[* 1]

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

PRESENT : DONNA M. MILLS **PART** 21

Justice

COX, WADE, et al.,

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX NO. 109681/07 ~~117619/06~~

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to 6 were read on this motion for .

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2+5
Answering Affidavits– Exhibits	3+4
Replying Affidavits	6

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

FILED
JUL 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7/15/08

J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

WADE COX and STEPHEN A. BANKS,

Plaintiffs,

- against -

SUBWAY SURFACE SUPERVISORS ASSOCIATION and The NEW YORK CITY TRANSIT AUTHORITY,

DEFENDANTS.

INDEX NO. 109681/07

DECISION/ORDER

DONNA M. MILLS, J:

BACKGROUND

Motion Sequence Nos. 001 and 002 are consolidated for disposition.

In Motion Sequence No. 001, defendant the New York City Transit Authority (hereinafter "NYCTA") moves for summary judgement dismissing all claims and cross claims brought against it. In Motion Sequence No. 002, defendant Subway Surface Supervisors Association (hereinafter "SSSA") moves for the same relief.

In this action, plaintiffs Wade Cox and Stephen A. Banks allege that the job pick seniority rule enforced by their union is arbitrary and discriminatory, and that the NYCTA's acquiescence to this rule violates the intent of the Civil Service Law. More specifically, plaintiffs allege that defendant SSSA breached its duty of fair representation by failing to represent their interests during contract negotiations.

Plaintiffs' allegations arise from a collective bargaining agreement entered into by the SSSA and the NYCTA on July 15, 2004, which covered the periods from November 1, 2003 through October 31, 2006. In its relevant part, the collective bargaining agreement reads,

b. [Section 16 of the MOU] "Employees who leave the bargaining unit or who are promoted within the bargaining unit for more than one year and then return to a position covered by the bargaining unit will be treated as new to the bargaining unit for all purposes relating to seniority except (a) where Civil Service Law governs otherwise, and (b) where otherwise agreed to pursuant to the TA/OA consolidation agreement."

This agreement was approved by the majority of the membership and became a legal and binding document as to all current and future members of the SSSA. Additionally, the SSSA and the NYCTA entered into a side letter on that date confirming that "any supervisors hired as Console Dispatcher[s] subsequent to the ratification of this agreement will not loose [sic] their seniority if they return to a bargaining unit position even if they work in the Console Dispatcher position for more than one year." Specifically, the Agreement stipulates that if any members left and became a Console Dispatcher *after* July 28, 2004 and then returned, they would retain their title seniority.

Plaintiff Cox became a member of the Collective Bargaining Unit, on November 8, 1993. Subsequently, plaintiff Cox assumed a position not in the Collective Bargaining Unit on March 30, 2003. As such, he was no longer a member of the SSSA as of that date. On March 14, 2007, almost four years later, plaintiff Cox, returned to his former position as train service supervisor, and thus became a member of the SSSA. Plaintiff Banks left his position on April 17, 2004 and did not return until December 30, 2006[1]. Thereafter, plaintiffs were informed that their seniority date for their next job pick would be calculated from the date they transferred back to a position within the SSSA's Collective Bargaining Unit.

[1] This date is according to statements made by plaintiff Banks in his affidavit. The verified complaint states that plaintiff Banks returned from his position in the Rail Control Center on or about November 2006.

The parties dispute when the cause of action accrued. Plaintiffs Cox and Banks contend that neither had to participate in a job pick until December 2007 and were not aware of the rule until March 2007 and June 2007, respectively. Defendants contend that plaintiff Banks was denied his pick in either November 2006 or January 7, 2007. Viviano Aff. P 19.

LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1978). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated." Andre v. Pomeroy, 35 NY2d 361 (1974). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]).

In support of their motion, defendants contend that since plaintiffs were not members of the bargaining unit at the time of either the negotiations or ratification of the contract, the SSSA had no obligation to represent plaintiffs' interests and was obligated to represent the interests of current members, which was opposed to plaintiffs' interests. Additionally, defendants contend the action against the NYCTA is properly characterized as a special proceeding pursuant to CPLR Article 78 to compel compliance with a requirement of law. Defendants contend that the claims against the NYCTA must be dismissed, as the agreement it entered into violated no provision of the New York Civil Service Law. Plaintiffs do not cite any particular provision that was allegedly violated.

Defendants further contend that the action is timed barred, as the statute of limitations for special proceedings pursuant to Article 78 and for claims brought for a

breach of the duty of fair representation is four months. see CPLR § 217. Defendants contend that the accrual of the cause of action should be measured as the date of return from the Rail Control Center to the SSSA unit.

In opposition, plaintiffs contend that the union, as the exclusive bargaining agent, breached its duty of fair representation, as their actions in negotiation of the collective bargaining agreement were arbitrary, capricious or taken in bad faith. Humphrey v. Moore, 375 US 335, 342 (1964) ("The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation."); see also Hickey v. Hempstead Union Free School District, 36 AD3d 760, 761 (2d Dept 2007) (citations omitted). Additionally, plaintiffs' allege that the NYCTA entered into an agreement that violated the spirit of Civil Service Law and NYCTA's Rule 9(c) and thus should be found void. Plaintiffs further contend, and defendants do not contest, that the NYCTA is a party necessary in order for any relief granted to be whole. NY CLS Civ S § 209-a(3). Furthermore, plaintiffs acknowledge that the statute of limitations is four months, but contend that their claims are not time barred as plaintiffs Cox and Banks were not aware of the provision being challenged until March 2007 and June 2007, respectively.

I. PLAINTIFFS' CLAIM FOR BREACH OF DUTY OF FAIR REPRESENTATION

In order to establish a breach of the duty of fair representation, the plaintiffs' must show that the SSSA's conduct was arbitrary, discriminatory or in bad faith. Hickey, 36 AD3d at 761. Absent such a finding of arbitrariness, capriciousness or bad faith, a

violation of the duty will not be found. Ponticello v. County of Suffolk, 225 AD2d 751, 752 (2d Dept 1996); see also Lundgren v. Kaufman Astoria Studios, Inc., 261 AD2d 513, (2d Dept 1999). Furthermore, it is well established that courts have given unions wide latitude in pursuing grievances and representing union members. Ponticello, 225 AD2d at 752. Plaintiffs' claim for breach of the duty of fair representation apparently arises from the SSSA's failure to adequately represent their interests during negotiations of the collective bargaining agreements.

Plaintiffs' claim that the SSSA was bound by "a statutory obligation to serve the interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Humphrey, 375 US at 342; see also Bernard v. Airline Pilots Assoc., 873 F2d 213 (9th Cir. 1989. However, at the time of the negotiations, plaintiffs had voluntarily left the bargaining unit and the SSSA only had a duty to negotiate on behalf of its members. In Bernard, the issue arose from a unions refusal to represent all pilots of merging airlines where the union had entered into an agreement to represent both groups. The 9th Circuit court found that the union violated its own merger policies and had breached a duty owed to those nonmember pilots due to the agreement.

Plaintiffs' also cite Baker v. Board of Education, 3 AD3d 678 (3rd Dept 2004), in support of their proposition that the SSSA owed plaintiffs, former employees, a duty of fair representation during the negotiations. However, in that case, the negotiations were commenced prior to the teachers' retirement and while they were still members of the bargaining unit. Furthermore, the agreed upon pay increases and contracts, in that case, were retroactive and covered a time span during which those plaintiffs were still members of the bargaining unit.

Additionally, Humphrey, recognized that a union can advocate a position, taken in good faith, that is contrary to the interests of some individuals within a group without

having breached the agent's duty of fair representation. Humphrey, 375 US at 349. The standard for finding a breach of the duty of fair representation is not easily satisfied, as neither tactical errors nor negligence will suffice. Mamorella v. Derkasch, 276 AD2d 152, 156 (4th Dept. 2000). Assuming the SSSA owed a duty to the plaintiffs at the time of negotiation, the SSSA has offered as an explanation that it negotiated on behalf of its then current members of the bargaining unit to protect their seniority from individuals who had left the unit voluntarily and to further encourage members to seek promotion to the position of Console Dispatcher.

Furthermore, the claim against the NYCTA pursuant to Section 209-a (3) must fail. For that section to apply, the SSSA must have breached its duty by failing to represent a member in a claim that the public employer has breached its agreement with the SSSA. Here, plaintiffs are claiming that the NYCTA's adherence to the agreement with the SSSA is what has aggrieved them. As such, Section 209-a (3) cannot apply.

II. PLAINTIFFS' CLAIMS AGAINST THE NYCTA FOR ENTERING INTO THE 2004 CBA

Plaintiffs request that the contractual provision of the CBA regarding job pick seniority be invalidated and that the NYCTA be enjoined from treating plaintiffs as new employees for the purpose of future job picks. The relief sought is essentially in the form of mandamus. As a special proceeding against a public body, such claim is properly brought pursuant to CPLR Article 78. See Sanginario v. New York City Transit Authority, 296 AD2d 413 (2d Dept 2002). Such relief can be granted only for the enforcement of a clear legal right. See Altamore v. Barrios-Paoli, 90 NY2d 378, 387

(1997). Plaintiffs have pointed to no more than the "spirit" of Civil Service Law in their claim against the NYCTA.[2]

III. PLAINTIFFS' TIMELINESS IN FILING THEIR COMPLAINT

Defendants ask that the claims against the NYCTA pursuant to Article 78 be dismissed as untimely. An Article 78 proceeding must be commenced within four months of the accrual of the action. Pursuant to Article 78, the statute of limitations accrues from the date that the decision at issue became final and binding upon the plaintiffs. The contractual provision at issue became final and binding in July 2004, even though the effects were not felt by the plaintiffs until a later time. See Edmead v. McGuire, 114 AD2d 758, 759-760 (1st Dept 1985), aff'd, 67 NY2d 714 (1986). At the latest, the decision would be binding and final on the plaintiffs at the point where they were out of the collective bargaining unit for over a year.

The statute of limitations for a claim of breach of the duty of fair representation is governed by CPLR 217(2)(a) and CPLR 217(2)(b). Plaintiffs contend that their cause of action did not accrue until plaintiffs knew that they were aggrieved and that since neither had to participate in a job pick until December of 2007, they were not aware of the rule until March 2007 (Cox) and June 2007 (Banks). The defendants have offered the position that the accrual should be measured from the date of return to the SSSA unit. Even so, plaintiff Cox's claim would be timely, as the action was brought less than four months after his return to the SSSA unit. In their relevant parts, CPLR 217(2)(a) and CPLR 217(2)(b) state that a claim must "be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later." As the statute of limitations is an affirmative defense, defendants must establish that plaintiffs knew or should have known of the provision in

[2] Even though plaintiffs' Article 78 claim against the NYCTA fails, it does not contest that it would be a necessary party for the granting of any relief herein.

dispute more than four months before the action was commenced. Matter of Quantum Health Resources v. De Buono, 273 AD2d 730, 732 (2000). Defendants fail to offer evidence that either plaintiff knew or should have known that they were aggrieved, which would toll the statute of limitations, prior to March 13, 2007, four months prior to when the action was commenced. As such, the claims against defendants for breach of the duty of fair representation cannot be dismissed as untimely.

However, as a matter of law, plaintiffs fail to state a cause of action for which relief can be granted.

Accordingly, it is

ORDERED that the defendants SSSA and the NYCTA's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of said defendants.

This constitutes the decision and order of the court.

Dated: 7/15/08

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

JUL 23 2008

COUNTY CLERK'S OFFICE
NEW YORK