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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
YASMIN PUJOLS,**

Petitioner,

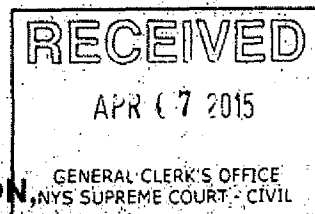
INDEX NO. 103637/12

-against-

MOTION SEQ. NO. 001

**For a Judgment Pursuant to the Provisions of
Article 78 of the New York Civil Practice
Law and Rules,**

**CITY OF NEW YORK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, and THE
CITY OF NEW YORK DEPARTMENT OF SANITATION**
Respondents.



The following papers, numbered 1 to 5 were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the Environmental Control Board (ECB):

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

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5	_____

Cross-Motion: Yes No

Upon consent of the parties, the herein action (Action One) is consolidated for purposes of disposition with a related action also pending before this Court, entitled *Yasmin Pujols v. City of New York*, Index No. 103638/12 (Action Two).

In Action One, commenced by Yasmin Pujols (petitioner), on August 23, 2012, petitioner seeks an order and judgment: (i) declaring that the fine imposed by respondents constitutes an excessive fine in violation of the Eighth Amendment of the Constitution of the United States of America (Excessive Fine Clause) and Art. I, § 5 of the New York Constitution; and (ii) annulling and vacating the determination of the Environmental Control Board (ECB) to impose a fine of

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

\$11,175.00, or in the alternative, remanding the determination to impose a fine consistent with the Constitution of the United States of America and the New York State Constitution and staying enforcement of the fine until such review has been conducted. Petitioner also alleges the determination by the Environmental Control Board (ECB) was arbitrary and capricious and "shocking to one's sense of fairness." On December 5, 2012, the City of New York, the ECB, and the City of New York Department of Sanitation (collectively, respondents) submitted papers in opposition to the herein Verified Petition and asserted a defense that the respondents' decision was rational, not arbitrary or capricious and is supported by the record. Moreover, respondents asserted that the fines imposed on petitioner for illegally posting handbills served a remedial purpose of deterring the posting of handbills, and was within the statutory range of civil penalties authorized by Administrative Code § 10-121(a) and (g), thus they did not violate constitutional prohibitions against excessive fines.

On August 24, 2012, petitioner commenced Action Two via summons and complaint, pursuant to 42 U.S.C. § 1983, to declare the actions of defendants the City of New York, the ECB, the City of New York Department of Sanitation, Suzanne Beddoe, John J. Doherty, Mitchell Regenbogen (ALJ Regenbogen), Kevon Chisholm (Chisholm), Darrick Milhouse (Milhouse), Derrick Donaldson, and Madelynn Liguori, sued herein in their official capacities (collectively, defendants) unconstitutional and a violation of Petitioner's right to be free of excessive fines, as guaranteed by the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States of America. Moreover, petitioner seeks to annul, vacate, or in the alternative remand for further proceedings, the final determination of the ECB, dated April 26, 2012, which fined petitioner a total of \$11,175.00 for 149 charges of violating § 10-119 of the New York City Administrative Code, which generally prohibits the posting or other placement of handbills, posters, notices, signs and other written materials on certain public property. Additionally, petitioner seeks attorneys fees pursuant to 42 U.S.C. § 1988.

On January 24, 2013, the defendants moved for an Order: (i) dismissing the Complaint in this action pursuant to CPLR 3211(a)(4) on the grounds that there is a prior action pending; or CPLR 3211(a)(7) on the grounds that it contains claims which fail to state a cause of action as against the defendants; or alternatively (ii) granting summary judgment in favor of the defendants, and dismissing the complaint as against them, pursuant to CPLR 3211(c). Petitioner filed papers in opposition to the defendants' motion to dismiss, on February 4, 2012¹, and defendants filed a reply memorandum on February 15, 2012.² Action Two was assigned to Justice Gregory Wright. Subsequently, all parties agreed by stipulation to consolidate both cases to this Court for disposition.

BACKGROUND

Petitioner is a 45 year old native Spanish-speaking person who does not write, read, or speak the English language. She resides in the Washington Heights neighborhood of New York City in a single bedroom apartment, with a monthly rent of \$1,060.85. Petitioner is the principal provider for her household, supporting her 76 year-old mother and 57 year-old sister, both of whom share the single-bedroom apartment with her. Petitioner's earnings are derived entirely through her private babysitting jobs. Petitioner's total annual income in 2011 was \$9,013.00, out of which she paid self-employment taxes totaling \$1,107.00. She qualified for an earned income credit against taxes in the amount of \$404.00. Petitioner's sister contributes to the family income by earning approximately \$300.00-400.00 per month by way of privately cleaning apartments. The family also receives food stamps.

Petitioner advertised her babysitting services in July, August, and possibly September of 2011. Petitioner posted more than 200 handbills advertising her services on various lampposts,

¹ This is the date of service on the opposing party indicated in the affidavit of service. The Court was served on February 21, 2013.

² This is the date of service on the opposing party indicated in the affidavit of service. The Court was served on February 19, 2013.

traffic stanchions, and other public structures in the Washington Heights neighborhood. The handbills were 8 1/2 by 11 inches with the words "Yasmin's Little Children Day Care" with her address and phone number (see Action One Verified Answer, exhibit A). She posted a portion of the handbills about once a week over a period of approximately six to eight weeks.

According to petitioner, at that time, she was unaware that posting handbills constituted a potential violation of Administrative Code § 10-119 (see Verified Petition, ¶ 17). Moreover, petitioner contends that after learning in late August or early September of 2011 that posting handbills may be unlawful, she ceased to do so (*id.* ¶ 20).

On July 29, 2011, August 1, 2011, and August 17, 2011, Chisholm, Milhouse, and Donaldson, Department of Sanitation (DOS) Enforcement Agents, removed 149 of petitioner's handbills from City property. On or about September 15, 2011, after petitioner had already ceased posting handbills, the DOS mailed 149 Notices of Violation (NOVs) to petitioner's residence (see Action One Verified Answer, exhibit B). The NOVs were returnable on December 2, 2011 at the Manhattan ECB. On December 2, 2011, petitioner appeared, *pro se* because she could not afford an attorney, and through a Spanish interpreter by telephone, before ALJ Regenbogen. Chisholm and Milhouse appeared as well. In response to ALJ Regenbogen's questions, petitioner stated, among other things:

"Well, I didn't have a job. I was financially desperate. So far I have been a person with good morals. I never thought I would be in front of a judge in my whole life. I trust he will take all these things into consideration" (see Action One Verified Answer, exhibit C p. 12 lines 11-16).

Subsequent to the hearing, ALJ Regenbogen issued a decision on December 6, 2011, in which he sustained all the 149 NOVs, assessed a \$75.00 fine for each violation, culminating in a total fine of \$11,175.00. Specifically, ALJ Regenbogen asserted that while he found petitioner to be credible, "her testimony does not rebut the presumption in AC 10-119(b), or

otherwise constitute a defense to these NOV's, and amounts to a tacit admission" (see Action One Verified Answer, exhibit D). On December 15, 2011, petitioner, still acting *pro se*, initiated an administrative appeal to the ECB Appeals Unit. In support of her appeal, petitioner submitted her tax return records for the years 2008, 2009, 2010, as well as a letter from New York City Council member Ydanis Rodriguez. In regards to the hardship application, petitioner stated:

"My mother lives with me and I support her. I pay rent and utilities not enough money to pay for other expenses. My annual income is 11,173 not enough" (see see Action One Verified Answer, exhibit E)

On January 6, 2012, petitioner retained her current *pro bono* counsel. On January 20, 2012, petitioner through her *pro bono* counsel, submitted a supplemental letter to the ECB Appeals Unit, arguing that the imposition of the \$11,175.00 fine violated the Excessive Fines Clause of the United States and New York Constitution and is shocking to one's sense of fairness." On April 26, 2012, the ECB Appeals Unit issued a decision affirming ALJ Regenbogen's decision and upheld the imposition of the \$11,175.00 fine (see Action One Verified Petition, exhibit 1). However, the ECB Appeals Unit declined to address petitioner's Constitutional claims finding that "the Board is not the proper forum to adjudicate these claims" (*id.*).

DISCUSSION

Action One

The standard of review in this Article 78 proceeding is whether the ECB's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 758 [1991]). In reviewing the challenged mandatory fine imposed against petitioner, "the question is not whether [this court] might have imposed another or different penalty, but whether the agency charged with

disciplinary responsibility reasonably acted within the scope of its powers" (*Pell v Board of Education*, 34 NY2d 222, 238 [1974]); "Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). "[A] penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law" (*id.* [internal quotations omitted]).

Administrative Code Section 10-119(a) provides, in relevant part:

"It shall be unlawful for any person to paste, post, paint, print, nail or attach or affix by any means whatsoever any handbill, poster, notice, sign, advertisement, sticker or other printed material upon any curb, gutter, flagstone, tree, lamppost, awning post, telegraph pole, telephone pole, public utility pole, public garbage bin, bus shelter, bridge, elevated train structure, highway fence, barrel, box, parking meter, mail box, traffic control device, traffic stanchion, traffic sign (including pole), tree box, tree pit protection device, bench, traffic barrier, hydrant, public pay telephone, any personal property maintained on a city street or other city-owned property pursuant to a franchise, concession or revocable consent granted by the city or other such item or structure in any street, or to direct, suffer or permit any servant, agent, employee or other person under his or her control to engage in such activity."

Administrative Code Section 10-121(a) provides, in relevant part:

"Any person convicted of a violation of any of the provisions of section 10-119 or 10-120 of the code shall be punished by a fine of not less than seventy-five dollars nor more than one hundred fifty dollars, for the first offense and not less than one hundred fifty dollars nor more than two hundred fifty dollars for the second and each subsequent offense within a twelve month period, plus the cost of the removal of the unauthorized signs."

"The Eighth Amendment of the United States Constitution forbids the imposition of 'excessive fines.' The New York State Constitution contains the same prohibition (art I, § 5)" (*Matter of Prince v City of New York*, 108 AD3d 114, 118-119 [1st Dept 2013]; see also *Matter of Street Vendor Project v City of New York*, 43 AD3d 345, 346 [1st Dept 2007]). The

Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as 'punishment for some offense'" (*County of Nassau v Canavan*, 1 NY3d 134, 139 [2003], quoting *Austin v United States*, 509 US 602, 609-610 [1993]). A fine is unconstitutionally excessive if it "notably exceeds in amount that which is reasonable, usual, proper or just" (*People v Saffore*, 18 NY2d 101, 104 [1966]). Thus, the Excessive Fines Clause is violated where the fine is "grossly disproportional to the gravity of [the] offense" (*United States v Bajakajian*, 524 US 321, 334 [1998]; see *Canavan*, 1 NY3d at 140). "In determining gross disproportionality, courts consider a multitude of factors, many of which concern the particular circumstances of the wrongdoer" (*Matter of Street Vendor Project*, 43 AD3d at 346).

It is undisputed that petitioner violated the relevant Administrative Code provision and substantial evidence supports ECB's determination that petitioner is liable for violating § 10-119 of the New York City Administrative Code, which generally prohibits the posting or other placement of handbills, posters, notices, signs and other written materials on certain public property. Nonetheless, this Court finds that under the specific circumstances presented herein, the imposition of the mandatory minimum of \$75.00 per violation for a total penalty of \$11,175.00 amounts to an unconstitutionally excessive fine, and cannot be viewed as solely remedial (see *Matter of Prince v City of New York*, 108 AD3d 114, 118-119 [1st Dept 2013]; see also *Matter of Ruiz v City of New York*, 42 Misc 3d 1233[A], 2014 NY Slip Op 50321[U] [Sup Ct, NY County 2014]).

Moreover, this Court, in considering the seriousness of the offense, the severity of the harm caused to petitioner, and the City's objective to deter posting of materials on public property, we find that the fine imposed is "grossly disproportional" to the gravity of petitioner's offense (see *Prince*, 108 AD3d at 120, quoting *Bajakajian*, 524 US at 334; see also *Canavan*, 1 NY3d at 140). As such, petitioner's application annulling and vacating the determination of the

ECB imposed fine of \$11,175.00 is granted.

Action Two

Defendants move to dismiss plaintiff's summons and complaint pursuant to CPLR 3211(a)(4), or in the alternative pursuant to CPLR 3211(a)(7). In opposition plaintiff avers that this case should not be dismissed under CPLR 3211(a)(4), as both cases are before Justice Wooten and each action serves a unique role in protecting plaintiff's constitutional rights. Additionally, plaintiff avers that she filed two separate actions as the nature of the relief sought in the Article 78 is not the same or substantially the same as the relief sought in Action Two. Petitioner claims in her Article 78 petition that the fine imposed by respondents constitutes an excessive fine in violation of the Eighth Amendment of the United States Constitution. An Article 78 proceeding is done without discovery, which is "intended to produce a judgment with the ease and speed of a motion" (Petitioner Memorandum in Opposition to Defendants' Motion to Dismiss at p. 2). Whereas in Action Two, petitioner brings a plenary action under 42 USC § 1983, which allows for discovery, and includes the ability to recover attorneys fees. However, the gravamen of petitioner's claim in Action Two is that the fines imposed violate the Eighth Amendment to the United States Constitution (Complaint, First Count at ¶¶ 35, 36).

Pursuant to CPLR 3211, "[a] party may move for judgment dismissing one of more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States" (CPLR 3211[a][4]). It is necessary that there be substantial identity with regards to the parties, and that the relief sought in both actions be "the same or substantially the same" (*White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1st Dept 1997]).

The Court finds that dismissal of Action Two is warranted in light of petitioner's Article 78 proceeding, wherein she seeks substantially the same relief in both Actions, namely, a declaration that the fine imposed by the ECB constitutes an excessive fine in violation of the

Eighth Amendment of the Constitution of the United States of America and Art. I, § 5 of the New York Constitution and the annulment or vacatur of the final determination of the ECB, dated April 26, 2012, which fined petitioner a total of \$11,175.00 for 149 charges of violating § 10-119 of the New York City Administrative Code. Moreover, the Court finds that there is substantial identity of the parties in both actions even though in Action One petitioner only sues the City agencies whereas in Action Two she also seeks relief as against individual defendants being sued in their official capacities. The Appellate Division has held that the presence of additional parties will not necessarily defeat a motion pursuant to CPLR 3211(a)(4) where, as here, "both suits arise out of the same subject matter or series of alleged wrongs" (*White Light Prods. v On The Scene Prods.*, 231 AD2d at 94, quoting *Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]). Additionally, the Court finds unpersuasive plaintiff's argument that the two Actions do not have substantial identity because petitioner seeks attorneys fees in Action Two, which is relief not available in an Article 78 proceeding. Petitioner would have been able to assert said claims for attorneys fees pursuant to 42 USC § 1988 in a hybrid Article 78/42 USC § 1983 declaratory judgment proceeding (*see e.g. Coleman v Daines*, 79 AD3d 554 [1st Dept 2010]). The Court notes that petitioner acknowledges such in a footnote in her memorandum of law in opposition wherein she seeks in the alternative that the Court allow her to amend her Article 78 proceeding to include claims under 42 USC §§ 1983 and 1988 (*see* Action Two, Memorandum of Law in Opposition p. 3 footnote 1). However, the Court need not consider petitioner's request as it is improper to seek affirmative relief in a memorandum of law.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's application in Action One for an order and judgment, reversing, annulling and setting aside and declaring that: (i) the fine imposed by respondents constitutes an excessive fine in violation of the Excessive Fine Clause of the Eighth

Amendment of the United States Constitution and Art. I, § 5 of the New York Constitution; (ii) annulling and vacating the determination of the ECB to impose a fine of \$11,175.00 is granted; and it is further,

ADJUDGED that the fine imposed by respondents constitutes an excessive fine in violation of the Excessive Fine Clause of the Eighth Amendment of the United States Constitution and Art. I, § 5 of the New York Constitution; and it is further,

ORDERED that the April 26, 2012 determination of the ECB upholding the imposition of a \$11,175.00 fine on the petitioner is hereby vacated; and it is further,

ORDERED that the portion of defendants' motion in Action Two for an Order dismissing the Complaint, pursuant to the CPLR 3211(a)(4), on the grounds that there is a prior action pending is granted and the Complaint in Action Two, index number 103638/2012 is dismissed; and it is further,

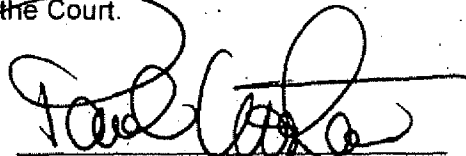
ORDERED that the portion of defendant's motion in Action Two for an Order dismissing the Complaint, pursuant to the CPLR 3211(a)(7), on the grounds that it contains claims which fail to state a cause of action; or alternatively granting summary judgment in favor of the defendants, and dismissing the complaint as against them, pursuant to CPLR 3211(c) is denied; and it is further,

ORDERED that petitioner shall serve a copy of this order, with Notice of Entry, upon all parties in Action One and Action Two and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4/2/15

Enter:


PAUL WOOTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

UNFILED JUDGMENT

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