

Matter of Fiore-Rosenfeld v Town of Brookhaven

2015 NY Slip Op 30776(U)

May 5, 2015

Supreme Court, Suffolk County

Docket Number: 14-13166

Judge: Joseph C. Pastorella

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 34

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In the Matter of an Application of

STEVE FIORE-ROSENFELD,

Petitioner,

- against -

TOWN OF BROOKHAVEN,

Respondent.

-----X

By: Pastoressa, J.S.C.
 Dated: May 5, 2015

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 Mot. Seq. # 001 MD; CDISPSJ

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This Article 78 proceeding seeks a judgment (1) annulling the determination of respondent Town of Brookhaven denying the request of petitioner Steve Fiore-Rosenfeld that the Town defend him in the action entitled Rush v Town of Brookhaven and Steve Fiore-Rosenfeld, assigned index number 64291/13, (2) directing the Town to provide him with a defense and indemnification in the Rush action, (3) directing the Town to pay all reasonable attorney's fees incurred in the Rush action to an attorney of his choice, and (4) awarding attorneys fees. For the reasons stated herein, the petition is denied and the proceeding is dismissed.

Petitioner Steve Fiore-Rosenfeld formerly was a member of the Town Council of respondent Town of Brookhaven. Initially elected in 2003 to represent the First Council District of the Town of Brookhaven, Fiore-Rosenfeld served as a Town Councilman from 2004 through 2013. In 2008, Jocelyn Rush was hired by the Town to work as a legislative secretary, and was assigned to work for Fiore-Rosenfeld. Suffering from relapsing-remitting multiple sclerosis, Rush allegedly advised Fiore-Rosenfeld sometime in 2010 that, due to symptoms related to her autoimmune disease, she was unable to perform certain activities allegedly expected as part of her job, including walking and standing for long periods of time and door-to-door campaigning. According to Rush, Fiore-Rosenfeld became abusive and started discriminating against her at work after learning of her disease. She alleges he screamed profanities and berated her at work,

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and prohibited her from taking lunch breaks on days when he was working in his office. Rush allegedly complained to various Town officials about Fiore-Rosenfeld's treatment of her, but no actions were taken. In December 2012, Rush applied for and was granted a leave of absence from her position based on her medical condition.

Subsequently, at the end of 2013, Rush commenced an action in this Court against the Town and Fiore-Rosenfeld seeking compensatory and punitive damages. The action, assigned index number 64291/13, alleges, in relevant part, that Fiore-Rosenfeld harassed and discriminated against her because of her medical condition, that Fiore-Rosenfeld was abusive and created a hostile work environment, and that the Town failed to act on her complaints about such behavior. The first cause of action in the complaint alleges that, in violation of the New York State Human Rights Law, plaintiff was unlawfully discriminated against and constructively terminated from her position with the Town because of her actual or perceived disability. The second cause of action asserts defendants aided and abetted in such disability discrimination, and the third cause of action, for intentional infliction of emotional distress, asserts defendants engaged in extreme and outrageous conduct knowing that stress exacerbated plaintiff's disease.

In January 2014, counsel for Fiore-Rosenfeld sent letters to Brookhaven Town Attorney, Annette Eaderesto, requesting a defense and indemnification of Fiore-Rosenfeld in the Rush action. After allegedly conducting an investigation into Rush's allegations, the Town Attorney, by letter dated March 10, 2014, advised Fiore-Rosenfeld that the Town would not provide a defense or indemnify him for any judgment or costs resulting from the Rush lawsuit, as she had determined the allegations against him were outside the scope of his employment as a Town Councilman, and were "taken for personal and political motives unrelated to the furtherance of Town interests."

Subsequently, Fiore-Rosenfeld commenced this proceeding for a judgment annulling the Town's determination that he was not acting within the scope of his employment at the time of the conduct that is the subject of the Rush action and, therefore, was not entitled to a defense and indemnification. In addition, Fiore-Rosenfeld seeks a judgment directing the Town to defend and indemnify him in the Rush action, as well as an award for the attorney's fees incurred in bringing the instant proceeding. The petition alleges, among other things, that the Town is obligated under Public Officers Law § 18 and the Brookhaven Town Code to provide him with a defense to the underlying action, and that the Town Attorney's determination refusing to provide a defense and indemnification was arbitrary and capricious. It alleges that Fiore-Rosenfeld was never personally served with the complaint and received only a photocopy of it from the Town on the last day of his term as Councilman, and that the Town Attorney unduly delayed in making a determination on his request for a defense and indemnification. Further, the petition alleges that the Town Attorney falsely created the impression that the Town would defend Fiore-Rosenfeld by engaging in settlement talks with Rush's attorney, that the Town has denied Fiore-Rosenfeld "access to any of the transcripts, records, complaint letter, determinations or findings"

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related to the Rush action, including a 50-H transcript and certain motion papers, and that the withholding of evidence prejudices his defense in the underlying action.

The Town opposes the petition, arguing the duty to defend and indemnify public employees in a civil matter established by Public Officers Law § 18, adopted by the Town under Brookhaven Town Code § 20-101, does not apply, because the allegations made against Fiore-Rosenfeld in the Rush action involve intentional wrongdoing outside the scope of his employment with the Town. It also asserts it is against public policy for a municipality to use public funds to defend against or indemnify for damages caused by intentional misconduct. Moreover, the Town contends the determination by the Town Attorney that the complained-of conduct by Fiore-Rosenfeld occurred outside his job as Councilman was reasonable and had a sound factual basis.

The remedy of mandamus to review calls upon the court to examine administrative actions involving the exercise of judgment or discretion (see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753). A determination by an agency or official is considered administrative and within the scope of mandamus to review if it involved the exercise of discretion and no quasi-judicial hearing was required to make such a determination; rather, the petitioner “need only to be given an opportunity ‘to be heard’ and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise” (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757-758; see Matter of Niagra Frontier Transp. Auth. v DiNapoli, 69 AD3d 1209). The standard applied by a court in a mandamus to review proceeding is whether the determination of the agency or official was arbitrary and capricious, affected by an error of law, or irrational (see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753; Matter of Pile Found. Constr. Co., Inc. v New York City Dept. of Env'tl. Protection, 84 AD3d 963; Matter of Ignaczak v Ryan, 79 AD3d 881). Furthermore, it is fundamental that when reviewing a determination that an agency or official alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency or official in making the decision (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758; see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y., 16 NY3d 360; Matter of Filiposwki v Zoning Bd. of Appeals of Vil. of Greenwood Lake, 77 AD3d 831).

Brookhaven Town Code § 20-101 adopts Public Officers Law § 18, which provides, in part, that a public entity “shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties,” and “shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees . . . provided that the act or omission from which such judgment or claim arose occurred while the employee was acting within the scope of his public

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employment or duties” (Public Officers Law § 18 [3][a], [4][a]). The statute, however, also provides that the duty to indemnify and hold harmless shall not apply where the injury or damage was caused by “intentional wrongdoing or recklessness on the part of the public employee” (Public Officers Law § 18 [4][b]). Further, pursuant to Public Officers Law § 18 (3)(b), a public employee is “entitled to be represented by a private counsel of his choice in any civil action or proceeding whenever the chief legal officer of the public entity . . . determines that a conflict of interest exists, or whenever a court, upon an appropriate motion or otherwise by special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by counsel of his choice.”

The March 10, 2014 letter from Town Attorney Eaderesto to Fiore-Rosenfeld advises that, based on the allegations in the complaint and an independent investigation, she determined the actions at issue in the Rush lawsuit were not within the scope of his job as a Town Councilman. As support for the Town’s refusal to defend and indemnify Fiore-Rosenfeld, the letter refers to certain allegations of wrongdoing set forth in the underlying complaint, including that Fiore-Rosenfeld required Rush, in addition to her performing her duties as a legislative secretary, to help his re-election campaign; that he asked Rush, or her children, to perform door-to-door campaigning on his behalf; and that he gave Rush a \$1,000 bonus, but gave a co-employee on his staff a \$10,000 bonus, because he believed her efforts in support of his re-election were insufficient. It also states the conclusion of the Town Attorney that the complained-of conduct was related to Fiore-Rosenfeld’s political goals and was intended to “advance [his] own personal agenda.”


Whether a public employee’s acts were committed within the scope of his or her employment is a factual question (Matter of Williams v City of New York, 64 NY2d 800, 802; see generally Riviello v Walden, 47 NY2d 297). As indicated above, the question of whether a public employee named in a civil action is entitled to a defense and indemnification for an act or omission that allegedly occurred when he or she was acting within the scope of his or her public employment duties is to be determined in the first instance by the public officer designated by the public entity employing such person (Public Officers Law § 18 [3][b]), and such determination may only be set aside if it is arbitrary and capricious, i.e., lacks a factual basis (Matter of Williams v City of New York, 64 NY2d 800, 802; Matter of Polak v City of Schenectady, 181 AD2d 233; see Matter of Grecco v Cimino, 100 AD3d 892; Matter of Vitucci v City of New York, 272 AD2d 620).

The Town Attorney’s decision that Fiore-Rosenfeld was not acting within the scope of his employment as a Town Councilman as to the incidents that are at issue in the Rush action was not arbitrary and capricious. An employee’s actions will be found to fall within the scope of employment if “the purpose in performing such actions is ‘to further the employer’s interest, or to carry out duties incumbent upon the employee in furthering the employer’s business’” (Beauchamp v City of New York, 3 AD3d 465, 466, quoting Stavitz v City of New York, 98

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AD2d 529, 531; see Selmani v City of New York, 116 AD3d 943; Pinto v Tenenbaum, 105 AD3d 930; Danner-Cantalino v City of New York, 85 AD3d 709). Conversely, actions taken by an employee for wholly personal reasons, which are not job related, are outside the scope of employment (Beauchamp v City of New York, 3 AD3d 465, 466). Here, the Town Attorney reasonably determined that the tortious actions of Fiore-Rosenfeld alleged by Rush were taken for personal reasons, not to further the Town's interest, and were outside the scope of his duties as a Town Councilman (see Matter of Polak v City of Schenectady, 181 AD2d 233; see also Grasso v Schenectady County Public Library, 30 AD3d 814; Evans v City of Mount Vernon, 92 AD3d 829). Thus, the Town Attorney reasonably concluded petitioner is not entitled under Public Officers Law § 18 to a defense in the Rush action or to indemnification in the event judgment is granted against him.

Accordingly, the petition is denied and the proceeding is dismissed.


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

FINAL DISP. ~~X~~ NON-FINAL DISP. _____