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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 105385/2009
SUBWAY SURFACE
VS.
NYC TANSIT AUTHORITY
SEQUENCE NUMBER : 002
RENEWAL

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 is decided as

attached

FILED

JAN 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/14/11

EJG

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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
SUBWAY SURFACE SUPERVISORS ASSOCIATION,

Petitioner,

Index No. 105285/09

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

Pursuant to Article 78 of the Civil Practice Law and Rules.

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Emily Jane Goodman, J.S.C.:

New York City Transit Authority (NYCTA) moves for permission to answer, renew/reargue, and/or for leave to appeal from a non-final order. The motion is denied as to renewal and reargument, but is granted as to leave to appeal to the Appellate Division, regarding the four questions raised on page 5 of the Memo. Of Law in Support. Further, NYCTA may submit an Answer within the next 30 days, containing a general denial.[1]

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[1]Respondent seeks to submit an Answer beyond a general denial. For example, NYCTA seeks to include the defense of failure to exhaust administrative remedies. However, there is no reason why this defense was not asserted along with the many other defenses raised in connection with the cross motion to dismiss and the further briefs submitted. Further, contrary to NYCTA's argument, it did not reasonably believe that no facts surrounding the representation and bargaining history of the two positions should be submitted because they "had no relevance to the only claim set forth in the petition currently before the Court, which is that the Transit Authority is allegedly violating

The motion concerns the Court's April 14, 2010 Decision and Order (the Decision), regarding an Article 78 brought by Petitioner originally claiming unfair treatment of the NYCTA employees it represents under Civil Service Law (CSL) § 61 (2).[2] However, in response to NYCTA's cross motion to dismiss,[3] Petitioner changed its theory, instead alleging that NYCTA violated CSL § 115[4] and the Equal Protection Clauses of the State

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Civil Service Law §61." Although NYCTA clearly did not want the Court to reach the issue under Civil Service Law §115, after Petitioner changed its original theory, it was also clear that the Court permitted the change of theory and required further briefing to address it, and NYCTA did submit extensive papers on the issue. However, the Court grants Respondent leave to move to submit an amended answer after a decision by the First Department on the four questions raised herein, as further briefs are needed on the issue of service of an answer, beyond a general denial.

[2]CSL § 61 (2) applies to "Prohibition against out-of-title work." It states, in pertinent part, that:

> [n]o person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed, and ... no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder.

[3]NYCTA cross-moved to dismiss the petition based on statute of limitations; laches; lack of subject matter jurisdiction (because the matter should be heard before the Public Employment Relations Board); and lack of merit.

[4]CSL § 115 reads:

> In order to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services

and Federal Constitutions. Because Petitioners stated a potential violation of CSL § 115, and under that section, employees are entitled to the same pay, if they perform the same work, the Court determined that a hearing was needed pursuant to CPLR 7804 (h). Accordingly, the Court referred the determination of whether station supervisor level 1 employees performed the same duties as station supervisor level 2 employees, to a Special Referee to hear and report, who was also to specify the duties performed by both types of employees.[5]

NYCTA devotes a large percentage of its papers to complaints that the Court should not have entertained additional briefing on the theory under CSL § 115, but should have dismissed the proceeding, originally brought under CSL §61 (2). NYCTA complains that Petitioner failed to amend its Petition to assert the theory under CSL § 115 or re-plead the allegations, despite the fact that the parties fully briefed the issues. The Court

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> for the necessary costs of government, it is hereby declared to be the policy of the state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service.

[5]Station supervisor level 1 is a position which evolved from a prior position called assistant supervisor. Employees of station supervisor level 2 titles are represented by the Transit Supervisors Organization, and not Petitioner. Station supervisor level 1 employees are paid approximately $69,000 per year, while station supervisor level 2 employees are paid $83,000 per year.

was free to disregard irregularities under CPLR §2001, as no substantial right of a party was prejudiced, and NYCTA, who was give a full opportunity to brief the issues, cannot cite any such prejudice. As noted in the Practice Commentaries to CPLR §2001, our system "eschews the elevation of form over substance."

NYCTA also alleges that the Court overlooked facts that demonstrated that Petitioner had negotiated and agreed to the salary structure for its employees since 1984, and, therefore is estopped, or, has waived any challenges in this proceeding. However, the Court did not overlook these facts, but merely rejected any finding that laches (or estoppel or waiver) would completely bar this proceeding.[6]

NYCTA's argument, regarding subject matter jurisdiction was already made by NYCTA, and rejected by the Court. The Court correctly found that the issue should not be before the New York Public Employment Relations Board, which has jurisdiction over claims of unfair labor practices under CSL § 209-a, because CSL § 209-a was inapplicable. This case did not involve complaints

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[6]The Court stated "[n]or is the proceeding barred by the doctrine of laches. Laches requires a showing of "significant prejudice," which is absent here. *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983); *see also Public Administrator of Kings County v Hossain Construction Corp.*, 27 AD3d 714 (2d Dept 2006)." While it is true that the Court did not specifically address the issue of estoppel or waiver in its Decision, the Court rejected the arguments that laches, estoppel or waiver present a complete bar to this proceeding. There is no basis to bar this proceeding, which involves the allegation of a continuing wrong, under statute.

regarding "interference with the right of public employees to organize, interference with the formation of an employee organization, discrimination against an employee for the purpose of discouraging the activities of an employee organization, or refusal to negotiate in good faith with the duly recognized representatives of public employees." Nothing has been cited to alter that determination.

Little time was devoted by either side, to the most important issue, i.e., whether CSL § 115 can be applied to NYCTA at all. NYCTA reiterates its argument that CSL § 115 is applicable only to employees of the State of New York (*see* Article VIII title, "Classification and Compensation of State Employees"), and that, as a public authority, it is not a civil division of the State subject to CSL § 115.[7]

As noted in the Court's prior decision:

Despite NYCTA's intricate discussion as to why it is not governed by the CSL, its enabling legislation indicates otherwise. NYCTA was created pursuant to PAL § 1201 as a public benefit corporation. *See Matter of Subway-Surface Supervisors Association v New York City Transit Authority*, 44 NY2d 101 (1978). Section 1210 deals with NYCTA employees. Section 1210 (2) states, in relevant part "[t]he appointment, promotion and continuance of employment of all employees of the authority shall be governed by the civil service law and the rules of the

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[7]NYCTA argues that CSL § 115 does not create any individually enforceable rights, an argument that it admits that it did not previously raise. However, there is no reason why NYCTA did not make this argument previously, as it specifically argued that CSL §115 did not apply to NYCTA, because NYCTA is not a state agency. Accordingly, this new argument will not be addressed.

municipal civil service commission of the city." NYCTA attempts to distinguish this language by emphasizing the words "rules of the municipal civil service commission of the city," arguing that this addition to the statute makes NYCTA employees something other than State employees governed by the CSL.

This argument is futile. While it is settled that a petitioner must be employed by the State of New York in order to gain the benefit of CSL § 115 (*Ryan v Adler*, 51 Misc 2d 816 [Sup Ct, Westchester County 1966], *affd* 28 AD2d 920 [2d Dept 1967], *affd* 21 NY2d 815 [1968]), PAL § 1210 (2) clearly indicates that the manner of employment of NYCTA employees will be governed by the CSL "and" the rules of the municipal civil service commission; and the applicability of the municipal civil service commission rules does not trump the applicability of the CSL. NYCTA also fails to point to the conclusion of PAL § 1210 (2), which states, in case there is any doubt about it, that "[e]mployees of the authority shall be subject to the provisions of the civil service law."

This holding has already been made at the appellate level. In *Margolis v New York City Transit Authority* (157 AD2d 238, 241-242 [1st Dept 1990]), the Court, while finding that NYCTA was undoubtedly "not a division of the State," and a "separate entity" from the City of New York, nevertheless found that CSL § 115 applied to NYCTA employees via PAL § 1210 (2). Thus, petitioner herein may rely on the statutory promise of equal pay for equal work. This being the case, there is no need to discuss petitioner's equal protection arguments.

Nothing has been cited to alter the Court's determination as to the applicability of CSL §115 to NYCTA. However, the Court, in its discretion, grants leave to appeal to the First Department. Notably, in opposition, Petitioner has merely stated that "NYCTA should not be permitted to further delay this proceeding by appealing a non-final order." Although the Court concluded that laches, estoppel and waiver does not act to completely bar this proceeding, it rings hollow that Petitioner now focuses on delay, when this proceeding could have been brought earlier.

Accordingly, it is

ORDERED that the motion for permission to answer, renew/reargue, and/or for leave to appeal is denied as to renewal and reargument, and is granted as to leave to appeal to the Appellate Division, regarding the four questions raised on page 5 of the Memo. Of Law in Support, and is granted as to submission of an answer within the next 30 days, containing a general denial, without prejudice to a motion to amend the answer after decision by the First Department; and it is further

ORDERED that the Petition and the Reference directed in the Decision and Order, dated April 14, 2010, is held in abeyance pending decision from the First Department; and it is further

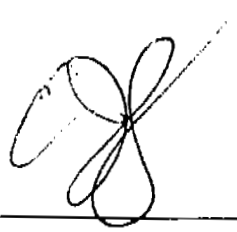
ORDERED that if Respondent does not move to appeal within the next 30 days, Petitioner may email the Court for an order proceeding with the Reference; and it is further

ORDERED that the parties are directed to inform the Special Referee's office of the stay of the reference directed herein.

This Constitutes the Decision and Order of the Court.

Dated: January 14, 2011

ENTER:



J.S.C.

EMILY JANE GOODMAN