

**Colon v New York City Bd. of Educ.**

2008 NY Slip Op 31388(U)

May 6, 2008

Supreme Court, New York County

Docket Number: 0115361/2006

Judge: Paul G. Feinman

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

PRESENT: PAUL G FEINMAN

PART 52

*Justice*

Index Number : 115361/2006

COLON, HIPOLITO

INDEX NO. 115361/06

vs

BOARD OF EDUCATION

MOTION DATE 3-11-08

Sequence Number : 008

MOTION SEQ. NO. 008

ORDER OF PROTECTION

MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3

4, 4A

5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/6/08

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
HIPOLITO COLON,

Plaintiff,

against

Index Number 115361/2006  
Submission Date 3-11-2008  
Mot. Seq. No. 008

NEW YORK CITY BOARD OF EDUCATION,  
JOEL KLEIN, CHANCELLOR, MICHAEL BEST,  
GENERAL COUNSEL FOR THE NYCBOE; THE  
PANEL FOR EDUCATIONAL POLICY, all in their  
individual and official capacities; PS 120 PRINCIPAL  
LISA CARABALLO; JAMES SANDNER ESQ.,  
GENERAL COUNSEL, NYSUT, and CLAUDE  
I. HERSCH, ASSISTANT GENERAL COUNSEL,  
Defendants.

**DECISION AND ORDER**

-----X

**For the Plaintiff:**  
Hipolito Colon, *pro se*  
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**For the Defendant:**  
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By: Carolyn Walker-Diallo, Esq.  
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**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Papers considered in review of this motion for a protective order:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation, Memo of Law.....	1, 2, 3
Affidavit in Opposition, Aff. of Service .....	4, 4A
Defendant's Memo of Law in Further Support.....	5

**PAUL G. FEINMAN, J.:**

Defendants move for a protective order pursuant to CPLR 3103. For the reasons which follow, the motion is granted.

Plaintiff, who is self represented, is a teacher for the New York City Department of Education, sued here as the Board of Education(BOE). He alleges that after he reported wrong doings by the principal of his school, he was retaliated against by being removed from his teaching position in January 2006, and now reports to the BOE reassignment center. He asserts

certain contractual rights including the right to a disciplinary hearing, pursuant to the collective bargaining agreement, and also seeks compensatory and punitive damages for the intentional infliction of emotional harm.<sup>1</sup>

The parties are conducting disclosure. Defendant Liza Caraballo has been at least partially deposed. Previously, on January 29, 2008, another justice of this court denied plaintiff's motion to schedule the depositions of Chancellor Joel Klein, and non-party Lydia Arnold, but directed that the depositions would be addressed at the next scheduled compliance conference held in the Supreme Court's Differentiated Case Management part (*Colon v New York City Bd. of Educ.*, 115361/2006 [seq. no. 7], Rakower, J.). Thereafter, plaintiff served defendants with a subpoena for the deposition of Chancellor Klein on February 13, 2008 (Pl. Aff. in Opp. Ex. B).

Defendants move for a protective order pursuant to CPLR 3103. They argue that plaintiff has not demonstrated that Chancellor Klein has knowledge that is material and necessary to the prosecution or defense of the litigation, nor that, as a high-ranking official, he possesses unique personal knowledge that could not be obtained from any other source.

Plaintiff argues that Chancellor Klein, as the administrator appointed by the Mayor who has control over the public school system, has probative evidence that necessitates his deposition. The gravamen of his complaint is that he has been denied a hearing, in violation of his due process and contractual rights, following his unlawful removal from the classroom after he complained about acts of his principal. He now contends that defendants have been "discarding" teachers without allowing them an opportunity to be heard or defend themselves, and that only

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<sup>1</sup>The claims against Michael Best and the individual members of the Panel for Educational Policy have been dismissed based on lack of personal jurisdiction.

through the deposition of the chancellor, and of co-defendant Caraballo, the principal of his school, can plaintiff gather information to prove his case (Colon Aff. in Opp. ¶ 52).

Plaintiff alleges that after he was removed from his teaching position, his termination was discussed on September 19, 2006, by an executive session of the BOE, called the Panel for Educational Policy, which threatened to vote him out of his employment without notifying him of the charges and specifications against him, and that Chancellor Klein is the Panel's Chair and has ultimate decision-making power over the Panel's actions. Plaintiff seeks to ask the chancellor the "crucial" question of why he is working without a contract, in violation of Education Law sec. 2590-h (Colon Aff. in Opp. ¶ 26). He also states that on November 27, 2006, the chancellor declared, in public, that anyone in the reassignment room was guilty of conduct such as sexual misconduct or corporal punishment, thus impliedly accusing plaintiff of some sort of misconduct. He also seeks to question the chancellor concerning comments made on September 26, 2006 concerning the reassignment room, as well as "threats of terminating Plaintiff *as if he had* personal information" (Colon Aff. in Opp. ¶¶ 27-28, emphasis added).<sup>2</sup> He contends that the statements made then and thereafter by the chancellor are "personally insulting and directed toward plaintiff" (Colon Aff. in Opp. ¶ 37). He seeks to hold the chancellor accountable for those remarks, and to "obtain valid proof of Defendant Klein's statements and discover his administrative ability to carry out any decisions at all, due to his not having a contract" (Colon Aff. in Opp. ¶ 39).

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<sup>2</sup>Plaintiff's papers refer to certain internet sites, including a posting on the website YouTube which is a video of part of a public hearing at which plaintiff spoke and the chancellor responded. The Courts' computers do not permit it to have access to sites such as YouTube, and thus the content has not been viewed or considered.

Finally, he argues that as the previously assigned justice denied defendants' motion to dismiss the chancellor from the litigation, and more recently signed a subpoena for a deposition to occur on March 4, 2008, this court should not now grant defendants' motion for a protective order. He argues that the chancellor is a public employee and must be held accountable for his actions, that the Panel acts in secrecy, and that if a protective order is granted, there will be no way to shine a light on its proceedings or promote the public good.

CPLR 3101 provides that parties have the right to "full disclosure of all matter material and necessary to the prosecution or defense of an action." The courts retain the authority under CPLR 3103 (a) to quash discovery (*see, e.g., Matter of Lange [Doe v Roman Catholic Diocese of Dallas]*, 170 Misc 2d 43 [Sup Ct, NY County 1996], *aff'd* 245 AD2d 118 [1st Dept. 1997]). Subpoenas have been quashed based on an independent determination that the material sought is not critical or necessary (*see, Matter of Brown & Williamson Tobacco Corp. v Wigand*, 228 AD2d 187 [1st Dept 1996]), and to prevent harassment (*Matter of Lange v Roman Catholic Diocese of Dallas, supra*). When the witness is a high ranking official, the courts are to place "reasonable limits" on deposition requests so as to conserve their time and energies and prevent the disruption of the primary functions of the government (*Community Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 [D.D.C. 1983]). As said elsewhere, "common sense suggests that a member of the Cabinet and the administrative head of a large executive department should not be called upon personally to give testimony by deposition, either in New York or elsewhere, unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it." (*Wirtz v Local 30, Int'l Union of Operating Eng'rs*, 34 F.R.D. 13, 14 [S.D.N.Y. 1963]). A party seeking a

deposition of a high ranking official must therefore show that the official has information that cannot be obtained from any other source and that a deposition would not interfere significantly with the official's ability to perform his or her governmental duties (*Martin v Valley Nat'l Bank*, 140 F.R.D. 291, 314 [SDNY 1991]).

Defendants state that plaintiff has now deposed his principal, co-defendant Caraballo, who has knowledge concerning the charges and specifications served on him and his placement in the reassignment center, and has also deposed the non-party witness, Arnold (Def. Memo in Furth. Supp. p. 2).<sup>3</sup> Furthermore, defendants' attorney states in the memorandum of law in support of their motion, although without including an affidavit from someone with first hand knowledge, that plaintiff would not be terminated by a vote of the Panel for Educational Policy, and that a hearing had been commenced on February 6, 2008, to be completed by the end of February 2008 (Def. Memo of Law. unnumbered p. 4).

On the extant record, plaintiff has not established that Chancellor Klein has specific relevant information that cannot be obtained from any other source. Plaintiff's allegations show only that the chancellor has a generalized knowledge concerning the reassignment rooms, and not that he has any particular knowledge as concerns the events leading up to plaintiff's reassignment and the service upon him of charges and specifications. Plaintiff does not establish the relevance to his situation of his claim that the chancellor is working without a contract and why there is a need to question him about that. Questions concerning teachers who were allegedly terminated by a vote of the Panel for Educational Policy are also not relevant to plaintiff's claims.

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<sup>3</sup>It is not clear, however, whether the deposition of Caraballo has been completed.

Here, as defendants have provided co-defendant Caraballo and the non-party witness, both of whom having knowledge of the facts and circumstances, plaintiff must show that the chancellor has "material, relevant and unique" information which would be pertinent to his claims (*Weiner v Jewish Home & Hosp. for the Aged*, 243 AD2d 403, 403 [1<sup>st</sup> Dept. 1997]). Because of the timing of the depositions and the course of the litigation, it cannot here be determined that the information provided by the principal and teacher was not sufficient or adequate for plaintiff to prove his claims (*see, Lange v Roman Catholic Diocese*, 170 Misc. 2d at 45, citing *National Reporting v State of New York*, 46 AD2d 576, 578 [1975]). Accordingly, defendants' motion for a protective order is granted. It is

ORDERED that the defendants' motion for a protective order precluding the deposition of Chancellor Joel Klein in this litigation is granted;, and it is further

ORDERED that to the extent that Liza Caraballo's deposition remains unfinished, defendant is directed to make her available for a continued deposition on a date not later than 30 after entry of this order; and it is further

ORDERED that the parties are to appear, as previously scheduled, on May 14, 2008, in Supreme Court, 80 Centre Street, room103, for a DCM compliance conference.

This constitutes the decision and order of the court.

Dated: May 6, 2008  
New York, New York

  
\_\_\_\_\_  
J.S.C.

