

Finer v City of New York
2008 NY Slip Op 33680(U)
November 3, 2008
Sup Ct, New York County
Docket Number: 107373/08
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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MICHAEL FINER, JAMES DALTON, LOUIS GUZZO,
JOSEPH STARK, RICHARD JOHNSON, JAMES
ZODKOWIT, THOMAS PLAMBINO, JOSEPH
DILORENZO, JOHN DRURY, ROBERT ORLOFF,
PETER FARENKOPF, JAMES MCCABER and
TIMOTHY MALONEY,

Index No.
107373/08

Plaintiffs,

- against -

DECISION/ORDER
Seq. No. 001 & 002

THE CITY OF NEW YORK, MICHAEL BLOOMBERG,
Mayor of the City of New York, JAMES F. HANLEY,
Commissioner of the New York City Office of Labor Relations, and
THE UNIFORMED FIRE OFFICERS ASSOCIATION,

Defendants.

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COUNTY CLERK'S OFFICE
NEW YORK X

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HON. EILEEN A. RAKOWER

Plaintiffs are 13 Fire Officers employed by the City of New York in the Marine Unit of the Special Operations Command (SOC) of the New York City Fire Department. These 13 Fire Officers are represented in collective bargaining by the Uniformed Fire Officers Association (UFOA). There are two other units of the SOC. These include the Hazardous Materials Unit (Hazmat) and the Rescue Unit (Rescue). The UFOA, on August 10, 2007, ratified a collective bargaining agreement applicable to all Fire Officers, which provided a 12% pay differential for the Hazmat and Rescue units, but did not provide the differential for the Marine Unit. The Marine Unit brings this action for what it states in paragraph 31 of its complaint, is declaratory relief, seeking to vacate the April 29, 2008 determination of dismissal rendered by the Board of Collective Bargaining (BCB), and "remanding the matter to the municipal defendants and the UFOA for further negotiations" meant to include plaintiffs in the 12% hazardous duty pay component. BCB is not named as a party to this action.

Plaintiffs brought a previous action, Index number 112042/07 of this Court, for similar relief, which was dismissed by the Honorable Karen S. Smith by decision dated March 6, 2008. However, this predated the April 29, 2008 decision of the BCB. The municipal defendants now move to convert the instant proceeding to an Article 78 proceeding and to dismiss the action in its entirety. UFOA, by separate motion, moves to dismiss the action in its entirety, making arguments similar to the municipal defendants.

Plaintiffs, in opposition, argue that they are not seeking an Article 78 review of the August 29, 2008 decision of the BCB, and have named the municipal defendants “solely because under the terms of the municipal collective bargaining agreement they and the parties thereto are required to defend the CBA [collective bargaining agreement] against all challenges.” Plaintiffs urge that “the complaint seeks a declaratory judgment that the exclusion of the plaintiffs from the Hazardous Duty Stipend accorded other members of the Special Operations Command of the NYC Fire Department which the plaintiffs of the Marine Division face was a breach of the UFOA’s fiduciary duty to the plaintiffs.”

CPLR §3211 states, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (2) the court has not jurisdiction of the subject matter of the cause of action; or
 - (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability or the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
 - (7) the pleading fails to state a cause of action; or
 - (10) the court should not proceed in the absence of a person who should be a party.

Justice Smith, in dismissing the earlier action, which was grounded upon the same issue, states that plaintiffs’ “sole cause of action alleged in the complaint is one for breach of the duty of fair representation.” Justice Smith dismissed the complaint for lack of subject matter jurisdiction, stating:

The New York Public Employment Relations Law (also known as “the

Taylor Law”) governs collective bargaining with public employers, and empowers local governments to promulgate laws and rules for collective bargaining. (Civil Service Law §205). The New York City Charter §1171 creates the Board of Collective Bargaining (“BCB”) and §1173 confers upon the BCB “such powers and duties with respect to labor relations and collective bargaining as shall be prescribed by law.” The New York City Administrative Code § 12-306(b)(3) states that it shall be an improper practice for a public employee organization of its agents “to breach its duty of fair representation to public employees.” Subsection e of that chapter specifies that allegations of an improper practice may be filed by petition with the BCB within four months of the occurrence of the acts alleged to constitute the improper practice. This procedure, it has been held, confers “exclusive non-delegable jurisdiction” upon the BCB and removes original subject matter jurisdiction from the Supreme Court. (*Patrolmen’s Benevolent Assoc. Of the City of New York, Inc. v. City of New York, et al.*, 293 AD2d 253 [1st Dept 2002]).

Plaintiffs have not alleged or submitted evidence that they filed a petition with the BCB regarding their allegations of the UFOA’s breach of the duty of fair representation. Further, plaintiffs do not, in their opposition papers, make any argument that their claims are excepted under any law from the procedures set forth in the Admin. Code § 12-306. As such, this Court lacks original subject matter jurisdiction to hear plaintiffs’ claims and plaintiffs’ cross-motions, and the complaint must be dismissed in its entirety.

Plaintiffs urge that they have not named the BCB because “the request to vacate the finding of the Board of Collective Bargaining is a procedural request by reason of its inapplicability to Civil Service Law 209 a(2c).” Thus, plaintiffs have not inadvertently failed to name a necessary party, and do not seek an Article 78 review of the BCB decision. A subsequent action challenging such BCB decision would now be time barred.

The doctrine of “collateral estoppel” precludes a party from re-litigating an issue decided against him in a prior proceeding when he had a full and fair opportunity to litigate that point. (*CIBC Mellon Trust Co. v. Samuel Montagu & Co., Ltd.*, 25 AD3d 492[1st Dept. 2006]).

For the reasons stated by Justice Smith in her March 6, 2008 decision, the motion to dismiss is granted.

Wherefore it is hereby

ORDERED that the municipal defendants' and UFOA's motions are granted and the action is dismissed in its entirety.

This constitutes the decision and order of the Court.

DATED: November 3, 2008



EILEEN A. RAKOWER, J.S.C.

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