

Opromalla v Port Auth. of N.Y & N.J.

2018 NY Slip Op 31548(U)

July 9, 2018

Supreme Court, New York County

Docket Number: 151283/17

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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JOSEPH M. OPROMALLA,

Plaintiff,

-against-

Index No. 151283/17

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Defendant.

Motion Sequence No. 001

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PAUL A. GOETZ, J.:

The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 17, 18, 19, 20, 21, 22, 23, 24, and 25, were considered on the instant motion to dismiss.

Plaintiff Joseph M. Opromalla brings this action for breach of the collective bargaining agreement between defendant Port Authority of New York and New Jersey (hereinafter, the Port Authority) and nonparty Port Authority Police Sergeants Benevolent Association (hereinafter, the SBA). Defendant Port Authority moves, pursuant to CPLR 3211 (a) (7) and (c), to dismiss the complaint for failure to state a cause of action.

BACKGROUND

The following facts are taken from the complaint. Plaintiff alleges that, at all relevant times, he was employed by the Port Authority as a police sergeant in the Port Authority Police Department (complaint, ¶ 2). According to plaintiff, police sergeants in the Port Authority Police Department are employed pursuant to a Memorandum of Agreement between the Port Authority and the SBA (*id.*, ¶ 4). On January 6, 2016, the Port Authority Police Department issued a Police Detective Sergeant Promotional Opportunity Announcement for promotion to the rank of detective sergeant, which included the screening criteria and described the selection

process (*id.*, ¶¶ 6, 7). Plaintiff submitted an application in response to the announcement (*id.*, ¶ 7). Thereafter, on February 1, 2016, the Port Authority Police Department issued a Police Lieutenant Promotional Opportunity Announcement (*id.*, ¶¶ 7, 8). The announcement described the screening criteria and selection process (*id.*, ¶ 8).

According to the complaint, on February 10, 2016, plaintiff learned that he was ineligible for promotion to the ranks of lieutenant and detective sergeant (*id.*, ¶ 9). Michael Ford of the Port Authority's Human Resources Department told plaintiff that he had been disqualified because of poor ratings received on the development appraisal, which the Port Authority uses for all promotion candidates (*id.*). Plaintiff alleges that Lieutenant Kenneth Talon conducted the development appraisal, and that he has a longstanding bias against plaintiff's advancement in the force (*id.*, ¶ 10). He also alleges that it is the Port Authority's custom and practice to have development appraisals conducted by a current commanding officer and/or a commanding officer who had the most interaction with the applicant (*id.*, ¶ 14). Nevertheless, Lieutenant Talon was not in plaintiff's direct chain of command at the time, and had not interacted with plaintiff for a significant amount of time when Lieutenant Talon did the appraisal (*id.*). Further, plaintiff alleges that it is the Port Authority Police Department's custom and practice to use separate development appraisals for each application for promotion (*id.*, ¶ 16).

The complaint asserts two causes of action for breach of contract (*id.*, ¶¶ 24-29). According to plaintiff, section XXI and Appendix J of the Memorandum of Agreement require the Port Authority to list the elements of evaluation that would be utilized in a promotion evaluation and to then follow those criteria (*id.*, ¶ 12). Plaintiff alleges that the Port Authority breached the Memorandum of Agreement "[b]y using the improperly prepared Development Appraisal to block Plaintiff's consideration for promotion" to detective sergeant and lieutenant,

and “by continuing to deny Plaintiff’s application to be promoted” to detective sergeant and lieutenant (*id.*, ¶¶ 25, 28).

The Port Authority moves to dismiss, arguing that: (1) the Port Authority’s alleged conduct complied with the Memorandum of Agreement; and (2) the alleged violations of the Memorandum of Agreement cannot be litigated in this action.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). However, “bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

It is well settled that “[a]n individual union member normally lacks standing to enforce the terms of a collective bargaining agreement between the union and the employer” (*Spano v Kings Park Cent. School Dist.*, 61 AD3d 666, 671 [2d Dept 2009]; *accord Hickey v Hempstead Union Free School Dist.*, 36 AD3d 760, 761 [2d Dept 2007]; *Berlyn v Board of Educ. of E. Meadow Union Free School Dist.*, 80 AD2d 572, 573 [2d Dept 1981], *affd* 55 NY2d 912 [1982]). There are two exceptions: (1) where “the contract provides otherwise”; and (2) where

“the union fails in its duty of fair representation” (*Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987], *cert denied sub nom. Margolin v Board of Educ., Commack Union Free Sch. Dist.*, 485 US 1034 [1988]).

Here, plaintiff does not allege that the SBA failed in its duty of fair representation. Thus, the court must consider whether the first exception applies, i.e., whether the contract “either expressly allows such suits or implicitly does so by excluding the dispute at issue from, or not covering it within, the ambit of the contractual dispute resolution procedures” (*Buff v Village of Manlius*, 115 AD3d 1156, 1157 [4th Dept 2014], quoting *Ledain v Town of Ontario*, 192 Misc 2d 247, 251 [Supreme Court, Wayne County 2002], *affd* 305 AD2d 1094 [4th Dept 2003]).

Section XXI, entitled “PROMOTION TO THE RANK OF POLICE LIEUTENANT,” of the Memorandum of Agreement states that “Procedural elements for promotion of Police Sergeants to the rank of Police Lieutenant, if applicable, shall be as set forth in Appendix ‘J’ annexed hereto. Neither this Section nor Appendix ‘J’ shall be subject to the grievance-arbitration procedures provided for in this Memorandum of Agreement” (Denalli affirmation in support, exhibit G at 33). Section XXXIII, paragraph 1, which concerns “Detective Sergeants,” states that “All Police Sergeants (Job Specification 2605) who have at least six years of Port Authority police service, at least two years of which is service as a Port Authority Police Sergeant, shall be eligible to be considered for promotion to the rank of Detective Sergeant (Job Specification 2606)” (*id.* at 48). Section XXII of the Memorandum of Agreement, which sets forth the grievance arbitration/disciplinary procedure, indicates that the grievance arbitration procedure is available only “with respect to the alleged violation of any provision (other than . . . Section XXI and Appendix ‘J’ annexed hereto . . . [and] Paragraph one of Section XXXIII . . .” (*id.* at 34). Appendix G defines a “grievance” as a “complaint limited to the application or

interpretation by the Port Authority of any provision of the Memorandum of Agreement (other than . . . Section XXI and Appendix 'J' referred to therein . . . [and] paragraph one of Section XXXIII . . .) which application or interpretation is alleged to constitute a violation of the said Memorandum of Agreement or any provision thereof" (*id.* at 210).

Appendix J provides for the procedure for promotion of police sergeants to the rank of police lieutenant (*id.* at 225). Under Appendix J, promotion evaluation announcements were required to contain the "[e]lements of evaluation to be utilized . . ." and "[c]andidates who successfully complete each element of the promotion evaluation shall be placed on a list of those eligible to be considered for promotion to the position of Police Lieutenant" (*id.* at 226, 228). Further, Appendix J states that "[i]n the event the Port Authority elects as part of any promotion evaluation conducted pursuant to this procedure to provide for any appeal process for any aspect of the evaluation, then there will be an Appeal Board which shall consist of three members to be appointed by the Director of the Human Resources Department" (*id.* at 229). Section V of Appendix J states that "[t]he grievance-arbitration procedure set forth in the Memorandum of Agreement between the Port Authority and the SBA shall not be applicable to this promotion evaluation procedure, in whole or in part, or to the implementation thereof, including but not limited to any matter which is permitted to be submitted to the Appeal Board as set forth herein" (*id.* at 232). The following section of Appendix J, section VI, provides that "[a] charge that the Port Authority has violated a procedural matter in this promotion evaluation procedure shall be submitted to the Port Authority Employment Relations Panel for an expedited determination" (*id.*).

Here, plaintiff has no standing to enforce a breach of the Memorandum of Agreement. First, plaintiff has not identified any express contractual provision allowing him to bring contract

issues on his own. Second, to the extent that plaintiff relies on an implied term of the Memorandum of Agreement, this claim lacks merit. The application and interpretation of section XXI and Appendix J and paragraph one of section XXXIII are not subject to a grievance. However, paragraph one of section XXXIII only addresses who is eligible to be considered for promotion to the rank of detective sergeant. It does not set forth the form of the promotion process. In addition, any claim that the Port Authority violated a procedural matter in the promotion evaluation procedure for promotion to the rank of police lieutenant was required to be submitted to the Port Authority Employment Relations Board. Moreover, the Memorandum of Agreement does not carve out a separate right regarding these procedures that can be enforced by an employee directly against the Port Authority (*see Altman v Rossi*, 107 AD3d 1223, 1224 [3d Dept 2013] [member of faculty association of community college lacked standing to bring action for breach of collective bargaining agreement]; *cf. Buff*, 115 AD3d at 1158 [retired village employee could bring action against village directly for allegedly breaching its collective bargaining agreement, where he was no longer a member of union within meaning of the agreement when he became aggrieved, and he could not file a grievance]; *Hohenberger v Smithtown Cent. Sch. Dist.*, 58 Misc 3d 6, 8-9 [App Term, 2d Dept 2017] [trial court did not err in finding that former school bus driver had standing to sue under collective bargaining agreement where the collective bargaining agreement failed to address whether union's representation of "transportation personnel" was confined to current employees or former employees]).

Although plaintiff relies on the case of *Westchester County Correction Officers Benev. Assn., Inc. v County of Westchester* (65 AD3d 1226 [2d Dept 2009]), that case is distinguishable. There, the Second Department held that the plaintiffs (including the correction officers' union)

were not obligated to exhaust a grievance procedure prior to bringing an action for breach of a collective bargaining agreement, which advanced claims pertaining to their right to certain retirement benefits, since the agreement excluded from the term “grievance,” any “matter involving . . . retirement benefits” (*id.* at 1227). Here, in contrast, the plaintiff is an individual, and not the SBA. In addition, the Port Authority’s alleged failure to comply with procedural mechanisms in the promotion process is sufficiently covered by contractual dispute mechanisms in the Memorandum of Agreement.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendant Port Authority of New York and New Jersey to dismiss is GRANTED and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 9, 2018

ENTER:



Hon. Paul A. Goetz, JSC