

<b>Westchester County Corr. Superior Officers Assoc. v County of Westchester</b>
2011 NY Slip Op 34205(U)
June 20, 2011
Supreme Court, Westchester County
Docket Number: 26983/10
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED  
6/20/11

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

FILED  
JUN 20 2011  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

-----X  
WESTCHESTER COUNTY CORRECTION SUPERIOR OFFICERS ASSOCIATION, RETIRED CORRECTION CAPTAIN KEVIN MCGREW, RETIRED CORRECTION SERGEANT PHILIP BANKS, RETIRED CORRECTION CAPTAIN PAUL BATTISTA, RETIRED CORRECTION SERGEANT ALAN CARDEN, RETIRED CORRECTION CAPTAIN ROBERT CRAIG, RETIRED CORRECTION SERGEANT JEAN DESIR, RETIRED CORRECTION SERGEANT DONALD LANDGREBE, RETIRED CORRECTION SERGEANT RICHARD MACCABEE, JR., RETIRED CORRECTION SERGEANT JOSEPH MASCETTA, RETIRED CORRECTION SERGEANT JOHN REILLY, RETIRED CORRECTION OFFICER SPECIALIST STEPHEN TURNER,

MOTION DATE: 6/3/11  
INDEX NO. 26983/10

Plaintiffs,

-against-

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS,

Defendants.  
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The following papers numbered 1 to 7 were read on this motion by defendants for an Order pursuant to CPLR 3211 dismissing the complaint based upon the documentary evidence, lack of subject matter jurisdiction and failure to state a cause of action.

Papers Numbered

Notice of Motion - Affirmation (Spicer) - Exhs. (A-B) ..... 1-3  
 Answering Affirmation (Bartlett) - Exhs. (A-F) ..... 4-5  
 Replying Affirmation (Aden) - Exh. .... 6-7

Upon the foregoing papers, it is Ordered that this motion by defendants is disposed of as follows:

Plaintiff Westchester County Correction Superior Officers Association (the "Union") is the collective bargaining agent for employees working in the titles of Correction Officer-Sergeant, Captain and Assistant Warden in defendant Westchester County Department of Corrections ("Department"). The individually named plaintiffs are alleged to be former County Superior Officers and former members of the Union. Defendants allege that, on February 28, 2002, defendant County of Westchester ("County") and the Union had entered into a Collective Bargaining Agreement (CBA).<sup>1</sup> Plaintiffs allege in this action that the County has breached Article XVII of the CBA by not providing them, upon their respective disability retirements, permanent total or partial disability benefits pursuant to New York State Workers' Compensation Law.<sup>2</sup>

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<sup>1</sup>It appears that this CBA had been an extension of the CBA that had been in effect from January 1, 1996 to December 31, 2001.

<sup>2</sup>The Court notes the County argues that its records indicate that plaintiffs Carden, Craig, Jena, Oswain and Turner are each receiving non-disability retirement pensions and that plaintiffs Hargraves and Macabee remain on active duty. Further, the County

Article XVII states in pertinent part:

Employees who are injured in the performance of their duties ... shall be entitled to the provision of §207-c of the General Municipal Law and Workers' Compensation. Employees injured in the course of their employment ... but not in the performance of their duties ... shall be entitled only to the Workers' Compensation provision of this Collective Bargaining Agreement and state law.

The complaint at bar alleges that each plaintiff had suffered line of injury duties while employed by the County for which each had received during the course of his/her County employment benefits pursuant to General Municipal Law section 207-c rather than Workers' Compensation, which benefits included full, untaxed pay and medical benefits. According to plaintiffs, at a certain point the County had filed applications for disability retirement on their behalf, that all the plaintiffs ultimately were found by the New York State Retirement System to be permanently disabled as a result of their line of duty injuries and that plaintiffs' disability retirement applications were granted. Based upon the determinations that the plaintiffs were permanently incapacitated and that there were no light duty positions available to offer them, plaintiffs were then removed from the County payrolls and their benefit payments pursuant to section 207-c were terminated.

Plaintiff allege that, since the CBA is silent as to awards of

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states that its records establish that Mascetta, Oswain and Reilly had retired prior to the effective date of the applicable CBA and that they are not proper plaintiffs herein.

permanent total or partial disability, the Workers' Compensation Law controls such disability payments and that they are entitled to permanent disability benefits thereunder.<sup>3</sup>

Presently, defendants are moving for dismissal of the complaint pursuant to CPLR 3211, arguing that plaintiffs have failed to exhaust their administrative remedies and that this Court is without jurisdiction to entertain their claims. Defendants' argument is predicated upon Article XVII, §12(b) which states that "The employee may receive only direct Workers' Compensation benefits that he/she may be entitled to as determined by the Workers' Compensation Board." Since plaintiffs are seeking Workers' Compensation benefits to supplement their disability retirement pensions, defendants argue that they should have filed Workers' Compensation claims once they had begun receiving the pensions they want supplemented, and since they have not alleged herein that they have filed for benefits with the Workers' Compensation Board, that dismissal of plaintiffs' claims is mandated.

Plaintiffs oppose this motion, arguing that it is identical to other dispositive motions previously brought by these defendants in

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<sup>3</sup>The Workers' Compensation Law provides for an award of benefits for permanent partial or total disability based on reduced earnings or loss of earning capacity following the determination that a worker has suffered a permanent impairment.

related actions that had been brought on behalf of other correction officers seeking disability retirement benefits, to wit, *Westchester County Correction Officers Benevolent Association, Inc. et al. against The County of Westchester, et al.*, (Nastasi, J.), Westchester County Index No. 17541/07, entered December 7, 2007; *Westchester County Correction Officers Benevolent Association, Inc. et al. against The County of Westchester, et al.*, (Nastasi, J.), Westchester County Index No. 22156/07, entered February 27, 2008; *Westchester County Correction Officers Benevolent Association, Inc. et al. against The County of Westchester, et al.* (Colabella, J.), Westchester County Index No. 17541/07, entered January 22, 2010. Plaintiffs argue that in each of these actions the respective Courts had rejected the defendants' arguments, once again raised herein, that this Court lacks subject matter jurisdiction since plaintiffs had failed to exhaust their administrative remedies and that the plaintiffs have failed to state a cause of action. Indeed, Justice Nastasi twice previously expressly held in the above-cited actions that the plaintiffs were not required to exhaust the grievance procedure prior to commencing their action and that the plaintiffs' claims with respect to their involuntary retirement "are meritorious," and he further had held in his February 27, 2008 Order, that defendants were collaterally estopped from relitigating the issues of whether plaintiff had stated a

cause of action. Justice Nastasi's February 27, 2008, Order had been affirmed by the Second Department, by its Decision and Order, dated September 22, 2009. Notably, the Second Department held that Justice Nastasi properly had determined that defendants were collaterally estopped from litigating the issue of whether the complaint failed to state a cause of action, as well as whether plaintiff lacked standing, because "these arguments were previously raised by the defendants in a motion to dismiss the complaint in a prior action commenced against them by [the Union] and 15 correction officers, in which the causes of action were largely identical in substance to those asserted here." Plaintiffs submit that defendants are collaterally estopped from arguing that the instant complaint fails to state a cause of action and that the Court lacks subject matter jurisdiction.

In any event, plaintiffs argue that their allegations state a legally cognizable cause of action and thus that defendants' motion seeking dismissal of their complaint must be denied.

Additionally, plaintiffs argue that defendants' reliance upon documentary evidence as a basis for dismissing the complaint is entirely misplaced since, contrary to defendants' assertion, there is no language in the CBA that constitutes a defense to plaintiffs' action as a matter of law. Rather, plaintiffs note that contractual provision Article XVII, section 12(b), upon which

defendants rely, is titled, "Line of Duty Injury Determinations," and they argue that it relates solely to whether a correction officer is entitled to received benefits pursuant to General Municipal Law section 207-c and/or Workers' Compensation. Plaintiffs submit that said provision is inapplicable here since plaintiffs previously all were found to have sustained injuries in the line of duty and had received 207-c benefits and Workers' Compensation benefits up until the time the County had filed applications on their behalf for disability retirement benefits; plaintiffs argue that there is nothing in the language of Article XVII relating to the disability retirement benefits sought herein.

Finally, plaintiffs note that defendants had opted out of the Workers' Compensation System and they impliedly argue that they should be judicially estopped from now asserting that plaintiffs have to pursue review by the Workers' Compensation Board since they previously had opposed plaintiff McGrew's Workers' Compensation filed claim on the basis that the Workers' Compensation Board had no jurisdiction.

By way of reply, defendants argue that the doctrine of collateral estoppel does not apply to bar defendants' instant motion since the actions upon which plaintiffs rely in support of their collateral estoppel claim had involved alleged injuries that

had arisen prior to the institution of Article XX<sup>4</sup> of the 2000 COBA and had occurred under what had been referred to as Appendix B, which had been the procedural mechanism for dealing with injuries under the 1989 COBA CBA, which had been effective 1989 until September, 2000. Defendants assert that "a decision interpreting a contract provision that is not in question in this suit cannot be decisive of the issue in the instant motion, which is whether or not plaintiffs are required to exhaust their administrative remedies under Article XVII of the CBA."

Lastly, defendants argue that they have not objected to the Workers' Compensation Board's jurisdiction and that plaintiff McGrew's objection had involved a claim that had been filed in 1993 when Appendix B was still in effect.

Initially, in this Court's view, based upon the previous Decisions and Orders relied upon by plaintiffs, defendants properly are collaterally estopped herein from relitigating the issues of whether this Court lacks subject matter jurisdiction to entertain this action based upon plaintiffs' failures to have sought relief from the Workers' Compensation Board and whether plaintiffs have stated a cause of action, and thus their motion properly is denied

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<sup>4</sup>Article XX of the 2000 COBA is alleged to be identical to Article XVII of the CBA here in issue; while the language of the two provisions are identical the two CBAs are for distinct bargaining units.

on this basis. The Court finds an identity of issues in the present litigation and the prior determinations. Firstly, the Court observes that all of the cases raise the common issue of whether the Workers' Compensation Law, which permits awards based upon loss of earning capacity and reduced earnings due to an employees' permanent disability, applies to involuntarily retired employees receiving retirement benefits. Secondly, the Court finds that defendants unsuccessfully previously have moved to dismiss those actions based upon prior arguments, once again raised herein, that the Court lacks subject matter jurisdiction to entertain the actions and that plaintiffs have failed to state any cause of action. Also supporting a finding of collateral estoppel is this Court's finding that defendants have had full and fair opportunities to litigate these issue in those prior actions. See Kaufman v. Lilly & Co., 65 N.Y.2d 449 (1985); Nachum v. Ezaqui, 83 A.D.3d 1017 (2<sup>nd</sup> Dept. 2011).

Although defendants herein have attempted to argue in support of their position that collateral estoppel does not apply that the CBAs in issue are not identical, and specifically that at bar in the prior determinations had been a CBA provision known as Appendix B which is not a provision contained in the subject CBA, defendants have fail to include a copy of Appendix B and they have failed to specifically identify and argue any terms of Appendix B which are

different than or at odds with the terms of the CBA at bar.

The Court thus finds that defendants' instant dispositive motion properly is denied based upon collateral estoppel.

However, even if collateral estoppel does not apply to require denial of defendants' motion, the Court finds that said motion independently fails on its own merits.

It is well established that upon a motion to dismiss, the pleading must be afforded a liberal construction and all inferences in favor of plaintiffs must be accorded to determine whether the facts fit within a cognizable legal theory. See Dank v. Sears management Holding Corp., 59 A.D.3d 582, 583 (2<sup>nd</sup> Dept. 2009); Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143 (1<sup>st</sup> Dept. 2001); Cooper v. 620 Properties Associates, 242 A.D.2d 359 (2<sup>nd</sup> Dept. 1997). It further is well settled that in order to prevail upon a defense founded upon documentary evidence, the documents relied upon must resolve all of the factual issues as a matter of law. See Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303 (2000); Scott v. Bell Atlantic Corp., 282 A.D.2d 180, 183 (1<sup>st</sup> Dept. 2001); Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2<sup>nd</sup> Dept. 1994). Dismissal based upon the documentary evidence is appropriate only where said evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of

law." See Schwarz Supply Source v. Redi Bag USA LLC, 64 A.D.3d 696 (2<sup>nd</sup> Dept. 2009).

This simply cannot be found at bar; indeed, defendants have admitted that the CBA here in issue does not address retirement benefits and thus this Court necessarily finds that the CBA does not "conclusively establish" defendants' defense that plaintiffs are not entitled to retirement benefits which include Workers' Compensation payments for permanent disabilities. Accordingly, defendants' motion to dismiss based upon the documentary evidence is denied.

Further, the Court finds defendants' dismissal motion predicated upon an alleged lack of subject matter jurisdiction due to plaintiffs' failures to have exhausted their administrative remedies also fails. While the subject CBA does state in Article XVII, section 12(b), as defendants argue, that "the employee may receive only direct Workers' Compensation benefits ... as determined by the Workers' Compensation Board," that provision appears under the heading entitled "Line of Duty Determinations." Said provision is not here relevant, as presently there is no issue as to whether these individual plaintiffs, who previously all had received section 207-c benefits, are entitled to line of duty benefits. Rather, at issue here is the benefits to which these involuntarily retired employees are entitled, and whether same

includes permanent disability payments under the Workers' Compensation Law. Therefore, to the extent that defendants are arguing that this Court lacks subject matter jurisdiction because plaintiffs have failed to exhaust their administrative remedies under the CBA, such argument is rejected.

Finally, the Court finds that plaintiffs' complaint which seeks additional retirement benefits under the Workers' Compensation Law for the individual plaintiffs' previously determined permanent disabilities states meritorious causes of action. See Burns v. Varriale, 9 N.Y.3d 207 (2007); Funke v. Eastern Suffolk BOCES, 80 A.D.3d 971 (3<sup>rd</sup> Dept. 2011); Bryant v. New York City Transit Authority, 31 A.D.3d 936 (3<sup>rd</sup> Dept. 2006); Matter of Leiber v. LILCO, 29 A.D.3d 1198, 1199 (3<sup>rd</sup> Dept. 2006). Accordingly, defendants' motion seeking dismissal based upon a failure to state a cause of action is without merit.

Within thirty (30) days after the date hereof, defendants shall serve their answer. The parties thereafter shall apprise the Preliminary Conference Part of the need for a conference date.

Dated: June 20, 2011  
White Plains, New York



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J.S.C.

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