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

PART 11

Index Number : 401580/2011
TUNNE, MARK
vs
DUANE READE, INC.
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE 11/3/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 23, 2012

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

MARK TUNNE,

Plaintiff,

-against-

Index № 401580/11

DUANE READE, INC., ROBIN COSTA, LOCAL 338 RWDSU/UFCW, JACK CAFFEY,

Defendants.

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JOAN MADDEN, J.:

This is a motion by defendants Local 338 RWDSU/UFCW (hereinafter, Local 338, or Union, as appropriate) and Jack Caffey (hereinafter, Caffey) for an order, pursuant to CPLR 3211 (a) [1], [2], [3], [5], and [7], dismissing the complaint. Plaintiff pro se Mark Tunne (hereinafter, Tunne) opposes the motion, and seeks an order granting summary judgment in his favor and against defendants.

The following facts are taken from plaintiff's complaint, supporting papers and exhibits, and from defendants' motion papers and exhibits, unless otherwise indicated.

Tunne was hired by defendant Duane Reade, Inc. (Duane Reade) on or about September 8, 2008, to work as an overnight stock associate at its Columbus Avenue and 75th Street store location in Manhattan. As a Duane Reade employee, Tunne became a member of labor union Local 338, and Caffey was, at all relevant times, Local 338's director. While it is unclear from the parties' papers whether Tunne was, initially, a full-time employee with health benefits, it is undisputed that by May 2009, due to the number of hours he was assigned to work, he was considered a part-time employee, and was not eligible for health insurance as part of his

employment.

On January 29, 2009, Tunne was reassigned to another Duane Reade store located at 8th Street and Broadway following a conflict he had with the store's assistant manager, Tania Polanco (Polanco) and another employee, Tiffany Marcano (Marcano). According to Tunne, problems arose when Marcano, on three separate occasions, used racial epithets and Polanco failed to stop or otherwise discipline Marcano for this conduct. Tensions escalated on January 10, 2010, when he told Polanco that he would not speak with her outside the presence of a union representative due to her failure to deal appropriately with Marcano, and Polanco retaliated against him by calling the police and falsely reporting that he had threatened her. Although the police did not pursue the complaint against Tunne, Polanco's action caused Tunne to be suspended for 10 days without pay. A reinstatement hearing resulted in a finding that Tunne had not committed a wrongful act (the store's security/video tape did not confirm Polanco's allegations), and he was both reinstated to his position and transferred to the 8th Street and Broadway location, but was denied back wages for the 10 days he was suspended.

In early September 2009, Tunne developed cold symptoms, including a sore throat and fever, and with his (new) manager's permission, he stayed home from work for a couple of days. According to Tunne, he did not see a private doctor about his symptoms because he did not have health insurance to cover to the cost of that type of medical treatment. When, by September 15th, his condition had not improved, Tunne went to the emergency room at Beth Israel Medical Center (Beth Israel) where he received medical treatment based upon his status as an indigent person. He was diagnosed with bronchitis and sinusitis. Tunne attempted to return to work on September 21, 2009, but was told by his manager that he could not return to work unless and

until he met with Duane Reade's Human Resources Director, Robin Costa (Costa). Tunne requested a grievance hearing on this issue.

At a grievance hearing on September 29, 2009, Tunne attempted to speak with Costa and Caffey about his illness, his absence from work, his indigent status and his lack of health insurance. According to Tunne, he was trying to get Costa and Caffey to understand that, due to his part-time employment, he was placed in a position in which he was not provided with health insurance but based upon the salary he was receiving, he was not eligible for Medicaid and was left with medical bills he could not afford to pay.[1] According to Tunne, neither Costa nor Caffey would look at his medical bills, nor would they take the time to review with him the relevant provisions of the Bargaining Agreement handbook. However, by the time he left the hearing, it was his understanding that Costa would allow him to return to his job if he produced a physician's note from Beth Israel confirming that he was well enough to return to work.

Tunne complied, and on September 30, 2009, he provided Costa, as well as Caffey and the Union, with a copy of his hospital treatment records and a medical clearance note from Beth Israel. Costa responded by informing plaintiff, by letter dated October 6, 2009, that the medical clearance note was inadequate. The letter states, in relevant part:

> This note does not reflect that you were under the care of a doctor or medical practitioner for the scheduled work shifts that you missed due to an illness beginning September 14, 2009. This note only states that you visited the Department of Emergency Medicine at Beth Israel Medical Center on September 29, 2009 and were deemed healthy to return to work. . . . Unless and until we receive a valid doctor's statement by October 14, 2009, stating that you were under the care of a doctor and unable to work, you will be considered to have been

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[1]Tunne, eventually, sued Duane Reade in Small Claims Court to recover the amount owed on the medical bills, and following an inquest, was awarded a judgment in the amount of $707.00, plus interest and disbursements (*see* Plaintiff' Exhibit G).

on an unapproved absence from work and subject to disciplinary action up to and including possible termination of your employment.

Tunne responded by letter and sought a grievance hearing on the issue of the medical clearance note. Tunne's letter dated October 8, 2009, states, in relevant part:

> On September 29, 2009, at our Grievance Hearing in the presence of . . . Caffey, and union representative, Basil McDonald, I told you . . . that I did not seek a medical doctor's attention during the dates of my sickness due to the fact that I do not have medical health care coverage.
> Furthermore, I told you . . . I can not afford medical health care coverage . . . .
> I remember specifically saying to you, ".. . I'll go see a medical doctor if you're willing to pay for it." You told [me] to get a note from a medical doctor affirming I am well enough to return to work. I specifically told you I did not see a doctor during the two plus weeks I was out from work . . . I specifically told you, if I saw a doctor on a weekly or daily basis, I would accrue a major, medical bill. . . I can not afford to pay.
> Furthermore, I told you, I don't have a primary care doctor. I have to go to the emergency room. I was seen by the on-duty Physician Assistant who confers with the on-duty doctor. I personally never get to interact with the on-duty doctor . . .
> * * *
> I told you at the 09/20/09 Grievance Hearing, I returned to work from my vacation on 09/02/09 with a major, fever outbreak . . .during the weekend of 09/06/09, I began having feverish spells, chronic coughing, sweat outbreaks, frequent diarrhea and a numbing sensation in my cheek bones. I also had chest pains and then I began coughing profusely. Then I further stated, I avoided going to the hospital because I did not want to incur anymore rising medical debts. I can not afford to pay. I attempted to treat my ailments on my own to the best of my ability.
> * * *
> You knew I was not under a doctors care during the dates of 09/08/09-09/29/09.
> You are now attempting to change your stated requirements to effect a termination without having to be held responsible for unemployment compensation.
> You acknowledged and accepted my statements without rebuttal or questioning.
> You and Jack Caffey instructed me to get a doctors note affirming I am well enough to return to work. I have complied with your request.
> Today, October 8, 2009, you are attempting to add new condition or requirement that was never stated to me in your presence on 09/20/09 by you. This violates the laws of contracts.
> * * *
> As of October 6,7, & 8, 2009, I may be owed back wages and/or unemployment compensation. I was ready, willing, and able to work. As of 09/20/09, I have been cleared by a medical physician to return to work with no cough, fever

> ailments, or bronchitis.
>
> I saw a medical physician on 09/20/09. I mailed the medical record you requested on 09/30/09 . . .

(Plaintiff's Memorandum of Law, Exhibit E).

By letter dated October 13, 2009, Caffey wrote Tunne a letter concerning his grievance against Duane Reade based upon Costa's demand for a doctor's note, noting that the issue was addressed at the September 29 grievance meeting. Caffey pointed out that Article 10 of the Collective Bargaining Agreement (CBA) grants the employer, Duane Reade, the right to verify all absences in excess of three days due to illness, and that his employer was not satisfied with the note because it did not establish that Tunne was, in fact, ill during the days he missed work. Caffey further advised Tunne that the Union "carefully investigated all of the relevant circumstances, including reviewing the September 29 doctor's note . . . Duane Reade's October 6 correspondence to you and your October 8 correspondence to Duane Reade. We find no ground to pursue a grievance on your behalf based upon Duane Reade's demand for a valid doctor's note" (Plaintiff's Exhibit E).

Costa sent Tunne a letter, dated October 19, 2009, notifying him that: "[y]our employment with Duane Reade is being terminated for misconduct effective October 19, 2009. This misconduct includes, but is not limited to, your failure to abide by the Company's time and attendance policies, as well as your repeated incidents of rude and inappropriate behavior towards your fellow employees" (Plaintiff's Exhibit D). As a result of Costa's act of terminating him "for misconduct," Tunne was automatically disqualified from receiving unemployment insurance benefits (*see* Plaintiff's Exhibit F).

Caffey then informed Tunne, by letter dated November 12, 2009, that with respect to his

termination by Duane Reade, "the Union will not pursue a grievance on your behalf based upon your termination" (Plaintiff's Exhibit E).

Following his termination and the Union's failure and refusal to pursue a grievance and arbitration on his behalf based upon his termination, Tunne commenced Equal Employment Opportunity Commission (EEOC) and New York State Division of Human Rights (DHR) proceedings against Duane Reade concerning his employment and/or termination issues. Tunne also (successfully) appealed his disqualification from unemployment insurance benefits,[2] and commenced two actions in federal court, sounding in racial and sexual discrimination, under index numbers 09 Civ. 10187 and 10 Civ. 885 (first action and second action, respectively). Duane Reade, Local 338, Polanco and Marcano were named as defendants in the first action, and only Duane Reade and Local 338 were named as defendants in the second action. The first action relates to Tunne's complaints that Marcano created an offensive and hostile work environment by voicing racial epithets in his direction, his employer's failure to correct this behavior, and the retaliatory action taken by Polanco which resulted in his wrongful suspension for 10 days without pay.

The second action was based, primarily, on his claims that: (1) Costa required him to produce, in addition to the Beth Israel note and record, a private doctor's note with respect to his illness in September 2009, despite knowing that he could not afford to comply with the additional directive, and then terminating him for not complying; and (2) the Union refused to

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[2]After an inquest on the merits of the misconduct finding, an Administrative Law Judge issued a decision on January 20, 2010, overruling the initial determination and concluding "that claimant [Tunne] committed no act of misconduct which resulted in his discharge and is not subject to the disqualification imposed." The overrule was upheld on appeal (Exhibit F).

pursue a grievance based upon his wrongful termination.

In a consolidated decision and order, dated March 12, 2011, the Hon. Barbara S. Jones granted motions by Duane Reade and Local 338 to dismiss the complaints to the extent that the complaint in the first action was dismissed only as against Local 338, and the complaint in the second action was dismissed in its entirety.

In dismissing the first complaint as against the Union, the federal court noted that Tunne did not name the Union as a party to either the EEOC or DHR proceeding. It also noted that the EEOC dismissed the charge on the ground that Tunne had indicated that he wanted to pursue the matter in court, and that the DHR complaint was withdrawn by Tunne before any findings were made. Judge Jones stated that "because plaintiff failed to exhaust his administrative remedies and because the "identity of interest" exception is inapplicable, dismissal of the first action as to the Union is appropriate" (Defendant's Exhibit B).

The second complaint was dismissed as against both Duane Reade and Local 338 based on lack of jurisdiction, and because Tunne, in seeking clarification from the court as to provisions of the CBA, was in effect, seeking an advisory opinion when there was no actual controversy between the parties to that agreement. Judge Jones pointed out that Tunne was not a party to the CBA, and citing *S. Jackson & Son, Inc. v Coffee, Sugar & Cocoa Exch. Inc.* (24 F3d 427, 432 [2d Cir 1994]), informed plaintiff that federal courts are prohibited from giving advisory opinions. Judge Jones explained that the only way the federal court could address the issues regarding Costa's "re-instituted" demand for another doctor's note, or Tunne's allegations that Duane Reade and/or Local 338's used "adverse discrimination, retaliatory actions, or disciplinary action to [force] . . . a Part Time employee, who is not covered by [Duane Reade or

the union] for medical insurance; who has publicly declared [he is] . . . indigent; [to] be held to perform the covenant agreement," would be if Tunne had alleged wrongful termination, but he did not. Accordingly, the federal court dismissed the second complaint in its entirety, and by order, dated April 27, 2011, Tunne's motions to reconsider and vacate the prior order, were denied as untimely.

In or about early May 2011, Tunne attempted to negotiate with Duane Reade for reinstatement to his former position. At or about the same time, Tunne filed a charge against Local 338 with the National Labor Relations Board (NLRB) claiming that his union failed and refused to pursue a grievance against Duane Reade for reasons that were both arbitrary and discriminatory. Tunne later withdrew this charge. According to Tunne, he "withdrew voluntarily his grievance filed with the NLRB, DHR, and EEOC against the Union because the Union's attorney, William Anspaugh, promised to help settle and resolve all of plaintiff's grievance issues if he agreed to work amicably with them" (Plaintiff's Exhibit F, ¶ 7).

On or about June 14, 2011, Tunne commenced the instant action against Duane Reade, Local 338 and Caffey, demanding a joint and several order and judgment: (1) enforcing his right to a grievance hearing; (2) reinstating him to his prior employment; (3) directing payment of all gross and net back wages from October 5, 2009 to the present date, and to grant to him appropriate seniority rights; and (4) unspecified damages to be determined by the court, together with costs and disbursements.

A few weeks later, Tunne filed a notice of voluntary discontinuance, pursuant to CPLR 8020 (d), with the office of the New York County Clerk on July 7, 2011, by which he discontinued, without prejudice, his civil action against Duane Reade and Costa based upon the

terms of a settlement reached between these parties (*see* Plaintiff's Reply, Exhibit A). Tunne did not settle his claims as against Local 338 and Caffey who have responded jointly to service of the summons and complaint with the instant pre-answer motion to dismiss the complaint. Tunne opposes the motion, and, in what appears to be a cross motion, seeks summary judgment in his favor and an order, essentially, forcing Local 338 and Caffey to grieve the circumstances surrounding his wrongful termination, or, in the alternative, an order directing Local 338 and Caffey to compensate him for their failure to do so.

There is no question that Tunne has strongly held beliefs with respect to the events leading up to his termination, and with respect to Local 338 and Caffey's decision not to pursue a grievance on his behalf despite knowing that he was not financially able to meet Duane Reade/Costa's "re-instituted" demand for another doctor's note as a condition of his reinstatement/employment. Tunne finds his union's refusal to advocate on his behalf even more distressing because the direct result of Costa/Duane Reade's decision to base his termination on "misconduct" was his disqualification from receipt of unemployment insurance benefits following his discharge.

Defendants, in support of their instant motion, contend that the allegations contained in plaintiff's complaint either fail to state a claim upon which relief may be granted, or must be dismissed based upon documentary evidence, the statute of limitations, and/or the terms of a settlement agreement reached between himself and Duane Reade (CPLR 3211 [a] [1], [5] and [7]).

This court has examined the complaint and supporting papers in order to assess the adequacy of the allegations in light of defendants' motion to dismiss pursuant to CPLR 3211.

However, notwithstanding the lenient standard for reviewing the sufficiency of the complaint, affording the pleadings a liberal construction, accepting the allegations as true and providing Tunne the benefit of every favorable inference, as this court must, for the following reasons, the allegations contained in the complaint are inadequate to withstand dismissal (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]).

The CBA is a labor contract between "Duane Reade, Inc.," as the employer, and "Allied Trades Council a Division of Local 338 RWDSU/UFCW," as the labor union representing the employees of Duane Reade (*see* Plaintiff's Exhibit B). Contrary to plaintiff's assertion, an individual employee's membership in a labor union does not, regardless of the conduct of the union representative, make that employee a party to the labor contract (CBA). It is well settled that "an individual union member normally lacks standing to enforce the terms of a collective bargaining agreement between the union and the employer" (*Spano v Kings Park Cent. School Dist.*, 61 AD3d 666, 671 [2nd Dept 2009]; *see also Hickey v Hempstead Union Free School Dist.*, 36 AD3d 760, 761 [2nd Dept 2007]; *Berlyn v Board of Educ. of E. Meadow Union Free School Dist.*, 80 AD2d 572, 573 [2nd Dept 1981], *affd* 55 NY2d 912 [1982]). Furthermore,

> [a]s the exclusive bargaining representative of the employees and as one of the two parties to the collective bargaining agreement, it is the Union that "owns" the grievance (essentially an allegation that the employer breached the agreement), and it is generally only the Union that has the discretion—within the bounds of its duty of fair representation—to pursue or not to pursue a particular grievance

(*Matter of District No. 1-PCD v Apex Mar. Ship Mgt. Co.*, 296 AD2d 32, 37 [1st Dept 2002], citing *Vaca v Sipes*, 386 US 171, 184, 191 - 192 [1967]).

Based on the facts of this case, Tunne has no breach of contract claim against any of the

named defendants based upon the CBA because, as stated above, he is not a party to that agreement, and Tunne's only recourse against Local 338 would be through a claim for breach of the Union's duty of fair representation. The principle underlying a breach of fair representation claim is that, while a labor union is under no duty to pursue every grievance requested by every employee it represents, it must not act arbitrarily, discriminatorily, or in bad faith in deciding whether and to what extent to pursue any particular grievance (*see Smith v Sipe*, 67 NY2d 928, 929 - 930 [1986]; 109 AD2d 1034, 1036 - 1037 [3rd Dept 1985] Mahoney, P. J. dissenting; *see also Ahrens v New York State Pub. Empls. Fedn., AFL-CIO*, 203 AD2d 796, 798 [3rd Dept 1994]). An examination of Tunne's complaint and supporting papers reveals that, although Tunne did not identify a breach of duty of fair representation claim in his complaint, he has, in effect, charged Local 338 and Caffey with acting arbitrarily and discriminatorily when it refused to grieve the circumstances of his termination. Nevertheless, his allegations in this respect, must be dismissed.

> It is well settled that
>
> > in order to recover damages from a union pursuant to a cause of action alleging a breach of the duty of fair representation, the employee must prove the merits of the underlying grievance against the employer, the proper prosecution of which the union is alleged, by its misconduct, to have foreclosed

(*Sinicropi v New York State Pub. Empl. Relations Bd.*,125 AD2d 386, 388 - 389 [2nd Dept 1986], *appeal dismissed* 69 NY2d 822 [1987]). The plaintiff in this action, similar to the plaintiff in *Sinicropi*, is precluded from proving the merits of his complaints against his employer because that matter has been resolved. In *Sinicropi*, the merits of the underlying complaint against that plaintiff's employer had been fully litigated. In the instant matter, the merits of the underlying

complaint against Duane Reade were resolved by the global settlement between Tunne and Duane Reade of "all claims that Plaintiff may have against [Duane Reade] and its parents, subsidiaries . . . including but not limited to Robin Costa . . . including, but not limited to, the Complaint, the Small Claims Action and the State Court Action" (*see* Plaintiff's Reply, Exhibit A). A result of his settlement with Duane Reade is that, even if plaintiff could demonstrate that his Union and Union representative were arbitrary or discriminatory in refusing to grieve his termination, Local 338 cannot provide the requested relief because he forgave and released Duane Reade from all claims, including those underlying his requested grievance. Therefore, he can no longer allege a violation on the part of both his employer and his union, a prerequisite for a claim for breach of fair representation (*see DelCostello v International Bhd. of Teamsters*, 462 US 151, 164 - 165 [1983]; *see also* CPLR 3211 [a] [1], [5] and [7]).

Tunne is also barred from bringing this claim against his union based upon the statute of limitations (CPLR 3211 [a] [5]). The applicable statute of limitations for a breach of fair representation claim is set forth in CPLR 217 (2) (a), which provides, in relevant part, that the action be commenced against the labor union "within four months of the date the employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later." Tunne commenced the instant action by filing a copy of the complaint in the office of the New York County Clerk on June 14, 2011, more than a year after he was discharged from his employment; was informed by letter dated November 12, 2009, that the Union would not pursue his grievance; and was initially denied unemployment insurance benefits.

Finally, the complaint must be dismissed as against Caffey because the complaint does

not state a cause of action against him in his individual capacity (CPLR 3211 [7]). It is clear from the complaint and all supporting papers, that Caffey is named as a defendant based solely upon his involvement with Tunne's employment dispute with Duane Reade as the Union director, and not based upon any acts or omissions on his part that are not related to Tunne's employment dispute with Duane Reade. As there are no allegations of conduct by Caffey that are unrelated to his role as a union official, the complaint against him must be dismissed (*see Duane Reade, Inc. v Local 338 Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO,* 17 AD3d 277, 278 [1st Dept 2005], *appeal dismissed in part, denied in part* 5 NY3d 797 [2005]).

For the reasons set forth above, it is

ORDERED that the motion of defendants Local 338 RWDSU/UFCW and Jack Caffey to dismiss the complaint against them is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED the request of plaintiff Mark Tunne for summary judgment is denied.

Dated: April 23, 2012

FILED

APR 26 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.