SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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LLOYD POLANISH,

Petitioner,

DECISION & ORDER

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

Index No.: 155805/18

- against-

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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ALEXANDER M. TISCH, J.:

In this article 78 action, petitioner, Lloyd Polanish, petitions the court pursuant to article 78 and CPLR 3001 for an order annulling respondent City of New York's denial of legal representation to petitioner in the civil matter of *Rron Kastrati, an infant by his father and natural guardian, Fatmir Kastrati, and Kastrati, individually v City of New York, New York City Department of Education* (index No. 159503/2015 [Sup Ct, NY County]) (Underlying Action).[1]

Background

Petitioner is employed as a physical education teacher by the New York City Department of Education at Public School (PS) 183, which is located at 419 East 66th Street, New York, New York. In addition to teaching physical education, petitioner coaches the school track team in the mornings before the start of the school day and instructed an after-school extracurricular program at PS 183. The after-school program is known as "Mind Body & Sport" (MBS), which was offered to PS 183 students and held in the auditorium at PS 183. MBS was approved by PS 183's principal, Tara Napoleoni, and all equipment used was provided by PS 183 and the New York City Department of Education. The

[1] For purposes of this decision, respondents, the City of New York and New York City Department of Education, are collectively referred to as "the City."

program was approved by the Department of Education and promoted by PS 183 and its staff.

According to Napoleoni, MBS was a "partnership" program (Napoleoni tr at 25-26, 29). When a family inquired about an after-school program, Napoleoni testified that the school would advise that "PS 183 does not have an after school program, but we have partner [sic] with organizations for you to have offerings that you can elect to sign your child up with directly with that organization" (*id.* at 140).

Napoleoni testified that she does not supervise the hiring or organization of the after-school programs, but does research them to make sure they are appropriate for the school (*id.* at 29). In general, an after-school program at PS 183 will apply for a permit to use the school facilities (*id.* at 30-32). Napoleoni testified that when petitioner was working at MBS, he was not working for the school but under the direction of Dianne Gallagher, the owner of MBS (*id.* at 61-62). It was Napoleoni's understanding that Gallagher's business was self-insured, though Napoleoni admitted that she did not have an understanding as to how the liability insurance works for any of the after-school programs (*id.* at 62). On the other hand, Napoleoni testified that if she saw something unsafe, she would end the activity and that under her authority, she would take away their permit (*id.* at 87-88).

On February 25, 2015, a student enrolled in MBS was injured while participating in an activity. The family commenced the Underlying Action. During the course of discovery in the Underlying Action, the defendants produced petitioner as their witness for deposition and confirmed that he was their employee.

On November 7, 2016, petitioner was notified by the City of New York Law Department (Corporation Counsel), that petitioner would be required to testify at a deposition in the Underlying Action (petitioner exhibit F). The deposition was held Tuesday, November 15, 2016, which Corporation Counsel defended (*id.*). According to petitioner, he believed that during the deposition, he was being represented by an attorney with Corporation Counsel, Vanessa Domenichelli. Prior to the deposition, petitioner met with, conferred and was prepped for the deposition by Domenichelli.

On November 1, 2017, the court in the Underlying Action granted the plaintiff's permission to add Diane Gallagher and petitioner as additional defendants (petitioner exhibit H). Over the City's objection, the court ordered the City to agree to accept service for petitioner as the City had previously agreed to do at petitioner's deposition (*id.*; *see also* petitioner deposition tr dated November 15, 2016 at 5, petitioner exhibit G). Subsequent to the deposition, the plaintiffs' counsel amended the pleadings to add petitioner as a defendant.

Petitioner requested a defense from Corporation Counsel. On December 26, 2017, the New York City Department of Education wrote to Corporation Counsel recommending that petitioner be represented by Corporation Counsel (petitioner exhibit J).

The City moved to vacate the court's November 1, 2017 order with respect to accepting service for petitioner. However, since service had already been personally served on petitioner, the motion was deemed moot; and the court further ordered that "the parties shall treat Polanish as a separate and distinct defendant until he answers or appears (whether individually on behalf of himself, or through the City)" (*see* decision and order dated February 28, 2018, respondent exhibit 3). As per a letter dated February 26, 2018, Corporation Counsel declined to represent petitioner in the Underlying Action (petitioner exhibit A).

According to the affirmation of Georgia Pestana, first assistant Corporation Counsel, she is charged with the responsibility of reviewing requests for legal representation submitted by Department of Education employees (Pestana affirmation dated September 17, 2018, ¶ 1). Pestana affirms that "[a]fter reviewing the facts and circumstances in relation to the Underlying Action and the after-school program 'Mind Body & Sport,'" I concluded that, at the time the alleged incident occurred, Mr. Polanish was working for the after-school program 'Mind, Body & Sport,' which is not operated or controlled by Department of Education" (*id.* at ¶ 3). Further, Pestana affirms that "[b]ecause Mr. Polanish was not acting within the scope of his employment as a Department of Education employee at the time of the

incident, he is not entitled to representation under Education Law § 2590 [sic] and General Municipal Law § 50-K" (*id.* at ¶ 4).

Discussion

"A special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government" (*Matter of Gottlieb v City of New York*, 129 AD3d 724, 725 [1st Dept 2015]). It is well settled that judicial review of an administrative determination pursuant to CPLR article 78 is limited to whether the determination was arbitrary and capricious or rationally based on the record (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]). An action is arbitrary and capricious when it is taken "without sound basis in reason, and is made without regard to the facts" (*Matter of Gottlieb*, 129 AD3d at 725).

Petitioner contends that Corporation Counsel's denial of his request for representation, pursuant to General Municipal Law (GML) § 50-k, in the Underlying Action was arbitrary and capricious and without a rational basis.

GML § 50-k (2) requires the City of New York to represent an employee in any proceeding which arises from the following:

> "any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred."

Education Law § 2560 (1) states that representation of teachers in cities having a population of one million or more, which would include the New York City Department of Education teachers, is subject to the conditions set forth in GML § 50-k (*Matter of Gullotta v Board of Educ. of City Sch. Dist. of City of New York*, 2013 NY Slip Op 33504[U], * 5 [Sup Ct, NY County 2013]["Education Law Section 2560 incorporates General Municipal Law Section 50-k [2]").

Corporation Counsel is charged with the responsibility of making the initial determination as to

whether the employee's conduct is covered by GML § 50-k (*Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]). "The Corporation Counsel's determination may be challenged by means of a CPLR article 78 proceeding, but the challenge will succeed only if the determination, which is one of a factual sort . . ., is without factual basis and is thus arbitrary and capricious" (*Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128, 130 [1st Dept 1986] [internal citation omitted]).

Respondents claim that Corporation Counsel's determination that petitioner was not acting within the scope of his employment has a basis in fact and, therefore, is not arbitrary and/or capricious. A city employee acts within the scope of employment if the actions were "done while the servant was doing his master's work," which occurs when the employee "is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control . . . over the employee's activities" (*Matter of Sagal-Cotler v Board of Educ. of City Sch. Dist. of City of New York*, 20 NY3d 671, 675-676 [2013] [internal quotation marks and citation omitted]).

Respondents rely on the testimony in the Underlying Action of both petitioner and Napoleoni, who testified that petitioner's activities with MBS were separate from his employment as a DOE teacher; and that at the time of the incident, petitioner was "off school hours" and was working under Gallagher's direction. Additionally, petitioner was paid by Gallagher for his work at MBS. Napoleoni also testified that she: (a) did not manage or hire the employees for the after-school program; (b) did not supervise the hiring or organization of the programs; and (c) did not have a roster of the children that participated in the programs. According to Napoleoni, parents were required to make a $600 payment to Gallagher for participation in the after-school program with MBS, as opposed to any free after-school programs which were offered by the DOE . Respondents argue that these facts demonstrate that petitioner was not acting in furtherance of his DOE duties as a teacher at PS 183, nor did the DOE exercise control over his activities while working for MBS.

Petitioner contends that his work at MBS counted towards hours he was required to work before

or after school and points to Napoleoni's testimony that she occasionally looked in on the after-school programs and that, if she saw anything unsafe, she had the authority to stop the activity. However, this Court cannot say that Corporation Counsel's determination was not without factual basis, as there is no dispute petitioner was working with MBS at the time of the alleged incident (*see Jonathan A. v Board of Educ. of City of N.Y.*, 8 AD3d 80 [1st Dept 2004]).

Petitioner also asserts that the City is required to represent him because petitioner detrimentally relied on Domenichelli's alleged representation that she was petitioner's attorney for purposes of the deposition, and that she also agreed to accept service on his behalf at some later date. Domenichelli denies that she ever represented that she was petitioner's attorney (Domenichelli aff, ¶¶ 5-6), and further that it was her standard practice to supply witnesses who are city employees with *Upjohn* warnings, i.e., that her representing the City did not equate to her representing petitioner individually (*see Campbell v McKeon*, 75 AD3d 479, 480-481 [1st Dept 2010]; *Talvy v Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]). However, detrimental reliance is not an independent cause of action but is an element of equitable estoppel (*Keane v Kamin*, 257 AD2d 433, 434 [1st Dept], *affd* 94 NY2d 263 [1999]).

A party seeking equitable estoppel must demonstrate that it has (1) "rightfully relie[d] . . . upon . . . [the] word or deed" of another; (2) as a result it changed its position; and (3) has been injured by this change in position (*Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 368-369 [1988]; *Dorothy G. Bender Found., Inc. v Carroll*, 126 AD3d 585, 587 [1st Dept 2015]). In addition, the party seeking estoppel must show, by clear and convincing evidence, that the party being estopped, engaged in "[c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert . . . [and had the] intention, or at least expectation, that such conduct will be acted upon by the other party . . . and, in some situations, knowledge, actual or

constructive, of the real facts" (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985] [internal quotation marks and citation omitted]).

Here, petitioner fails to meet the elements of this claim. Specifically, Domenichelli does not recall telling petitioner that she represented him or that she or Corporation Counsel were his attorney but rather that her recollection was that she would have provided petitioner with the *Upjohn* warnings as was her practice (Domenichelli aff, ¶ 6). Nor did Domenichelli intend for petitioner to believe as such (*id.*, ¶ 7). While petitioner may have changed his position by having another attorney represent him at the deposition (6A N.Y. Jur. 2d Attorneys At Law § 90 ["(t)he right to choose one's own counsel is a valued right, and the restriction of that right must be carefully scrutinized"]), it cannot be said that the facts testified to by petitioner, if answered honestly, would have been any different than if represented by someone other than Corporation Counsel. Therefore, there can be no showing of injury and this claim fails.

Moreover, to the extent that petitioner alleges that respondents should be "collaterally estopped from denying a defense and indemnification under General Municipal Law 50 (k)" (verified petition, ¶ 51), the issue of representation under Education Law § 2560 and GML § 50-k was never fully litigated in the Underlying Action. Collateral estoppel precludes a party from contesting in a subsequent action issues clearly raised in a prior proceeding and decided against that party and only "applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]; *Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [1st Dept 2011]).

The court had only ruled on a motion to vacate or modify a prior order concerning service of the complaint upon petitioner so as to acquire personal jurisdiction over him; the entirely different issue here regarding legal representation was clearly not raised. Therefore, collateral estoppel does not apply.

Finally, to the extent that petitioner seeks reimbursement for attorney's fees he has incurred and indemnification in the Underlying Action, where, as here, an employee's actions arose outside of the scope of his employment, there is no statutory right to the reimbursement of private attorney's fees (*Matter of Zampieron v Board of Educ. of City School Dist. of City of N.Y.*, 30 Misc 3d 1210[A], 2010 NY Slip Op 52338[U] [Sup Ct, NY County 2010]). Likewise, reimbursement for legal fees privately incurred in an action seeking representation pursuant to GML § 50 is not available (*Blood*, 121 AD2d at 134).

Additionally, as no judgment or settlement has been entered in the Underlying Action to date, the request for indemnification is premature, and is, therefore, dismissed without prejudice (*Matter of Bolusi v City of New York*, 249 AD2d 134 [1st Dept 1998]).

Conclusion

Accordingly, it is ADJUDGED that the petition by Lloyd Polanish is denied and the proceeding is dismissed.

Dated: February 5, 2018

ENTER:

J.S.C.

HON. ALEXANDER M. TISCH