

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

In the matter of a proceeding under Article 78 of the
Civil Practices Law and Rules commenced by
GORDON JENKINS and SCOTT SCHOONMAKER,

Petitioners,

- against-

Decision & Order

JIM BARNICLE,

Respondent.

Motion and Cross Motion Return Date : May 29, 2007

RJI No.: 52-26249-2007

Index No.: 953-07

Appearances:

Greenwald Law Offices
Attorney for petitioners
99 Brookside Avenue
Chester, New York

Marvin Newberg, Esq.
Attorney for respondent
33 North Street
Monticello, New York 12701

Sackett, J.:

In this combined special proceeding brought pursuant to CPLR article 78 and General Municipal Law §51, petitioners seek the return of \$6,000.00 which they allege respondent improperly paid to himself without authorization of the Village of Monticello Board of Trustees and a declaratory judgment directing that respondent shall not be indemnified herein under Public Officer's Law §18 or Village Code Indemnification Local Law. Respondent, the duly elected Mayor of the Village of Monticello, opposes the petition and cross-moves to dismiss on the grounds that no bond was posted as required by General Municipal Law §51, that there is a defense founded on documentary evidence and for failure to join all necessary parties, namely, the Village Board of Trustees. The cross-motion is

granted and the petition is dismissed for the following reasons.

Petitioners are owners of real property in the Village of Monticello and pay real property taxes to the Village; they are also duly elected Trustees on the Village Board. The 2006 Village budget authorizes an annual salary of \$72,000.00 for the position of Village Manager and an annual salary of \$9,000.00 for the part-time position of Mayor. There is no dispute that the duties of Mayor and Village Manager are separate and distinct, except that one of the duties of Mayor is to assume the duties of Village Manager, in addition to his usual part-time duties as Mayor, if a vacancy occurs in that office (Village Code §45-9). It is undisputed that Barnicle assumed the duties and responsibilities of Village Manager as mandated by Village Code §45-9 in August 2006 after that office became vacant. Barnicle served in that capacity, as well as continuing in his capacity of Mayor, for five months until a new Village Manager was hired in January 2007. He received, in addition to his salary as Mayor, the amount of \$2,000.00 per month for the first three months as compensation as part-time Acting Village Manager, without a Village Board resolution. When Jenkins and Schoonmaker raised the issue of whether he was entitled to additional pay for serving as Acting Village Manager, Barnicle agreed to stop the \$2,000.00 monthly payment until the matter of his entitlement to this compensation as Acting Village Manager was resolved.

Respondent argues that dismissal of the General Municipal Law §51 petition is mandated because petitioners have failed to post a bond or undertaking prior to bringing the action as required by the statute. The requirement for a bond or undertaking in a General Municipal Law §51 proceeding is mandatory. However, failure to file a bond or undertaking is not fatal because either may be filed nunc pro tunc (see Schultz v De Santis, 218 AD2d 256, 259 [1996]; Resnick v Town of Cannan, 38 AD3d 949 [2007]). In this instance a nunc pro tunc filing is moot because the petition is dismissed.

Petitioners argue that Barnicle is not entitled to two salaries (for Mayor and for Acting Village Manager) and was required to seek Village Board authorization to pay himself \$2,000 per month for assuming the position of Acting Village Manager. Respondent asserts that as he was mandated to fill the position of Village Manager during the vacancy in that office and as the Village Manager's salary was authorized by the 2006 budget, he did not require a resolution to pay himself, at a below pro rata rate, for the part-

time hours spent carrying out the duties exclusively associated with the position.

The Office of the Attorney General has held that a Deputy County Attorney who became Acting County Attorney after the County Attorney resigned was entitled to the full salary of the County Attorney (see 1962 NY Op [Inf] Atty Gen No. 80; citing People ex rel. Church v. Hopkins, 55 NY 74, [1895]; see also 1962 NY Op Atty Gen No.95). Village Code §45-5 states that the Village Manager “**shall receive compensation** as shall be fixed by the Board of Trustees [emphasis supplied];” that compensation was set in the 2006 budget at the rate of \$72,000.00 annually for full-time employment. Respondent is not only entitled to receive pay for assuming the position, the Board is mandated to pay him. Petitioners themselves have attached a letter from their attorney to Barnicle indicating that in 1999 the Board of Trustees authorized the annual sum of \$12,000.00 to be paid to the Mayor who was also serving as Acting Village Manager.¹ Thus, it appears that in the past the Board of Trustees have followed the mandate of the Village Code and authorized additional payment for the extra duties imposed on the Mayor. Indeed, it is absurd to expect the part-time Mayor, whose **annual** salary is \$9,000.00, to assume even part-time additional duties without compensation.

Under the guidelines of the above Attorney General’s Opinions, Barnicle could have assumed the full-time Village Manager’s position and received the salary of \$72,000.00 for those services without further resolution. Instead, Barnicle states that as Village Manager he worked part-time, between 20 and 25 hours per week, and received compensation of \$2,000.00 per month for three months, one-third of the budgeted salary, for those services. These were services in addition to his duties as Mayor, for which he received his mayoral salary. There was no increase in the salary or additional appropriation for either Mayor or Village Manager which would require an amendment to the budget.

Barnicle alleges that he notified the Board of Trustees as early as July 2006, when it became known that the Village Manager would resign, and again in August 2006 that he would require \$2,000.00 monthly to assume the additional duties of Acting Village Manager; and that the Board of Trustees, including petitioners, made no objection.

¹Petitioner Jenkins overlooked this letter when he stated in his sworn affidavit that no prior mayor had taken extra pay for serving as Acting Village Manager.

Petitioners maintain, without supporting evidence, that Barnicle “secretly” caused the additional compensation to be paid and it was not “publicly” discovered until an October 10, 2006 Village Board meeting. The Court finds that there is no showing of secrecy. In fact, petitioners submit a letter of the Village Attorney indicating that the Deputy Treasurer issued the checks to Barnicle – at Barnicle’s direction, but not in any surreptitious manner. There are no allegations of wrong-doing by the Deputy Treasurer.

In any event, petitioners and the Village Board knew of the payments at least by October 10, 2006, if not sooner. Petitioners do not explain why the Board of Trustees has not acted upon this issue. However, the failure of the Board to call for the return of the payments indicates tacit approval of the Board of Trustees. Although petitioners present themselves as tax payers entitled to bring a General Municipal Law §51 proceeding, the Court cannot overlook the fact that they are also members of the Board of Trustees and should have raised these issues before the Board for formal action prior to commencing a lawsuit. As petitioners did not raise their claims with the Board of Trustees, no cause of action is stated.

It is a Board of Trustees matter to determine what level of compensation is appropriate for the services rendered for the **five** months in which Barnicle provided services as Acting Village Manager, separate and distinct from his services as Mayor, and in addition to his mayoral salary. There is no showing that the Board of Trustees has made a determination or has been unable to reach a determination on the issue; nor is there a cause of action to compel the Board to perform a duty enjoined by law. There is no justiciable issue before the Court on the appropriateness of the amount of compensation received and due. Additionally, petitioners have failed to join the Board, or at least the remaining Board Trustees, who are necessary parties to an action on the appropriateness of the amount of compensation.

There is no allegation that Barnicle was paid more than the budgeted amount for the position of Village Manager and no support for the self-serving allegations of petitioners that he was paid “secretly” or was paid more than a pro rata amount budgeted for the position. Petitioners, who are Board Trustees, have seen fit to raise these issues in the context of a lawsuit and thereby bypass the regular function of the Village Board, where the

matter may have been disposed of without litigation. Respondent has been sued in his capacity as Mayor and Acting Village Manager and is entitled to indemnification pursuant to the Village Code Indemnification Local Law and Public Officer's Law §18. Respondent's attorney is directed to submit an affidavit of services and proposed order for attorney's fees and disbursements within two weeks of the date of this decision and order. Petitioners are not entitled to reimbursement for their legal fees.

There is no motion for disqualification of respondent's counsel before the Court and the Court finds no merit to the request.

Therefore, it is

ORDERED that the cross-motion to dismiss is granted and the petition is dismissed in all respects, with costs.

This shall constitute the decision and order of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED.

Dated: Monticello, New York
August , 2007

ENTER



HON. ROBERT A. SACKETT, JSC

Papers considered:

Order to show cause dated April 2, 2007 and verified petition of Gordon Jenkins and Scott Schoonmaker, dated March 30, 2007; notice of cross-motion and affirmation of Marvin Newberg, Esq., dated May 9, 2007; reply affirmation of David A. Brodsky, Esq., dated May 15, 2007, reply affidavit of Gordon Jenkins, dated May 16, 2007; reply affirmation of Marvin Newberg, Esq., dated May 23, 2007, reply affidavit of Jim Barnicle, dated May 25, 2007.