

Serby v New York City Dept. of Educ.

2010 NY Slip Op 30793(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 101402/09

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE
Justice

PART JOS

Serby, Anne

INDEX NO.

101402/09

MOTION DATE

- v -

MOTION SEQ. NO.

02

Dept. of Ed

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the removed decision and Order*

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

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/10

Lewis Bart Stone

HON. LEWIS BART STONE S.C.

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 50S

----- X
 ANNE SERBY, :
 :
 Petitioner, : DECISION AND
 : ORDER
 - against- :
 Index Number
 NEW YORK CITY DEPARTMENT OF EDUCATION : 101402/09
 and THE CITY OF NEW YORK, :
 Respondents

----- X
 Hon. Lewis Bart Stone, J

FILED
 APR 09 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Petitioner, Anne Serby ("Serby") moved by Notice of Motion dated May 21, 2009 for leave to reargue a motion which this Court had, by Decision and Order dated April 12, 2009 (the "April Order"), decided.

The April Order had dismissed a petition filed by Serby pursuant to Civil Practice Law and Rules ("CPLR") Article 78 to review a decision of respondent, Department of Education ("DOE") on the grounds that it was not commenced in a timely manner.

Respondents replied to Serby's motion on July 20, 2009, by which time this Court was no longer assigned special proceedings and the Motion was submitted to Hon. Emily Jane Goodman. On January 27, 2010, Hon. Emily Jane Goodman referred this motion to this Court on the grounds that although this Court was no

longer being assigned new civil cases, this motion was addressed to the reargument of a motion decided by this Court.

The April Order dismissing Serby's Petition was based solely on a determination by this Court that Serby's Petition was untimely, and expressly declined therefore to address any of Serby's contentions.

Accordingly, Serby's motion to reargue must first address the timeliness of her original motion. Only if this Court grants Serby's motion to reargue and reverses itself on such issue may this Court consider the remainder of her contentions.

After reviewing this issue of timeliness, this Court finds no basis to reconsider its earlier decision, and accordingly, denies Serby's motion to Reargue.

Serby was terminated on June 20, 2008 and commenced her Article 78 proceeding to review her termination on February 2, 2009, over six months later. This Court in the April Order found that there was no tolling of the statute as a result of the administrative review of her termination under her union contract.

Serby's argument in her Motion to Reargue is addressed to the date the four month statute under CPLR §217 commences. She here asserts that such period does not commence until she had been formally served notice of DOE's June 20, 2009 decision, which she asserts occurred on October 27, 2008, well within four months of the date on which she commenced the proceeding.

Unlike Court actions where the time to object to an order is measured from the time of service of a notice of entry of such order, the time to object to a decision of a body is not measured in the same way.

In 90-92 Wadsworth Ave. Tenants Assn. v. City of NY Dept of Housing Preservation & Dev., 227 AD2d 331 (1st Dept 1996), the First Department noted:

CPLR §217(1) provides, in pertinent part, that: “a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” A determination becomes “final and binding” when the aggrieved party receives notice of the determination. (Matter of New York State Assn. Of Counties v. Axelrod, 78 NY2d 158, 164; Matter of Village of Westbury v. Department of Transp., 75 NY2d 62, 72)

While Serby was entitled to notice, she was not entitled to written notice. Accordingly, the four month period began when she had notice of the adverse ruling. Such date occurred in any event, prior to October 2, 2008, the date four months prior to her filing her petition on February 2, 2009.

On July 10, 2008, she was sent a written notice advising her that her services were discontinued as of August 11, 2008. Serby’s reply to this letter of July 23, 2008, opposing such discontinuance confirms that, at the latest, she was aware on July 23, 2008 of the adverse decision. Further, she acknowledged in her petition that she was advised by her union representative on August 25, 2008 that she had been terminated.

Such advise was also notice of the adverse determination.

DOE's Cross Motion is granted and the Petition is dismissed. This is the Decision and Order of the Court.

DATED: APRIL 12, 2010
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE