Sarkar v City of New York
2020 NY Slip Op 30640(U)
January 27, 2020
Supreme Court, Bronx County
Docket Number: 260029/2018
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

JAY SARKAR,

Petitioner,

-against-

CITY OF NEW YORK, NEW YORK CITY OFFICE OF SPECIAL COMMISSIONER OF INVESTIGATION, NEW YORK CITY DEPARTMENT OF EDUCATION, and CARMEN FARINA, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

INDEX NUMBER: **260029/2018**

Present:
HON. **ALISON Y. TUITT**

The following papers numbered 1 - 8,

Read on this Article 78 Petition, Motions and Cross-Motion

On Calendar of **11/28/18**

Notice of Petition/Motion/Cross-Motion/Order to Show Cause - Exhibits, Affirmations, Affidavits 1, 2, 3, 4, 5

Affirmations in Opposition 6, 7

Reply Affirmation 8

Upon the foregoing papers, the Petition pursuant to Article 78 of the CPLR; the Amended Verified Petition; respondents' motion to change venue or, in the alternative, dismiss the Petition; respondents' Order to Show Cause to quash subpoenas; and, petitioner's cross-motion to deny respondents' Order to Show Cause to quash subpoenas are consolidated for purposes of this decision. For the reasons set forth herein, the Petition/Amended Verified Petition is dismissed and the remainder of the motions are denied as moot.

The within Article 78 proceeding seeks a declaration that the City of New York ("City"), the Special Commissioner of Investigation for the New York City School District ("SCI"), the New York City Department of Education ("DOE") and/or Carmen Farina as DOE's Chancellor acted arbitrarily and capriciously in refusing to remove from SCI's website a public reported dated December 12, 2006 regarding an investigation into certain allegations against petitioner and a colleague in connection with their work and billing practices under a prior contract with DOE for in-school occupational therapy services. The investigation report substantiated allegations against petitioner of theft of services and recommended that he be deemed ineligible to work as a contractor for DOE. Petitioner seeks an Order that DOE deem petitioner and his affiliates eligible to resume working in the schools.

Petitioner sought the same relief in an Article 78 proceeding in Supreme Court, New York County. That petition was dismissed. On appeal, the First Department affirmed the dismissal of the petition. In Sarkar v. City of New York, --- N.Y.S.3d ---- (1st Dept. 2020), 2020 WL 20398, the Court held that the decision not to remove the report upon petitioner's request was not arbitrary and capricious.

> The record demonstrates that SCI considered petitioner's refusal to participate in its investigation, the nature of the conduct it substantiated, and the public interest in exposing misconduct. It was not unreasonable for SCI to conclude that petitioner's untimely rebuttal, submitted to the DOE months after it adopted SCI's recommendations, and the almost 10 years that passed from the report's publication before petitioner's current request, did not compel the report's removal.
>
> Petitioner's challenge to SCI's authorization to publish reports online is unpreserved and, in any event, unavailing. The Special Commissioner is authorized to "issue such reports regarding corruption or other criminal activity, unethical conduct, conflicts of interest, and misconduct, that he or she deems to be in the best interest of the school district". The power to publish substantiated misconduct is necessarily implied.

Petitioner brought the instant petition seeking the same relief it sought in the New York County petition. Article 78 of the CPLR provides for limited judicial review of administrative actions. Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 provides in relevant part that "[t]he only questions that may be raised in a proceeding under this article are... (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or (4) whether a determination made as a result of a hearing

held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." Section 7804 (h) provides that "[i]f a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith."

In deciding whether an agency's determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency's decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than "bare surmise, conjecture, speculation or rumor" and "less than a preponderance of the evidence." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 180 (1978). Substantial evidence consists of "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Id. See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency's determination is "supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law, it must be confirmed." American Telephone and Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984). The arbitrary and capricious test "chiefly 'related to whether a particular action should have been taken or is justified... and whether the administrative action is without foundation in fact." Pell, *supra*, quoting 1 N.Y. Jur., Administrative Law, §184, p. 609). The reviewing Court does not examine the facts *de novo* to reach an independent determination. Marsh v. Hanley, 50 A.D.2d 687. Furthermore, a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary, unreasonable and an abuse of discretion. Pell, *supra*. The Court must also defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses. Lindenmann v. American Horse Shows Association, 222 A.D.2d 248, 250 (1st Dept. 1995) citing Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987).

Petitioner's Article 78 Petition/Amended Verified Petition must be dismissed as the First Department has already held that the decision not to remove the report was not arbitrary and capricious.

The First Department has consistently held that the commencement of an action where a prior action was dismissed or resolved which involved the same facts and circumstances, the action is barred under

the doctrines of res judicata and collateral estoppel. See, Conte v. City of New York, 741 N.Y.S.2d 403 (1st Dept. 2002); Pahmer v. Touche Ross and Co., 707 N.Y.S.2d 825 (1st Dept. 2000); Prospect Owners Corp. v. Tudor Realty Services Corp., 689 N.Y.S.2d (1st Dept. 1999). It is well-settled that under the transactional approach adopted by New York in res judicata jurisprudence that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brian v. City of Syracuse, 54 N.Y.2d 353 (1981) citing Matter of Reilly v. Reid, 45 N.Y.2d 24 (1978); Marinelli Associates v. Helmsley-Noyes Co., Inc., 705 N.Y.S.2d 571 (1st Dept. 2000). The doctrine bars not only claims that were actually litigated but also claims that could have been litigated. Browning Ave. Realty Corp. v. Rubin, 615 N.Y.S.2d 360 (1st Dept. 1994). Collateral estoppel, together with its related principles, merger and bar, is but a component of the broader doctrine of res judicata, which holds that as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action. Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481 (1979). "This principle, so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." Id.

Although collateral estoppel is a corollary to the principles of res judicata, unlike res judicata, which involves claim preclusion, collateral estoppel involves issue preclusion. Singleton Management, Inc. v. Compere,673 N.Y.S.2d 381 (1st Dept. 1998). It is an equitable doctrine, based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue that was previously decided against it. Id. Since res judicata precludes relitigation of issues actually litigated and resolved in a prior proceeding, the party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in a subsequent action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue. Sweeney v. New York City Dept. of Health and Mental Hygiene , 935 N.Y.S.2d 511 (1st Dept. 2012). Collateral estoppel is grounded on concepts of fairness and should not be rigidly or mechanically applied. It is well settled that, in order to invoke the doctrine of collateral estoppel, a two prong test must be satisfied: 1. the identical issue was necessarily decided in the prior proceeding and is decisive of the present action; and 2. that there was a full and fair opportunity to contest that

issue in the prior proceeding. See O'Brien v City of Syracuse, 54 NY2d 353 (1981); D'Arata v. New York Central Mutual Fire, 76 NY2d 659 (1990); Zimmerman v. Tower Insurance Company,13 AD3D 137 (1st Dept. 2004); Cordon v. 698 Realty, L.L.C. 288 A.D.2d 45, 732 N.Y.S.2d 564 (1st Dept.,2001). Satisfaction of the "full and fair opportunity test" requires the examination of a number of factors first set forth by the Court of Appeals in Schwartz v. Public Administrator of County of Bronx, 24 N.Y.2d 65 (1969). These factors include the size of the claim, the forum of the prior litigation, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, differences in the applicable law and foreseeability of future litigation. Id. at 72.

In the instant matter, the Petition/Amended Verified Petition is dismissed on the grounds of collateral estoppel and res judicata. Respondents' motion to dismiss the Petition is granted. Respondents' Order to Show Cause to quash subpoenas and petitioner's cross-motion to deny respondents' Order to Show Cause to quash subpoenas are denied as moot.

This constitutes the decision and Order of this Court.

Dated: 1/27/20

Hon. Alison Y. Tuitt