Toppin v Sheridan-Gonzalez
2016 NY Slip Op 31192(U)
June 21, 2016
Supreme Court, New York County
Docket Number: 653349/2014
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DARRYL TOPPIN,

Plaintiff,

- against-

JUDY SHERIDAN-GONZALEZ, RN, as President of the NEW YORK STATE NURSES ASSOCIATION,

Defendant.

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Index No.: 653349/2014

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In the original complaint in this action, labeled as a "class action complaint," plaintiff Darryl Toppin claims that Judy Sheridan-Gonzalez, RN ("Sheridan-Gonzalez"), as President of the New York State Nurses Association ("NYSNA"), breached her duty of fair representation to him when the new collective bargaining agreement did not provide for retroactive pay to employees who had resigned prior to the ratification of the agreement. Previously, defendant moved to dismiss the complaint. Plaintiff cross-moved to amend the complaint, and also for an extension of time to serve. Due to reasons explained below, plaintiff withdrew his original complaint, mooting out defendant's motion to dismiss. Plaintiff now cross-moves for leave to file a proposed first amended class action complaint and also for an extension of time to serve this complaint. Defendant opposes the amendment, arguing that it should be denied because plaintiff's claim has no merit.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff, a nurse, voluntarily quit his employment with the City of New York and the New York City Health and Hospitals Corporation (collectively, the "City"), in November 2013. During his employment with the City, he was a dues-paying member of the NYSNA. On January 20, 2010, certain collective bargaining agreements ("CBA") between NYSNA and the City expired. The parties were unable to ratify a new CBA until July 2, 2014, with the new terms taking effect on July 21, 2014.

According to plaintiff, when the new CBA was ratified, as part of the terms, active NYSNA members who were employed on the date of the ratification and retired NYSNA members employed by the City after January 20, 2010, were entitled to retroactive wage increases between January 21, 2010 and July 31, 2014. Active members employed on the date of the ratification also received a $1,000.00 bonus. Former employees, such as plaintiff, whose employment ended between January 21, 2010 and July 31, 2014, were not eligible for retroactive pay under the 2014 CBA.

Plaintiff believes that he, as well as other potential dues-paying members of NYSNA, were not fairly represented when he and other class members were excluded from receiving benefits under the new 2014 CBA. He argues that NYSNA, as the sole bargaining unit for most of the nurses who work in the City, owes its members a duty of fair representation. Plaintiff contends that

the duty of fair representation extends to former employees and that the breach of NYSNA's duty was arbitrary, discriminatory and in bad faith.

Plaintiff commenced an action against Sheridan-Gonzalez, as president of NYSNA. He timely filed a complaint on October 31, 2014, which was within four months of the ratification date. However, he did not serve the complaint until February 26, 2015, which was almost 120 days after the statute of limitations expired.

Sheridan-Gonzalez moved to dismiss the complaint. As the four-month statute of limitations applies to plaintiff's claim, pursuant to CPLR 306-b, service was to be made not more than 15 days after the limitations period had expired. Sheridan-Gonzalez claimed that service was not only late, but was defective. Evidently, the summons was delivered to NYSNA's offices and counsel for plaintiff was allegedly assured that Sheridan-Gonzalez would receive the papers. For service on an individual defendant, Sheridan-Gonzalez argued that she should have been served personally or that the complaint should have been mailed to her office or home. She also argued that the complaint should also be dismissed because she is the only defendant named, and, as an individual union officer, cannot be held individually liable for the union's actions.

Plaintiff cross-moved for leave to file an amended class action complaint and also for extension of time to serve the summons and complaint. The proposed amended complaint contains four new paragraphs. Counsel for plaintiff claimed that this late service was due to law office oversight, as the standard service deadline for most cases is 120 days. Plaintiff argued that, in the interest of justice, he should be permitted an extension of time. He also alleged that an employee at NYSNA offices represented to him that, upon the employee's acceptance of service, service upon Sheridan-Gonzalez would be complete. He also maintained that he spoke to NYSNA's counsel, who advised him that hand-delivery to an agent at NYSNA's headquarters would be sufficient.

The parties met for oral argument, during which plaintiff was made aware that NYSNA is a corporation. Counsel for plaintiff maintained that he was under the impression that NYSNA was an unincorporated association. This Court noted that plaintiff's proposed amendment may no longer be valid, as plaintiff named only the president of the corporation and not the corporation itself. Up until this time, NYSNA had not mentioned that NYSNA was a corporation, just that the complaint should be dismissed, as it was brought against Sheridan-Gonzalez individually, that service was late and defective, and that the underlying claim had no merit.

When this Court inquired about this during oral argument, counsel for NYSNA argued that it was plaintiff's responsibility to find out that NYSNA was a corporation if plaintiff believed it was relevant. At the close of the oral argument, this Court suggested that plaintiff withdraw the current cross motion to amend, and submit another appropriate cross motion to amend, which is the subject of the current motion practice. This Court stated, "[y]ou are writing in the papers that you are withdrawing the claim with regard to the president and you are going to seek to amend, add the corporation and, obviously serve, like you said, through the Secretary of State." Tr of July 13, 2015 oral argument at 22.

Plaintiff's new cross motion seeks leave to amend his complaint to amend the caption to name NYSNA as a defendant, instead of Sheridan-Gonzalez, and requests an extension of time to serve the complaint. The proposed amended class action complaint also adds the four new paragraphs that were proposed in the initial cross motion papers.

Plaintiff explains that he had been under the impression that NYSNA was an association, and that, pursuant to the General Association Law, an action or proceeding against an unincorporated association may be maintained against the president, among other people. According to plaintiff, Sheridan-Gonzalez was not named in her individual capacity and all claims

were directed towards the union. As a result, plaintiff argues he should be permitted to amend the caption to reflect that all claims are asserted directly against NYSNA.

Plaintiff further notes that, although the timeliness of the complaint is still at issue, service on Sheridan-Gonzalez, as president, was appropriate. Pursuant to CPLR 311, delivery of the summons to the president provides notice to the corporation. The corporation may select another agent to receive process on behalf of the officials such as the president. Plaintiff argues that he was relying on the NYSNA's information that he served a person authorized to accept service of the complaint.

Although the notice of cross motion does not cite any statute, plaintiff claims that, in the interest of justice, pursuant to CPLR 306 (b), he should be allowed an extension of time to serve the amended complaint. Plaintiff again reiterates that he was under the impression that he had 120 days to serve the complaint after filing. He claims that dismissal based on counsel's mistake would affect not only plaintiff, but many other proposed class members. He also believed that service was effectuated on Sheridan-Gonzalez based on certain representations made to him.

In his rationale for why his cross motion should be granted, plaintiff cites to *Morton v Mulgrew*, 2015 NY Slip Op 31363[U] [Sup Ct, NY County 2015]). In this case, as explained by

plaintiff, former employees who had resigned prior to the ratification of the 2014 CBA, brought a claim against the New York United Federation of Teachers ("UFT") for breach of duty of fair representation. The UFT CBA "similarly omitted retroactive pay to resignees while also providing for retroactive pay to retirees." Plaintiff's Exhibit "B," First Amended complaint, ¶ 36.

According to plaintiff, the subject CBA was almost identical to that of the UFT. On July 23, 2015, the Hon. Donna Mills, J.S.C., dismissed the plaintiff's complaint. She held "that the UFT gained the benefit of retroactive pay for some members, and not for plaintiffs, is not actionable." *Morton v Mulgrew,* 2015 NY Slip Op 31363[U] at *7. Justice Mills also noted that "plaintiffs make the conclusory allegation that UFT's decision not to represent the plaintiffs at all was arbitrary, discriminatory, or in bad faith." *Id.* Nonetheless, plaintiff argues that the UFT matter, as well as his, holds a long appellate journey in the future, and that the fate of these two parties are intertwined. Plaintiff's Memorandum of Law at 17.

According to plaintiff, as an answer has not yet been filed, there will be no prejudice to NYSNA. Plaintiff further alleges that he has a meritorious claim. He avers that, pursuant to an Appellate Division, Third Department, case, the court should find that NYSNA owed him a continued duty of fair representation, and

that NYSNA's failure to represent him was arbitrary, discriminatory or in bad faith.

NYSNA opposes plaintiff's cross motion, stating that leave to amend should be denied because the proposed complaint is both time-barred and without merit. NYSNA maintains that, as more than four months have elapsed since the July 2014 alleged breach, the proposed amended complaint would be time-barred. Although not addressed by plaintiff, NYSNA argues that any attempt to relate the complaint back to Sheridan-Gonzalez for limitations purposes would fail. Among other arguments, NYSNA claims that Sheridan-Gonzalez, as an individual, is not united in interest with the NYSNA corporation.

NYSNA argues that, even if plaintiff's claim were timely, his proposed amended complaint should be denied as it would fail on the merits. NYSNA believes that it did not owe plaintiff a duty of fair representation after plaintiff resigned because plaintiff was no longer in the bargaining unit. According to NYSNA, although there is a narrow exception to this standard, this does not apply to plaintiff, as he had no continuing nexus to the NYSNA. Plaintiff had voluntarily and permanently severed his ties to the union as of November 2013. NYSNA alleges that, for example, plaintiff was not, at the time of the ratification, contesting his employment with NYSNA or suing about a grievance that arose while he was employed by the City.

NYSNA claims that the Court of Appeals, as well as other courts, have held that a union does not violate a duty of fair representation when it enters into an agreement with an employer that provides pay to active employees and retirees, but not to those who resigned. It maintains that plaintiff relies on one "outlier" case by the Appellate Division, Third Department, which should not be relied upon in this situation.

NYSNA notes that Justice Mills' recent decision held that providing retroactive pay for current employees and retirees, but not resignees, was not actionable. According to NYSNA, as it owed him no duty when it entered into the 2014 CBA, plaintiff's breach of duty of fair representation claim fails as a matter of law. However, even if NYSNA owed plaintiff a duty, his claim would still fail because, absent improper intent, a union does not breach its duty of fair representation by entering into an agreement that benefits some employees and not others.

NYSNA further argues that, even if it owed plaintiff a duty, the breach of duty of fair representation claim would fail because plaintiff cannot demonstrate that the union's actions were discriminatory, arbitrary or in bad faith. According to NYSNA, plaintiff has not shown any improper intent or bad faith.

NYSNA argues that plaintiff's request for an extension of time to serve NYSNA should be denied. According to NYSNA, "[i]f the Court denies [plaintiff's] request to file his proposed

amended complaint, logic dictates that it should also deny his request for an extension of time to serve it." NYSNA's Memorandum of Law at 23.

The parties met again for oral argument on October 19, 2015, where they decided, on the record, that the plaintiff's original complaint would be withdrawn, making NYSNA's original motion to dismiss, moot. NYSNA noted that it did not want to apply its original motion to dismiss to the proposed amended complaint, and would only be opposing plaintiff's cross motion to amend, which consists of amending the caption and adding new paragraphs, and also seeks an extension of time to serve.

Counsel for plaintiff then argued that he should be allowed an extension of time to serve, under CPLR 306 (b). He mentions again, how he believed that he had 120 days to serve the complaint. This Court stated that plaintiff should have requested an extension of time in his notice of cross motion, instead of his memorandum of law, but "we all know what you're talking about, but I wanted to have it on the record." Transcript of oral argument on October 19, 2015 at 13.

This Court asked counsel for plaintiff if he had researched the relation-back theory, to which counsel replied "no." Counsel maintained that he did not have to address the relation-back theory because he believed that the president and the entity were one and the same.

In any event, counsel for plaintiff concluded that he would seek an extension of time under CPLR 306 (b), as he did not serve Sheridan-Gonzalez, the president, properly from the beginning and he needed the extended time to serve her as president of the corporation.

DISCUSSION

Plaintiff's Cross Motion to Amend:

Plaintiff is seeking leave to amend his complaint to add four new paragraphs and also correct the caption to have NYSNA as the defendant, thereby clarifying that all claims are against NYSNA as a corporate entity. In general, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay [internal quotation marks and citations omitted]." *Murray v City of New York*, 51 AD3d 502, 503 (1st Dep't 2008). However, "leave should be denied where the proposed claim is palpably insufficient." *Pasalic v O'Sullivan*, 294 AD2d 103, 104 (1st Dep't 2002).

Breach of Duty of Fair Representation:

"[A] union is obligated to act fairly toward all employees it represents stemming from its statutory authority and responsibility as their exclusive bargaining representative [internal quotation marks omitted]." *Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 196 (1984). To establish a claim for breach of duty of

fair representation, "there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith [internal quotation marks and citation omitted]." *Matter of Sapadin v Board of Educ. of City of N.Y.*, 246 AD2d 359, 360 (1st Dept 1998).

Plaintiff has failed to state a claim for breach of duty of fair representation. At the time NYSNA negotiated and ratified the contract, plaintiff was no longer employed by the City or a union member of NYSNA. As plaintiff and the alleged proposed class members were "neither members of, nor represented by, the Association's bargaining unit, [] the Association owed them no duty of fair representation." *Cox v Subway Surface Supervisors Assn.*, 69 AD3d 438, 438 (1st Dep't 2010).

Similarly, in decisions published by the New York Public Employment Relations Board ("PERB"), PERB has found that a union does not owe a duty to people it no longer represents, except in certain circumstances not present here. In *Matter of Steven D. Heady, et al., Charging Parties, and County of Dutchess and Dutchess County Deputy Sheriffs' PBA, Inc., Respondents* (31 PERB ¶ 3068 [1998]), the union had entered into a collective bargaining agreement that excluded resigned employees or employees who had transferred jobs during the period of retroactivity, from receiving a retroactive raise with the

negotiation of the new CBA. These employees filed a claim against the union, alleging, among other things, that the union did not negotiate for them in good faith and that they were discriminated against by the union. PERB held the following in pertinent part:

> "But the union's duty is owed only to the persons it represents. When an employee's employment relationship is severed, the union's representation duties to that former employee end, except in circumstances in which the severance from employment is being contested or there is some other basis upon which to conclude that there is a continuing nexus to employment notwithstanding the individual's relinquishment or loss of employment . . . . [E]ven if we were to find some duty owing to these charging parties on the part of the County or the PBA . . . [t]he fact that these charging parties did not receive retroactive pay increases to which they would likely have been entitled had they continued their employment with the County in the unit represented by the PBA does not by itself evidence the discriminatory intent necessary to sustain the alleged violations."[1]

Even if NYSNA owed plaintiff a duty, plaintiff has not made the requisite showing that NYSNA's actions were "invidious, arbitrary or founded in bad faith." *Matter of Sapadin v Board of*

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[1] A continuing nexus has been found when an employee has been discharged and is fighting the termination with the help of his union, at the time of the negotiated contract. It is not applicable in plaintiff's situation. *See e.g. Matter of John Anthony Bartolini, Charging Party, and Westchester County Correction Officers' Benevolent Assn., Inc., Respondent*, (30 PERB ¶ 3075 [1997])("[I]f Bartolini had voluntarily resigned or abandoned his position, COBA would clearly not owe him thereafter any duty of fair representation. Just as clearly, if Bartolini was discharged in March 1995, and had then sought COBA's help with a proceeding to reclaim his position, COBA might have owed him a duty of fair representation").

Educ. of City of N.Y., 246 AD2d at 360. To begin, courts have found that it is not arbitrary, invidious or in bad faith when some members receive benefits while others do not. *See e.g. Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York* (64 NY2d at 197) ("Where the union undertakes a good-faith balancing of the divergent interests of its membership and chooses to forgo benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation"); *see also Cox v Subway Surface Supervisors Assn.* (69 AD3d at 438) (even if a duty was owed, the union did not act "arbitrarily, capriciously or in bad faith by protecting the 'pick seniority' of its current members").

Moreover, plaintiff claims NYSNA's actions with respect to the resigned employees demonstrated a "total lack of representation," and that NYSNA refused to negotiate on behalf of the resigned employees. Plaintiff's Exhibit "B," proposed amended complaint, ¶ 51. However, plaintiff's contentions are vague and conclusory. He "fails to set forth factual allegations demonstrating the union's bad faith in negotiating the [2014] collective bargaining agreement. While the terms of that agreement may not be the most advantageous to plaintiffs, that

fact alone is insufficient." *O'Riordan v Suffolk Ch., Local No. 852, Civ. Serv. Empls. Assn.*, 95 AD2d 800, 800 (2d Dep't 1983).

Plaintiff argues that this Court should follow *Baker v Board of Educ., Hoosick Falls Cent. School Dist.*, 3 AD3d 678 [3d Dep't 2004]). In *Baker*, the plaintiffs commenced an action for breach of duty of fair representation when retired employees were not provided with retroactive raises when the new contract was ratified. The Board of Education informed the plaintiffs that their own union "rejected its offer to have the retroactive salary schedule apply to retirees." *Id.* at 679. The Appellate Division upheld the denial of the union's motion to dismiss, holding that the union's "total lack of representation" was sufficient to state a cause of action. *Id.* at 681.

However, the situation herein is distinguishable. Plaintiff is a resignee, not a retiree. Although a union may choose to represent retired members, the Court of Appeals has found that it is not required to do so. *See e.g. Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 332 (1998) ("a public employer's statutory duty to bargain does not extend to retirees").

Significantly, there is no allegation in this case that NYSNA rejected any offers by the City to provide retroactive pay to former employees. In fact, it appears that NYSNA merely ratified and followed the same CBA that UFT had previously

negotiated for its union members. As stated above, a earlier and similar challenge, in *Morton v Mulgrew, supra,* by resigned teachers who alleged that the UFT had breached its duty of fair representation when the new contract did not provided retroactive pay for them, was unsuccessful.

As previously mentioned, the Court of Appeals, the First Department and PERB have all held that no duty exists as to individuals who are not a member of the bargaining unit at the time the contract is ratified, and, even if there was a duty, it is not necessarily breached when some members receive benefits and others do not.

At the beginning of the oral argument, plaintiff effectively withdrew his original complaint as against Sheridan-Gonzalez, leaving the proposed amended complaint as against NYSNA. As a result of this decision, this Court need not address whether or not plaintiff is permitted an extension of time to serve.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Darryl Toppin's cross-motion for leave to file an amended complaint and for an extension of time to serve is denied.

Dated: June 21,2016

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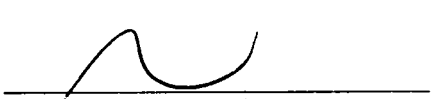

J.S.C.