Matter of Salomon v Town of Wallkill
2018 NY Slip Op 33826(U)
April 6, 2018
Supreme Court, Orange County
Docket Number: EF007740/2017
Judge: Maria S. Vazquez-Doles

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 1841 Court House, 101 Main Street, Goshen, New York 10924 on the 6th day of April, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

In the Matter of the Application of
JESSENIA SALOMON,

Petitioner,

For a Judgment pursuant to ARTICLE 78 of the CPLR

-against

TOWN OF WALLKILL;

Respondent.

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, on all parties.

DECISION & ORDER

INDEX #EF007740/2017
Motion Date: 1/29/2018
Motion Seq. #1&2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 to 23 were read on this Article 78 petition, and Respondents' pre-answer motion to dismiss wherein Petitioner seeks a determination that Petitioner's actual contribution to the cost of her health insurance has been in excess of the contractual obligation, and directing Respondent to refund the difference:

Notice of Petition(Seq. #1)/Petition/ Exhibits A - B. . . . . .1 - 4
Notice of Motion to Dismiss(Seq. #2) Affirmation (Frank)/ Exhibits A- I/
Supporting Affidavit/ Memorandum of Law . . . . . 5 - 17
Affidavit in Opposition (Burke)/ Exhibits A- B/ Memorandum of Law. . . . . 18 - 21
Reply Affirmation (Frank) /Memorandum of Law . . . . . 22 - 23

It is undisputed that prior to January 1, 2015, Petitioner worked as a part-time court clerk for the Town of Wallkill Justice Court. She was appointed to the position of a full-time court clerk pursuant to a Resolution of the Town Board on December 11, 2014 effective January 1,

2015. As a full-time employee, Petitioner became eligible for health insurance provided through the Town pursuant to the collective bargaining agreement between the Town and Civil Service Employees Association ("CBA"). Petitioner did not qualify for health insurance coverage in her part-time position. Article 16 of the CBA was modified by a Memorandum of Agreement dated February 20, 2015 which states the following language is to be added to §16.1:

> All current employees of the Town, effective upon ratification, will be required to contribute the following:
>
> Family Plan - $1,028.00 per year
> Individual Plan - $ 462.92 per year
>
> . . .
>
> All employees hired after December 31, 2014 will contribute fifteen (15%) percent of the cost of the premium of a family or individual plan for as long as they are benefits provided by the Town. . . .

Once the eligibility waiting period of ninety (90) days expired (April 1, 2015) the Town began deducting from her paycheck an amount that would total fifteen (15%) percent of the cost of her individual's plan's premium. After nearly two years of deductions from her paycheck, Petitioner submitted a grievance on April 14, 2017 claiming that she was subject to the pre-2015 contribution limit for her health insurance premium ($462.92 per year) which was denied on April 19, 2017. Petitioner appealed and a hearing was held on May 18, 2017 before the Town Supervisor. Petitioner appeared with her Union representative and was given the opportunity to present relevant evidence and arguments. The Town Supervisor rendered a decision dated June 2, 2017 finding that Petitioner's grievance was untimely under the CBA which requires grievances to be made within thirty days of the alleged violation, and that in any event, as a full-time employee hired as of January 1, 2015, Petitioner was subject to the fifteen (15%) percent insurance premium contribution requirement under the CBA. Petitioner then commenced this

Article 78 proceeding on September 27, 2017 which the Town now moves to dismiss.

The Petition alleges that Respondent's deductions from the Petitioner's paycheck for the cost of her health insurance was and is arbitrary and capricious and an abuse of discretion and in violation of the Petitioner's rights pursuant to the CBA. The Petition makes no mention of the grievance she brought, the hearing or the Town Supervisor's decision. The Respondent contends that the Petition fails upon documentary evidence pursuant to CPLR §3211(a)(1), is barred by the statute of limitations pursuant to CPLR §3211(a)(5) and fails to state a cause of action pursuant to CPLR §3211(a)(7).

Timeliness

CPLR § 3211 (a)(5) permits the respondent to seek and obtain a dismissal of one or more claims asserted against them on the ground that the cause of action is barred by the statute of limitations. This much is clear and undisputed - from April 2015 through August 2017, the petitioner herein chose not bring this Article 78 proceeding or otherwise challenge, in the courts, the Town's determination that Petitioner, as a new full-time hire on January 1, 2015, is subject to a payroll deduction of fifteen (15%) percent of the cost of health insurance premium instead of the pre-2015 contribution limit of $462.92 per year for an individual plan.

The statute of limitations in an Article 78 proceeding is four months (CPLR § 217[1]). CPLR § 217(1) provides that the four months start to run when: "the determination to be reviewed becomes final and binding upon the petitioner ... or after the respondent's refusal, upon the demand of the petitioner ... to perform its duty ....". For the purposes of CPLR §217, an administrative determination becomes final and binding on the date that it becomes effective (*Matter of Calvert v. Westchester Co. Personnel Office*, 128 AD2d 523 [2nd Dept. 1987]).

Accordingly, the four month statute of limitations for challenging the payroll deduction amount began to run, the latest, on or about April 15, 2015 when the first payroll deduction was taken from Petitioner's paycheck, which allegedly aggrieved the petitioner herein. The Petitioner herein had until August 15, 2015 to challenge the Town's determination.

Petitioner takes the position that the wrongful conduct by the Town of deducting the incorrect amount from Petitioner's bi-weekly paychecks was of a continuing nature thus making her claim timely under the continuing wrong doctrine. Petitioner cites *Affordable Housing Associates, Inc. v Town of Brookhaven* 150 AD3d 800 [2d Dept 2011] in support of their argument but it clearly is contrary to their position. In that case, the Court found that since there was no breach of a recurring duty imposed on the Town under the agreement, the continuing wrong doctrine did not apply (*Id.* at 803). The continuing wrong doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (*Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998]). The doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (id. at 819; *see Thomas v City of Oneonta*, 90 AD3d 1135, 1136 [3d Dept 2011]). "In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017].

Here, the alleged wrong was the Town's one-time determination that Petitioner was a new full-time employee as of January 1, 2015 subject to higher insurance premium deduction. The continuing bi-weekly deduction from Petitioner's paycheck represent the consequence of the Town's alleged arbitrary and capricious determination in the form of continuing damages, not

wrongs, and do not qualify for application of the continuous wrong doctrine.

Failure to State a Claim/Documentary Evidence

Here the issue for consideration is whether the challenged determination, in this case, the interpretation of the CBA Agreement and subsequent Memoranda subjecting Petitioner to the higher health insurance premium deduction, was arbitrary and capricious or an abuse of discretion (*Matter of Arrocha v. Board of Educ. Of City of N.Y.*, 93 N.Y.2d 361, 363, [1999]). The Court's role in reviewing such a determination is not to substitute its judgment for that of the agency, but only to ascertain whether there is a rational basis for the decision or whether it is arbitrary and capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424,431 [2009]; *Matter of Warder v Board of Regents*, 53 NY2d 186, 194 [1981]; *Matter of Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]; *Matter of Prestige Towing & Recovery, Inc. v State of New York*, 74 AD3d 1606 [3rd Dept., 2010]). An action is arbitrary if it is without sound basis in reason and is taken without regard to the facts (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, WestchesterCounty, 34 N.Y.2d 222, 230, 231 [1974]).

Petitioner has failed to allege facts sufficient to show that the Town's decision was arbitrary/capricious or an abuse of discretion. Where, as here, an agency's determination is rationally based, it will be upheld by the court which will defer to an agency's interpretation of the terms of its Agreement which is not manifestly irrational or unreasonable (Marzec v. DeBuono, 95 N.Y.2d 262, 266 [2000]).

Based on the foregoing, it is hereby

ORDERED that Respondent's motion to dismiss the Petition is granted in its entirety;

and it is further

ORDERED that the Petition is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 6, 2018
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record Via NYSCEF