RECORD SEALED BY COURT

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CW 1830

[DOE][1]

VERSUS

THE LOUISIANA BOARD OF ETHICS, THE SUPERVISORY COMMITTEE ON CAMPAIGN FINANCE DISCLOSURE, FRANK P. SIMONEAUX, TERRY BACKHAUS, JULIE E. BLEWER, REV. GAIL BOWMAN, GARY G. HYMEL, JEAN INGRASSIA, DR. LOUIS LEGGIO, DR. CEDRIC LOWREY, M. BLAKE MONROSE, SCOTT SCHEIDER, AND GROVE STAFFORD

DATE OF JUDGMENT: JUL 21 2014

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 603,810, SECTION 23, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

* * * * * *

Ravi K. Sangisetty
Kara Hadican Samuels
New Orleans, Louisiana — Counsel for Plaintiffs- Respondents

Mary Olive Pierson
Baton Rouge, Louisiana — Counsel for Plaintiff- Respondent

[1] Due to the nature of these proceedings and because of the strict confidentiality required by La. R.S. 18:1511.8(A), the record in this matter was sealed both at the district court and at this Court, except for this opinion. To further safeguard the privacy of the plaintiffs, their names have been omitted and they will be referred to collectively in the caption of this case as "Doe" and in the opinion itself as "the plaintiffs." Additionally, we have not included the specific filing dates of various pertinent reports and documents in order to avoid the possibility of inadvertently revealing confidential information.

McDonald, J. dissents and assigns reasons.

R. Gray Sexton
Lewis O. Unglesby
Baton Rouge, Louisiana

Counsel for Plaintiffs- Respondents

Jennifer L. Thornton
J. Robert LeBlanc
New Orleans, Louisiana

Counsel for Plaintiffs- Respondents

Kyle Schonekas
Williams P. Gibbins
Joelle F. Evans
New Orleans, Louisiana

Allen Usry
New Orleans, Louisiana

E. Wade Shows
Baton Rouge, Louisiana

Counsel for Plaintiff-Respondent

Harry J. Philips, Jr.
William H. L. Kaufman
L. Adam Thames

Counsel for Defendants-Relators
the Louisiana Board of Ethics and
the Louisiana Supervisory Committee
on Campaign Finance Disclosure

Aaron D. Brooks
Kathleen Allen
Baton Rouge, Louisiana

Counsel for Defendants-Relators
Louisiana Board of Ethics and the
Board Members

****

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: WRIT APPLICATION GRANTED; JUDGMENT AFFIRMED.

KUHN, J.

Defendants-relators, the Louisiana Board of Ethics, the Supervisory Committee on Campaign Finance Disclosure,[2] and its individual members (collectively, the Board), seek review of a district court judgment that granted the plaintiffs-respondents' motion to quash and for protective order and denied the Board's motion to compel responses to subpoenas it had issued to the plaintiffs. The district court concluded that the information sought by the subpoenas related to an investigation of potential violations of the Campaign Finance Disclosure Act (CFDA)[3] that were prescribed. The dispositive issue before us is whether the alleged violations under investigation were "contained within a report" within the meaning of La. R.S. 18:1511.11(B) such that the one-year prescriptive period provided therein was applicable. Concluding that the alleged violations were contained in a report, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Initially, we emphasize that **the Board acknowledges in brief that the issues raised in this matter are identical to the issues** dealt with by the Fourth Circuit in ***Doe v. Louisiana Board of Ethics***, 12-1169 (La. App. 4th Cir. 3/13/13), 112 So.3d 339, 342-43, writ denied, 13-0782 (La. 8/30/13), 120 So.3d 265. In that case, the Fourth Circuit likewise concluded that the alleged violations were contained in a report within the contemplation of La. R.S. 18:1511.11(B). ***Doe***, 112 So.3d at 347.

In any event, after receiving an unsworn complaint alleging that certain parties violated the CFDA by giving contributions to the campaign of a candidate for public office through or in the name of others, the Board initiated a confidential

---

[2] Louisiana Revised Statutes 18:1511.1(A) establishes "The Supervisory Committee on Campaign Finance Disclosure" and provides that "[t]he Board of Ethics, as established in R.S. 42:1132, shall function as the supervisory committee to administer and enforce the provisions of [the Election Campaign Finance] Chapter and the rules, regulations, and orders issued hereunder."

[3] Louisiana Revised Statutes 18:1481 *et seq.*

investigation into the matter.[4] Both the instant matter and the ***Doe*** appeal in the Fourth Circuit arose from that investigation. The complaint alleged that certain plaintiffs actually funded several contributions that had been made to the candidate's campaign in the names of other plaintiffs, thereby allowing the funding-source plaintiffs to circumvent the contribution limits in effect at that time. The complaint referenced specific campaign disclosure reports filed by a political action committee (PAC report) and the candidate. Thereafter, the Board received another complaint, which this time was *sworn*, alleging additional CFDA violations by certain plaintiffs with respect to the candidate's campaign. The Board voted to expand its confidential investigation to include potential CFDA violations by additional plaintiffs.

As part of the investigation, the Board issued subpoenas and subpoenas *duces tecum* to certain plaintiffs commanding the production of numerous financial and other documents, including all documents and invoices related to a specified contribution from PAC that was listed on the candidate's campaign disclosure report.[5] In response, the plaintiffs filed a petition in the 19th Judicial District Court (19th JDC) seeking various relief, including a declaratory judgment and injunctive relief enjoining the Board from: 1) requiring the production of the documents sought by subpoena or by subpoena *duces tecum*; 2) investigating any plaintiff for alleged violations of the CFDA; and 3) filing charges against any plaintiff. The district court denied the plaintiffs' rule for a preliminary injunction.

Some of the plaintiffs made a partial return on the subpoenas, but excised selected information from the documents produced. Thereafter, the district court

---

[4] Louisiana Revised Statutes 18:1505.2(A)(1) provides, in pertinent part that: "No person shall give, furnish, or contribute monies, materials, supplies, or make loans to or in support of a candidate or to any political committee, through or in the name of another, directly or indirectly."

[5] The subpoenas sought, among other information, the documentation of contributions made to PAC and other legal entities, documentation of expenditures by these entities to the candidate's campaign, and copies of bank statements from all bank accounts where contributions were deposited or expenditures for political campaigns were made.

granted the Board's motion to compel responses to the subpoenas *duces tecum*, and the plaintiffs sought review of that ruling by writ application to this Court, which ordered the proceedings stayed pending review. Ultimately, this Court denied the plaintiffs' writ applications, ordered a new return date on all subpoenas, and lifted the stay previously ordered. The plaintiffs filed writ applications with the Louisiana Supreme Court, which initially issued a stay order, but ultimately denied the writ applications.

Subsequently, the plaintiffs filed a motion to quash the subpoenas and for a protective order. At that time, more than one year had elapsed since the filing of the campaign disclosure reports by PAC and the candidate. In opposition, the Board filed another motion to compel the plaintiffs' responses to the subpoenas *duces tecum*. Following a hearing, the district court ruled in favor of the plaintiffs and signed a written judgment granting their motion to quash the subpoenas and for a protective order, reasoning that the applicable prescriptive period governing any potential action for CFDA violations had elapsed. Further, the district court denied the Board's motion to compel responses to the subpoenas. The Board appealed the district court's judgment.

The plaintiffs filed a motion in this Court to dismiss the Board's appeal or, alternatively, to consolidate the appeal with an appeal taken by the Board from a judgment rendered by the 21st JDC in a related case.[6] This Court concluded that the judgment in this case, which granted the plaintiffs' motion to quash and for protective order and denied the Board's motion to compel responses, was a non-appealable interlocutory order, but converted the appeal to an application for

[6] Subsequent to the filing of the instant case in the 19th JDC, several of the plaintiffs also filed a motion in the 21st JDC seeking to quash additional subpoenas issued to them by the Board and to obtain a protective order. The Board acknowledges in brief that the instant case involves the "[s]ame issues, same facts, same parties; just different procedural postures and different jurisdictions of the particular [plaintiffs]." The 21st JDC ultimately rendered judgment quashing the subpoenas and granting a protective order. The Board appealed the judgment to this Court, and a decision in that appeal also is rendered this date. See ***Doe v. Board of Ethics***, 12-1623 (La. App. 1st Cir. 7/21/14).

supervisory writs. See La. Const. art. 5, § 10(A); ***Stelluto v. Stelluto***, 05-0074 (La. 6/29/05), 914 So.2d 34, 39. This Court also denied the plaintiffs' alternative motion for consolidation, but ordered that the instant writ application be assigned to the same panel as the related appeal taken from the 21st JDC judgment.

DISCUSSION

Under La. R.S. 18:1511.4(C)(1) the Board's investigative authority empowers it to "hold hearings, to subpoena witnesses, administer oaths, compel the production of books, records, and papers, public and private, require the submission under oath of written reports or answers to questions" as well as to "do all that is necessary to effect the provisions" of the CFDA. This power is not unfettered, however. An affected party may, upon a showing of good cause, move the district court to make "any order which justice requires to protect such person from annoyance, embarrassment, oppression, or undue burden or expense." La. R.S. 18:1511.4(C)(2). Among the remedies within the district court's authority is an order that "the inquiry not be had." La. R.S. 18:1511.4(C)(2)(a); ***Doe***, 112 So.3d at 342-43.

In this case, the Board argues that the district court erred in quashing the subpoenas and granting a protective order pursuant to La. R.S. 18:1511.4(C)(2) because prescription is designed to stop lawsuits and not investigations and, furthermore, cannot constitute "good cause" under this provision. It contends that the violations under investigation are governed by the three-year prescriptive period provided by La. R.S. 18:1511.11(B) rather than the one-year prescriptive period incorrectly applied by the district court. In opposition, the plaintiffs argue that the district court did not abuse its discretion in quashing the subpoenas and

granting a protective order.[7] They assert that "[i]t is self-evident that, if a subpoena seeks information or testimony regarding an investigation that is already prescribed and which cannot lead to timely charges, the subpoena has no purpose *other* than to annoy, embarrass, oppress, or unduly burden the subpoenaed party and cost the party unnecessary expense."

Louisiana Revised Statutes 18:1511.11(B) provides that actions for violation of the CFDA "must be commenced before three years have elapsed from the date of the violation or, *if the violation is contained in a report*, before one year has elapsed from filing of the relevant report." (Emphasis added.) It is undisputed that, at the time of the district court's judgment, more than one year had elapsed after the filing of the PAC and candidate reports. The Board contends, however, that the three-year prescriptive period applies in this case because the violations it was investigating were "prohibitive act" violations that were not contained in any report as contemplated by La. R.S. 18:1511.11(B). We disagree.

As noted, the Fourth Circuit addressed this identical issue in a case arising from the same investigation involved in this case. See ***Doe***, 112 So.3d 339. The Board acknowledges in brief that the instant case involves the "**[s]ame issues, same facts, same parties; just different procedural postures and different jurisdictions of the particular [plaintiffs].**" (Emphasis added.) In the ***Doe*** case, several parties, who were also plaintiffs in the 19th JDC case, filed a petition to quash the Board's subpoenas in the Civil District Court for the Parish of Orleans. The district court quashed the subpoenas and granted a protective order to the Orleans Parish plaintiffs, concluding that any action by the Board to penalize the alleged violations it was investigating had prescribed. ***Doe***, 112 So.3d at 341.

---

[7] The district court's rulings on the plaintiffs' motion to quash subpoenas and for protective order, as well as the Board's motion to compel, are rulings subject to the court's broad discretion. Upon review, these rulings will not be disturbed by an appellate court absent a clear abuse of discretion. See ***Doe***, 112 So.3d at 341; ***Vallery v. Olin Corporation***, 337 So.2d 631, 634 (La. App. 3d Cir. 1976).

On appeal, the Fourth Circuit concluded that the one-year prescriptive period provided in La. R.S. 18:1511.11(B) was applicable to the CFDA violations under investigation because the suspected violations were contained in the PAC report. In view of that conclusion, the ***Doe*** court further held that the district court did not abuse its discretion in quashing the Board's subpoenas pursuant to La. R.S. 18:1511.4(C)(2), reasoning that enforcement of the subpoenas would be "oppressive and unduly burdensome" since any charges resulting from the investigation were prescribed. ***Doe***, 112 So.2d at 347.

In reaching its holding, the ***Doe*** court observed:

> We note at the outset of our discussion that there has been no suggestion that the Board is suspicious of, or seeking to investigate, any direct or indirect giving, furnishing, or contribution of monies through, or in the name of, another person in support of a candidate or PAC **which has not already been reported. In other words, the Board in this case was investigating whether certain contributions that were named in the PAC's disclosure report and ascribed to named contributors were actually furnished by someone other than the named contributors**. Neither the initial complaint nor the Board's authorization for the investigation was directed at *unreported* contributions; the contributions under investigation were reported but they were allegedly reported by nominal contributors only.

Doe, 112 So.2d at 345. (Emphasis added.)

Additionally, the ***Doe*** court specifically rejected the Board's contention that the violations being investigated must be self-evident on the face of the report in order to be considered "contained in the report" within the meaning of La. R.S. 18:1511.11(B). The court explained its rationale as follows:

> [W]e acknowledge that the Board's interpretation of the phrase "contained in the report" is a reasonable reading of the term. We must also acknowledge, however, that the Board's reading of the term is not the only reasonable meaning attributable to La. R.S. 18:1511.11 B. Indeed, it is equally reasonable to read the statute as did the district court below because the suspected violations that the Board seeks to investigate via the issuance of subpoenas are clearly contained in the PAC's report. We also recognize that the Board is empowered, by virtue of La. R.S. 18:1511.2 A(2) and (3), to both clarify and define the various provisions found in the Campaign Finance Disclosure Act, but that it has not done so with respect to any phrase contained in La. R.S. 18:1511.11 B. **Our review of the statute, therefore, convinces**

us that it is ambiguous, and that we must construe this ambiguity in favor of the Does.

***

[I]n construing the phrase "contained in a report" so as to determine *which* prescriptive period is controlling, we observe that the statute is penal in nature ... because it is situated within that Part of Louisiana's election finance law that is dedicated to the enforcement of civil prohibitions and the collection of civil penalties.

Because of its penal nature, La. R.S. 18:1511.11 B must be construed in favor of the Does. Louisiana jurisprudence has long held that penal laws are strictly construed, and that any ambiguity in the language found within such statutes must be resolved with lenity and in favor of the individual subject to the penalty. The rule of lenity posits that "courts should not construe penal statutes as extending powers not authorized by the letter of the law even if such powers would be arguably within its spirit." The rule of lenity, moreover, applies not only to the substantive ambit of criminal laws and civil penal statutes, but also to the penalties imposed by those laws. Additionally, the rule of lenity requires that "where there is any doubt as to the interpretation of a statute upon which a prosecution is based, doubt must be resolved in favor of the accused." This principal applies to both criminal laws and civil statutes of a penal nature. Additionally, the rule of lenity has been applied in the area of administrative law.

Because La. R.S. 18:1511.11 B is both penal in nature and ambiguous, we conclude that the district court correctly interpreted it to mean that its one-year period applies to the facts of this case **because the suspected violations that the Board seeks to investigate are contained in the PAC's report**. The subpoenas, therefore, are oppressive and unduly burdensome on the Does because any potential civil enforcement action that might arise out of the information secured via the Does' response to the subpoenas has prescribed. The district court, therefore, did not abuse its discretion afforded it by La. R.S. 18:1511.4 C(2) in quashing the Board's subpoenas as moot.

Doe, 112 So.3d at 345-47. (Bold added.) (Footnote & citations omitted.)

Based on our review, we agree that the phrase "contained in the report" is ambiguous since it is susceptible to different interpretations. See ***Doe***, 112 So.3d at 346. Further, we agree that given the penal nature of La. R.S. 18:1511.11(B), this ambiguity must be construed in favor of the plaintiffs. See ***Doe***, 112 So.3d at 346-47. Hence, the one-year prescriptive period provided in La. R.S. 18:1511.11(B) was applicable, and any potential charges resulting from the

Board's investigation were prescribed, since well over one year had elapsed since the PAC and candidate's reports were filed. The fact that no timely charges could result from the investigation constituted "good cause" supporting the district court's judgment. Under these circumstances, the subpoenas could serve no useful purpose. See La. R.S. 18:1511.4(C)(2)(a); ***Doe***, 112 So.3d at 347. The Board has failed to establish any error or abuse of discretion by the district court.[8]

CONCLUSION

For the above reasons, we herby grant the application for supervisory writs and affirm the district court judgment in favor of the plaintiffs and against the Board quashing the Board's subpoenas, granting a protective order, and denying the Board's motion to compel.[9]

WRIT APPLICATION GRANTED; JUDGMENT AFFIRMED.

[8] Furthermore, we reject the Board's contention that prescription was suspended by the doctrine of *contra non valentem* during the respective periods that stay orders were in effect while writ applications were being considered by this Court and the Supreme Court. An identical argument also was rejected by the ***Doe*** court, which found it unpersuasive. In view of the fact that court issued stays do not suspend prescription, prevent the filing of a lawsuit, or implicate the doctrine of *contra non valentem*, we agree with this conclusion. See ***White v. Haydel***, 593 So.2d 421 (La. App. 1st Cir. 1991); ***Doe***, 112 So.3d at 347 n.9; ***Castaneda v. Louisiana Insurance Guaranty Association***, 95-29 (La. App. 5th Cir. 5/30/95), 657 So.2d 338.

[9] The Board's motion for leave to attach to its reply brief exhibits, which consist of campaign finance reports filed by a candidate in a different matter, is hereby denied.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CW 1830

DOE

VERSUS

LOUISIANA BOARD OF ETHICS

McDONALD, J., DISSENTING:

I respectfully dissent. The majority follows the Fourth Circuit in reasoning that the phrase "contained in a report" is ambiguous and is thus susceptible to different interpretations. **Doe v. Louisiana Board of Ethics**, 12-1169 (La. App. 4th Cir. 3/13/13), 112 So.3d 339, 345-47, writ denied, 13-0782 (La. 8/30/13), 120 So.3d 265. I respectfully disagree with this sentiment, and would conclude that the defendant-relators brought their investigation against the plaintiffs-respondents within the requisite period of time.

Political action committees (PACs) are required by the Campaign Finance Disclosure Act to periodically submit reports regarding contributions they receive. La. R.S. 18:1484(3). These reports must contain the full name and address of each person who made a contribution, the amount of the contribution, and the date on which the contribution was made. See La. R.S. 18:1491.7(B)(4)(a). One can only contribute a limited amount of money to a particular candidate, and cannot circumvent this limit by making contributions in the name of another. La. R.S. 18:1505.2. La. R.S. 18:1511.11(B) provides: "Actions for violation of this Chapter must be commenced before three years have elapsed from the date of the violation or, *if the violation is contained in a report*, before one year has elapsed from filing of the relevant report." (Emphasis added.)

The alleged violation in the instant case consists of the plaintiffs-respondents making contributions in the name of another. The majority agrees with the Fourth Circuit that the phrase "contained in a report" is ambiguous and could be construed to cover situations such as the present one where the contribution merely appears in the report, but in the name of someone else and in an amount that doesn't breach the limit. However, this interpretation is unreasonably broad. On the face of the report, there wouldn't appear to be any violation at all. A violation of this sort is rather isolated from the report. The violation occurs when one, who has already reached the monetary limit, gives money to someone else to make further contributions to the same candidate. This clandestine transaction would not appear on the face of the report, and one must look beyond the report to determine if any violation has occurred at all.

The applicable prescriptive periods are rather telling of what the legislature actually intended. When a violation is "contained in a report," the prescriptive period is one year, whereas if the violation is not "contained in a report," the prescriptive period is three years. See La. R.S. 18:1511.11(B). It seems the legislature intended there to be a shorter prescriptive period when all one had to do was read the report to understand that a violation had occurred. Such a violation could include those who pay over the monetary limit in their own name. Violations like this would be made manifest on the face of the report, and would conceivably require little time to discover as long as the reports were regularly being checked.

However, a violation like the one alleged before us is not so obvious. The legislature provided a three year prescriptive period likely to accommodate for those violations which were not made manifest in the report and could not be discovered so quickly just by reading it. Therefore, these would be violations not "contained in a report." I would conclude that the alleged violation before us is just such a violation. One cannot determine whether the plaintiffs-respondents made

any contributions in the name of another just by reading the report. The report would simply mention the contributors' names and addresses, the amount they contributed, and the date, but would not mention any person the contributors got their money from to make the contribution. See La. R.S. 18:1491.7(B)(4)(a). That vital information is not contained in any report, and therefore an investigation into this sort of violation should be subject to the three year prescriptive period.

Moreover, the PACs which submit these reports are not aware when contributions are made in the name of another. The PACs are only required to record who actually gives the money, not where the contributor got the money from. Even if they were required to make such a recordation, it's unlikely that one who makes a contribution in the name of another would be truthful. The interpretation the majority takes, however, would seem to require the defendants-relators to know more regarding the contributors and where they got their money than the PACs who file the reports themselves. Certainly, this will not be the case. Violations involving contributions which are made in the name of another can likely only be discovered through testimony of those who have inside knowledge of the violative act, since nothing on the face of the report would point to the possibility that a violation has occurred. Since information outside of the report itself is necessary to discover such a violation, the defendants-relators should have more than a year to make such a discovery and carry on an investigation.

For the reasons stated above, I do not find the majority's broad interpretation of La. R.S. 18:1511.11(B) to be convincing. I do not agree with our learned colleagues on the Fourth Circuit that the rule of lenity should apply, because I do not find their more lenient interpretation of the statute, one the majority has adopted, to be reasonable. I would reverse the ruling of the district court and allow further investigation to determine if a violation has occurred.