

Matter of Hunter v Transport Workers Union of Am., AFL- CIO
2010 NY Slip Op 32444(U)
August 31, 2010
Sup Ct, Nassau County
Docket Number: 003130/10
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

TRIAL/IAS PART 20

_____ X
In the Matter of the Application of
DORRINGTON HUNTER,

Petitioner,

Index No.: 003130/10
Motion Sequence...02, 03
Motion Date...07/01/10

For an Order and Judgment pursuant to Article 78
of the CPLR

-against-

TRANSPORT WORKERS UNION OF AMERICA,
AFL-CIO, TRANSPORT WORKERS UNION,
LOCAL 252, AFL-CIO and MTA-LONG ISLAND
BUS,

Respondents.

_____ X
Papers Submitted:
Notice of Petition.....X
Verified Petition.....X
Notice of Motion.....X
Notice of Cross-motion.....X
Memorandum of Law.....X
Affirmation and Affidavit in Opposition.....X
Reply Affirmation.....X
Memorandum of Law.....X

A Petition (Motion Seq. 01) was brought pursuant to Article 78 of the CPLR

seeking a judgment annulling an Arbitrator's determinations of November 2, 2009 suspending the Petitioner and placing him on probation for one year and an Arbitrator's determination dated December 21, 2009 terminating the Petitioner from his job as a bus driver with MTA-Long Island Bus. Said Petition has been adjourned to October 19, 2010.

The motion (Motion Seq. 02) by the Defendant, Transport Workers Union, Local 252 for an order pursuant to CPLR § 3211 (a) (1), (a) (5) and (a) (7) and the Cross-motion (Motion Seq. 03) by the Defendant, MTA-Long Island Bus for an order pursuant to CPLR § 404 (a) dismissing the Petition are **DENIED**.

Via this proceeding, the Petitioner, a bus driver formerly employed by the Respondent, MTA-Long Island Bus (hereinafter "LI Bus") from 1998 until December 21, 2009, challenges an Arbitrator's determination, dated November 2, 2009, suspending him for seven days and placing him on a one year probation as a result of an accident that occurred on June 30, 2009, as well as his ultimate termination by LI Bus, in part as a result thereof, on December 21, 2009. During his employment with LI Bus, the Petitioner was a member of the Defendant, Transport Workers Union Local 252, AFL-CIO (hereinafter "Local 252").

The pertinent facts are as follows:

On June 30, 2009, the Petitioner was involved in an accident while operating a bus for LI Bus on Stewart Avenue in Garden City when the driver's side of the bus he was driving collided with the passenger side of a passing van. The Petitioner promptly notified LI Bus but was instructed to finish his route. A Supervisor's Accident/Crime Investigation

Report, prepared by M. Geist, indicated that both the bus and the van were changing lanes when the accident occurred. The map prepared in conjunction with that report reflected both the bus and van moving from the far right eastbound lane of Stewart Avenue across two lanes to the left hand turning lane into Roosevelt Field. The Department of Motor Vehicle's report prepared by the Petitioner described the accident as follows:

"I approached the bus stop and saw no one there. I signaled to move to my left. I checked my mirror and saw it was clear to go. I moved to my left. A van came around me and made contact with the bus."

After completing his shift, the Petitioner prepared a Bus Operator Accident Report describing the accident as follows:

"I approached the bus stop and saw no one. I checked my mirror and saw that it was clear to go. I moved to my left signaling before I started left, a van came around me and made contact with the bus."

The petitioner described the point of impact to the bus as "left side radiator panel" and the point of impact with the van as "right side mirror." While the report indicated that he had a right to a review of the accident and that it was his responsibility to meet with the Division of Safety & Training within 10 days, he failed to check the box indicating that he desired such a review.

Nevertheless, despite the Petitioner's failure to request a review by the Division of Safety & Training, he provided a Bus Operator Interview Statement to Steve Cella on July 6, 2009 in which he stated: "I was traveling east bound on STEWART AVE. on the N35

Route. I was approaching the last bus stop on STEWART AVE. before going into Roosevelt Field, I checked my l/s mirror before changing lanes. The traffic was clear as I kept my eyes on my l/s mirror. Vehicle #2 came out of nowhere and made contact with his Rt. Side Mirror into the left side Radiator Panel. Command Center was notified.”

By letter dated July 10, 2009, the Petitioner was notified that the accident was rated “preventable” by the Accident Review Committee. “[A] preventable accident is one in which an operator failed to exercise every reasonable precaution to avoid having the accident, including anticipating the hazard and applying appropriate defensive driving techniques.” The Petitioner was advised that the rating would be recorded in his accident file. The Petitioner was suspended for ten days from September 21, 2009 to October 3, 2009 and placed on a one year probation from August 27, 2009 to August 27, 2010. He grieved that determination pursuant to his Collective Bargaining Agreement via his union.

The Step I grievance on August 27, 2009 was unsuccessful. The Petitioner appealed. At the Step II grievance attended by the Petitioner and his union representative on September 30, 2009, the hearing officer, Carl Macchio, the Director of Labor Relations for LI Bus, told the Petitioner that he lacked the authority to review the “preventable accident” finding which the Accident Review Committee had made but that Step II could be postponed to attempt to procure an appearance by a member of that Committee in order to enable the Petitioner to present his evidence. The Petitioner alleges that his union representative’s attempts to secure an Accident Review Committee member’s appearance were unsuccessful

and that on or about October 13, 2009 he was advised that the arbitration would proceed on October 27, 2009. He alleges that when he complained to the union regarding its failure to secure an Accident Review Committee member's appearance, he was cautioned and advised to simply go forward with arbitration. The Petitioner alleges that when he appeared for the arbitration on October 27, 2009, he learned that the Step II grievance affirming the Step I determination had been completed on October 6, 2009 and that someone had signed for him as having received that determination and appealed it to Impartial Arbitration on October 22, 2009. The Petitioner maintains that not only did he not know that Step II had been completed, but in addition, he never authorized anyone to sign for receipt of the Step II decision or to appeal it.

By opinion and award dated November 2, 2009, the arbitrator reduced the Petitioner's suspension from ten to seven days due to the Petitioner's previous accident having occurred over one year prior. However, he upheld the Petitioner's one year probation as mandatory under the May 8, 2008 Memorandum because of the Petitioner's five previous "preventable accidents." The arbitrator specifically held that his "jurisdiction did not extend to any review of the preventability determination of the Accident Review Committee."

On November 11, 2009, the Petitioner was involved in another incident involving his bus rolling at the Hempstead Transfer Center after he discharged passengers. Because he was on probation when that incident occurred, his employment with LI Bus was terminated on December 21, 2009.

This proceeding was commenced on February 16, 2010. The Petitioner alleges that Local 252 breached its duty of fair representation and violated his due process rights by failing to properly complete Step II of the Grievance procedure, more specifically, by failing to arrange for a member of the Accident Review Committee to appear to reconsider its “preventable accident” determination, and by signing off on the Step II determination on his behalf on October 22, 2009 without his authorization. He alleges that had he been afforded an opportunity to address an Accident Review Committee member at Step II, he could have presented evidence which indicates that the June 30, 2009 accident was in fact not preventable.

The union seeks dismissal of the Petition pursuant to CPLR § 3211 (a) (7) for failure to state a claim; pursuant to CPLR § 3211 (a) (1) based on documentary evidence; and, pursuant to CPLR § 3211 (a) (5) as untimely. LI Bus also seeks dismissal of the Petition pursuant to CPLR § 404 (a).

CPLR 3211 (a) (7)

When deciding a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the court is required to afford the pleading “a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994), citing CPLR § 3026. It must “accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, *supra*, at p. 87-88, citing *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980); *Rovello v. Orfino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *see also Mancuso v. Rubin*, 52 A.D.3d 580 (2nd Dept.

2008).

A breach of the duty of fair representation “ ‘occurs only when a union’s conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.’ ” *Civil Service Bar Ass’n, Local 237, Intern. Broth. of Teamsters v. City of New York*, 64 N.Y.2d 188, 196, (1984), quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), citing *Hines v. Anchor Motor Frgt.*, 424 U.S. 554, 568-569 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964), *reh. den.*, 376 U.S. 935 (1964), *reh. den.*, 376 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339 (1953). “[T]he fact that the union was guilty of mistake, negligence or lack of competence does not suffice for such a claim.” *Trainosky v. Civil Service Employees Ass’n Inc.*, 130 A.D.2d 827 (3rd Dept. 2987), citing *Kaminsky v. Connolly*, 51 A.D.2d 218 (1st Dept. 1976), *affd.*, 41, N.Y.2d 1068 (1977); *see also, Baraatz v. Mathison*, 180 A.D.2d 1007 (3rd Dept. 1992). However, “[a]scertaining whether, in any particular instance, the duty of fair representation has been violated is essentially a factual determination.” *Civil Service Bar Ass’n, Local 237 Intern. Broth. of Teamsters v. City of New York*, *supra* at p. 197, citing *Smith v. Hussmann Refrig. Co.*, 619 F.2d 1229, 1236 (8th Cir. 1980), *reh. den.*, 619 F.2d 1253, *cert. den.*, 449 U.S. 839 (1980); *Griffin v. International Union, UAAAIWA, UAW*, 469 F.2d 181, 182 (4th Cir. 1972). Contrary to the Respondent’s allegations, the Petitioner has adequately pled a cause of action sounding in breach of the duty of fair representation. Whether Local 252’s representation of the Petitioner was in fact arbitrary, discriminatory or in bad faith is not appropriately resolved on a motion pursuant to CPLR § 3211 (a) (7).

While the LI Bus Accident Evaluation Committee’s rules provide that its

accident rating, i.e., preventable, non-preventable or no knowledge or blind, is “irrevocable,” no party has addressed the applicability of that provision here, where a grievance proceeding was adjourned for the very purpose of allowing the Petitioner to readdress or revisit the issue with the Accident Evaluation Committee itself. Nor has it been demonstrated that it was for that reason that Local 252 was unable to procure a Committee member’s appearance.

CPLR 3211(a)(1)

In seeking dismissal based upon documentary evidence, the Respondents rely upon the statements that the Petitioner gave on the day of the accident and/or July 6, 2009. Neither the Petitioner’s failure to check the box indicating that he desired a meeting with Safety nor his July statements resolve the claim presently advanced, i.e., the manner in which the union handled his grievance at Step II.

CPLR 3211(a)(5)

The Statute of Limitations applicable to a claim for breach of the duty of fair representation is four months from the date that the petitioner knew or should have known that the breach has occurred, or within four months of the date he suffers actual harm, which ever is later. CPLR § 217 (a) (2); *Nabors v. Town of Somers*, 54 A.D.3d 833 (2nd Dept. 2008); *Dolce v. Bayport-Blue Point Union Free School Dist.*, 286 A.D.2d 316 (2nd Dept. 2001). Contrary to the Respondents’ contentions, applying that standard here, the Petitioner did not learn of the union’s alleged breach of its duty of fair representation on October 13, 2009 when he was advised by the union to proceed to arbitration; rather, it was not until the Petitioner appeared for the arbitration on October 27, 2009 that he definitively learned that Step II had

in fact been completed without his knowledge or consent and that he in fact was not being afforded an opportunity to address the Accident Review Committee to contest its finding that the June 30, 2009 accident was “preventable.” More importantly, however, it was not until the Petitioner received the arbitrator’s determination of November 2, 2009 that he suffered actual harm which is the triggering event under CPLR § 217 (a) (2). *See Nabors v. Town of Somers, supra; Weisel v. City of New York*, 24 Misc. 3d 1224(A) (Supreme Court Kings County 2009). Thus, this proceeding is timely.

Accordingly, it is hereby

ORDERED, that the Respondents interpose Answers to the Petition within 20 days of the date of service of this order; and it is further

ORDERED, that the Petition (Motion Seq. 01) is adjourned to **October 19, 2010 at 9:30 a.m.** at which time appearances by all counsel are required.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
August 31, 2010

ENTER:



HON. RANDY SUE MARBER

ENTERED

SEP 02 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE