Meirowitz v Bayport-Bluepoint Union Free School Dist.
2007 NY Slip Op 34445(U)
February 23, 2007
Supreme Court, Suffolk County
Docket Number: 19405/05
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

COPY

INDEX NO. 19405/05

Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

MARCIA MEIROWITZ, as President of the BAYPORT-BLUEPOINT TEACHERS' ASSOCIATION, on behalf of Its affected members, SEAN MEADE, JENNIFER OLSEN, ROGER KAUFFMAN. and SCOTT MURPHY, et al. (names of additional Plaintiffs being listed on Schedule A, attached hereto),

Plaintiffs,

-against-

BAYPORT-BLUEPOINT UNION FREE SCHOOL DISTRICT, RICHARD W. CURTIS, as Superintendent of the Bayport-Blue Point Free School District, the BOARD OF EDUCATION OF THE BAYPORT-BLUE POINT UNION FREE SCHOOL DISTRICT, AND JAMES S. MARCH, CAROL A. CINELLI, WILLIAM BARRY, JEANINE BROWNING, JANE BURGESS, LEONARD CAMARDA, LAURA JANKOWSKI, ANDREA M, O'NEILL AND ANDREW T. WITTMAN, JR., as members of the Board of Education of the Bayport-Blue Point Union Free School District.

Defendants.

ORIG. RETURN DATE: 6/27/06
FINAL SUBMIT DATE: 11/30/06
MOTION SEQ. NO.: 002-MG

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Upon the following papers numbered 1 to 42 read on this motion /summary judgment
Notice of Motion/OSC and supporting papers 1-6; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in opposition and supporting papers 7-25/26-29; Affirmation/affidavit in reply and supporting papers 30-38 Other 39-40/41/42 ___; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that the defendants' motion for summary judgment is granted under the circumstances presented herein. (CPLR 3212)

The matter at bar is one sounding in breach of contract, breach of implied covenant of

good faith and fair dealing, breach of fiduciary duty, negligent retention, negligent supervision, and negligent misrepresentation. The following salient facts are not in dispute: The individual plaintiffs are all either retired or active employees of the defendant Bayport-Bluepoint Union Free School District ("District"). Plaintiff Bayport-Bluepoint Teachers Association ("BTA") is the collective bargaining representative for all teachers and secretaries employed within the defendant District. Pursuant to a collective bargaining agreement between the BTA and the defendant District, the District offered to its employees a voluntary participatory 403 (b) retirement savings plan. On or about January 19, 2001 the District contracted with non-party Horizon Benefit Administration ("Horizon") to administer the savings program. The District deducted money from the individual plaintiffs pay checks where it was transferred to a custodial bank. Each of the participants in the plan selected a vendor to place their funds with. Horizon then directed the bank to distribute the funds to the selected vendors. It was also responsible for producing account statements as well as being responsible for the plan's compliance with IRS regulations.

In addition to serving as the plan's administrator, Horizon was also one of the vendors that the participants could select to place their funds with. Horizon offered two products: Choice Unlimited and Choice Select, the former similar to a brokerage account and the latter a managed portfolio account. On August 25, 2004 Horizon informed the District that it would no longer serve as the administrator of the plan. During the transition period, unbeknownst to the defendant District, Horizon was being investigated by the Ohio Attorney General's Office, which resulted in the freezing of Horizon's assets. The defendants aver, and the plaintiffs have not controverted, that only the individual plaintiffs who elected to invest their funds through Horizon's Choices Unlimited product lost money. Any participant in the 403 (b) that did not choose to invest in Choices Unlimited were unaffected by the investigation and subsequent liquidation of Horizon.

District employees who opted to participate in the 403 (b) plan were required to execute a Salary Reduction Agreement ("SRA") which authorized the District to transfer money directly from the employees paycheck to a custodial bank where the funds were eventually transferred by Horizon to the employees chosen vendor. Said agreement provided in paragraph 4 as follows:

> Employee releases any and all rights, present and future to receive payment of the sums from the Employer, resulting from such reduction in any form except (1) the right of the Employee's estate to receipt of sums so paid upon his death, or (2) the right of the employee upon termination

> of employment by reason other than death personally to receive all or any part of the amount specified for which service has been rendered but which has not been transmitted as shown in this amendment

Paragraph 6 of such agreement further provides:

> The Employee agrees that the Employer shall have no liability whatsoever for any loss suffered by the Employee with regard to his selection of an insurance company or mutual fund, or the solvency of, operation of, or benefits provided by said insurance company or mutual fund company

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York University Medical Center***, 64 N.Y2d 851,853, 487 N.Y.S.2d 316; ***Zuckerman v. City of New York*** 49 N.Y.2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***State Bank of Albany v. McAuliffe***, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986])

It is well settled that an exculpatory provision is enforceable if its language expresses in unequivocal terms the intent of the parties to relieve the defendant of liability for the defendant's breach of contract or negligence. Although ambiguities in an exclusionary clause are to be construed against the drafter, it is well established that when the meaning of a contract is plain and clear, it is entitled to be enforced according to its terms. (***Uribe v. Merchant's Bank,*** 293 A.D.2d 336, 670 N.Y.S.2d 693 [1998] ; ***Blumenkrantz v May,*** 293 A.D.2d 850, 740 N.Y.S.2d 497 [3rd Dept 2002]) Upon review of the release and hold harmless clauses of the SRA it is clear that the intent of the parties, in unambiguous terms, was to negate the nature of the claims set forth by the plaintiffs herein. As previously set forth above, the defendants have proffered, and the plaintiffs have not controverted, the assertion that the only plaintiffs who sustained monetary damages were those who chose to invest their funds in Horizon's Choices Unlimited investment product. Clearly, the release and hold harmless clauses of the SRA are applicable to such claims. Although the plaintiffs aver that defendant District's 403 (b) plan was mismanaged by Horizon and the defendants were

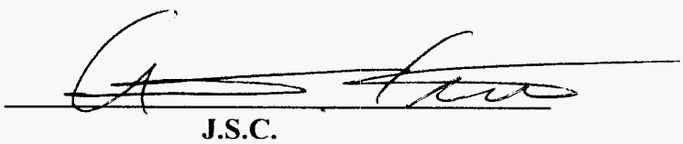
negligent as well as in breach of their fiduciary duty in selecting Horizon to administer such plan, there is no indication that they were damaged by said selection other than the aforementioned claims regarding certain plaintiffs investment choices. Accordingly, pursuant to the foregoing and under the circumstances presented herein, the defendants motion for summary judgment is granted.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
February 23, 2007



J.S.C.

___X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION _____ DO NOT SCAN