

Lynch v Johnson

2018 NY Slip Op 32962(U)

November 16, 2018

Supreme Court, New York County

Docket Number: 652761/2015

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 652761/2015

MOTION DATE _____

MOTION SEQ. NO. 004

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

- v -

DECISION AND ORDER

ROBERT JOHNSON, BRIAN FUSCO, JOSEPH ANTHONY, MICHAEL HERNANDEZ, SHEA COMMUNICATIONS, LLC, and JOHN AND JANE DOES 1 THROUGH 30,

Defendants.

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Plaintiffs bring this action for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, breach of confidential relationships, and violations of Penal Law § 195, and seek compensatory and punitive damages, and injunctive relief. Defendant Johnson moves pursuant to CPLR 3211(a)(3) and (7) for an order dismissing the complaint. Plaintiffs oppose.

I. AMENDED VERIFIED COMPLAINT (NYSCEF 87)

Plaintiffs allege the following:

Upon becoming officers of the New York Police Department (NYPD), individuals provide their personal information, including names and home addresses. The NYPD compiles this information into a database and shares it with plaintiff Patrolmen's Benevolent Association of the City of New York, Inc. (PBA), the union that represents NYPD officers, which generates a

membership list. PBA strictly regulates use of the membership list, and prohibits candidates running in PBA elections from accessing it.

PBA holds elections every four years. To mail campaign materials to PBA members, candidates are required to use a bonded mailing house selected by PBA and bound by a confidentiality agreement. Candidates submit their campaign materials to the bonded mailing house which, using the membership list, mails all materials to the membership.

In the course of the 2015 election, one group of electoral candidates, defendants Fusco, Anthony, and Hernandez, and some of the other unidentified John and Jane Does, ran as part of the Strengthen the Shield (STS) slate. Fusco, Anthony, and Hernandez are current or former NYPD police officers and former PBA trustees. They employed defendant Shea Communications, LLC to help with media relations.

On April 13, 2015, using his official NYPD email address reflecting his position with the Personnel Bureau, Johnson contacted nonparty officer Steven Hong requesting the personal information, including name, sex, race, address, and command, of all officers in the NYPD Housing and Transit Bureaus. On April 23, 2015, Hong forwarded Johnson's request to nonparty officer Oscar Nieves. The next day, Nieves sent a file containing the information to Hong, who forwarded the file to Johnson.

In connection with STS's campaign, Shea and Fusco, Anthony, and Hernandez hired Rose Press, Inc. to mail the flyers. Rose was neither authorized to serve as a PBA mailing house nor did it have a confidentiality agreement with the PBA. On May 12, 2015, a Rose employee emailed Shea asking for the list of addresses to which the flyers were to be sent.

STS and Shea prepared campaign flyers relating to a discrete issue. To mail them out, Johnson contacted Nieves on May 14, 2015 for the personal information of members impacted

by the issue. Later that day, Nieves sent Johnson a file containing the personal information of some 8,944 members. Given Johnson's use of his official NYPD email, Nieves responded promptly. Upon receipt of the file, Johnson forwarded it to his personal email address, and then sent it to Fusco, Anthony, and Hernandez, Shea, and other unidentified third parties. On May 19, 2015, defendants sent the file to Rose to use as the mailing list for the flyers.

On August 7, 2015, plaintiffs initiated this action. Plaintiffs assert that Johnson had knowledge that Fusco, Anthony, and Hernandez, by sending personal information of NYPD officers, breached their fiduciary duties to PBA, and that by helping the three gain access to the personal information and disseminate it to unauthorized third parties, he is also alleged to have aided and abetted a breach of their common law and statutory fiduciary duties. As an NYPD sergeant with the Personnel Bureau, plaintiffs contend, Johnson breached his confidential relationship with members of PBA by releasing the personal information of officers, which also constitutes a violation of Penal Law § 195.

Plaintiffs also allege that, due to defendants' actions, PBA and its members are faced with potentially life-threatening risks to their health and safety. In addition, they claim to have incurred monetary costs in attempting to retrieve and prevent further use and dissemination of officers' personal information.

II. CONTENTIONS

A. Defendant Johnson (NYSCEF 90)

Johnson asserts that plaintiffs lack organizational standing to prosecute this action, having failed to plead an "injury in fact." He denies that the protection of the personal information of PBA members falls within PBA's purpose. Even if an injury in fact is established and that its avoidance is within the purview of PBA, he claims that damages would be particular

to each member, thereby requiring the participation of all members. Johnson also contends that the contact information given to Rose did not originate from the confidential PBA membership list, but came directly from the NYPD, and thus, plaintiffs are not aggrieved.

Johnson argues that plaintiffs fail to state a cause of action for aiding and abetting a breach of fiduciary duty absent an underlying breach by Fusco, Anthony, and Hernandez, or the John and Jane Does, and denies that any of them acted in their capacity as trustees, delegates, officers, directors, or agents of PBA. Rather, he alleges, they acted in their individual capacities as candidates for office. Johnson also asserts that he cannot be held liable as plaintiffs do not allege that he knew of the existence of a fiduciary duty owed to PBA by Fusco, Anthony, and Hernandez.

Johnson also denies any confidential relationship with PBA members and offers an affidavit in which he denies membership in PBA or any knowledge as to whether defendants used the membership list in violation of their fiduciary duty, as to the PBA election policies and procedures, and as to those approved by PBA to access the membership list. (NYSCEF 85). He otherwise observes that when officers give their personal information to the NYPD, they receive no assurances as to how it would be used and who would be given access to it, and contends that as Penal Law § 195 does not allow for a private right of action, all claims made thereunder must be dismissed. And, absent any underlying substantive claims remaining against him, he asserts that plaintiffs' cause of action seeking to enjoin him from disseminating or using the mailing list must be dismissed.

B. Plaintiffs (NYSCEF 111)

Plaintiffs argue that PBA has common law standing to prosecute this action given its legal stake in stopping the alleged breaches of fiduciary duty, protecting the personal information

of officers, and obtaining damages for expenses incurred by it due to defendants' actions. They contend that a reasonably likely violation of plaintiffs' rights gives rise to PBA's legal stake in the matter, notwithstanding the absence of injury. Moreover, that the personal information was derived from NYPD and not from PBA's membership list is irrelevant, they claim, as the dissemination of information known to be confidential and protected is a breach of fiduciary duty, which Johnson aided and abetted. They express concern that the negligent management and misuse of police officers' personal information each creates a serious and potentially grave safety concern.

Plaintiffs also contend that they have organizational standing as one or more PBA members, like PBA itself, has a legal stake in remediating a breach of fiduciary duty, protecting members' personal information, and obtaining damages for expenses incurred due to defendants' conduct, and that this matter falls within PBA's zone of interest given its purpose in representing officers and ensuring officer safety. In addition, participation of individual PBA members is not necessary because the violations and relief sought for each member is uniform. There is also statutory standing to assert claims under Labor Law § 725 and a private right of action under Penal Law § 195.

According to plaintiffs, they sufficiently allege that Johnson aided and abetted breaches of fiduciary duty by stating that Fusco, Anthony, and Hernandez, and John and Jane Does had a fiduciary duty to PBA at the time they breached it by disseminating officers' personal information, and that Johnson knew of their fiduciary duties, and aided the three in obtaining and disseminating officers' personal information. Plaintiffs disagree that the three were not acting in their individual capacities, and that in any event, any doubt as to their role does not require dismissal at this juncture.

Moreover, plaintiffs maintain, Johnson was in a confidential relationship with PBA members because upon hire, they provide their personal information to the NYPD with the understanding that it would be protected, and as a member of the Personnel Bureau, he was entrusted with protecting members information. As PBA members did not deal on equal terms with Johnson and expected him to maintain the confidentiality of their information, he breached that duty of confidentiality by disseminating their information to unauthorized parties.

C. Reply (NYSCEF 112)

In reply, Johnson reiterates his prior arguments.

III. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]).

Capacity to sue relates to a litigant's right to appear and bring a grievance before a court. (*Cnty. Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). It is distinct from standing (*Silver v Pataki*, 96 NY2d 532, 537 [2001]; see *Matter of Part 60 RMBS Put-Back*

Litig., 155 AD3d 482, 484 [1st Dept 2017] [observing that capacity and standing have been used interchangeably]), the issue raised and addressed here.

Under common law, to have standing, one must have suffered an “injury in fact.” (*Id.* at 772; see *New York State Ass’n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004] [injury must be more than conjectural]). When a party suffers an injury in fact, they are deemed to have an actual legal stake in the matter being adjudicated. (*Soc’y of Plastics Indus., Inc. v Cty. of Suffolk*, 77 NY2d 761, 772 [1991]). Amorphous allegations of potential future injury do not suffice. Rather, a plaintiff must allege a concrete injury to obtain standing. (*Ass’n for a Better Long Island, Inc. v New York State Dep’t of Envtl. Conservation*, 23 NY3d 1, 7 [2014]).

Likewise, to have organizational standing, plaintiffs must demonstrate, *inter alia*, that some or all of its individual members have standing to sue. (*Mulgrew v Bd. of Educ. of City Sch. Dist. of City of New York*, 75 AD3d 412, 413 [1st Dept 2010]). Because individual and organizational standing both require a showing of injury, they are both addressed. Standing is a threshold determination which must be considered at the outset of litigation. (*Soc’y of Plastics*, 77 NY2d at 769).

In light of the risks faced daily by police officers, the dissemination of their personal information presents more risk, as the information, which is held in strictest confidence by PBA, could be used nefariously if misdelivered. As risky as Johnson’s conduct may be, however, it has not resulted in an injury in fact sufficient to confer standing.

In *Manning v Pioneer Sav. Bank*, bank customers initiated a class action for damages resulting from the theft of a bank laptop containing the customers’ personal information. Finding that the plaintiffs had alleged only a risk of identity theft without actual fraudulent charges to their accounts, the court held that the plaintiffs had failed to demonstrate standing. (56 Misc 3d

790, 797 [Sup Ct, Rensselaer County 2016]). Here too, as only a risk is pleaded, there is no standing.

In *Dental Soc. of State v Carey*, the plaintiff had sought an order mandating government officials to increase a fee reimbursement schedule. (61 NY2d 330, 334 [1984]). The Court found that a sufficient injury had been alleged in the form of inadequate reimbursements, reasoning that having incurred higher costs, the plaintiffs were subject to pecuniary losses absent readjustments to the reimbursement schedule, and as the damages were guaranteed to occur absent administrative action, they were not speculative. (*Id.* at 332-34).

The injuries alleged by plaintiffs here are not as assured as those addressed in *Carey*. While injury is possible, as it was in *Manning*, it remains only a risk, too speculative to constitute injury. (See *Police Benev. Ass'n of New York State Troopers, Inc. v Div. of New York State Police*, 43 AD3d 125, 132 [1st Dept 2007] [plaintiffs lack standing where they fail to demonstrate that defendants' conduct is "reasonably certain to result in actual harm"], *affd* 11 NY3d 96 [2008]).

Plaintiffs offer no explanation or proof of any "costs incurred in attempting to retrieve and present further use and dissemination" of the personal information. Thus, there is no basis for awarding them. To the extent that such costs constitute attorney fees and expenses, they are not recoverable as damages. (*Coopers & Lybrand v Levitt*, 52 AD2d 493, 496 [1st Dept 1976], citing *Miss Susan, Inc. v Enter. & Century Undergarment Co.*, 270 AD 747, 750 [1st Dept 1946], *affd* 297 NY 512 [1947]).

Labor Law § 725 was enacted with the Labor and Management Improper Practices Act (LMIPA) to combat abuse by senior officials within labor organizations. (Labor Law § 720). Given the corruption of some officials charged with maintaining the integrity of labor

organizations, the LMIPA expressly provides that union officials have a fiduciary duty to their membership. (*Id.*). Included therein is an enforcement provision by which the union or individual members may act in a derivative capacity to bring actions for breaches of fiduciary duty. (Labor Law § 725). Whether the union is acting for itself or an individual member suing derivatively, initiating an action under this section does not obviate the need to plead injury. And, as all actions which invoke section 725 concern breaches of fiduciary duty, as such a breach requires a demonstration of damages (*see Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [damages suffered as result of breach of fiduciary duty is essential element of claim for aiding and abetting breach of fiduciary duty]), and as plaintiffs fail to allege damages, they lack statutory standing as well.

Absent any authority for the proposition that plaintiffs may bring a private action under Penal Law § 195, and given the authority for the contrary proposition (*Byvalets v New York City Hous. Auth.*, 2017 WL 7793638, *7 [ED NY July 28, 2017], *report and recommendation adopted* 2018 WL 1067732 [ED NY Feb. 23, 2018]; *Christian v Town of Riga*, 649 F Supp 2d 84, 91 [WD NY 2009]; *Moore v New York City Dep't of Educ.*, 2004 WL 691523, *5 [SD NY Mar. 31, 2004]; *Rennix v Jackson*, 152 AD3d 551, 554 [2d Dept 2017]; *Tourge v City of Albany*, 285 AD2d 785, 787 [3d Dept 2001]). In any event, plaintiff offers no authority for stating that permitting a claim under section 195 would promote the legislative purpose or that the creation of a private right of action would be consistent with the legislative scheme. (*Sheehy v Big Flats Cmty. Day, Inc.*, 73 NY2d 629, 633 [1989] [setting forth test for determining whether private right of action exists]).

Absent standing to assert any of their claims against Johnson, there is no need to address the remaining contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Robert Johnson to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; it is further

ORDERED, that the action is severed and continued against the remaining defendants; it is further

ORDERED, that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; it is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

11/16/2018
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE