

Matrisciano v Metropolitan Transp. Auth.
2014 NY Slip Op 33435(U)
December 24, 2014
Supreme Court, New York County
Docket Number: 153638/2014
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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MICHAEL MATRISCIANO,

Plaintiff,

Index No.:
153638/2014

-against-

METROPOLITAN TRANSPORTATION
AUTHORITY and METROPOLITAN
TRANSPORTATION AUTHORITY POLICE
BENEVOLENT ASSOCIATION,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

This action arises out of plaintiff Michael Matrisciano's claims that defendant Metropolitan Transportation Authority Police Benevolent Association (MTA PBA) breached its duty of fair representation to him in connection with a waiver agreement he signed and an arbitration that took place. Pursuant to CPLR 3211 (a) (7), defendant Metropolitan Transportation Authority (MTA) moves to dismiss the complaint. Defendant MTA PBA supports the MTA's motion and adopts the MTA's arguments.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to his formal termination in January 2014, plaintiff had been employed with the MTA as a police officer. He was a member of the MTA PBA, which exclusively represents police officers employed by the MTA. Affirmation of John Curley, verified complaint, exhibit A, ¶ 6. In 2011, as a result of two allegations of misconduct, the MTA sent plaintiff two notices of intent to discipline. In lieu of contesting the disciplinary charges, plaintiff signed a waiver of trial agreement (Waiver Agreement). This Waiver Agreement, or “last chance” agreement, as referred to by defendants, sets forth that plaintiff has been advised about his rights to proceed with a trial on the disciplinary charges, but is choosing instead to enter into the Waiver Agreement.

The Waiver Agreement states, among other things, that plaintiff is subject to a 42-day suspension. In pertinent part, the Waiver Agreement sets forth the following:

“I acknowledge that if I commit any serious violation of the Rules and Procedures of the MTAPD that I agree the determination by the Chief of the Department as to the finding of any such serious violation will be appealable to binding arbitration under the collective bargaining agreement only on the issue of whether a serious violation has been committed. I understand that I may be placed on suspension during the time in which the arbitrator is making his/her decision. If the

arbitrator determines that I have committed a serious violation, the Chief of the Department, in his/her discretion may determine the suitable penalty that may include termination. The imposition of any resulting penalty by the Chief of the Department shall be binding and I hereby expressly waive any rights to appeal”

Curley affirmation, exhibit B at 1.

In addition, the Waiver Agreement states that plaintiff agrees that he was fairly represented by the MTA PBA in reference to the Waiver Agreement. The Waiver Agreement was signed by plaintiff, the MTA PBA representative and Michael Coan (Coan), who is the Chief of Police.

In August 2012, as a result of plaintiff having allegedly submitted false information to his insurance company, the MTA issued plaintiff another notice of intent to discipline. Coan, on behalf of the MTA, advised plaintiff that Coan had concluded that plaintiff was guilty of the charges, and that plaintiff should be terminated. Plaintiff was then placed on leave without pay status.

Prior to the arbitration, plaintiff commenced an Article 78 petition. Citing to his Waiver Agreement, he argued that Coan improperly terminated him before an arbitrator had ruled on the issue of whether a serious violation had been committed. Petitioner claimed, among other things, that defendants' actions constituted a breach of the Waiver

Agreement. He sought to nullify the Waiver Agreement.

This court denied the Article 78 petition. It held that defendants corrected petitioner's status to indicate that he was on leave without pay, not that he was actually terminated. In addition, as the arbitration was scheduled for an actual date, defendants had not breached the Waiver Agreement. Plaintiff appealed this determination. On December 11, 2014, the Appellate Division, First Department, affirmed the determination denying the petition. It concluded that petitioner failed to exhaust his administrative remedies by commencing the Article 78 prior to arbitration, and that he "failed to establish that he was actually terminated before arbitration, in violation of the Waiver Agreement." *Matter of Matrisciano v Coan*, __AD3d__, 2014 WL 6978697, *1, 2014 NY App Div LEXIS 8643, *2 (1st Dept 2014).

In accordance with the Waiver Agreement, the parties proceeded to arbitration to determine whether the alleged misconduct was a serious violation. The arbitration was conducted on December 17, 2013. Plaintiff was represented by the MTA PBA and the MTA PBA's attorneys throughout the arbitration process. In her award dated January 17, 2014, the arbitrator concluded that each of the charges was proven and that

plaintiff had engaged in a serious violation. The MTA then effectively terminated plaintiff the same day. As defendants note, although Coan notified plaintiff about his termination, the termination was not actually processed until after the results of the arbitration.

Plaintiff commenced this action, claiming that the MTA PBA breached its duty of fair representation to him. He argues that the MTA PBA did not represent him fairly during the entire disciplinary process, beginning from the signing of the Waiver Agreement. With respect to the Waiver Agreement, plaintiff alleges that it was unconscionable. He contends that, although he was advised by the MTA PBA that an attorney had reviewed the Waiver Agreement, plaintiff was not given the opportunity to speak with his counsel. Furthermore, he claims that the executive vice president of the MTA PBA “strongly encouraged” plaintiff to sign the Waiver Agreement and stated to plaintiff, “sign it or be fired.” Verified complaint, ¶ 21. In sum, plaintiff maintains that the MTA PBA should never have encouraged him to sign the Waiver Agreement. He writes, “[t]he provision waiving any future right to challenge a termination was also unconscionable, one-sided, against public policy and without consideration . . . [and] in having him sign a one sided agreement, the [MTA] PBA

breached its duty of fair representation” *Id.*, ¶¶ 26-27.

Plaintiff further maintains that the MTA PBA breached its duty of fair representation to him during the arbitration process. Plaintiff claims that the MTA PBA did not follow plaintiff’s suggestions for how he wanted to handle the arbitration. For instance, the MTA PBA failed to present evidence to the arbitrator about other police officers who allegedly were charged with the same or even more serious violations, but were not terminated. He argues that the MTA PBA failed to present mitigating evidence, and that it failed to meaningfully cross examine the MTA’s witnesses. Plaintiff writes,

“[t]he [MTA] PBA’s behavior amounted to conduct and omissions so egregious, so far short of the minimum standards of fairness to plaintiff as to render it arbitrary. Because the [MTA] PBA breached its duty of fair representation, plaintiff lost the right to challenge the disciplinary notices, through the procedures set forth in the collective bargaining agreement, and lost other rights to challenge his termination.”

Verified complaint, ¶¶ 60-61.

Plaintiff’s first cause of action is for breach of a duty of fair representation. The second cause of action alleges a breach of the collective bargaining agreement (CBA) between defendants, of which plaintiff is, allegedly, a third-party beneficiary. In addition to damages,

plaintiff seeks to be reinstated as a police officer.

As for the MTA PBA representation during the arbitration and during the signing of the Waiver Agreement, defendants contend that plaintiff's dissatisfaction stems from tactical decisions made by the MTA PBA, not by discriminatory actions or ones made in bad faith. As a result, they claim that the allegations cannot support a fair representation claim. With respect to the Waiver Agreement, defendants allege that plaintiff's claim is time-barred. Moreover, defendants maintain that the Waiver Agreement was a valid and binding contract, which was not unconscionable.

Finally, plaintiff argues that he did not suffer "actual harm" from the Waiver Agreement until the date of the arbitration award. As a result, according to plaintiff, the action is timely as it was commenced four months from January 17, 2014.

DISCUSSION

I. Dismissal:

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable

legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007); see also *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003).

II. Breach of Duty of Fair Representation:

A cause of action alleging a breach of duty of fair representation must be commenced "within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later." CPLR § 217 (2) (a). See e.g. *Nabors v Town of Somers*, 54 AD3d 833, 833-834 (2d Dept 2008). Plaintiff specifically alleges that he suffered harm as a result of the representation he received during the negotiation of the Waiver Agreement. For instance, plaintiff claims that he surrendered numerous rights as a result of signing the Waiver Agreement. As the underlying facts and circumstances complained of occurred years prior to when he commenced this action, any allegations regarding the Waiver Agreement are barred by the statute of limitations.

In addition, plaintiff alleges that the Waiver Agreement, among other things, lacked consideration and is one-sided. However, in actuality, the

Waiver Agreement gave plaintiff the benefit of the bargain, in that he was able to stay in his job and be subject to an agreed-upon penalty, in lieu of a potentially harsher outcome after a trial, which may have been termination. The Waiver Agreement was written in plain language and was enforceable. Had the arbitrator concluded that plaintiff's violation was not serious, plaintiff would never have commenced this action.¹

The court agrees with defendants that the MTA PBA's alleged breaches arose from two distinct matters: the negotiation of the Waiver Agreement that was signed as a result of plaintiff receiving two sets of disciplinary charges; and the representation during the arbitration, which arose as a result of plaintiff receiving another disciplinary charge. See e.g. *Matter of Gilliam v New York City Dept. of Sanitation*, 18 Misc 3d 1141(A), 2008 NY Slip Op 50396(U) (Sup Ct, Kings County 2008)(Challenge to termination is timely, "[h]owever, if petitioner had challenged the Last Chance Agreement he would have been time-barred"). However, even assuming that plaintiff's challenge to the Waiver Agreement is also timely, his challenge would fail on the merits. As set forth below, there was no

¹ As set forth in the facts, in plaintiff's Article 78 petition, he both argues that defendants breached the Waiver Agreement by allegedly not proceeding to arbitration, but also seeks to nullify the same Waiver Agreement.

arbitrary conduct or conduct founded in bad faith in the MTA PBA's representation in negotiating the Waiver Agreement.

A breach of duty of fair representation occurs when the conduct involved "was deliberately invidious, arbitrary or founded in bad faith." *Matter of Sapadin v Board of Educ. of City of N. Y.*, 246 AD2d 359, 360 (1st Dept 1998) (internal quotation marks and citation omitted). Even allegations of "irresponsible or grossly negligent conduct" are insufficient to demonstrate unfair representation on the union's part. *Matter of Civil Serv. Empls. Assn. v Public Empl. Relations Bd.*, 132 AD2d 430, 432 (3d Dept 1987), *affd* 73 NY2d 796 (1988) (internal quotation marks omitted).

Citing to *Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York* (64 NY2d 188, 196 [1984]), plaintiff argues that ascertaining whether a breach of a duty of fair representation has occurred is "essentially a factual determination." Nonetheless, even on a motion to dismiss, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). Plaintiff's dissatisfaction with the MTA PBA's tactical choices during the course of the arbitration do not give

rise to a fair representation claim. For instance, plaintiff believes that MTA PBA did not adequately cross examine MTA witnesses and that it did not introduce evidence of allegedly similarly situated individuals. His allegations, which would, at most, hypothetically be ones of negligence, do not provide sufficient examples of discrimination or bad faith. See e.g. *Braatz v Mathison*, 180 AD2d 1007, 1008 (3d Dept 1992) (“the fact that a union is guilty of mistake, negligence or lack of competence does not suffice for [a claim of breach of duty of fair representation]”).

III. Alleged Breach of the Collective Bargaining Agreement:

In plaintiff’s second cause of action he conclusorily and vaguely alleges that defendants breached the CBA. Plaintiff has the burden of pleading and proving that a specific provision of the CBA was violated. He has neither pleaded a specific section nor articulated how this differs from the first cause of action. Accordingly it is dismissed.

The Court has considered plaintiff’s other contentions and finds that they lack merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant Metropolitan Transportation

Authority to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants Metropolitan Transportation Authority and Metropolitan Transportation Authority Police Benevolent Association as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 24, 2014

ENTER



J.S.C.

HON. MICHAEL D. STALLIAN