

Jacobs v Mostow

2012 NY Slip Op 30369(U)

January 18, 2012

Supreme Court, Nassau County

Docket Number: 4162/01

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 3
NASSAU COUNTY**

DAVID B. JACOBS,

Plaintiff,

-against-

**MOTION SEQ. NO.: 005, 006
MOTION DATE: 10/25/11**

**MICHAEL H. MOSTOW, ROOSEVELT UNION
FREE SCHOOL DISTRICT, BOARD OF EDUCATION
OF THE ROOSEVELT UNION FREE SCHOOL
DISTRICT GLENN SIMMONS, MARK DAVIS,
MARSHA BEDARD, STEPHEN BUDHU,
RODNEY ROMAIN, STEVEN A. FAYER, M.D.
HOSSEIN ZAMANI, CAROLYN GEAR,
CAROLYN RUFFIN, HORACE WILLIAMS,**

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Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion Seq. No.: 005.....	1
Affirmation in Opposition.....	2
Affidavit in Support of Plaintiffs Motion.....	3
Notice of Cross Motion Seq. No.: 006.....	4
Affirmation in Opposition.....	5

Motion (seq. no. 5) by the plaintiff for an order pursuant to **CPLR §5015(a)(4)**, incorporating the causes of action in the complaint entitled *Jacobs V Mostow, et al.* under Supreme Court, Nassau County Index No. 7715/07 with this action and consolidating both; amending the caption to add those parties not named to date that appear in the 7715/07 action vacating the prior orders, decisions, and judgment pursuant to **CPLR §5015(a)(4)**; and granting summary judgment to the plaintiff is determined as hereinafter set forth. Cross-motion (seq. no. 6) by the attorney for the defendants Michael H. Mostow, Roosevelt Union Free School District, Board of Education of The Roosevelt Union Free School District, Glenn Simmons, Mark Davis, Marsha Bedard, Stephen Budhu, Rodney Romain, Hossein Zamani, Carolyn Gear, Carolyn Ruffin and Horace Williams for an order pursuant to **CPLR §3211(a)(5)** dismissing the complaint or, in the alternative, for summary judgment pursuant to **CPLR §3212** imposing sanctions on

plaintiff for his frivolous conduct and barring plaintiff from bringing any further legal proceeding which relate in any way to his employment with the Roosevelt Union Free School District is determined as hereinafter set forth.

At the outset, the Court notes that the plaintiff is withdrawing his claims against Arthur Riegel, Jaspan Schlesinger Hoffman, LLP, Lawrence Tenenbaum, Steven A. Fayer, M.D., Randall Solomn, New York State United Teachers, Richard Shane and Neil Dudich. (Plaintiff's Affidavit in Support sworn to July 22, 2011, pg. 2).

CPLR §5015(a)(4) does not provide authority for the relief requested by the plaintiff. **CPLR §5015(a)(4)** states that:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
(4) lack of jurisdiction to render the judgment or order (emphasis added).

The motion pursuant to **CPLR §5015(a)(4)** must be made to the court (judge) that rendered it. *See*, Siegel New York Practice Fifth Edition § 426, pg. 750. Notwithstanding anything to the contrary, there is nothing in the action bearing Nassau County Supreme Court Index No. 7715/07 or the Federal action to demonstrate that the courts did not have jurisdiction to do so as contemplated by **CPLR §5015(a)(4)**. *See also, Lack v Lack*, 41 NY2d 71.

Plaintiff appears to be asking to have all of the claims asserted against all of the named defendants in the 7715/07 action consolidated into the within 4162/01 action. There is no basis for this request since the 7715/07 action has been dismissed on the merits. Consolidation requires there be two pending actions. *See*, **CPLR §601** and **CPLR §602**. Since all aspects of the 7715/07 action were dismissed, there is nothing left to consolidate with this action (under no. 4162/01). The application for consolidation is **denied**.

The Court will next address the defendants cross-motion for summary judgment to dismiss the complaint in the within action.

The first three causes of action concern the decision to suspend the plaintiff from his teaching duties and the subsequent decision by the Board to require him to undergo a psychiatric examination. The plaintiff alleges he was wrongfully suspended and that there was no legitimate basis for the Board to require him to have a psychiatric evaluation. It was reported to Michael Mostow, the District's Superintendent of Schools at the time, that Mr. Jacobs was falling asleep during the school day because he was

staying up late viewing pornography online. That fact was reported to the Board which was concerned about such behavior in light of the plaintiff's relationship with students. As a result, even if it ultimately turned out not to be true, it was within the Board's authority to remove the plaintiff from the classroom until such time as a determination could be made as to whether it was appropriate for him to remain in the classroom with students. The Board directed plaintiff to undergo a psychiatric examination pursuant to New York Education Law § 913. As this Court noted in its June 13, 2002 decision, "the standard for requiring a psychiatric examination under NYS Education Law § 913 is very broad." Based on the information that had been provided to the Superintendent, the Board had a legitimate basis for requiring plaintiff to undergo the psychiatric evaluation. The evaluation conducted by Dr. Fayer confirmed the District's concerns that plaintiff should not be permitted to remain in the classroom. While plaintiff believes that there was no basis for reassigning him from the classroom or to require him to undergo a psychiatric examination, the District demonstrated its actions were based on the information it received and was both necessary and appropriate under the circumstances. The District had a legitimate basis for the action it took.

The defendants have made a *prima facie* showing of entitlement to summary judgment on the First, Second and Third Causes of Action. *Zuckerman v City of New York*, 49 NY2d 557. The plaintiff has failed to offer any evidentiary proof in admissible form to demonstrate a factual dispute exists requiring a trial on the First, Second and Third Causes of Action. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 N2d 1065. Conclusory statements are insufficient. *Sufsky v Rosenberg*, 163 AD2d 240. *Werner v Nelkin*, 206 AD2d 422. The First, Second and Third Causes of Action are **dismissed**.

The Fourth Cause of Action is a medical malpractice claim against Dr. Fayer which claim has been withdrawn by the plaintiff.

The Fifth and Sixth Causes of Action seek damages with respect to the plaintiff's personal items consisting of "chemicals, equipment and/or books and teaching materials" which he claims were left at the District's school and were removed and/or discarded. Previously, the plaintiff valued these items at \$34,440. (See Exhibit T, Defendant's Notice of Cross-motion, letter from plaintiff to defendants' attorney dated January 19, 2007). While defendants dispute plaintiff's claim and the value of these items, this is the only cause of action that is viable.

Defendants' motion for an order pursuant to CPLR §3212 granting summary judgment against the plaintiff and dismissing the First, Second and Third Causes of Action is **granted**. Except as to the Fifth and Sixth Causes of Action, the Court has considered the plaintiffs remaining arguments and finds them to be without merit. For

example, the plaintiff is incorrect where he asserts that Education Law § 3020-a(2)(a) is “jurisdictional” which cannot be waived, but rather may be raised at any stage of the proceedings. The requirements of Education Law § 3020-a(a) are procedural that may be waived. See, *Abramovich v Board of Educ.*, 46 NY2d 450. A tenured teacher may waive his rights. See, *Abramovich, supra* at p. 454-456. The plaintiff never raised the alleged procedural defect at the § 3020-a hearing. The applications for sanctions against the plaintiff are **denied**. Except as to the Fifth and Sixth Causes of Action, the application by the plaintiff for summary judgment against the defendants is **denied**.

In order to proceed to a hearing on the *issues of conversion and damages to personal property*, if any, this action must be certified ready for trial. The plaintiff and the attorney for the defendants shall appear in the Part 3 courtroom for a Certification Conference on **February 24, 2010 at 9:30 AM**. Plaintiff is admonished that should he attempt to raise issues already litigated and determined in this and prior Court decisions at the Conference or any other proceeding dealing with the Fifth and Sixth Causes of Action, he may be subject to sanctions and the dismissal of the Fifth and Sixth Causes of Action.

This constitutes the Order of the Court.

Dated: *January 18, 2012*

J. Daniel Justice
J.S.C.

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