

Lafia v New York City
2020 NY Slip Op 32812(U)
August 28, 2020
Supreme Court, New York County
Docket Number: 152739/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

SHARON LAFIA,

Petitioner,

- v -

NEW YORK CITY, BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK A/K/A
NEW YORK CITY DEPARTMENT OF EDUCATION,
CHANCELLOR RICHARD A. CARRANZA, IN HIS
INDIVIDUAL AND OFFICIAL CAPACITY

Respondent.

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INDEX NO. 152739/2020

MOTION DATE 08/05/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

Upon the foregoing documents, the instant CPLR Article 78 petition is denied, and respondents' cross-motion to dismiss the instant petition is granted, for the reasons stated hereinbelow.

Background

The Players

Petitioner, Sharon LaFia, (presumably still) is a tenured teacher (for special education and an after-school program) at I.S. 171 Abraham Lincoln District #19 ("Intermediate School 171"), located at 528 Ridgewood Avenue, Brooklyn, NY. She apparently has over twenty years of experience as an educator. According to the instant petition, "aside from [the subject] allegations, she has an unblemished employment record" (NYSCEF Doc. 1, at 7). Co-respondent the City of New York ("NYC") is a municipal corporation duly organized and existing under the laws of New York State. Co-respondent the Board of Education of the City School District of the City of New York a/k/a New York City Department of Education ("DOE") is an NYC agency that employs petitioner. Co-respondent Chancellor Richard A. Carranza ("Carranza") is DOE's chancellor; petitioner sues him both in his individual and official capacities in the instant special proceeding. (NYC; DOE; and Carranza, collectively, "respondents.") Non-party Jeffrey Eustache ("Eustache") is a paraprofessional at Intermediate School 171.

Relevant Facts

In or about September 2017, respondents assigned Eustache to petitioner's classroom at Intermediate School 171 as a paraprofessional. According to petitioner's affidavit, Eustache "was written up on numerous occasions" due to, essentially, his arriving late to class, using his telephone improperly, and eating during classes (NYSCEF Doc. 3). Petitioner alleges that students' parents complained that Eustache was physically aggressive with the students and physically intimidated at least one special needs student (NYSCEF Doc. 3, at 3).

In or about May 2018, DOE apparently suspended Eustache following a parent's report that her daughter had seen Eustache viewing sexually explicit pictures on his cellular phone in the classroom (NYSCEF Doc. 3, at 3). On the last day of the academic year in June 2018, Assistant Principal Kristin Conlon called petitioner into her office and handed petitioner a written Notice of Claim that Eustache had filed against petitioner and DOE, among others, accusing petitioner of sexually harassing him (NYSCEF Doc. 3, at 13). Petitioner asserts that respondents accepted service of said Notice of Claim on petitioner's behalf and that there was not a United Federation of Teachers ("UFT") representative present at this meeting (NYSCEF Doc. 3, at 4-5).

Petitioner asserts that Eustache's allegations against her are false and that the subject alleged text messages that he referenced "were divorced from the factual context in which they were allegedly provided" (NYSCEF Doc. 3, at 5). Petitioner claims that, at the time of the subject text messages that Eustache cites, petitioner was driving her vehicle while her co-worker, Ms. Lindsay Ciccillini ("Ms. Ciccillini," whom petitioner notes was never named as a defendant/respondent in the subject Notice of Claim) wrote and sent said text messages to Eustache (NYSCEF Doc. 3, at 5). Thus, petitioner asserts that Eustache "fabricated" said allegations "to retaliate against [petitioner's] participation in and compliance with [her] employer's various requests for information about his conduct as a paraprofessional" (NYSCEF Doc. 3, at 3).

In summer 2018, petitioner apparently contacted the "school administration" multiple times about Eustache's allegations, but she did not receive any information (NYSCEF Doc. 3, at 6). When the academic year commenced in September 2018, petitioner learned that the school had again assigned Eustache to serve as a paraprofessional in petitioner's classroom (NYSCEF Doc. 3, at 6). Petitioner notified Intermediate School 171's principal Indira Mota of her concerns, and Principal Mota, on the same day, changed the paraprofessional in petitioner's classroom (NYSCEF Doc. 3, at 6). On October 2, 2018, petitioner apparently received a duplicate copy of the subject Notice of Claim in her mailbox. Petitioner apparently then called the UFT, and a representative informed petitioner that he did not know how the Notice of Claim arrived in her mailbox (NYSCEF Doc. 3, at 6).

In January 2019, petitioner apparently received a letter from the Office of Equal Opportunity and Diversity Management ("OEO") directing her to attend a January 24, 2019 meeting and informing her that OEO was investigating a complaint (Eustache's) that a staff member had submitted (NYSCEF Doc. 3, at 6). Petitioner attended the meeting with a UFT representative and disputed all of Eustache's allegations against her. Between January and May 2019, petitioner periodically followed up with UFT representatives, who apparently repeatedly informed petitioner that they would provide information as it became available (NYSCEF Doc. 3, at 7).

The Underlying Action, Petitioner's Representation Therein, and DOE's Charges

In approximately mid-May 2019, Eustache filed a civil action entitled Jeffrey Eustache v Board of Education of the City of New York a/k/a The New York City Department of Education, and Sharon LaFia, under Index No. 153619/2019, in the Supreme Court of New York County (the "Underlying Action") (NYSCEF Doc. 1, at 2). (On or about November 18, 2019, Eustache e-filed an amended complaint.) In the Underlying Action, Eustache accuses petitioner of sexual harassment, racism, improper physical contact, use of racial stereotypes, and false accusations (NYSCEF Doc. 1, at 8).

In May 2019, an Intermediate School 171 secretary apparently handed petitioner legal papers from the Underlying Action (NYSCEF Doc. 3, at 7). Subsequently, Principal Mota apparently provided petitioner with a paper that read "Privileged and Confidential Request for Legal Representation" (NYSCEF Doc. 37), which petitioner claims that she filled out and Principal Mota signed (NYSCEF Doc. 3, at 7). Petitioner asserts that she never received service of the Underlying Action's summons and complaint and that respondents accepted service of Eustache's summons and complaint on petitioner's behalf (NYSCEF Doc. 1, at 11 and Doc. 3, at 8).

On or about May 15, 2019, petitioner claims that she received an email from Brittany J. Finder, Esq., an attorney for the New York City Law Department (the "Law Department") that stated that her office had received petitioner's request for representation in the Underlying Action (NYSCEF Doc. 3, at 8). Petitioner claims that said email did not copy anyone from the UFT (NYSCEF Doc. 3, at 8). On May 20, 2019, petitioner complied with Ms. Finder's request for a "representation interview" at which time petitioner claims that she was unaware that Eustache had filed a complaint (not just a Notice of Claim) against her (NYSCEF Doc. 3, at 8). Petitioner claims, "based upon the fact that Ms. Finder's email indicated that such meeting was being requested in response to my requests for representation, I was under the impression that the meeting was required for me to obtain such representation" (NYSCEF Doc. 3, at 8). Petitioner also informed Ms. Finder that it was Ms. Cicillini who had authored and sent inappropriate sexual text messages with Eustache (NYSCEF Doc. 3, at 9).

At the meeting, Ms. Finder requested petitioner's cellular phone to "run it for evidence" (NYSCEF Doc. 3, at 9). Ms. Finder also apparently informed petitioner that she was not yet sure if the Law Department could provide petitioner with legal representation in the Underlying Action "due to the fact that the [DOE] was also named as a defendant in the lawsuit" (NYSCEF Doc. 3, at 9). Petitioner notes that she did not have a UFT representative with her at this meeting. Additionally, petitioner claims that Ms. Finder recommended that petitioner speak with a UFT representative, but petitioner asserts that the UFT did not return her calls (NYSCEF Doc. 3, at 9-10). Petitioner alleges that her meeting with Ms. Finder became "in effect, a fishing expedition for the sole benefit of the DOE and calculated to gather as much information as possible to defend the DOE without regard to petitioner's rights or defense against such allegations" (NYSCEF Doc. 1, at 10).

In a letter dated May 28, 2019 that respondents e-filed, Ms. Finder informed petitioner that "her office" would be unable to represent petitioner in the Underlying Action (NYSCEF Doc. 16).

Ms. Finder stated that the Law Department could not make the findings that General Municipal Law § 50-k (2) required and suggested that petitioner immediately contact private or union counsel (NYSCEF Doc. 16).

In a June 3, 2019 email, Ms. Finder sought petitioner's consent to remove the Underlying Action to federal court "because she was unaware of whether petitioner had obtained counsel in the Underlying Action" (NYSCEF Doc. 17 and Doc. 37, at 7).

On June 5, 2019, petitioner apparently received a telephone call from Ms. Finder who (again?) informed petitioner that the Law Department could not defend petitioner in the Underlying action and recommended that she speak with the UFT (NYSCEF Doc. 3, at 10).

Although petitioner claims that she requested an attorney from the UFT in June 2019, "as of September 2019, [she] had not received any update regarding the status of the lawsuit or any additional information from the [UFT] regarding the union providing [her] with an attorney in connection with [Eustache's] civil suit" (NYSCEF Doc. 3, at 11). In October 2019 (which petitioner notes was in the midst of the Underlying Action and ongoing OEO investigation) Eustache returned to petitioner's classroom as a paraprofessional (NYSCEF Doc. 3, at 11). Petitioner informed Principal Mota and the school's UFT representative, Marissa Peterson, about "feeling highly uncomfortable" with Eustache's presence in her classroom (NYSCEF Doc. 3, at 11). After speaking with Principal Mota (who apparently contacted the Law Department), Ms. Peterson informed petitioner that Intermediate School 171 refused to move Eustache to another location (NYSCEF Doc. 3, at 11).

On November 8, 2019, petitioner received a letter from OEO Investigator Ester Hutchinson, informing petitioner that the subject OEO investigation found that petitioner had violated Chancellor's Regulation A-830, a provision in DOE's Non-Discrimination Policy (NYSCEF Doc. 3, at 11). On November 14, 2019, petitioner apparently received a "Summons to Conference" letter from DOE for a November 18, 2019 meeting about "allegations of professional misconduct" (NYSCEF Doc. 3, at 11). The UFT agreed that there was a conflict of interest and appointed independent counsel for petitioner (NYSCEF Doc. 3, at 12).

In a letter dated November 29, 2019, pursuant to the Freedom of Information Law ("FOIL"), petitioner, through her independent counsel, sought access to records from the Underlying Action, among which records are "electronic mailings, memoranda, text messages communications" (NYSCEF Doc. 26).

According to the instant petition, on or about January 9, 2020, respondents "brought false charges," pursuant to New York Education Law § 3020, against petitioner "for the same conduct as alleged by [Eustache]" (NYSCEF Doc. 1, at 12). Petitioner claims that DOE "levied such charges" against petitioner "to retaliate against [petitioner] for pursuing a defense of [her] legal rights through private counsel" (NYSCEF Doc. 3, at 12).

In or about February 2020, petitioner filed a Notice of Claim with the Brooklyn New York State Division of Human Rights against NYC; the Law Department; DOE; and Ms. Finder, among

others, for “retaliation, discrimination... wrongful search, wrongful seizure... failure to indemnify; intentional infliction of emotional distress,” among other claims (NYSCEF Doc. 30).

The Instant CPLR Article 78 Special Proceeding

On or about March 12, 2020, petitioner commenced the instant CPLR Article 78 Special Proceeding, seeking an order (1) finding respondents’ denial of petitioner’s requests, pursuant to General Municipal Law § 50-k, for a defense and indemnification in the Underlying Action, to be unlawful, wrongful, arbitrary, and capricious; (2) rescinding and setting aside said denial; (3) ordering respondents to indemnify petitioner in the Underlying Action; (4) appointing to petitioner private counsel to represent and defend respondent in the Underlying Action; (5) declaring that respondents are equitably estopped from disclaiming coverage of petitioner; (6) ordering respondents to pay attorney’s fees and costs to petitioner; and (7) temporarily staying all proceedings in the Underlying Action until this Court determines the instant petition (NYSCEF Doc. 2).

Respondents’ Instant Cross-Motion

On April 29, 2020, respondents cross-moved, pursuant to CPLR 7804(f), to dismiss the petition (NYSCEF Doc. 14). Respondents (1) assert that, if this Court denies said cross-motion to dismiss, respondents reserve the right to serve and file a verified answer to the petition, and, thus (2) request twenty days from the date of service of the order with notice of entry in which to serve said answer (NYSCEF Doc. 14). Respondents claim that, pursuant to the information that Ms. Finder learned in her representation interview with petitioner, the Law Department could not represent petitioner (NYSCEF Doc. 15, at 3). They assert that “at no time—either before or after conducting her representation interview of petitioner” did Ms. Finder assert that she represented petitioner in the Underlying Action (NYSCEF Doc. 15, at 4).

Respondents assert, inter alia, the following: (1) respondents DOE and Carranza are not proper parties in the instant proceeding and should be dismissed, as NYC’s Corporation Counsel issued the defense denial that petitioner here disputes; (2) pursuant to CPLR 217(1), the instant special proceeding is barred by the statute of limitations, as petitioner commenced said proceeding more than four months after Ms. Finder’s May 28, 2019 determination letter; (3) petitioner’s claim for indemnification is not yet ripe, as there has been no judgment or settlement entered in the Underlying Action; (4) General Municipal Law § 50-k does not entitle petitioner to reimbursement of attorney’s fees and/or costs; and (5) petitioner failed to file a Notice of Claim properly (NYSCEF Doc. 19).

Additionally, respondents assert that estoppel “is generally unavailable against a government agency.” See Matter of NY State Med. Transporters Assn. v Perales, 77 NY2d 126, 130 (1990) (NYSCEF Doc. 19, at 9). They claim, “equitable estoppel may be invoked to defeat a statute of limitations defense only when the ‘plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action,’” quoting Simcuski v Saeli, 44 NY2d 442, 448-449 (1978) (NYSCEF Doc. 19, at 10). Respondents allege that, as petitioner concedes in her moving papers, Ms. Finder articulated that “she was not yet sure” of the Law Department’s ability to defend petitioner in the Underlying Action and thus did not commit fraud, misrepresentations and/or deception (NYSCEF Doc. 19, at 10).

Petitioner's Opposition to Respondents' Cross-Motion

In opposition, petitioner asserts that respondents' cross-motion to dismiss is procedurally defective. For example, petitioner asserts that respondents have failed to attach verification and/or information from an individual with first-hand knowledge (NYSCEF Doc. 23). Specifically, petitioner asserts that respondents chose to submit their affirmation from an attorney without personal knowledge rather than from, for example, Ms. Finder. See PPO Indus. v AOP Svs., 235 AD2d 979 (3d Dept 1997) (NYSCEF Doc. 23, at 2). Petitioner emphasizes that respondents have failed to attach a copy of the pleadings that they ask this Court to dismiss (NYSCEF Doc. 23, at 4).

Additionally, petitioner asserts that respondents have failed to meet the burden of (1) showing that petitioner received a final determination; and (2) demonstrating that respondents had not been served with a Notice of Claim (NYSCEF Doc. 23, at 3). Petitioner alleges that respondents accepted service of Eustache's Notice of Claim on petitioner's behalf and cites Mundy v Nassau County Civ. Serv. Commn., 44 NY2d 352, 357 (1978), which held that "any ambiguity or uncertainty created by a public body concerning when a determination becomes 'final and binding' (CPLR 217) should be resolved against that body." Petitioner claims that that "respondents knew and had every reason to know a conflict should have prevented the representation of NYC, DOE, and [petitioner] just like placing her accuser back in the classroom with her for the months that followed the respondents demanding [petitioner's] personal cellular phone and refusing to shared [sic] the contents that NYC downloaded" (NYSCEF Doc. 23, at 7).

Petitioner also claims that respondents failed to reply to her FOIL requests that sought documentation "relating to what formed the basis of respondents['] purported denial of representation" (NYSCEF Doc. 24).

In reply to petitioner's opposition to the instant cross-motion, respondents assert that petitioner failed to submit written evidence (such as a representation letter signed by the Assistant Corporation Counsel assigned to the case) indicating that respondents agreed to represent her in the Underlying Action (NYSCEF Doc. 31, at 2). Respondents e-filed, as exhibits, the subject pleadings that petitioner noted were absent from the cross-motion (NYSCEF Doc. 32-35). Respondents claim that petitioner's argument that a representation determination can be considered binding only if came from the Corporation Counsel himself finds no basis in law (NYSCEF Doc. 37, at 8).

Additionally, respondents deny that the Law Department accepted service of Eustache's Notice of Claim and Summons with Notice on petitioner's behalf (NYSCEF Doc. 37).

The CPLR and Relevant Statutes

It is well-settled that in an Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id. at 231. "The arbitrary or capricious test chiefly relates to ... whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. This Court may not simply second-guess respondents.

Pursuant to CPLR 3211(a), a party may move to dismiss cause(s) of action asserted against it pursuant to, inter alia, whether “a defense is founded upon documentary evidence.”

CPLR 217(1) states, in pertinent part, that petitioner must commence a CPLR Article 78 special proceeding “within four months after the determination to be reviewed becomes final.”

Education Law § 2560 states, in pertinent part, that members of the NYC teaching or supervising staff “shall be entitled to legal representation and indemnification pursuant to the provisions of and subject to the conditions, procedures and limitations contained in section fifty-k of the general municipal law, except that any judgment or settlement pursuant to this section shall be payable from the monies of the board of education.”

Pursuant to General Municipal Law § 50-k (2), NYC “shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court ... arising out of 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.”

Discussion

Respondents did not act arbitrarily and/or capriciously because the underlying complaint accuses petitioner of acts that are far beyond the scope of her employment. A typical, formal definition of “scope of employment,” found in Cornell Law School’s Legal Information Institute, is “the actions or activities an employee might reasonably undertake as part of his or her job.” An employee is not acting within the scope of his or her employment when doing something that does not further the employer’s business, purpose or mission. Clearly, allegedly sending salacious texts did not further respondents’ business, purpose, or mission.

This Court notes in passing the following. Principal Mota provided petitioner with the proper “Request for Legal Representation” form; the Law Department completed the representation interview; and, in a May 28, 2019 letter and on a June 5, 2019 telephone call, the Law Department notified petitioner of its determination that, pursuant to General Municipal Law § 50-k (2), it could not defend petitioner.

In her affidavit, petitioner asserts that Ms. Finder’s June 3, 2019 email “did not state that the [Law Department] had determined that they could and would not be representing” her in the Underlying Action (NYSCEF Doc. 3, at 10). However, respondents e-filed the letter dated May 28, 2019 in which Ms. Finder notified petitioner that the Law Department could not defend her in the Underlying Action (NYSCEF Doc. 16). This Court finds that said exhibit (NYSCEF Doc. 16) satisfies respondents’ burden to demonstrate receipt of a final determination. Furthermore, petitioner herself asserted in her affidavit that Ms. Finder called her on the telephone on or about June 5, 2019 and informed her that the Law Department could not defend petitioner in the Underlying Action (NYSCEF Doc. 3, at 10).

Although respondents have not submitted an affirmation by an attorney with personal knowledge of the facts, said attorney provided documentary evidence, pursuant to CPLR 3211, particularly in e-filing the exhibit containing Ms. Finder’s May 28, 2019 letter that clearly informed petitioner that the Law Department was unable to defend her in the Underlying Action.

Additionally, pursuant to CPLR 217(1), petitioner’s time within which to commence a CPLR Article 78 special proceeding ran out after September 28, 2019, four months after Ms. Finder’s May 28, 2019 letter informing petitioner that the Law Department could not defend petitioner in the Underlying Action. However, petitioner e-filed the instant petition and the instant notice of petition on March 13, 2020, more than four months after Ms. Finder’s May 28, 2019 letter (NYSCEF Doc. 1 and 2). (This Court notes that the date on the instant petition reads March 12, 2020 while the date on the notice of petition reads March 12, 2019; however, said documents were e-field on March 13, 2020.)

Petitioner herself asserted that respondents apparently requested additional time to reply to petitioner’s FOIL requests due to the COVID-19 pandemic (NYSCEF Doc. 24, at 2).

This Court has reviewed petitioner’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, Sharon LaFia’s instant CPLR Article 78 petition is hereby denied, and the cross-motion of respondents, New York City; Board of Education of the City School District of the City of New York a/k/a New York City Department of Education; and Chancellor Richard A. Carranza, in his individual and official capacities; is hereby granted. To the extent that the cross-motion seeks to dismiss the petition as against Board of Education of the City School District of the City of New York a/k/a New York City Department of Education; and Chancellor Richard A. Carranza, in his individual and official capacities, it is hereby denied, without prejudice, solely as moot. The Clerk is hereby directed to enter judgment denying and dismissing the instant petition.

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8/28/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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APPLICATION:

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