

Froebel v Southampton Volunteer Ambulance, Inc.
2014 NY Slip Op 30682(U)
March 12, 2014
Supreme Court, Suffolk County
Docket Number: 13-15665
Judge: Joseph C. Pastorella
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - Continued
002 - MG
003 - MD

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SHANE A. FROEBEL,

Petitioner-Plaintiff.

- against -

SOUTHAMPTON VOLUNTEER
AMBULANCE, INC., TIMOTHY HURLEY, in
his capacity as Chairman of the Board of Directors
of Southampton Volunteer Ambulance, Inc.,
STEVE NOVAK, JOSEPH HOLMES, THERESA
HUNTER, and LINDA FOSTER in their capacity
as members of the Board of Directors of
Southampton Volunteer Ambulance, Inc.,
DONNA KREYMBORG in her capacity as
current Chief of Southampton Volunteer
Ambulance Inc. and in her capacity as former 2nd
Assistant Chief of Southampton Volunteer
Ambulance, Inc., RAFFAELE DE VIVO, in his
capacity as 1st Assistant Chief of Southampton
Volunteer Ambulance, Inc., and in his former
capacity as member of the Board of Directors of
Southampton Volunteer Ambulance, Inc. and the
TOWN OF SOUTHAMPTON, IN ITS
CAPACITY AS THE Commissioner of
Southampton Volunteer Ambulance, Inc..

Respondents-Defendants.

For a request for a Preliminary Injunction pursuant
to § 6301 for a Judgment Pursuant to Article 78
and/or Declaratory Judgment action pursuant to
§ 3001 of the Civil Practice Law and Rules, and
for Nominal Damages pursuant to 42 USC § 1983
of Title 42 of the United States Code

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Upon the following papers numbered 1 to 81 read on these motions to dismiss and for consolidation: Notice of Motion/
Order to Show Cause and supporting papers 1 - 55, 56 - 60, 66 - 70 ; Notice of Cross Motion and supporting papers

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Answering Affidavits and supporting papers 61 - 65, 71 - 79; Replying Affidavits and supporting papers 80 - 81; Other ;
(and after hearing counsel in support and opposed to the motion) it is.

ORDERED that this motion by the respondents/defendants for an order pursuant to CPLR 7804 (f) and CPLR 3211 (a) (7) dismissing the second, third, fourth and fifth causes of action in the petition/complaint on the grounds that the petitioner/plaintiff has failed to state a cause of action, is granted; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the respondents/defendants to consolidate the action entitled *Shane A. Froebel v Southampton Volunteer Ambulance, Inc.* filed under Suffolk County Index No. 13-23765 with the instant action is denied; and it is further

ORDERED that this hybrid proceeding and action is now deemed a special proceeding pursuant to CPLR article 78; and it is further

ORDERED that the respondents are directed to serve and file their answer to the remaining cause of action in the petition, and to file any additional documents pursuant to CPLR 7804 (e), within 10 days of service of a copy of this order with notice of entry; and it is further

ORDERED that pursuant to CPLR 7804 (f), any party may re-notice this matter for hearing upon appropriate notice.

In this hybrid CPLR Article 78 proceeding and action for declaratory relief the petitioner/plaintiff (petitioner) seeks, inter alia, a judgment pursuant to CPLR Article 78 reversing and setting aside the decision of the respondent Southampton Volunteer Ambulance, Inc. (SVA or corporation) to suspend the petitioner as an ambulance driver, and a judgment declaring that SVA must, among other things, develop a written policy regarding driving in extreme weather conditions.

The petitioner sets forth five causes of action in his petition/complaint. The first cause of action seeks damages pursuant to Public Officers Law 84 *et seq.*, the Freedom of Information Law, based on SVA's alleged failure to respond to proper requests for the disclosure of documents regarding the petitioner. The second cause of action seeks to overturn the petitioner's suspension as a driver as arbitrary and capricious pursuant to CPLR article 78. The third cause of action seeks a declaratory judgment that SVA's decision to suspend the petitioner from driving was arbitrary and capricious. The fourth cause of action seeks a judgment declaring that SVA has failed to, among other things, "have or enforce an annual driver recertification policy as set forth in its Standard Operating Procedures." The fifth cause of action seeks "nominal damages" pursuant to 42 USC § 1983, based upon SVA's alleged violation of the petitioner's due process rights.

The petitioner has been a member of SVA, a New York not-for-profit corporation, since March 2011. During his tenure as a member he became certified by the New York State Department of Health as an Emergency Medical Technician (EMT), and he was certified by the SVA's Driving Committee to drive the ambulances which respond to emergency calls within the area served by the corporation. It is undisputed that, during Hurricane Sandy in October 2012, the petitioner damaged the ambulance that he was driving when he attempted to pass on the shoulder of a road partially blocked by a fallen tree. On or about November 7, 2012, he was verbally "suspended" from driving for SVA by its Chief. Thereafter, the Driving Committee investigated the incident and determined that the petitioner was no longer permitted to drive the corporation's ambulances or Chiefs' vehicles. It appears that the petitioner was notified of the committee's final determination by letter dated March 28, 2013.

The parties disagree as to the term to be used in describing the Driving Committee's determination. The petitioner labels the determination a "suspension." The respondents refer to the determination variously as a "suspension," a "removal," or a "de-selection" from driving privileges. Nonetheless, it is undisputed that the petitioner was not permitted to drive any SVA vehicles after November 7, 2012. From that date, and after his receipt of the letter dated March 28, 2013, the petitioner continued to challenge the fairness of the determination. It is undisputed that the petitioner wrote a letter to the editor claiming that he had been treated unfairly which appeared in the May 30, 2013 edition of a local newspaper.

On or about June 5, 2013, the petitioner received written charges seeking a 90-day suspension of his membership in the corporation for action "detrimental toward the" corporation. A hearing regarding the charges was scheduled for June 17, 2013 before SVA's Membership Committee. That day, the petitioner commenced this hybrid proceeding/action (Froebel I) by order to show cause which included a request for an order restraining the Membership Committee from holding said hearing and directing the corporation to expunge the record of the charges against him. Said request was denied, and by letter dated September 27, 2013 the attorney for the petitioner has withdrawn the request for said relief. After the hearing and an internal appeal before the Board of Directors of SVA (Board), the petitioner was expelled from membership in SVA. On or about September 5, 2013, the petitioner commenced a second special proceeding against SVA entitled *Shane A. Froebel v Southampton Volunteer Ambulance, Inc.* (Froebel II) seeking to reverse his expulsion as a member of the corporation.¹

In support of his petition, the petitioner submits, among other things, the corporation's by-laws, the corporation's Standard Operating Procedures, and miscellaneous written and e-mail communications between the parties.

The respondents² now move pursuant to CPLR 3211 (a) (7) and 7804 (f) to dismiss the second, third, fourth and fifth causes of action in the petition/complaint. In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a) (7) and 7804 (f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference (see, Matter of Eastern Oaks Dev., LLC v Town of Clinton, 76 AD3d 676; Matter of Bloodgood v Town of Huntington, 58 AD3d 619). The motion must be determined solely on the allegations contained in the petition (see, Matter of East End Resources, LLC v Town of Southold Planning Bd., 81 AD3d 947; Matter of McComb v Reasoner, 29 AD3d 795; Matter of Long Is. Contrs. Assn. v Town of Riverhead, 17 AD3d 590). The court must also accept as true all factual submissions made in opposition to the dismissal motion (see, Wohlgemuth v Lang Constr., LLC, 18 AD3d 650).

Second Cause of Action Pursuant to CPLR article 78

It is undisputed that the corporation's by-laws provide that a Chief can verbally suspend a member, and that the SVA's Driving Committee is responsible for determining whether a member is permitted to drive the corporation's vehicles. The petitioner alleges that Chief Lucy Gulli "suspended" him from driving on November 7, 2012, that he appeared with witnesses before a combined meeting of

¹ Froebel II is simultaneously before the Court and has been disposed of by memorandum decision.

² The computerized records maintained by the Court reflect that a stipulation of discontinuance in favor of the Town of Southampton only has been filed with the Clerk of the Supreme Court (see, CPLR 3217 [a], [b]).

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the Driving Committee and the Board on December 3, 2012, that he attended a second combined meeting of the Driving Committee and Board on February 4, 2013, and that the Driving Committee met on March 9, 2013 to discuss his "suspension" from driving. The petitioner further alleges that he was advised by letter dated March 28, 2013, that the Driving Committee was upholding its determination to suspend his driving privileges.

The gravamen of the petitioner's contentions is that the determination to suspend his driving privileges violates the corporation's by-laws, and that the Driving Committee was biased and improperly formed, as the majority of its members were also on the Board. A review of the by-laws reveals that they do not address the issue of the "suspension," "removal," or "de-selection" of a member's driving privileges. Rather, the by-laws, Article XII, only set forth a procedure for the corporation to suspend or expel an individual from membership in the corporation based on certain prohibited actions not relevant herein.

The plain reading of the by-laws establishes that there is no procedure which covers the issues raised by the petitioner. Generally, pursuant to Article 78, the court will only look into the record to ascertain whether the procedure was in accordance with the by-laws (Matter of Capossela v Wykagyl Country Club, 258 AD2d 522; see also, Matter of Lane v Sierra Club, 183 Misc 2d 944; Matter of Anderson v Board of Directors of Powelton Club, 183 Misc 2d 200). However, due process or procedural fairness requires a corporation to provide a member certain fundamental rights even where the by-laws are silent as to the procedure to be utilized in a disciplinary context (Kelly v Northport Yacht Club, 44 AD3d 858; Matter of Anderson v Board of Directors of the Powelton Club, supra; Matter of Lane v Sierra Club, supra). Thus, the lack of fundamental fairness in a disciplinary proceeding, particularly where such proceeding runs afoul of the organization's own internal procedures, rules and regulations, may result in a finding by the reviewing court that the resulting decision was arbitrary and capricious (Matter of Marandino v Westchester Country Club, Inc., 33 AD3d 800; Matter of Pupura v Richmond County Country Club, 114 AD2d 460, 494 NYS2d 371 [2nd Dept 1985]; Matter of Capossela v Wykagyl Country Club, supra).

Here, taking the allegations in the petition as true, the petitioner has failed to state a cause of action that the determination of the Membership Committee should be considered a disciplinary proceeding or, if it was, that the determination was arbitrary and capricious. Bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any favorable inference (Berman v Christ Apostolic Church Intern. Miracle Ctr., 87 AD3d 1094; Brown v Foster, 73 AD3d 917; Garner v China Natural Gas, Inc., 71 AD3d 825; Riback v Margulis, 43 AD3d 1023; Sud v Sud, 211 AD2d 423).

The allegations set forth in the petition reveal that SVA and the Membership Committee met on multiple occasions to consider whether the petitioner should be permitted to drive the corporation's ambulances, provided the petitioner the opportunity to present witnesses at one meeting, and obtained the Board's input in making its determination. The bare legal conclusion that the Driving Committee cannot be comprised of Board members and that its determination was arbitrary and capricious is belied by the petitioner's submission and is not entitled to any favorable inference. Accordingly, the petitioner's second cause of action is dismissed.

Third Cause of Action for Declaratory Judgment - Declaring Decision Arbitrary and Capricious

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The petitioner alleges, among other things, that “the material on which [SVA] based its decision to suspend him from driving was in violation of the lawful procedures of [SVA’s] bylaws, that the decision ... was arbitrary and capricious, and that the decision was an abuse of discretion.” The instant cause of action is duplicative of the petitioner’s second cause of action pursuant to CPLR article 78 because this claim arises from the same facts (see eg., Deer Park Enter., LLC v. Ail Sys., Inc., 57 AD3d 711; Silverman v Carvel Corp., 8 AD3d 469; Mecca v Shang, 258 AD2d 569). Accordingly, the petitioner’s third cause of action is dismissed.

Fourth Cause of Action for Declaratory Judgment - Seeking Various Relief

The petitioner alleges, among other things, that SVA “does not have or enforce” an annual driver recertification policy as set forth in its Standard Operating Procedures, does not have a written policy regarding rules and regulations as to driving in extreme weather events, that the corporation’s by-laws are “defective,” and that SVA has failed to file a correct version of its by-laws and its Standard Operating Procedures with the Town of Southampton, as required by its contract with said Town.

A review of the petition reveals that the relief requested pursuant to the petitioner’s fourth cause of action does not involve any current dispute between the parties, and said relief impinges upon the relationship between SVA and a nonparty, as well as a private corporation’s right to govern its own affairs without un-necessary court intervention. Courts do not issue advisory opinions for the fundamental reason that the giving of such opinions is not the exercise of the judicial function. Thus, the Court may not issue a judicial decision which can have no immediate effect and may never resolve anything (Simon v Nortrax N.E., LLC, 44 AD3d 1027, quoting Cuomo v Long Is. Light. Co., 71 NY2d 349 and New York Pub. Interest Research Group v Carey, 42 NY2d 527; see also, Hirschfeld v Hogan, 60 AD3d 728). Thus, this cause of action is dismissed as moot.

Fifth Cause of Action for Nominal Damages For Violating Petitioner’s Due Process Rights

The petitioner alleges that SVA contracts with the Town of Southampton to provide “medical and related emergency ambulance services,” and receives “taxpayer dollars” for its operation and pension fund. The petitioner further alleges that SVA acted “under color of law” to work a denial of the petitioner’s rights under the United States Constitution.

42 USC §1983 enables an aggrieved individual to seek a civil remedy against every person who, under color of law, subjects that individual to a deprivation of his or her rights, privileges or immunities secured by the United States Constitution (see, Monell v New York City Dept. of Social Servs., 436 US 658 [1978]; see, Manti v New York City Tr. Auth., 165 AD2d 373). The law requires that a state, not a private party, act to deprive one of constitutionally protected rights (Schnabel v Abramson, 232 F3d 83; Ruhlmann v Ulster County Dept. of Social Services, 234 F Supp 2d 140; Copeland v Northwestern Memorial Hosp., 964 F Supp 1225; Berrios v Inter Am. University, 535 F 2d 1330).

In order to find “state action” for purposes of § 1983 a sufficiently close nexus between the State and the challenged action of the private entity must be established so that the action of the latter may be fairly treated as that of the State itself (Briscoe v Boek, 540 F 2d 392; Ruhlmann v Ulster County Dept. of Social Services, supra). It has been held that the receipt of substantial government funds by a private entity does not make said entity amenable to suit as acting under color of law (Schneider v Arc Of Montgomery County, 497 F Supp 2d 651; Schnabel v Abramson, supra). In addition, the actions of a volunteer ambulance corporation seeking to discipline an employee without state involvement do not

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Volunteer Ambulance Corp., 917 F Supp 2d 283). Accordingly, the petitioner's fifth cause of action is dismissed.


Accordingly, the respondents' motion to dismiss the second, third, fourth and fifth causes of action is granted.

The respondents concede that the petitioner has pled a cause of action under the Freedom of Information Law (FOIL), and have not sought to dismiss the petitioner's first cause of action. A person denied access to public records is entitled to bring a special proceeding for review of such denial pursuant to CPLR article 78 (Public Officers Law 89[4][b]). Accordingly, the sole remaining cause of action should be prosecuted as a special proceeding, and the Court directs that this hybrid action be treated as such.

Turning to the respondents' motion to consolidate Froebel II with this action, it is determined that the motion should be denied. A motion pursuant to CPLR 602 to consolidate actions rests within the sound discretion of the trial court (see, Alizio v Perpignano, 78 AD3d 1087). It is well settled that consolidation may be denied when the actions are at markedly different procedural stages and it would result in undue delay in the resolution of either matter (see, Ahmed v C.D. Kobsons, Inc., 73 AD3d 440; Abrams v Port Auth. Trans-Hudson Corp., 1 AD3d 118; Smith v Smith, 261 AD2d 928).

Here, the respondents have not served an answer nor filed any additional documents pursuant to CPLR 7804 (e) in the instant action (Froebel I). However, the respondents have completed both steps in Froebel II, and said matter is ripe for determination. Accordingly, the respondents' motion to consolidate is denied.

Dated: March 12, 2014


 HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION