Fernandez v Town of Brookhaven
2016 NY Slip Op 32204(U)
September 20, 2016
Supreme Court, Suffolk County
Docket Number: 24077/2014
Judge: Joseph Farneti

SHORT FORM ORDER INDEX NO. 24077/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

Application for a Judgment under Article 78 and other relief by

LAUREN FERNANDEZ,

Petitioner,

-against-

TOWN OF BROOKHAVEN,

Respondent.

ORIG. RETURN DATE: DECEMBER 30, 2014
FINAL SUBMISSION DATE: JANUARY 29, 2015
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: JANUARY 29, 2015
FINAL SUBMISSION DATE: JANUARY 29, 2015
MTN. SEQ. #: 002
MOTION: MD

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Upon the following papers numbered 1 to 12 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78 AND MOTION TO DISQUALIFY ATTORNEY. Order to Show Cause and supporting papers 1-3; Verified Answer and supporting papers 4, 5; Respondent's Memorandum of Law 6; Reply Affirmation 7; Notice of Motion and supporting papers 8-10; Affirmation in Opposition 11; Reply Affirmation 12; it is,

ORDERED that this petition (seq. #001) by LAUREN FERNANDEZ ("petitioner") for an Order and judgment, pursuant to CPLR Article 78: (1) directing respondent TOWN OF BROOKHAVEN ("respondent" or "Town") to immediately reinstate petitioner to her employment position as a Principal Clerk with the Brookhaven Highway Department; (2) directing respondent to pay to petitioner all of her salary from August 22, 2014 until petitioner is reinstated; and (3) directing respondent to afford to petitioner all employment benefits from August 22, 2014 until petitioner is reinstated, is hereby **DENIED** in its entirety. The Court has received a Verified Answer and Memorandum of Law in opposition to this application from respondent; and it is further

ORDERED that this motion (seq. #002) by petitioner for an Order: (1) pursuant to CPLR 3211 (b), dismissing respondent's "Complete Affirmative Defense," or in the alternative, striking prejudicial matter involving the employment history of petitioner; and (2) pursuant to the Rules of Professional Conduct and the Court's inherent power, disqualifying respondent's counsel, David Cohen, Esq., and his law firm, Cooper, Sapir & Cohen, P.C. from representing respondent further in this action, is hereby **DENIED** for the reasons set forth hereinafter.

Petitioner was an employee of the Town's Highway Department, is over the age of 18 years, and resides in Suffolk County, New York. Respondent is a municipality, organized under and by virtue of the laws of the State of New York, as a Township in Suffolk County, New York and with offices in Suffolk County, New York. At all relevant times, petitioner was employed by the Brookhaven Highway Department as a Principal Clerk, and had been employed by the Town since September 1985.

The instant special proceeding arises out of petitioner's employment in the Street Lighting department of the Town, and petitioner's contention that respondent's decision to terminate petitioner was arbitrary, capricious, in bad faith, and an abuse of discretion.

As to petitioner's application for the disqualification of respondent's outside labor counsel, the burden to show that counsel's testimony would be adverse to the interest of respondent's has not been alleged, never mind proven. In the absence of such proof, the motion to disqualify counsel must be **DENIED**.

For the past twenty-eight years, the Court of Appeals has held steadfast to its holding in *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 443 (1987):

> Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice (*see Matter of Abrams [John Anonymous]*, 62 NY2d 183). The right to counsel of choice is not absolute and may be overridden where necessary – for example, to protect a compelling public interest – but it is a valued right and any restrictions must be carefully scrutinized (*id.*, at 196).

Important in the context of this case, the Court of Appeals continued:

> Considering all the significant interests to be balanced, it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation. The Code instead provides "guidance for the courts in determining whether a case would be tainted by the participation of an attorney or a firm." (*Armstrong v McAlpin*, 625 F2d 433, 446, n 26, *vacated on other grounds* 449 US 1106.) While in most instances the balance would be struck and the issue of disqualification finally resolved by the Appellate Division, in the circumstances presented no such taint or unfairness has been established by defendant, who bears the burden on this motion, and we therefore reverse and deny disqualification

(*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 444-445). Petitioner has not sustained her burden in this regard.

Also, that branch of petitioner's motion to dismiss defenses is without basis in law under these circumstances. Setting forth the factual history and narrative of the prior dealings between the parties is relevant and material as it concerns the issue of bad faith and the circumstances surrounding the Last Chance Agreement.

Turning to the merits of the petition, on January 10, 2014, petitioner signed a "Last Chance Agreement" with the Town. The Last Chance Agreement states, among other things:

> WHEREAS, Fernandez was served with the third amended disciplinary charges dated January 2, 2014, pursuant to Section 75 of the Civil Service Law . . . [and]
>
> WHEREAS the parties have negotiated an agreement resolving the matter and alleviating the need for a hearing.

The Last Chance Agreement further states, among other things, that petitioner pled guilty to certain disciplinary charges against her and no contest to other charges against her. The agreement states that petitioner agreed to be

suspended from December 11, 2013 through March 10, 2014, and that petitioner was to return to work on March 11, 2014. The agreement also states that petitioner would resign her employment with the Town effective March 31, 2016.

There were allegations that petitioner had been conducting a private cleaning business during her work day with the Town, and was counseled to cease and desist from those private activities. Unfortunately, based on the investigation of the Town's labor counsel, there was credible first-hand evidence of petitioner's private enterprise activities continuing during business hours at her desk located in the Town's offices after her execution of the Last Chance Agreement. As the legal equivalent of a probationary employee, petitioner's rights under the Civil Service Law are limited under the circumstances.

Moreover, in the absence of bad faith or other constitutional violation on the part of the municipal employer, petitioner's claim must be dismissed. As held by the Second Department:

> "A probationary employee may be terminated without a hearing and without a statement of reasons in the absence of a showing that the termination was for a constitutionally impermissible purpose, in bad faith, or in violation of statutory or decisional law" (*Matter of Iannuzzi v Town of Brookhaven, 258 AD2d 651, 651, 685 NYS2d 784 [1999]*). "[A] petitioner has the burden of demonstrating bad faith by competent evidence, not speculation" (*Matter of Negron v Jackson, 273 AD2d 241, 242, 709 NYS2d 437 [2000]*)

(*Matter of Bonanno v Nassau County Civ. Serv. Commn.*, 59 AD3d 541, 541 [2d Dept 2009]; *see Matter of Watson v Healy*, 119 AD3d 808 [2d Dept 2014]).

Here, the Court finds that respondent's determination to discharge petitioner was rationally based, and neither arbitrary nor capricious. Further, the Court finds that petitioner failed to demonstrate that the dismissal was carried out in bad faith or illegally accomplished, and failed to raise a "material issue of fact" with respect to that issue so as to warrant a hearing (*Matter of Johnson v Katz*, 68 NY2d 649 [1986]; *Matter of Watson*, 119 AD3d 808; *Matter of Bonanno*, 59 AD3d 541; *Matter of Abbondandolo v Edwards*, 174 AD2d 737 [2d Dept 1991]).

Wherefore, this petition for reinstatement, back pay and retroactive benefits is **DENIED**, and this special proceeding is hereby dismissed. As such, petitioner's motion to disqualify respondent's counsel herein is **DENIED** as set forth hereinabove.

The foregoing constitutes the decision and Order of the Court.

Dated: September 20, 2016

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION

____ NON-FINAL DISPOSITION