

Bolin v Nassau County Bd. of Coop. Educ. Servs.

2010 NY Slip Op 31420(U)

May 27, 2010

Supreme Court, Nassau County

Docket Number: 11473/06

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
MARY JANE BOLIN,

Petitioner,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 11473/06
Motion Seq. No.: 03**

NASSAU COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES,

DECISION AND ORDER

Respondent.

-----X

Papers Read on this Motion:

Petitioner's Notice of Motion	03
Petitioner's Memorandum of Law	xx
Respondent's Affirmation of Michael McAlvin	xx
Respondent's Memorandum of Law	xx

The Petitioner moves pursuant to CPLR §3024 to strike the second affirmative defense asserted in Respondent's answer and preclude further discovery related to said defense pursuant to CPLR §3103(a).

BACKGROUND

In this hybrid proceeding Petitioner seeks to compel the payment of the cash value of forty (40) days accrued/unused vacation time which she contends is due and owing by Petitioner Nassau County Board of Cooperative Educational Services (BOCES) and the return of personal property allegedly retained, damaged, lost or destroyed by BOCES after Petitioner's resignation from her position as supervisor of the Arts & Education Program on or about November 16, 2005.¹

¹Petitioner resigned after entering a plea of guilty to the crime of attempted grand larceny in the second degree. She was sentenced to five years' probation and required to make restitution in the amount of \$62,674.

Petitioner seeks to preclude Respondent BOCES from asserting the faithless servant/good faith service doctrine as a bar to recovery predicated on the contention that the law of the case doctrine forecloses the assertion of said defense. In this regard, Petitioner maintains that, in reinstating Petitioner's petition/complaint, after it was dismissed pursuant to CPLR §3211(a)(7) and CPLR §7804(f) by order of this court entered April 3, 2007, the Appellate Division specifically rejected the good faith service doctrine as a bar to the instant proceeding. A careful reading of the decision in *Matter of Bolin v Nassau County Board of Cooperative Education Services*, 52 AD3d 704 [2d Dept 2008], however, indicates otherwise.

In its decision, the court distinguished between unused vacation leave and vested bank vacation leave finding that Petitioner failed to state a claim that BOCES was required to pay her the cash value of her 34-day vested bank vacation balance based on paragraph five of the 2005 amendment to the parties' collective bargaining agreement which grants Petitioner BOCES the discretion to deny such payment where an employee's separation is for cause.² Noting that, although the collective bargaining agreement does not specifically require that BOCES pay retiring/separating employees the cash value of their accumulated vacation leave balances, paragraph six of the amendment thereto references such a past practice but unlike paragraph five, does not contain a separation "for cause" element.³ Based upon

²Paragraph 5 of the amendment provides, in pertinent part, as follows: "Unit members who maintain a vacation day account consisting of more than forty (40) days (regular vacation leave days) will be granted a 'vested bank' of vacation days pursuant to the formula hereinafter set forth. . . Such members will be credited with two (2) days of 'vested' vacation leave for every full year of Nassau BOCES service . . . Upon resignation for purposes of retirement or resignation for purposes of separation other than a separation for cause, the unit member will be paid a cash sum equal to the number of days remaining in the unit member's 'vested bank' of vacation leave days. . ."

³ Paragraph 6 of the amendment provides as follows: "This Agreement does not change nor amend in any way the Nassau BOCES practice of paying retiring or resigning unit members

this distinction, the court held that the petition stated a claim for recovery of the cash value of her forty (40)-day vacation leave balance.

The decision does not, however, address the merits of the good faith service defense, nor does it foreclose Petitioner BOCES from raising the defense in its answer as Petitioner urges. While Petitioner contends that the Appellate Division rejected that defense “in light of BOCES’ clear contractual obligation in the collective bargaining agreement to pay the cash equivalent of the forty (40) days of accumulated unused vacation leave,” the assertion is simply inaccurate. Rather, the court stated that the collective bargaining agreement was ambiguous. While it does not specifically require BOCES to pay retiring employees the cash value of their accumulated vacation leave balances, paragraph six of the 2004 amendment to the collective bargaining agreement specifically references such a past practice.

ANALYSIS

Where, as here, the meaning of an agreement is ambiguous, its construction is an issue to be resolved by the trier of fact. *Quinn v Buffa*, 97 AD2d 752, 753 [2d Dept 1983]; *Meathe v State University Const. Fund*, 65 AD2d 49, 52 [3rd Dept 1978]. Absent a preexisting contractual provision or legislative enactment, a municipal employee is not entitled to recover the monetary value of accrued credits such as unused vacation time. *Baksh v Town/Village of Harrison*, 38 AD3d 808, 809 [2d Dept 2007]; *Karp v North Country Community College*, 258 AD2d 775 [3rd Dept 1999]; General Municipal Law § 92(1).

Pursuant to the faithless agent rule, a disloyal employee forfeits his right to compensation. Generally, an employee is obligated to be loyal to his employer and is prohibited from acting in any

the per diem value of up to forty (40) days accumulated by unused vacation days in the employee’s regular vacation leave account.”

manner inconsistent with his agency or trust and is at all times required to exercise the utmost good faith and loyalty in the performance of his duty. *Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977]. Where an employee engages in repeated acts of disloyalty, courts have found forfeiture of compensation, deferred or otherwise, warranted under the faithless servant doctrine. *William Floyd Union Free School Dist. v Wright*, 61 AD3d 856, 859 [2d Dept 2009].

The doctrine of law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. *Hampton Valley Farms, Inc. v Flower & Medalie*, 40 AD3d 699 [2d Dept 2007] [citations and internal quotation marks omitted]. The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision. *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1293, 1294 [2d Dept 2009]. Here, the decision of the Appellate Division did not address the merits of the faithless servant defense deciding only that Petitioner's claim was viable. Moreover, a motion to dismiss pursuant to CPLR §3211(a)(7) addresses only the sufficiency of the pleadings—and does not look to the sufficiency, or lack thereof, of the underlying evidence. *Thompson v Lamprecht Transport*, 39 AD3d 846, 847 [2d Dept 2007].

Under CPLR Article 78, a Petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CLR §408. The Court has ruled that discovery often prolongs a case and is inconsistent with the summary nature of a special proceeding, as such, discovery will be granted only where it is demonstrated that there is a need for such relief. *Town of Pleasant Valley v New York State Bd. of Real Property Services*, 253 AD2d 8, 15 [2d Dept 1999]. When leave is granted, discovery occurs pursuant to CPLR §3101 which generally provides that there “shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” will be interpreted liberally to require disclosure, upon request, of any facts bearing on the

controversy which will assist preparation for trial by sharpening the issues and reducing delay. *Friel v Papa*, 56 AD3d 607, 608 [2d Dept 2008]. Under the circumstances extant, given the hybrid nature of this matter, Petitioner BOCES is entitled to conduct discovery.

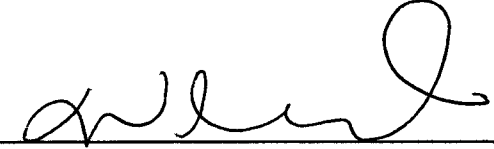
Inasmuch as Petitioner BOCES is not precluded by the doctrine of law of the case from asserting the faithless servant defense, there is no basis to dismiss the defense pursuant to CPLR §3024 or preclude discovery on this issue.

While Petitioner seeks a protective order pursuant to CPLR §3103(a) with respect to discovery requests that relate in some way to her criminal conviction and surrender of her educational licenses, which she considers an “unreasonable annoyance” and “harassment,” she has failed to submit a copy of the particular requests at issue, i.e., Petitioner BOCES’ third request for documents and request for further examination of Petitioner for the court’s consideration or to substantiate her claims of annoyance/harassment.

Based on the foregoing, the Petitioner’s application is **denied**.

This constitutes the Decision and Order of the Court.

DATED: May 27, 2010
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

G:\DECISION - DISCOVERY\Bolin v Nassau County CAK.wpd

ENTERED
JUN 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE