Komlosi v Cuomo
2010 NY Slip Op 34114(U)
April 26, 2010
Supreme Court, New York County
Docket Number: 115207/09
Judge: Jane S. Solomon

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------X

MARK KOMLOSI,

Petitioner-Plaintiff,

-against-

Index No.
115207/09

ANDREW M. CUOMO, as Attorney General of the State of New York, NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, and Commissioner DIANA JONES RITTER,

Respondents-Defendants.

----------X

JANE SOLOMON, J.S.C.:

Petitioner-plaintiff Mark Komlosi brings this Article 78 proceeding seeking an order annulling the July 1, 2009 decision (Decision) of respondent-defendant Andrew Cuomo denying non-party Melanie Fudenberg's request for indemnification, pursuant to Public Officers Law (POL) § 17 (3), and declaring that the Decision violates Ms. Fudenberg's rights under Public Officers Law § 17.

POL § 17 (3) (a) provides that:

> [t]he state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court ... or shall pay such judgment ..., provided that the act or omission from which such judgment ... arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify ... shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.

Petitioner-plaintiff appears here by virtue of an October 28, 2003 order of the United States District Court for the Southern District of New York appointing him "as Receiver for the purposes of administering, prosecuting and liquidation [of] the Judgment

Debtor's [Ms. Fudenberg's] claims against third parties for indemnification of judgment or for damages that could be used to satisfy the judgment." Verified Petition, Exhibit A. In order to avoid confusion, I shall refer to petitioner-plaintiff as petitioner, when referring to his presence in this action, and as Dr. Komlosi when referring to matters pertaining to the action against Ms. Fudenberg and other defendants, that he brought in the United States District Court for the Southern District of New York, *Komlosi v New York State Office of Mental Retardation and Developmental Disabilities*, 1994 WL 465993, 1994 US Dist Lexis 11864 (SD NY 1994) revd in part, mod in part 64 F3d 810 (2d Cir 1995). In that action, which was dismissed, on appeal, as against all defendants other than Ms. Fudenberg, Dr. Komlosi won a $2,372,988 judgment, after remittitur, on his claim of malicious prosecution. Ms. Fudenberg was, and remains, judgment proof, and petitioner is here seeking indemnification on her behalf, so as to satisfy the judgment obtained by Dr. Komlosi.

At the time that the first of the events directly underlying this action took place, Dr. Komlosi held a permanent civil service appointment as a "Psychologist II," to defendant-respondent New York State Office of Mental Retardation and Developmental Disabilities (OMRDD), and was stationed at the Williamsburgh Rehabilitation and Training Center (WRTC). Ms. Fudenberg was a mental hygiene aid at WRTC. In the past, Dr. Komlosi had been accused a number of times of sexually abusing one or another of the patients at WRTC. Each time, he was exonerated after an internal

investigation. In the past, Ms. Fudenberg had viewed herself as a very much needed client advocate and had made accusations of sexual abuse of clients, all of which were concluded to have been unfounded.

On March 11, 1985, David Rosenberg, a disabled client at WRTC, stated to Walter DeLeon, a mental therapist who was supervising the night shift, that he had been sexually abused by Dr. Komlosi. At the time that he made that accusation, Mr. Rosenberg was accompanied by Ms. Fudenberg and two other therapy aids. An internal investigation ensued, in the course of which OMRDD personnel concluded that, although Mr. Rosenberg alternated between affirming the truth of his accusation, which, itself, shifted as to what Dr. Komlosi had done, and asserting that the accusation was false, and that Ms. Fudenberg had "forced" him to make it, Mr. Rosenberg was "sincere" in his accusation. Accordingly, on March 25, 1985, OMRDD served Dr. Komlosi with a written notice charging him with inducing Mr. Rosenberg to engage in oral sex with him, and suspending him without pay pending a resolution of the charges. On May 2, 1985, Dr. Komlosi was arrested on charges of having sexually abused Mr. Rosenberg, and on May 2, 1985, he was indicted on two counts of committing deviant sexual intercourse.

At Dr. Komlosi's criminal trial, which commenced in May 1986, Mr. Rosenberg, after initially testifying that Dr. Komlosi had sexually abused him, testified that the accusation was untrue and that Ms. Fudenberg had urged him to make it. Consequently, the criminal court dismissed the indictment against Dr. Komlosi. OMRDD

then paid Dr. Komlosi the back pay to which he was entitled for the period of his suspension, but Dr. Komlosi did not return to work, having been diagnosed with post-traumatic stress syndrome. On March 15, 1988, Dr. Komlosi commenced his action against Ms. Fudenberg and the other defendants.

The Attorney General contends that: (a) decisions on applications for indemnification, pursuant to Public Officers Law § 17 (3), are discretionary, and, therefore, his decision to deny indemnification to Ms. Fudenberg is immune from judicial review; (b) mandamus to compel is unavailable to compel a particular result where that result is not required by law; (c) petitioner is collaterally and judicially estopped from arguing that Ms. Fudenberg acted recklessly, rather than intentionally, when she motivated Mr. Rosenberg falsely to accuse Dr. Komlosi; and (d) the denial of Ms. Fudenberg's application for indemnification was rational. The first three of these arguments require little discussion.

Even were decisions on applications for indemnification committed to the full discretion of the Attorney General, those decisions would be reviewable, when challenged as arbitrary or irrational. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Wathne Imports, Ltd. v PRL USA, Inc.*, 63 AD3d 476 (1st Dept 2009). In fact, the Attorney General's discretion in such matters is circumscribed by POL § 17 (3) (a), which provides that, in certain circumstances, "[t]he state *shall* indemnify and

save harmless its employees." It cannot seriously be disputed that the Attorney General's decisions on applications made pursuant to POL § 17 are reviewable in an Article 78 proceeding. *See Matter of Police Benevolent Assn. of New York State Troopers, Inc. v Vacco*, 253 AD2d 920 (3d Dept 1998); *see also Frontier Ins. Co. v State of New York*, 87 NY2d 864 (1995).

POL § 17 (3) (a) "'creat[es] a cause of action on behalf of State employees against the State for indemnification'" (*Frontier Ins. Co. v State of New York*, 197 AD2d 177, 181 [3d Dept 1994], *affd* 87 NY2d 864 [1995], quoting *Ott v Barash*, 109 AD2d 254, 258 [2d Dept 1985]), and mandamus to compel is available to "seek[] judicial enforcement of a legal right derived through enactment of positive law." *Matter of Sharpe v Sturm*, 28 AD3d 777, 779 (2d Dept 2006) (seeking indemnification).

Inasmuch as Dr. Komlosi sued Ms. Fudenberg and was seeking to obtain a judgment against her, it is not surprising that he made numerous statements that are at variance with the positions that petitioner takes here. However, petitioner appears, here, in a different capacity from that which Dr. Komlosi occupied as the plaintiff in the federal court action. There, Dr. Komlosi acted in his individual capacity; here, petitioner acts as the court-appointed receiver for Ms. Fudenberg, in whose shoes he stands. Accordingly, petitioner is neither equitably, nor judicially, estopped on the basis of the positions that Dr. Komlosi took in the federal action, or on the basis of court decisions on certain post-judgment motions that he made. *See Matter of Juan C. v Cortines*,

89 NY2d 659 (1997).

I turn, now, to the merits of the petition. The Decision states, in relevant part, that

> [i]n this matter, a jury found that Ms. Fudenberg violated Mr. Komlosi's constitutional right to be free of malicious prosecution and that she knew with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mark Rosenberg were false. Thus, the act or omission from which the judgment arose in *Komlosi v Fudenberg* did not occur while Ms. Fudenberg was acting within the scope of her public employment or duties and, as well, Mr. Komlosi's injury or damage resulted from Ms. Fudenberg's intentional wrongdoing.

Duffy Aff., Exh 35, at 1-2. In his memorandum of law in opposition to the petition, the Attorney General defends the Decision on the basis of matters other than the above-quoted jury findings. However, it is a fundamental principle of administrative law that a court reviewing an administrative determination is limited to the grounds presented by the agency at the time that it made the decision that is under review. *Matter of Scanlan v Buffalo Public School Sys.*, 90 NY2d 662 (1997); *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753 (1991); *Timmerman v Board of Educ. of City School Dist. of City of New York*, 50 AD3d 592 (1st Dept 2008). The Attorney General based the Decision squarely, and exclusively, on the above-quoted findings of the jury. Accordingly, the question to be decided is whether those findings suffice to support the Decision.

The Attorney General's statement that the conclusion, that Ms. Fudenberg was not acting within the scope of her employment, follows from the jury's findings is a non-sequitur. It is undisputed that Ms. Fudenberg's conversation with Mr. Rosenberg,

during which he first accused Dr. Komlosi of sexual abuse, and her participation in the ensuing internal investigation, occurred while she was on duty at WRTC and "doing [her employer's] work, no matter how irregularly, or with what disregard of instructions." *Riviello v Waldron*, 47 NY2d 297, 302 (1979) (internal quotation marks and citation omitted); *see* Netburn Affirm., Exh. 3. The jury's finding that she violated Dr. Komlosi's constitutional right to be free of malicious prosecution (*see* Netburn Affirm, Exh 4), does not establish that she was not acting within the scope of her employment. *See Ramos v Jake Realty Co.*, 21 AD3d 744, 745 (1st Dept 2005) (employer may be liable for intentional tort by employee, if employee was acting within scope of employment); *Cepeda v Coughlin*, 128 AD2d 995 (3d Dept 1987) (correction officer's statutorily prohibited use of excessive force against prison inmate within scope of employment). Indeed, in another case, the Attorney General approved the indemnification of a state employee after a jury verdict against that employee on a malicious prosecution claim, and thus, necessarily found that the acts giving rise to the plaintiff's claim had been performed within the employee's scope of employment. *Kemp v Lynch* (Sup Ct, Oneida County 1994, Index no. 10968/94).

Nor does the jury's finding, that Ms. Fudenberg knew with certainty that the allegations of sexual misconduct on Dr. Komlosi's part were false, support the conclusion that Dr. Komlosi's injury resulted from Ms. Fudenberg's intentional wrongdoing. While the jury's finding would support the inference

that Ms. Fudenberg wished to get Dr. Komlosi in trouble, it does not, standing alone, support an inference that she wished him to be prosecuted.

Finally, even were the Decision fully supported by the jury's findings, the Decision could still not stand, because the Attorney General has concluded in numerous cases that, notwithstanding the terms of POL § 17 (3), a defendant state employee who has been found by a jury to have violated a plaintiff's constitutional or statutory rights by intentional wrongdoing is, nonetheless, entitled to indemnification, and he has offered no explanation of why this case is different from those. A determination that, without explanation, treats similar cases differently must be considered arbitrary. *Matter of Lantry v State of New York*, 6 NY3d 49 (2005); *Matter of Charles A. Field Delivery Serv., Inc. (Roberts)*, 66 NY2d 516 (1985); *Matter of Buffalo Civic Auto Ramps, Inc. v Serio*, 21 AD3d 722 (1st Dept 2005). Petitioner has shown that the State has indemnified employee defendants in the following circumstances, among others, after a jury finding of intentional wrongdoing: following jury verdict in a hostile work environment and retaliation case (*Kelly v Sisco*, 99 Civ 2967 [SD NY]), following jury verdict in a retaliation case (*Maurer v Keane*, 96 Civ 3273 [SD NY]), following jury verdict in a race discrimination case (*Tolbert v Queens College*, 94 Civ 5630 [ED NY]), following jury verdict of deliberate indifference to plaintiff inmate's medical needs (*Ortiz v Deming*, 94 Civ 476 [SD NY]), and following jury verdicts in excessive force claims against correction officers

[* 9]

(*Torres v Dumbar*, 97 Civ 6366 [WD NY]; *Cepeda v Mann*, 95 Civ 6182 [WD NY]; *Blissett v Casey*, 83 Civ 218 [ND NY]). *See* Plaintiff's Mem. of Law, at 20-23 and Netburn Affirm., Exh 12. In his memorandum in opposition to the petition, the Attorney General ignores these cases. In these circumstances, the Attorney General's Decision is not entitled to deference. *See Timmerman v Board of Educ. of City School Dist. of City of New York*, 50 AD3d 592, *supra*.

The verified petition requests, in addition to other relief, an award of pre-judgment interest. Such an award is not authorized by CPLR 7806. *Patrick v Perales*, 172 AD2d 279 (1st Dept 1991).

Accordingly, it is hereby

ORDERED and ADJUDGEd that the petition is granted, and the July 1, 2009 determination of respondent-defendant Cuomo denying non-party Melanie Fudenberg's request for indemnification is annulled; and it is further

ADJUDGED and DECLARED that said July 1, 2009 determination is invalid; and it is further

ADJUDGED and DECLARED that petitioner-plaintiff Mark Komlosi is entitled to payment from the State of New York, pursuant to Public Officers Law § 17 (3), ~~in the amount of $2,372,988.~~ of the amount of the judgment in his favor, namely $2,372,988, with interest calculated as provided for a judgment entered in a United States District Court.

Dated: 4/26/10

ENTER:

J.S.C.
JANE S. SOLOMON

Norman Goodman
Clerk of the court

8/9/10
Judgment amended pursuant to order dated 8/9/10. MB/JMC

FILED
MAY 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

9