Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO
2016 NY Slip Op 32765(U)
February 23, 2016
Supreme Court, Westchester County
Docket Number: 70553/2015
Judge: Terry J. Ruderman

To commence the statutory time 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 WESTCHESTER

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In the Matter of the Application of:

CITY OF YONKERS,

Petitioner,

For a Decision and Order Pursuant to Article 75 of the Civil Practice Law and Rules

-against-

YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Respondent.

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DECISION AND ORDER
Sequence Nos. 1 and 2
Index No. 70553/2015

RUDERMAN, J.

The following papers were considered in connection with petitioner's application for an order permanently staying arbitration pursuant to CPLR 7503:

Papers	Numbered
Order to Show Cause, Petition, Exhibits A – H	1
Verified Answer	2
Order to Show Cause Cross-Motion, Affidavit, Exhibits A – F	3
Memorandum of Law in Support of Cross-Motion	4
Affirmation in Opposition, Exhibits 1 – 4	5
Reply Affirmation in Support of Cross-Motion	6

By Order to Show Cause dated December 15, 2015, the petitioner City of Yonkers ("City") seeks to permanently stay arbitration demanded by the respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Local 628"). Petitioner alleges that respondent is not entitled to arbitration because it failed to comply with the grievance procedure as set forth in the collective bargaining agreement ("CBA") negotiated by the parties. Petitioner further avers that the respondent lacks standing to arbitrate certain claims raised on behalf of its members.

The respondents cross-move, by Order to Show Cause filed January 4, 2016 as modified by this Court's January 5, 2016 Decision and Order, for an order granting a preliminary injunction pursuant to CPLR 7502(c) compelling petitioner to: (1) engage in expedited

arbitration of the respondent's grievance, (2) process benefits claims for injuries and illnesses sustained by Yonkers' Fire Fighters in the line of duty, and (3) cease and desist from denying and delaying medical treatment for said injuries and illnesses.

Facts and Background

Respondent and petitioner are parties to a CBA which is in effect through June 30, 2019. (Respondent's Mem. of Law, p. 3.) On December 22, 2014, the City entered into a service contract with Pomco, Inc. to administer the City's GML 207-a benefits for injuries sustained by firefighters in the line of duty. (*Id.*) After Pomco was retained by the City, Local 628 began receiving complaints from its members that the City was delaying and denying their medical treatments. (*Id.*) Local 628 raised these concerns with the City, and on September 3, 2015, the Commissioner of the Yonkers Fire Department issued a memorandum detailing the new Pomco procedures ("Pomco Memo"). (Verified Petition, Ex. B.) The memo stated that effective immediately, Pomco would be assigning Nurse Case Managers ("NCM") to all Yonkers Fire Department personnel placed on sick leave as a result of an on-duty injury. (*Id.*) According to the memo, the NCM's would assist union members with coordinating physician visits, arranging for therapy, evaluating and facilitating prescribed treatment plans, and communicating information with claims adjusters, employers and medical providers. (*Id.*)

On September 11, 2015, Local 628 submitted a letter to the City complaining that Pomco's failure to properly process members' GML-207-a claims was resulting in continued denials of benefits and delays in treatment for injured firefighters. (Verified Petition, Ex. B.) The letter specifically mentioned Firefighters Garrett Lockwood and Joseph Reihm as examples of members who were experiencing delays in obtaining medical treatment. (*Id.*) Thereafter, Local 628 submitted a written grievance to the Yonkers Fire Department Commissioner, dated October 2, 2015, with the September 11, 2015 letter attached. In its grievance, the respondent listed a number of alleged violations of the CBA, and included the name of one additional firefighter, Sean Flanagan, who had allegedly been denied medical treatment since the respondent's earlier, September 11, 2015 letter to the City. (*Id.*)

In support of its application, the petitioner submits a copy of Article 29:0 of the CBA, which provides the detailed grievance procedure to be followed in the event there is a dispute concerning the interpretation or application of any provision of the CBA. (Verified Petition, Ex. A.) The petitioner argues that the respondent failed to follow Step 1 of the procedure, which is a

condition precedent to arbitration. Under Step 1, any dispute as to the interpretation or application of the CBA must be presented to the Fire Commissioner, in writing, within 20 calendar days of its occurrence. (*Id.*) The written grievance must include the contract provision alleged to be violated, the date or dates of the occurrence, and the names of the employees involved. (*Id.*) Although Local 628 submitted a letter to the Fire Commissioner on October 2, 2015, pursuant to Step 1 of the procedure, the City claims that the letter merely set forth "vague, specious allegations of delaying or denying medical treatment" (Verified Petition, Ex. B.) to firefighters who had allegedly sustained injuries in the line of duty, and did not include any "date or dates" of the purported violations, or the "name or names of the employees involved." (Verified Petition, ¶ 13.) The City further asserts that while the grievance named Firefighter Sean Flanagan as another union member experiencing delayed medical treatment, it did not state the nature of Flanagan's injuries, nor did it specify the date his grievance occurred, as required by the grievance procedure. (Petitioner's Affirmation in Opposition, ¶ 7.)

Lastly, petitioner claims that the respondent lacks standing to arbitrate these issues, and further avers that Local 628's grievance with regard to the issuance of the Pomco Memo (*see* Verified Petition, Ex. B, ¶ 2), is untimely, because the grievance was submitted on October 2, 2015, more than 20 days from the date the Pomco memo was issued.

In support of its cross-motion, Local 628 argues that it did, in fact, follow the step-by-step grievance procedure set forth in the CBA, and the October 2, 2015 grievance was not defective or untimely. First, respondent claims that the date of the alleged violation, which "was and is ongoing," is September 11, 2015, which is the date of respondent's letter to the City outlining continuing incidents of delay and denial of medical treatment. Second, the September 11, 2015 letter specifically named two firefighters whose treatments had allegedly been delayed. Finally, because the September 11, 2015 letter was attached to, and therefore incorporated into, the October 2, 2015 grievance, the respondent avers that it was in compliance with Step 1 of the grievance procedure. (Respondent's Mem. of Law, p. 11.)

Local 628 further asserts that the issue of whether it properly followed the CBA's grievance procedures is itself an issue for the arbitrator to resolve (*Id.* at p. 10), and any argument that it lacks standing to arbitrate the issues at hand is without merit. Lastly, Local 628 avers that the City should be enjoined from delaying and denying necessary and critical medical treatment to firefighters injured in the line of duty. The respondent argues that without a

preliminary injunction, Yonkers Fire Fighters will be irreparably harmed during the pendency of arbitration, thereby rendering any future arbitration award ineffectual. (*Id.* at pp. 12 – 13.)

Analysis

I. *Motions to Stay and Compel Arbitration*

On a motion to stay or to compel arbitration pursuant to CPLR 7503, the court must resolve three threshold questions: "(1) whether the parties made a valid agreement to arbitrate, (2) whether if such an agreement was made it has been complied with, and (3) whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State." (*Rockland County v. Primiano Const. Co., Inc.*, 51 N.Y.2d 1, 6-7 [1980]; CPLR 7503[a]-[b]; 7502[b]; *Allstate Ins. Co. v. Laldharry*, 130 A.D.3d 814, 815 [2d Dept. 2015] [*citing Morales v. American Apparel, Inc.*, 113 A.D.3d 659, 660 [2d Dept. 2014] [internal quotation marks omitted]; see CPLR 7503[b]; *Matter of County of Nassau v. Civil Serv. Empls. Assn.*, 14 A.D.3d 509, 2d Dept. 2005].)

If the court finds that a valid agreement between the parties exists, and the particular claim sought to be arbitrated falls within the scope of that agreement, the court must then determine whether there is a "preliminary requirement or condition precedent to arbitration to be complied with, and, if so, whether there has been compliance with such requirement or condition precedent." (*Primiano*, 51 N.Y.2d at 7.) The courts have "drawn a distinction between conditions precedent *to* arbitration, the merits of which are to be determined by the courts, and conditions *in* arbitration, which are to be determined by the arbitrators." (*Matter of Town of Queensbury (Joseph R. Wunderlich, Inc.)*, 175 A.D.2d 946, 947 [3d Dept. 1991] [citing *Primiano*, 51 N.Y.2d 1] [emphasis added].) Whether a condition precedent falls "within the jurisdiction of the courts or of the arbitrators depends on its substance and the function it is properly perceived as playing – whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process." (*Primiano*, 51 N.Y.2d at 9.)

An evaluation of the nature of the arbitration agreement is also important when determining whether an issue is a condition precedent to arbitration or a condition precedent in arbitration. (*See United Nations Dev. Corp. v. Norkin Plumbing*, 45 NY2d 358, 363 [1978] ["[o]f critical importance in this area is the nature of the arbitration agreement: that is, whether it contains a broad or narrow arbitration clause"].) Generally, where there is broad arbitration clause, compliance with contractual notice provisions and time requirements in the grievance

procedure are matters for the arbitrator to decide. However, where the agreement expressly states that compliance with such provisions and limitations is a condition precedent to arbitration, "the question of compliance is for the court to decide." (*Niagara Frontier Transp. Auth. v. Computer Scis. Corp.*, 179 A.D.2d 1037, 1038 [4th Dept. 1992] [citing *Norkin Plumbing Co.*, 45 N.Y.2d at 364; *see also Matter of Raisler Corp. [New York City Hous. Auth.]*, 32 N.Y.2d 274, 282 [1973].)

Here, the parties do not dispute that the CBA, negotiated and signed by both parties, contains a valid agreement to arbitrate any disagreements "involving the interpretation or application of any provision" of the agreement that remain unresolved after Step 2 of the grievance procedure. (Petition, Ex. B.) In addition, the claims sought to be arbitrated fall within the scope of the CBA, which contains the terms and conditions of the firefighters' employment with the City, and the procedure regulating the application for, and award of, GML 207-a benefits. (*See* George Rocha Aff., Ex. B; Appendix C to the CBA.) Indeed, the City acknowledged during oral argument before the Court on January 6, 2016 that the arbitration provision of the CBA is very broad and would include the grievance at issue here. (*See* Respondent's Reply, Ex. B, p. 9.)

Moreover, whether Local 628's October 2, 2015 letter was untimely with regards to the Pomco memo, and defective or vague for failing to include the dates of the alleged violations and the names of the employees involved, are issues for the arbitrator to decide. This is particularly true where, as here, the arbitration clause is broad and does not expressly state that the three-step grievance procedure and the time limitations related to Step 1, are conditions precedent to arbitration. (*See City of Poughkeepsie v. City of Poughkeepsie, Unit, Local 486 Civ. Serv. Emp. Ass'n*, 78 A.D.2d 653, 653 [2d Dept. 1980] ["compliance with CBA's step-by-step grievance procedures are procedural issues that must be decided by the arbitrator and not the court"]; *Inc. Vil. of Floral Park v. Floral Park Police Benevolent Ass'n*, 131 A.D.3d 1240, 1242-43 [2d Dept. 2015] ["[q]uestions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators"]; *Matter of Natl. Amusements, Inc.*, 210 A.D.2d 336 [2d Dept. 1994] ["the issue of whether a party has complied with the time provisions relating to a step-by-step grievance procedure are for the arbitrator in the absence of a very narrow arbitration clause or an express provision making compliance with such time constraints a condition precedent to arbitration"]; *see also Matter of Enlarged City School Dist. of Troy [Troy Teachers Assn.]*, 69 N.Y.2d 905, 907 [1987]; *Matter of*

Triborough Bridge & Tunnel Auth. [Dist. Council 37 of Am. Fedn. of State, County & Mun. Empls., AFL–CIO], 44 N.Y.2d 967, 969 [1978].)

Accordingly, the City's motion seeking an order permanently staying arbitration is denied and respondent's cross-motion seeking an order compelling arbitration is granted.

II. *Standing*

The City's argument that respondent lacks standing to grieve and arbitrate the issue of the City's allegedly improper denial and delay of firefighters' receipt of GML 207-a benefits is without merit. The City's reliance on *Schenectady County Sheriff's Benevolent Ass'n v. McEvoy*, 124 A.D.2d 911, 913 [3d Dept. 1986] is also unavailing because the case involved a union's standing to commence a CPLR Article 78 proceeding to compel compliance with GML 207-c on behalf of two of its members who were denied benefits for failing to submit the necessary documentation. The case did not involve arbitration of a dispute arising out of a collective bargaining agreement.

III. *Preliminary Injunction*

The respondents also move for a preliminary injunction compelling the petitioner to engage in expedited arbitration, to promptly process claims for benefits for injuries and illnesses sustained by Yonkers Fire Fighters in the line of duty, and to cease and desist from denying and delaying medical treatment for injuries and illnesses sustained by the firefighters,

Respondents seek such relief pursuant to CPLR 7502(c), which permits a court to "entertain an application for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." A party seeking relief under CPLR 7502(c) must "make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63." (*Advanced Digital Sec. Sols., Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613 [2d Dept. 2008] [quoting *Winter v. Brown*, 49 A.D.3d 526, 529 [2d Dept. 2008]; *see Matter of K.W.F. Realty Corp. v. Kaufman*, 16 A.D.3d 688, 689 [2d Dept. 2005]; *Matter of Ottimo v. Weatherly Sec. Corp.*, 306 A.D.2d 287, 287 [2d Dept. 2003]). "To demonstrate entitlement to a preliminary injunction under CPLR 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction."

(*Advanced Digital,* 53 A.D.3d at 613; citing *Matter of K.W.F. Realty Corp.*, 16 A.D.3d at 689-690.)

The respondents have failed to show that the firefighters, in particular Lockwood, Tobacco and McManus, will suffer irreparable harm if a preliminary injunction is not granted. The respondents have not demonstrated that the City is continuing to deny or delay the processing of claims for the firefighter's medical treatment, which is evidenced by the parties conflicting affidavits on this point. Local 628 has also acknowledged that certain claims, particularly with regards to Firefighter Tobacco, have indeed been processed. Even assuming that Pomco is denying or delaying benefits, the respondents have not demonstrated that the firefighters are unable to pay the costs of additional medical treatment (e.g. more physical therapy sessions for Lockwood and a stent for McManus) either privately, or through their primary health care insurance plan. There is also no indication that the firefighters' conditions are worsening, or that they are life threatening, but only that their conditions have not yet improved.

Nor have respondents demonstrated that any arbitration award to which the firefighters might be entitled, would be rendered ineffectual without the preliminary injunction. Any arbitration award would be in the form of Pomco's approval of, and payment for, additional medical treatment, which ultimately equates to a monetary award. It is well settled that a preliminary injunction is not a proper remedy where it appears that a moving party has an adequate remedy at law and may be fully compensated by monetary damages. (*See Family Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 [2d Dept. 2010]; *Mar v. Liquid Management Partners*, 62 A.D.3d 762, 763 [2d Dept. 2009]; *Dana Distribs., Inc. v. Crown Imports, LLC*, 48 A.D.3d 613-614 [2d Dept. 2008].) Accordingly, that branch of respondents' motion seeking a preliminary injunction is denied.

The parties' remaining contentions either are without merit or need not be reached in light of the Court's determination.

Based on the foregoing, it is hereby

ORDERED that the petitioner's motion for an order permanently staying arbitration is denied, and that branch of respondent's motion seeking an order compelling arbitration is granted, and it is further

ORDERED that the branch of respondent's motion seeking a preliminary injunction is denied, and it is further

ORDERED that the temporary stay on all arbitration proceedings issued in the executed Order to Show Cause signed by the Court on December 15, 2015 is hereby lifted.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 23, 2016

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN