Aptive Environmental, LLC v. Village of East Rockaway, New York

2020 | Cited 0 times | E.D. New York | December 23, 2020

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK ----------x APTIVE ENVIRONMENTAL, LLC, Plaintiff, -against- VILLAGE OF EAST ROCKAWAY, NEW YORK, Defendant.

REPORT AND RECOMMENDATION 19-CV-3365 (SJF) (SIL)

----------x STEVEN I. LOCKE, United States Magistrate Judge:

By way of Complaint dated June 6, 2019, later modified by an Amended Complaint dated June 12, 2019 and again by a Second Amended Complaint dated December 13 menced this action against the Village of East Rockaway alleging violations of the First and Fourteenth Amendments to the United States

Constitution, and seeking a declaratory judgment and permanent injunction in connection with these violations. See Complaint (Compl.) Second Amended Complai SACC DE [44]. Presently before the Court, on referral from the Honorable Sandra J.

-motion for

summary judgment , DE [56], both seeking relief as a matter of law . For the reasons set forth herein, the Court respectfully recommends: (i) denying Motion in its entirety; and (ii) granting Motion in its entirety. I. Background

A. Relevant Facts and respective Local Rule 56.1 statements. Except where indicated, these facts are

not in dispute. 1

Aptive is a Utah limited liability company that performs pest control services, with offices throughout the United States. See SACC ¶ 10; Plaintiff s Statement of Undisputed Material Facts Pursuant -3], ¶ 1. Plaintiff serves markets throughout New York, including the Village, and its sales are made primarily through door-to-door solicitations by its sales representative employees. Pl. 56.1 ¶¶ 1-2. Aptive requires all sales representatives to apply for, and receive, solicitation licenses in any city, town or village that requires solicitors to possess such licenses before commencing sales work. See id. ¶ 4.

Prior to June 2019, the Village enforced a 5:00 p.m. solicitation curfew and a $2,500 bond on solicitation, as well as a $20 fee for an annual solicitor license, via . See id ¶¶ 6-7; SACC , DE [44-3]. As a result of Judge

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As discussed below, Defendant failed to provide a statement of material facts pursuant to Fed. R. Civ. P. 56.1, as well as a counterstatement of material facts statement of material facts pursuant to Fed. R. Civ. P. 56.1 in support of its motion. As such, all uncontroverted statement of material facts are deemed admitted. the Village from enforcing then-sections 171-14, 171-16 and 171-18 of the Village Code, Defendant amended Chapter 171 in September 2019. See Pl. 56.1 ¶¶ 8-9; July 16, 2019 Order, DE [24]. The September 2019 amendment removed the curfew and bond requirements under Chapter 171 and added a $200 fee for solicitor licenses (the . See Pl. 56.1 ¶ 9; SACC Ex. R, DE [44-6]. Though subsequently further amended, the current Village Code still includes the Fee, which is payable by each applicant for a license. See , DE [55-2].

Under the current Village Code, Section 171-3 requires that all applications and Section 171-5(A) states that

See Pl. 56.1 ¶¶ 11-12; Def. Mot. Ex. A; SACC Ex. R, 3-4. defined by Chapter 171, and is therefore required to pay the Fee before conducting door-to-door sales. See Pl. 56.1 ¶ 13; SACC Ex. R, 2. of State, the Fee is to be applied to: (1) processing costs; (2) criminal background

code enforcement. See Def. Mot. Ex. A. Defendant did not receive estimates from background check companies to aid in its determination of the amount of the Fee, nor did it research the costs of enforcement concerning solicitation or administrative costs related to solicitor licenses. See Pl. 56.1 ¶¶ 20, 23-24. As the Village had not yet issued any solicitor licenses at the time of filing, it could not estimate the amount of time the issuance of a solicitor license would take. See id. ¶ 21.

Plaintiff alleges that Defendant individuals who wish to engage in door-to-door solicitation to pay a fee violates the

First Amendment of the United States Constitution, as it effectively snuffs out exercise its free speech by way of door-to-door sales in the Village through a prohibitively expensive Fee that operates as a virtual b solicitation. See id. ¶¶ 15-17 . Plaintiff further maintains that the Fee restricts the free speech rights of Village residents who do not object to door-to- See Pl. 56.1 ¶ 19. The Village contends that the Fee does not violate the First Amendment. See Def. Mot.

B. Procedural History Based on the above, Plaintiff commenced this action on June 6, 2019 against the Village. See Compl. The Complaint and Amended Complaint seeking declaratory and injunctive relief along with in connection with the Fee allege that the solicitation ban, bond and curfew violated

the First and Fourteenth Amendments to the United States Constitution.

On June 12, 2019, Aptive filed an Amended Motion for a Temporary Restraining Order. See DE [13]. Judge Feuerstein entered an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction on June 14, 2019, directing Defendant to show cause why an order should not be entered preliminarily enjoining and restraining the Village from enforcement of the Village Code Sections at issue. See s application for a preliminary injunction on July 16, 2019, enjoining

Defendant from enforcing the relevant sections of the Village Code. See DE [24].

This resulted in Defendant revising its Village Code to add the $200 fee, and on October 28, 2019, Plaintiff moved to further amend its Complaint as a result of this code modification. See DE [40]. On December 11, 2019, this Court granted See DE [43]. Plaintiff filed its Second Amended Complaint on December 13, 2019, alleging that the Fee violates the First and Fourteenth Amendments of the United States Constitution, and seeking declaratory relief and a permanent injunction. Discovery followed.

On May 11, 2020, the parties filed cross-motions for summary judgment. See Def. Mot.; Pl. Mot. Each party opposes See Memorandum of Law in Support of its Cross-Motion for Summary Judgment and in -14], [56-1]; Defend -5]. Judge

Feuerstein referred the motions to this Court for report and recommendation. See May 11, 2020 and May 12, 2020 Orders Referring Motions. II. Legal Standard for Summary Judgment

Pursuant to summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a Fed. R. Civ. P. 56(a). The movant bears the burden of establishing that there are no issues of material fact such that summary judgment is appropriate. See Huminski v. Corsones, 396 F.3d 53, 69 (2d Cir. 2004). In deciding a motion for summary judgment, the C the evidence but is instead required to view the evidence in the light most favorable

to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility as Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 122 (2d Cir. 2004); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (holding that a motion for summary judgment such that a reasonable

Once the movant has met its initial burden, the party opposing summary judgment metaphysical doubt as to the material facts.... [T]he nonmoving party must come

Matsuhita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986) (internal quotation omitted); see also Maxton v. Underwriter Labs., Inc., 4 F. Supp. 3d 534, 542

(E.D.N.Y. 2014) a reasonable finder of fact could render a verdict in favor of the non-

In determining whether summary judgment is warrant responsibility is not to resolve disputed issues of fact but to assess whether there are

any factual issues to be tried, while resolving ambiguities and drawing reasonable Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986); see also Artis v. Valls, No. 9:10-cv-427, 2012 WL 4380921, at *6 n.10 (N.D.N.Y. Sept. 25, 2012) never to be resolved by a court on a motion for summary judgment

III. Discussion

Applying the standards outlined above, and for the reasons set forth below, the Court respectfully recommends: (i) denying Motion in its entirety; and (ii) granting Motion in its entirety.

A. Procedural Defects As an initial matter, the Court has determined that there are several As set forth above in the margin, Defendant failed to file a 56.1 statement of undisputed material facts as required by Local Civil Rule 56.1(a) (. Rule 56.1 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New separate, short and concise st out in numbered paragraphs, on which the moving party relies in arguing that there

is no genuine issue to be tried. See Local Rule 56.1(a); see also Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003); Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 72 (2d Cir. 2001). The Rule further requires that the Rule 56.1 Statement contain citations to admissible evidence supporting each asserted material fact. Local Rule 56.1(d); see Giannullo, 322 F.3d at 143 (reversing the district court's grant of summary judgment because there was insufficient evidence in the record to support certain critical assertions in the moving party's statement of material facts); see also Watt v. New York Botanical Garden, No. 98 CV 1095, 2000 WL 193626, at *1 n. 1 (S.D.N.Y. Feb. 16, 2000).

In the instant case, the Village failed to file a Rule 56.1 Statement of Material Facts in support of its motion for summary judgment. That failure alone would justify denial of the government's motion. Local Rule 56.1(a); see also United States v. Kadoch, No. 96 CV 4720 CBA, 2012 WL 716899, at *1 2 (E.D.N.Y. Feb. 17, 2012), report and recommendation adopted, No. 96-CV-4720 CBA CLP, 2012 WL 716894 (E.D.N.Y. Mar. 5, 2012); Searight v. Doherty Enterprises, Inc., No. 02 CV 0604, 2005 WL 2413590, at *1 (E.D.N.Y. Sept. 29, 2005) (denying motion for summary judgment for failure to submit a 56.1 Statement). discretion to determine whether to overlook a party's failure to comply with local

Holtz, 258 F.3d at 73; Healthfirst, Inc. v. Medco Health Solutions, Inc., No. 03 CV 5164, 2006 WL 3711567, at *5 (S.D.N.Y. Dec. 15, 2006). Where parties fail to file Rule 56.1 statements, the court may choose to accept all factual allegations of the opposing parties as true for the purposes of deciding the motion for summary

Holtz, 258 F.3d at 73 (internal quotations and citations omitted); see also Sawyer v. Wight, 196 F. Supp. 2d 220, 225 (E.D.N.Y. 2002) (noting that where Rule 56.1 has not their own accord .

Not only did Defendant fail to file its own Rule 56.1 Statement, it also failed to The party opposing a motion for summary judgment is also required to submit a counterstatement controverting the moving party's 56.1 Statement, indicating which facts are in dispute that would require a trial. See Local Rule 56.1(b); Paige-Bey v. Lacoste, No. 13CV7300, 2020 WL 1643660, at *1 (E.D.N.Y. Mar. 31, 2020). Under the

Giannullo, 322 F.3d at 140 (citing Local Rule 56.1(c)). Where the party opposing a motion for summary judgment fails to submit a proper counterstatement of material facts, controverting the moving party's statement, courts have deemed the moving party's statement of facts to be admitted and have granted summary judgment in favor of the moving party on the basis of the uncontroverted facts. See, e.g., Local Rule in the statement required to be served by the moving party will be deemed to be

admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the ; Taylor & Fulton Packing, LLC v. Marco Int'l Foods, LLC, No. 09- CV- failure to respond to a Rule 56.1 statement permits the court to conclude that the Feis v. United States, No. 07 Civ. 2706(JS), 2009 WL 2983026, at *1 n. 2 (E.D.N.Y. Sept.10, 2009), aff'd in relevant part, 394 Fed. App'x. 797, 799 (2d Cir.2010) (refusing to consider as disputed any of movant's Rule 56.1 statements supported by evidence, to which nonmovant objected without evidentiary support); Transp. Ins. Co. v. AARK Const. Grp., Ltd., 526 F.Supp.2d 350, 354 n. 1 (E.D.N.Y. fails to submit a responsive Rule 56.1 Statement, the Court may deem admitted all

facts in the movan AFL Fresh & Frozen Fruits & Vegetables, Inc., No. 06 Civ. 2142(GEL), 2007 WL 4302514, at *5 (S.D.N.Y. Dec.7, 2007) (movant's Rule numbered paragraph in the opposing party's Rule 56.1 statement and followed by

showing that it is entitled to judgment as a matter of law, and a Local Rule 56.1

statement is not itself a vehicle for making factual assertions that are otherwise Holtz, 258 F.3d at 74; see also Vermont Teddy Bear Co., Inc. v. 1 800 Beargram Co., 373 F.3d 241, 244 (2d Cir. may not rely solely on the statement of undisputed facts contained in the moving

party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the Giannullo, 322 F.3d at 142 (2d Cir. 2003)). Statement that are supported by admissible evidence. affixed to its summary judgment papers to add to and controvert facts Defendant previously testified to. See February 20, 2020 Affidavit of John E. Ryan in Support -1]; May 1, 2020 Reply Aff -15], [56-6]. An attorney's unsworn statements in a brief are not evidence. See INS v. Phinpathya, 464 U.S. 183, 188 89 n. 6, 104 S.Ct. 584 (1984). When an attorney makes statements under penalty of perjury in an affidavit or an affirmation, however, the statements do constitute part of the evidentiary record and must be

considered. See Kulhawik v. Holder, 571 F.3d 296, 298 (2d Cir. 2009).

Nevertheless, a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts [the affiant's] previous deposition testimony. Fei Long Zhang v. Alvarado, No. 15CV4373, 2017 WL 6375732, at *1 n. 1 (E.D.N.Y. Dec. 12, 2017); see also Moll v. Telesector Res. Grp., Inc. sham issue of fact doctrine prohibits a party from defeating summary judgment simply by submitting an affidavit that contradicts (internal quotation marks and citation omitted) (emphasis omitted); Hayes v. New

York City Dep't of Corr., 84 F.3d 614, 619 (2d Cir. 1996); Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) (examining omission in four-day deposition); Martin v. City of New York, 627 F.Supp. 892, 896 (E.D.N.Y. 1985) (examining direct contradiction between deposition and affidavit). has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham Hayes, 84 F.3d at 619. Thus, factual issues created solely by an trial. Id. There are two exceptions to this rule: red

Brown v. Reinauer Transportation Companies, L.P., 788 F. App'x 47, 49 (2d Cir. 2019); see also Giliani v. GNOC Corp., 04 CV 2935 (ILG), 2006 WL 1120602, at *3 (E.D.N.Y. Apr. 26, 2006) (citing Palazzo v. Corio conflicting affidavit statements are corroborated by other evidence, the affidavit may Brown, 788 F. App'x at 49.

directly contradict the Village s Rule 30(b)(6) testimony testified at deposition that it did not take estimates from background check companies to determine the cost for performing background checks for solicitor license applicants. See February 20, 2020 Village 30(b)(6) Deposition Transcript, Ex. A to Declaration (DE [55-10], [56-2]), DE [55-11], at 118:14- the Village did not know, at the time of setting the Fee, how much time the issuance

of a solicitation license would take, as it had not yet issued any licenses, and it did not research the costs of enforcement relative to solicitation prior to setting the Fee. Id. at 28:20-29:9; 125:6-9. The Village also testified it did not perform any studies or analyses to support its estimates as to the Fee amount. Id. at 135:2-15.

Moreover, Aptive served Defendant with a number of interrogatories and requests for production relating to documents and communications the Village relied upon in determining the Fee. See Cowan Dec. Ex. B, DE [55-12], 4-7. Rather than object to the requests, Defendant responded that it had no responsive documents or communications, aside from the attorney work product of the Village attorney. See Cowan Dec. Ex. C, DE [55-13], 1-4. In response to Interrogatory No. 5, asking investigating, and denying a solicitor license application, listing the approximate

inal background check ($100); (b) Intake/review of application, etc. ($50 to $75); (c) Maintenance of

No-Knock List ($50 to $75); and (d) Enforcement ($50 to $75). See Cowan Dec. Ex. C, 2.

The Village testified as to its lack of communications or documents evidencing research, studies, investigations, analyses, accounting reports, memoranda or other data that the Village relied upon in determining the costs for processing solicitor licenses. See Cowan Dec. Ex. A at 75:13-18. It further conceded its projections for administrative costs for solicitation licenses were not based on studies. See id. at 135:2-15.

The Village also testified at deposition that the Village Clerk is the most knowledgeable individual as to administrative expenses incurred in connection with solicitation administrative costs associated with licensing solicitors prior to passing the $200 Fee.

See id. at 60:2-63:13. In fact, the Village testified it did not consult any documents or individuals beyond the Village attorney, on whose affidavit it now relies, in determining the Fee. See id. at 77:13-17, 79:16-24; Cowan Dec. Ex. B, 4, 7; Cowan Dec. Ex. C, 1, 4 (Defendant testified under oath that it did not consult with or rely on documents, witness statements, studies, analyses, data, accounting reports, legislative findings, police reports, Village clerk memoranda or other information to determine the Fee amount, and did not consult or involve any Village employee, representative, official or third party in determining the Fee aside from the Village attorney). Lastly, the Village conceded under oath that it copied the Fee from the ordinance of the Village of Floral Park. See Cowan Dec. Ex. A at 71:8-72:2; Cowan Dec. Ex. B, 8; Cowan Dec. Ex. C, 4.

that [he has] utilized in the past charge at least one hundred ($100.00) for such a

serSee Ryan Aff. ¶ 7. The attorney affidavit cites the salary of the Village Clerk C $65.0 See id. ¶¶ 8-9. As such, the affidavit calculates, if both the Village Clerk

- enforcemen therefore the $200 Fee is reasonable. See id. ¶¶ 9-10. In his reply affidavit, the Village attorney personal knowledge that the cost of a criminal background check conducted by a Aff. ¶ 9. The reply affidavit states that the fact that no commercial solicitation

licenses have been sought or issued

See id. ¶¶ 12-14.

The majority of the assertions in both attorney affidavits depart from the deposition testimony. To the extent either attorney affidavit contradicts previous deposition testimony, the Court will not consider it, -motion. With this limitation cross-motions.

B. Constitutionality of the Fee The Court concludes that claim that the Fee and is appropriate.

Door-to-door solicitation is a form of expression that is entitled to First Amendment protection. See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632, 100 S. Ct. 826, 833-34 (1980). In the First Amendment context, the Supreme Court has held that governmental entities may impose licensing fees relating to the exercise of constitutional rights when the fees are designed the expense incident to the administration of the [licensing statute] and to the Cox v. New Hampshire, 312 U.S. 569, 577, 61 S.Ct. 762, 766 (1941) (quotation marks omitted); see Kwong v. Bloomberg, 723 F.3d 160, 165 (2d Cir. 2013). Put another way, imposing fees on the exercise of constitutional rights is permissible when the fees are designed to defray, and do not exceed, the administrative costs of regulating the protected activity. See Kwong, 723 F.3d at 165; Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) incident to the administration of a regulation and to the maintenance of public order

; E. Conn. Citizens Action Grp. v. Powers, 723 F.2d 1050, 1056 (2d Cir. administrative expenses are permissible, but only to the extent necessary for that

Int'l Women's Day March Planning Comm. v. City of San Antonio, 619 F.3d 346, 370 (5th Cir. 2010); see also Selevan v. N.Y. Thruway Auth., 711 F.3d 253, 259 61 (2d Cir. i cf. Murdock v. Pennsylvania, 319 U.S. 105, 113 14,

63 S.Ct. 870, 875 imposed as a regulatory measure to defray the expenses of policing the activities in

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Here, the Village fails to set forth sufficient documentary or testimonial evidence to show that the Fee is designed to defray, and does not exceed, the administrative costs of regulating solicitor licensing. Rather, through attorney affidavits alone, Defendant has provided generalizations and unsupported estimations as to how the Village decided on the Fee amount. The Village s Rule 30(b)(6) deposition testimony further attributes the Fee to guesses and estimates not based on research, analysis, accounting reports or any other data. See Cowan Dec. Ex. A at 43:6-12, 75:13-76:1, 79:21-24, 118:9-119:19, 124:24-125:9, 135:2-15. In fact, the only numbers cited are the salaries of Village employees likely to work on the issuance of solicitation licenses. See Ryan Aff. ¶¶ 8-9. However, such figures are provided in conjunction with approximations as to the number of hours the Village predicts those employees will work in this context, without consulting those employees. See Cowan Dec. Ex. A at 60:2-63:13, 106:13-24, 113:6-21; Cowan Dec. Ex. B, 4; Cowan Dec. Ex. C, 1. Further, Defendant has offered nothing to show that any meaningful or significant research regarding the Fee was conducted prior to its implementation. See Cowan Dec. Ex. A at 77:13-17, 78:3-8, 79:21-24; Cowan Dec. Ex. B, 7; Cowan Dec. Ex. C, 4.

Accordingly, Defendant . It has not provided evidence sufficient to justify the Fee, and has not established a factual basis for concluding that the $200 Fee is equal to the cost incurred in processing and issuing solicitation licenses. While the Court acknowledges that a fee, in some amount, may be

constitutionally valid, Defendant has not done the requisite research and analysis, nor shown that is the case through evidence appropriately cited to at summary judgment. Accordingly, the Court finds the Fee unconstitutional, and recommends motion for summary judgment be denied. IV. Conclusion

For the reasons set forth above, the Court respectfully recommends: (i) denying Motion in its entirety; and (ii) granting Motion in its entirety. V. Objections

A copy of this Report and Recommendation is being served on all parties by electronic filing on the date below. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a); Ferrer v. Woliver, 05-3696, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); Beverly v. Walker, 118 F.3d 900, 902 (2d Cir. 1997); Savoie v. Merchants Bank, 84 F.3d 52, 60 (2d Cir. 1996). Dated: Central Islip, New York December 23, 2020

/s/ Steven I. Locke STEVEN I. LOCKE United States Magistrate Judge