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Grassroots Campaigns, Inc.

Plaintiff

vs.

The Pennsylvania Democratic Party
and
Pennsylvania Victory '04
Defendants

COMMONWEALTH OF
PENNSYLVANIA
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

October term, 2008
No. 3303

**MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION FOR SUMMARY
JUDGMENT OF THE PENNSYLVANIA DEMOCRATIC PARTY**

I. MATTER BEFORE THE COURT

The motion for summary judgment of the Pennsylvania Democratic Party.

II. STATEMENT OF QUESTIONS INVOLVED

1. Does a contract signed by an agent in the name of a non-entity bind the Pennsylvania Democratic Party as the principal which conducted campaign activities in the name of the non-entity? Suggested answer: yes.

2. Does the evidence show that the Pennsylvania Democratic Party and Pennsylvania Victory '04 were so intertwined that Victory '04 is an alter ego of the Party? Suggested answer: yes.

3. Do disputed material facts and inferences in favor of the non-moving party preclude the entry of summary judgment for the moving party? Suggested answer: yes.

III. COUNTERSTATEMENT OF FACTS

It is undisputed that Plaintiff has not been paid for canvassing and voter mobilization services performed pursuant to a contract signed by Wes Jones on behalf of Plaintiff and by David Katz, on behalf of Defendants. The agreement is signed Pennsylvania Victory '04 By David Katz. David Katz was a political operative who held the title of executive director of Pennsylvania Victory '04. Pennsylvania Victory '04 is the name of the coordinated Democratic campaign in the 2004 general election. (Guinan 7). Wes Jones negotiated terms of the contract with Tim Penna. Mr. Penna's email address uses the domain name of the Party. (Jones affidavit ¶5). Shannon Bilger, who directly reported to the executive director of the Party, authorized Mr. Penna to have an email account with the Party's domain name. (Interrogatory answer #5, Isenhour 7,8).

Pennsylvania Victory '04 is a project of the Pennsylvania Democratic Party. (Admission #4 and public website image attached, Guinan 7, 8) Pennsylvania Victory '04 had no officers. (Interrogatory answer # 16) Pennsylvania Victory '04 had no dues-paying membership. (Guinan 8) Pennsylvania Victory '04 had no bylaws. (Guinan 7, Answer to request for documents #3) Pennsylvania Victory '04 was not registered as a fictitious name. (Guinan 7-8, Answer to request for documents #6, #9) The Party and Victory '04 used the same logo in 2004. (Isenhour 30-31 and Exh. B, C, D attached to request for admissions).

Since it is a project of the Party, Pa. Victory '04 is not registered with the Federal Election Commission (FEC) (Guinan 8, 1 22-25). The Controller of the Party compiled information supplied by Pennsylvania Victory '04 to prepare a single filing for the Federal Election Commission (FEC). (Guinan 8-9, 16, 37). Pennsylvania Victory '04 did not file a

separate report of income and distributions with the FEC. (Guinan 17). It is impossible to distinguish between contributions made to the Party and contributions made to Victory '04 in statements or reports to the FEC. (Guinan 17, 37). Pa. Victory '04 and the Party shared the same bookkeeping system and same data base and same software to prepare financial reports. (Guinan 35). The Party purchased the bookkeeping software used to prepare financial reports to the FEC for the Party and for Pennsylvania Victory '04. (Guinan 23-24). The Controller of the Party could search the Pa. Victory '04 bank account in the system of the Party. Party software was used to keep the Victory '04 account records. (Guinan 35,36) . The Party distributed Levin funds in the amount of \$100,907.00 to an account in the name of Pa. Victory 2004. (Jones affidavit with attached Schedule H5 of FEC Form 3X, FEC 179288).

Victory '04 had its first office in a building owned by the Party. (Guinan 45).

Because the office is the base of the Party, it becomes the base of Victory '04 (Guinan 45) There is no lease between Victory '04 and the Party. (Answer to request for documents, #7 and Guinan

46) There is no evidence that Victory '04 paid rent to the Party. (Guinan 46). Records of payments from Victory '04 were destroyed. (Answer to request for documents #10).

The Party paid the phone bill for Victory '04 while Victory '04 used space at the Party headquarters. Volunteers for Victory '04 were volunteers for the Party too. (Guinan 47)

Volunteers did not allocate time between the Party and Victory '04 because it would make no difference. Pa. Victory '04 volunteers answered phones for the Party. (Guinan 47-48).

TJ Rooney, in his role as chairperson of the Party, led the PA Victory '04 effort that led to John Kerry's victory in Pennsylvania . (Exh. D to request for admissions, request for admission #5). Pennsylvania Victory '04 and the Party share the purpose to support and elect democratic

candidates. (Interrogatory answer 3, 13)

Pennsylvania Victory '04 terminated when people who worked on the campaign went home. (Guinan 18). The Pennsylvania Department of Labor&Industry transmitted notices of unemployment compensation claims for persons who worked on the coordinated campaign to the Party. (Guinan 19). Pennsylvania Victory '04 wound up its operation by closing a bank account on December 5, 2004. (Answer to interrogatory 10a, b). Upon dissolution, Pennsylvania Victory '04 distributed tangible and intangible general office supplies to the Party. (Interrogatory 10 d, Guinan 21, 29).

Information about donors to Pennsylvania Victory '04 were placed in the Party's data bases. (Guinan 29, 30-31). The Party used information about donors gathered by Pennsylvania Victory '04 to help build the Party's donor base. (Guinan 32).

The Party has not filed any cross claim against Pennsylvania Victory '04. Indeed, the same counsel represents both the Pennsylvania Democratic Party and Pennsylvania Victory '04.

LEGAL ARGUMENT

I. THE PENNSYLVANIA DEMOCRATIC PARTY IS THE PRINCIPAL OBLIGATED ON THE CONTRACT WITH PLAINTIFF

The written contract itself signed "Pennsylvania Victory '04 By David Katz" (Exh. B attached to Party's motion for summary judgment) demonstrates that David Katz is an agent. The identity of the principal is at issue in this case.

Defendant's argument in support of its motion for summary judgment is based upon the false premise that Pennsylvania Victory '04 is an entity capable of contracting. It is undisputed that Pennsylvania Victory '04 was not a corporation. Pennsylvania Victory '04 does not fit the

criteria for an unincorporated association, since it never had members. An unincorporated association has no legal existence separate and apart from its individual members. *Krumbine v. Lebanon Tax Claim Bureau*, 541 Pa. 384, 663 A. 2d 158 (1995). Pennsylvania Victory '04 is the name applied to the combined campaign of November, 2004, a project of the Party. A title is not a distinct entity which fits the definition of an unincorporated association. *Testa v. Janssen*, 482 F. Supp. 1195, 1200 (W.D. Pa. 1980).

Only an entity with a recognized legal existence can own property or contract. *Venus Lodge No. 62 v. Acme Benevolent Association*, 231 N.C. 522, 58 S.E. 2d 109 (1950); *Chicago Grain Trimmers Ass'n v. Murphy*, 389 Ill. 102, 58 N.E. 2d 906 (1945). Since it is a legal non-entity, Pennsylvania Victory '04 lacks the capacity to enter into a contract. Since a non-entity could not contract, the principal is the Pennsylvania Democratic Party, which sponsored the Project named Pennsylvania Victory '04.

The principal is a party to the contract made by an agent acting within the scope of delegated authority. *Pa. Federation of Teachers v. School District of Philadelphia*, 506 Pa. 196, 484 A. 2d 751 (1984). *Casey v. GAF Corporation*, 828 A. 2d 362 (Pa. Super. 2003). Notice to a third party of the existence and identity of the principal imposes liability on the principal. *Fink v. Montgomery Elevator Co. Of Colo.* 421 P. 2d 735, 737 (Colo. 1966). Plaintiff knew of the existence and identity of the Party from the publicly available websites identifying Pennsylvania Victory '04 as the project of the Party, the negotiations conducted with Tim Penna via an email account with the Party's domain name, and the statement "Paid for by the Pennsylvania Democratic Party" on the fax cover sheet transmitting the contract signed by David Katz. The Party could be a principal responsible for contractual obligations even if Pennsylvania Victory '04

were an entity with capacity to contract. In this analysis, David Katz would have signed the agreement with Plaintiff as a sub-agent of the Party.

The principal may be identified by parol evidence. If there is any ambiguity in the instrument about the identification or liability of a principal, the court can consider parol evidence as well as the entire contract. *Fink v. Montgomery Elevator Co. Of Colo.* 421 P. 2d 735 (Colo. 1966). “The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law than an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction.” *Williston on Contracts* (4th ed, sec. 35.54), citing *Ford v. Williams*, 62 U.S. 287, 16 L. Ed. 36 (1858).

The principal is a party in interest to the contract whether or not the principal is disclosed, partially disclosed or undisclosed. Under Colorado law, which applies to the construction of the contract in this case, a third party may proceed against either an undisclosed or partially disclosed principal or the agent. *Connor v. Steel*, 659 P. 2d 50 (Colo. App. 1982). Pennsylvania law is consistent with Colorado law on this point. *Joseph Melnick Building & Loan Ass’n v. Melnick*, 361 Pa. 328, 64 A. 2d 773 (1949); *Wedgewood Diner, Inc. V. Good*, 368 Pa. Super. 480, 534 A. 2d 537 (1987). The classification of the principal as disclosed, undisclosed or partially disclosed does not affect the liability of the principal; in the case of a disclosed principal, the agent cannot be liable to a third party. This case does not present an issue of Mr. Katz’ potential liability.

The agency law analysis is consistent with decisions holding that a parent entity is responsible for performance of contractual obligations of a subsidiary or a name which is

incapable of performance. In *Testa v. Janssen*, 482 F. Supp. 1195, 1200 (W.D. Pa. 1980) the Court imposed liability on the person which used a label for convenience, since the label was not an entity. In *AK Steel v. Viacom, Inc.*, 835 A. 2d 820 (Pa. Super. 2003), the parent entity may be viewed as the principal on whose behalf an agent entered into a contract. Since a division of a corporation is not a separate entity, the parent corporation is responsible for acts in the name of the division. In *re Sugar Antitrust Litigation*, 579 F. 2d 13, 18 (3d Cir. 1978) In *General Dynamics v. United States*, 47 Ct. Cl. 514 (2000), the Court concluded that a parent corporation, rather than a corporate division which ceased existence, was the contracting party. The reasons employed to hold parent corporations responsible for contractual obligations incurred in the name of a division are applicable to the issue of liability of a parent political organization on a contract in the name of its project.

II. THE PARTY IS LIABLE FOR OBLIGATIONS OF ITS ALTER EGO

In the context of corporations, the alter ego concept applies if there is such unity of interest and ownership that the separate personalities of the corporation and owners no longer exist. Under Colorado law, an entity could be liable by application of the alter ego theory if there is such a close relationship between the entities that one is an instrumentality of the other and injustice would be promoted by recognizing a distinct entity. See *H&H Distributors, Inc. v. BBC Intern. Inc.* 812 P. 2d 659 (Colo. App. 1990); *Masinton v. Dean*, 659 P. 2d 50 (Colo. App. 1982).

The evidence demonstrating the intertwining of Pennsylvania Victory '04 and the Party includes the following: the Party's filing of reports for its project, Pennsylvania Victory '04 with the Federal Election Commission (FEC) (Guinan 8-9) , inability to distinguish between contributions made to Pennsylvania Victory '04 and the Party on FEC filings (Guinan 17), the

contribution of over \$100,907.00 by the Party to the Pennsylvania Victory 2004 non federal Levin account (FEC 179288 form 3X schedule H5), the Party's provision of software for the use of activity conducted in the name of Pennsylvania Victory '04, (Guinan 22-24), the use of the identical logo (Isenhour, 30-31) the Party's provision of office space and telephones without charge to Pennsylvania Victory '04, (Guinan 45-48) email accounts provided by the Party on its domain name for persons purportedly acting on behalf of Pennsylvania Victory '04 (Isenhour 7,8 and Jones affidavit) the sharing of volunteers (Guinan 47-48) , the sharing of donor information and any information received from Grassroots Campaigns (Guinan 29-31, 39), the transfer of tangible and intangible office supplies to the Party after the November, 2004 general election (Interrogatory answer #9d) , the common purpose to elect Democratic candidates (Interrogatory answer #3, 13) and the leadership of the Pennsylvania Victory '04 effort by the Chairperson of the Party (Admissions, #5, 6) and the public description of Pennsylvania Victory '04 as a project of the Party (website, admission #4).

Despite the foregoing facts, with citations to the record provided in Plaintiff's answer, Defendant infers that the Party and Pennsylvania Victory '04 merely have similar and overlapping goals. Plaintiff infers that the facts show that the Party is the controlling entity which used the name of Pa. Victory '04 for the combined Presidential campaign in November 2004 and that the Party thereafter benefitted from information obtained by canvassers regarding donors and volunteers.

III. DISPUTED MATERIAL FACTS, CREDIBILITY ISSUES AND INFERENCES IN FAVOR OF PLAINTIFF DEFEAT THE PARTY'S MOTION FOR SUMMARY JUDGMENT

Defendant has not fulfilled the requirements for summary judgment in Pa. R. Civ. P.

1035.2:

whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or an adverse party who will bear the burden of proof at trial has failed to produce evidence of essential facts which in a jury trial would require the issues to be submitted to a jury.

As the nonmoving party in this case, Plaintiff must have the benefit of all well-pleaded facts and all reasonable inferences drawn from the facts. *Goldberg v. Delta Tau Delta*, 613 A. 2d 1250 (Pa. Super. 1992), appeal den., 534 Pa. 539, 626 A. 2d 1158.

Numerous material facts are disputed. The Party denies that it funded Pa. Victory 04 in ¶19 of its motion for summary judgment. Schedule H5 to filing FEC-179288, attached to Jones affidavit, belies this denial. The Party reported to the Federal Election Commission the transfer of \$100,907.00 in Levin funds to an account in the name of Pa. Victory 2004 Non- Federal Levin on November 13, 2004 for the purpose of voter identification efforts. Pursuant to the agreement which Plaintiff seeks to enforce in this case, Plaintiff's canvassers engaged in voter identification, volunteer identification and persuading eligible voters to get to the polls. The Party's transfer of funds to a Levin account for the purpose of voter identification efforts supports an inference that the Party desired canvassing services to promote its goals, that the Party expected to pay for such services and that the Party benefitted from Plaintiff's canvassing.

Levin funds, named after Senator Carl Levin, may be used for some federal election activity such as voter registration and get-out-the vote (GOTV) drives. § 67 Fed. Reg. No. 145 page 49064 (July 29, 2002). "Non-federal funds" is the term used by the FEC to designate what is commonly known as soft money. Any state, district or local committee must solely raise the funds that it expends or disburses. 11 C.F.R. §300.31. Federal election activities may be

financed with a mix of federal funds and Levin funds. 67 Fed. Reg. 49065 (July 29, 2002). State, district and local party committees intending to expend Levin funds must establish separate Levin accounts or demonstrate the sufficiency of restricted funds to make payments for activities allowed by the Bipartisan Campaign Reform Act. The state party or its committees has the responsibility to allocate expenditures from federal or non-federal accounts in compliance with the Bipartisan Campaign Reform Act and regulations of the FEC. 11 C.F.R. §300.32. A Party committee may spend Levin funds on voter registration, voter identification, get-out the vote activity or generic campaign activity. 11 C.F.R. §300.32(b) The FEC places responsibility on the Party or committees of the Party to properly allocate funds to particular activities, to maintain records and report expenditures. 11 C.F.R. §300.34, 300.36. The Party's transfer of Levin funds to an account in the name of Pennsylvania Victory 2004 supports an inference of the Party's control over Pennsylvania Victory '04 activity.

Defendants' answers to interrogatories contradict Ms. Guinan's testimony that the Party did not have involvement in the formation or decision to form Pennsylvania Victory '04. In the answers to interrogatories, verified by the current executive director of the Party, Defendant identifies Don Morabito the former Executive Director of the Party, as one of the individual who decided to form Pennsylvania Victory '04. (Answer to Interrogatories #6).

While the Party denies input into activities of Pa. Victory '04 or control over day to day operations, the Party touts T.J. Rooney's leadership of Pa. Victory '04 as *Chair of the Pennsylvania Democratic Party* (Admission #5, 6). The Chairperson of the party is not a mere foot soldier; he led the Pennsylvania Victory '04 effort. As a leader, it is reasonable to infer that the Chairperson of the Party exercised significant control over activities of Pennsylvania Victory

'04.

Whether the Party obtained any benefit from Plaintiff's activities pursuant to the contract is disputed. Plaintiff submitted reports about potential voters and volunteers to field offices operating in the name of Pennsylvania Victory '04. Volunteers between the Party and Victory '04 were indistinguishable. (See Guinan 47). The Party transferred funds which the Party raised for voter identification and get out the vote efforts, the activities performed by Plaintiff pursuant to the contract. On the Pennsylvania Democratic Party website (Admissions 5, 6 and attached biography) T.J. Rooney touts his leadership of the Pennsylvania Victory '04 effort that led to John Kerry's victory in Pennsylvania. The Party boasts about increasing Democratic turnout on Rooney's watch. While the Party extols increased voter turnout as a positive occurrence on its website, it denies that canvassing to increase voter turnout conferred any benefit on the Party.

Summary judgment may be entered only in cases where the right is clear and free from doubt. *Cappelli v. York Operating Co., Inc.* 711 A. 2d 481 (Pa. Super. 1998) en banc. The moving party has the burden of proving the nonexistence of any genuine issue of fact. All doubts about the existence of a genuine issue of material fact must be resolved against the moving party. The record must be viewed in the light most favorable to the non-moving party. *Thompson Coal Co. V. Pike Coal Co.*, 488 Pa. 198, 412 A. 2d 466 (1979). Questions of the agency relationship and the nature of the relationship are for the jury where facts are disputed. Contradictory evidence in the record raises a question of the credibility of the Executive Director and of the Controller of the Party. It is inappropriate to grant summary judgment if the credibility of witnesses is an issue. *Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc.*, 320 Pa. Super. 291, 467 A. 2d 330 (1983).

CONCLUSION

For all the reasons stated herein, Plaintiff prays this Honorable Court to deny the motion of the Pennsylvania Democratic Party for summary judgment, and to grant Plaintiff's cross-motion for partial summary judgment by declaring that the Pennsylvania Democratic Party is liable for obligations to Plaintiff pursuant to the contract between Plaintiff and Pennsylvania Victory '04.

S/ Doris J. Dabrowski

Doris J. Dabrowski, attorney for Plaintiff