

Matter of Mason v City of New York

2011 NY Slip Op 32227(U)

August 11, 2011

Sup Ct, NY County

Docket Number: 112033/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE *is Jaffe*

PART 5

Index Number : 112033/2010
MASON, AUDREY
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 001
 ARTICLE 78
CAL #73

INDEX NO. 112033/10
 MOTION DATE 5/31/11
 MOTION SEQ. NO. 001
 MOTION CAL. NO. 73

this motion to/for vacate administrative determination

PAPERS NUMBERED

1, 2, 3
4, 5
6

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

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).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 8/11/11

(Signature)
BARBARA JAFFE J.S.C.
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):

I. FACTUAL BACKGROUND

Petitioner was employed by respondent New York City Human Resources Administration (HRA) as an Associate Job Opportunity Specialist for over 15 years. (Pet.). Pursuant to section 75 of the Civil Service Law, HRA preferred 15 charges against her, alleging that sometime between August 2007 and October 2008 she rented an apartment to one of her clients and hired him as a handyman, failed to disclose same to her supervisor, obtained confidential information about him that she used for personal benefit, negotiated and accepted shelter allowance checks issued to her on the client's behalf, and was arrested on September 28, 2008 for illegally evicting him. (Pet., Exh. A). In doing so, petitioner violated multiple sections of HRA's Code of Conduct, Confidentiality Policy, and Procedure, sections 1-13(a) and 2604(b)(2) and (4) of the New York City Charter, and Penal Law §§ 145.25 and 120.20. (*Id.*).

On April 30, 2010, petitioner and respondents signed a stipulation of settlement whereby they agreed as follows:

[petitioner] agrees to resign in settlement of charges referenced above effective 5/14/10. If [petitioner] fails to resign by said date she will be deemed terminated effective 5/14/10. [Respondents] agree[] to a neutral reference to non-[C]ity employment inquiries.

(*Id.*, Exh. B). They also agreed to "resolve this matter" and not appeal it "at law or equity" and "that the agreement is final and binding." (*Id.*).

As petitioner did not resign by May 14, 2010, she was deemed terminated. (Pet.). No section 75 hearing was held despite petitioner's repeated requests for one. (*Id.*).

By affidavit dated November 23, 2010, petitioner states that she "had no significant performance issues" before the charges were preferred against her, that she does not believe she violated any policy in renting the apartment to her client, that she understood the stipulation at

signing to mean that she would have the right to a hearing if she was deemed terminated, and that she would never sign an agreement terminating “her lifetime career with [] HRA unless there was a significant monetary settlement.”

II. PERTINENT PROCEDURAL BACKGROUND

On September 27, 2010, petitioner served respondents with the instant petition (Pet.), and on October 29, 2010, respondents served petitioner with their cross-motion to dismiss it (Notice of Cross-Motion).

On May 23, 2010, petitioner served respondents with a cross-motion to amend her petition to include the following paragraph:

In addition, the purported settlement agreement was not knowingly and voluntarily entered into and was a product of extraordinary duress. Petitioner had no time to contemplate whether to sign the agreement and was under extraordinary pressure to sign the agreement.

(Notice of Cross-Motion to Amend, Exh. A).

III. CROSS-MOTION TO AMEND

A. Contentions

Petitioner contends that she should be granted leave to amend her petition, as respondents would not be prejudiced thereby. (Affirmation of Stewart Lee Karlin, Esq., dated May 23, 2011).

In opposition, respondents argue that petitioner’s amendment is futile, as the record, which shows that petitioner was represented by counsel at the signing, belies her contention that she was under duress, and the amended petition therefore fails to state a cause of action.

(Affirmation of Gail M. Mulligan, ACC, in Opposition, dated May 26, 2011).

B. Analysis

CPLR 3025(b) provides that “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at anytime by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just, including the granting of costs and continuances.” It is well settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010]).

A viable claim of duress requires a showing of both “(1) a wrongful threat and (2) preclusion of the exercise of free will.” (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [1st Dept 2009]). A threat to do that which one has a legal right to do does not constitute duress. (*Madey v Carman*, 51 AD3d 985, 987 [2d Dept 2008]; *767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216, 218 [1st Dept 2006]; *Fred Ehrlich, P.C. v Tullo*, 274 AD2d 303, 304 [1st Dept 2000]).

Here, petitioner’s amended petition contains no assertion that respondents threatened her or that she could not exercise free will in deciding whether to sign the stipulation. Even if petitioner “was under extraordinary pressure to the sign the agreement” due to respondents threat to continue with a section 75 hearing or terminate her after a hearing, such threats do not constitute duress. (*Cf. Faillace v Port Auth. of New York & New Jersey*, 130 AD2d 34 [1st Dept 1987] [no duress where employer threatened to terminate employee before agreement was signed, as employer had right to do so pursuant to Port Authority procedures]; *Hopkins v Governale*, 222 AD2d 435 [2d Dept 1995] [no duress where employer threatened to bring

disciplinary charges before agreement signed, as employer had right to do so)). Moreover, petitioner was represented by counsel and her recent claim of duress is fatally conclusory.

IV. PETITION AND CROSS-MOTION TO DISMISS

A. Contentions

Petitioner claims that respondents' failure to provide her with a section 75 hearing was arbitrary and capricious, as she signed the stipulation on the understanding that she would be terminated and entitled to a hearing if she did not resign. (Pet.). In any event, assuming that her actions violated HRA policy, she maintains that termination constitutes an excessive penalty. (*Id.*).

In opposition, and in support of their cross motion, respondents argue that petitioner waived her right to a hearing in signing the stipulation even though it does not contain an express waiver, as it provides that the parties agreed to "resolve the matter" in signing it and that it is "final and binding," and its plain language does not afford petitioner the right to a hearing upon termination. (Mem. of Law in Support of Respondents' Cross-Motion, dated Oct. 28, 2010). They also deny that termination constitutes an excessive penalty. (*Id.*).

In reply, and in opposition to respondents' cross-motion, petitioner alleges that respondents misapprehend her claims, as she, too, is seeking to enforce the stipulation's plain language, which contains no provision that she waive her right to a section 75 hearing. Moreover, she claims that the provision setting forth that termination would settle the charges was "deliberately omitted" from the stipulation, as she would never have agreed to termination, the worst penalty she could have faced had she continued to participate in section 75 disciplinary procedures. (Affirmation of Stewart Lee Karlin, Esq., in Opposition, dated Nov. 29, 2010). And

petitioner maintains that this is an excessive penalty in light of the charitable nature of her actions. (*Id.*).

In sur-reply, and in further support of their cross-motion, respondents claim that the stipulation must be enforced, as petitioner provides no proof that she signed it involuntarily or that its terms are unclear and ambiguous. (Affirmation of Gail M. Mulligan, ACC, in Reply, dated Dec. 2, 2010).

B. Analysis

1. Enforceability of stipulation

Pursuant to section 75 of the Civil Service Law, a permanent civil service employee is entitled to a hearing before being removed or subjected to any disciplinary penalty for incompetence or misconduct. However, she may waive this right if she does so knowingly and voluntarily and her “waiver serves as consideration for the curtailment of pending disciplinary proceedings.” (*Winkler v Kingston Hous. Auth.*, 259 AD2d 819, 820-21 [3d Dept 1999]; *Whitehead v State of N.Y. Dept. of Mental Hygiene*, 71 AD2d 653, 653 [2d Dept 1979]).

When determining whether “a voluntary waiver of rights has occurred, the focus is ‘upon the existence of a bona fide agreement by which the employee received a desired benefit in return for the waiver, the complete absence of duress, coercion, or bad faith and the open and knowing nature of the waiver’s execution.’” (*Nabors v Town of Somers*, 72 AD3d 769 [2d Dept 2010]). Absent proof that a waiver was not knowing or voluntary, “it may not be assumed that an employee would refuse to waive rights if he or she were aware of the rights being waived.” (*Whitehead*, 71 AD2d at 653).

Here, petitioner agreed that the stipulation, which required both that she resign by May

14, 2010 or be terminated, and that respondents provide her with neutral references to non-City employers, was the “final and binding” means of “resolv[ing] the matter.” Although it does not provide that the charges would be settled upon petitioner being deemed terminated or that petitioner waived her right to a hearing, these terms need not be included in the agreement in order for it to be final. Were petitioner able to invoke her right to a hearing after being terminated, the stipulation would have no effect, and the parties would be in the same position as if it had never been executed.

Petitioner’s denial of having waived her right to a hearing on the ground that she would not have agreed to termination is unpersuasive, as in exchange for the waiver, the disciplinary proceedings against her were suspended and she was given a choice between resigning or being deemed terminated; respondents’ agreement to provide her with neutral references constitutes an additional incentive. Moreover, had a section 75 hearing been held, petitioner would have had no choice as to if and how her employment would end and the type of reference respondents would provide. That petitioner would have refused to waive this right may not be assumed in these circumstances. (*See Whitehead*, 71 AD2d at 653 [no showing that waiver was neither knowing nor voluntary despite no express waiver in agreement, as petitioner provided no proof thereof]).

2. Arbitrary and capricious

Judicial review of an administrative agency’s decision is limited to whether the decision “was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” (CPLR 7803[3]). In evaluating whether an administrative

agency's determination is arbitrary or capricious, courts consider whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc., Ltd v Div. of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]).

As petitioner waived her right to a hearing by signing the stipulation (*supra*, IV.B.1.), and as it is enforceable, final, and binding, respondents' refusal to hold a hearing cannot be found arbitrary or capricious.

3. Excessive penalty

The standard for reviewing a penalty imposed after a hearing held pursuant to Civil Service Law § 75 is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Matter of Pell*, 34 NY2d at 233).

Although the charges were settled by the stipulation, were petitioner's termination to be considered a penalty imposed by respondents, it has not been shown to be disproportionate to her offenses, as petitioner violated HRA policy and the Penal Law in exploiting her professional relationship with the client for personal benefit, failing to disclose this conflict of interest to her supervisor, and endangering the client by illegally evicting him. (*Cf. Nabors*, 72 AD3d 769 [termination not shocking to one's sense of fairness where petitioner guilty of misconduct in misrepresenting employment status with municipality to receive unemployment benefits]; *Sassone v New York State Thruway Auth.*, 189 AD2d 86 [3d Dept 1993] [termination not shocking to one's sense of fairness where petitioner guilty of tampering with toll records for

personal financial benefit]; *Plante v Buono*, 172 AD2d 81 [3d Dept 1991] [termination not shocking to one's sense of fairness where petitioner guilty of failing to follow orders "concerning administrative and organizational functions"]).

V. CONCLUSION

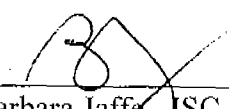
Accordingly, it is hereby

ADJUDGED, that petitioner's cross-motion to amend the petition is denied; and it is further

ADJUDGED, that the petition for an order vacating the award is denied; it is further

ADJUDGED, that respondents' cross-motion for an order dismissing the petition is granted to the extent that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.G.

DATED: August 11, 2011
New York, New York

AUG 11 2011

UNFILED JUDGMENT

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