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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 100372/2011
BRITO, ALINI
VS.
NYS DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 002
EXTEND TIME

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by respondent to dismiss is denied and the motion by petitioner to deem the Notice of Petition and Amended Petition timely served is granted.

FILED

JAN 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JAN 23 2012

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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In the Matter of the Application of,

ALINI BRITO,

Petitioner,

Index No. 100372/11
Motion Seq. No. 002

-against-

DENNIS M. WALCOTT, as CHANCELLOR OF THE CITY OF NEW YORK DEPARTMENT OF EDUCATION,

Respondent.

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SCHLESINGER, J.:

Before the Court is a motion by respondent Department of Education ("DOE") to dismiss this Article 75 petition pursuant to CPLR §3211(a)(8), arguing that the Court lacks jurisdiction for failure to timely serve process pursuant to CPLR §306-b. Petitioner Alini Brito opposes this motion in the form of her own motion pursuant to the same CPLR section 306-b asking this Court to grant her an extension of time to serve the Notice of Petition and Petition and deeming it timely served upon good cause shown or in the interest of justice.[1]

This Article 75 is a challenge by Ms. Brito, a tenured High School language teacher at James Madison High School, to a decision by Hearing Officer Mary L. Crangle dated December 23, 2010, finding after a multi-day hearing that three of four Specifications by DOE were sustained and that the appropriate penalty was termination.[2]

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[1]Also, forming a part of DOE's motion to dismiss is one pursuant to §3211(a)(7) or failure to state a cause of action. This will be dealt with briefly after resolving the jurisdictional issue.

[2]The specifications concerned events that occurred in a class room in the school during the evening hours of November 20, 2009 and the publicity concerning these events.

Therefore, what is at stake here, at least from the petitioner's point of view, is whether she can continue her profession as a public school teacher, a substantial issue in her life. Second, it is undisputed that the Petition itself was filed timely, meaning within the extremely abbreviated ten-day statute of limitations. Ms. Brito alleged receipt of Ms. Crangle's Opinion and Award on or about December 31, 2010 (New Year's Eve) and commenced the Article 75 proceeding on January 10, 2011 in accordance with §3020-a(5) of the New York Education Law. In other words, on January 10, 2011, she purchased an index number and filed a Petition with the New York County Clerk.

The respondent was not served with the Notice of Petition and Amended Petition until May 9, 2011, just within 120 days of the filing of the Petition but well after the mandated date of January 25, 2011, or 15 days after the commencement of the proceeding as spelled out in §306-b of the CPLR. This section speaks of service of a Petition where the applicable statute of limitations is four months or less. Such was the case here.

However, one other date is important to mention, that of February 24, 2011. On that day, respondent was served with a Verified Petition but not with a Notice of Petition. That date is still important because from that time DOE was on notice (small "N") of the impending controversy.

Finally, and certainly critical to a controversy such as this, counsel for respondent acknowledges on page 21 of his memorandum of law that his client has not been prejudiced by the delay stating: "while respondent has admittedly not been prejudiced..."

Both sides cite the decision by Court of Appeals in *Leader v Maroney*, 97 NY2d 95 (2001). That case deals with the then newly-enacted statute CPLR §306-b wherein the Court is given the discretion to extend time for service upon good cause shown or in the

interest of justice. The opinion focused on how much of a factor reasonable diligence was to a finding for the plaintiff under the statute's "interest of justice" standard, as opposed to the "good cause shown" standard. The Court's holding (at p 104) was that "under the interest of justice standard, a showing of reasonable diligence in attempting to effect service is not a 'gatekeeper'. It is simply one of many relevant factors to be considered by the court."

Here, as in *Leader, supra,* counsel for the petitioner acknowledged not having been aware of an aspect of the law. In *Leader*, it was the amendment to CPLR §306-b. Here, counsel acknowledges not having been aware of the extraordinarily shortened time to serve under CPLR §306-b where the statute of limitations is four months or less. Counsel says he first became aware of this deadline when respondent served him with its cross-motion to dismiss dated August 1, 2011.

Counsel for Ms. Brito also explains that it was difficult gathering all of the needed documents, as well as the 1,000 page transcript of the hearing, pointing out that he did not represent petitioner at that hearing. He also relates that both sides have been accommodating to each other regarding granting lengthy adjournments.

The *Leader* court also stated (at p105) that: "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." It added (at p 106) that a court is "to consider any factor relevant to the exercise of its discretion" but that the court should keep in mind "a clearly expressed desire by the Legislature that the interests of justice be served."

Here, I find that the interests of justice would clearly be served by granting petitioner's motion to extend time to serve or here, to deem the late service proper, find that

the proceeding is timely commenced, and allow it to continue. Under these circumstances, where the proceeding itself was commenced timely, where respondent learned of it the following month, where the respondent has acknowledged no prejudice, where the hearing and documents placed into evidence at the hearing were extensive and required a detailed perusal, and finally where the stakes for the petitioner are so high, I believe that petitioner is entitled to a judicial forum.

This Court turns now to respondent's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7). It is well-established that the motion must be denied if from the four corners of the pleadings factual allegations are discerned which, taken together, manifest any cause of action cognizable at law. *See, e.g., Sheila C. v Povich*, 11 AD3d 120 (1st Dep't 2004), *citing 511 W. 232nd Owners Corp. v Jennifer Realty Co,.*, 98 NY2d 144, 152 (2002), *quoting Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). In an Article 75 proceeding such as this one, the cause of action could well include the claim that the penalty of termination is disproportionate to the offense. *See, e.g., Pell v Board of Education*, 34 NY2d 222 (1974).

If the motion is denied, the court "shall permit the respondent to answer, upon such terms as may be just ..." CPLR §7804(f); *Matter of Davis-Elliot v New York City Dept. Of Educ., 31 AD3d 266* (1st Dep't 2006).However, an exception to this rule exists if "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts and no prejudice will result from the failure to require an answer. *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100, 102 (1984), citing *O'Hara v Del Bello,* 47 NY2d 363.

In the case at bar, petitioner noted that respondent had not directly addressed the standard applicable under CPLR §3211(a)(7). This Court as well noted that respondent's papers appeared to go beyond the four corners of the pleadings so as to address the merits of petitioner's claims in full. Therefore, at oral argument, the Court inquired whether petitioner desired an opportunity to file an Answer if the motion to dismiss were denied, and counsel or the DOE answered in the affirmative. The Court thus concludes that this case does not fall within the above-quoted exception noted in the *BOCES* case, and that leave must be given to respondent to file an Answer as requested.

However, it would be a complete waste of judicial resources for this Court to address the merits of petitioner's claims twice under the circumstances presented here. Such a procedure is strongly disfavored by the courts as it would effectively give respondent "two bites at the apple". Siegel, David, *New York Practice,* §567 (5th ed. 2011), citing *R. Bernstein Co. v Popolizio,* 97 AD2d 735 (1st Dep't 1983)*; see also 230 Tenants Corp. v Board of Standards and Appeals,* 101 AD2d 53 (1st Dep't 1984).

Therefore, the motion to dismiss pursuant to CPLR §3211(a)(7) is denied. Respondent shall serve an Answer to the Petition by personal delivery to the offices of petitioner's counsel and file it in Room 222 within fifteen days of the date of this decision, and petitioner shall serve and file a Reply in like manner within ten days thereafter. The Court will notify counsel if further oral argument is required.

Accordingly, it is hereby

ORDERED that petitioner's motion pursuant to CPLR §306-b is granted and the Notice of Petition and Amended Petition are deemed timely served *nunc pro tunc*; and it is further

ORDERED that respondent's motion to dismiss this proceeding is denied. Counsel for both parties shall follow the briefing schedule set forth above.

Dated: January 23, 2011

JAN 23 2012

J.S.C.
ALICE SCHLESINGER

FILED

JAN 24 2012

NEW YORK
COUNTY CLERK'S OFFICE