Dispo

To commence the 30 day statutory time period for 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
COUNTY OF PUTNAM

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JEFFREY D. RICHTER,

Plaintiff,

-against -

TOWN OF CARMEL (NEW YORK), TOWN OF CARMEL POLICE DEPARTMENT, KENNETH SCHMITT, Supervisor of the Town of Carmel, MICHAEL JOHNSON, Chief of Police of the Town of Carmel Police Department,

Defendants.

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DECISION & ORDER

Index No. 1152/13

Sequence No. 1

Motion Date: 1/3/14

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 3211(a)(5)(7) dismissing plaintiff's complaint on the grounds that plaintiff failed to state a cause of action for monetary and/or declaratory relief and for such other relief as this Court finds just and proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-D	1
AFFIRMATION IN OPPOSITION/EXHIBITS A-D	2
REPLY AFFIRMATION	3
SUPPLEMENTAL AFFIRMATION IN OPPOSITION	4

Plaintiff, a former patrol officer with the Town of Carmel Police Department ("Police Department"), commenced this action on December 11, 2012, for breach of contract and declaratory relief against these municipal entities and officers to recover various retirement benefits allegedly due and owing to him as a "retiree". More specifically, plaintiff seeks a sum of money equal to 25% of

the value of 174 accrued sick days, a declaration that he is entitled to an official identification card identifying him as a retired police officer, a declaration that he is eligible to participate, at his sole expense, in the health insurance plan available to other police officers, and interest, costs and disbursements of this action. The claim for an official identification card has since been resolved and, as such, is deemed withdrawn.

Plaintiff was employed as a patrol officer by the Carmel Police Department from January 6, 1987, through his date of resignation, December 31, 1998. Since, upon reaching full retirement age in 2011, plaintiff had amassed enough public service credit upon taking into account his years of service with the Village of Wappingers Falls, the County of Putnam and the United States Marine Corps, plaintiff applied for and was granted a retirement pension with the New York State and Local Retirement System, effective November 1, 2011. In connection therewith, plaintiff was assigned a registration number and unit identification number reserved for police and firefighter retirees of the New York State and Local Retirement System. Plaintiff applied for state retirement benefits on or about the earliest possible date on which he was eligible for same.

Defendants now collectively move for dismissal of the complaint as untimely (CPLR 3211[a][5]) and for failure to state a cause of action (CPLR 32111[a][7]).

Upon liberally construing the complaint and allowing plaintiff every reasonable inference, the Court finds that the action is timely. The action was commenced well within six years of when the complaint alleges that plaintiff would have been entitled to the relief demanded, i.e, upon retirement (CPLR §213[1], [2]; C.S.A. Contr. Corp. v. New York City School Const. Auth., 5 NY3d 189, 193 [2005]).[1]

In any event, the Court concludes that plaintiff lacks standing to maintain this action.

Generally, where a collective bargaining

[1] This determination is made upon the assumption that the relief herein demanded is not barred by plaintiff's failure to have exhausted his administrative remedies (see, CBA Article XXI) and, correspondingly, that the action should not more properly have been brought as an Article 78 proceeding. These issues are not fully addressed by the parties and are not decided by the Court. Such defenses may, however, be raised by defendants in their answer, if the action survives the motion.

> agreement containing a grievance and arbitration procedure exists, a covered employee may not sue his or her employer directly for breach of the agreement, but must proceed through the union in accordance with the contract (Matter of Board of Educ., Commack Union Free School Dist. v. Ambach, 70 N.Y.2d 501, 508, 522 N.Y.S.2d 831, 517 N.E.2d 509). In the absence of a contract provision stating otherwise, an employee may proceed directly against the employer only when the union fails in its duty of fair representation (Matter of Board of Educ., Commack Union Free School Dist. v. Ambach, supra; Tomlinson v. Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak, 223 A.D.2d 636, 636 N.Y.S.2d 855). In order to establish a breach of the duty of fair representation, it is necessary to show that the union's conduct was arbitrary, discriminatory, or in bad faith (Ponticello v. County of Suffolk, 225 A.D.2d 751, 640 N.Y.S.2d 169; Schmitt v. Hicksville UFSD No. 17, 200 A.D.2d 661, 606 N.Y.S.2d 761).

(Lundgren v. Kaufman Astoria Studios, Inc., 261 AD2d 513, 514 [2d Dept 1999]). Whether couched in terms of breach of contract or declaratory relief, plaintiff has wholly failed to establish standing to maintain this action directly against his former employer.

The complaint does not aver nor has plaintiff submitted a personal affidavit or other viable evidence sufficient to support a claim that the PBA breached any duty to him in this regard. As such, plaintiff lacks standing to maintain an action directly against the defendants (Lundgren v. Kaufman Astoria Studios, Inc., supra, citing Ponticello v. County of Suffolk, supra; Matter of Prendergast v. Kingston City School Dist., 242 A.D.2d 773, 662 N.Y.S.2d 141; DiBenedetto v. Ryan, 208 A.D.2d 796, 618 N.Y.S.2d 70). "[S]ince the collective bargaining agreement does not grant individual employees the right to pursue contractual issues on their own, and since there is no allegation that the union breached its duty of fair representation, the plaintiff's reliance upon any third-party beneficiary theory is misplaced" (Lundgren v. Kaufman Astoria Studios, Inc., supra, citing Parker v. Borock, 5 N.Y.2d

156, 182 N.Y.S.2d 577, 156 N.E.2d 297).[2]

Even upon "liberally construe[ing] the pleadings, deem[ing] the allegations to be true and grant[ing] the plaintiff the benefit of every possible inference [citations omitted]" (Delaware County v. Leatherstocking Healthcare, LLC, 110 AD3d 1211, 1213 [3d Dept 2013]), the Court concludes that the complaint fails to state a cause of action for relief as to the health insurance coverage allegedly "available to other retired patrolmen." Among other things, the complaint does not even specify the "designation" demanded of the defendants and, to the extent that he seeks the designation as a town retiree, he fails to state a cause of action for same. Admittedly, plaintiff resigned from service with the Town; he did not retire from service. The fact that he qualifies as a "retiree" within the meaning of the New York State and Local Retirement System is to no avail in that regard.

Finally, it cannot be ignored that plaintiff's resignation was the result of a negotiated and executed written agreement wherein the relief now demanded could and should have been specifically accounted for, but was not.

Based upon the foregoing, it is hereby

ORDERED, that the action be and is hereby dismissed in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
March 17 , 2014

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

Mainetti Mainetti & O'Connor, PC
By: Christopher R. Ragucci, Esq.
Attorneys for Plaintiff
11 Market Street, Suite 203
Poughkeepsie, New York 12601

[2] Although raised by defendants for the first time by way of reply papers, the Court finds that plaintiff has been given and has taken the opportunity to have addressed this issue.

Cronin & Byczek, LLP
By: Moshe C. Bobker, Esq.
Attorney for Defendants
1983 Marcus Avenue, Suite C-120
Lake Success, NY 11042