SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 49

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In the Matter of the Arbitration of

LLEWELLYN LIBERT,

Petitioner,

Index No. 401234/97

-against-

NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING,

Respondents.

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HERMAN CAHN, J.:

Petitioner, a former employee of the City of New York, brought this proceeding pro se, to annul and overturn an adverse decision of respondent New York City Board of Collective Bargaining (the "Board") dated January 30, 1997. Respondents move, pursuant to CPLR 2221, for reargument and/or renewal of this court's decision and order dated December 24, 1997 denying their motion to dismiss the petition. That motion sought dismissal on the ground that this proceeding was commenced in excess of the 30-day period of limitations contained in Civil Service Law § 213(a).

In support of their motion for reargument, respondents argue: (1) that the court improperly accepted petitioner's Second Amended Petition dated April 25, 1997, (2) that the Board had met its burden of showing that a true or properly conformed copy of the Board's decision was served by certified mail on petitioner's

counsel on January 31, 1997; and 7) that the court erred in finding this proceeding timely pursuant to the four-month Statute of Limitations contained in CPLR 217(2)(b), when the limitations period of Civil Service law 213(a) controlled. For the foregoing reasons, reargument is granted as to the first and third contentions, and renewal is granted as to the second contention regarding service of the Board's decision.

Starting with the alleged improprieties concerning the Second Amended Petition, the court notes that the original Petition, dated March 27, 1997, was returnable on April 29, 1997. Respondents filed their motion to dismiss the Petition on or about April 16, 1997 in accordance with CPLR 7804(c) and (f) i.e., five days before the Petition was noticed to be heard. Petitioner then had the right to submit reply papers one day before the return date of the Petition (CPLR 7804[c]). What petitioner did here was to serve and file a Second Amended Petition dated April 25, 1997 returnable on May 15, 1997 (despite the fact that the original petition and motion were noticed for April 29, 1997) together with an affidavit in opposition to the motion to dismiss. Respondents are correct that this amended petition was not filed with leave of court as required by CPLR 3025(b), and, as discussed below, the amendment should not have been allowed. In addition, petitioner's papers raised a brand new claim, i.e., that petitioner's union, non-party Social Services Employees Union, Local 371 (“SSEU Local 371"), had breached its duty of fair representation both with respect to the

underlying arbitration proceeding, before the Board and in the instant proceeding. Where a party has not been given a chance to respond, new claims raised for the first time in reply papers should not be considered by the court (Azzonardi v American Blower Corp., 192 AD2d 453, 454 [1st Dept 1993]; Ritt v Lenox Hill Hospital, 182 AD2d 560, 562 [1st Dept 1992]),

Second, the court found that the evidence proffered by the respondents in support of the claim that the Board's decision was served by certified mail on petitioner's counsel of record on January 31, 1997 was insufficient to meet their burden of proof on this issue. Again, because respondents did not submit additional evidence on this issue, renewal is proper. Counsel for respondent Office of Collective Bargaining has now sufficiently explained the basis of her personal knowledge, has detailed the procedures relating to the mailing of decisions of the Board, has supplemented the supporting documentary evidence, and has explained the reason for the absence of the signatures of the seven members of the Board who joined in the decision. Considering all of this new evidence, the Court finds that the respondents, have now met their burden of proof on this issue and that a copy of the Board's decision was served by certified mail on petitioner's counsel on January 31, 1997.

The third and final ground for reargument is that the court wrongly applied the four-month Statute of Limitations contained in CPLR 217(2)(b), and not the 30 days specified by Civil Service Law § 213(a). Respondents are correct that the 30 day limitations

period applies:

Since this proceeding was not commenced until March 21, 1997, it is untimely under this limitations period.

In the prior decision, the court ruled that CPLR 217(2)(b) was applicable to this proceeding. That section, which was added by the Legislature in 1990 (L 1990, ch 467), states in pertinent part:

> (b) Any action or proceeding by An employee or former employee against an employer subject to article fourteen of the civil service law ... , an essential element of which is that an employee organization breached its duty of fair representation to the person making the complaint, shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

(Emphasis added). Upon reargument, the court determines that this section does not apply to this proceeding for two reasons. First, the Board was not the petitioner's employer as is required by CPLR 217(2)(b). The Board is an independent, neutral decision-making body charged with administering and enforcing the provisions of the New York City Collective Bargaining Law. The City of New York was petitioner's employer, and has never been named a respondent in this proceeding. Second, the petition that was the subject of the respondents, motion to dismiss did not contain any claim, an essential element of which is that the petitioner's union breached its duty of fair representation to him. Even assuming that, pursuant to CPLR 3025(b), petitioner had requested leave to amend his petition to add this claim, and

leave should have been denied.

It is well settled that a union breaches its statutory duty of fair representation only when its conduct toward a member is arbitrary, discriminatory or in bad faith. (Civil Service Bar Assn., Local 237, Intl. Brotherhood of Teamsters v City of New York, 64 NY2d 188, 195-96 [1984]; Kleinmann v Bach, 195 AD2d 736 Dd Dept 19931). "The fact that the union was guilty of mistake, negligence or lack of competence does not suffice for such a claim." (Mellon v Benker, 186 AD2d 1020, 1021 [4th Dept 1992]; see also, Kaminsky v Connolly, 51 AD2d 218, 221 [1st Dept 1976], affd 41 NY2d 1068 [1977]; Trainosky v Civil Service Employees Assn., Inc., 130 AD2d 827 Dd Dept 19871). Moreover, "[a] union is not required to carry every grievance to the highest level, and the mere failure on the part of a union to proceed to arbitration with a grievance is not, per se, a breach of its duty of fair representation." (Matter of Garvin v New York State Public Employees Relations Bd., 168 AD2d 446, 447 [2d Dept 1990]).

Here, the petitioner alleges nothing more than a failure by SSEU Local 71 to object to the timeliness of the City's petition challenging the request for arbitration, and a failure to pursue the matter in this Court by way of an Article 78 proceeding within 30 days of service of the Board's decision. He fails to allege "fraud, ... dishonest conduct, or ... discrimination that is intentional, severe, and unrelated to legitimate union objectives." Badman v Civil Service Employees Assn., 91 AD2d 858

[4th Dept 1982]). As such, the Second Amended Petition fails to state a claim for breach of the duty of fair representation by SSEU Local 71, and thus this proceeding is governed by Civil Service Law § 213(a) and is time-barred.

For the foregoing reasons, respondents, motion for reargument, and/or renewal is granted. Upon reargument and renewal, the respondents' motion to dismiss is granted, and the petition is denied and the proceeding is dismissed.

The Clerk may enter judgment accordingly.

The foregoing constitutes the order and judgment of the Court.

Dated: June 10, 1998

ENTER:

J. S. C.