

Simulinas v City of New York

2013 NY Slip Op 30263(U)

January 31, 2013

Supreme Court, New York County

Docket Number: 103726/12

Judge: Arthur F. Engoron

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

PRESENT: ENGORON
Justice

PART 52

ANTHONY SIMULINAS
-v-
CITY OF NY

INDEX NO. 103726/12
MOTION DATE 12/12/12
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

FEB 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/31/13

HON. ARTHUR F. ENGORON 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
COUNTY OF NEW YORK: PART 52

-----X
ANTHONY SIMULINAS,

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.
-----X

Index Number: 103726/12

Motion Sequence No.: 1

Submitted: 12/12/12

Decision and Order

FILED

FEB 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, submitted by plaintiff, were used on this motion by plaintiff for a preliminary injunction:

Papers Numbered:

Moving Papers	1
Opposition Papers (Eichenholtz)	2
Opposition Papers (Stodola)	3
Reply Papers	4

Upon the foregoing papers, the instant motion is granted.

Basic Background

Since 1998 plaintiff has been a civilian employee of the New York City Police Department, repairing "electronic communications systems" (mostly police car radios). Until the events here in issue, he was never the subject of any disciplinary action.

On July 27, 2012, defendants ordered plaintiff to submit to a psychological evaluation. During the five-hours-plus interview he told defendants' psychologist that he occasionally drank beer on his days off from work. On July 31, defendants ordered plaintiff to submit to an interview by defendant police officer Karl Schaefer, of defendants' Counseling Services Unit ("CSU"). After interrogating plaintiff, Schaefer informed him that he would be escorted to an in-patient rehabilitation center for a minimum of 28 days, beginning immediately. Plaintiff signed an agreement to submit to rehabilitation, allegedly under duress (Moving Affidavit ¶¶ 21-24). Schaefer then ordered a colleague to drive plaintiff home to collect his personal effects and then drive him to the rehabilitation center, an hour and a half away. At home, plaintiff experienced an apparent "cardiac incident." He was then taken by emergency vehicle to a hospital. Upon his release two days later, Schaefer called to arrange a trip to the rehabilitation center. Plaintiff

refused, citing “doctor’s orders.” On August 6, defendants informed plaintiff that they considered him AWOL and apparently placed him on indefinite suspension without pay.

Afraid that he would lose his job, pay and health insurance, plaintiff commenced the instant action and applied for a temporary restraining order. In support thereof he submitted the affidavit of a psychiatrist who has been treating plaintiff since shortly before the events here in issue, when plaintiff suffered a significant on-the-job head injury. The psychiatrist states (¶ 8) that “at no time in the course of my ongoing treatment did I ever come to believe that Mr. Simulinas had a problem with substance abuse or alcohol abuse.” He also says (¶ 14):

I believe that the actions of the NYPD are outrageous, harmful to [plaintiff], and run completely counter to my attempts to provide proper medical treatment to him. I am shocked by NYPD’s ability to behave with impunity in this way, and in my professional opinion significant harm has already been done to the treatment of [plaintiff]. The ability of the NYPD to engage in this sort of action towards its own employee, while ignoring his ongoing psychiatric condition and treatment, and in the absence of its own proper evaluation, and in the absence of the consent of the employees [sic], is unconscionable and should be stopped.

In response, defendants claim that plaintiff admitted to them that he drinks 6-to-12 beers a day (sometimes 12 at one sitting), often while taking pain medication as to which alcohol is contraindicated. Defendants also claim that they are only trying to help plaintiff conquer his (alleged) alcohol abuse, and they point out that their CSU is an accredited substance abuse facility.

On October 5, 2012, after hearing oral argument, this Court signed a temporary restraining order (“TRO”) prohibiting defendants from placing plaintiff on an involuntary leave of absence for alcohol abuse treatment without first complying with the provisions of Civil Service Law (“CSL”) § 72. On October 9, 2012, defendants restored plaintiff to his position of employment. To date, defendants have not initiated CLS § 72 proceedings. Their position at the present time is that without judicial intervention, they will not allow plaintiff to continue in his job unless he first takes an involuntary medical leave of absence for alcohol abuse treatment, irrespective of CSL § 72. See generally, Shrier 12/11/12 Affirmation ¶ 9). Plaintiff’s current court-ordered employment appears, as far as this Court is aware, to be proceeding without disciplinary or substance abuse issues.

Plaintiff now moves (1) to enjoin defendants from placing plaintiff on an involuntary leave of absence to address his alleged alcohol abuse without first complying with the notice and hearing provisions of CSL § 72, and (2) for declaratory and related relief. Plaintiff claims that defendants’ aforesaid acts violate CSL § 72; New York Executive Law §§ 290, et seq. (the State Human Rights Law); NYC Administrative Code § 8-107 (the City Human Rights Law); Public Health Law § 18; and (last but not least) the “due process of law secured by the Constitution of the State of New York.”

Discussion

In Matter of Sheeran v New York State Dept. of Transp., 18 NY3d 61 (2011), the Court of Appeals provided the following useful summary of CSL § 72:

Civil Service Law § 72 (1) provides that when an employer determines that “an employee is unable to perform the duties of his or her position by reason of a disability,” the employer may require the employee to undergo a medical examination. If, after such examination, the employee is found unfit to perform the duties of the job, the employee may be placed on an involuntary leave of absence (*id.*). The statute requires that the employer provide the employee with written notice. The employee may, within certain time limits, object to the proposed leave and request a hearing (*id.*). It further provides that in the event that the employee requests a hearing, imposition of the proposed leave of absence is held in abeyance pending final determination, unless the employee’s continued presence on the job creates a potential danger (see § 72 [5]).

Id. at 64 (emphasis added); see also, Matter of Moses v Rensselaer County, 262 AD2d 697 (3d Dept 1999): “plaintiff has a vested property right in his position and cannot be placed on involuntary medical leave without first being provided the procedural safeguards embodied in CSL § 72.” A complete reading of CSL § 72 shows it to be a detailed, well-delineated procedure for a municipal employer to remove a disabled employee from work. This Court finds that it is absolutely applicable here, and that plaintiff is entitled to its protections.

Defendants argue (Eichenholtz Affidavit ¶ 32) that CSL § 72 “lays out a process that can be used to separate an employee from employment if, in the opinion of the appointing authority, the employee is medically unfit to perform the duties of the position,” but that that is not happening here. Rather (¶ 33), “While it is true that the CSU has diagnosed plaintiff with alcohol dependence, the NYPD is not attempting to separate plaintiff or force him to take any sort of leave. Rather, the CSU has recommended that plaintiff rehabilitate himself so that he can return to work.” Suddenly ordering an employee to grab his toothbrush so that he can be driven an hour and a half from his home to spend 28 days in an in-patient rehabilitation center certainly sounds like some “sort of leave,” and the more so a “separation,” whether or not plaintiff would continue receiving salary. Defendants’ argument proves too much; it would allow a municipal employer total discretion to make an employee’s job and/or life miserable, as long as he or she was not “terminated,” without so much as notice and a hearing.

Defendants also argue (Eichenholtz ¶ 39) that as due process “guarantees no particular form of procedure; it protects substantial rights,” defendants are not depriving plaintiff of due process; he can undertake the rehabilitation they have ordered, and keep his job, pay, and benefits. However, an employee should not have to give up his freedom, in in-patient rehabilitation or otherwise, to keep his job. Defendants also argue (Eichenholtz ¶ 48) that “Section 72 of the Civil Service Law simply lays out a process that can be used to separate an employee from employment. It does not

mandate use of that process, nor does it an [sic] employee any rights to its use.” That CSL § 72 is voluntary would probably surprise the legislators who drafted and passed it. The very first sentence of CSL § 72 is telling:

When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability ... the appointing authority may require such employee to undergo a medical examination

Defendants’ position is akin to saying that the City “may” require a medical examination, but that if the City chooses not to, it can nevertheless do whatever it wants. So-called “Civil Service Protection” may not be what it used to be, but it is not a complete charade.

Defendant also argues (12/5/12 Memorandum of Law, at 8) that “Even Plaintiff’s CSU evaluation, standing alone, is more than adequate to ensure that the constitutional due process protections were met and defeat any due process claims.” This shocking statement seems lifted from Kafka or Orwell. In effect, “If we say you are a substance abuser, that is all the due process that we must give.” Defendants do not contest in any material respect the facts set forth above. Officer Schaefer’s pronouncement that plaintiff is an abuser was essentially *ipse dixit* and clearly not made after reasonable notice and a fair hearing, the hallmarks of due process.

Defendants also note (12/5/12 Memorandum of Law, at 9) that “There is nothing unlawful about an employer requiring that an employee with an alcohol addiction enter an in-patient treatment facility as a condition of continued employment.” That puts the cart before the horse, as defendants have failed to comply with CSL § 72 to determine whether plaintiff actually suffers from “alcohol addiction.”

Defendants summarize as follows (12/5/12 Memorandum of Law, at 12):

The reason plaintiff’s due process claim fails is because no party . . . is claiming, or even suggesting, that plaintiff will be deprived of any constitutionally protected interest without due process.”

A job is an interest of constitutional dimension, and plaintiff’s is being threatened without his having received due process, much less the specific process to which CSL § 72 entitles him. A worker should not be forced to chose between the Scylla and Charybdis of losing his freedom or losing his job.

The New York standard for granting a preliminary injunction is well established: a movant must show (1) the likelihood of success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) a balancing of the equities that favors the movant’s position. Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 (1990); W.T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981). Furthermore, a preliminary injunction is a “drastic” remedy, and the movant must make

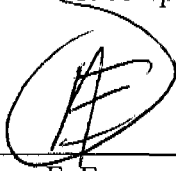
a "clear showing" of each of these elements. Faberge Intl., Inc. v Di Pino, 109 AD2d 235, 240 (1st Dept 1985). "If key facts are in dispute, the relief will be denied." Id.

As set forth above, plaintiff is likely to succeed on the merits. He will be irreparably injured if he is stripped of his employment or his freedom (with or without pay) and his dignity. A balancing of the equities favors the right of a long-term employee with a clean disciplinary record, who is not directly in a public safety position (see CSL § 72(5)), not to have to attend a four-week, in-patient rehabilitation that he and his treating psychiatrist say is unnecessary, without any more due process than a say-so.

Conclusion and Disposition

For the reasons set forth herein, plaintiff's motion for a preliminary injunction is granted, and defendants are hereby enjoined, without further court order, from placing plaintiff on an involuntary leave of absence for alcohol abuse treatment without first complying with the provisions of Civil Service Law § 72.

Dated: January 31, 2013



Arthur F. Engoron, J.S.C.

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