

Myers v City of New York
2011 NY Slip Op 31871(U)
July 5, 2011
Supreme Court, New York County
Docket Number: 116672/2010
Judge: Judith J. Gische
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SCANNED ON 7/11/2011

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

DECEMBER. HON. JUDITH J. GISCHE

PART 10

Index Number : 116672/2010 J.S.C.

MYERS, ANTOINETTE

vs

INDEX NO. _____

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

VACATE/ STAY ORDER/ JUDGMENT

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/5/11

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court of the State of New York
Country of New York: Part 10

-----x
ANTOINETTE MYERS,

Petitioner,

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

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION; JOEL I. KLEIN
CHANCELLOR OF NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondents.
-----x

Decision/Order

Index No.: 116672/10

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

UNFILED JUDGMENT

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Notice of Pet, Verified Pet w/exhs	1
Respondents x/m (dismiss), exhs	2
Petitioner's opp to x/m	3

-----x

Upon the foregoing papers, the decision and order of the court is as follows:

This is an Article 75 petition brought by Antoinette Myers ("Myers"), a former school teacher working in the New York City public schools. The respondents are the Board of Education of the City School District of New York ("BOE") and the City of New York ("City") (collectively, "respondents"). Myers contends that she was unjustly terminated, following a decision by Hearing Officer Richard Gwin ("Gwin"), dated December 1, 2010 ("determination"), after a compulsory arbitration proceeding held pursuant to Section 3020-a of the New York State Education Law. Myers seeks an

order vacating the determination on the grounds that the Hearing Officer exceeded his jurisdiction, the decision is arbitrary and capricious, and that the penalty ordered is irrational and shocking to the conscious.

Respondents have cross-moved (pre-answer) to dismiss this action. Respondents argue that the petition is time barred under Education Law § 3020-a(5) which provides a 10-day statute of limitations to appeal a Hearing Officer's determination, and that the petition otherwise fails to state a cause of action.

Discussion

It is undisputed that this petition was filed on December 28, 2010. The Opinion and Award was made on November 26, 2010. On November 26, 2010, Gwin mailed a copy of the Opinion and Award to the BOE Office of School Personnel Review and Accountability, Teacher Tenure Hearing Unit. That Unit then mailed out the Opinion and Award on December 3, 2010 to both petitioner and the attorney who had represented her at the arbitration, Aileen C. Naughton ("Naughton").

Petitioner claims that she did not receive the Opinion and Award until December 17, 2010. Education Law § 3020-a (5) requires that any appeal challenging a hearing officer's decision must be filed with the New York State Supreme Court within 10 days of receipt.

In addressing the issue of timeliness, the court need not resolve the parties' collateral dispute about whether attorney Naughton continued to be Myers' attorney following the hearing and/or whether receipt of the Opinion and Award by Naughton is receipt by Myers. Accepting Myers' facts in the most favorable light, she received the

decision on December 17, 2010, and filed this petition 11 days later on December 28, 2010. As such, this petition is untimely.

Petitioner incorrectly claims that she is excused from the 10-day statute of limitations requirement of Education Law § 3020. The BOE's role under Education Law § 3020-a (4)(b) is only to "implement" the decision of the hearing officer. The petitioner's remedy, as defined by Education Law § 3020-a (5), is to challenge the hearing officer's determination in a proceeding pursuant to CPLR article 75. Regardless of whether the claims petitioner asserts are cognizable in such a proceeding (see CPLR 7511; *Matter of Halasy v Department of Educ. of City of N.Y., Brooklyn High School Dist. No. 73*, 17 AD3d 676, 677, 792 NYS2d 909 [2005]), the proceeding is required to be commenced within the 10-day time limitation set forth in Education Law § 3020-a (5). CPLR § 7801; CPLR § 217.

Here, petitioner failed to challenge the hearing officer's determination within this 10-day period. Myers admits receiving a copy of Gwin's Decision on December 17, 2010, yet she filed her appeal on December 28, 2010 (11 days later). Although Myers concedes that her filing was untimely, she requests that this court set aside the filing requirement of Education Law § 3020-a(5). Myers claims that the court should excuse her failure to commence the instant proceeding because inclement weather conditions on December 27, 2010 rendered the Supreme Court "inaccessible." Petitioner argues that the Federal Rule of Civil Procedure Rule 6(a)(1), which excuses tardiness for "weather or other conditions [that] make the clerk's office inaccessible," is a viable excuse. Nevertheless, and by Myers' own admission, the court was open on December 27, 2010.

Although the court has sympathy for petitioners' difficulties due to inclement weather, Federal Rule of Civil Procedure 6(a)(1) is inapplicable to this proceeding. The court is without power to extend a statute of limitations, even by one day. (see Mose v Sangiovanni, 2011 NY Slip Op 4218 (N.Y. App. Div. 2d Dep't May 17, 2011), McGarty v. City of New York, 2007 N.Y. Misc. LEXIS 40 44 AD 3d 447 (N.Y. App. Div. 1st Dep't 2007). The Supreme Court was open on December 27, 2010, and Myers failed to file her appeal in accordance with Education Law § 3020. The court need not reach any other issues. Accordingly, Myers' petition to vacate the determination was not timely filed and is denied. Respondents' motion to dismiss is granted.

Conclusion

It is hereby:

ORDERED, DECLARED, AND ADJUDGED that the respondents' cross-motion to dismiss is granted and the petition is denied; and it is further

ORDERED that any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied; and it is further

ORDERED this shall constitute the Decision, Order, and Judgment of the Court.

Dated: New York, New York
 July 5, 2011

SO ORDERED

UNFILED JUDGMENT

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HON. JUDITH U. GISCHE, J.S.C.

