CORNING v. LAUREL HOLLOW

48 N.Y.2d 348 (1979)

Howard Corning, Jr., et al., Appellants,

v.

Village of Laurel Hollow, Respondent.

Court of Appeals of the State of New York.

Argued September 11, 1979.
Reargued November 12, 1979.
Decided November 21, 1979.

Gerard A. Dupuis and *Christopher G. FitzPatrick* for appellants.
Thomas A. Shaw, Jr., and *Robert R. Elliott, III*, for respondent.
Judges GABRIELLI, FUCHSBERG and GREENBLOTT* concur with Chief Judge COOKE; Judge MEYER dissents in part and votes to modify in a separate opinion in which Judges JASEN and JONES concur.

Chief Judge **COOKE**.

The question here is whether certain former high-ranking officials of the Village of Laurel Hollow are entitled to reimbursement from the village of their costs, disbursements and legal fees incurred in asserting a successful defense to a civil rights action brought against them as a result of acts performed in their official capacities. Reversing Special Term, the Appellate Division held that in the absence of express authority to employ counsel, plaintiffs were not entitled to recover legal fees from the village. There should be an affirmance. Without the benefit of authorizing legislation, reimbursement by the village of these expenses would constitute a gift of public funds for a purely private purpose, a matter expressly forbidden by our Constitution (NY Const, art VIII, § 1).

The present action finds its genesis in a long-standing conflict between the village and two of its residents, Erwine and Estelle Laverne. In 1954, this court affirmed an order of the Appellate Division which enjoined the Lavernes from using their property, located in a residential zone, for commercial purposes (*Incorporated Vil. of Laurel Hollow v Laverne Originals*, 307 N.Y. 784, affg 283 App Div 795). Matters proceeded peacefully until 1962, when, pursuant to the authority of the village zoning ordinance, plaintiffs, the former Mayor, trustees, building inspector and a police officer of the village, conducted three warrantless searches of the Laverne home to ascertain whether there were zoning violations on the premises. Judgments imposing both civil and criminal penalties against the Lavernes were subsequently reversed on the ground that the warrantless searches were unconstitutional (*Incorporated Vil. of Laurel Hollow v Laverne Originals*, 17 N.Y.2d 900; *People v Laverne*, 14 N.Y.2d 304).

Some years later, the Lavernes instituted a Federal civil rights action (US Code, tit 42, §§ 1981-1983) against plaintiffs, all of whom had, by this time, discontinued their relationship with the village. The complaint in that action alleged that plaintiffs, while acting under color of State law in their official capacities as officers and officials of the village, had violated the constitutional rights of the Lavernes by unlawfully entering their home and conducting illegal searches and seizures upon entry (see *Bivens v Six Unknown Fed. Narcotics Agents*, 403 U.S. 338). The village was not joined as a party in

the Federal action, since under then-existing precedent it was not amenable to suit (see *Monroe v Pape*, 365 U.S. 167).

Although the reason does not appear on the record, plaintiffs were initially represented by the Nassau County Attorney, presumably at county expense. However, immediately after the Federal District Court granted the Lavernes summary judgment on the issue of liability (*Laverne v Corning*, 316 F.Supp. 629), plaintiffs dismissed the Nassau County Attorney and, on their own initiative, privately retained a prestigious Wall Street law firm as counsel. Throughout the pendency of the Federal action, plaintiffs kept the village apprised of their intention to hold it responsible for the cost of their defense. When the representation of substituted counsel ultimately led to final dismissal of the *Laverne* action (*Laverne v Corning*, 376 F.Supp. 836, affd 522 F.2d 1144), plaintiffs instituted this action to recover from the village the legal fees, costs and disbursements they had incurred following their dismissal of the Nassau County Attorney.

Plaintiffs do not quarrel with the proposition that, in the absence of extraordinary circumstances not present here, a municipality may not be compelled to compensate for services rendered by an attorney unless his retainer is authorized by statute or appropriate resolution of the governing body (e.g., *Cahn v Town of Huntington*, 29 N.Y.2d 451, 454-455; *Seif v City of Long Beach*, 286 N.Y. 382, 386-387; *Lyddy v Long Is. City*, 104 N.Y. 218, 222-223; 10 McQuillin, Municipal Corporations, § 29.11). The rationale underlying this rule — to guard against extravagance and collusion on the part of public officials — is aptly illustrated by the circumstances here.

Dissatisfied with their representation by the Nassau County Attorney, plaintiffs summarily dismissed him and retained one of the more esteemed and, as this record bears out, costly, New York law firms. This, of course, they had every right to do. But this does not mean that the village must underwrite the consequences of plaintiffs' choice. Were this construction to be adopted, it would enable all public officials to employ counsel whenever it is deemed desirable and, thus, unilaterally empower them to create municipal debt. Allowing these plaintiffs reimbursement would result in a drastic departure from the safeguards erected about the disposition of public funds and would invite invasions of the public fisc for purely personal benefit. Having chosen to forsake the representation gratuitously provided them, plaintiffs may not now seek public funds to alleviate the cost of that selection (see *People ex rel. Van Keuren v Board of Town Auditors of Town of Esopus*, 74 N.Y. 310, 313-314).

Indeed, as a practical matter, here there is not even involved a question of entitlement to payment to an attorney who has rendered service to a municipality but who had not been retained in accordance with statute. Rather, these plaintiffs were sued personally for their actions in office and their attorneys performed no services for the village. This case, therefore, does not concern whether plaintiffs' law firm is entitled to its fees, but rather who is responsible for their payment. There is no question that if plaintiffs' law firm had sued the village for fees for services rendered on behalf of plaintiffs, recovery would be denied (*Seif v City of Long Beach*, *supra*). This result may not be altered by the simple expedient of substituting plaintiffs as a party for the law firm (see *Leo v Barnett*, 41 N.Y.2d 879, affg 48 A.D.2d 463, 464).

Plaintiffs admit that their attorneys were never retained by the village. Instead, they seek to assert some obscure common-law right to reimbursement based upon a novel theory of agency. This argument proceeds on the premise that in conducting the searches, plaintiffs were acting as mere agents for the village, their principal. Since agents are entitled to be indemnified for any damages they suffer as a result of following the directions of their principal, the village must assume plaintiffs' attorney's fees. There is, however, a major practical difficulty in accepting this argument. With the exception of Meehan, plaintiffs simply were not low-level officials executing

facially valid directions of their superiors. Rather, they were the very people in whom the decision to search the Laverne home was vested and, thus, are more properly characterized as principals (see Village Law, §§ 3-301, 4-400). Indeed, the underpinnings of the Federal action were not grounded on plaintiffs following the orders of a superior, but on the implementation of a policy over which they alone had control (cf. Restatement, Agency 2d, § 14 C). Hence, there is no principal involved to whom the plaintiffs may look for reimbursement.

On an even more fundamental level, any payment by the village to plaintiffs for their previously incurred costs would run afoul of the constitutional prohibition against gifts of public funds to assist a purely private purpose (NY Const, art VIII, § 1). Well settled is the proposition that a municipality may expend its funds only to meet its lawful obligations incurred as a result of the performance of its governmental functions (*Union Free School Dist. v Town of Rye*, 280 N.Y. 469, 474). Conversely, a governmental entity may not compensate a person who performs an act which the government had no duty to undertake (*Matter of Guarino v Anderson*, 259 N.Y. 93, 95-96).

One of the risks traditionally associated with the assumption of public office is that of defending oneself against charges of misconduct at one's own expense (*Matter of Chapman v City of New York*, 168 N.Y. 80, 85-86).[1] The public owes no duty to defend or even aid in the defense of such a charge. As was said in *Matter of Chapman* (*supra*, at p 86): "Whoever lives in a country governed by law assumes the risk of having to defend himself without aid from the public, against even unjust attempts to enforce the law, the same as he assumes the burden of taxation * * * Asking for aid to pay the expenses of a defense already made from one's own resources, is like asking for aid in the payment of taxes or the discharge of any public burden. It is not a city or county purpose, but a mere gift" (see, also, *Leo v Barnett*, *supra*; *Buckley v City of New York*, 289 N.Y. 742, affg 264 App Div 116; *Matter of Guarino v Anderson*, *supra*; *Matter of Kilroe v Craig*, 238 N.Y. 628, affg 208 App Div 93; 17 Opns St Comp, 1961, p 125; 12 Opns St Comp, 1956, p 479).

This is not to question the power of the municipality to enact an ordinance empowering it to defend its officials who in the future may be charged with violating the law in the performance of their duties. Such a considered policy decision would raise no constitutional objections, for the cost of the defense would simply be considered additional remuneration (*Matter of Guarino v Anderson*, *supra*, at pp 95-96; *Matter of Deuel v Gaynor*, 141 App Div 630, 631-632). But plaintiffs point to no statute or ordinance empowering the village, in the discretion of its governing body, to assume the responsibility of their defense. Rather, they seek an order declaring that the village must reimburse them for expenses previously incurred — expenses which vindicated their interests alone. It is precisely this result which our Constitution prohibits.

In short, the simple fact is that the dispute in the Federal action was a purely private one between plaintiffs, in their individual capacities, and the Lavernes. The pecuniary or proprietary interests of the village were in no way implicated. As the village had no connection with the suit, no obligation, either legal or moral, arose on its part to make good the expenses plaintiffs had incurred. A municipality, and by extension the public, is under no obligation to reimburse its officers for legal expenses incurred in defense of allegations of misconduct in office. In these circumstances, there can be no reimbursement from the municipality for expenditures incurred in serving a purely private purpose.[2]

Accordingly, the order of the Appellate Division should be affirmed, with costs.

MEYER, J. (dissenting in part).

While I agree that plaintiffs are not entitled to reimbursement for the fees of their substituted attorneys or for the fees incurred in prosecuting the present action, I conclude that they are entitled to reimbursement from the village for the reasonable value of the expenses incurred by them in defending the Laverne action, for which they have not already been reimbursed by the award of costs to them in that action. The premises for that conclusion are: (1) since plaintiffs acted in their official capacity and in good faith they were entitled to be defended at the expense of the village, (2) the village had the authority to and did in fact provide plaintiffs with a defense by enlisting the County Attorney pursuant to applicable statutory provisions, (3) having been provided with counsel by the village, plaintiffs could not, under the circumstances of this case, without authorization from the village, substitute new attorneys in place of the County Attorney, (4) though in consequence of that unauthorized substitution plaintiffs cannot obtain reimbursement for the fees of the substituted attorneys, they are not barred from reimbursement for the reasonable value of printing and other similar expenses which would have been incurred in defending the action had there been no substitution.

A somewhat more complete recital of the background than is set forth in the majority opinion may facilitate understanding of what is at issue. The present action is the latest episode in a litigation saga that began in 1950 when the Incorporated Village of Laurel Hollow brought an action to enjoin Erwine and Estelle Laverne from using their residentially zoned property for commercial purposes. The injunction was granted and sustained on appeal (*Incorporated Vil. of Laurel Hollow v Laverne Originals*, 283 App Div 795, affd 307 N.Y. 784). On the basis of a neighbor's complaint concerning the number of trucks entering and leaving the Laverne premises and the section of the Village Building Zone Ordinance (article 10, § 10.1) which empowered him "to enter any building or premises at any reasonable hour", plaintiff Johnson, the then building inspector of the village, entered the Laverne premises on July 24, 1962 and saw equipment and materials that led him to believe the injunction was being violated. He reported these facts to the village board which, with the advice of the Village Attorney, authorized him and plaintiff Dubosque, the Deputy Mayor, to make another inspection. That inspection, in which plaintiff Corning, the Mayor, joined, was made on October 18, 1962, and a third inspection by the building inspector was made on December 18, 1962. Contempt proceedings, an action for civil penalties and a criminal proceeding for violation of the zoning ordinance followed. On Erwine Laverne's appeal from his conviction on the criminal charge, we held the inspections unlawful, distinguishing *Frank v Maryland* (359 U.S. 360), which had upheld a warrantless inspection for health code purposes, and dismissed the information (*People v Laverne*, 14 N.Y.2d 304). Thereafter the civil actions brought by the village against the Lavernes were also dismissed (*Incorporated Vil. of Laurel Hollow v Laverne Originals*, 17 N.Y.2d 900).

The Lavernes then brought an action in the Federal court against the present plaintiffs, based on the Civil Rights Act (US Code, tit 42, § 1983).[1] In that action, in which the present plaintiffs were represented by the County Attorney of Nassau County, summary judgment was granted the Lavernes (316 F.Supp. 629), but after the Second Circuit's decision in *Bivens v Six Unknown Named Agents of Fed. Bur. of Narcotics* (456 F.2d 1339), holding a good faith reasonable belief in the lawfulness of a search to be a defense in a similar action, a motion to vacate was made (354 F.Supp. 1402) and, based on a jury finding that defendants (present plaintiffs) had acted in good faith, judgment was entered for defendants (376 F.Supp. 836). That judgment was ultimately affirmed on appeal (522 F.2d 1144).

The complaint in the present action alleges that the acts which formed the basis for the Federal action were performed by plaintiffs in the exercise of their duties as officers and agents of the village and in

good faith, that they were represented in the Federal action by the County Attorney, that on August 11, 1970 (about a month after the Federal court granted summary judgment against them) plaintiffs consented to the change of their attorney from the County Attorney to a private law firm, which represented them thereafter until the conclusion of the Federal action, that they kept the village informed of the proceedings in the action, and that plaintiffs incurred substantial costs and disbursements for legal fees, printing and court costs, for which the village has refused to reimburse or indemnify plaintiffs. The answer of the village admits that plaintiffs purported to make the inspections in their capacities as village officials and performed them in good faith and admits its refusal to reimburse or indemnify plaintiffs, but alleges that the village is prohibited by section 1 of article VIII of the New York Constitution and by the Village Law from reimbursing plaintiffs and that plaintiffs, in violating the Lavernes' constitutional rights, acted outside the scope of their authority. Plaintiffs' motion for summary judgment was granted by Special Term and the cross motion of the village was denied. On appeal, the Appellate Division reversed, on the ground that without express authorization plaintiffs were not entitled to reimbursement, denied plaintiffs' motion for summary judgment and granted defendant village's cross motion (64 A.D.2d 918).

I agree that village officials and employees are not entitled to counsel of their choice unless the village improperly refused to provide an attorney to defend them and even then can be reimbursed only to the extent that the trier of facts finds both the choice made and the fees charged to be reasonable. It is, I also agree, a necessary corollary of that rule that such officials cannot, without authorization by village officials or the unreasonable refusal of them to accept a substantial reason for substituting attorneys after the necessity for doing so has been brought to their attention, substitute an attorney of their own choosing for one provided by the village. I cannot, however, accept the majority's characterization of plaintiffs' acts as personal, nor the conclusions it deduces therefrom that there is no statutory authority for employment by the village of counsel to defend plaintiffs and that there is a consequent violation of the constitutional prohibition against making a gift of public funds.

I

My disagreement with the majority's basic premise that plaintiffs are not entitled to a defense at the expense of the village rests primarily on considerations of policy, but involves also differences concerning prior holdings of this court and the interpretation of the Constitution (art VIII, § 1).
I start with the fundamental proposition that the law implies an obligation on the part of a principal to indemnify his agent for the expense of defending a lawsuit brought for the acts of the agent done in the good faith performance of his duties. That principle, recognized by this court for more than 100 years (*Howe v Buffalo, N. Y. & Erie R. R. Co.*, 37 N.Y. 297; see *People ex rel. Van Keuren v Board of Town Auditors of Town of Esopus*, 74 N.Y. 310 [involving a town employee]; Restatement, Agency 2d, § 438, subd [2]; § 439, subds [c], [d]), entitles the agent to indemnity for the expenses of a successful defense of actions brought by third persons acting under the mistaken belief that the agent's conduct was wrongful (Restatement, Agency 2d, § 439, Comments *g, h*) and authorizes recovery by the agent even after termination of his agency with respect to obligations incurred during it (Restatement, Agency 2d, § 438, Comment *f;* see, also, *id.*, § 451, Comment *d*).

The basis of the rule is the conception that it is only fair that the principal should bear the loss for acts performed by the agent in the principal's business (Restatement, Agency 2d, § 438, Comment *a*).[2] It is, moreover, a rule generally applied to municipal officers and employees, even though it turns out that they may have exceeded their legal authority, provided they acted in good faith (see *Levine v Miteer*, 16 A.D.2d 990; 3 McQuillin, Municipal Corporations [3d ed rev], § 12.137, pp 575-576; 1 Dillon, Municipal Corporations [5th ed], § 307, pp 563-564). With respect to municipal officers and employees, however, the policy behind the rule is broader than that for agents generally.

The policy considerations involving governmental employees are three. Though stated in the context of immunity from liability rather than indemnity for expenses, they are most succinctly articulated in two recent decisions of the Supreme Court, Scheuer v Rhodes (416 U.S. 232) and Wood v Strickland (420 U.S. 308).3Scheuer states the first two (416 US, at p 240) as follows: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good" and Wood, the third (420 US, at p 320, see, also, p 331): "The most capable candidates * * * might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." In this day of ever expanding litigation against public officials and employees the public interest in obtaining capable officials, who will act effectively in enforcing the laws, as these plaintiffs sought to do, mandates that such officials and employees be reimbursed for fees and expenses incurred in defending themselves with respect to acts undertaken officially and in good faith. The injustice and chilling effect of a contrary holding requires that its source be the clearest constitutional or statutory proscription.

The majority's holding rests on no such foundation. Its bases are three: defending oneself against charges of misconduct at one's own expense is a risk traditionally associated with acceptance of public office (at p 353); the Constitution prevents compensating a person who performs an act which the government had no duty to undertake (at p 353); the possibility of extravagance or collusion require that, absent extraordinary circumstances, the retainer of an attorney be authorized by statute or appropriate resolution (at pp 351-352).

The difficulty with the first is that it rests on the rhetoric of the decisions cited to support it and pays too little attention to their holdings. The "misconduct" of the present plaintiffs, if their acts in furtherance of the declared zoning policy of the village can be so characterized, was of a totally different character than that involved in the cited cases, which was such as to warrant dismissal from office or worse. Thus, *Matter of Chapman v City of New York* (168 N.Y. 80) involved fees and expenses of a police officer sought to be disciplined and removed from office; *Matter of Kilroe v Craig* (238 N.Y. 628), an Assistant District Attorney indicted on charges of conspiracy in conducting certain prosecutions; *Matter of Guarino v Anderson* (259 N.Y. 93), police officers indicted for failing to report the maintenance of a public nuisance; *Leo v Barnett* (41 N.Y.2d 879), town assessors who having been removed from office, successfully sued for reinstatement. One can agree with the statement in the Appellate Division opinion in that case, on the basis of which this court affirmed, that "at common law the public officer contested his ouster at his own expense, no matter what might be the baseless character of the attack" (48 AD2d, at p 465), without doing violence to the rule argued for in this dissent that when the action defended seeks to impose liability for the performance of an official act, as distinct from ouster from or reinstatement in office, a public official is entitled to reimbursement for reasonable fees and expenses reasonably incurred. Only *Buckley v City of New York* (264 App Div 116) sought to apply *Matter of Chapman's* holding to the defense of a civil action for official acts and in light of the trial court's holding that plaintiff Buckley, chamberlain of the city, was not an agent of the city, the recital of that holding in the State reporter's memorandum accompanying our affirmance, and the absence of any reference to the Appellate Division's reasoning in that memorandum, our no opinion affirmance (289 N.Y. 742), is at best equivocal.

The constitutional argument appears no better founded. *Matter of Guarino v Anderson* (259 N.Y. 93, 95-96, *supra*) cited at page 353 for the proposition that the Constitution prevents compensating a person who performs an act the government had no duty to undertake does not sustain the broad proposition for which it is cited. The act there referred to was of the same limited character noted in the preceding paragraph of this dissent, i.e., "a public officer in defending himself against false accusations". It is inconsistent too with the recognition in *Gavin v Board of Supervisors of Rensselaer County* (221 N.Y. 222, 227) that "There is no greater [constitutional] objection to the payment of the

costs and expenses incurred by a public officer in defending himself against charges of misconduct than there is to the payment of the costs and expenses incurred in the prosecution of such charges".[4] It is, moreover, wholly inconsistent with the admission by the village in its answer that plaintiffs purported to perform the acts of which the Lavernes complained in their capacities as agents of the village and in doing so acted in good faith.

II

The third basis — the necessity for authorization pursuant to statute or resolution — is no greater obstacle for there can be no question on the facts of this case that statutory authorization for employment of counsel for plaintiffs at village expense existed, and that the County Attorney's representation of plaintiffs came about pursuant to such statutes. Subdivision 11 of section 89 of the Village Law in effect at the time that the *Laverne* action was brought provided for the employment of a Village Attorney, but further provided that: "The board also may, from time to time as necessity requires, employ an attorney, other than the one regularly employed, to perform any special service for the village, and pay a reasonable compensation therefor, and the expense may be a legal charge against the village."[5] Not only was the village authorized to retain special counsel by that section, but also the County Attorney of Nassau County was authorized by statute to act in such a capacity. Section 1102 of the County Government Law of Nassau County, in effect since 1938, provides that: "The county attorney * * * upon the request of the governing body of any * * * village * * * may act as the legal advisor or representative thereof on such terms as may be agreed upon between the county executive and the said governing body." The complaint in the present action annexes as an exhibit the answer filed in the *Laverne* action and the answer of the village in this action concedes that the paper annexed was the answer filed. That answer expressly alleged in its first and third separate defenses that defendants in the *Laverne* action were officers or agents of the village and that the acts complained of were committed in the exercise and discharge of their official duties and with the consent and permission of the village. While the papers on the instant motion do not expressly state that the County Attorney undertook defense of the *Laverne* action on plaintiffs' behalf under that provision, it is clear from the answer he filed that his defense of them was authorized by that section (cf. *Levine v Miteer*, 16 A.D.2d 990). Even if that were not so the presumption of regularity (Richardson, Evidence [10th ed — Prince], § 72) would require the village, as the opposing party in this action, to come forward with proof to rebut that conclusion (*People v Richetti*, 302 N.Y. 290, 298). Thus the village both had statutory authority to employ counsel in defense of its employees and officials, the present plaintiffs, and in fact did so. That we are not told the terms agreed upon between the County Executive and the village is of no moment on the present appeal, since plaintiffs do not seek reimbursement for fees paid or payable for the County Attorney's services, it cannot be presumed that the County Executive agreed to the payment of out-of-pocket printing and other disbursements on behalf of village officials from county funds, and, in any event, the phases of the litigation at which such expenses are normally incurred occurred after substitution of the private firm for the County Attorney.

III

The issue, then, is not whether the village had an obligation to provide a defense, but whether, it having done so, plaintiffs were at liberty to employ at the expense of the village an attorney different than the village provided. While there may be cases in which the withdrawal, disability or incompetence of the attorney provided by a municipality requires the employment of a substitute attorney (see, e.g., *Cahn v Town of Huntington*, 29 N.Y.2d 451 [disability]), a municipal official for whom counsel has been provided generally has no authority on his own judgment and without the approval of the municipality to make a substitution at its expense (see *People ex rel. Van Keuren v Board of Town Auditors of Town of Esopus*, 74 N.Y. 310, *supra*; *Matter of Kay v Board of Higher*

Educ., 260 App Div 9, app den 260 App Div 849, 912; Restatement, Agency 2d, § 438, Comments *b, e*). As the Supreme Court of Minnesota put it in *Adams v North Range Iron Co.* (191 Minn. 55, 59), in an analogous situation: "After some search we have found no case where, in a suit by a third party against both the principal and the agent in which the principal employed competent attorneys to defend both, it was held that the agent was nevertheless entitled to employ his own separate attorney and recover the reasonable attorney's fees from the principal." Neither in the complaint nor in their affidavits on this motion do plaintiffs indicate the reason for the substitution. While it may have been that they lost confidence in the County Attorney after the Lavernes were granted summary judgment, there is nothing to suggest that substitution rather than

reargument or appeal[6] was the required or even the appropriate course. Having chosen for reasons of their own to employ a different attorney than that employed for them by the village, plaintiffs foreclosed themselves from recovering from the village the fees charged by the substitute attorneys.[7]

IV

They did not, however, by that action foreclose themselves from recovering their reasonable printing disbursements and other reasonable expenses, which the village would have been required to pay even if the County Attorney continued to represent plaintiffs (see *Sniffen v City of New York*, 4 Sandf 193, 198), since those expenses were essential to the ultimate success of plaintiffs as defendants in the Federal action. Since the village by employing the County Attorney as counsel for plaintiffs may reasonably be deemed to have agreed to pay those expenses (see *Judson v City of Niagara Falls*, 140 App Div 62, 66, affd 204 N.Y. 630; *Kramrath v City of Albany*, 127 N.Y. 575, 581), plaintiffs are entitled to recover from the village such part of those expenses as they have not already recovered from the Lavernes as costs in the Federal action and as Special Term on assessment of damages finds reasonably incurred.

While I disagree with so much of the majority holding as foreclosed plaintiffs' recovery of their expenses other than fees, I agree that they are not entitled to recover fees incurred by them for the prosecution of the instant action. It is well settled that attorneys' fees are merely incidents of litigation and, therefore, not compensable in the absence of an express statutory or contractual provision therefor (Equitable Lbr. Corp. v IPA Land Dev. Corp., 38 N.Y.2d 516; City of Buffalo v Clement Co., 28 N.Y.2d 241; 1 Speiser, Attorneys' Fees, § 13:1). The necessary corollary of that rule is that neither a statutory nor a contractual provision for the payment of counsel fees includes counsel fees in the suit to collect those fees, absent specific language to that effect (Mighty Midgets v Centennial Ins. Co., 47 N.Y.2d 12; Grimsey v Lawyers Tit. Ins. Corp., 31 N.Y.2d 953; Doyle v Allstate Ins. Co., 1 N.Y.2d 439; Swiss Credit Bank v International Bank, 23 Misc.2d 572 [STEUER, J.]). Since plaintiffs suggest no such basis for their claim, they are entitled to no more than such court costs and disbursements as the CPLR (CPLR 8101, 8301) allow them in this action (see Restatement, Agency 2d, § 438, Comment k).

Accordingly, the order of the Appellate Division should be modified to provide that defendant's cross motion for summary judgment is granted to the extent of dismissing so much of the complaint as seeks attorneys' fees for defending the underlying action or prosecuting the present action but otherwise denied, that plaintiffs are granted partial summary judgment for their unreimbursed expenses in the underlying action, the matter is remitted to Special Term for assessment of damages, and the Appellate Division order should otherwise be affirmed.

Order affirmed.

Footnotes

* Designated pursuant to section 2 of article VI of the State Constitution.

1. The dissenters' concerns notwithstanding, history has proven that the constitutional prohibition against reimbursing public officials for costs incurred in defending actions brought against them in their official capacities has yet to produce a dearth of candidates on the ballot year after year. Moreover, it is quite difficult to perceive how granting public officials such as plaintiffs the right to recover their expenses, but not attorney's fees (which are a substantially larger item of expense), in situations such as this will ameliorate the concern of the dissenters. Indeed, as this litigation bears out, plaintiffs did not act effectively in enforcing the law; in fact, they violated the very laws they were sworn to enforce (*People v Laverne*, *supra*; *Incorporated Vil. of Laurel Hollow v Laverne Originals*, *supra*).

2. The dissent's reliance on former subdivision 11 of section 89 of the Village Law is misplaced (dissenting opn, at p 362). That statute authorized the board of trustees of a village to employ an attorney "to perform any special service *for the village*" (emphasis supplied). As such, it simply codified the common-law rule that, except in extraordinary circumstances not present here, an attorney may not be compensated with public funds unless his employment is authorized by the governing body of the municipality (*Cahn v Town of Huntington*, 29 N.Y.2d 451, *supra*; *Seif v City of Long Beach*, 286 N.Y. 382, *supra*). Moreover, the statute authorizes retention only when the attorney will "perform any special service for the village." Here, plaintiffs retained the law firm not to protect any interest of the village, but to defend plaintiffs in their personal capacities. Since the law firm, and for that matter the County Attorney, performed no service for the village, the statute is inapposite.

Inapposite, too, is section 1102 of the County Government Law of Nassau County. There is no indication in the record that the village board of trustees requested that the County Attorney provide representation to plaintiffs. More important, the record is absolutely devoid of any indication of what the terms of that representation were to be. It may very well have been that the village would be responsible for those costs. Equally reasonable is the assumption that the county would provide representation, including costs and disbursements, at no charge. Or it is possible that plaintiffs themselves agreed to underwrite this cost. The point is that we are left with only surmise and conjecture of the terms of that representation. To conclude, as does the dissent, that the village was to pay the expenses of the County Attorney is tantamount to this court making new findings of fact — a function clearly beyond our power (CPLR 5501, subd [b]).

Given the inappropriateness of the above assumptions, the conclusion of the dissent must fall. Since there is no evidence that the village agreed to pay the costs and disbursements of the County Attorney, it is impossible to imply an agreement on its part to pay those costs billed by the law firm substituted in its place. This is especially so in view of the fact that the record is devoid of any indication that either the County Attorney or his successor was retained in accordance with statute or by resolution of the village board of trustees (*Seif v City of Long Beach*, *supra*).

Finally, the dissenters avoid what is the real issue in this case, viz., the constitutional prohibition against gifts of public funds for a private purpose (NY Const, art VIII, § 1). As noted, so long as the interests of the village were not implicated by the *Laverne* action and in the absence of a statute authorizing the village to provide plaintiffs a defense, the Constitution prohibits it from reimbursing

plaintiffs for any expenses incurred in defending themselves in their personal capacities (e.g., *Matter of Chapman v City of New York*, 168 N.Y. 80, *supra*).

1. As the majority opinion notes, the action was against the plaintiffs individually and not against the village because *Monell v New York City Dept. of Social Servs.* (436 U.S. 658) had not yet overruled the holding of *Monroe v Pape* (365 U.S. 167) that a municipality could not be sued under the act. While *Monell* holds that a municipality cannot be held liable under section 1983 solely on a *respondeat superior* basis, it recognizes municipal liability for acts which "may fairly be said to represent official policy" (436 US, at p 694). In view of the quoted provision of the ordinance, the advice of the Village Attorney and the authorization by the village board, there can be little question that the inspections for which the Lavernes sued represented official policy.

2. The majority equates plaintiffs and the village and suggests (at p 353) that "there is no principal involved to whom the plaintiffs may look for reimbursement". The suggestion is contradicted by the very Restatement (Agency 2d, § 14 C) section cited for Comments *a* and *b* to that section distinguish between the board of directors of a corporation and an individual director who is also appointed an officer, in which case "he is necessarily an agent, and normally a general agent, of the corporation, since he acts on its behalf and subject to its control exercised through the board of directors".

3. Similar policy statements by this court may be found in *Stukuls v State of New York* (42 N.Y.2d 272) and go back at least to Chancellor KENT'S statement in *Yates v Lansing* (5 Johns 282, 292, affd 9 Johns 395) that the "vigorous and independent administration of justice" required that Judges be exempt from civil suit, and in his quotation (5 Johns, at p 296) from a Connecticut decision that: "No man would accept the office of judge, if his estate were to answer for every error of judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend".

4. It is not necessary, since as pointed out in Part II below there is existing statutory authority, to meet the suggestion made in both the majority opinion and in *Guarino* that prospective but not retroactive authorization passes constitutional muster. It may be noted, however, that that suggestion appears to conflict with the moral obligation cases, such as *Farrington v State of New York* (248 N.Y. 112); see, also, *Seif v City of Long Beach* (286 N.Y. 382, 389), which do not require prior legislation, and, indeed, with the wording of the constitutional provision itself which draws no such prospective-retroactive distinction. Whether a gift is made turns not on when an expenditure is authorized but on whether it is for a legitimate public purpose: here, the furtherance of village zoning purposes through good faith performance of duty and the encouragement of qualified persons to seek village office or employment without fear of personal liability for good faith performance of official duties (cf. *Board of Educ. v Associated Teachers of Huntington*, 30 N.Y.2d 122, 128). Moreover, the same fairness principle upon which the agency rule discussed at page 358, 359 above is grounded also determines what is a moral obligation which can be constitutionally recognized without violating the gift restriction (*People v Westchester County Nat. Bank*, 231 N.Y. 465, 477 ["some direct injury suffered by the claimant under circumstances where in fairness the State might be asked to respond"]).

5. The provision was omitted from the 1972 recodification of the Village Law, apparently, however, without intent to change the rule, see section 57 of chapter 892 of the Laws of 1972.

6. As above noted (*supra*, at p 357), the reargument avenue was ultimately successful, after the Second Circuit decision in the *Bivens* case.

7. Since plaintiffs would be entitled to attorneys' fees except for the unauthorized substitution, the second sentence of footnote 1 of the majority opinion is based on a misunderstanding of my position.