

Matter of Sharpe v Sturm
2005 NY Slip Op 30573(U)
May 4, 2005
Supreme Court, Westchester County
Docket Number: 0989/05
Judge: Richard A. Molea
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

**FILED
AND
ENTERED**
ON 5/5 2005
WESTCHESTER
COUNTY CLERK

-----X
In the Matter of the Application of
JOHN SHARPE and JAMES J. MINIHAN,

DECISION & JUDGMENT

Petitioners,

Index No. 0989/05

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

QA

- against -

BARNETT STURM, individually and in his
capacity as Superintendent of Schools for the
Lakeland Central School District, and the
LAKELAND CENTRAL SCHOOL DISTRICT,

FILED
MAY 5 2005
LEONARD N. SPANO
COUNTY CLERK
COUNTY OF WESTCHESTER

Respondents.

-----X
MOLEA, J.

The following papers, numbered one (1) through seventy-nine (79) were read upon review of the respondents' motion to dismiss the instant proceeding, submitted in connection with the instant petition for relief brought pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

Order to Show Cause	1-3
Amended Verified Petition - Exhibits	4-30
Affidavit of Sharpe in Support	31-34
Affirmation of Seymour in Support	35-37
Affirmation of Adams in Support	38-42
Memorandum of Law in Support	43-45
Notice of Motion to Dismiss	46-47
Affirmation of Rushfield in Support - Exhibits	48-51
Memorandum of Law in Support - Exhibit	52-61
Affirmation of Adams in Opposition - Exhibits	62-68
Memorandum of Law in Opposition	69-73
Reply Memorandum of Law	74-79

Upon the foregoing papers, it is ordered and adjudged that the respondents' motion to dismiss is disposed of as follows:

Petitioners bring this special proceeding by petition submitted pursuant to Article 78 of the CPLR, seeking an order of this Court (1) reversing, annulling and setting aside the determination of the respondent Lakeland Central School District (hereinafter, LCSD), rendered on September 1, 2004, resolving to deny all statutory indemnification and legal representation to petitioner Sharpe in connection with a civil lawsuit pending under Index Number 04 CIV.6681 in the United States District Court, Southern District of New York, (2) directing respondent LCSD to provide the petitioners with legal counsel of their own choosing in connection with the above-referenced federal litigation, and (3) directing respondent LCSD to pay all legal fees incurred by the petitioners in connection with the instant special proceeding. In support of the instant petition, the petitioners claim that Education Law §§ 3023 and 3811, and Public Officers Law § 18 compel the respondent LCSD to provide the petitioners' with legal counsel of their own choosing, which includes assumption of responsibility for the compensation of such legal counsel, in connection with the petitioners' defense in the above-referenced federal litigation. Respondents oppose the instant petition and move this Court to dismiss same pursuant to CPLR 3211(a)(2), (7) and (8), arguing that the petitioners failed to comply with the notice requirements established by Education Law §§ 3023 and 3811, and Public Officers Law § 18, and thereby failed to satisfy the statutory conditions precedent to the statutory entitlements sought to be enforced through the instant special proceeding.

As the underlying federal litigation concerns a civil claim through which monetary damages are sought in connection with alleged civil rights violations, the Court finds that Education Law § 3811 and Public Officers Law § 18 are applicable to the instant proceeding, to the exclusion of Education Law § 3023 which applies solely to claims of alleged negligence

resulting in bodily injury and property damage. With respect to both Education Law § 3811 and Public Officers Law § 18, the respondents cite to the notice requirements set forth within each of these statutes and claim that the failure of the petitioners to comply with these notice requirements constitutes a failure to satisfy a condition precedent to a successful claim seeking indemnification and legal representation in connection with their defense of the above-referenced federal litigation brought against them. In opposition to the respondents' arguments, the petitioners urge the Court to find that it is was not necessary for them to comply with the notice requirements set forth in Education Law § 3811[1][a] and Public Officers Law §18 [5][i], arguing that the notice requirements set forth therein are not to be considered a condition precedent to a claim brought thereunder.

Specifically, Education Law § 3811 provides, in substance and pertinent part, that whenever a non-instructional school district employee is named as a defendant in a civil action or proceeding arising from employment-related conduct, all of the reasonable costs and expenses incurred in connection with that defense shall be a school district charge, "provided that (a) such . . . non-instructional employee . . . shall notify the trustees or board of education . . . in writing of the commencement of such action or proceeding against him within five days after service of process upon him" (*see*, Education Law § 3811[1][a]). Whereas, Public Officers Law § 18 provides, in substance and pertinent part, that where a public employee is named as a defendant in a civil action or proceeding arising from employment-related conduct, the employer's duty to defend or indemnify the employee "shall be conditioned upon: (i) delivery by the employee to the chief legal officer of the public entity or to its chief administrative officer of a written request to provide for his defense together with the original or a copy of any summons, complaint, process,

notice, demand or pleading within ten days after he is served with such document” (*see*, Public Officers Law § 18 [3][a] and [5][i]).

Upon consideration of the notice requirements of Education Law § 3811[1][a] and Public Officers Law § 18[5][i], the Court examined the Amended Verified Petition and the Affidavit In Support submitted by petitioner Sharpe and found that the petitioners allege that Sharpe was served with a summons and complaint in connection with the above-referenced federal litigation on August 24, 2004.¹ Through these submissions, the petitioners further allege that despite their failure to make any request for legal representation, the LCSD sent petitioner Sharpe a letter on September 10, 2004 which indicated that the LCSD Board of Education had passed a resolution denying him all statutory rights to indemnification and legal representation in connection with this litigation. It is undisputed that each of the petitioners responded to receipt of this correspondence by submitting letters to the respondents on September 23, 2004 and September 27, 2004, respectively, through which each of the petitioners made an initial demand for indemnification and legal representation in connection with this litigation.

Although it is conceded by the petitioners that neither of them complied with the notice requirements set forth in either Education Law § 3811[1][a] or Public Officers Law § 18[5][i], they suggest that such compliance is not necessary for the maintenance of a claim thereunder, asserting that the respondents’ independent knowledge of the proceedings brought against them obviated the need for their compliance with the statutory notice requirements. The petitioners support this argument with exclusive reliance upon three decisions of the Appellate Division,

¹ Through this summons and complaint, the plaintiffs allege that the petitioners and other members of the LCSD were responsible for engaging in the “intentional, unlawful and systematic eavesdropping activities” of the plaintiffs in their workplace.

Third Department, which stand for the proposition that the failure of an employee to strictly comply with the notice requirements of Public Officers Law § 18[5][i] may not necessarily be fatal to an application for indemnification and legal representation under the terms of the statute, having considered the attendant facts and circumstances in determining the effect of such an omission (*see, Frontier Ins. Co. v. State of New York*, 239 AD2d 92, *lv. denied* 92 NY2d 807; *Walsh v. County of Saratoga*, 256 AD2d 953; *Matter of Hunt v. Hamilton County*, 235 AD2d 758; *Polak v. City of Schenectady*, 181 AD2d 233). Specifically, in *Polak* and *Frontier*, the court found that the failure of the employer to object to the employee's failure to comply with the notice requirements of Public Officers Law § 18[5][i] constituted a waiver of any claim that his omission compelled the denial of his claim for indemnification and legal representation under the statute. Similarly, in *Hunt*, the court held that under the circumstances of that particular case, the employee's failure to comply with the notice requirements of Public Officers Law § 18[5][i] should not compel the denial of his claim for indemnification and legal representation due to its finding that the County Attorney had placed him in a position where he could not comply with those notice requirements. In accordance with these earlier decisions, the court in *Walsh* relied upon several undisputed factual findings in determining that the employee's failure to comply with the notice requirements was not fatal to his claim.

Here, it is undisputed that the petitioners failed to notify the trustees or board of education of respondent LCSD, in writing, of the commencement of the underlying federal litigation action within five days after the service of process upon him as required by Education Law § 3811[1][a] and similarly failed to deliver a written request to provide for his defense, together with the original or a copy of the summons and complaint with which he was served, to any officer of the

respondent LCSD within ten days after he had been served with those documents as required by Public Officers Law § 18 [3][a] and [5][i]. In this regard, no waiver by the respondents of any claim concerning the petitioners' failure to comply with the notice requirements of either Public Officers Law § 18[5][i] or Education Law § 3811[1][a] may be found, as the present circumstances demonstrate that the respondents have raised specific objection to the petitioners' omission through the instant motion. Furthermore, there are no undisputed facts in the present case which establish that the petitioners were acting within the scope of their employment when the alleged civil rights violations occurred, nor is it undisputed that the respondents were aware of the federal litigation proceedings and had adequate opportunity to investigate same despite the petitioners' failure to comply with the statutory notice requirements. Moreover, the Court's review of the circumstances surrounding the petitioners' failure to comply with the notice requirements of Public Officers Law § 18[5][i] and Education Law § 3811[1][a] reveals that no justification exists for their outright and complete failure to comply with those terms of these statutes.

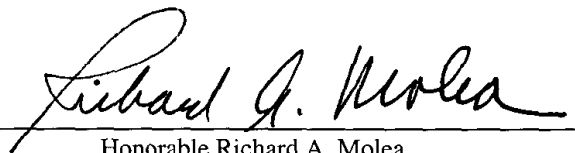
Under the circumstances present here, the Court finds persuasive the controlling precedent from the Appellate Division, Second Department in *Matter of Eisenstein v. DeSario* (104 AD2d 992), which held that where indemnification and legal representation were sought from a school district pursuant to Education Law § 3028, the employee's compliance with the statutory notice requirements were an absolute condition precedent to the relief sought (*see, Matter of Newman v. Poughkeepsie City School District, et al.*, Sup Ct, Dutchess County, November 9, 2004, Dolan, J., index No. 3889/04).

Accordingly, under the circumstances of this case, the Court finds that the petitioners' failure to comply with the statutory notice requirements prescribed under Public Officers Law § 18[5][j] and Education Law § 3811[1][a] constitutes a failure to satisfy a condition precedent to a successful application for indemnification and legal representation under the terms of these statutes.

Based upon the foregoing, the respondents' motion to dismiss the instant proceeding is granted, the instant petition is denied and this proceeding is hereby dismissed.

The foregoing constitutes the Decision and Judgment of this Court.

Dated: White Plains, New York
May 4, 2005

A handwritten signature in black ink, reading "Richard A. Molea", written over a horizontal line.

Honorable Richard A. Molea
Acting Justice of the Supreme Court