Morton v Mulgrew
2015 NY Slip Op 31363(U)
April 21, 2015
Supreme Court, New York County
Docket Number: 652211/2014
Judge: Donna M. Mills

At the General IAS, Part 58, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 21st day of April, 2015.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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DIANNA MORTON, GRANT TEDALDI, CARLY MASSEY, and JOY BEIDER,

Plaintiffs,

-against-

MICHAEL MULGREW, as President of THE NEW YORK UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Defendant.

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Index No. 652211/2014
DECISION AND ORDER
Motion Sequence No. 1

HON. DONNA A. MILLS

Recitation (CPLR 2219 [a]) of papers used on these orders to show cause:

PAPERS	**EXHIBITS**
Plaintiff	
Notice of Cross Motion	
Memorandum in Opposition and in Support of Cross Motion	
Shimko Affirmation in Support of Cross Motion and in Opposition to Motion	A-B
Defendants	
Notice of Motion	
Klinger Affirmation in Support	1-10
Memorandum in Support	
Memorandum in Further Support	
Memorandum in Opposition to Cross Motion	

Upon this motion, defendant, Michael Mulgrew, as President of the New York United Federation of Teachers, Local 2, AFT, AFL-CIO (the UFT), moves, pursuant to CPLR 3211 (a) (7), to dismiss this class action, for breach of the duty of fair representation, brought by plaintiffs on behalf of persons who were members of the UFT, employed by the New York City Department of Education (DOE) at any time between November 1, 2009 and June 30, 2014,

whose employment with the DOE ended on or before June 30, 2014 for reasons other than retirement or termination, and who would be entitled to retroactive benefits under the 2014 Collective Bargaining Agreement, negotiated between the UFT and the DOE (the 2014 CBA), if presently employed. Plaintiffs cross-move for leave to file a second amended class action complaint.

BACKGROUND

The UFT is recognized under the New York State Public Employees' Fair Employment Act, Civil Service Law § 200, *et seq.* (CSL, also referred to herein as the Taylor Law), as the exclusive bargaining agent for non-supervisory pedagogical personnel, and other titles, working predominantly in the New York City public schools. A collective bargaining agreement between the UFT and the DOE, expired in October 2009 without agreement on a successor contract.

In January of 2010, the UFT filed a declaration of impasse with the New York State Public Employment Relations Board (PERB), pursuant to CSL § 209. As of February 22, 2010, pursuant to its authority under CSL § 209 (3) (a), PERB issued a letter appointing a mediator to assist the parties in negotiations. As the mediation was unsuccessful, PERB then issued a letter, as of September 24, 2012, pursuant to its authority under CSL § 209 (3) (b), appointing a public fact-finding panel to make a non-binding recommendation as to potential terms and conditions of employment for a successor agreement.

On May 1, 2014, the parties announced that they had tentatively reached agreement on a new CBA covering the nine-year period from November 1, 2009 through October 31, 2018, which was memorialized in a Memorandum of Agreement (the 2014 MOA, and sometimes herein the 2014 Collective Bargaining Agreement, or the 2014 CBA; *see* Klinger affirmation,

exhibit 8), and ratified by a vote of 69,815 UFT members in favor, and 20,655 UFT members against on June 3, 2014.

At issue in this action are provisions of the 2014 MOA regarding retroactive pay. The 2014 MOA states that

> "[u]pon ratification, the City shall establish a Structured Retiree Claims Settlement Fund in the total amount of $180 million to settle all claims by retirees who have retired between November 1, 2009 through June 30, 2014 concerning wage increases arising out of the 2009-2011 round of bargaining. The Fund will be distributed based upon an agreed upon formula."

2014 MOA, § 3C.

The 2014 MOA then goes on to delineate benefits for those who were active and continuously employed during the term of the agreement (*id.*, § 3E), and those who retired from service after June 30, 2014 (*id.*, § 3D). The 2014 MOA does not offer any benefits for those who are neither active nor retired. In other words, there is no benefit offered for the plaintiffs herein, i.e., former UFT members who resigned or were discontinued.

Plaintiffs now bring an action in which their sole cause of action against the UFT is for breach of duty of fair representation. The amended class action complaint alleges that "[t]he exclusion of Plaintiffs and Class members from the 2014 CBA evidences a total lack of representation of their interest by the UFT during negotiations[, which was] beyond arbitrary, discriminatory, and in bad faith[, and constitutes] a breach of the UFT's duty of fair representation owed to the Plaintiffs and Class members." Amended Class Action Complaint, ¶¶ 63-65.

In the proposed second amended class action complaint, the plaintiffs add the allegations that the UFT, in reaching an overall agreement on the 2014 MOA, "refused to negotiate on behalf of former teachers and union members who resigned after November 1, 2011 as it

believed that it did not owe any duty to those individuals[, and that] the UFT did not endeavor to balance the rights of" such individuals. Second Amended Class Action Complaint, ¶¶ 54-56.

ARGUMENTS

The UFT argues that the court should dismiss this case under the "Martin Rule," which established that "the Legislature has limited . . . suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven." *Martin v Curran*, 303 NY 276, 282 (1951). Alternatively, the UFT urges that the court decline to exercise jurisdiction in this matter, and leave the resolution of the dispute to PERB. Finally, the UFT maintains that the complaint fails to plead material facts giving rise to the essential elements of a claim sounding in breach of the duty of fair representation.

Plaintiffs argue that the court should find that New York General Association Law § 13 has been altered by common law and CSL § 209-a (2) (c); or otherwise that CSL § 209-a (2) (c) was satisfied by the union-wide ratification vote approving the MOA. Plaintiffs also urge that the court find that UFT owed the plaintiffs a continued duty of fair representation, and that UFT's alleged decision not to represent the plaintiffs at all was arbitrary, discriminatory, or in bad faith.

DISCUSSION AND DECISIONS

Cross Motion to Amend the Complaint

As a preliminary matter, UFT argues that the Court should deny plaintiffs' cross motion for leave to file the amended complaint because it "merely repackages the existing conclusory assertion that the UFT somehow failed or refused to represent Plaintiffs, with no supporting facts having been articulated," and the "amendment is futile as the proposed additions, even if

accepted, could not cure the fatal deficiencies identified in Defendant's Motion to Dismiss." Memorandum in Opposition to Cross Motion at 10. This argument is rejected.

First, given a choice, this court, absent prejudice or surprise resulting directly from any delay in defining the causes of action, errs on the side of freely granting leave to amend. CPLR 3025 (d); *Fahey v County of Ontario*, 44 NY2d 934, 935 (1978). Second, it is the longstanding preference, and strong public policy, in New York, that cases be decided on their merits. *See Rivera v City of New York*, 292 AD2d 246 (1st Dept 2002). Finally, UFT's assertion that the proposed amendments do not cure the deficiencies of the complaint suggests that there is no particular prejudice to UFT in allowing the amendment, and that the essence of UFT's motion to dismiss is undisturbed by directing it toward the second amended class action complaint. The cross motion to amend is granted, and the motion to dismiss is directed to that complaint.

Motion to Dismiss Breach of the Duty of Fair Representation

On a motion to dismiss, pursuant to CPLR 3211, the challenged pleading is afforded a liberal construction, and the facts alleged therein are generally accepted as true, and it is given the benefit of every possible favorable inference. The court seeks only to determine whether the facts as alleged fit within any cognizable legal theory. *See e.g. Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Despite this, unsubstantiated speculation is insufficient to defeat an otherwise properly brought motion to dismiss. *See Mark Hampton v Bergreen*, 173 AD2d 220, 220 (1st Dept 1991) (inherently incredible, unsupported, or flatly contradicted facts, as well as allegations consisting of bare legal conclusions are not entitled to the presumption of truth and the benefit of every favorable inference).

As a backdrop to this matter, the court notes that General Associations Law § 13 provides that

> "[a]n action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section."

The liability aspect of General Associations Law § 13 operates within the context of CSL § 209-a, under which "[a] breach of the duty of fair representation entails a showing of conduct by a union that is arbitrary, discriminatory or founded in bad faith." *Butler v McCarty*, 306 AD2d 607, 608 n1 (3d Dept 2003). Under New York common law, courts have required "substantial evidence of fraud, deceitful action, or dishonest conduct, or evidence of discrimination that is *intentional*, severe, and unrelated to legitimate union objectives." *Badman v Civil Serv. Empls. Assn.*, 91 AD2d 858, 858 (4th Dept 1982) (emphasis added), citing *Street, Railway & Motor Coach Empls. v Lockridge*, 403 US 274, 299 (1971), and *Humphrey v Moore*, 375 US 335, 348 (1964). "[A]bsent [such] improper intent, a union does not breach the duty of fair representation [under New York law] by entering into an agreement which favors some employees over others." *McGovern v Local 456, Intl. Bhd. of Teamsters, Chauffeurs & Warehousemen & Helpers of Am., AFL--CIO*, 107 F Supp 2d 311, 319 (SD NY 2000); *see also Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. Of Teamsters v City of New York*, 64 NY2d 188, 197 (1984) ("[w]here the union undertakes a good-faith balancing of the divergent interests of its membership and chooses to forgo benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation"); CSL § 209-a (2).

The standing aspect of General Associations Law § 13 was recently treated in *Palladino v CNY Centro* (23 NY3d 140, 147-48, *rearg denied* 23 NY3d 1030 [2014]). *Palladino* maintained, contrary to the assertions of plaintiffs, that the court's prior statutory interpretations of the operation of General Associations Law § 13 remain in place. More specifically, the court stated that "New York [clings] to the common-law requirement that the complaint allege that all of the individual members of the union authorized or ratified the conduct at issue." *Id.* at 148 (citation and internal quotation marks omitted).

Here, plaintiffs' cursory allegation added in the second class action complaint, even if afforded the benefit of every favorable inference, is conclusory at best. Plaintiffs merely state that the UFT did not bargain on their behalf. However, the existence of retroactive pay provisions in the MOA is a clear indication that retroactive pay was, indeed, a part of the negotiation. *See Matter of County of Erie v State of New York*, 14 AD3d 14, 16 (3d Dept 2004) (*"[w]here, however, a CBA is silent on an issue*, the unilateral implementation of procedures regarding matters subject to collective bargaining violates the statutory duty to bargain under Civil Service Law § 209–a [1] [d]") (emphasis added); *see also Matter of Roma v Ruffo*, 92 NY2d 489, 494 (1998) ("when the dispute between public employer and the employees' representative arises during term of an CBA, the statutory duty to bargain collectively and the improper practice of failing to do so in good faith apply only when the parties' dispute is outside the terms of the CBA, *but not when the condition of employment in question is expressly provided for in the parties' agreement*") (emphasis added); CSL § 209-a. Moreover, as indicated in *Matter of Civil Service Bar Assn.* (64 NY2d at 197), that the UFT gained the benefit of retroactive pay for some members, and not for plaintiffs, is not actionable.

In addition, plaintiffs make the conclusory allegation that UFT's decision not to represent the plaintiffs at all was arbitrary, discriminatory, or in bad faith. First, as noted above, there is every indication that no such decision was made. Moreover, plaintiffs fail to give any indication that facts indicating UFT's purported decision could be discovered. *See e.g.* CPLR 3211 (d) ("[s]hould it appear from affidavits submitted in opposition to a motion [to dismiss] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion").

The court finds the various citations to PERB decisions offered by the plaintiffs referring to the jurisdiction of PERB to be taken out of context. In all of the decisions offered, the subject unions refused to represent an individual with regard to discharge or disciplinary procedures. For example, the quote from *Matter of Jeffrey Kaufman, Charging Party, and United Federation Of Teachers, Local 2, AFT, AFL-CIO, Respondent* (39 PERB ¶ 4540) that "[t]he Board does not permit the filing of class action charges by individuals" is taken from a footnote (note 3) in that decision. Meanwhile, plaintiffs ignore the concluding admonition of the decision that "[a]s long as employee organizations and employers do not impinge upon basic organizational or *collective negotiation rights* in dealing with employees as *union members*, their conduct is not within the purview of the Act." First emphasis added; second emphasis original. This is, thus, an indication that while PERB does not permit class actions, PERB is willing to hear complaints of plaintiffs where the matter involves collective negotiation rights. *See e.g. Matter of Thomas C. Barry, Charging Party, and United University Professions, Respondent*, 21 PERB ¶ 3025 ("[w]hile we have held many times that PERB's procedures do not permit the filing of class action improper practice charges, and that PERB will accordingly not order remedial relief on a class-wide basis, we have also held that an agency fee payer has standing to file an improper

practice charge alleging that certain aspects of an agency fee refund procedure are violative of his own Taylor Law rights, even if he has acted in conformity with a challenged procedure").

Given PERB's position, the court perceives no reason that the parties adversely affected by the MOA cannot be named; it is beyond question that the DOE will have records of its employees. As such, that PERB does not permit class actions is irrelevant to the plaintiffs' ability to gain relief if a breach of the duty of fair representation has occurred; the plaintiffs can obtain the names of affected parties and, with permission, institute proceedings on their behalf.

Finally, plaintiffs rely on *De Cherro v Civil Serv. Empls. Assn.* (60 AD2d 743, 744 [3d Dept 1977]) to assert that this matter may not be referred to PERB because "[t]he Supreme Court retains jurisdiction over all labor contracts when the question of fair representation arises. This provides employees with assurance of impartial review of union conduct. To hold otherwise in this case would strip the public employee of the protection afforded by the fair representation doctrine." Citations and internal quotation marks omitted. This reliance is misplaced. Plaintiffs fail to note the immediately prior passage in *DeCherro*, which indicates that the question was not whether PERB had *any jurisdiction*, but, rather, whether it had *exclusive jurisdiction*: "PERB's sphere of exclusive jurisdiction is limited and does not preclude judicial relief in matters outside its range of jurisdiction. *At issue in this case is not an improper employment practice over which PERB has exclusive authority*, but rather, an issue concerning whether or not the duty of fair representation guaranteed to plaintiff by the employment contract has been fulfilled." Emphasis added.

Given the well-established jurisprudence in this area, this court adopts the position of the Court of Appeals in *Palladino*, which is that although the standards set under General Associations Law § 13 and the Martin Rule are onerous, "union members like [plaintiffs] are not

without a remedy. Public employees in New York may bring an improper practice charge before the New York State Public Employment Relations Board pursuant to the Taylor Law." 23 NY3d at 152.

In accordance with this decision, it is hereby

ORDERED the motion of cross motion of plaintiffs to amend the complaint is granted; and it is further

ORDERED that the motion of defendant, Michael Mulgrew, as President of the New York United Federation of Teachers, Local 2, AFT, AFL-CIO, to dismiss this class action, for breach of the duty of fair representation is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Dated:

7/16/15

Enter:

DONNA M. MILLS, J.S.C.
HON. DONNA A. MILLS, JSC