

George v Hynes

2013 NY Slip Op 33222(U)

December 13, 2013

Supreme Court, New York County

Docket Number: 100730/13

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ABE GEORGE, CANDIDATE FOR KINGS COUNTY
DISTRICT ATTORNEY IN 2013, and ABE GEORGE
2013, A POLITICAL COMMITTEE,
Plaintiffs,

INDEX NO. 100730/13

MOTION SEQ. NO. ~~000~~ 01

- against -

CHARLES J. HYNES, FRIENDS OF CHARLES J.
HYNES, CBS CORP., CBS NEWS, A DIVISION OF
CBS CORP., AND CBS TELEVISION NETWORK,
A DIVISION OF CBS CORP.,
Defendants.

FILED

DEC 19 2013

NEW YORK

CLERK'S OFFICE

The following papers were read on this motion by plaintiffs for a temporary restraining order and preliminary injunction (motion Sequence 001).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Before the Court is a motion by Abe George (George), a candidate for Kings County (Brooklyn) District Attorney in the 2013 Election¹, and Abe George 2013, an authorized political election committee for the 2013 election² (collectively, plaintiffs) seeking an application for a Temporary Restraining Order (TRO) and preliminary injunction (PI), pursuant to CPLR 6301. Specifically, on May 14, 2013, plaintiffs moved by Order to Show Cause (OSC) for a TRO pending the final determination in this matter and a PI enjoining defendants from: (1) promoting and advertising *Brooklyn D.A.*, which was scheduled to have an initial air date of May 28, 2013; (2) broadcasting or publishing *Brooklyn D.A.*, at any time prior to the General Election for the

¹ See New York State Election Law § 14-104.

² See New York State Election Law §§ 14-112 and 14-118.

Kings County District Attorney scheduled for November 5, 2013; and (3) using state monies to further Hynes' political campaign for re-election. Charles J. Hynes (Hynes), the Friends of Charles J. Hynes, an authorized political committee for the incumbent candidate Charles J. Hynes' reelection to the Kings County District Attorney for the 2013 Election (collectively, Hynes defendants), CBS Corporation, CBS News, a Division of CBS Corporation, and CBS Television Network, a Division of CBS Corporation (collectively, CBS) are in opposition to plaintiffs' motion.³

BACKGROUND

George represents that he is a candidate for the election to the public office of District Attorney for Kings County, New York in the 2013 election. Accordingly he also maintains that he has established an authorized political committee "Abe George 2013" pursuant to the campaign Finance requirements of the New York State Election Law. On May 14, 2013, plaintiffs commenced the herein action by filing a summons and complaint against defendants Hynes, the Hynes defendants and CBS.⁴ In their complaint, plaintiffs are seeking injunctive relief based upon two causes of action. First, to restrain CBS from giving an unlawful campaign contribution to the Hynes defendants, as they seek reelection for Hynes' seventh term as District Attorney. Plaintiff alleges that CBS' airing of a six-week reality television show entitled *Brooklyn D.A.* amounts to an in-kind services and campaign contribution by CBS in a value in excess of \$ 5,000.00, the maximum campaign limit permitted by the New York State campaign Finance Law (see Complaint ¶¶ 46-50; Memorandum of Law p. 16 ¶ 2). As such, plaintiffs allege that CBS' contribution is in violation of the New York State Election Law §§ 14-116(2) and 16-114(3). Second, plaintiffs also allege that Hynes unlawfully seeks to further his personal

³ See plaintiffs' complaint ¶¶ 2, 10.

⁴ The CBS defendants acknowledge that they are erroneously labeled in the lawsuit. They are the CBS Broadcasting Inc., however this fact does not change the substance of the proceedings (see CBS defendants' letter dated May 21, 2013)

political career, in his capacity as District Attorney, by providing public monies and resources of his public office to the CBS defendants, a private corporation, which plaintiffs assert violates Article VII, Section 8(e) of the New York State Constitution (*see id.* ¶¶ 51-54; *id.* p. 22 ¶ 2). Plaintiffs further seek to enjoin the Hynes defendants from using public funds to further Hynes' political campaign for re-election.

In his complaint, plaintiff asserts that he learned for the first time on March 26, 2013 that the CBS defendants were planning to broadcast *Brooklyn D.A.* The television show which was scheduled to have an initial air date of May 21, 2013,⁵ was alleged to feature Hynes, the 23 year incumbent candidate for District Attorney, and was being promoted and produced with his cooperation. Plaintiff asserts that after finding out about *Brooklyn D.A.* he subsequently made contact with the CBS defendants in an attempt to negotiate with the CBS defendants to voluntarily postpone the airing of the television show until after the 2013 General election scheduled for November 5, 2013. Plaintiffs assert that having failed to successfully persuade CBS to voluntarily postpone the television show, on May 14, 2013, they sought injunctive relief by the herein application.

All parties appeared⁶ on May 14, 2013, and this Court held a hearing on plaintiffs' application for a TRO pending a hearing on their application for a preliminary injunction. A party seeking a preliminary injunction must demonstrate 1) a probability of success on the merits; 2) danger of irreparable injury; and 3) a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]; *Jones v Park Front Apartments, LLC*, 73 AD3d

⁵ The CBS defendants, for reasons of their own, subsequently postponed the initial air date to May 28, 2013.

⁶ The defendants Charles J. Hynes and Friends of Charles J. Hynes were represented by Martin Connor (see Court Transcript p. 3, line 25 to p.4, top). Counsel did not make a distinction in his representation that he did not represent Hynes, in his capacity as District Attorney, notwithstanding the Court's subsequent incorrect recollection the counsel may have made the distinction, before the Court reviewed the transcript. Consequently, all the Hynes defendants are before the Court.

612 [1st Dept 2010]). Moreover, in seeking a temporary restraining order, "the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had" (CPLR 6313[a]). The plaintiffs' application for a TRO was denied in accordance with the Court's finding on the record that the plaintiffs failed to meet their burden to show that the *alleged* statutory violations, the basis of the injunction, would result in irreparable harm (*see* the Court transcript, dated May 14, 2013). Moreover, plaintiffs failed to demonstrate that the balance of equities are in their favor, particularly in light of the timeliness of the injunction application and the First Amendment Constitutional Issues involved (*id.*).

The defendants thereafter consented to accept service of the conformed OSC in Court. The Court notes that plaintiffs failed to provide notice to Hynes, in his capacity as the Kings County District Attorney, that they would be in Court seeking a TRO on May 14, 2013. Plaintiffs did not subsequently serve Hynes, in his capacity as the District Attorney, with their OSC or with any other papers.

Subsequently, on May 17, 2013, CBS and the Hynes defendants filed memoranda in opposition to plaintiffs' request for a preliminary injunction, and thereafter filed separate pre-answer motions to dismiss the complaint (motion sequence 002). Thereafter on Tuesday, May 21, 2013, plaintiffs filed opposition to CBS and the Hynes defendants' motions, and also moved by letter application with the Court's permission, for expedited discovery on plaintiffs' request for a preliminary injunction hearing, pursuant to CPLR 3214(b). Specifically, plaintiffs sought leave for expedited discovery in an effort to establish that *Brooklyn D.A.* is a reality entertainment show featuring Hynes, that Hynes is heavily involved in its promotion and production, and in doing so, Hynes has violated the state campaign finance laws and the State Constitution. Plaintiffs requested various e-mails and communications between the producers of *Brooklyn D.A.* and Hynes' staff. CBS and the Hynes defendants separately opposed plaintiffs' request

for discovery.

On Thursday, May 23, 2013, the Court granted plaintiffs' request for the production of two witnesses that were employees of CBS, as well as plaintiffs' request for documentary discovery excluding any communication subject to privilege, as well as the alleged First Amendment news reporter privilege asserted by CBS. The Court ordered that CBS provide the documents by 2:00 p.m. on May 24, 2013, and scheduled an expedited preliminary injunction hearing for May 24, 2013 at 2:30 p.m. (see Court-Ordered Transcript, dated May 23, 2013).

On Friday, May 24, 2013, at 10:00 a.m the defendants sought an interim stay from the Appellate Division, First Department, pending an appeal from this Court's order to proceed with the expedited preliminary injunction hearing while defendants' pre-answer dispositive motions to dismiss were pending. The Appellate Division, First Department, denied defendants' application for an interim stay pending appeal. The CBS defendants completed plaintiffs' discovery request and the Court held a preliminary injunction hearing.

STANDARD

"The determination to grant or deny a preliminary injunction lies within the sound discretion of the trial court" (*Gilliland v Acquafredda Enterprises, LLC*, 92 AD3d 19, 24 [1st Dept 2011]). In order to be entitled to a preliminary injunction, the moving party must establish by clear and convincing evidence: (1) irreparable injury in the absence of injunctive relief; (2) a likelihood of success on the merits; and (3) a balance of equities in its favor (see *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]; *Aetna Insurance Co. v Capasso*, 75 NY2d 860 [1990]; *Jones v Park Front Apartments, LLC*, 73 AD3d 612 [1st Dept 2010]).

DISCUSSION

After a hearing, including testimony by Susan Zirinsky, a senior executive producer at CBS News, and Patti Aronofsky, a producer for "48 Hours," and after reviewing the submissions of the parties and considering the totality of the evidence, this Court denied plaintiffs' application

for a preliminary injunction. This Court found that plaintiffs failed to meet the aforementioned standard for injunctive relief (see So-Ordered Court transcript, dated May 24, 2013). As such, *Brooklyn D.A.* aired as previously scheduled on May 28, 2013. In light of the Court denying the TRO and PI, and since the plaintiff never sought declaratory relief on any of his claims asserted in his complaint, the complaint is dismissed and this matter disposed.

CONCLUSION

Accordingly, it is,

ORDERED, that plaintiffs' motion for a preliminary injunction enjoining CBS and Hynes candidate defendants on the first cause of action, from: (1) promoting and advertising a weekly, six-part CBS television series which is scheduled to have an initial air date of May 28, 2013, entitled *Brooklyn D.A.*, (2) broadcasting or publishing *Brooklyn D.A.*, at any time prior to the General Election for the Kings County District Attorney scheduled for November 5, 2013, and (3) using state monies to further Charles Hynes' political campaign for re-election is denied; and it is further,

ORDERED that the Court *sua sponte* dismisses the complaint in this matter as there are no remaining claims for the Court to resolve; and it is further,

ORDERED that counsel for CBS Corp. is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/13/13

FILED

DEC 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

PAUL WOOTEN

J.S.C.

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