SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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SWAYNE FLOWERS,

Plaintiff,

- v -

DISTRICT COUNCIL 37 AFSCME, AFL-CIO, NEW YORK CITY HEALTH AND HOSPITALS CORP.,

Defendants.

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INDEX NO. 161683/2013

MOTION DATE 08/24/2022, 09/01/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 198, 199, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 230, 231, 232, 233, 235, 236, 237

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 200, 201, 202, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 234

were read on this motion for JUDGMENT - SUMMARY.

In motion sequence 006, defendants District Council 37 ("DC 37"), AFSCME, and AFL-CIO (collectively, the "Union") move for summary judgment dismissing this action as against it. In motion sequence 007, defendant the New York City Health and Hospitals Corp. ("HHC") moves for the same relief. These motions are consolidated for disposition and are, for the reasons set forth below, granted.

The following factual recitation is adapted from plaintiff's Amended Complaint and his affidavit and documentary evidence submitted in opposition to the instant motions. Plaintiff was employed as a laborer by HHC from 1988 until his retirement in 2019. As a laborer, plaintiff's duties entailed, inter alia, assisting tradespeople, maintaining a safe work environment, and loading

and unloading equipment and materials. Plaintiff is a member of DC 37 and, more specifically, Local 924, the DC 37 affiliate representing certain HHC tradespeople and laborers. In 2004, plaintiff was transferred to Lincoln Hospital and, in 2007, promoted to sheet metal worker. However, in 2009, Joseph Lopopolo, the new supervisor of Lincoln Hospital's Facilities Department, demoted plaintiff back to laborer. After plaintiff complained to Chandler Henderson, a DC 37 delegate, about the demotion, Lopopolo reduced plaintiff's overtime hours. Plaintiff again complained to Henderson who allegedly informed plaintiff that he would meet with plaintiff to address the issue. According to plaintiff, Henderson neither met with him nor did Henderson file a grievance as requested by plaintiff, despite informing plaintiff that he "was working on them" and would "take care of it."

In or about 2011, HHC assigned plaintiff to perform out-of-title work as a mason tender. Plaintiff sought to file a grievance as to this out-of-title work and Lopopolo's improper distribution of overtime hours and plaintiff's demotion from sheet metal worker, but neither Henderson nor Kyle Simmons, Local 924's president, assisted him in doing so.

Plaintiff's complaint asserts claims against the Union for: (i) breaching its duty of fair representation by failing to process and file his grievances; and (ii) fraud, based upon Henderson's alleged false representations that the grievances would be filed. Plaintiff also asserts claims against HHC for breach of its collective bargaining agreement with the Union (the "CBA") by improperly distributing overtime and assigning plaintiff out-of-title work[1].

In motion sequence 006, the Union now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint, arguing, principally, that plaintiff is barred from

[1] While the complaint also includes claims against HHC for racial discrimination, retaliation, and hostile work environment under Administrative Code §8-107, these claims were dismissed pursuant to HHC's pre-answer motion to dismiss (See NYSCEF Doc. No. 187 [July 20, 2015 Decision and Order]).).

pursuing his claims against the Union because he has failed to allege and prove that every member of DC 37 authorized or ratified the alleged wrongful conduct, as required by Martin v Curran, 303 NY 276 (1951). The Union argues, alternatively, that it has established that: (i) its handling of plaintiff's grievance was neither arbitrary, discriminatory, nor in bad faith, precluding plaintiff's fair representation claim; and (ii) Henderson did not knowingly make any false representations about plaintiff's grievance for the purpose of inducing plaintiff to rely on such representations, mandating the dismissal of plaintiff's fraud claim. Plaintiff opposes the Union's motion, arguing that the Union waived its right to rely upon Martin after failing to plead it as an affirmative defense in its Answer and, in any event, that the Union has failed to establish that it is an unincorporated association such that the Martin rule applies.

In motion sequence 007, HHC moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's remaining claim against it for breach of the CBA, arguing that plaintiff may only proceed with such a claim against an employer after exhausting the grievance procedures set forth in that CBA[2] or, alternatively, establishing that the union acted arbitrarily or in bad faith, neither of which plaintiff has done. In opposition, plaintiff argues that he has satisfied the latter requirement.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been

[2] As previously noted by Justice Kotler in her decision addressing HHC's pre-Answer motion to dismiss (NYSCEF Doc. No. 47 [July 20, 2015 Decision and Order]) and HHC's motion to reargue that decision (NYSCEF Doc. No. 90 [January 5, 2016 Decision and Order]), HHC has not established that the relevant CBA was in effect during the relevant period, as this CBA, by its terms, expired prior to the events at issue herein.

made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

The Union has met its burden. Through the affirmation of its General Counsel, Robin Roach, the Union has established that DC 37 is an unincorporated association with more than 150,000 members and that "[n]either the DC 37 membership nor the membership of Local 924, which is included in DC 37's membership, was involved with any of the grievances or complaints [p]laintiff raises in his Amended Complaint" (NYSCEF Doc. No. 170 [Roach Affirm. at ¶¶2, 4]).

General Associations Law §13, which authorizes actions against such an unincorporated association, "limit[s] such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven" (Martin v Curran, 303 NY 276, 282 [1951]). Stated another way, to maintain the instant action "plaintiff [is] required to plead and prove that each member of the union authorized or ratified the alleged wrongful conduct" (Palladino v CNY Centro, Inc., 23 NY3d 140, 147 [2014]). Plaintiff has not done so. To the contrary, it is undisputed that Henderson and Simmons's conduct—i.e., failing to process his grievances or inducing plaintiff into believing his grievances would be processed—was within the scope of their duties as association officers and was not authorized or ratified by each of the Union's members.

The Court does not credit plaintiff's argument, in opposition, that the Union waived its right to raise the Martin Rule by failing to specifically cite same as an affirmative defense in its answer. Even assuming that the Union's first affirmative defense—that the Complaint fails to state a claim against the Union upon which relief may be granted—was insufficient to do so, the Union

may move for summary judgment on such a defense where, as here, "the opposing party is not taken by surprise and does not suffer prejudice as a result" (Arteaga v City of New York, 101 AD3d 454, 454 [1st Dept 2012]; see also Otero v Dist. Council 37, AFSCME, AFL-CIO, 2019 NY Slip Op 32313[U] [Sup Ct, NY County 2019]). Accordingly, plaintiff's claims against the Union are dismissed (See Palladino v CNY Centro, Inc., 23 NY3d 140, 148 [2014]; see also Otero v Dist. Council 37, AFSCME, AFL-CIO, 2019 NY Slip Op 32313[U], *1 [Sup Ct, NY County 2019]).

Even ignoring the foregoing, the Union has established that it did not act arbitrarily or in bad faith in failing to process and file plaintiff's grievances. To the extent that the Union failed to file grievances regarding plaintiff's demotion and the distribution of overtime hours, "a union has discretion with respect to processing grievances, and the mere failure on the part of the union to process a grievance is not per se a violation of its duty of fair representation" (Mellon v Benker, 186 AD2d 1020, 1021 [4th Dept 1992] citing Symanski v E. Ramapo Cent. Sch. Dist., 117 AD2d 18 [2d Dept 1986]). The Union also established a good faith basis for not pursuing plaintiff's grievance based upon his purportedly out-of-title masonry work grievance, insofar as it recently secured a pay raise for laborers based on the argument that laborers performed the duties of mason tenders (See Ahrens v NY State Pub. Empls. Fedn., 203 AD2d 796, 798 [3d Dept 1994]; see also Symanski v E. Ramapo Cent. Sch. Dist., 117 AD2d 18, 22 [2d Dept 1986]). Accordingly, the Union's motion for summary judgment dismissing plaintiff's complaint as against it is granted.

The dismissal of plaintiff's claim against the Union for breach of its duty of fair representation mandates summary judgment dismissing plaintiff's breach of contract claim against HHC. "As a general proposition, when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue

the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract. Unless the contract provides otherwise, only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer" (Matter of Bd. of Educ., Commack Union Free School Dist. v Ambach, 70 NY2d 501, 508 [1987] [internal citations omitted]; see also Matter of Gil v Department of Educ. of the City of N.Y., 146 AD3d 688, 688 [1st Dept 2017]). In this case, plaintiff does not dispute that he failed to exhaust the relevant grievance procedures and instead asserts that this action may be maintained based on the union's breach of its duty of fair representation. As discussed above, however, no such claim exists. Accordingly, HHC's motion for summary judgment is granted.

In light of the foregoing, it is

ORDERED that defendants District Council 37, AFSCME, and AFL-CIO's motion for summary judgment is granted and this action is dismissed as against them; and it is further

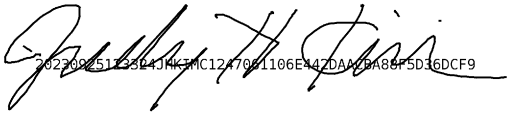
ORDERED that New York City Health and Hospitals Corp.'s motion for summary judgment is granted and this action is dismissed as against it; and it is further

ORDERED that, in light of the foregoing, this action is dismissed in its entirety; and it is further

ORDERED that, within ten days of the date of this decision and order, counsel for New York City Health and Hospitals Corp. shall serve a copy of this order with notice of entry on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; 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 this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



9/25/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE