4).

In opposition, plaintiff contends that candidates participating in the campaign finance program are required to inform plaintiff about any changes in address for the candidate, the campaign and the treasurer. Plaintiff argues that the address it had on file for defendants was 2088 Bragg Street and that it made diligent efforts to serve defendants at that address.

In reply, plaintiff points out that a demand letter was sent to Victoria Testaverde to an address in Staten Island and that this shows that plaintiff had notice that Ms. Testaverde no longer lived in Brooklyn. Defendants also claim that plaintiff offers no admissible evidence from anyone with first-hand knowledge that plaintiff lacked notification about address changes.

Discussion

"The nail and mail provision of the CPLR permits a plaintiff to mail duplicate process to defendant at his last known residence, but clearly requires that the nailing be done at the defendant's actual place of business, dwelling place or usual place of abode" (*Feinstein v Bergner*, 48 NY2d 234, 239, 422 NYS2d 356 [1979]).

A "process server's affidavits, which indicate that [defendants] were each served in accordance with CPLR 308(4), constituted prima facie evidence of proper service" (*Fairmount Funding Ltd. v Stefansky*, 235 AD2d 213, 214, 652 NYS2d 14 [1s Dept 1997]). A "bald assertion that [defendants] never received process was insufficient to dispute the veracity or content of the affidavits" (*id.*).

According to the affidavits of service, the process server traveled to 2088 Bragg Street on March 20, 2018, March 23, 2018 and March 28, 2018 to serve all three defendants. (NYSCEF Doc. No. 7). On March 20, 2018, the process server reported that “Per man through window at first floor door, Testaverdes lives upstairs, he is tenant of theirs. He was not sure which Testaverdes lived upstairs. I knocked the door and rang the bells several times on the second-floor door, no answer. No lights” (*id.*). After returning two more times without success, the process server affixed a copy of the required papers on the fourth visit, on April 7, 2018, and mailed a copy on April 9, 2018 (*id.*). The affidavits of service constitute prima facie evidence that plaintiff made diligent efforts to locate the Testaverdes before utilizing nail and mail service.

In his affidavit, Mr. Testaverde does not deny any of the process server’s sworn statements. Instead, he claims that he moved from 2088 Bragg Street before the date of service and lives elsewhere in Brooklyn. But without providing any evidence that he moved and when, the Court must deny defendants’ motion. There is plenty of proof he could have offered to raise doubt about the service; he could have provided his current lease (showing the commencement date), he could have shown utility bills, the mover’s dated bill or an affidavit from his old landlord stating the date he vacated the apartment. But simply offering a conclusory statement that he no longer lives at an address is not sufficient to defeat a proper affidavit of service.

The Court also observes that during the campaign Mr. Testaverde and Ms. Testaverde completed a certification form in which they both listed 2088 Bragg Street as their home address (*see* NYSCEF Doc. No. 2). Part of this form asked both Testaverdes to initial next to a paragraph that instructed them to promptly notify plaintiff in writing if their address changed (*id.* at 6, 8). Defendants failed to attach any evidence in their moving papers demonstrating that they informed plaintiff about a new address.

Moreover, plaintiff's rule 2-01(d) provides that:

"The participant or limited participant shall notify the Board of any material change in the information submitted pursuant to this rule, including, but not limited to any new, or any change to any required information concerning any political committee, bank account, unique merchant account, candidate or treasurer employment, address, telephone number, or e-mail address, included in the filer registration information required by Rule 1-11, in such manner as may be provided by the Board and no later than the next deadline for filing a disclosure statement or, in the case of changes that occur after the deadline for the last disclosure statement required to be filed, no later than 30 days after the date of the change, provided, however, that if the participant or limited participant has extinguished all outstanding liabilities resulting from the election to which the certification relates, including payment of any penalties and/or repayment of public funds owed to the Board, the candidate need not notify the Board of any material change to the information required by Rule 1-11 after issuance of the candidate's final audit report, except as provided in Rule 4-03(b). If, based upon a reasonable belief that there has been a material change in the information submitted, the Board requests an amendment, the participant or limited participant shall submit promptly any amendment necessary in such manner as may be provided by the Board. Notification of any change to the candidate's or treasurer's information included in the certification must be made to the Board for six (6) years after the date of the last election to which the certification relates."

Because the certification was for a 2013 race, defendants were required to submit a change of address (if their addresses changed) until 2019. As defendants failed to show that they submitted a change of address, there is no proof that they did change their address. Certainly, defendants cannot avoid service by claiming to have ignored this clear rule.

With respect to service on Ms. Testaverde, the Court finds that service was properly effectuated. Ms. Testaverde did not submit an affidavit in support of the motion denying that she received service or that she lives elsewhere. Instead, *Mr. Testaverde* asserts that she lives in Staten Island, although he does not provide an address or when she moved. Although defendants point out that plaintiff mailed a notice to Ms. Testaverde at an address in Staten Island, the Court cannot consider that claim because it was raised for the first time in reply and plaintiff did not have a chance to respond (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454, 596

NYS2d 404 [1st Dept 1993]). In their moving papers, defendants did not meet their burden to show that 2088 Bragg Street was not Ms. Testaverde's usual place of abode.

Summary

The documents signed by defendants make clear that they were required to inform plaintiff if they moved. This rule makes sense because plaintiff often makes findings about alleged campaign violations *after* the election is over. In other words, plaintiff needs to know where candidates and their treasurers are after an election to ensure that any campaign finance issues can be resolved. This is part of a candidate's obligation in exchange for accepting public funds. The defendants here provided no evidence that they complied with this rule and provided no evidence that they changed their address; in fact, defendants failed to provide anything other than a conclusory assertion that they no longer lived at 2088 Bragg Street.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is denied. Defendants to answer pursuant to the CPLR and the parties are directed to appear for a preliminary conference on January 8, 2019 at 2:15 p.m.

ARLENE P. BLUTH, J.S.C.

11/13/18
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE