
STEVEN MAHLER and DANIEL GARROW

Plaintiffs,

-against-

S. JOHN CAMPANIE, KILEY LAW FIRM PC,
CAMPANIE & WAYLAND-SMITH PLLC, and
THOMAS P. DiNAPOLI, COMPTROLLER OF
THE STATE OF NEW YORK

Defendants.

DECISION
AND
ORDER

Supreme Court, Albany County
Index No. 2502-11
RJI No. 01-11-103839
Justice Michael C. Lynch, Presiding

APPEARANCES:

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LYNCH, J.:

Plaintiffs commenced this action pursuant to State Finance Law §123-b and General Municipal Law §51 to challenge the use of State funds to pay the defendant S. John Campanie (hereinafter, Campanie), for services provided to the law firm retained by the State to defend

Madison County in federal land claim litigation brought by the Oneida Indian Nation (hereinafter, "OIN litigation"). Now before the Court are pre-answer motions to dismiss the action by defendants Thomas P. DiNapoli, Comptroller of the State of New York (hereinafter, the Comptroller) and S. John Campanie, Kiley Law Firm PC, and Campanie & Wayland-Smith PLLC (hereinafter, Campanie). Plaintiffs oppose the motions. Oral argument was held on September 26, 2011.

Defendant Campanie has served as the part-time Madison County Attorney since May 1987. The part-time County Attorney position is salaried and Campanie is provided an office in the Madison County Office Building. During his tenure as County Attorney, Campanie has also maintained a separate, private office where he serves as a member of his private practice, defendant Campanie & Wayland-Smith PLLC.

In the early 1970s, the Oneida Nation of New York commenced Federal land claim litigation to recover damages from Oneida and Madison Counties. In such a case, where there is an action to recover lands in the State, "the governor shall, at the expense of the state, employ counsel and provide for the defense of any action or proceeding" (State Law §10). Pursuant to this authority, the State of New York entered into two contracts with a law firm to defend Madison County in the OIN litigation. The first contract, executed by and between the State and Nixon, Hargrave, Devans & Doyle LLP (hereinafter, Nixon), commenced on September 30, 1997; and, after a "number of" extensions, expired on March 31, 2007 (hereinafter, the 1997 Agreement). The second contract, executed by and between the State and Nixon Peabody LLP (hereinafter, Nixon), commenced on April 1, 2007 for a two year term; and, after one extension, expired on March 31, 2010 (hereinafter, the 2007 Agreement).

Under the terms of both contracts, payments were made by the State to Nixon at a specified hourly rate. The 1997 Agreement allowed Nixon to submit itemized disbursements that could not exceed a specified annual amount. The 2007 Agreement allowed Nixon to retain,

“third-party legal consultants, third party consultants and experts...subject to prior approval” by the Governor’s Counsel’s office.

In April 1997, the Madison County Board of Supervisors passed a Resolution to accept the State’s selection of Nixon and to request that the firm be “immediately so engaged” to address the “myriad of issues arising from [the] Native American land claims”. In January 1999, Campanie was named Local Director and Counsel to the “Joint Madison-Oneida County Indian Land Claim Litigation Task Force” (hereinafter LTF), that was formed “to support the massive effort in defending against and resolving the OIN claims” (Campanie Aff ¶ 11). The formation of the LTF was authorized by Madison County Resolution No. 64 of 2001 dated March 13, 2001 and ratified by a subsequent Memorandum of Understanding (hereinafter, MOU) by and between Madison and Oneida Counties dated June 6, 2001 (Campanie Affidavit ¶12, Exhibits B, C). The MOU defined the “structure” of the LTF as follows:

The LTF shall be a joint Madison-Oneida County venture in cooperation with New York State and shall convene and operate at the request of and under the direction of [the principal attorney at Nixon], counsel to Madison County and Oneida County, in their defense of the Indian Land Claim lawsuit. The local Director thereof shall be S. John Campanie, Esq. And local counsel shall be S. John Campanie, Esq. and Randal B. Caldwell, Esq.

(Campanie Aff. Ex C - Article II). Further, the MOU provided,

The work of the Task Force shall be considered separate and apart from the normal activities of any County employee. Separate and secure physical facilities shall be provided, and only the work of the Task Force should be conducted within those facilities, unless specific exceptions shall be authorized by agreement of the Oneida County Executive, Madison County Attorney and [the principal attorney at Nixon].

(Id., Article IV (1)).

According to Campanie, beginning in February 1999, there were “ongoing discussions”

with regard to whether Campanie's private law firm could be retained as local counsel to support their defense of the OIN litigation. The purported rationale behind such arrangement was described in correspondence from the partner at Nixon as follows:

...the demands on [Campanie's] time [has] been overwhelming and far in excess of that contemplated in their part-time attorney agreements. It is grossly unfair to expect them to continue this level of effort without additional compensation. For example, John Campanie informed me that he has averaged 50 hours per week on the Oneida matter for the past couple months, ... It is very difficult, if not impossible for the Counties to compensate [Campanie] ... for this additional time, ... without this additional compensation, [Campanie] must turn [his] attentions to [his] private [practice] ... and more [Nixon staff would be assigned] to this project. That would undoubtedly be much more expensive, and, ... less effective because [Campanie], in addition to being [a] very good [lawyer], understand[s] this case and the local politics so well.

(See Campanie Affidavit para 13; Exhibit D). By correspondence dated March 19, 1999,

Campanie explained that the time devoted to the OIN matter had "increased dramatically" and,

As County Attorney for Madison County, ... it has been contemplated that, although the County Attorney is on call, available, and works on county matters every day of the week, the nature of the commitment is such that a very significant private practice may be maintained. In my instance, this has typically involved my being physically present at the county offices two days per week. It is the unfortunate truth in our profession that no lawyer is able to work a normal work week, and accordingly in years past I have been able to devote typically in excess of thirty hours per week to my private practice in addition to meeting my responsibilities to the County. Over the last couple of months, this has fallen to an extraordinarily small fraction, while the total hours per week I am committing to my professional activities has increased dramatically – a situation that cannot continue

(Id., ¶ 15, Exhibit F).

Sometime in the Spring of 1999, it was agreed that the State would compensate Nixon for the services Campanie and his firm provided to Nixon at the rate of ten hours per week. The State did not pay Campanie, rather, pursuant to the arrangement, the State reimbursed Nixon for its payments to Campanie and his firm. Plaintiffs contend that to date, Campanie and/or his

firm has received at least \$800,000.00 from Nixon pursuant to the arrangement agreed to in 1999.

By summons and complaint filed April 11, 2011, plaintiffs commenced this taxpayer action alleging, as against Campanie and his firm, (1) that he has wasted and/or misappropriated State funds because (a) the payments through Nixon violate Public Officers Law §67 and County Law §201; (b) the agreement by and between Madison County and Nixon is prohibited by General Municipal Law §801 and General Municipal Law §804; (c) he has been paid for services performed that were outside of the scope of the retention authorized by State Law §10; and, (d) he has received “additional compensation” in violation of County Law §201 and County Law §203 (i.e. lump sum payments from Madison County to cover expenses of his private law office). As against the State Comptroller, plaintiffs allege that it has “refused to prevent continued illegal payments” to Campanie and that it should be “permanently enjoined from making those payments, and compelled to bring an action under Public Officers Law §67 to recoup those funds already wrongfully paid (Complaint ¶58).

The defendant State Comptroller now moves for an Order dismissing plaintiff’s cause of action against him. More specifically, he contends that this Court does not have the authority to issue an Order compelling the Comptroller to commence an action pursuant to Public Officers Law §67; that plaintiffs lack standing under State Finance Law §123-b to obtain the relief they are seeking; that the Comptroller is not a proper party to the action; the claim against the Comptroller is not ripe for review; and that the plaintiffs failed to join necessary parties, to wit: the Governor and Nixon.

The State Finance Law permits:

... any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property

(State Finance Law §123-b [1]). The statute should be “narrowly construed” (Matter of Humane Socy. of U.S. v. Empire State Dev. Corp., 53 AD3d 1013, 1016 [2008] app. den. 12 NY3d 701 [2009]) and it does not confer standing upon a taxpayer who seeks, “to obtain judicial scrutiny of the [State’s] nonfiscal activities” (Transactive Corp. v. DSS, 92 NY2d 579, 589 [1998] [quoting Matter of Urban League v. County of Monroe, 49 NY2d 551,556]).

Here, the plaintiffs allege that certain payments made by the State to Nixon were illegal because, inter alia, the payments included disbursements for services provided by Campanie. The Comptroller contends that because it did not approve this arrangement and because the allegedly improper payments were made by Nixon, not the State, it is not a proper party to this action. This Court disagrees. The Comptroller is the public officer who warrants the payment of State funds (see State Finance Law §8). Plaintiffs allege that the Comptroller has approved and may continue to approve illegal disbursements of State funds. Accordingly, he is a proper party to this action (Cass v. State, 88 AD2d 305, 308 [1982] mod 58 NY2d 460).

Although plaintiffs have standing to seek injunctive relief, the Court agrees with the Comptroller that plaintiffs may not seek mandamus relief in this taxpayer action. As set forth above, plaintiffs seek an Order compelling the Comptroller to bring an action under Public Officers Law §67. Mandamus relief:

“...is available 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law' *** ‘Thus, mandamus does not lie to enforce the

performance of a duty that is discretionary, as opposed to ministerial’ ** ‘A discretionary act “involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result”’ ***

(Matter of Glenman Indus. & Commercial Contr. Corp. v. New York State Office of the State Comptroller, 75 A.D.3d 986 [2010] [cit. om.]). Here, even if, as plaintiffs contend, Campanie received funds in violation of the County Law and/or the Public Officers Law, the Comptroller is not under a legal duty to commence legal action against Campanie. Accordingly, plaintiffs are not entitled to mandamus relief (VSF Coalition, Inc. v. Scoppetta, 13 A.D.3d 517 app. dismissed 5 N.Y.3d 817, Cert. Den. 128 S. Ct. 1474).

The Comptroller also contends that the action as against the Comptroller should be dismissed for failure to join the Governor of the State of New York and Nixon as necessary parties. “Necessary parties are ‘[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action”’ (Sorbello v. Birchez Assoc. LLC, 61 A.D.3d 1225 [2009]; see CPLR 1001 [a]). The statute is afforded a strict construction and, “is limited to ‘those cases and only those cases where the determination of the court will adversely affect the rights of nonparties’ ” (Schulz v. De Santis, 218 A.D.2d 256 [quoting Matter of Castaways Motel v Schuyler, 24 NY2d 120, 125]). Here, neither the Governor nor Nixon would be inequitably affected by an Order enjoining the payment to State funds, directly or indirectly through Nixon, to Campanie. Accordingly, the Comptroller’s motion to dismiss pursuant to CPLR 3211 (a)[10] is denied.

Defendant Campanie moves to dismiss plaintiffs’ first and second causes of action

pursuant CPLR 3211 (a) [7]. On such a motion, this court, “must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. ...the question of ‘[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (Roni LLC v. Arfa, ___ NY3d ___, 2011 NY Slip Op 9163, [December 20, 2011] [cit. om.]).

By their first cause of action, plaintiffs allege that Campanie received additional compensation for services provided as County Attorney in violation of the County Law and the Public Officers Law. As relevant to this dispute, a County Attorney is “a public official..and not a mere employee” (Thompson v. Hofstatter, 265 NY 54, 58; County Law §500(1) and serves as “legal advisor to the board of supervisors and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature.” (County Law §501(1)). Further, a County Attorney is required to, “prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law” (Id). The County’s Board of supervisors establishes a fixed County Attorney’s salary that is “in lieu of all fees, percentages, emoluments or other form of compensation payable for services rendered in the performance of the powers and duties of the office” (County Law §201). Further, “[a]ll fees, percentages, emoluments or other compensation received by any such officer by virtue of his office from whatever source shall belong to the county and be paid into the county treasury monthly on or before the tenth day of the month” (Id.).

The Public Officers Law §67 provides that, “[a]n officer or other person, to whom a fee or other compensation is allowed by law, for any service, shall not charge or receive a greater fee

or reward, for that service, than is so allowed". Further,

Money received by a public officer, or which shall come into his possession or custody, in the performance of his official duties or in connection therewith or incidental thereto, shall be held by him in trust for the person or persons entitled thereto or for the purposes provided by law and all interest or increments which shall accrue or attach to such money while in his possession or custody shall be added to, and become a part of, the money so held and no part of such interest or increments shall be retained by such officer to his personal use or benefit, except legal fees allowed by law for receiving and disbursing the same, notwithstanding the provisions of any general or special law.

An officer or other person, who violates either of the provisions contained in this section, is liable, in addition to the punishment prescribed by law for the criminal offense, to an action in behalf of the person aggrieved, in which the plaintiff is entitled to treble damages.

(Public Officers Law §67).

Based on County Law §201, County Law §501, and Public Officers Law §67, plaintiffs argue in their first cause of action that because Campanie retained the funds paid by Nixon that were reimbursed by the State pursuant to State Law §10, he misappropriated State funds in violation of State Finance Law §123-b and wasted municipal funds in violation of General Municipal Law §51.

Campanie argues that plaintiffs have failed to state a cause of action because the cited statutes address the payment of "additional compensation" to a public officer in his official capacity but do not "[prohibit] him from maintaining a separate law office and receiving fees for services rendered that are separate and apart from his normal duties [as County Attorney]". On this pre-answer motion to dismiss, however, it is not clear what services Campanie provided or whether the services were "separate and apart" from his County Attorney duties.

In support of his motion to dismiss plaintiff's first cause of action, Campanie relies on the June 6, 2001 MOU by and between Oneida County and Madison County, authorized by Madison

County Resolution No. 64, that provided, as set forth above, that the “work of the Task Force shall be considered separate and apart from the normal activities of any County employee” (Campanie Exhibit C). The terms of the MOU do not resolve the relevant question, that is, whether the services actually provided by Campanie were within the scope of his official duties as Madison County Attorney (Thompson, Supra, 265 NY 54 [1934]). Further, the MOU is not dispositive, inasmuch as “the prescribing of duties by a local law may not be used as a subterfuge for paying additional compensation” (Id.). Here, as in Thompson, it is at least arguable that the arrangement was made in the Spring of 1999 to compensate Campanie for the excessive amount of time he was devoting to his duties as Madison County Attorney. Accordingly, Campanie’s motion to dismiss plaintiffs’ first cause of action is denied.

Campanie also seeks dismissal of plaintiffs’ second cause of action alleging that he received payments pursuant to an Agreement in violation of General Municipal Law §§801 and 804. Campanie contends that plaintiffs have failed to state a cause of action because Madison County was not a party to the Agreement with Nixon.

A prohibited conflict of interest exists where a municipal officer or employee has, an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above

(General Municipal Law §801(1)). Indisputably, the express contract at issue in plaintiffs’ second cause of action is by and between the State and Nixon pursuant to State Law §10. Under the statute, it is the State, not the County, that selects counsel to represent the County (Broome v. Cuomo, 102 A.D.2d 266 [1984] *affd* 64 NY2d 1051). The State is explicitly

required to “employ counsel”, not simply indemnify the County for its legal fees (Williams v. State, 137 A.D.2d 277 [1988]). Pursuant to the terms of the 2007 Contract, the Office of Counsel to the Governor was required to approve both the payments to Nixon and the retention of “third party legal consultants” or “special counsel” to assist Nixon (Becker Affidavit Exhibit B).

The General Municipal Law defines a “contract” as “any claim, account or demand against or agreement with a municipality, express or implied” (General Municipal Law §800(2)). Here, it is undisputed that Campanie was an officer of Madison County and Nixon did not have a contract with Madison County. In this Court’s view, these facts are not dispositive of the issue presented. Rather, a prohibited conflict of interest may exist where, after consideration of the “larger and more complex picture” of the relationship between the parties involved, it becomes apparent that the municipal parties may have “an overlap, if not identity of interest” (Rose v. Eichhorst, 42 NY2d 92, 97 [1977]).

Here, based on the submissions, the Court cannot conclude that Madison County had no connection to the State’s contract with Nixon (Id.). Further, the submissions demonstrate that, at least arguably, there was an agreement by and between the State, Nixon and Madison County that Campanie would be paid additional compensation for services he provided on the OIN litigation. Campanie does not dispute that he has an interest in the agreement and plaintiffs have submitted documentation that raises a question of fact with regard to Campanie’s role in authorizing payments from Madison County to Nixon (Carpinello Affidavit, Exhibit T). Accordingly, the Court declines to grant his pre-answer motion to dismiss plaintiffs’ second cause of action.

Campanie also moves to dismiss the causes of action asserted against him as time barred.

A three year statute of limitations applies to actions “to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215 (CPLR 214(2)). A one year statute of limitations applies to

an action to enforce a penalty or forfeiture created by statute and given wholly or partly to any person who will prosecute; if the action is not commenced within the year by a private person, it may be commenced on behalf of the state, within three years after the commission of the offense, by the attorney-general or the district attorney of the county where the offense was committed

(CPLR 215(4))

A taxpayer action pursuant to either State Finance Law §123-b or General Municipal Law §81 is subject to the one year statute of limitations set forth in CPLR 215(4) (Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v Egan, 65 NY2d 793 [1985]; Clowes v. Pulver, 258 AD2d 50, app. dismissed 94 N.Y.2d 858). Accordingly, plaintiffs’ claims pursuant to General Municipal Law §51 and State Finance Law §123-b are time barred to the extent they challenge payments made prior to April 11, 2010.

The parties remaining arguments have been considered and, in this Court’s view, are either without merit or not necessary to consider given the above determination.

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that the defendant Comptroller’s motion to dismiss the plaintiffs’ complaint, is granted, in part; and it is further

ORDERED AND ADJUDGED that plaintiff is not entitled to mandamus relief as against the Comptroller and it is further;

ORDERED AND ADJUDGED that in all other respects, the defendant Comptroller’s motion to dismiss is denied; and it is further;

ORDERED AND ADJUDGED that defendant Campanie's motion to dismiss the complaint is granted, in part; and it is further


ORDERED AND ADJUDGED to the extent that plaintiffs' claims pursuant to General Municipal Law §81 and State Finance Law §123-b are time barred to the extent they challenge payments made prior to April 11, 2010; and it is further

ORDERED AND ADJUDGED that in all other respects, defendant Campanie's motion to dismiss is denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorneys for plaintiff. The below referenced original papers are being mailed to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

SO ORDERED!
ENTER.

Dated: Albany, New York
January 24, 2012



Michael C. Lynch
Justice of the Supreme Court

Papers Considered:

- (1) Notice of Motion dated June 1, 2011 with Affidavit in Support (Becker) and Exhibits thereto, Affirmation in Support (Nancy G. Groenwegen, Esq.) and Exhibits thereto, Memorandum of Law;
- (2) Notice of Motion dated June 1, 2011 with Affidavit in Support (William J. Dreyer, Esq.) and Exhibit thereto, Affidavit in Support (S. John Campanie, Esq.) and Exhibits thereto, Memorandum of Law;
- (3) Affirmation in Opposition dated July 21, 2011 (George F. Carpinello, Esq.) and Exhibits thereto, Memorandum of Law;
- (4) Reply Affidavit sworn August 18, 2011 (S. John Campanie, Esq.) and Exhibit A thereto, Reply Memorandum of Law;
- (5) Comptroller's Reply Memorandum of Law filed August 22, 2011.

Oral Argument was held on September 26, 2011.