SHORT FORM ORDER

ADR 2000-23
BACKGROUND

INDEX
NO. 16954/00

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XV - SUFFOLK COUNTY

PRESENT:
HON. PATRICK HENRY

Hearing/Motion Date: 8/28/00

REGINA SELTZER,

Petitioner,

v

THE NEW YORK STATE DEMOCRATIC COMMITTEE, JUDITH HOPE, State Chair, and DAVID ALPERT, Treasurer,

Respondents.

PETITIONER'S ATTORNEY
GILBRIDE, TUSA, LAST & SPELLANE, LLC-
By: ERIC H. SELTZER, ESQ.
The Graybar Building
420 Lexington Avenue
New York, N.Y. 10170

RESPONDENTS ATTORNEY
JOHN J. LEO, ESQ.
229 Main Street
Huntington, New York 11743

FISHER, FISHER & BERGER, ESQS.
One Whitehall Street
New York, New York 10004
By: Henry T. Berger, Esq.
Appearing of Counsel to John J. Leo, Esq.

ELIOT SPITZER-ATTORNEY GENERAL
STATE OF NEW YORK
By: Denis J. McElligott, Esq.
Assistant Attorney General
300 Motor Parkway
Hauppauge, N.Y. 11788

ORDERED that this special proceeding petition to compel respondents' compliance with Section 2-126 of the Election Law and thus to enjoin further expenditure of money in aid of the primary election campaign of petitioner's opponent, Michael Forbes, is granted.

The petitioner has filed designating petitions sufficient to gain the ballot in the Democratic Party primary election to be held on September 12, 2000 for the office of United States Representative to Congress for the First Congressional District.

The petitioner alleges, and the respondents do not deny, that the New York State Democratic Committee has paid for certain radio and television advertisements in connection with Mr. Forbes's

Section 2-126 of the Election Law reads:

> No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election either as a candidate for nomination for public office, or for any party position.

The petitioner claims that, in paying for the subject radio and television ads, respondent State Democratic Committee has expended money "in aid of the designation or nomination" of Mr. Forbes in the upcoming primary election, in violation of the statute.

The respondents, in opposition to the petition, argue, procedurally, that (1) this Court lacks subject matter jurisdiction of the instant dispute, and (2) the Federal Election Campaign Act ("FECA") pre-empts the field with respect to the instant dispute and supercedes New York law. Substantively, the respondents contend that (1) the subject ads are not "in aid of the designation or nomination of" Mr. Forbes in the primary election; and (2) Sec. 2-126 is unconstitutional under the First Amendment.[1]

As for jurisdiction, the petitioner purports to bring this proceeding under Article 16 of the Election Law. The respondents point out that that Article enumerates its instances of applicability, and enforcement of Section 2-126 is not listed. However, respondents' argument is unpersuasive, for three reasons.

(1) Although no Court seems to have addressed precisely the use of Article 16 to enforce Section 2-126, that use has, in fact, been judicially entertained without objection (e.g., Baran v. Giambra, ___AD2d___, 705 NYS2d 740 [4th Dep't 1999]; Horn v. The Regular Democratic Organization of Long Beach, Inc., 59 Misc2d 664, 300 NYS2d 146 [Sup. Ct. Nassau Co. 1969] [Meyer, J.]; and Werner v. The Nassau County Republican Committee, 36 Misc2d 535, 232 NYS2d 617 [Sup. Ct. Nassau Co. 1962] [Brennan, J.]).

(2) The actions of any political party are subject to review, prohibition and mandamus under CPLR Article 78 (e.g., Blood v. Koerner, 220 AD2d 712, 633 NYS2d 979 [2nd Dep't 1995]; Cullinan v. Ahern, 212 AD2d 103, 628 NYS2d 895 [4th Dep't 1995]; Filiberto v. Roosevelt Fire Dist., 75 AD2d 572, 426 NYS2d 551 [2nd Dep't 1980]; Di Buono v. Sunderland, 175 Misc2d 636, 669 NYS2d 468 [Sup. Ct. Westchester Co. 1997]; and Casey v. Nuttall, 62 Misc2d 386, 308 NYS2d 957 [Sup. Ct. Rensselaer Co. 1970]); and this Court, in the interest of favored construction, may so deem the form of the instant matter (CPLR 103 [c]).

(3) To accept respondents' hypothesis is to hold that Sec. 2-126 is unenforceable by a private party candidate, thus completely frustrating the sanguine intent of the statute.

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1 The respondents do raise other minor challenges to the

With respect to FECA pre-emption, we readily adopt -- although we need not -- the analysis and conclusion of the Federal Court: that FECA does not have a provision comparable to Sec. 2-126 and thus the element of common statutory terrain essential to the applicability of the pre-emption doctrine is missing (see *Holzman* v. *Oliensis*, 91 NY2d 488, 673 NYS2d 23 [1998]). We add, moreover, that Sec. 2-126 aims, not at the candidate for office - - federal or local - - but at the political parties, which are state chartered and closely regulated by the New York Election Law and the State Board of Elections.

From the substantive standpoint, we decline to adopt, as the respondents urge, the nice distinctions drawn by the regulations of the Federal Election Commission ("FEC") between "issue advertisements", and an "electioneering message". The instant dispute presents a state court with a state statute to interpret. Sec.2-126 is meant to "serve a substantial government interest in removing both actual corruption and the appearance thereof from the electoral process" (*Baran* v. *Giambra*, supra). Thus construed in that light, the statute was violated, in our opinion, by the subject ads in the case at bar.

As for the constitutionality of Sec. 2-126 under the First Amendment, that has already been upheld, in *Baran* v. *Giambra*, supra.

We decline, at this time, petitioner's request for matching financial funds.

The foregoing shall constitute the order of this Court.

Dated: 29 August 2000

Patrick Henry
J.S.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

REGINA SELTZER, Petitioner, -against- NEW YORK STATE DEMOCRATIC COMMITTEE, JUDITH HOPE, State Chair, and DAVID ALPERT, Treasurer, Respondents.	MEMORANDUM AND ORDER 00-CV-4077 (JS) (ARL)

Appearances:

For Petitioner: Regina Seltzer, Esq., pro se
30 South Brewster Lane
Bellport, New York 11713

For Respondents: John J. Leo, Esq.
229 Main Street
Huntington, New York 11743

SEYBERT, District Judge:

Pending before the Court is Petitioner Regina Seltzer's ("Petitioner") motion to remand this action to the New York Supreme Court, Suffolk County on the ground that no federal jurisdiction is present. Respondents New York State Democratic Committee, Judith Hope, and David Alpert ("Respondents") oppose. Petitioner, who is a candidate for the Democratic nomination for United States Representative in New York's First Congressional

District, urges the Court to rule quickly on the motion because the Democratic primary election is scheduled for September 12, 2000. For the reasons discussed below, the motion to remand is GRANTED.

Petitioner commenced this action by Order to Show Cause in the Supreme Court, Suffolk County, on July 10, 2000. Petitioner sought an order enjoining the Respondents from unlawfully expending party funds in violation of New York Election Law § 2-126 on behalf of Petitioner's putative primary opponent, Michael Forbes. Petitioner alleged that the Respondents had admitted that they had paid for radio advertisements on Forbes' behalf, that she had informed Respondents that she also was a candidate for the same office, that she had informed Respondents that such conduct violated § 2-126, but that Respondents continued to run the ads and expend party funds in violation of the statute.

Respondents removed this action to federal court on July 19, 2000, pursuant to 28 U.S.C. § 1441. Respondents alleged in their Notice of Removal that this Court has original jurisdiction over this matter under the Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq. ("FECA"). Petitioner promptly moved to remand on the ground that this action was improperly removed and that this Court has no jurisdiction, because the action arises solely under New York law and because FECA contains no provision parallel to that found in the New York law under which Petitioner has brought this action.

New York Election Law § 2-126 governs and restricts expenditures of political party funds prior to contested primary elections. The section states that

> No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election either as a candidate for nomination for public office, or for any party position.

N.Y. Election Law § 2-126 (McKinney's 1998). In short, this section of the Election Law prohibits a New York political party, or party committee, from playing favorites. Political parties, or party committees, are forbidden to spend or contribute money to a candidate who is facing a challenge in the party's primary election. See Baran v. Giambra, 265 A.D.2d 796, 705 N.Y.S.2d 740, 741 (4th Dep't 1999) (discussing purpose of § 2-126).

In the present case, this section of New York law at first glance appears to run head-on into Section 453 of the Federal Election Campaign Act. This section of federal law provides that "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453 (West 1997).

Here, Petitioner is running for a seat in the United States House of Representatives. There is no doubt that the office being sought by Petitioner is a "Federal office" as defined in FECA. "The term 'Federal office' means the office of . . . Senator or Representative in . . . the Congress." 2 U.S.C. § 431(3). Therefore, the question presented is whether § 2-126 of the New York Election Law has been preempted by FECA.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." Crosby v. National Foreign Trade Council, — U.S. —, 120 S. Ct. 2288, 2293 (2000) (citing Const. Art. VI, cl. 2). Federal law preempts state law when preemption is "the clear and manifest purpose of Congress." CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Where, as here, there exists an express preemption clause such as that found in § 453, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." Id.; see also Weber v. Heaney, 995 F.2d 872, 875 (8th Cir. 1993) (noting that congressional intent is the "touchstone" of the analysis into whether FECA preempts a particular state law).

Turning to the plain language of the federal statute, the Court determines that Congress could not have been more clear. Congress explicitly provided that the "provisions" and "rules prescribed under" the Federal Election Campaign Act "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453. Thus, to the extent that FECA's provisions and rules occupy the same sphere as state law, FECA preempts and supersedes the state law.

This interpretation of § 453 is consistent with the sparse case law, which reflects that FECA is given "a narrow preemptive effect in light of its legislative history." Stern v. General Electric Corp., 924 F.2d 472, 475 & n.3 (holding that FECA did not preempt state regulation of corporate political spending). In other words, when Congress specifically expresses and defines its intent to preempt, as it has done in § 453, such specificity "implies that matters beyond that reach are not pre-empted." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). Therefore, with Congress having defined the scope of

FECA preemption, the Court's only remaining task is "to 'identify the domain expressly pre-empted by [this section].'" Weber, 995 F.2d at 875 (quoting Cipollone, 505 U.S. at 517) (brackets in original).

In determining the terrain occupied by FECA, the Court turns to the Commission's own position on preemption as set forth in the Code of Federal Regulations. The applicable regulation states that federal law specifically supersedes state law regarding "(1) Organization and registration of political committees supporting Federal candidates; (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and (3) Limitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7.[1] The situation presented here - the alleged expenditure of money by the Respondents in favor of a candidate in a primary race - is not encompassed within these three areas. Accordingly, there is ample room in the field of election law for the co-existence of both New York Election Law § 2-126 and FECA, and FECA does not preempt the state statute.

[1]The C.F.R. also sets forth five areas where the FECA does not supersede State laws, none of which are applicable here. See 11 C.F.R. § 108.7(c).

Also telling is the fact that when Respondents removed this action, they cited to several provisions of FECA which they allege confer jurisdiction in this Court. See Notice of Removal, ¶ 3. However, none of the cited provisions do what Respondents claim. In addition to citing § 453, which as discussed above does not confer jurisdiction on this Court, Respondents cite to 2 U.S.C. § 437c, which deals only with the creation and administration of the Federal Election Commission. Respondents cite to § 437d, which deals only with the powers and authority of the Commission. Respondents cite to § 437f, dealing with the Commission's issuance of advisory opinions and other various procedures. Respondents cite to § 437g, which sets forth the method by which any person who believes that FECA has been violated may file and pursue a complaint with the Commission. Respondents also cite to § 437h, which deals only with judicial review of the constitutionality of FECA. Respondents cite to § 438, which deals with the duties of the Commission. Respondents also cite to §§ 441a(a)(1) and 441a(a)(2), which -- while getting a little closer to the pertinent issue -- deal only with contributions to candidates and political committees. Thus, no part of the statute cited by Respondents confers jurisdiction in this Court, despite the language of the Notice of Removal.

Finally, and perhaps most importantly, removal was improper because this Court has no jurisdiction to entertain an action under FECA. Pursuant to § 437d(e), and subject only to one exception, the Federal Election Commission - and only the Federal Election Commission - has power to initiate civil actions under FECA. The exclusive civil remedy for enforcing FECA is an action brought by the Commission. 2 U.S.C. § 437d(e). The only exception to the Commission's exclusive power to bring suit to enforce the provisions of FECA is found in § 438g(a)(8), which provides that any person aggrieved by an order of the Commission may file a petition in the United States District Court for the District of Columbia. 2 U.S.C. § 438g(a)(8).

Thus, even if Petitioner originally had brought a FECA action in federal court in this district, the action would have been subject to dismissal for lack of subject matter jurisdiction. This jurisdictional defect is no less significant simply because the action was removed to this Court by Respondents. Either way, the action cannot proceed in this forum.

Therefore, for the reasons discussed, the Court holds that Section 2-126 of the New York Election Law is not preempted by the Federal Election Campaign Act, and that FECA does not purport to govern the type of alleged primary election expenditures challenged here. The Court further holds that it has no jurisdiction over this action, and that this matter was improperly removed from state court. The motion to remand is therefore GRANTED.

The Clerk of the Court is directed to remand this case to New York State Supreme Court, Suffolk County, where it originated under index number 16954-2000, and thereafter to close this case.

SO ORDERED.

/S/

Joanna Seybert, U.S.D.J.

Dated: Uniondale, New York
August 18, 2000

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BNA, Inc.

Money & Politics

Report

Number 414 September 21, 2000

TOPICAL INDEX

NEWS

Federal Courts

MEASURE TO CURB PERKS FOR JUDGES OPPOSED BY FEDERAL COURT POLICYMAKERS

The Judicial Conference of the United States Sept. 19 voted to oppose a Senate bill aimed at curbing perquisites and trips for federal judges funded by private interest groups with current or potential litigation before the courts.

The Judicial Education Reform Act of 2000 (S. 2990) is overly broad, would have unintended consequences, raises potential constitutional questions, and has not been adequately studied, according to the conference resolution.

In a press briefing following the vote, Chief Judge Ralph K. Winter Jr., of the U.S. Court of Appeals for the Second Circuit, said that S. 2990 contains "an enormously broad prohibition" that could "knock out all kinds of law school programs and seminars," and could even affect Federal Judicial Center programs to the extent they are jointly funded by private organizations.

Winter chairs the conference's Executive Committee, which crafted the resolution and recommended its adoption.

Measure Goes Too Far

The bill, introduced July 27 by Sens. John Kerry (D-Mass.) and Russell Feingold (D-Wis.), responded to a report by Community Rights Counsel, a public interest law firm, of all-expense-paid trips and other benefits afforded to judges by private sponsors--some with special interests and agendas. This practice "creates a perception of improper influence that erodes the trust the American people must have in our judicial system," Kerry said in presenting the bill. The measure was referred to the Senate Judiciary Committee.

The bill prohibits judges from accepting "anything of value in connection with a seminar," unless the judge will be a speaker, presenter, or panel participant. The measure also sets up a $2 million Judicial Education Fund to pay expenses judges incur in attending seminars approved by the FJC board. Under the bill, the conference must issue guidelines to ensure that board approval will be limited to seminars operated in ways that do not undermine public confidence in the judicial branch. The board may not approve a seminar until it reviews the content, presenters, funding, and litigation activities of the sponsors and presenters. This information must be posted on the Internet if the seminar is approved.

To illustrate the breadth of the bill, Winter proposed a hypothetical: A judge is invited to a seminar at Yale Law School. The seminar will include outside speakers. The law school would likely give the judge transportation assistance if needed, but certainly a pad, pencil, and free lunch. This would be unlawful under S. 2990 unless the law school and the Judicial Center had jumped through the required preclearance and disclosure hoops.

The pre-seminar review would require the law school to communicate with the Judicial Center well in advance, outlining the contents of the seminar, the speakers, and the litigation activities of the sponsors and presenters. Another problem would be defining the activities of a presenter from a large law firm.

Judicial Center as Censor

The bill would direct the center to "promulgate guidelines to ensure that the Board only approves seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."

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This is a vague standard with plenty of discretion, Winter said. The bill would dramatically alter the center's role by turning it into a censor for approving or disapproving seminars and who can attend them, he added.

Winter found it "surprising" that the press has embraced such "explicit content regulation without many limits on [the board's] discretion." The bill is "a very Draconian ban in one of the most sensitive areas of our public life--the marketplace of ideas," he said.

The executive committee report recommending opposition to S. 2990 acknowledged that judges are probably not paying sufficient attention to the public perception that they are being wined and dined by parties with particular agendas that could be played out in the courtroom. However, the approach taken by this legislation represents "an inappropriate response to a highly complex question." This is not a time "for hasty legislation that may well be more dangerous than the concerns it is designed to allay," the report said.

The report also noted that the proposed legislation would appear to subject judges to the most restrictive rules of any government officials. "[E]xisting legal and ethics provisions already restrict judges from accepting benefits from parties to litigation before them and provide for disqualification in any instance where a judge's impartiality might reasonably be questioned," it said.

By its very size and nature, the conference is not equipped to fashion alternative, narrower measures to remedy the types of perceived improprieties that led to the bill's introduction, Winter said.

Other Business

In other business, the conference approved and sent to Congress a recommendation for the creation of new Article III judgeships. It also urged federal courts to post their local rules on their own Web sites, creating such sites if necessary.

Responding to a question at the press briefing, Winter said that the conference has not taken a position on honoraria for judges. The topic was not on the meeting agenda, he said.

A provision inserted into the current Senate version of the Commerce-Justice-State appropriations bill (H.R. 4690) would ease a ban on honoraria for federal judges. The provision was supported by Chief Justice William Rehnquist in letter sent in April to Senate Rules Committee Chairman Mitch McConnell.

Winter noted that discussion of S. 2990 was added to the agenda at the last minute on the request of the executive committee.

The Judicial Conference serves as the main policymaking entity for the federal court system. Rehnquist presides over the body, which includes the chief judges of the 13 federal courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The group meets twice a year to consider policy and court administration issues within its purview. It also makes recommendations to Congress relating to legislation that affects the judiciary. The vote to oppose S. 2990 came at the conference's biannual meeting.

Corporate Contributions

FEDERAL JUDGE IN NORTH CAROLINA HEARS CHALLENGE TO FEC BAN ON CORPORATE MONEY

A federal judge, who in 1998 struck down North Carolina's law prohibiting corporate campaign contributions, now is considering a similar challenge to the federal ban on corporate contributions.

Judge Terrence Boyle of the U.S. District Court for the Eastern District of North Carolina heard oral arguments in the case Sept. 18 from lawyers for the Federal Election Commission and from James Bopp, the attorney representing challengers of the corporate contribution ban ("Beaumont v. FEC," D. E.N.C., Civil No 00-2, motion hearing 9/18/00).

Following the hearing on motions for summary judgment, the judge indicated he would rule on the case shortly, according to Bopp of the Indiana-based law firm Bopp, Coleson & Bostrom. Bopp told BNA that the judge said he was aware that an election is coming up, in which Bopp's clients wish to participate.

The case is being pursued on behalf of North Carolina Right to Life (NCRL), an anti-abortion organization that is organized as a nonprofit corporation, not an FEC-regulated political action committee. NCRL says it brought the case because it wants to make campaign contributions.

Challenge Relies on MCFL Decision

The court challenge mainly relies on a 1986 Supreme Court decision in "FEC v. Massachusetts Citizens for Life", which held that a similar nonprofit corporation in Massachusetts could not be barred from making independent expenditures for or against candidates.

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Bopp argues that the logic of the MCFL decision should also be extended to campaign contributions. He is asking the North Carolina court to declare unconstitutional Sec. 441b of the Federal Election Campaign Act, which bars "any corporation whatever" from making corporate campaign contributions or independent expenditures.

Corporations or unions that wish to contribute to a federal candidate are required to set up a PAC--also known as a "separate segregated fund." Funding for the PAC must come from the voluntary contributions of corporate employees or union members.

Judge Boyle cited the Supreme Court's decision in the "MCFL" case when he struck down in 1998 the provisions of North Carolina's law barring corporate contributions. That decision in "North Carolina Right to Life v. Bartlett" was largely upheld last year by the U.S. Court of Appeals for the Fourth Circuit ("North Carolina Right to Life v. Bartlett, "4th Cir, No. 98-1636, 2/17/99).

Both the district court and appeals court decisions held that the state law's prohibition on corporate political spending was too broad because it did not distinguish between for-profit and nonprofit corporations.

The FEC, however, in court papers filed in the latest case, pointed to a series of court rulings upholding the federal ban on corporate campaign contributions. Most recently, the U.S. Court of Appeals for the Third Circuit upheld the federal law in May in "Mariani v. U.S., "(3rd Cir., No. 99-3875, 5/18/00). The plaintiff in the Mariani case had argued that restrictions on corporate contributions were unconstitutional because they have been eviscerated by a loophole allowing corporations and unions to make unregulated "soft money" contributions to the political parties.

The FEC also argued in its court papers that the Supreme Court decision in the "MCFL" decision provided a "constitutional exemption ... for certain corporations applied only to restrictions on independent expenditures."

By Kenneth P. Doyle

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For editorial inquiries, call 202-452-4262; or fax 202-452-7504. Toby J. McIntosh, Managing Editor; Kenneth P. Doyle, Senior Editor.