

**Holloway v City of Albany**

2018 NY Slip Op 33571(U)

February 6, 2018

Supreme Court, Albany County

Docket Number: 5998-15

Judge: Kimberly A. O'Connor

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

JOHN HOLLOWAY, RAY GAUL, DANIEL DOHERTY, PATRICK DOHERTY, THOMAS MCMULLEN, BARRY VANDEBURGH, MICHAEL TOBLER, WILLIAM WURTZBURG, DAVID PECK, GUY FALKENHEIMER, HENRY ISENBERGH, DAVID BOGARDUS, ALBERT TURCOTTE, EDWARD PHELPS, JOHN THERRIEN, RICHARD RAFFERTY, MICHAEL J. THORPE, ROBERT MENGEL, SR., MICHAEL MURDICK, HENRY ABRIEL, ART CLOW, MARK ABELE, PAUL FRUSCIONE, JOHN J. WALSH, PAUL RANKIN, HAROLD SIEGEL, ROBERT SLEASMAN, SANTE MAHAN, JOHN CARR, DAN SCHLIECHER, AUGUST DINOVA, WILLIAM JONES, HOWARD SCHRAMM, BRIAN STRUWE, AND ALLAN STRANAHAN,

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**DECISION AND ORDER**

Index No.: 5998-15

RJI No.: 01-16-122946

Plaintiffs,

-against-

THE CITY OF ALBANY, NEW YORK AND KATHY SHEEHAN, AS MAYOR OF THE CITY OF ALBANY, NEW YORK,

Defendants.

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(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: THOMAS J. JORDAN, ESQ.  
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O'CONNOR, J.:

Plaintiffs John Holloway, Ray Gaul, Daniel Doherty, Patrick Doherty, Thomas McMullen, Barry Vandeburgh, Michael Tobler, William Wurtzburg, David Peck, Guy Falkenheimer, Henry Isenbergh, David Bogardus, Albert Turcotte, Edward Phelps, John Therrien, Richard Rafferty, Michael J. Thorpe, Robert Mengel, Sr., Michael Murdick, Henry Abriel, Art Clow, Mark Abele, Paul Fruscione,<sup>1</sup> John J. Walsh, Paul Rankin, Harold Siegel, Robert Sleasman, Sante Mahan, John Carr, Dan Schliecher, August Dinova, William Jones, Howard Schramm, Brian Struwe, and Allan Stranahan (collectively "plaintiffs") are retired professional firefighters formerly employed by the defendant City of Albany, New York ("City"). During their employment with the City, plaintiffs were members of the Permanent Professional Firefighters' Association, Locals 2007 and 2007-a ("Union"). Plaintiffs retired from their employment under collective bargaining agreements between the City and the Union in effect from 1986 and 2009.

On or about October 30, 2009, each plaintiff (except Allan Stranahan) received an "Important Notice" from the City, indicating, in relevant part:

**Medicare Refund for Part B Coverage**

As of December 31, 2009, the City will no longer reimburse individuals for the Medicare Part B premium whose effective date for Part B is January 1, 2010 and later. Individuals currently receiving a Medicare refund will continue to do so. Please note, regardless of your eligibility for Part B premium refund, **it is mandatory that you elect Medicare Part B coverage when you become Medicare eligible.**<sup>2</sup>

On January 1, 2010, the City ceased reimbursing plaintiffs (or will cease reimbursing plaintiffs once they become Medicare eligible) their Medicare Part B premiums. Plaintiff subsequently commenced this action seeking, among other things, a declaration that the City breached its contractual obligation

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<sup>1</sup> The record indicates that Paul Fruscione has decided not to be a party to this action for personal reasons.

<sup>2</sup> According to the record, plaintiff Allan Stranahan learned that the Medicare Part B premium reimbursement was being discontinued after he became Medicare eligible on August 2, 2015.

to them when it ceased reimbursing their Medicare Part B premiums, and an order directing the City to account for and pay to each plaintiff retiree any and all outlays and expenditures made by each plaintiff because of the change in the City's health care coverage.

Plaintiffs now move for an order: (1) pursuant to CPLR 3212, granting summary judgment in their favor and against the City and defendant Kathy Sheehan, as Mayor of the City of Albany, New York (collectively "defendants") on the ground that there are no triable issues of fact and that as a matter of law, defendants are liable to plaintiffs to reimburse their Medicare Part B premiums; (2) pursuant to CPLR 3025(c), granting plaintiffs leave to amend the pleadings concerning plaintiff Robert Sleasman to conform to his affidavit and the proof offered thereto; and (3) dismissing the claims of plaintiff Sante Mahan, John Carr, and Howard Schramm as they are already receiving Medicare Part B premium reimbursement from the City. Since defendants oppose only that part of the motion seeking summary judgment in plaintiffs' favor and against them, plaintiffs' application for leave to amend the pleadings concerning plaintiff Robert Sleasman and to dismiss the claims of Sante Mahan, John Carr, and Howard Schramm is granted.

Turning to the remainder of the motion, the Court begins by noting that "[i]n determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the Court" (*Agor v. Bd. of Educ., Northeastern Clinton Cent. Sch. Dist.*, 115 A.D.3d 1047, 1048 [3d Dep't 2014]; *Adamo v. City of Albany*, 156 A.D.3d 1017, 1018 [3d Dep't 2017]; see *Cosedine v. Portville Cent. Sch. Dist.*, 12 N.Y.3d 286, 293 [2009]; *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 [2002]; *Vectron Int'l, Inc. v. Corning Oak Holding, Inc.*, 106 A.D.3d 1164, 1165 [3d Dep't 2013]; *Williams v. Village of Endicott*, 91 A.D.3d 1160, 1162 [3d Dep't 2012]). "A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion" (*Pozament Corp. v. Aes Westover, LLC*,

27 A.D.3d 1000, 1001 [3d Dep't 2006]; *Agor v. Bd. of Educ., Northeastern Clinton Cent. Sch. Dist.*, 115 A.D.3d at 1048; accord *Vectron Int'l, Inc. v. Corning Oak Holding, Inc.*, 106 A.D.3d at 1165; see *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162-163 [1990]). "If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law" (*Agor v. Bd. of Educ., Northeastern Clinton Cent. Sch. Dist.*, *supra* at 1048), and summary judgment is not appropriate (see *Della Rocco v. City of Schenectady*, 252 A.D.2d 82, 86 [3d Dep't 1998][Carpinello, J. dissenting]).

A review of Article 27 of the subject collective bargaining agreements discloses an ambiguity as to whether the existing health insurance plan included reimbursement for Medicare Part B premiums for retired firefighters. Therefore, it cannot be construed as a matter of law, and summary judgment is denied on that basis (see *Agor v. Bd. of Educ., Northeastern Clinton Cent. Sch. Dist.*, *supra*; *Della Rocco v. City of Schenectady*, 252 A.D.2d at 86). Furthermore, the Court is not persuaded that collateral estoppel applies in this circumstances, and finds this case distinguishable from the *Matter of Gooshaw v. City of Ogdensburg* (67 A.D.3d 1288 [3d Dep't 2009]). In *Matter of Gooshaw*, the arbitrator addressed the obligations of the City of Ogdensburg to reimburse Medicare Part B premiums to retired firefighters, who shared the same status as the petitioner retired firefighters litigating that case. Here, Arbitrator Sheila Cole's decisions were made in the context of a grievance filed by active firefighter members who do not necessarily share the same status as the plaintiff retirees. Such distinction, in this Court's opinion, is not without significance. Therefore, summary judgment on this basis is also denied.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit, or need not be reached in light of this determination.

Accordingly, it is hereby

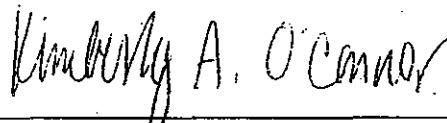
**ORDERED**, that plaintiffs' motion for summary judgment is denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to the attorneys for the defendants. A copy of this Decision and Order together with all papers on the motion are being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry of the original Decision and Order.

**SO ORDERED.**

**ENTER.**

Dated: February 6, 2018  
Albany, New York



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HON. KIMBERLY A. O'CONNOR  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion for Summary Judgment, dated July 26, 2017; Affidavit of Thomas J. Jordan, Esq., sworn to July 26, 2017, with Exhibits 1-3 annexed; Plaintiffs' Exhibits 1-5; Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, dated July 26, 2017, with Exhibit 1 annexed;
2. Affidavit of Matthew J. Kelly, Esq., sworn to September 13, 2017; *and*
3. Reply Affidavit of Thomas J. Jordan, Esq., sworn to September 19, 2017.