Matter of Grassel v Department of Educ. of City of N.Y.
2015 NY Slip Op 32033(U)
May 8, 2015
Supreme Court, New York County
Docket Number: 100252/14
Judge: Kathryn E. Freed

[* 1]

EA
5/13/15
E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Grassel, Ronald
-v-
NYC Dept. of Education

INDEX NO. 100252/14
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5-8-15
MAY 08 2015

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------X

In the Matter of the Application of
RONALD GRASSEL,

Plaintiff,

-against-

DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Defendant.

----------X

DECISION/ORDER
Index No. 100252/2014
Seq. Nos. 002 and 003

KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

Seq. No. 002

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFS. ATTACHED	1-2 (Ex. A)
MEMORANDUM OF LAW IN SUPPORT	3
AFFIRMATION IN OPPOSITION	None

Seq. No. 003

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFS. ATTACHED	1-2 (Exs. A-I)
MEMORANDUM OF LAW IN SUPPORT	None
AFFIRMATION IN OPPOSITION	None

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Defendant Department of Education of the City of New York ("the DOE") moves, in Sequence No. 002, pursuant to CPLR 217(a), 3211(a)(3), 3211(a)(5), 3211(a)(7), and 7804(f), for an order dismissing the complaint on the grounds that it is time-barred, fails to state a cause of action, and that plaintiff lacks standing. Although plaintiff fails to submit opposition, he moves, in Sequence No. 003, pursuant to a notice of motion, for an order asking, inter alia, why the DOE disciplined him for reporting an attack upon his person, and asking why the DOE: failed to comply with State Education Law §3028; failed to report an injury to a staff member to the DOE's medical unit; failed to comply with the Chancellor's Regulations, and willfully dismissed a staff member (plaintiff) by throwing him into the street.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff, a teacher employed by the DOE, commenced this action by filing a summons and complaint on May 4, 2014. Plaintiff seeks removal of certain letters in his personnel file dating from December 2012 and January 2013, as well as an investigation into an incident that occurred in his school in December 2012 which resulted in a determination that he had engaged in professional misconduct. Specifically, plaintiff alleges that he was assaulted by an intruder on December 4, 2012, while employed at Boys and Girls High School ("the school"). He attempted to report the incident and obtain medical attention, which the DOE's Executive Director of Employee Relations, Andrew Gordon, did not allow him to do.

At a follow-up meeting about the incident held on December 12, 2012, the principal of the school, Bernard Gassaway, determined that the plaintiff was guilty of misconduct. Gassaway noted

this misconduct in a letter, dated January 9, 2013, which was inserted into plaintiff's DOE file. Additionally, the plaintiff apparently argued with Gassaway before his class and was "thrown into the street" by Gassaway. Plaintiff argues that Gassaway's actions violated New York State's Education Law. Plaintiff now asks that Gassaway's letter be removed from his DOE file. Plaintiff also asks that a letter written by Gordon be removed. Additionally, plaintiff requests that an investigation be conducted and that he be removed from this "lawless" environment.

Defendant had previously made a motion to dismiss, which was denied by this Court (York, J.) on May 21, 2014, with leave to renew, due to the DOE's failure to annex copies of the complaint and its exhibits and any "other materials [which] the Court should have before it." The DOE now re-files its previous motion with all pertinent materials annexed.

POSITIONS OF THE PARTIES:

The DOE argues that plaintiff's action should have been brought by way of an Article 78, since it challenges an administrative decision, and therefore, it is untimely, since it was filed beyond the four month statute of limitations. In support of its position, the DOE cites *Broderick v Board of Educ.* 253 AD2d 836, 837 (2nd Dept. 1998), in which case the Appellate Division held that, since plaintiff's claims for breach of contract, unjust enrichment, quantum meruit, and injunctive relief presented "the classic formulation of an article 78 proceeding (citation omitted)", they should have been brought in the form of a proceeding pursuant to CPLR article 78 and were time-barred by the four-month Statute of Limitations set forth in CPLR 217.

Further, the DOE asserts that, to the extent that the complaint would lie against a breach of the underlying Collective Bargaining Agreement ("CBA"), it would still be untimely in that the time

limit for bringing such a complaint is also governed by CPLR 217, which is entitled "Proceeding against body or officer; actions complaining about conduct that would constitute a union's breach of its duty of fair representation; four months." The DOE maintains that, even were this Court to deem this action as a proper vehicle in which to assert a breach of the CBA, under this statute, it would still be governed by a four-month statute of limitations and therefore be time-barred. The relevant periods would run from either the actions of December 2012 or the letters filed in January 2013. In either situation, the fact that the summons and complaint were filed on March 4, 2014 puts them well beyond four months after December 2012 and January 2013 and thus the action must be dismissed.

The DOE further argues that the complaint must be dismissed because it fails to state a cause of action. Specifically, the DOE asserts, relying on *Hickey v New York City Dept. Of Education*, 17 NY3d 729 (2011), that there is no cause of action which would allow this Court to remove disciplinary letters from a DOE file. Secondly, it maintains that, were there a basis for such an action, it clearly should have been brought within the existing structure for filing grievances set up between the DOE and the CBA which covered plaintiff and that, by definition, the action would have to be initiated by the union, not by plaintiff.

Plaintiff maintains in his affidavit in support of his motion that this Court should grant his motion for an investigation and removal of the letters from his personnel file because the DOE failed to follow its own rules and created an unsafe condition and further wrongfully disciplined an injured party while protecting the alleged perpetrators.

CONCLUSIONS OF LAW:

Initially, it is clear that plaintiff's claims are barred by the statute of limitations. It is beyond peradventure that a challenge to an administrative determination must be brought by the commencement of a proceeding pursuant to CPLR article 78 and that the statute of limitations for such a proceeding is four months. CPLR 217. *See Todras v City of New York*, 11 AD3d 383, 384 (1st Dept 2004) ("Inasmuch as plaintiff's claims are fundamentally premised upon the contention that the administrative determinations . . . were wrongful, they should have been brought in a proceeding pursuant to CPLR article 78. . . and were time-barred, having been brought beyond the applicable four-month statutory period." [citations omitted]); *Pagan v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 56 A.D.3d 330 (1st Dept 2008) ("Such claims are fundamentally premised upon the contention that the administrative determination . . . was wrongful, and accordingly, should have been brought in a proceeding pursuant to CPLR article 78" [citations omitted]).

It is also clear that this Court cannot order the disciplinary letters removed from plaintiff's personnel file. *See Hickey v. New York City Dept. of Education*, *supra*. In *Hickey*, the Supreme Court, New York County, ordered disciplinary records expunged from a teacher's personnel file. That finding was reversed by the Appellate Division, First Department. Thereafter, the matter was certified to the New York Court of Appeals on the limited question of whether that reversal was proper. The Court of Appeals found that the reversal was proper and set forth a detailed explanation of how it came to that conclusion. It compared several sections of the United Federation of Teachers' CBA with the New York City teachers' CBA and determined that the New York City

teachers' union intended to adopt certain procedures "with respect to the placement of written materials in tenured teachers' files." Id., at 733. The Court of Appeals concluded that the teachers' union knowingly waived certain procedural rights and held that "[b]ecause the letters at issue are not subject to section 3020-a procedures, petitioners are not entitled to have them expunged." Therefore, this Court lacks the ability to order the subject letters expunged from plaintiff's file and plaintiff thus should have pursued this matter with his union.

Finally, it is also clear that plaintiff cannot proceed in this matter in his personal capacity against the DOE, but must instead avail himself of his union's grievance process. In *Lundgren v. Kaufman Astoria Studios*, 261 AD2d 513, 514 (2nd Dept 1999), the Appellate Division stated that "where a collective bargaining 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. v Ambach*, 70 NY2d 501, 508 [1987])." While the Court in *Lundgren* notes that an exception to this finding may be made when a union fails in its duty of fair representation, no such claim has been made in this action. *See also Chupka v Lorenz-Schneider Co.*, 12 NY2d 1(1962); *Spano v Kings Park Cent. Sch. Dist.*, 61 AD3d 666 (2d Dept 2009).

Therefore, since plaintiff cannot bring an individual action or assert a breach of contract action against the DOE, any such breach of contract claim must be dismissed.

Therefore, in accordance with the foregoing, it is hereby:

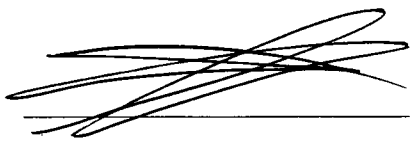
ORDERED that the motion (Seq. No. 002) by the defendant Department of Education of the City of New York, pursuant to CPLR 217(a), 3211(a)(3), 3211(a)(5), 3211(a)(7), and 7804(f), for an order dismissing the complaint on the grounds that it is time-barred, that it fails to state a cause of action, and that plaintiff lacks standing, is granted; and it is further,

ORDERED that the notice of motion brought by plaintiff Ronald Grassel (Seq. No. 003) seeking, inter alia, an order asking why the Department of Education of the City of New York disciplined plaintiff; failed to comply with the State Education Law; failed to report an injury; and failed to comply with the Chancellor's Regulations, is denied as moot; and it is further,

ORDERED that this constitutes the decision and order of this Court.

DATED: May 8, 2015

ENTER:



Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT