

Matter of Clark v Metropolitan Transp. Auth.
2013 NY Slip Op 33506(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 107588/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

R. THURSTON CLARK, JOHN PROVETTO

INDEX NO. 107588/2011

-v-

MOTION DATE _____

METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS
COMPANY, and JAY H. WALDER

MOTION SEQ. NO. 001

The following papers, numbered 1 to 2, were read on this ^{petition} motion ~~to~~ for Mandamus

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-2</u>
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies the amended petition in part and converts the remainder to a plenary action pursuant to the accompanying decision. C.P.L.R. §§ 103(b) and (c), 3211(a)(2), (5), and (7).

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

FILED

JAN 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/20/13

Lucy Billings, J.S.C.

LUCY BILLINGS
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: IAS PART 46

-----x

In the Matter of the Application of

R. THURSTON CLARK, JOHN PROVETTO, and
all similarly situated non-represented
managers of the MTA Bus Company, JOHN
DOES 1 through 170,

Index No. 107588/2011

Petitioners,

For an Order Pursuant to Article 78 of
the C.P.L.R.

- against -

DECISION AND ORDER

METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY, and JAY H. WALDER,
Chairperson of the Metropolitan
Transportation Authority,

Respondents

FILED

JAN 08 2014

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APPEARANCES:

COUNTY CLERK'S OFFICE
NEW YORK

For Petitioners

Gail Blasie Esq. and Stuart A. Salles Esq.
225 Broadway, New York, NY 10007

For Respondents

Helene Fromm, Deputy General Counsel
Metropolitan Transportation Authority
347 Madison Avenue, New York, NY 10017

I. PETITIONERS' CLAIMS

Respondent MTA Bus Company, a subsidiary of respondent
Metropolitan Transit Authority (MTA), has employed petitioners as
nonunion managers since July 2005. Both petitioner Clark and
petitioner Provetto began their employment with private bus
business entities that MTA Bus acquired in 2005. Petitioners
allege that, as part of the agreed conditions of their

employment, respondents repeatedly promised petitioners and other similarly situated nonunion managers from private bus business entities that they would be considered MTA employees, receive the same benefits as MTA employees, and be placed in the MTA Defined Benefit Plan. The plan, which petitioners refer to as a final average salary pension, allows MTA employees to collect pension benefits equal to a percentage of their final average salary at the time of retirement multiplied by their years of service.

In a written offer of employment accepted by Clark, who was employed by Queens Surface Corporation, MTA Bus specified that:

You will begin participation in the MTA 401(k) plan and MTA Bus will make contributions to that plan on your behalf pursuant to the same terms and conditions as Queens Surface Corporation made to its 401(k) plan.

Am. V. Pet. Ex. 1, at 1. Both written offers of employment accepted by petitioners specified that:

Like all non-represented employees of the MTA and its agencies, the outlined benefits and the like are subject to modification. However, you will not be treated differently than other non-represented MTA employees.

Id. Ex. 2, at 1. See id. Ex. 1, at 2.

Petitioners allege that they relied on these promises and respondents' subsequent oral promises of equal pension benefits in accepting employment with respondents. Petitioners maintain that all managers performing the same functions throughout MTA are enrolled in the MTA Defined Benefit Plan with a final average salary and that respondents' policy is to provide the same pension plan to MTA managers from private entities that MTA acquired, even if those private entities previously provided no

final average salary pension plan.

Petitioners further allege, however, that in fact respondents fail to provide the same retirement benefits to petitioners and other nonunion managers from a private entity whom MTA Bus now employs. According to petitioners, all nonunion managers with MTA Bus, Long Island Bus, and New York City Transit Bus perform the same functions and supervise employees from all three entities. Nevertheless, while nonunion managers at the latter two entities receive MTA's pension plan, MTA Bus managers from another private entity only receive the retirement plans carried over from their previous private employers. Clark, for example, has only "a 401k contribution plan" with no pension. Id. ¶ 76. Petitioners also allege that managers at MTA Bus, unlike all other MTA managers, are prohibited from applying their military service time toward their years of service in calculating pension benefits.

Petitioners claim respondents made oral promises as well. Respondents specifically assured petitioners that respondents would enroll petitioners in the final average salary pension plan after the merger, but then repeatedly in 2007, 2008, and 2009 urged petitioners to be patient because respondents were working on resolving the pensions issue. Clark finally wrote to respondents MTA and Walder on March 22, 2011, demanding equal treatment and enrollment in a final average salary pension as respondents had promised both orally and in their written offer of employment. On April 11, 2011, Clark wrote to MTA and Walder

again, reminding them that he expected a response. Receiving none, petitioners commenced this proceeding on behalf of themselves and all similarly situated nonunion managers on June 29, 2011.

Petitioners claim that respondents' refusal to provide them retirement benefits equal to other nonunion MTA managers breaches the employment agreements by MTA and MTA Bus with petitioners and violates New York Civil Service Law § 115 and the Equal Protection Clause, Article I, § 11, of the New York Constitution. Petitioners seek declaratory and injunctive relief entitling them and all MTA Bus nonunion managers to enrollment in the MTA Defined Benefit Plan with a final average salary and to retirement benefits equal to other MTA nonunion managers. Petitioners also seek relief entitling them and all MTA Bus employees to count their military service toward their length of employment in calculating pension benefits.

II. RESPONDENTS' MOTION TO DISMISS THE AMENDED PETITION

Respondents move to dismiss the amended petition pursuant to C.P.L.R. §§ 3211(a)(2), (4), (5), and (7) and 7804(f). Respondents maintain, first, that petitioners' claims are not ripe for review and, if ripe, are barred by the applicable statute of limitations. C.P.L.R. § 217(1). Second, this proceeding pursuant to C.P.L.R. Article 78 is not the vehicle for petitioners' claims because petitioners fail to allege any mandatory duty imposed on respondents; Civil Service Law § 115 does not confer a private right of action and does not apply to

MTA employees, who are not civil servants; and petitioners allege only a claim for breach of contract. Finally, a federal action by Provetto against respondents precludes his claims here.

Upon respondents' motion to dismiss the amended petition pursuant to C.P.L.R. § 3211(a), the court must accept petitioners' allegations as true, liberally construe them, and draw all reasonable inferences in their favor. Walton v. New York State Dept. of Correctional Services, 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); IDT Corp. V. Tyco Group, S.A.R.L., 104 A.D.3d 170, 176 (1st Dep't 2012); Wadiak v. Pond Management, LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). The court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002). Dismissal of a claim is warranted under C.P.L.R. § 3211(a)(5) when respondents establish that the claim is barred by the statute of limitations, collateral estoppel, or res judicata. E.g., Chelsea 18 Partners, LP v. Sheck Yee Mak, 90 A.D.3d 38, 43 (1st Dep't 2011;); Constructamax, Inc. v. Weber, 109 A.D.3d 574, 576 (2d Dep't 2013).

III. BREACH OF CONTRACT

Respondents urge that petitioners' claims for breach of contract may not be included in a proceeding pursuant to C.P.L.R. Article 78 and in any event are premature, as neither petitioner

is at the point of retirement and thus eligible for pension benefits. No authority prohibits consideration of petitioners' breach of contract claims along with their Article 78 claims. A breach of contract claim is not subject to dismissal solely because the claim is not enumerated in C.P.L.R. § 7803. When an Article 78 proceeding includes a claim outside the scope of § 7803, the proceeding may be converted to a plenary action combined with the proceeding in a hybrid form. C.P.L.R. § 103(c); Eidlisz v. New York Univ., 15 N.Y.3d 730, 731-32 (2010); O'Neil v. New York Univ., 97 A.D.3d 199, 201 (1st Dep't 2012); Chatelle v. North Country Community Coll., 100 A.D.3d 1332, 1332 (3d Dep't 2012). See New York State Psychiatric Assn., Inc. v. New York State Dept. of Health, 19 N.Y.3d 17, 22 (2012); New York State Superfund Coalition, Inc. v. New York State Dept. of Env'tl. Conservation, 18 N.Y.3d 289, 292-93 (2011); Yatauro v. Mangano, 17 N.Y.3d 420, 425 (2011); Phillips v. City of New York, 66 A.D.3d 170, 173 & n.2 (1st Dep't 2009).

Petitioners allege that their employment agreements with MTA Bus entitle petitioners to join the MTA Defined Benefit Plan with a final average salary, because the terms of the offer specified that petitioners would be treated no differently than other nonunion MTA employees, who are offered the pension benefits petitioners seek. Petitioners further allege that respondents continued to promise petitioners orally that they would be enrolled in the plan after they began their employment. To date, however, respondents have failed to enroll petitioners in the MTA

Defined Benefit Plan with a final average salary. Thus petitioners adequately plead claims that respondents have failed to perform as promised under their written and oral contracts. Tini v. AllianceBernstein L.P., 108 A.D.3d 409, 409 (1st Dep't 2013); Red Oak Fund, L.P. v. MacKenzie Partners, Inc., 90 A.D.3d 527, 528 (1st Dep't 2011); Plaza PH2001, LLC v. Plaza Residential Owners LP, 79 A.D.3d 587 (1st Dep't 2010); Morris v. 702 E. Fifth St. HDFC, 46 A.D.3d 478, 479 (1st Dep't 2007). See 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Edge Mgt. Corp. v. Crossborder Exch. Corp., 304 A.D.2d 422, 423 (1st Dep't 2003).

While respondents' written offer to Clark promised his "participation in the MTA 401(k) plan" and MTA Bus's contributions to it "pursuant to the same terms and conditions as Queens Surface Corporation made," Am. V. Pet. Ex. 1, at 1, he also relied on the additional promise that his "benefits and the like" would be no different than the benefits other non-represented MTA employees received. Id. at 2. Thus, while he expected the contributions to the 401(k) plan to continue at the same level, he expected retirement benefits that would provide him a pension equal to the pensions calculated by the formula used for other nonunion managers performing the same duties as Clark. Upon a record confined to the amended petition, moreover, "the MTA 401(k) plan" is undefined and may be the equivalent of the MTA Defined Benefit Plan with a final average salary that petitioners are not receiving.

Given petitioners' allegations that respondents promised petitioners enrollment in the MTA Defined Benefit Plan and equal treatment with other nonunion MTA employees and that other, current employees have been offered enrollment in the plan, respondents' insistence that petitioners' claims are premature, because petitioners have not yet applied for retirement, rings hollow. They allege a current breach of these promises. A breach of contract claim accrues when the breach occurs, even though no damage may be incurred until later. Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co., 18 N.Y.3d 765, 770 (2012); Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993); Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929, 930 (1st Dep't 2010). Only when a claim is for a specific payment owed under the contract does the claim accrue when that claimant becomes entitled to demand that payment, rather than when the breach occurs. Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co., 18 N.Y.3d at 770-71; Verizon New York, Inc. v. Sprint PCS, 43 A.D.3d 686, 686-87 (1st Dep't 2007); Kuo v. Wall Street Mortg. Bankers, Ltd., 65 A.D.3d 1089, 1090 (2d Dep't 2009).

Petitioners' claims are not for payment under a contract, but for entitlement to retirement benefits as part of their employment terms and benefits. The pension petitioners seek is a form of deferred compensation and thus is part of the consideration for the their services under their employment contract. See Raynor v. Raynor, 90 A.D.3d 1009, 1010 (2d Dep't

2011). Their retirement benefits bear directly on their continued acceptance of employment with respondents: (1) whether, when MTA acquired petitioners' private employer in the first instance, petitioners accepted respondents' offer or sought employment elsewhere and (2) whether petitioners continue in respondents' employ or now seek employment elsewhere. Petitioners' retirement benefits affect their current planning for their future retirement, planning that must occur now, not when petitioners retire. Therefore petitioners need not wait until they retire to enforce their rights to a pension under the contract.

The alleged breach of the employment contracts, respondents' failure to enroll petitioners in the MTA Defined Benefit Plan with a final average salary, has occurred continuously from when performance under the contracts commenced: when petitioners commenced employment with respondents. See Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d at 402; Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929 at 930. Even if respondents' continued refusal to provide petitioners with the claimed pension entitlements, despite respondents' subsequent oral assurances to petitioners, does not amount to a continuing breach, and the breach occurred when petitioners' employment commenced in July 2005, their claims, filed in June 2011, are timely. C.P.L.R. § 213(2).

IV. EQUAL TREATMENT UNDER CIVIL SERVICE LAW § 115

Respondent MTA Bus is a subsidiary of respondent MTA, which is a public benefit corporation. Am. V. Pet. ¶¶ 5-6; N.Y. Pub. Auth. Law §§ 1263(1)(a), 1266; MTA Bus Non-Union Emps. Rank & File Comm. ex rel. Simone v. Metro. Transp. Auth., 899 F. Supp. 2d 256, 258 (S.D.N.Y. 2012). Respondents seek dismissal of petitioners' claim for violation of Civil Service Law § 115 based on the lack of a cognizable claim under that statute. C.P.L.R. § 3211(a)(2) and (7). Respondents maintain that petitioners do not identify any failure by respondents to perform a mandatory duty, C.P.L.R. § 7803(1), and that any such claim is barred by the limitations period of four months in C.P.L.R. § 217(1). C.P.L.R. § 3211(a)(5).

A. The Statute of Limitations

The limitations period of four months does not run until after respondents refuse petitioners' demand to perform the claimed statutory duty. C.P.L.R. § 217(1); Bottom v. Goord, 96 N.Y.2d 870, 872 (2001); Moskowitz v. New York City Police Pension Fund, 82 A.D.3d 473, 473 (1st Dep't 2011); Schwartz v. Morgenthau, 23 A.D.3d 231, 233 (1st Dep't 2005). Petitioners commenced this proceeding June 29, 2011, after receiving no response to petitioner Clark's demand March 22, 2011. Even if respondents' lack of response may be considered a rejection of that demand, petitioners' claim for equal pay for equal work under Civil Service Law § 115 is not time barred.

B. Respondents' Mandatory Duty

In a proceeding pursuant to C.P.L.R. § 7803(1) for mandamus to compel the performance of a duty enjoined by law, petitioners must establish an unambiguous legal right to the relief requested. Council of City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 388 (2006); New York Civ. Liberties Union v. State of New York, 4 N.Y.3d 175, 184 (2005); Cohen v. Engoron, 72 A.D.3d 446, 447 (1st Dep't 2010). The performance of the duty petitioners seek to enforce must be non-discretionary, a compulsory adherence to the law, without allowance for the exercise of judgment. New York Civ. Liberties Union v. State of New York, 4 N.Y.3d at 184; Ozdoğa v. Chelsea Landmark LIC, LLC, 74 A.D.3d 555, 556 (1st Dep't 2010).

"Civil Service Law § 115 codifies a critical public policy" of "equal pay for equal work" in public employment. Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d 532, 534 (1st Dep't 2013). Although that "principle of equal pay for equal work need not be applied in all cases under any and all circumstances," Bertoldi v. State of New York, 275 A.D.2d 227, 228 (1st Dep't 2000), the unambiguous implication of just such a limitation is that, in circumstances of a "palpable . . . or arbitrary" disparity in compensation "detrimental to the individual or class," the court "may correct the disparity." Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d at 535. Thus, while the "court need not presume" that a disparity in compensation violates Civil Service Law § 115,

Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d at 535, "no such 'jurisdictional' prohibition," as respondents insist, id. at 534, eliminates the court's power to apply and enforce the principle of "equal pay for equal work," N.Y. Civ. Serv. Law § 115, in favor of persons who invoke it and whom it protects. Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d at 534. Otherwise this principle "would become a hollow promise that afforded no remedy for those it was designed to protect." Id.

Although Civil Service Law § 115 is more than a hortatory enunciation of policy and imposes a mandatory statutory duty, it does not protect petitioners. Because MTA and its subsidiaries are a public authority and not a state agency, MTA Bus employees are not civil service employees, who comprise only state employees. N.Y. Const. art. X, § 5; N.Y. Pub. Auth. Law § 1263; Schulz v. State of New York, 84 N.Y.2d 231, 246 (1994); Collins v. Manhattan & Bronx Surface Tr. Operating Auth., 62 N.Y.2d 361, 355 (1984); Madison Sq. Garden, L.P. v. New York Metro. Transp. Auth., 19 A.D.3d 284, 286 (1st Dep't 2005); MTA Bus Non-Union Emps. Rank & File Comm. ex rel. Simone v. Metro. Transp. Auth., 899 F. Supp. 2d at 267. Although Public Authorities Law § 1210(2) specifically provides that the Civil Service Law nonetheless governs New York City Transit Authority employees, the Public Authorities Law does not include a comparable provision for MTA employees. See Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d at 533-34. Instead,

Public Authorities Law § 1265(8) specifically empowers MTA to "appoint such officers and employees as it may require for the performance of its duties, and to fix and determine their qualifications, duties, and compensation."

In sum, Civil Service Law § 115's statutory mandate of "equal pay for equal work" protects New York City Transit Authority employees and requires respondents to provide those public authority employees equal compensation. N.Y. Pub. Auth. Law § 1210(2); Subway Surface Supervisors Assn. v. New York City Tr. Auth., 102 A.D.3d at 534. Petitioners, in contrast, allege respondents' failure to provide them and other MTA Bus nonunion managers equal retirement benefits in the form of a final salary average pension plan to which other MTA nonunion managers are entitled, but the Civil Service Law does not govern these public authority employees. Therefore, even though petitioners may allege an arbitrary disparity in compensation, they fail to plead a claim that respondents violated their mandatory duty under the Civil Service Law. C.P.L.R. § 3211(a)(7).

V. EQUAL TREATMENT UNDER THE STATE CONSTITUTION

Respondents' motion does not set forth any grounds for dismissing petitioners' claim that respondents' refusal to provide petitioners retirement benefits equal to other nonunion MTA managers violates the Equal Protection Clause, Article I, § 11, of the New York Constitution. Only in reply do respondents refer to the grounds set forth by the United States District Court in the related federal action. MTA Bus Non-Union Emps.

Rank & File Comm. ex rel. Simone v. Metro. Transp. Auth., 899 F. Supp. 2d 256. The court may not consider points presented for the first time in reply, especially when respondents' initial failure to support dismissal of this claim deprived petitioners of an opportunity to respond. Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012).

The rational bases for respondents' refusal to provide petitioners retirement benefits equal to other nonunion MTA managers set forth in the federal action, moreover, are not part of the record in this proceeding and are contradicted by the amended petition. The first basis is cost savings. MTA Bus Non-Union Emps. Rank & File Comm. ex rel. Simone v. Metro. Transp. Auth., 899 F. Supp. 2d at 261. Yet even in the record in the federal action, the cost savings were negligible, \$255,000 per year for 14 individuals, compared to MTA's annual budget. Id. at 260. This or a higher cost of course would be saved by limiting benefits equally among all nonunion managers performing the same duties.

The second basis is that the continuation of the same pension benefits petitioners received from their former employers protects petitioners' expectations. Here, however, petitioners allege that their expectation was not that they would receive only what they received from their former employers. Petitioners

accepted employment with respondents in reliance on the expectation that petitioners would receive the same benefits, including retirement benefits, that other nonunion employees performing the same duties for MTA, not petitioners' former employers, received. Although the federal district court implies that the expectation petitioners allege here would "not make much sense, because there were and are many different pension plans" among MTA employees, petitioners here claim different treatment only in comparison to other nonunion MTA employees performing the same duties. Id. at 266.

Petitioners, on the other hand, may point to irrationalities in respondents' refusal to provide petitioners retirement benefits equal to other nonunion MTA managers, even in the record of the federal action. The pension benefits for nonunion managers are less than for the employees they manage, which MTA Bus's top officials have found "is not an effective pension policy." Id. at 259. See Am. V. Pet. ¶ 107. Pension benefits are based on neither past nor current employment duties or performance. Petitioners thus plead a claim that respondents lack any basis rationally related to a legitimate governmental interest for paying petitioners less compensation than respondents pay to other managers performing the same duties in the same locality, in violation of Article I, § 11, of the New York Constitution. C.P.L.R. § 3211(a)(7). E.g., Graves v. Doar, 87 A.D.3d 740, 742-43 (2d Dep't 2011); Weiner v. Board of Assessors &/or Assessor of Town/Vil. of Harrison, 69 A.D.3d 949,

950 (2d Dep't 2010); Supreme Assoc., LLC v. Suozzi, 65 A.D.3d 1219, 1220-21 (2d Dep't 2009).

VI. THE ABSENCE OF ANY OTHER MANDATORY DUTY

Petitioners do not specifically seek to compel respondents to perform any mandatory duty other than to provide all MTA Bus non-union managers equal retirement benefits. Liberally construing the amended petition in petitioners' favor, it raises an inference that petitioners seek to compel a response to Clark's and any other petitioner's demands for equal treatment and enrollment in a final average salary pension as respondents had promised. The direct effect of petitioners' retirement benefits on their continued acceptance of employment at MTA Bus and on their current planning for their retirement warrants a response, to be sure.

Nevertheless, petitioners do not identify, and the court does not ascertain, any mandatory duty imposed on respondents to respond to petitioners' demands. New York Civ. Liberties Union v. State of New York, 4 N.Y.3d at 184; Ozdoba v. Chelsea Landmark LLC, LLC, 74 A.D.3d at 556. The justification for such a response relates only to the ripeness of this proceeding and whether respondents' silence shows any rational basis for denying petitioners equal retirement benefits.

VII. THE APPLICATION OF RES JUDICATA TO PETITIONER PROVETTO

Petitioner Provetto was a plaintiff in a federal court action against the same parties that are respondents in this proceeding. MTA Bus Non-Union Emps. Rank & File Comm. ex rel.

Simone v. Metro. Transp. Auth., 899 F. Supp. 2d 256, aff'd, ___ F. App'x ___, 2013 WL 5529602 (2d Cir. Oct. 8, 2013). The federal court action involved the same claims and relief as this proceeding. Although respondents seek dismissal of Provetto's claims under the Equal Protection Clause of the New York Constitution and Civil Service § 115 in this proceeding as barred by collateral estoppel, because this proceeding and the federal court action involve the same parties as well as the same claims, res judicata, rather than collateral estoppel applies. C.P.L.R. § 3211(a)(5).

A judgment on the merits, by a court of competent jurisdiction, necessarily decided in a prior action between the same parties, and conclusive on issues of fact and law, operates as res judicata, barring those parties from relitigating the same issues of fact and law. Josey v. Goord, 9 N.Y.3d 386, 389 (2007); IDT Corp. v. Tyco Group, S.A.R.L., 104 A.D.3d at 178; Gomez v. Brill Sec., Inc., 95 A.D.3d 32, 35 (1st Dep't 2012). In the federal action, the United States District Court for the Southern District of New York, interpreting New York law, held that Civil Service Law § 115 does not apply to the plaintiffs, who include Provetto, and who are not civil service employees. MTA Bus Non-Union Emps. Rank & File Comm. ex rel. Simone v. Metro. Transp. Auth., 899 F. Supp. 2d at 267. The federal court granted the defendants, respondents in this proceeding, summary judgment dismissing the plaintiffs' state constitutional equal protection claim, id. at 264, and breach of contract claims based

on written offers that differed from the offer to Clark, id. at 266-67, aff'd, 2013 WL 5529602, and on the MTA Defined Benefit Plan itself, and not based on any oral promises. Id. at 265, aff'd, 2013 WL 5529602. Because the federal District Court, exercising its supplemental jurisdiction, issued a decision on the merits against Provetto on his claims in this proceeding, res judicata bars him from relitigating those same claims against respondents here. Syncora Guarantee Inc. v. J.P. Morgan Securities LLC, 110 A.D.3d 87, 95-96 (1st Dep't 2013); U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc., 105 A.D.3d 639, 640 (1st Dep't 2013); PJA Assoc. v. India House, Inc., 99 A.D.3d 623, 624 (1st Dep't 2012).

VIII. DISPOSITION

For the foregoing reasons, the court grants respondents' motion to dismiss petitioners' claims only to the extent of dismissing petitioner Provetto's claims based on res judicata, C.P.L.R. § 3211(a)(5), and the remaining petitioners' claims under Civil Service Law § 115. The court otherwise denies respondents' motion to dismiss petitioners' claims, C.P.L.R. § 3211(a)(2), (5), and (7), and converts the remainder of this proceeding to a plenary action. C.P.L.R. § 103(b) and (c). It shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 46

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R. THURSTON CLARK and all similarly situated non-represented managers of the MTA Bus Company, JOHN DOES 1 through 170,

Index No. 107588/2011

Plaintiffs

- against -

METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY, and JAY H. WALDER,
Chairperson of the Metropolitan
Transportation Authority,

Defendants

-----x

Within 10 days after service of this order with notice of entry, plaintiffs shall serve and file an amended complaint omitting their claims under Civil Service Law § 115 and Provetto's claims. Defendants shall serve and file an answer to an amended complaint within 10 days after its service. C.P.L.R. § 3211(f). C.P.L.R. § 3211(e) shall bind defendants as if the amended complaint were the prior amended petition. After defendants answer, any party may request a preliminary conference from the Clerk of Part 46.

DATED: December 20, 2013

FILED

JAN 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.