

Spano v Kings Park Cen. School Dist.
2007 NY Slip Op 33211(U)
September 25, 2007
Supreme Court, Suffolk County
Docket Number: 0001848/2007
Judge: Jeffrey Arlen Spinner
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

~~CONFIDENTIAL~~

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

ROCCO SPANO,

Plaintiff,

- against -

**KINGS PARK CENTRAL SCHOOL DISTRICT and
CSEA, LOCAL 1000, AFSCME, AFL-CIO,**

Defendants.

INDEX NO.: 2007-1848

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 03/20/07

MOTION SEQ. NO.: 002 - CASEDISP
ORIG. MOTION DATE: 05/15/07

MOTION SEQ. NO.: 003 - MD
ORIG. MOTION DATE: 06/06/07

FINAL SUBMIT DATE: 06/06/07

UPON the following papers numbered 1 to 158 read on these Motions:

- Defendant KINGS PARK's Motion (Pages 1-40 & Exhibits A-C);
- Defendant CSEA's Motion (Pages 41-68 & Exhibits A-G);
- Plaintiff's Motion (Pages 69-96 & Exhibits A-O);
- Defendant KINGS PARK's Reply (Pages 97-137 & Exhibits D-G);
- Defendant CSEA's Reply (Pages 138-158);

it is,

ORDERED, that the application of Defendant KINGS PARK is hereby granted in all respects; the application of Defendant CSEA is hereby granted in all respects; and the application of Plaintiff is hereby denied as moot, since the granting of Defendants' applications herein disposes of the within action.

Defendant KINGS PARK moves this Court for an Order dismissing the Causes of Action against Defendant Kings park, upon the grounds that:

1. Plaintiff has failed to exhaust his administrative remedies, as set for in the CBS, including that of binding arbitration;
2. Plaintiff lacks standing to assert his claims;
3. Punitive damages are not permitted in a contract claim against a municipality;
4. A fraud claim cannot be maintained, as it arises out of an alleged breach of the contract;
5. Plaintiff cannot state a claim upon which relief may be granted, as Plaintiff is not qualified for the retirement bonus.

Defendant CSEA moves this Court for an Order, pursuant to CPLR 3211(a)(7), 3211(c) and/or 3212, dismissing the Causes of Action herein against Defendant CSEA, upon the grounds that the Complaint fails to state a Cause of Action.

Plaintiff moves this Court for an Order granting Summary Judgment and/or compelling arbitration.

This action arises out of a claim for a retirement bonus at the time Plaintiff retired from employment with Defendant KINGS PARK as a Custodian, on December 29, 2006, pursuant to a Collective Bargaining Agreement (CBA) between Defendant KINGS PARK and Defendant CSEA, in the amount of \$13,000, Plaintiff also seeking \$500,000 in punitive damages and reinstatement to his former employment position.

The facts herein clearly demonstrate that Plaintiff was employed by Defendant KINGS PARK in various custodial capacities from January 4, 1995, until his retirement on December 29, 2006; that he was initially hired as a 'substitute custodian' from January 4, 1995, through August 19, 2006, during which employment he was not a member of Defendant CSEA, nor covered by the CBA between Defendants herein; that Plaintiff became a full-time employee, beginning in the capacity of 'probationary custodian', on August 20, 1996, later becoming a 'permanent custodian'; and that Plaintiff took a one year unpaid leave of absence from May 26, 2001, through May 20, 2002.

As pointed out by Counsel for Defendant KINGS PARK, in determining a Motion to dismiss, the scope of review is limited (*See: Cron v Hargro Fabrics*, 91 NY2d 362 [1998]); that said Motion will be denied if, from the four corners of the pleadings, factual allegations can be discerned which, taken together, manifest any cause of action cognizable at law (*See: 511 West 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144 [2002]); and that, if there is no rational process by which a jury could find for Plaintiff and against moving Defendant, the Court should dismiss those claims (*See: Tormey v Shell Oil Co*, 309 AD2d 856 [2 Dept 2003]).

Furthermore, if the Court converts the instant Motions into one for summary judgment pursuant to CPLR 3211(c), then in order to grant same it must clearly appear that there are no material issues of fact (*See: Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395 [1957]); the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*See: Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Sillman v Twentieth Century-Fox Film Corp*, *supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (*See: Zuckerman v City of New York*, *supra*).

In reviewing the five prongs of Defendant KINGS PARK's Motion, the Court notes the following:

- 1 As to the argument that this action must be dismissed because Plaintiff has failed to exhaust his administrative remedies, as set for in the CBS, including that of binding arbitration:

At Article V of the CBA between Defendants herein, a four step grievance process is set forth, whereby disputes are to be resolved, culminating in binding arbitration, none of which Plaintiff engaged in. It is well settled that, where an employer and a union enter into a CBA that contains grievance procedures, an employee covered by said CBA may not sue the employer directly for breach of said agreement, but must first exhaust the administrative remedies set forth in said agreement (*See: Plummer v Klepak*, 48

NY2d 486 [1979]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2 Dept 2005]; *Hall v Town of Henderson*, 17 AD3d 981 [4 Dept 2005]; *Miller v County of Broome*, 197 AD2d 170 [3 Dept 1994]). In fact, exhausting the grievance procedure becomes a condition precedent to an employee's right to file a lawsuit to enforce the contract (See: *Brown v County of Nassau*, 288 AD2d 216 [2 Dept 2001]).

It is, therefore, apparent that this action must be dismissed due to Plaintiff's failure to exhaust his administrative remedies.

2. As to the argument that this action must be dismissed because Plaintiff lacks standing to assert his claims

The CBA between Defendants herein does not contain a grant to allow an employee to sue in their individual capacity. When an employer and a union enter into a CBA that creates a grievance procedure, an employee who is subject to said CBA may not sue the employer directly for breach of that agreement, but instead must proceed through the union in accordance with that procedure (See: *Brd of Ed, Commack UFSD v Ambach*, 70 NY2d 501 [1987]) unless the CBA expressly grants the employee said right to sue in their individual capacity (See: *Tomlinson v Brd of Ed, Lakeland CSD of Shrub Oak*, 223 AD2d 636 [2 Dept 1996]; *Berlyn v Brd of Ed, East Meadow UFSD*, 80 AD2d 572 [2 Dept 1981] *affirmed* 55 NY2d 912 [1982]; *Sargent v BOCES, First Supervisory Dist, Monroe County*, 149 AD2d 921 [4 Dept 1989]); and since Plaintiff was subject to the CBA between the Defendants herein, he abrogated his individual right to sue for violations of said agreement (See: *Menkes v City of New York*, 91 AD2d 654 [2 Dept 1982] *appeal dismissed* 59 NY2d 602 *cert denied* 464 US 858 [1983]).

It is, therefore, apparent that this action must be dismissed due to Plaintiff's lacks standing to assert his claims.

3. As to the argument that the Fourth Cause of Action must be dismissed because punitive damages are not permitted in a contract claim against a municipality:

Plaintiff seeks \$500,000.00 in punitive damages, but it is well settled that political subdivisions of the state, such as school districts, are no subject to demands for punitive damages (See: *Krohn v NYPD*, 2 NY3d 329 [2004]); and that punitive damages are not available for a breach of an employment contract (See: *Wegman v Dairylea Co-op, Inc*, 50 AD2d 108 [3 Dept 1975] *appeal dismissed* 38 NY2d 918 [1976]; *Charles v Onondaga Community College*, 69 AD2d 144 [4 Dept 1979] *appeal dismissed* 48 NY2d 650 [1979]); unless the breaching party's conduct is so egregious that, in a few instances, punitive damages may be proper, such as where bath faith or a dishonest failure to carry out a contract can be demonstrated (See: *Gordon v Nationwide Mut Ins Co*, 30 NY2d 427 [1972]), for which no demonstration has been made in the instant matter.

It is, therefore, apparent that the Fourth Cause of Action must be dismissed because punitive damages are not permitted in a contract claim against a municipality.

4. As to the argument that the Fourth Cause of Action must be dismissed because a fraud claim cannot be maintained, as it arises out of an alleged breach of the contract:

Defendant KINGS PARK argues that the Court could determine that Plaintiff's Fourth Cause of Action, seeking \$500,000.00 in punitive damages, was founded in fraud, even though it is not plead with the particularity required by CPLR 3016(b), but even then, it is well settled that a cause of action sounding

in fraud will not arise when the only fraud charged relates to a breach of contract (See: *Rubinberg v Correia Designs, Ltd*, 262 AD2d 474 [2 Dept 1999]; *Colucci v O'Brien*, 204 AD2d 257 [2 Dept 1994]; *Trusthouse Forte (Garden City) Mgt, Inc v Garden City Hotel, Inc*, 106 AD2d 271 [1 Dept 1984]; *Scally v Simcona Elec Corp*, 135 AD2d 1086 [4 Dept 1987]; *Freyne v Xerox Corp*, 98 AD2d 965 [4 Dept 1983]; *Gould v Community Health Plan of Suffolk*, 99 AD2d 479 [2 Dept 1984]); and that, if the only fraud charged relates to a breach of contract, and not to the inducement of making the contract, the fraudulent breach of the contract does not give rise to an action for fraud (See: *Regnell v Page*, 54 AD2d 540 [1 Dept 1976]; *Schenkman v New York College of Health and Professionals*, 29 AD3d 671 [2 Dept 2006]). As further adeptly pointed out by Counsel for Defendant KINGS PARK, in a fraud claim punitive damages are not generally permitted unless Defendant's conduct was sufficiently egregious to warrant such relief (See: *Reinah Development Corp v Kaaterskill Hotel Corp*, 59 NY2d 482 [1983]), for which, as stated herein above, no demonstration has been made in the instant matter.

It is, therefore, apparent that the Fourth Cause of Action, even if the Court were to determine that same was founded in fraud, must be dismissed because it arises out of an alleged breach of contract and because punitive damages are not permitted in a fraud claim.

5. As to the argument that Plaintiff cannot state a claim upon which relief may be granted, as Plaintiff is not qualified for the retirement bonus:

First, the Court notes that the CBA between Defendants set forth a Retirement Bonus at Article XXV thereof, which required 10 years of completed service with Defendant KINGS PARK, specifically stating at Section B thereof that "Ten years of completed service means continuous service except that persons on an approved leave or excused persons shall neither lose accrued time nor gain time because of said leave or layoff". Section D thereof doubled the retirement bonus for those who gave notice of resignation for retirement on or before March 1, 2006.

The Court then notes that Plaintiff began working for Defendant KINGS PARK on January 4, 1995, as a 'substitute custodian', in which position he continued until August 19, 1996. During said time, Plaintiff was not a dues-paying member of Defendant CSEA, nor covered by any CBA between Defendants. Thereafter, on August 20, 1996, Plaintiff became a full-time custodian, first completing his probationary period, and then attaining permanent status. Plaintiff then took a one year unpaid leave of absence from May 26, 2001, through May 20, 2002, which according to the language clearly set forth in the CBA did not contribute time toward his employment service. On or about February 28, 2006, Plaintiff informed Defendant KINGS PARK of his resignation for retirement, to be effective December 29, 2006, apparently in an attempt to comply with the double Retirement Bonus set forth in the CBA.

It is undisputed that Plaintiff was employed by Defendant KINGS PARK from January 4, 1995, to December 29, 2006. The evidence submitted demonstrates that Plaintiff was not a member of Defendant CSEA, and therefore not covered by any CBA between Defendants herein, until August 20, 1996. The evidence submitted further demonstrates that Plaintiff took a one year leave of absence from May 26, 2001, to May 20, 2002. This leaves Plaintiff with 9 years and 4 months completed service upon his retirement, insufficient to meet the requisite 10 year service completion set forth on the CBA regarding the Retirement Bonus.

Treating this application as a Motion for summary judgment pursuant to CPLR 3211(c), it is clear that Defendant KINGS PARK has successfully made a *prima facie* showing of entitlement to judgment as

a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, which Plaintiff has not been able to refute.

The Court is reminded that Plaintiff has also petitioned this Court for reinstatement at his prior position, but it is also well settled law that once a Board of Education has accepted a letter of resignation, the retiring employee may not withdraw it (*See: Schmitt v Hicksville UFSD*, 200 AD2d 661 [2 Dept 1994]; *Sherman v Brd of Ed, Hendrick Hudson CSD*, 88 Misc2d 661 [Westchester Co SupCt 1976]; *Totevski v Brd of Ed, Hempstead Public School*, 178 Misc2d 758 [Nassau Co SupCt 1998]).

It is, therefore, apparent that this action must be dismissed because Plaintiff cannot state a claim upon which relief may be granted, as Plaintiff is not qualified for the retirement bonus.

In reviewing Defendant CSEA's application for an Order dismissing the Causes of Action herein against it upon the grounds that the Complaint fails to state a Cause of Action against said Defendant, the Court notes that, as per the transcript submitted by Defendant CSEA of the deposition of Plaintiff, it is clear Plaintiff testified he tendered his notification to Defendant KINGS PARK that he would retire effective December 29, 2006, before he discussed his eligibility for the Retirement Bonus with Defendant CSEA. Furthermore, according to the affidavit of Defendant CSEA's Unit President for the Kings Park SD, he did not even notify Defendant CSEA that Defendant KINGS PARK had taken the position that he was not eligible for same until October, 2006, even though he had been so informed for the first time in April, 2006.

In light of the above, Plaintiff cannot sustain the allegations contained in the Complaint herein that Defendant CSEA misinformed him he was eligible for a retirement bonus, nor that he relied upon such misinformation to his detriment. In order to establish a claim against one's union, the claim must be treated as a breach of the duty of fair representation (*See: Roman v City Employees Union*, 300 AD2d 142 [1 Dept 2002] *appeal denied* 100 NY2d 510 [2003]; *Dolce v Bayport-Blue Point UFSD*, 286 AD2d 316 [2 Dept 2001]; *Mamorella v Derkasch*, 276 AD2d 152 [4 Dept 2000]; *Harrington v CSEA*, 130 AD2d 961 [4 Dept 1987]). Furthermore, to establish such a breach, the evidence must demonstrate that the union's conduct was arbitrary, discriminatory, or in bad faith (*Ponticello v Suffolk County*, 225 AD2d 751 [2 Dept 1996]; *Garvin v PERB*, 168 AD2d 446 [2 Dept 1990]; *Vaca v Sipes*, 386 US 171 [1967]). Given the failure to seek timely counsel, and the failure to timely forward Defendant KINGS PARK's denial of eligibility, no such demonstration could be made herein, and the Cause of Action against Defendant CSEA must be dismissed.

In light of the above, this action must be dismissed in its totality, the Complaint dismissed and the action disposed. Therefore, Plaintiff's application for an Order granting Summary Judgment and/or compelling arbitration must be denied in all respects, as it is now moot.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Defendant KINGS PARK for an Order dismissing the Causes of Action against Defendant Kings park, upon the grounds that:

1. Plaintiff has failed to exhaust his administrative remedies, as set for in the CBS, including that of binding arbitration;
2. Plaintiff lacks standing to assert his claims;
3. Punitive damages are not permitted in a contract claim against a municipality;
4. A fraud claim cannot be maintained, as it arises out of an alleged breach of the contract;

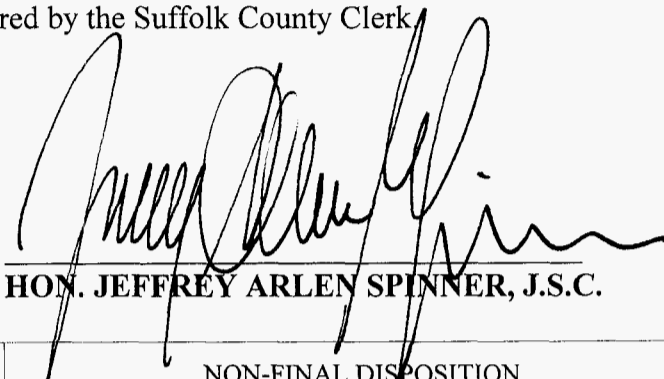
5. Plaintiff cannot state a claim upon which relief may be granted, as Plaintiff is not qualified for the retirement bonus; is hereby granted in all respects, the Complaint is hereby dismissed and the action disposed; and it is further

ORDERED, that the application of Defendant CSEA for an Order dismissing the Causes of Action herein against Defendant CSEA, upon the grounds that the Complaint fails to state a Cause of Action is hereby granted in all respects, the Complaint is hereby dismissed and the action disposed; and it is further

ORDERED, that the application of Plaintiff for an Order granting Summary Judgment and/or compelling arbitration is hereby denied in all respect, as moot, since this action has been dismissed; and it is further

ORDERED, that Counsel for Defendants are hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties and upon the Calendar Clerk of this Court and the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: Riverhead, New York
September 25, 2007



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Ahern & Ahern, Esqs
Attorneys for Plaintiff
One Main Street
Kings Park, New York 11754

Ingerman Smith, LLP
Attorneys for Defendant KINGS PARK
150 Motor Parkway, Suite 400
Hauppauge, New York 11788

Nancy E Hoffman, Esq
Attorney for Defendant CSEA
PO Box 7125, Capitol Station,
143 Washington Avenue
Albany, New York 12224