

**Pagan v Board of Educ. of City School Dist. of City
of N.Y.**

2007 NY Slip Op 31952(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0116905/2006

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 116905/2006

INDEX NO. 116905/2006

PAGAN, YVONNE

MOTION DATE 5/3/07

vs
BRD OF EDUCATION

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

ARTICLE 78

_____ papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 5

Answering Affidavits — Exhibits _____

2, 3

Replying Affidavits _____

4, 4

Cross-Motion: Yes No

FILED

JUL 05 2007

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE
FILED

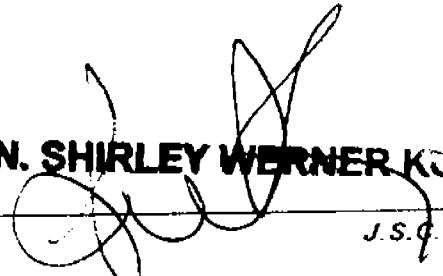
JUL 05 2007

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/8/07

HON. SHIRLEY WERNER KORNREICH



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
YVONNE PAGAN,

Plaintiff,

-against-

INDEX NO. 116905/2006
DECISION & ORDER

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK; and
JOEL I. KLIEN, as Chancellor of the City School
District of the City of New York,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Plaintiff is a former employee of defendants who was terminated pursuant to a stipulation between the parties, stating plaintiff would be immediately terminated if she was excessively absent. Plaintiff has brought a cause of action for breach of contract, arguing defendants wrongfully terminated her pursuant to the stipulation. Defendants now move to convert the action to an Article 78 proceeding and to dismiss for failure to state a cause of action.

FILED

JUL 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

I. Statement of Facts

A. Plaintiff's Proof

The following facts are taken from plaintiff's verified complaint. Plaintiff was a tenured teacher employed by defendants, most recently working at the Park Slope Education Complex at Middle School 88 in Brooklyn, New York. On or about March 1, 2005, defendants preferred disciplinary charges against plaintiff pursuant to Education Law §§ 2590-j and 3020-a, citing excessive absence from work. The charges were resolved by the parties without a formal hearing by executing a Post Charge Stipulation of Settlement ("Stipulation"). Pursuant to the Stipulation,

plaintiff agreed to pay a \$6,500 fine and complete a three year probationary period, during which she would be limited to 10 absences per year, or she could be summarily discharged. The Stipulation stated that absences due to plaintiff being summoned for jury duty or a court proceeding would not count towards the ten allowable absences, provided that plaintiff immediately submitted proof of the court appearance upon her return to work. The Stipulation was executed and became effective on or about May 18, 2005.

The verified complaint also said that by letter dated July 12, 2006, but not received by plaintiff until August 31, 2006, plaintiff's principal, Ailene Altman Mitchell, notified her that she had been terminated immediately for absences exceeding 10 days. The complaint alleges that plaintiff had submitted proof of three absences due to court appearances, which meant her absence count was only eight days for the year. In her opposition to defendants' motion, she has submitted copies of the Stipulation, her termination letter, her School Record of Teacher's Absence for the 2005-2006 school year, and two appearance notes from the Richmond County Civil Court, dated June 1, 2006 and June 15, 2006.

B. Defendants' Proof

Defendants do not present any evidence contradicting plaintiff's submissions. Defendants note that the Stipulation states plaintiff was absent 39 and 51 days during the 2002-2003 and 2003-2004 school years, respectively. Defendants also point out that the Stipulation only allows an absence exception for a court appearance when the plaintiff was summoned to court and immediately supplied documentation upon returning to work. Defendants further highlight that plaintiff waived her tenure right to a hearing pursuant to the Stipulation.

C. The Stipulation

The Stipulation provides in part:

2. Respondent agrees that for the school years 2005-2006, 2006-2007 and 2007-2008 she will be on a probationary period, whereby should she exceed ten (10) days per school year in absences she will be automatically terminated thereby waiving her right under Education Law Section 3020-a.
3. Respondent understands and agrees that all absences, with the exception of the reasons listed below, may be considered towards absences specified in paragraph 2 above:
 - ...
 - (b) In the event that the Respondent is summoned to appear for jury duty or a court proceeding, the Respondent must immediately submit proof of jury service or verification that she appeared in court, upon her return to school;
 - ...
4. Upon belief that the Respondent has violated the Stipulation the Superintendent or their designee will present documentation to the Office of Legal Services for a final determination as to whether the Respondent violated the Stipulation and should be automatically terminated.
 - ...
 11. Respondent affirms that she has entered into this agreement freely, knowingly and openly, without coercion or duress, and that she has voluntarily waived all statutory, contractual, constitutional or other rights she may have held in this matter, including her right to a hearing in accordance with Education Law §3020-a.

II. Arguments

Defendants argue that plaintiff's complaint should be converted to an Article 78 pursuant to CPLR § 103(c). They contend that although plaintiff couches her claim in the language of contract law, in essence, her complaint seeks review of an administrative decision to terminate her employment. Defendants further argue that plaintiff's complaint should be dismissed because she failed to adduce evidence that her termination was made in bad faith. They contend that because plaintiff was under probation and does not claim defendants violated any constitutional provision, statute, or decisional law, she has no claim for reinstatement.

Plaintiff argues that her claim was properly brought as a cause of action for breach of

contract. She contends that she seeks specific performance of a contractual obligation. She further argues that she is a tenured employee and that the bad faith standard only applies to probationary employees. Finally, plaintiff argues that defendants' motion is premature, because plaintiff was not required to set out in detail all facts at the pleading stage.

III. *Conclusions of Law*

A. *Motion to Convert to Article 78 Proceeding*

Plaintiff is seeking a declaration that her termination by the Board of Education is null and void and asks for reinstatement with back pay. Though she states a breach of contract cause of action, she is challenging the determination of a governmental agency for violating a stipulation entered into as a result of agency charges and a hearing. Because her claim is fundamentally premised upon the contention that the administrative determination terminating her employment was wrongful, it should have properly been brought as an Article 78 proceeding. *See Todras v. City of New York*, 11 A.D.3d 383, 384 (1st Dept. 2004).

Plaintiff's cases cited in opposition, are inapposite. In *Barrier Motor Fuels, Inc. v. Boardman*, 256 A.D.2d 405 (2d Dept. 1998), plaintiff was seeking specific performance of a contract to construct two gas stations, which had been put on hold. In *Mitchell v. Board of Educ. of City School Dist. of City of New York*, 15 A.D.3d 279 (1st Dept. 2005), plaintiff was seeking enforcement of a stipulation maintaining her salary following reassignment. Neither case deals with an administrative determination to terminate employment. In *Golomb v. Board of Educ. of City School Dist. of City of New York*, 92 A.D.2d 256 (2d Dept. 1983), plaintiff was seeking damages alone for salary unpaid during an unlawful ouster, but was not seeking nullification of an administrative determination and reinstatement as in the case at bar. Therefore, defendants'

motion to convert to an Article 78 proceeding is granted.

B. Motion to Dismiss

It is settled that a teacher may voluntarily waive her tenure rights under Education Law § 3020-a in exchange for withdrawal of disciplinary charges. See *Abramovich v. Board of Ed. of Central School Dist. No. 1 of Towns of Brookhaven and Smithtown*, 62 A.D.2d 252 (2d Dept. 1978). As a result, with respect to absenteeism, plaintiff was essentially a probationary employee, subject to termination by the Office of Legal Services without the right to a § 3020-a hearing. Thus, during her probationary period, any dismissal due to absenteeism should be reviewed under the standard for probationary employees. See *Wilson v. Bratton*, 266 A.D.2d 140 (1st Dept. 1999) (analyzing termination of police officer on dismissal probation for previous incidents under bad faith standard); *Weir v. Bratton*, 4 A.D.3d 160 (1st Dept. 2004) (police officer on disciplinary probation failed to meet burden of showing bad faith).

Plaintiffs fail to cite any cases to counter this conclusion. The language of the Stipulation is clear; plaintiff was in a “probationary period” during which she waived her tenure right to a hearing, and could be terminated for violation of the Stipulation. Plaintiff retained her status as a tenured employee in all other aspects, but with regard to absenteeism, she was a probationary employee. Therefore, “[j]udicial review ... is limited to an inquiry as to whether the termination was made in bad faith.” *Thomas v. Abate*, 213 A.D.2d 251 (1st Dept. 1995).

Plaintiff submitted evidence of two morning court appearances in which she was a defendant/respondent. The first document indicates that the matter was adjourned at 11:40 a.m., after a court appearance. The second document demonstrates that she applied for an Order to Show Cause on June 15, at 10:45 a.m., at the courthouse and would pick up that Order to Show

Cause on June 16, 2006, the next day and the third day of absence for an alleged court appearance. Consequently, the documents submitted by plaintiff/petitioner establish that she was not summoned to court on either June 15, the morning she chose to obtain an Order to Show Cause, or June 16, the morning she was to pick up the Order. Furthermore, plaintiff does not claim she timely submitted proof of the court appearances, as required by the Stipulation. Nothing in the record indicates that defendants violated the Constitution, a statute, or decisional law. Since plaintiff has no tenable claim that her dismissal was based on bad faith, defendants' motion to dismissed is granted. *See Batista v. Kelly*, 16 A.D.3d 182 (1st Dept. 2005).

Accordingly, it is

ORDERED that the motion of defendants Board of Education of the City School District of the City of New York, et. al. to convert this action to an Article 78 proceeding, is granted; and it is further

ORDERED that the caption of the proceeding shall read:

-----X

In the Matter of the Application of

YVONNE PAGAN,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

INDEX NO. 116905/2006

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and JOEL I. KLIEN, as Chancellor of the City School District of the City of New York,

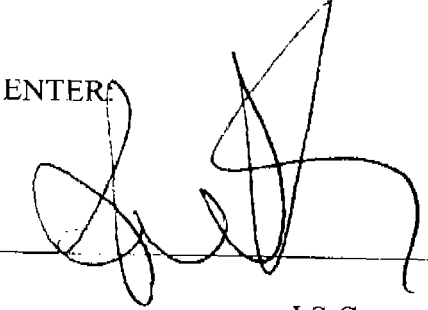
Respondents.

-----X

and it is further

ORDERED that the motion of respondents Board of Education of the City School District of the City of New York, et. al. to dismiss the Article 78 preceding, is granted.

Dated: June 18, 2007

ENTER

J.S.C.

FILED

JUL 05 2007

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