

Fischer v Melville Fire Dist.

2008 NY Slip Op 30520(U)

February 6, 2008

Supreme Court, Suffolk County

Docket Number: 0011039/2004

Judge: Robert W. Doyle

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.

Fischer v Melville Fire District, et al.
Index No. 04-11039
Page No. 2

This action arises out of the defendants' alleged failure to obtain the disability insurance coverage required by their collective bargaining agreement. By the instant motion, defendant, Melville Fire District (hereinafter District), renews its prior motion (#005) for an award of summary judgment or partial summary judgment dismissing all or part of the plaintiff's amended complaint pursuant to the terms of a prior order of this court dated August 23, 2007 (Doyle, J).

By his pleadings, the plaintiff contends that the defendant, Melville Fire District Employees Association of Firefighters Local 2843, AFLCIO (hereinafter Union), represented him in negotiating a Collective Bargaining Agreement (CBA) with the District. The CBA covered the period from January 1, 2001 to December 31, 2003. At the time the CBA was executed, the plaintiff was employed by the District as a dispatcher and was a "dues paying" member of the Union. The CBA set forth the terms of the plaintiff's employment by the District. Article XV[A][3] of the CBA provided that the District would provide its employees with a Special Disability Plan (SDP) which would cover them if they were unable to work at their "*current occupation*" because of a long term illness or injury, other than that covered by the Workmen's Compensation Law. Under the terms of the SDP, as required by the CBA, a covered employee would receive his or her daily salary for each day absent from work at a rate of 100% for the first 30 days, 80% for the next five months and 60%, starting at the beginning of the seventh month of absence and continuing until the employee was 65. After the CBA was executed, the plaintiff and other members of the Union paid additional dues to help the District defray the cost of the upgraded SDP.

Prior to August of 2001, the plaintiff worked as a dispatcher for the District and was member in good standing of the Union. However, the plaintiff suffered a heart attack on August 13, 2001, and was purportedly found to be unable to work at his job as a dispatcher. During the next six months, he received the 100% and 80% payments provided for under the terms of the SDP. On February 9, 2002 he started receiving monthly long term disability payments of \$2,281 which represented 60% of his salary pursuant to the SDP. Prior to this date, and while still an active member, the plaintiff expressed his concern to the Union that the disability insurance procured by the District provided benefits for only up to two years of disability unless at the end of that period he could demonstrate his total disability, *to wit*, an inability to perform "*any occupation*". Plaintiff asserts that this provision was inconsistent with the SDP required by the CBA which would have provided coverage to the plaintiff until the age of 65 if he was unable to perform the duties of a dispatcher.

Notwithstanding the plaintiff's communication of these concerns before and after his retirement on August 31, 2002, the Union refused to meet with the plaintiff, and refused to analyze the merits of his claim, represent him and/or otherwise assist him with his claim. Although the President of the Union, Anthony Nicholes (Nicholes), informed the plaintiff that the Union had neither the standing nor obligation to represent him because of his retirement, the plaintiff attributes the Union's failure to act to the fact that he was the only member of the Union seeking long term

Fischer v Melville Fire District, et al.
 Index No. 04-11039
 Page No. 3

disability benefits under the CBA and to its concern for public scrutiny for its mistake in not confirming that the District had purchased the proper insurance.

The plaintiff further alleges that the District was aware that the Union had refused to represent him in this matter. On September 10, 2002, the plaintiff, his attorneys, the District's attorneys, the District Chairman and Commissioner met, without a Union representative present, to discuss the merits of his claim. The District continued to try to resolve this dispute through subsequent correspondence with his attorneys. According to the plaintiff, this conduct constituted a waiver of any right on its part to insist that the plaintiff adhere to the grievance procedures set forth in the CBA in order to litigate its claim. The plaintiff continued to receive the monthly disability payment of \$2,281 for twenty four consecutive months with the last payment being made on February 8, 2004. Finally, the plaintiff avers in the complaint, that these payments stopped although he was still unable to work as a dispatcher because of long term disabilities.

By the first three causes of action set forth in the amended complaint, the plaintiff asserts that the District breached terms of the CBA in effect when plaintiff suffered his heart attack and became disabled in August of 2001. The fourth and sixth causes of action, wherein the Union was charged with negligence in failing to perform its duty to make the District purchase the correct SDP policy in compliance with the terms of the CBA, were dismissed pursuant to CPLR3211 in a prior order issued herein on April 4, 2005 (Oliver, J). However, the fifth cause action, wherein the plaintiff alleges that the Union acted in bad faith and breached its duty of fair representation by failing to represent him with regard to this claim, was sustained as legally sufficient in the prior order of Justice Oliver dated April 4, 2005. The Union's subsequent motion (#006) for summary judgment dismissing the fifth cause of action was denied by order of this court dated, August 23, 2007 (Doyle, J.). Said order, stated in relevant part as follows:

.....a union has broad discretion as to whether and the manner in which it will pursue a grievance against an employer (*Chauffeurs, Teamsters and Helpers, Local No. 391 v Terry*, 494 US 558, 110 S. Ct. 1339, 108 L. Ed.2d 519 [1990]). Mere negligent conduct by the Union does not constitute a breach of the duty of fair representation (*Smith v Sipe*, 67 NY2d 928, 502 NYS2d 134 [1986]). However, "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion...." (*Vaca v Sipes*, 386 US 171, 191, 87 S Ct. 903, 917, 17 L Ed.2d 842 [1967]).

As this Court has already noted herein, a union's conduct may

Fischer v Melville Fire District, et al.
 Index No. 04-11039
 Page No. 4

be considered arbitrary if it fails to address or investigate the merits of its member's claim or addresses the claim in a perfunctory manner (*Vaca v Sipes, supra; Jackson v Regional Transit Service*, 54 AD2d 305, 388 NYS2d 441 [1976]; *DiMola v Local Union 808, Intern. Broth. of Teamsters, Chauffeurs and Warehousemen of America*, 95 Misc2d 910, 408 NYS2d 731 [1978]; *see, Wingenbach v Mushroom Transportation Co., Inc.*, 51 AD2d 855, 379 NYS2d 567 [1976]). "Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of...inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation" (*Griffin v International Union, UAAAIWAWA*, 469 F2d 181, 183 [1972])

.....the Union's submissions have raised triable issues of fact as to whether a grievance regarding this issue was filed by the plaintiff in 2001 and whether that grievance was meritorious. Assuming, ad arguendo, that the plaintiff had filed a meritorious grievance, the Union's submissions also raise a triable issue of fact as to whether Union officials, knowing or having reason to know that the terms of the Phoenix policy did not conform to the terms of the SDP, neglected or refused to investigate the merits of the plaintiff's grievance. This purported failure raises a triable issue of fact as to whether the Union breached its duty of fair representation (*Smith v Hussman Refrig. Co.*, 619 F2d 1229, 1243 [1980], *cert den* 449 US 839, 101 S.Ct. 116, 66 L.Ed.2d 46).

By the instant motion (#008), the District moves, *inter alia*, for summary judgment dismissing the plaintiff's amended complaint to the extent that it asserts claims against it, all of which sound in the District's breach of the terms of the CBA in effect when plaintiff suffered his heart attack and became disabled in August of 2001. This portion of the motion is singularly predicated upon the District's claims that the plaintiff's failure to establish that the Union breached its duty of fair representation warrants a denial of the plaintiff's claims against the District, as said claims are entirely dependent on the successful prosecution of the plaintiff's claims against the Union. The District's position is premised upon the following statement set forth in the April 4, 2005 order of Justice Oliver:

The District correctly notes that in order for the plaintiff to ultimately establish the District's liability for breach of the CBA,

Fischer v Melville Fire District, et al.
Index No. 04-11039
Page No. 5

he must, as a predicate to the action, demonstrate a breach by the Union of its duty of fair representation (*Board of Education v Ambach*, 70 NY2d 501, 522 NYS2d 831 [1987], cert. den. *Margolin v Board of Education*, 485 U.S. 1034, 99 L.Ed2d 908, 108 S.Ct. 1593).

For the reasons set forth below, the District's motion is denied.

Summary judgment is drastic remedy and should only be granted when it clearly appears that no material question of fact is presented (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since it is the procedural equivalent of a trial, any doubt as to the existence of a triable issue, or where the existence of a material issue of fact is arguable, the motion should be denied (*Peerless Insurance Company v Allied Building Products Corp.*, 15 AD3d 373, 79C NYS2d 474 [2005]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, as such party must affirmatively demonstrate the merit of his or her claim or defense as a matter of law (*Velasquez v Gomez*, 44 Ad3d 649, 843 NYS2d 368 [2007]).

To be entitled to summary judgment dismissing the plaintiff's amended complaint, the District was required to establish that the plaintiff's last, surviving claim against the Union, namely, that it breached its duty of fair representation, is, as a matter law, without merit. Review of the record adduced on the instant motion reveals, however, that the District, like the Union before it on its prior motion (#006) for summary judgment, failed to adduce proof sufficient to eliminate all material facts regarding the absence of actionable conduct on the part of the Union, thereby entitling the District to the summary judgment demanded by it. As the plaintiff points out, the District principally relies on evidence which the Union presented in support its prior motion (#006) for summary judgment, which motion, this court denied in its August 23, 2007 order. Therein, the court found that several material questions of fact existed which precluded the granting of the Union's motion for summary judgment. Those questions of fact have not been eliminated by the proof adduced on this motion by the District.

Moreover, this court previously noted on page 13 of its order of August 23, 2007, that "the *ad hoc* determination of whether a union's duty of fair representation has been breached is, generally, a factual one (*Civil Service Bar Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York*, 64 N.Y.2d 188, 195, 485 N.Y.S.2d 227, 230 - 231 [1984] *supra*) and the union's conduct will not be considered arbitrary unless "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor*

Fischer v Melville Fire District, et al.
Index No. 04-11039
Page No. 6

Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953), as to be irrational” (*Air Line Pilots Ass’n, Intern. v. O’Neill*, 499 U.S. 65, 67, 111 S.Ct. 1127, 1130, 113 L. Ed.2d 51 [1991]). The District’s failure to produce the proof necessary to eliminate material questions of fact regarding actionable conduct on the part of the Union warrants a denial of those portions of the District’s motion wherein it seeks summary judgment dismissing the plaintiff’s amended complaint in its entirety.

The remaining portions of the District’s motion wherein it demands partial summary judgment dismissing the plaintiff’s claims for a declaration that the District is obligated to provide him with monthly disability benefits from February 8, 2004, through the date on which the plaintiff reaches age 65, are also denied. In support thereof, the District asserts that it is not liable to pay the plaintiff the disability benefits demanded because the District’s obligation to provide plaintiff with disability benefits was fulfilled by its purchase of a disability insurance policy and was limited by the terms thereof. Underlying these assertions is the District’s claim that the terms of its obligations to provide disability benefits in accordance with the CBA (Collective Bargaining Agreement) and its Special Disability Plan provisions were limited by the terms of the disability policy purchased by the District in discharge of its obligations to provide disability benefits to its employees. However, the court rejects these claims and assertions as unmeritorious.

It is axiomatic that the fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent and the best evidence of what the parties to a written agreement intend is that which they say in their writing (*Henrich v Phazar Antenna Corp.*, 33 AD3d 864, 827 NYS2d 58 [2007]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Greenfield v Phillies Records*, 98 NY2d 562, 750 NYS2d 565 [2002]). Circumstances or evidence extrinsic to the agreement will not be considered when the parties intent is clear from the four corners of their agreement (*Katina, Inc v Famiglietti*, 306 AD2d 440, 761 NYS2 327 [2003]). Evidence outside the four corners of the document regarding what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (*South Road Associates, LLC, v International Business Machines Corporation*, 2 AD3d 829, 770 NYS2d 126 [2003]).

Here, the provisions of the terms of the CBA at issue are complete and unambiguous. The district’s attempt to limit or alter the terms thereof by resort to the terms of the of the disability insurance policy it purchased in an effort to defray the costs of providing the disability benefits it was obligated to provide to its employees under the terms of the CBA constitutes an impermissible resort to extrinsic evidence under the above cited rules of contract interpretation. The District thus failed to establish, *prima facie*, that it satisfied its obligations under the CBA to provide disability benefits and is thus not liable to the plaintiff for any further payments of such benefits. Accordingly, those portions of the instant motion by the District for partial summary judgment dismissing the plaintiff’s claims for an adjudication of the District’s liability for the past unpaid and future

Fischer v Melville Fire District, et al.

Index No. 04-11039

Page No. 7

disability benefits demanded by the plaintiff are denied.

In his opposing papers, the plaintiff demands an award of reverse, partial summary judgment on his claims that the District is liable for payment of all of the unpaid disability benefits demanded by him. In support of such demand, the plaintiff asserts that the evidence adduced on the instant motion demonstrates the absence any factual issues regarding the District's failure to provide employees such as the plaintiff with disability benefits through age 65 in the event that they were unable to work at their "current occupation" because of a long term illness or injury, other than that covered by the Workmen's Compensation Law. Instead, the District provided only two years of disability coverage at the 60% of salary rate to employees unable to work unless the employee could establish that he or she was totally disabled, *i.e.*, unable to work at any occupation. Plaintiff argues that the fact that this limitation of coverage was the same as that prescribed by the policy of insurance which the District purchased to cover the disability claims of its employees is of no consequence and does not relieve the District of its obligation to provide benefits commensurate with the terms of the CBA and its Special Disability Plan provisions. The plaintiff thus claims an entitlement to an award of reverse, partial summary judgment on the issue of the District's liability for its failure to provide him with disability benefits through age 65 at the 60% of salary rate set forth in the CBA.

With these contentions the court agrees. The 2001-2003 CBA in effect at the time of the plaintiff's disability unequivocally obligated the District to provide its employees with a Special Disability Plan (SDP) which would cover them if they were unable to work at their "*current occupation*" because of a long term illness or injury, other than that covered by the Workmen's Compensation Law. A disabled employee who could not perform his or her occupation was entitled to receive 100% of his or her salary for the first 30 days; from the 31st day to six months, 80% of his or her salary; from the start of the seventh month to age 65, 60% of said salary. The CBA did not require that the employee be totally disabled in the sense that he or she could not work at any occupation. There is no dispute regarding the fact that the plaintiff's disability rendered him unable to work at his, then, current job as a dispatcher as contemplated by the CBA. The fact that the terms of the insurance policy purchased by the District limited the plaintiff's receipt of benefits to a period of thirty months after his heart attack because the plaintiff did not establish that he was totally disabled and thus unable to work at any occupation, did not relieve the District of liability for its breach of the obligations imposed upon it with respect to providing disability benefits under the terms of the CBA.

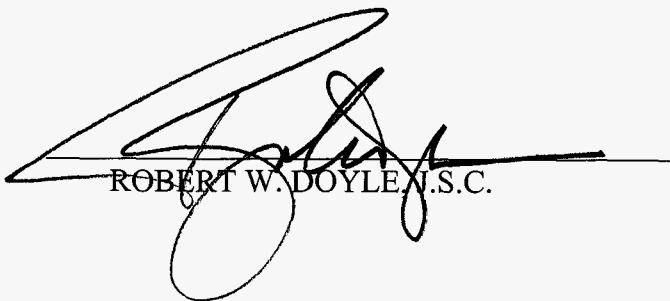
The court thus finds that the evidence adduced on the instant motion is sufficient to support an award of partial summary judgment in favor of the plaintiff pursuant to CPLR 3212(e) on the issue of the District's liability for payment of the disability benefits demanded by the plaintiff. Since, however, the District's liability to the plaintiff for unpaid, disability payments is dependent upon the plaintiff's successful prosecution of its remaining claim against the Union, which sounds

Fischer v Melville Fire District, et al.
Index No. 04-11039
Page No. 8

in breach of its duty of fair representation, the plaintiff's award of partial summary judgment on the issue of the District's liability for unpaid, disability benefits is expressly conditioned upon and subject to the plaintiff's successful prosecution of his claims of unfair representation against the Union.

In view of the foregoing, the instant motion (#008) by defendant, Melville Fire District, for summary judgment dismissing the plaintiff's amended complaint, or in the alternative, for partial summary judgment dismissing plaintiff's claims of entitlement to monthly disability benefits until he reaches the age of 65, is denied. Pursuant to CPLR 3212(e), the plaintiff is awarded partial summary judgment on the issue of the District's liability for payment of the subject disability benefits from February 8, 2004, until the plaintiff reaches the age of 65, but said award is expressly conditioned upon and subject to the plaintiff's successful prosecution of his claims of unfair representation against the Union.

Dated: FEB 06 2008


ROBERT W. DOYLE, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION