

**Matter of Bonilla v Town of Hempstead**

2014 NY Slip Op 30697(U)

March 20, 2014

Sup Ct, Nassau County

Docket Number: 15001/13

Judge: Angela G. Iannacci

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This opinion is uncorrected and not selected for official publication.

## SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. ANGELA G. IANNACCI,**

Justice

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 TRIAL/IAS, PART 12  
 NASSAU COUNTY

**IN THE MATTER OF  
 MARK A. BONILLA,**
**Petitioner(s),****MOTION DATE: January 15, 2014****MOTION SEQ.: 01****-against-****INDEX NO.: 15001/13****TOWN OF HEMPSTEAD,****Respondent(s),**


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 The following papers read on this motion:

Notice of Motion/Order to Show Cause	1
Affirmation in Opposition	2
Reply Affirmation	3

This proceeding, for a determination pursuant to article 78 of the CPLR that the respondent, Town of Hempstead (Town), is obligated to defend and indemnify the petitioner, Mark Bonilla, former Town Clerk for the Town (Bonilla), in an action commenced against him in federal court, is determined as follows:

An action was commenced against Bonilla and the Town in the United States District Court, Eastern District of New York, on or about September 6, 2013, by Elissa Smith alleging causes of action sounding in sexual harassment under 42 USC § 1983, and Executive Law § 296, as well claims for intentional and negligent infliction of emotional distress, and assault and battery. Smith alleges that during her employment at the Town, she was subjected to sexual advances by the petitioner during normal work hours and after hours at Town related functions.

There is no dispute that the Town and Bonilla were served with the federal complaint on September 18, 2013. By unsigned letter to the Town Attorney dated September 20, 2013, Bonilla requested defense and indemnification in Smith's federal action. By letter dated September 25, 2013, the Town Attorney's office responded to Bonilla's request and stated, "[w]e acknowledge receipt of an unsigned letter dated September 20, 2013, and received in out [sic] office on September 24, 2013." The letter further provided:

Please be advised that it is the opinion of this office that you have not met the conditions set forth in 11-2 of the [Chapter 11 of the Town Code]. Therefore, the Town of Hempstead will not be responsible for representation of you.

On December 17, 2013, Bonilla commenced this proceeding to compel the Town to defend and indemnify him in the underlying Smith action. In opposition, the Town asserts two grounds for dismissal of this proceeding. First, that Bonilla did not give timely notice of the claim against him and, second, that the claims of sexual harassment asserted by Smith in the underlying federal lawsuit were not within the scope of employment.

Chapter 11 of the Town of Hempstead Code, Entitled Defense and Indemnification of Town Officers and Employees, provides, in pertinent part:

§ 11-1. **Definitions.** \* \* \* EMPLOYEE Unless the context otherwise requires, any person holding a position by election, appointment or employment in the service of the Town of Hempstead, whether or not compensated, but shall not include an independent contractor. The term "employee" shall include a former employee, his estate or judicially appointed personal representative. The benefits of this chapter shall inure only to "employees" as defined herein and shall not enlarge or diminish the rights of any other party.

\* \* \*

**§ 11-2. Defense of employee by town; exception**

A. The town shall provide for the defense of an employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties or which is brought to enforce a provision of Section 1981 or 1983 of Title 42 of the United States Code; provided, however, that the duty of the town to defend or save harmless shall be conditioned upon:

(1) Delivery to the Town Attorney at his offices by the employee of the original or a copy of any summons, complaint, process, notice, demand or pleading within five days after he is served with such document. Such delivery shall be deemed a request by the employee that the town provide for his defense pursuant to this chapter.

Initially, there is no dispute that Bonilla, as a former employee of the Town, falls within the definition of “employee” pursuant to the code.

With regard to the first contention, the Town Code provision requiring an employee to request a defense within five (5) days of service of the underlying complaint is shorter than the ten (10) day requirement provided in the Public Officers Law § 18(5). Further, the purpose of the notice requirement is to prevent default and to provide the municipality with adequate opportunity to investigate whether the alleged conduct was within the employee’s scope of employment (see *Sharpe v Sturm*, 28 AD3d 777 [2d Dept. 2006]; *Walsh v County of Saratoga*, 256 AD2d 681 [3d Dept. 1998]; *Polak v City of Schenectady*, 181 AD2d 233 [3d Dept. 1992]). Here, even assuming that the Town Attorney did not received Bonilla’s letter requesting a defense until September 24, 2013, six (6) days after service of Smith’s federal complaint, there can be no claim that the Town did not get adequate notice since it is a named defendant in the underlying action. Further, the Town was clearly aware that Bonilla was seeking a

defense and indemnification for these same claims made by Smith because he apparently made an identical request in October 2012 when the allegations of sexual misconduct were first made public. Accordingly, I find the Bonilla's request for defense under § 11-2(1) of the Town Code to be timely.

With regard to the scope of employment claim, the well settled principle in the private insurance contract field that the duty to defend is broader than its duty to indemnify, is clearly analogous to a public employer's duty to defend (see *Matter of Lancaster v Inc. Vil. of Freeport*, 92 AD3d 885 [2d Dept. 2012]; *Matter of Barkan v Roslyn Union Free Sch. Dist.*, 67 AD3d 61 [2d Dept. 2009]; see generally *QBE Ins. Co. v ADJO Contracting Corp.*, 112 AD3d 686 [2d Dept. 2013]). Here, § 11-2 (A) of the Town Code provides that the Town shall provide a defense for an act or omission which "occurred or is *alleged in the complaint to have occurred* while the employee was acting within the scope of his public employment or duties." This provision is abundantly broad in that merely allegations of conduct within the scope of employment will trigger the defense requirement (see *Higgins v Town of Southampton*, 613 F.Supp.2d 327 [EDNY, Boyle, J., 2009]). Therefore, because the Smith complaint alleges that Bonilla's conduct was committed within the scope of his employment, the Town is required to provide a defense for him in that action.

I need not reach the issue of indemnification, because the determination of what constitutes action within the scope of employment are generally factual issues left to the trier of fact (see *Riviello v Waldron*, 47 NY2d 297 [1979]; *Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678 [2d Dept. 2013]), and will be made in the underlying action. In

fact, the authority cited by the Town supports this conclusion. In *Stavitz v City of New York* (98 AD2d 529 [1<sup>st</sup> Dept. 1984]), the court reversed a *jury verdict* finding that a public employee was acting within the scope of his employment.

The petition is granted to the extent that the Town shall provide a defense for Bonilla in the federal civil action commenced by Smith.

This constitutes the decision, order and judgment of the court.

Dated: March 20, 2014

Angela G. Iannacci, J.S.C.

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