Original

SHORT FORM ORDER

INDEX NUMBER: 20432-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

X

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

COALITION AGAINST BREAST CANCER, INC., ANDREW SMITH, DEBRA KOPPELMAN, PATRICIA SCOTT, CAMPAIGN CENTER, INC., and GARRETT MORGAN,

Defendants.

X

DECISION AFTER INQUEST

In the Court's Order dated February 21, 2013, it set this entire matter down for trial. The State, in its 2011 Complaint sought relief against the Defendants, Campaign Center, Inc., ("Campaign Center") and Garrett Morgan ("Morgan") in the form of broad injunctive and monetary relief. This included the State's request: 1)to enjoin Morgan and the Campaign Center from engaging in the solicitation and collection of contributions on behalf of any charitable organization as well as participating in any manner or receiving compensation from a business so engaged pursuant to Executive Law §§ 63(12), 175(2) and General Business Law § 349(b); 2)

to cancel the registration statement for the Campaign Center filed with the State Attorney General pursuant to Executive Law § 175(2); 3) to dissolve the Campaign Center as a corporation in New York pursuant to Executive Law § 175(2); 4) to order Morgan and the Campaign Center to pay penalties for violations of General Business Law § 349; 5) to order Morgan and the Campaign Center to disgorge profits and pay restitution for their violations of Executive Law §§ 63(12) and 172-d(2) and General Business Law § 349; 6) to order those Defendants to pay the litigation costs of the Attorney General under Executive Law § 175(2) and CPLR § 8001; and 7) to hold an inquest to determine the amount to be paid in restitution and disgorgement of profits. In its Decision and Order, dated May 2, 2013, this Court granted the State Summary Judgment, and denied Defendants Campaign Center and Morgan Summary Judgment, finding that viewed in its entirety, the actions of those Defendants for the period from 2005 through 2011, while the Campaign Center (owned and run by Morgan) acted as a fundraiser for Defendant CABC, violated Executive Law §§ 172-d(2), 174(b) and 63(12) as well as General Business Law § 349. It also found that Morgan had violated the express provisions of a Consent Order he signed with the Attorney General in the case of **People v Senior Citizens Assistance Group** (Index #24842/95).

The Court thereafter awarded the State relief under the Executive Law, including an injunction, prohibiting the Campaign Center and Morgan from engaging in any future charitable solicitations for profit within the State of New York, cancellation of the Campaign Center's registration statement filed with the Attorney General, mandated dissolution of the Campaign Center, reimbursement of the costs of the Attorney General in connection with this case, and restitution by the Campaign Center and Morgan in an amount and method to be determined at inquest. In that Decision and Order this Court set the inquest which thereby required far less in the form of proof than a trial of the entire matter, for May 20, 2013, the exact date the entire case had been set for the commencement of trial.

Based upon the above history, the Court proceeded with the inquest as

scheduled and rejected the argument by Defendants' attorneys that they somehow were not afforded sufficient time for "discovery" in this matter or to prepare for trial as well as the objection by Plaintiff's counsel that they were not prepared to cross examine the CPA who testified on behalf of the Defendants.

Cintia Brown-Felder, a Senior Accountant for the New York Attorney General's Charity Bureau testified as the State's witness. She had also provided the documentary evidence in support of the State's motion for Summary Judgment, including all of the mandatory filings by the Campaign Center and Morgan as well as by CABC. The Defendants did not contest the validity of any of the documents that she referred to in the State's motion papers to make the calculations setting forth the total of monies raised on behalf of CABC for the years in question; the amount raised by the Campaign Center for CABC; the amount given to CABC by the fundraisers, including the Campaign Center and Morgan, and the total amounts for the subject period expended on charity related to breast cancer. These same figures were set forth in the State's Rule 19, Statement of Undisputed Facts and none of them were objected to by the Campaign Center or Morgan. Accordingly, these documents were admitted into evidence by the Court. Ms. Brown-Felder stated that she reviewed the Form 990's and CHAR 500's for CABC for the period between 2005 and 2011(Plaintiff's Exhibits 1-7) as well as the CHAR 037's prepared by the Defendants herein [Plaintiff's Exhs 8(a)-8(h)]. Based upon these figures, Ms. Brown-Felder set forth that the Campaign Center raised $4,861,224.00 for CABC, out of a total raised by all fundraisers for the period in question for CABC of $9,9788,434. She, therefore, was able to calculate that the Campaign Center raised 48.7% of CABC's funds for that period. The documents also demonstrated that of the amounts raised, $3,908,262 were paid to the Campaign Center; $ 952,962 were retained by CABC; and that a total of $435,273 were expended by CABC for charitable purposes.

Ms. Brown-Felder testified that she spent several years reviewing these records as part of the Attorney General's investigation in this case and that she actually went through all of the checks written on CABC's accounts as well as that entity's

financial records and found that they matched the amounts set forth on CABC's required Form 990 filings. Ms. Brown-Felder then multiplied the 48.7% (representing the percentage of funds raised by the Campaign Center of all those raised by fundraisers for that organization for the period in question) times the $435,273 that was actually expended by CABC for charitable purposes, resulting in a figure of $211,978. That amount she attributed to the Campaign Center by subtracting it from the total figure raised by that organization for the years in question, obtaining a final figure of $4,649,246. That is the amount that the State now requests be paid in toto in restitution in this matter by the Campaign Center and Morgan.

Ms. Brown-Felder also reviewed invoices of the Attorney General for depositions and travel expenses of one Assistant Attorney General, that she asserted were kept in the ordinary course of her agency's business, as well as payments made on such invoices and found that the Attorney General expended a total of $12,345.40 on court reporting for depositions, transcripts of oral arguments and one travel voucher connected with a deposition (Exhs 22 and 23). The Attorney General's Office set forth that to the extent that any of this amount is collected from the Campaign Center and/or Morgan it will be deducted from any amounts to be paid by CABC for the Attorney General's costs.

The Attorney General also sought penalties to be imposed on Morgan alone for each of his CABC pledge forms (which this Court already determined to be violative of the law as set forth in its Decision and Order). Ms. Brown-Felder made a calculation of what she believed to be an accurate summary of the number of pledge forms sent out by the Campaign Center on behalf of CABC that resulted in donations, as follows. First, Ms. Brown-Felder took Morgan's deposition testimony in this case, that the Campaign Center sent out 350,000 pledge forms annually for all of the Campaign Center's charitable clients. She multiplied the 350,000 by 40%, which she derived by calculating the percentage of funds raised by the Campaign Center on behalf of CABC as compared to the total funds the Campaign Center raised for all of

the charities which it acted as fundraiser for the years in question (all derived from the Campaign Center's Char037's) (Plaintiff's 25; 9-20). Thus she arrived at 140,000 as the number of pledge forms sent out annually by the Campaign Center on behalf of CABC. Ms. Brown-Felder then multiplied that number by 6, to cover the years 2005 through 2010 to derive a total figure of 840,000 pledge forms mailed out by the Campaign Center on behalf of CABC. She eliminated 2011 because CABC was closed down early in that year due to the Consent Order reached between the Attorney General and that organization. Based upon the deposition testimony of Morgan that from 25% to 30% of the pledges mailed out by his organization result in donations, Ms Brown-Felder multiplied 840,000 by 25% and reached a figure of 210,000 as her summary of the estimated amount of Campaign Center pledge mailings between 2005 and 2010 that resulted in actual donations to CABC. In order to review the accuracy of her estimate, Ms. Brown-Felder took the figure set forth in the Campaign Center's CHAR 037's for CABC of $4,861,224 and divided this amount by 25, based upon Morgan's deposition testimony that $25 is the average amount that a person donates as a result of this type of fundraising solicitation. Her resulting figure of 194,449 was, according to her testimony, sufficiently close in number to her figure of 210,000 that she claimed it supported her calculations. It is the Attorney General's argument that this Court should assess a monetary penalty for each of the unlawful mailings (ie, 210,000 x a dollar amount to be determined by the Court).

Although this Court had already rejected the Attorney General's request for a disgorgement of funds by the Campaign Center and Morgan, it permitted those parties to present the testimony of an accountant, Daniel Somela, who testified as to the percentages of the Campaign Center's solicited funds that were attributable to that organization's costs during the years in question. According to Mr. Somela, by his review of the financial records kept by the accountant for the Campaign Center for 2005-2009 and himself for 2010-2011, he determined the percentage of fundrasing revenues for the years in question and applied the same to the corporations' costs attributable to CABC fundraising. According to his calculations, the total revenue raised for CABC by the Campaign Center amounted to $3,908,262.00. The total cost,

including rent, salaries, telephone, mailings, automobiles, and similar expenses, amounted to $3,793,249.07; and the total profit earned by the Campaign Center over those years was $115,012.93 (Defendant's A and B). In response, the Attorney General placed in evidence the Campaign Center's tax returns for 2009 (Plaintiff's 27) , which listed Morgan's salary (as officer) of $135,200, entertainment expenses at $6,947, and three different automobiles among the corporate expense items. In addition, the corporation's 2010 tax return information for three quarters of that year show Garrett Morgan's income for the first three quarters of that year in the amount of $106,200. The Court received this testimony as relevant to the penalty issues alone. The reason for this is that, as set forth in the Court's Decision and Order, the purpose of the laws that were clearly violated is to protect the consumer. This is especially true with regard to the issue of restitution to those who were mislead and deceived by the fundraiser's acts. According to Mr. Samela, who acted as accountant for the Campaign Center for some of the years in question, a large percentage of the funds raised by that organization, go to cover its heavy costs including rent, salaries, mailings, telephone bills and photocopying. These percentages, based upon the corporation's records did appear high; however, the costs did also include salaries each year, entertainment costs which were unspecified, costs for leases and repairs of automobiles and salaries for certain members of Morgan's family.

Based upon the Court's Decision and Order, it finds that the documentary evidence presented by the State both on the amount sought for restitution and for coverage of its costs are reasonable and supported requests. The Court also finds that the request by counsel for Morgan and the Campaign Center that it deduct the amount already required to be paid in restitution by CABC from any amounts it calculates as due and owing from the Campaign Center and Morgan to be a reasonable request. Again, the purpose of these statutes is to protect the consumer. Thus, the Court finds that the Attorney General has demonstrated its entitlement to $3,094,246 in restitution from the Campaign Center and Morgan, which the Court derived by taking the Attorney General's requested figure of $4,649,246 and subtracting the $1,555,000 to be paid in restitution by CABC. The Court also finds that the Attorney General has

demonstrated its entitlement to recoup its costs from the Campaign Center and Morgan in connection with this matter in the amount of $12,345.40, with the proviso as set forth by the Attorney General's Office that it will deduct this amount from the costs it is collecting from CABC as a result of its prior Consent Order.

The Court is persuaded by the Attorney General's argument that the violations this Court found applicable to the Defendants' conduct herein under Executive Law §§ 63(12), 175-d and 175, are all governed by a six year residual statute of limitations as set forth under CPLR § 213(1). As stated by the Court of Appeals, where statutes upon which an action is based do not effect creation of new activities within the ambit of what is unlawful; but, rather, give the Attorney General standing to seek remedies for wrongful conduct, already recognized as such under common law, such actions are not subject to the three year statute of limitations set forth under CPLR § 214. Thus, where activities that the Attorney General seeks to prohibit contain a corollary in common law, such as those constituting an expansion of fraud, the six year statute of limitations will apply. **see, State v Cortelle**, 38 NY 2d 83, 378 NYS 2d 654, 341 NE 2d 223 (1975).

While the Court acknowledges the argument of the Attorney General that the duration and number of violations by Morgan should be dealt with in a meaningful manner, the Court believes that it has already done so in requiring the dissolution of Morgan's corporation, barring him from any charitable fund-raising in New York State for profit and requiring him to pay both several millions of dollars in restitution along with the State's costs. Accordingly, the Court, in its discretion, declines to award the State the GBL § 350-d penalties it seeks against Garrett Morgan.

With regard to the Attorney General's proposed method of distribution of the restitution funds ordered, the Court finds that the proposed *cy pres* distribution is both supported by New York law and a just solution to a difficult problem. As set forth in the Attorney General's memorandum on this subject, requested by the Court, the funds obtained from the Defendants would be placed by the Attorney General's

Office in a restitution fund, with grants to be made by the Attorney General from such fund to organizations that perform the types of charitable activities relating to breast cancer that the parties to be protected herein, i. e., the consumers/donors, were told that CABC actually performed. As stated by the Court of Appeals in **People Two-Wheel Corp**, 71 NY 2d 693, 530 NYS 2d 46 (1988), where the Court found a merchant violation of the General Business Law and ordered an Attorney General administered restitution fund: "[t]he fashioning of a mechanism for the administration of a restitutionary fund is a matter appropriately left to the trial court's discretion". New York Courts have regularly authorized this manner of restitution, as in **State v Mcleod**, 45 AD 3d 282, 845 NYS 2d 29, where the First Department approved a settlement involving the repayment by the defendant, [who violated the Martin Act and Executive Law § 63(12)] of $4.4 million which was to be distributed to New York law schools and/or not for profit entities selected by the Attorney General.

The Court finds convincing the Attorney General's claim that many of thousands of New Yorkers donated relatively small amounts over many years to CABC; that many of these donations go back several years and that the cost of locating such individuals is likely to deplete the restitution obtained. Thus, a *cy pres* distribution to organizations that the Attorney General selects appears appropriate. In so ordering such a method of restitution distribution, the Court has complied with the Second Department's requirement as set forth in **Klein v Robert's American Gourmet Food, Inc**, 28 AD 3d 63, 808 NYS 2d 766 (2d Dep't 2006), that where it is found difficult to locate and/or distribute funds to those who may be entitled, the Court should explore the appropriateness of a *cy pres* distribution.

Accordingly, based upon the foregoing, following the inquest as ordered, the Attorney General has demonstrated entitlement from Morgan and the Campaign Center: 1) to restitution in the amount of $3,094,246; 2) to payment of the costs of the Attorney General in connection with this matter in the amount of $12,345.40; and 3) to a *cy pres* distribution of these restitution funds, by the Attorney General's creation of a fund where it makes monetary grants to not-for-profit organizations in

good standing that perform charitable activities relating to breast cancer.

This constitutes the **DECISION** and **ORDER** of the Court. Submit Judgment, including the relief set forth in the Court's Decision and Order of May 2, 2013, which sets forth the mandated injunctive relief granted therein.

Dated: June 11, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

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