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

PRESENT: LOBIS Justice PART 6

MICHAEL CARBONE
-v-
CITY OF NY

INDEX NO. 113693/09
MOTION DATE 12/15/09
MOTION SEQ. NO. 1
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	8-16
Replying Affidavits	17-18

Cross-Motion: ☐ Yes ☑ No

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

FILED
FEB 23 2010
COUNTY CLERK'S OFFICE

Returned

THIS ~~MOTION~~ IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER + Judgment

Dated: 2/18/10

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the Matter of the Application of
MICHAEL CARBONE,

Petitioner,

Index No. 113693/09

For a Judgment under Article 78 of the
Civil Practice Law and Rules

Decision, Order, and Judgment

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY CORPORATION COUNSEL, and THE NEW YORK CITY DEPARTMENT OF BUILDINGS

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner Michael Carbone brings this proceeding under Article 78 of the C.P.L.R. to annul the determination by respondent New York City Corporation Counsel ("Corporation Counsel") that petitioner was not entitled to representation by respondent New York City (the "City") in two pending civil suits. For the reasons stated below, the petition is granted.

Petitioner began working for respondent New York City Department of Buildings ("DOB") in September 1999. He worked continuously from that period until about July 2008, when he resigned. Subsequent to his resignation, he was named as a defendant in two civil actions arising out of the collapse of a crane on 91st Street and First Avenue in Manhattan on or about May 30, 2008. Petitioner asked the City for indemnity and legal representation under Section 50-k of the General Municipal Law. Corporation Counsel refused on the grounds that petitioner lost his right to representation and indemnity due to acts and omissions between October 2006 and June 2007.

Petitioner first worked with the DOB as a Hoisting and Rigging Inspector in September 1999 in the Crane and Derricks Unit ("CDU"). After 9/11, petitioner was put in charge of crane operations for all search and rescue activity at Ground Zero. In or about December 2001, petitioner was promoted to the position of Administrative Inspector/Supervisor in the CDU. On March 14, 2008, petitioner was named Chief of the DOB's Emergency Response Team ("ERT"). The next day, a crane collapsed in midtown Manhattan resulting in fatalities, injuries, and property damage. Following the accident, petitioner rejoined the CDU as an inspector and, according to petitioner, retained his responsibilities as Chief of the ERT. On May 30, 2008, a crane on 91st Street and First Avenue (the "91st St. Crane") collapsed. This collapse also caused deaths, injuries, and property damage. As a result, the DOB's Office of Internal Audit and Discipline ("IAD") began an investigation to determine the cause of the accident. The investigation revealed that on thirteen occasions between October 2006 and June 2007 petitioner violated DOB's procedures and acted improperly while investigating complaints about cranes on DOB sites. According to the investigation, petitioner dismissed multiple complaints without either properly investigating the complaints or alerting the proper DOB division of the complaints. The 91st St. Crane was not the subject of any of the complaints. In June 2008, petitioner was suspended for thirty days. On July 21, 2008, petitioner resigned and no administrative charges were filed against him. In early 2009, petitioner was named as a defendant in two civil actions arising out of the 91st St. Crane collapse (the "91st St. Crane lawsuits"). On April 30, 2009, petitioner requested representation from the City. On June 1, 2009, the Corporation Counsel informed petitioner that his request was denied, because—in an apparent reference to the IAD investigation—at the time of the 91st St. Crane collapse, he was "not acting within the scope of [his] employment and . . . [was] not in compliance with [DOB] rules and regulations[.]"

Petitioner argues that the Corporation Counsel's decision was arbitrary and capricious and should be annulled. Petitioner argues that he is entitled to representation and indemnification. Petitioner articulates an argument that Corporation Counsel's decision misinterpreted General Municipal Law § 50-k. He asserts that since none of the thirteen complaints discussed above involved the 91st St. Crane, he was acting within the scope of his employment and in compliance with DOB rules and regulations with respect to the 91st St. Crane collapse. During oral argument, petitioner also argued that since the IAD investigation concerned events in 2006 and 2007 and the 91st St. Crane collapsed in 2008, he was acting within the scope of his employment and in compliance with DOB rules and regulations when the 91st St. Crane collapsed. Petitioner further argues that he properly investigated complaints before dismissing them and that the DOB never instructed him on the procedure for closing out complaints identified in the IAD investigation.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). When examining claims that the administrative action was premised on an error of law, the court must determine if he administrative action was based on reasonable and rational application and understanding of the relevant statute. See In re Howard v. Wyman, 28 N.Y.2d 434, 438 (1971).

Under Section 50-k(2) of the New York State General Municipal Law,

> the city shall provide for the defense of an employee of any agency in any civil action arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.

Section 50-k(3) deals with indemnification and has a similar standard:

> The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller, provided that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

Respondent's action was premised on an error of law. Section 50-k "limits the obligation to defend and indemnify when the conduct of the employee complained of in the action also constitutes a violation of . . . disciplinary rules." In re Committee of Interns and Residents v. Dinkins, 86 N.Y.2d 478, 483 (1995) (citation omitted). Therefore, "whether the City is obligated to represent [an employee] in [an] action cannot be separated from the merits of the action, because the question turns in part on precisely what the [employee] did: if an [employee's] conduct was in violation of a rule or regulation of [his agency], the City (through its Corporation Counsel) does *not* have an obligation to defend the [employee.]" Schwartz v. City of New York, 57 F.3d 236, 238 (2d Cir. 1995) (italics in original). Likewise, when Corporation Counsel determines whether an employee's acts or omissions

were outside the scope of employment, the relevant acts or omissions are the tortuous conduct that led to the lawsuit. Gen. Mun. Law 50-k(3); see also Weitman v. City of New York, 222 A.D.2d 316 (1st Dep't 1995); In re Blood v. Board of Educ. of City of New York, 121 A.D.2d 128, 131 (1st Dep't 1986); In re Williams v. City of New York, 64 N.Y.2d 800, 802 (1985).

None of the complaints against petitioner in the IAD investigation are related to the merits of the 91st St. Crane lawsuits. In fact, it is unlikely that the plaintiffs in those lawsuits will be permitted to use the investigation to impute liability upon petitioner. See Feaster v. New York City Transit Auth., 172 A.D.2d 284, 285 (1st Dep't 1991) ("it [is] well settled that a plaintiff may not adduce evidence tending to demonstrate that a person alleged to have committed a negligent act has previously committed similar acts or was generally negligent[.]"). Respondent's argument that a direct nexus exists between petitioner's behavior referenced in the IAD investigation and the 91st St. Crane collapse is an attempt to turn what is currently an allegation that petitioner acted negligently with respect the 91st St. Crane into a foregone conclusion. Without facts that petitioner did anything wrong with regard to the 91st St. Crane, Corporation Counsel cannot withhold representation from petitioner. See Blood, 121 A.D.2d at 132. Petitioner has the right to seek indemnification in the event of a judgment or settlement regarding the 91st St. Crane lawsuits, but the court cannot grant indemnification at this juncture.

In light of this court's determination that Corporation Counsel's decision was premised on an error of law, this court need not address petitioner's argument that his actions discussed in the IAD investigation were in compliance with DOB's rules and regulations and within the scope of his employment.

The petition is granted. Petitioner is protected by General Municipal Law § 50-k and the City is obligated to defend him in the 91st St. Crane lawsuits. This constitutes the decision, order and judgment of the court.

Dated: February 18, 2010

JOAN B. LOBIS, J.S.C.