Matter of Mujica v State of N.Y. Unified Ct. Sys.

2009 NY Slip Op 31398(U)

June 17, 2009

Supreme Court, New York County

Docket Number: 113317/08

Judge: Emily Jane Goodman

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SCANNED ON 6/24/2009

[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 113317/2008

MUJICA, RODRIGO

VS.

STATE OF NY UNIFIED COURT SYS.

SEQUENCE NUMBER : 001

CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided per attached

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 6/17/09

J.S.C.

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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In the Matter of the Application of

RODRIGO MUJICA,

Petitioner,

For a Judgment under Articles 75 and 78 of the Civil Practice Law and Rules for an Order vacating arbitrator's award in instant matter,

Index No. 113317/08

-against-

STATE OF NEW YORK UNIFIED COURT SYSTEM,

Respondent,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and LOCAL 1070,

Intervenor-Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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Emily Jane Goodman, J.S.C.:

Petitioner Rodrigo Mujica, an employee of respondent State of New York Unified Court System, brings this proceeding, pursuant to Articles 75 and 78 of the CPLR, seeking a judgment vacating an award rendered in arbitration, which denied petitioner's request to have days charged against his sick leave restored.

I. Background

Petitioner was employed by respondent as a Spanish Court Interpreter, assigned to Queens Criminal Court. Court interpreters rotate their court assignments every two weeks. On

August 5, 2006, petitioner suffered a tear of his meniscus in his left knee.[1] Despite the injury, he continued to work, walking with the aid of crutches. At the time of his injury, petitioner was assigned to a rotation in "All Purpose" (AP) part 4 (AP4), where he remained until August 12, 2005.

Petitioner's condition continued to worsen. He had an MRI, and was told that he would require intensive physical therapy on his knee. He consulted an orthopedic surgeon on September 15, 2005, who advised that petitioner have arthroscopic surgery, which eventually occurred.

This matter involves petitioner's claim that respondent failed to offer petitioner appropriate accommodation for his condition under sections 19.3 and 19.3 (i) (3) of the Collective Bargaining Agreement (CBA), the New York Human Rights Law, and the Americans With Disabilities Act, in that respondent would not allow petitioner to continue to work in the AP1 part (that closest to the Court Interpreter's Office), or at a desk job, that would have shortened the amount of steps petitioner would have to walk each day. Petitioner complains that, because he did not receive adequate accommodation for his injury, and was increasingly hampered by his pain, he was eventually forced to

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[1]Throughout the arbitration proceedings, and in this proceeding, the discussion concerns petitioner's right knee. Petitioner provides an affidavit confirming that the injury was actually to his left knee.

take unpaid sick leave of 3.5 hours on September 15, 2005, 7.0 hours on September 16, and 7.0 hours on September 19, 2005. From September 20, 2005, petitioner was covered by a grant from the Sick Leave Bank, until he returned to work on October 11, 2005. Essentially, petitioner is complaining that he should have been assigned to the AP1 part, rather than the AP2 part, which was much closer to the Court Interpreter's Office, and that he took sick leave rather than accept the assignment to AP2.

Petitioner commenced a grievance with respondent, which advanced, after preliminary grievance steps, to an arbitration, as called for by the CBA. The arbitration was brought on behalf of petitioner by Intervenor/respondent District Council 37, AFSCME, AFL-CIO and Local 1070 (Union), also as required by the CBA. The framed issue was whether the Court System had violated Section 9.3 (i) (3) of the CBA. Petitioner's Reply Aff., Ex A. Petitioner was not a party to the arbitration.

Section 9.3 (i) (3) of the CBA reads as follows:

> An employee who is temporarily disabled from performing the full duties of his/her position may, as far as practicable, be assigned to in-title and related duties in the same title during the period of the employee's disability. If no suitable position is available, the State may also offer the employee any available opportunity to another title for which the employee is qualified pursuant to the applicable rules of the Chief Administrative Judge. If no suitable position is available, and there is no offer of appointment to another title, or the employee refuses such offer, such employee shall be placed on leave and allowed to draw all accumulated and unused sick leave, annual leave, compensatory time, overtime credits and other time

allowances standing to his/her credit prior to being placed on leave without pay.

The arbitration dealt in considerable detail with the issue of how many individual steps petitioner was required to take daily between the various AP parts to which he was assigned and the Court Interpreter's Office, as well as to and from the men's room and his car. The arbitrator actually visited the court house, and measured the number of steps between the Court Interpreter's office and AP1, compared with AP2 (where petitioner was frequently assigned during the period in question). The arbitrator also took note of the amount of walking petitioner was required to do to and from his car.

The arbitrator rendered his Opinion and Award on July 2, 2008 (Award)(Petition, Ex. A). In a detailed decision, the arbitrator found, in short, that respondent had made a reasonable accommodation for petitioner by assigning him to AP2, considering the relative distances petitioner was required to navigate, and had been navigating, especially in light of a doctor's letter petitioner produced in which petitioner was advised not to walk at all. The arbitrator, taking account of the number of steps between petitioner's car and the Court Interpreter's Office, and the steps between his various rotational assignments during the period before his surgery, concluded that "Mujica was doing a substantial amount of walking contrary to medical instruction even while assigned to AP1." Award, at 15.

Based on the evidence which the arbitrator amassed during the proceedings, he determined that "I find that [petitioner's] assignment to AP2 for the rotational period commencing September 12, 2005, was not unreasonable accommodation. I thus find that the Court System did not violate Section 9.3 (i) (3) of the Agreement." *Id.* at 16.

II. Discussion

A. Standing

The present proceeding must be dismissed because the petitioner lacks standing to bring the matter to this court. As this court recently held, "[w]here an employee is represented by a union at an arbitration proceeding, the union possesses the sole right to confirm or vacate the resulting award, and any petition brought independently by the employee must be dismissed for lack of standing." *Matter of Smerina v New York City Transit Authority*, 2008 WL 4325878, 2008 NY Slip Op 32520(U) (Sup Ct, NY County 2008), citing, inter alia, *Matter of Moreira-Brown v New York City Board of Education*, 288 AD2d 21 (1st Dept 2001); *Delgado v New York City Board of Education*, 272 AD2d 207 (1st Dept 2000); *see also Chupka v Lorenz Schneider Company*, 12 NY2d 1 (1962).

As such, petitioner can only bring this proceeding if he can establish an exception to the above rule. Petitioner believes that he has done so, by reference to the CBA.

Article 17 of the CBA (Answer, Ex. A), provides grievance procedures, including arbitration. *Id.*, section 17.2 (3) (c). Section 17.1 (3) deals with "Discriminatory supervisory practices except insofar as such practices as alleged would constitute violations of law." The section states that

> [w]ith respect to claims alleging such practices as would constitute violations of law, they shall, *at the election of the employee*, be subject to review in accordance with State and Federal procedures established for such purposes as well as such internal review procedure as may exist, but shall not be subject to review under the provisions of this Article. *Use of the internal review procedure shall not deny the employee access to State and Federal procedures*; provided, however, that an employee electing pursuant to a claim in accordance with State and/or Federal procedures shall not be allowed to utilize the Unified Court System's Internal Discrimination Claim Procedure [emphasis added by petitioner].

Based on this language, petitioner claims that "[c]learly, the Agreement affords Mr. Mujica the right to retain counsel and utilize State and Federal procedures of review if he elects to do so." Petitioner's Reply Memorandum, ¶ 6.

Petitioner's argument fails based on the undeniable reality that he has not brought any claim for discriminatory supervisory practices constituting a violation of law, as described in Article 17.1 (3). Here, what petitioner has brought is contract grievance, pursuant to Article 17.3 (b) (1) of the CBA (which deals with "Contract Grievances"), based on a perceived violation of section 9.3 (i) (3) of the CBA, culminating in an arbitration brought by the Union under Article 17.3, to which petitioner was

not a party.[2] Petitioner cannot rely on an argument that he is entitled to pursue this proceeding, based on a claim for discriminatory supervisory practices which constitute violations of law, because under Section 17.1 (3), such a claim "shall not be subject to review under the provisions of [Article 17 of the CBA]." As petitioner cannot dispute that the petition seeks to vacate an arbitration determination made in accordance with the procedures of Article 17, petitioner's fleeting reference to the Human Rights Law and the Americans With Disabilities Act cannot change the nature of the present matter.

Petitioner raises the case of *Matter of Diaz v Pilgrim State Psychiatric Center of State of New York* (62 NY2d 693 [1984]) as an example of a case where a contract between an employee and his employer permitted the employee to bring a grievance up to and including arbitration. The *Diaz* Court distinguished the matter before it from that raised in *Chupka* (12 NY2d 1, *supra*), based on the fact that the contract in *Chupka* did not allow the employee the same rights.

Diaz offers no comfort to petitioner herein, as, unlike the

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[2]Petitioner's Reply Affirmation contradicts his argument that he is entitled to sue based on discriminatory supervisory practices in violation of law as he concedes that "while the Arbitrator's conclusion that Respondents accommodations were reasonable, warrants a conclusion that Respondent was not in violation of Americans with Disabilities Act, it does not warrant the Arbitrator's decision that Respondent was not in violation of Section 9.3(i) (3) of the Agreement."

contract provisions in *Diaz*, the CBA does not permit petitioner to appear as a party in the arbitration of contract disputes, although the CBA does allow an employee to control the grievance procedure up to arbitration. Whatever contract language existed in *Diaz* does not exist in the matter at hand. Further, petitioner has not established that the union breached its duty of fair representation such that petitioner would be entitled to maintain this proceeding. *See Sapadin v Bd of Ed. of the City of NY*, 246 AD2d 359 (1st Dept 1998). Therefore, petitioner is without standing to pursue this Article 75 proceeding.[3]

Because petitioner lacks standing to pursue this Article 75 proceeding, it is not proper to pursue any other of petitioner's arguments. *See Matter of Smerina v New York City Transit Authority*, 2008 WL 4325878, *supra*.

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: June 17, 2009

This judgment has been entered and notice of entry may be obtained only by counsel or a party appearing in person at the Judgment Clerk's Desk (Room 141B). ENTER:

J.S.C.
EMILY JANE GOODMAN

[3]The petition also refers to Article 78 of the CPLR. That section is inapplicable here.