

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

950/17

CA 17-00249

PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

ANN VANYO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.,
AND CITY OF BUFFALO, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

JAMES OSTROWSKI, BUFFALO, FOR PLAINTIFF-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR
DEFENDANT-RESPONDENT BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF
COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF BUFFALO.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 5, 2016. The order and judgment granted the motions of defendants to dismiss the complaint and amended complaint. The order and judgment was affirmed by order of this Court entered March 16, 2018 in a memorandum decision (159 AD3d 1448 [4th Dept 2018]), and the Court of Appeals on December 17, 2019 modified the order and remitted the case to this Court for consideration of an argument raised but not addressed on the appeal to this Court (34 NY3d 1104 [2019]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order and judgment so appealed from is unanimously modified on the law by denying that part of the motion of defendant Buffalo Police Benevolent Association, Inc. seeking dismissal of the first cause of action and reinstating that cause of action and by denying that part of the motion of defendant City of Buffalo seeking dismissal of the second cause of action and reinstating that cause of action and as modified the order and judgment is affirmed without costs.

Memorandum: On remittitur from the Court of Appeals, we are to consider the contention of defendant Buffalo Police Benevolent Association, Inc. (PBA), which was "raised but not addressed on the appeal to [this] Court, that plaintiff's first cause of action should be dismissed pursuant to CPLR 3211 (a) (7)" (*Vanyo v Buffalo Police Benevolent Assn., Inc.*, 34 NY3d 1104, 1105 [2019]). Upon giving the

amended complaint a liberal construction, accepting the allegations as true, and providing plaintiff with the benefit of every favorable inference (see *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]), we conclude that plaintiff has stated a cause of action for breach of the duty of fair representation (see generally *Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 196 [1984]). We therefore modify the order and judgment by denying that part of the motion of the PBA seeking dismissal of the first cause of action and reinstating that cause of action and, in accordance with the Court of Appeals' memorandum, we further modify the order and judgment by denying that part of the motion of defendant City of Buffalo seeking dismissal of the second cause of action and reinstating that cause of action.

Entered: March 20, 2020

Mark W. Bennett
Clerk of the Court