

Cruz v United Fedn. of Teachers
2011 NY Slip Op 33499(U)
December 23, 2011
Supreme Court, New York County
Docket Number: 103386/11
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PART 15

Index Number : 103386/2011

CRUZ, JOSEFINA

vs

UNITED FEDERATION OF TEACHERS

Sequence Number : 001

- DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, It is ordered that this motion is

FILED

JAN 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

RECORDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/23/11



J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
JOSEFINA CRUZ,

Plaintiff,

- against -

UNITED FEDERATION OF TEACHERS,
NEW YORK STATE UNITED TEACHERS,
JAMES SANDNER, ESQ., MITCHELL
RUBINSTEIN, ESQ. and CHARLES MOERDLER,
ESQ.,

Defendants,
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
103386/11

**DECISION
and ORDER**

Mot. Seq.
001 & 002

FILED

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Josefina Cruz ("Plaintiff") was a tenured teacher with the New York City Department of Education until her termination in 2008, and was a member of defendant United Federation of Teachers ("UFT"). Plaintiff states in her complaint that in 2006, charges were preferred against her alleging "unsatisfactory performance, misconduct or other disciplinary charges." Based upon the charges against her, Plaintiff was placed on an Ineligible Inquiry List, was removed from her teaching responsibilities, and was placed in a Temporary Reassignment Center - otherwise known as a "rubber room." Plaintiff states that she provided UFT with timely notice of the charges and her reassignment. UFT then called upon defendant New York State Unified Teachers ("NYSUT") to represent Plaintiff in her Education Law §3020-a hearing. Defendants Sandner and Rubinstein were assigned to be Plaintiff's attorneys concerning her disciplinary charges.

Plaintiff claims that Sandner and Rubinstein failed to adequately represent Plaintiff during the course of her disciplinary proceeding. Specifically she states that during the two year pendency of her disciplinary charges, they never moved to have the charges dismissed or dropped; and that during the proceedings, they failed to "raise jurisdictional or other objections to the disciplinary hearing process."

In 2008, during her disciplinary proceeding, Plaintiff, along with other teachers, filed a lawsuit against UFT alleging, *inter alia*, that UFT (1) failed to honor its obligations to Plaintiff and to other teachers who were reassigned to the “rubber room” and facing disciplinary charges; (2) was discriminating against Plaintiff; and (3) that UFT was failing to fairly represent her.

Plaintiff alleges that, in response to, and in retaliation for commencing the lawsuit against UFT, defendant Moerdler, a UFT attorney, advised NYSUT, Sandner and Rubinstein that they should end their representation of Plaintiff. Sandner and Rubinstein complied and moved to withdraw as Plaintiff’s attorneys, citing a conflict of interest. After the arbitrator granted Sandner and Rubinstein’s motion to withdraw, Plaintiff proceeded *pro se*. After the hearing, the Arbitrator issued a decision dated December 1, 2008 finding Plaintiff guilty of ten out of the 14 specifications brought against her (*see Cruz v. New York City Dept. of Educ.*, 2010 NY Slip Op 50016U [Sup. Ct., N.Y. Co. 2010]) (denying Plaintiff’s Article 75 petition challenging the termination). Plaintiff claims that her termination was the result of her *pro se* status and her inability to adequately defend herself.

Plaintiff commenced this action on March 18, 2011. She asserts three causes of action against Sandner and Rubinstein sounding in malpractice, breach of contract, and violation of General Business Law (“GBL”) §349. NYSUT is also named in the GBL claim. As against UFT, Plaintiff asserts causes of action sounding in breach of contract, tortious interference with contract, and breach of the duty of fair representation (“DFR”). Moerdler is also named in the tortious interference claim.

Presently before the court are motions to dismiss by UFT, NYSUT, Sandner and Rubinstein pursuant to CPLR §3211(a)(5), (7) & (8) on the one hand (“UFT movants”); and by Moerdler pursuant CPLR §3211(a)(7) & (8) on the other. With respect to Plaintiff’s DFR claim, UFT movants state that the action is time-barred by CPLR §217(2)(a). UFT movants further claim that Plaintiff’s DFR claim fails on the merits because she fails to adequately plead that she was damaged as a result of their actions. UFT movants claim that Plaintiff’s remaining claims fail as a matter of law because her sole remedy is a DFR claim. UFT movants also contend that these claims fail on the merits. Lastly, with respect to UFT and NYSUT, UFT movants claim that they have not been properly served by Plaintiff.

In his motion to dismiss, Moerdler first states that he was never personally

served by Plaintiff, as she claims in her "Declaration of Service." On the merits, Moerdler claims that Plaintiff's tortious interference claim must be dismissed because (1) there is no underlying contract between Plaintiff and UFT or NYSUT; (2) even if there was an underlying contract, the claim is barred because Plaintiff is limited to a DFR claim; and (3) in any event, assuming there was a valid contract and that Plaintiff could maintain a breach of contract action, Moerdler's alleged conduct was wholly appropriate.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
- (5) the cause of action may not be maintained because of ... statute of limitations; or
- (7) the pleading fails to state a cause of action; or
- (8) the court has not jurisdiction of the person of the defendant

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Here, the court finds that Plaintiff's complaint must be dismissed. Petitioner's DFR claim is clearly barred by the four-month statute of limitations set forth in CPLR §217(2)(a), which provides:

Any action or proceeding against an employee organization subject to article fourteen of the civil service law or article twenty of the labor law which complains that such employee organization has breached its duty of fair representation regarding someone to whom such employee organization has a duty shall be commenced within four months of the

date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

Further, the court notes that, even if timely, Plaintiff fails to state a DFR cause of action.

[I]f the union has processed a contract grievance in an arbitrary and negligent manner, resulting in an adverse determination in the arbitration forum... the employee may ... sue the union and recover a money judgment for those damages which directly resulted from the union's misconduct

It is obvious that, in order to recover damages from a union pursuant to a cause of action alleging a breach of the duty of fair representation, the employee must prove the merits of the underlying grievance against the employer, the proper prosecution of which the union is alleged, by its misconduct, to have foreclosed (*Sinicropi v. N.Y. State Pub. Empl. Rels. Bd.*, 125 A.D.2d 386, 388-89 [2nd Dept. 1986]).

Plaintiff fails to allege facts that establish that her union attorneys engaged in misconduct of any kind. On the contrary, the facts pleaded establish that Sandner and Rubinstein withdrew from their representation of Plaintiff after she sued the UFT alleging, among other things, that UFT was failing to properly represent her, thereby creating a conflict of interest. Moreover, the court notes that the union attorneys withdrew only after duly moving for, and being granted leave to withdraw by the arbitrator in Plaintiff's §3020-a proceeding. Nor does Plaintiff sufficiently plead that she had a valid defense to the charges - procedurally or substantively - which, had the union attorneys presented, would have resulted in a more favorable outcome in her disciplinary proceeding. Indeed, the court notes that, in denying her Article 75 petition, Justice Scarpulla found that the petition was "both procedurally infirm *and lacks substance on the merits*" (*Cruz* at *8) (emphasis added).

Plaintiff's additional claims are preempted by her DFR claim, and may not be asserted in order to circumvent the applicable four-month statute of limitations (*see Roman v. City Empl. Union Local 237*, 300 A.D.2d 142 [1st Dept. 2002]) ("The expedient of characterizing a claim for breach of the duty of fair representation as one

for breach of contract is unavailing to avoid the four-month limitations period prescribed in CPLR 217(2)(a)"); *Mamorella v. Derkasch*, 276 A.D.2d 152, 155 [4th Dept. 2000] ("attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services performed constitute part of the collective bargaining process.... Plaintiff is limited to bringing an action against the union for breach of the duty of fair representation.").

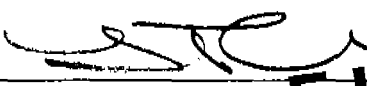
Wherefore it is hereby

ORDERED that defendants' motions to dismiss are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 23, 2011


EILEEN A. RAFTERY, J.S.C.

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