School Adm'rs Assoc. N.Y. State Nassau Boces Ch. v Board of Coop. Educ. Servs. of Nassau County

2008 NY Slip Op 30993(U)

March 31, 2008

Supreme Court, Nassau County

Docket Number: 1474-07/

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

SCHOOL ADMINISTRATORS ASSOCIATION NEW YORK STATE NASSAU BOCES CHAPTER, EDUCATIONAL ADMINISTRATORS ASSOCIATION and CAROLINE MEYER,

Plaintiff(s),

-against-

MOTION DATE: 2/13/08
INDEX NO.: 21474/07
SEQ. NO. 1

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF NASSAU COUNTY,

Defendant(s)

The defendant's motion, pursuant to CPLR §311(a)(7) and 3211(a)(7) and Education Law §§ 2(13) and 3813(1), to dismiss the plaintiff's complaint is determined as hereinafter provided.

The plaintiff Caroline Meyers is employed by the defendant as an Assistant Principal at the Joseph M. Barry Career and Technical Education Center pursuant to a collective bargaining agreement (see defendant's Exhibit 1). The plaintiff School Administrators Association New York State Nassau Boces Chapter, Educational Administrators Association is Ms. Meyer's sole and exclusive bargaining representative in accordance with the agreement (id. at §1.1). In or about June, 2007 she received an "unsatisfactory" evaluation report for the 2006-2007 school year from her Principal, James Clark (see plaintiff's Exhibit A), and, as a result, was denied a salary increase for the following year. After exhausting the agreement's three step grievance procedure (Article 8), on October 23, 2007 the plaintiffs served a notice of claim upon "Stephen B. Witt, District Clerk" by certified mail, return receipt requested (see plaintiffs' Exhibit B). On or about November 13, 2007 the defendant served a demand for examination pursuant to Education Law §3813 (see defendant's Exhibit 3). The plaintiffs did not comply but on December 3, 2007 filed this

breach of contract action.

More specifically, their complaint (see defendant's Exhibit 1) purports to plead two separate and distinct causes of action for breach of the collective bargaining agreement. The initial cause of action alleges, inter alia, that the evaluation was arbitrary and capricious (para. 28) because the defendant violated the guidelines for evaluation of educational administrators (i.e., Board Regulation 3120R.1). Instead of compensatory damages, the relief requested is, however, a direction that the evaluation "be changed from unsatisfactory to satisfactory and [that] the unsatisfactory evaluation should be expunged from [Ms. Meyer's] file" (para. 28). The other purported cause of action asserts that the defendant violated Article 3 (Salaries) of the agreement by denying the plaintiff a salary increase for the 2007-2008 school year (para. 29). Notwithstanding the plaintiffs' formulation of these claims as sounding in breach of contract, in addition to the foregoing remedy, the wherefore clause demands a variety of declaratory relief.

The defendant presently seeks to summarily dismiss the complaint citing various alleged procedural and substantive deficiencies. Initially, contrary to the plaintiffs' contention, Ms. Meyer lacks standing to institute an action in her individual capacity. "In the absence of a contract provision stating otherwise, an employee may proceed directly against the employer only when the union fails in its duty of fair representation" (Hickey v Hempstead Union Free School District, 36 AD3d 760, 761; see Matter of Board of Education, Commack Union Free School Dist. v Amback, 70 NY2d 501). The plaintiffs have not advanced a claim of unfair representation against the union and their reliance upon §8.2 (i.e., step 3 of the grievance procedure) is misplaced. That provision merely states that a "unit member and/or his/her representative" may proceed to step 3 to review the determinations made at the initial two steps. It does not constitute an exception to the union's status as the member's sole and exclusive bargaining representative.

Conversely, the plaintiffs' October 23, 2007 Notice of Claim (see defendant's Exhibit 2) appears to have been validly served (see Education Law §3813[1]) since it was sent by certified mail,

return receipt requested, to Mr. Witt (see plaintiffs' Exhibit B) who is identified on the defendant's website as a member of its Board since 1996 (see plaintiffs' Exhibit C). The plaintiffs also adequately pleaded compliance with §3813(1) (see defendant's Exhibit 1, para. 8).

However, "[t]he courts of this State have consistently required strict compliance with the statutory procedures for the institution of claims against the State and its governmental subdivisions" (Franz v Board of Education of the Elwood Union Free School District, 112 AD2d 934, 935, lv. to app. den., 67 NY2d 603 [1986]). Pursuant to CPLR §311(a)(7), service upon a school district is effectuated by serving "a school officer". Education Law §2(13) defines "school officer" as:

> "a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education or other body in control of the schools by whatever name known in a union free school district, central school district, central high school district, or in a city school district; a superintendent of schools; a district superintendent; a supervisor of attendance or other attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system"

Here, the December 3, 2007 affidavit of the plaintiffs' process server, John F. Barry (see plaintiffs' Exhibit E), avers that at 10:55 a.m. on that date a copy of the plaintiffs' summons and complaint were served upon "Marie Schilling" as a corporate agent authorized to accept service. Ms. Schilling reportedly "informed Barry that the Superintendent was not available but that she was authorized to receive service of the Summons and Verified Complaint (see 2/05/08 affirmation in opposition of John C. O'Dea, Esq., para. 14). Ms. Schilling has repeatedly denied stating that she was authorized to accept service of the pleading. Instead, she asserts that as a "senior stenographer" she performs clerical services within the District Superintendent's office but is not allowed to accept service of process.

She contends that on December 3, 2007 at approximately 10:55 a.m. a man approached her desk, identified himself as "Louis D. Stober, Jr." (i.e., plaintiffs' counsel) and, without inquiry, simply handed her the pleading (see 12/20/07 and 2/8/08 affidavits). She recorded the incident in a "Legal Document Transmittal Form" (see Exhibit 2 to the 2/11/08 reply affirmation of Edward H. McCarthy, Esq.). Mr. Stober's February 5, 2008 affirmation denies Mr. Schilling's account and avers that at that time he was in his office (see plaintiff's Exhibit D). In any event, a "senior stenographer" is unauthorized to accept service (see Education Law §2[13]). Therefore, "[b]ecause strict compliance [with CPLR §311(a)(7) and Education Law §2(13)] was required, [even assuming, arguendo, that Mr. Barry's version of events is accurate], it is irrelevant that [he] relied upon [Mr. Schilling's] representations ... that [she] was authorized to receive service of process" (Franz supra at 935). Accordingly, service of the plaintiffs' December 3, 2007 pleading upon the defendant was defective and its motion to dismiss the complaint is granted.

The remaining branch of the defendant's motion which seeks to dismiss the pleading, pursuant to CPLR 3211(a)(7), due to its alleged failure to state a valid cause of action is dismissed as academic.

Dated: 3-31-08

A.J.S.C.
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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE