Matter of Local 342, Long Is. Pub. Serv. Empls., United Mar. Div., Intl. Longshoremen's Assn., AFL-CIO v Town of Huntington
2018 NY Slip Op 30359(U)
February 2, 2018
Supreme Court, Suffolk County
Docket Number: 15-19688
Judge: Joseph Farneti
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PUBLISH

SHORT FORM ORDER

INDEX No. 15-19688

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12/11/15 (#001)
MOTION DATE 1/5/16 (#002)
ADJ. DATE 12/15/16
Mot. Seq. #001 - CDISPSUBJ
Mot. Seq. #002 - MG

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In the Matter of the Application of

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
(Grievant William T. Perks),

Petitioner,

- against -

TOWN OF HUNTINGTON, HUNTINGTON TOWN ATTORNEY'S OFFICE, HUNTINGTON TOWN ATTORNEY CINDY ELAN-MANGANO, ASSISTANT HUNTINGTON TOWN ATTORNEY/ RECORDS ACCESS OFFICER JACOB TURNER, ASSISTANT HUNTINGTON TOWN ATTORNEY/F.O.I.L. OFFICER DEIRDRE BUTTERFIELD, HUNTINGTON TOWN CLERK'S OFFICE, HUNTINGTON TOWN CLERK JO ANN RAIA, HUNTINGTON DEPUTY TOWN CLERK STACY H. COLAMUSSI,

Respondents.

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Upon the following papers numbered 1 to 31 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1; 2-10; 11; 12; 13-18; 19; 20 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21-23 ; Replying Affidavits and supporting papers 24-25; 26-27; 28-29; 30; 31 ; Other order to show cause dated November 13, 2015, petition dated October 30, 2015, and supporting papers; respondents' memorandum of law dated December 14, 2015; petitioner's memorandum of law dated January 21, 2016; respondents' reply memorandum of law dated February 10, 2016; it is,

ORDERED that the motion by respondents for an Order, pursuant to CPLR 3211 and 7804 (f), dismissing the petition in its entirety, is granted.

By way of this special proceeding, the petitioner seeks the entry of an order and judgment, ostensibly pursuant to articles 51, 75, and 78 of the CPLR:

> (i) vacating and annulling an appeal decision by the Town of Huntington, Town Attorney's Office dated July 20, 2015, denying various requests by Edward J. Yule, Esq. of The Law Offices of Edward J. Yule, LLC pursuant to the Freedom of Information Law (Public Officers Law art 6; "FOIL") for billing records and other documents relating to legal services and disbursements paid by the Town to certain attorneys and law firms on behalf of any and all Town employees, elected officials, and officers, and directing the respondents to produce all documents responsive to those requests;
>
> (ii) directing the Town, under penalty of contempt, to proceed to arbitration pursuant to a May 9, 2012 Order of this Court in a related matter under Index No. 10-3857 (*Matter of Local 342, Long Is. Pub. Serv. Empls. v Town of Huntington*, 2012 NY Slip Op 31268 [U] [Sup Ct, Suffolk County 2012], *affd* 117 AD3d 743 [2d Dept 2014]);
>
> (iii) directing the Town to post a bond in the amount of $10 million to ensure its compliance with the Order to proceed to arbitration; and
>
> (iv) disqualifying the Town's current attorneys from representing the Town in connection with the arbitration by reason of a claimed conflict of interest.

This proceeding, like the related actions and proceedings discussed below,[1] arises from an

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[1] It appears that Edward J. Yule, whose passing on February 28, 2016 the Court notes with regret, represented Perks in each of those actions and proceedings, including a federal court action (*Perks v Town of Huntington*, US Dist Ct, EDNY, 99 Civ 4811) which was concluded in or about 2009, as well as in the arbitration. It also appears that in 1999, the firm of Rains & Pogrebin, P.C. was retained to represent the Town in the federal court action, by Ernest R. Stolzer, a partner, and James P. Clark, an associate attorney; that when Rains & Pogrebin dissolved in 2004, Stolzer and Clark both moved to Bond, Schoeneck & King as members of that firm; that in 2006, Stolzer and Clark began to represent the Town in the arbitration; that Clark left Bond, Schoeneck & King in 2007 and joined Cullen & Dykman; that in 2011, Clark formed his own firm, the Law Offices of James P. Clark, P.C., and represented the Town for the duration of the federal court action; and despite all the changes in firms, Stolzer and Clark have continued at all times to act as co-counsel for the Town.

incident on February 28, 1999, involving a physical altercation between William T. Perks, then employed as the Town's harbormaster, and Susan Scarpati-Reilly, then a member of the Town Board. The allegations of each party concerning the confrontation are recited in this Court's May 9, 2012 Order, but are not relevant to this proceeding.

Following the incident, the Town engaged an independent fact finder to investigate Scarpati-Reilly's claims that Perks assaulted her while in the scope of his employment, and Perks retained attorney Yule to defend him. When the Town refused his subsequent request to pay his legal fees stemming from the incident, Perks filed a grievance, alleging that such refusal violated article 19, section C of the parties' collective bargaining agreement. The matter proceeded to arbitration. A series of hearings were conducted before the arbitrator between December 14, 2000 and May 8, 2001, following which the arbitration was suspended, at the request of the parties, while the underlying matter was litigated in federal court. Before resuming the hearings on May 14, 2008, the parties agreed to bifurcate the arbitration. Hearings concluded on September 11, 2008. (At or about the same time, Yule initiated a series of FOIL requests for the Town to produce certain attorney billing records, the most recent of which, discussed below, is a subject of this proceeding.) On February 16, 2009, the arbitrator issued a decision and award in favor of Local 342, concluding that the Town had breached article 19, section C, and directing that arbitration be reconvened for a determination as to the amount of legal fees owed.

On February 17, 2010, Local 342 commenced a special proceeding to confirm the arbitration award (*Matter of Local 342, Long Is. Pub. Serv. Empls. [Town of Huntington]*, Sup Ct, Suffolk County, Index No. 10-3857).

Discovery ensued regarding the issue of fees. During the course of the discovery, Local 342 requested that the arbitrator disqualify the law firms of Bond, Schoeneck & King and Cullen & Dykman from continuing to represent the Town in the damages phase of the arbitration. Claiming a conflict of interest, Local 342 argued that attorney Jessica Satriano, an associate at Bond, Schoeneck & King, was a necessary witness because she was personally familiar with Yule's file and billing records in this matter, having worked as an intern at his office for a number of years before accepting employment as an associate at Bond, Schoeneck & King (*see* n 1). The Town, in response, argued that the arbitrator lacked the authority to resolve the issue because attorney disqualification is a matter solely within the jurisdiction of the courts. On May 13, 2010, the arbitrator issued a decision, ruling provisionally that the matter was within his jurisdiction but deferring resolution of the issue pending an agreement by the parties whether to submit the matter to the Ethics Committee of the Suffolk County Bar Association for its input. The Town rejected the proposed submission and, on June 28, 2010, commenced an action seeking to permanently enjoin the arbitrator from ruling on the matter (*Matter of Town of Huntington v Local 342, Long Is. Pub. Serv. Empls.*, Sup Ct, Suffolk County, Index No. 10-23474).

On May 9, 2012, this Court issued orders in both of the pending matters. In the proceeding commenced under Index No. 10-3857, the Court, *inter alia*, granted the petition confirming the award. In the action commenced under Index No. 10-23474, the Court granted the Town's motion for a preliminary injunction; in so ruling, the Court effectively stayed arbitration on the issue of damages pending a judicial determination on the matter of attorney disqualification.

Curiously, Local 342 did not then proceed to seek a judicial ruling on the matter of attorney disqualification; its attorney did, however, continue to submit FOIL requests for the production of the Town's attorney billing records – on May 22, 2012, October 2, 2014 and finally, on May 11, 2015. In his May 11, 2015 letters addressed to Town Attorney, Yule requested "[a]ll itemized legal bills and disbursements paid by the Town of Huntington for legal professional services rendered on behalf of the Town and/or legal fees paid by the Town of Huntington" to Bond, Schoeneck & King, PLLC, Rains & Pogrebin, P.C., and the Law Office of James P. Clark, P.C. *et al.* "on behalf of any and all employees, elected officials, officers, and/or persons * * * from January 1, 1998 to the present." On June 15, 2015, the Town Attorney's records access officer, Deirdre Butterfield, issued a decision denying the requests as duplicative, noting Yule's own statement that his office "previously requested the above information and was provided with the same by the Town of Huntington," and also noting the absence of any representation by Yule that those records had since been lost or destroyed. By letter dated July 7, 2015, Yule appealed the denial of his requests, claiming that he had never received any of the requested records from 2005 forward. On July 20, 2015, the Town Attorney's records access appeal officer, Jacob Turner, issued a decision again denying the requests as duplicative (and, with respect to Yule's belated claim that he had not, in fact, received all of the records previously requested, declining to consider such claim). This proceeding followed, with Local 342 not only challenging the denial of Yule's FOIL requests under CPLR article 78 but also seeking to place the unresolved issue of attorney disqualification before the court.

The respondents now move, pre-answer, to dismiss the petition.

A motion to dismiss, whether in an action or a special proceeding, is a procedural vehicle to test the sufficiency of a pleading. To dismiss a pleading on CPLR 3211 (a) grounds, it must appear either that the pleading is defective on its face or, though adequate on its face, lacks merit or requires dismissal on some other basis (Siegel, NY Prac § 257 [5th ed]); CPLR 7804 (f) provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an "objection in point of law," which is akin to an affirmative defense (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7).

Upon review, the Court finds that dismissal is appropriate.

Initially, as to the respondents' claim that the petitioner lacks standing to challenge the denial of the FOIL request, the Court is constrained to agree. Pursuant to Public Officers Law § 89 (4) (b), only "a person denied access to a record in an appeal determination * * * may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules." Here, it is evident that the FOIL request was made by Yule on his own behalf. The May 11, 2015 letters and the July 7, 2015 letter contain no references to clients generally or to Local 342 or Perks specifically; the July 7 letter, moreover, is replete with phrases such as "my May 21, 2015 FOIL requests" and includes the following:

> Your decisions state that I am in receipt of documents previously requested via FOIL application. By stating this, in essence, you admit that my previous FOIL requests

> have been granted. However, I have never received any of the documents and record previously requested in my last two sets of FOIL applications * * *.
>
> Again, please allow this letter to serve as notice that I am appealing your decision dated June 15, 2015 denying this office access to my specific requests for public documents.

As neither Local 342 nor Perks requested the subject records, it does not appear how the petitioner may be said to have been "denied access" thereto. Whether the petitioner, subsequent to the July 20, 2015 appeal decision, may have raised the issue of the "error" in the caption of that decision – *i.e.*, designating Yule as the appellant instead of Local 342 and Perks – is plainly irrelevant. Whether, as the petitioner further claims, the Town was aware at all times that Yule was representing Local 342 and Perks is likewise irrelevant; again, there is no indication in the record, apart from the petitioner's belated protestations to the contrary, that the FOIL request was made on its behalf. And while the petitioner also claims that the Town was "fully aware that the requested documents were for use" in the matters stemming from the February 28, 1999 incident, the Court is at a loss to understand how records pertaining to legal fees paid by the Town generally on behalf of its own employees, elected officials, and officers might relate to a determination of how much is due to reimburse Perks for *his own* legal fees.

The Court further finds that the petitioner's application for attorney disqualification may not be brought in the context of this proceeding. Motion practice in special proceedings is very limited. "The profusion of motion practice seen in actions has no counterpart in special proceedings for the reason that the proceeding itself is analogous to a motion and is designed to go to hearing and determination promptly" (Siegel, NY Prac § 554 [5th ed]). Article 4 of the CPLR, which governs special proceedings, does not envision any motion practice in such proceedings apart from motion to dismiss on objections in point of law (CPLR 404 [a]), as here, and corrective motions (CPLR 405 [a]). Statutory authorization, moreover, must exist for the use of a special proceeding to enforce a particular right (*see* CPLR 103 [b]). Consequently, a party may not seek resolution of a controversy by way of motion in a special proceeding, or by way of the special proceeding itself, unless permitted by statute; while the bringing of a special proceeding where none is authorized is not a fatal defect (*see* CPLR 103 [c]), here the Court cannot simply sever the application and allow it to proceed as an action because the request for disqualification has no meaning or import outside the context of an already-pending action or proceeding related to the arbitration. However, since such a proceeding does exist (*Matter of Local 342, Long Is. Pub. Serv. Empls. [Town of Huntington]*, Sup Ct, Suffolk County, Index No. 10-3857), and since CPLR 7502 (a) (iii) permits subsequent applications concerning an arbitration to be made by motion in the same proceeding in which the first application was made, the petitioner may, if it be so advised, renew its motion for disqualification in that proceeding.

The petitioner's remaining request for a contempt order (and, derivatively, for the posting of a bond) similarly lacks context. Where, as here, the alleged contemnor is a party to the action out of which the contempt arises, the proper procedure to punish for contempt is by motion under the caption of that action (Siegel, NY Prac § 484 [5th ed]). Given, moreover, that this Court, in its May 9, 2012 Order confirming the arbitration award, expressly referenced its sister Order preliminarily enjoining the continuation of the arbitration pending a judicial determination on the petitioner's application for

attorney disqualification – an Order from which no appeal has ever been taken – it can hardly be said that the Court expressed a clear or explicit mandate directing the parties to promptly resume arbitration. "To sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate of which that party had knowledge, and that, as a result of the violation, a right of a party to the litigation was prejudiced" (***S.P.Q.R. Co. v United Rockland Holding Co.***, 136 AD3d 610, 611, 24 NYS3d 701, 702-703 [2016]). It would seem, rather, a matter of choice for the petitioner to await the resumption of arbitration pending a judicial determination on the issue of disqualification or to waive its insistence on such remedy. Since the petitioner has clearly chosen to pursue the disqualification remedy, any resumption of arbitration at this juncture would be premature, as would be any order directing arbitration to proceed, under penalty of contempt or otherwise. In any event, the petitioner's request is technically deficient in that the order to show cause does not contain the notice and warning required by Judiciary Law § 756, a defect to which the respondents timely objected (*see* ***Pizzirusso v Grossman***, 286 AD2d 428, 730 NYS2d 235 [2001]; *cf.* ***Matter of Rappaport***, 58 NY2d 725, 458 NYS2d 911 [1982]).

Accordingly, the motion is granted, the petition is denied, and the proceeding is dismissed.

Submit judgment.

Dated: February 2, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION