To be Argued by:
PHILLIP A. OSWALD, ESQ.
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STATE OF NEW YORK

Court of Appeals

APL-2018-0074

ANN VANYO,

Plaintiff-Appellant,

vs.

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., and CITY OF BUFFALO,

Defendants-Respondents.

(Appeal No. 2.)
Erie County Index No.: 801776/2015.

REPLY BRIEF FOR PLAINTIFF-APPELLANT ANN VANYO

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Term	Definition
The amended complaint	The amended verified complaint in this action that was filed on May 21, 2015 and that appears on page A20 of the Appendix for this appeal
The Appellant's Brief or Applt. Br.	Brief for Plaintiff-appellant Ann Vanyo, dated October 25, 2018, in the appeal in this action to this Court
Appendix or App.	The Appendix for this appeal
The BPBA	Defendant-respondent the Buffalo Police Benevolent Association
The CBA	The Collective Bargaining Agreement that is the subject of this action
The City	Defendant-respondent the City of Buffalo
Defendants	Collectively, defendants-respondents the Buffalo Police Benevolent Association and the City of Buffalo
The original complaint	The verified complaint that first was filed in this action on February 10, 2015 and that appears on page 31 of the Record for this appeal from the Appellate Division
Plaintiff	Plaintiff-appellant Ann Vanyo
The Record or R.	The Record for this appeal from the Appellate Division. Although there were two appeals in the Appellate Division — one of which was dismissed as being brought up for review in the other — the record that will be cited to in this appeal is the record in the appeal from the denial of plaintiff's CPLR 306-b motion because that record contains all of the documents from the other record, as well as additional documents.

PRELIMINARY STATEMENT

The issues in this appeal are simple and straightforward. With respect to timeliness, the claims that are being challenged on this ground — *i.e.*, the first and second causes of action — were timely because they were pled in the original complaint and this action was commenced before the expiration of the four-month limitations period. This analysis simply is the beginning and end of the timeliness issue, regardless of service. With respect to service, defendants waived any objection to service when they filed a pre-answer motion to dismiss without raising that objection. With respect to the first and fourth causes of action, plaintiff has stated a claim if the allegations are accepted as true as they must be on this motion.

Fundamentally, with respect to timeliness and service, this appeal can be summed up to the fact that plaintiff's failure to effect service — even as inexcusable as defendants argue it is — no longer matters. It ceased to matter when defendants made a strategic decision to move against the amended complaint on the merits, but without raising any objection to personal jurisdiction under CPLR 3211(a)(8) or CPLR § 306-b. A bedrock principle in American jurisprudence is that when a litigant avails herself or himself of the courts by seeking affirmative relief, she or he has subjected themselves to the court's jurisdiction. This is exactly what results from making a motion under 3211(a)

without including an objection to personal jurisdiction as a ground for that motion, which this Court squarely addressed in *Addesso v. Shemtob*. Thus, the fact that plaintiff's failure to serve defendants does not matter should be the beginning and end of these issues.

Turning to whether plaintiff has stated a claim in her first and fourth causes of action, plaintiff undoubtedly engaged in some inappropriate behavior during a difficult time in her life, but whether or not that warranted termination is neither here nor there in this appeal. What is significant in this respect, however, is that plaintiff was denied several crucial protections and, in fact, the BPBA worked against her in her disciplinary hearings. Plaintiff clearly has alleged this in her *20-plus-page, 124-paragraph verified* complaint. Furthermore, even if it were appropriate to consider on a motion to dismiss, defendants have not cited anything in the record to dispute these allegations. Therefore, plaintiff has sufficiently pled causes of action for a breach of the duty of fair representation and a deprivation of due process.[1]

[1] To be clear, plaintiffs' claim for deprivation of due process is only against the City.

ARGUMENT

Plaintiff relies primarily on the Appellant's Brief as providing the clear and straightforward reasoning for why the majority decision at the Appellate Division should be reversed, and most of defendants' arguments were addressed anticipatorily in that brief. However, defendants raise some points that warrant a further discussion of the issues originally addressed in the Appellant's Brief and some that were not addressed in that brief, which will be the purpose of this brief. To summarize, the points discussed below are: (1) that the first two causes of action are timely regardless of the relation-back doctrine and regardless of defendants' opposition to plaintiff's motion under CPLR § 306-b; (2) the amended complaint is controlling, since defendants have treated it as such; (3) plaintiff has stated a claim against the BPBA for a breach of the duty of fair representation; and (4) plaintiff has stated a due-process claim against the City.

POINT I

THE FIRST AND SECOND CAUSES OF ACTION WERE TIMELY BECAUSE THE RELATION-BACK DOCTRINE OF CPLR § 203(f) SIMPLY DOES NOT APPLY AND DEFENDANTS' CANNOT RELY ON THEIR OPPOSITION TO PLAINTIFF'S MOTION UNDER CPLR § 306-b AS AN OBJECTION TO SERVICE.

Simply put, the first two causes of action were pled in the original complaint and that complaint was filed within the four-month limitations period —

these facts are not disputed and they are decisive on the timeliness of these claims. Knowing this, defendants continue to force a relation-back argument and continue to confuse timeliness with service. Plaintiff fully addressed these issues in the Appellant's Brief, but defendants' briefs warrant further discussion on two points in this respect. First, defendants argue that the relation-back doctrine must apply in order for these claims to be timely, but that is incorrect because that doctrine wholly is inapplicable to these claims when they were included in the original complaint (Sub-point A, infra). Second, defendants argue that they properly raised an objection under CPLR 306-b, but this argument also is incorrect because they never made a motion under that section and, instead, moved against the amended complaint on the merits (Sub-point B, infra).

A. The Relation-Back Doctrine Does Not Apply Because It Does Not Affect the Timeliness of Claims That Were Initially Pled In the Original Complaint and Carried Over In the Amended Complaint.

As discussed at length in the Appellant's Brief, the timeliness of claims in the *initial complaint* are measured pursuant to CPLR § 203(c), which applies the date of filing to measure timeliness. *E.g.*, N.Y. CPLR § 203(a), (c) (McKinney's 2019); *see also Spodek v. New York State Com'r of Taxation and Finance*, 85 N.Y.2d 760, 763 (1995). On the other hand, the timeliness of "*new*" claims in an "*amended*" complaint that were not in the initial complaint is

measured pursuant to CPLR § 203(f) — otherwise known as the "relation-back doctrine." N.Y. CPLR § 203(f); *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995) (emphasis added). Therefore, CPLR § 203(f) or the relation-back doctrine *is not applicable* to claims that are included in the initial complaint and then carried over to the amended complaint. *See Buran*, 87 N.Y.2d at 177.

More specifically, this Court has acknowledged and explained that the relation-back doctrine only applies to new claims that did not appear in the initial complaint. *Buran*, 87 N.Y.2d at 177 ("the doctrine enables a plaintiff to *correct* a pleading error — *by adding either a new claim or a new party* — after the statutory limitations period has expired") (emphasis added). Moreover, applying the requirements of this doctrine only to new claims is consistent with the statutory text because it clearly distinguishes "[a] claim asserted in an amended pleading" from "the claims in the original pleading" by providing that the former can relate back to the latter. N.Y. CPLR § 203(f). Of course, applying this doctrine in a manner that is consistent with the text of CPLR § 203(f) — as this Court and other courts have — is required because "[e]vidence of legislative intent is 'first sought in the words the Legislature has used.'" *People v. Silburn*, 31 N.Y.3d 144, 155 (2018) (quoting *People v. White*, 73 N.Y.2d 468, 473-74 (1989)).

Furthermore, the Legislature's application of the relation-back doctrine to "claims" in particular as opposed to "pleading[s]" as a whole also is a consequential distinction because both of those terms were used separately in CPLR § 203(f). *See Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975) ("[w]hen different terms are used . . .[,] it is reasonable to assume that a distinction between them is intended"). The significance of this distinction is that it further evinces legislative intent that the timeliness of new claims in an amended pleading would be determined differently from those in the original pleading. In other words, if the Legislature intended for CPLR § 203(f) to apply to all claims in an amended pleading, it would have just related that pleading as a whole back to the original pleading without even mentioning the term "claims." Thus, this distinction clearly is another indication that CPLR § 203(f) was not intended to affect the timeliness of claims in the original pleading, even if they were carried forward in the amended pleading.[2]

[2] Interpreting the phrase "claim asserted in an amended pleading" to broadly include claims that were asserted in the original pleading and then carried forward in the amended pleading would also overlook the common practice whereby an amended pleading includes claims that were in an original pleading. In this respect, including the same claims from the original pleading in an amended pleading is necessary because an amended pleading supersedes the original pleading for the purposes of proceeding with the litigation. *E.g.*, *Stella v. Stella*, 92 A.D.2d 589, 589 (2d Dep't 1983).

Here, even though plaintiff argued that the relation-back doctrine in CPLR § 203(f) is not applicable to the first or second causes of action,[3] defendants did not provide any analysis of why that doctrine is applicable in the first place. Thus, defendants' entire argument on the requirements of that doctrine — *i.e.*, notice vis-à-vis the original complaint — basically is moot because plaintiff does not need to meet those requirements in the first place when these claims were pled in the original complaint and merely repeated verbatim in the amended complaint (*compare* App. at A33-A36 (¶¶ 83-101)) *with* R. at 43-46 (¶¶ 83-101)). Therefore, irrespective of the relation-back doctrine, these claims were timely because the original complaint was filed within the four-month limitations period.

B. Defendants Did Not Properly Object To Service Under CPLR § 306-b Because They Did Not File a Cross-motion Seeking Dismissal and They Had Already Consented To Personal Jurisdiction At the Time That They Opposed Plaintiff's Motion.

Defendants argue that they had not consented to personal jurisdiction and that they properly objected to service under CPLR § 306-b because they raised the issue of defective service in their opposition papers in plaintiff's motion for an

[3] Plaintiffs' argument in her appellant's brief that the first and second causes of action met the requirements of the relation back doctrine clearly was an alternative argument that was made in the event that this Court deemed that doctrine to apply to those claims (Appllt. Br. at 17 ("that doctrine nevertheless would apply *if necessary*"), 21 ("assuming, *arguendo*, that . . . [those claims] need to meet the requirements of . . . [that] doctrine, they do")). Plaintiff will withdraw her argument that the doctrine was met and will rely on her argument that the doctrine does not need to be met for the first two causes of action to be timely.

extension of time to serve the original complaint. However, this argument must be rejected for two reasons. First, the case law clearly establishes that a motion seeking dismissal is necessary to obtain that relief under CPLR § 306-b, which was acknowledged by both the majority and dissent at the Appellate Division (Sub-point 1, infra). Second, at the time that defendants filed their opposition papers, they already had consented to personal jurisdiction by filing a motion seeking to dismiss the first and second causes of action on the merits (Sub-point 2, infra).

1. The Case Law Is Clear That a Party Opposing Another Motion Under CPLR § 306-b Must File a Cross-motion If That Party Is Seeking Its Own Form of Relief Under That Provision.

As discussed in the Appellant's Brief, a well-settled rule is that relief under CPLR § 306-b cannot be sought merely in answering papers, and, instead, a cross-motion is necessary. *Komanicky v. Contractor*, 146 A.D.3d 1042, 1043 (3d Dep't 2017) ("[t]o the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR § 306-b, *such affirmative relief should have been sought by way of a cross motion*"); *Lee v. Colley Group McMontebello*, 90 A.D.3d 1000, 1000-01 (2d Dep't 2011) (plaintiff "*was required to serve a notice of cross motion* in order to obtain the affirmative relief of an extension of time to serve"); *Matter of Ontario Sq. Realty Corp. v. LaPlant*, 100 A.D.3d 1469, 1469 (4th Dep't 2012) (citing *Lee* for

the same rule) (emphasis added). Moreover, this rule applies even when there is an already pending motion under CPLR § 306-b. *See Matter of Ontario Sq. Realty Corp.*, 100 A.D.3d at 1469.

Here, the trial court clearly erred when it dismissed this action under CPLR § 306-b because defendants never filed a cross-motion seeking this affirmative relief, which is required under the case law that is discussed above. In each of those cases, a plaintiff informally sought an extension of time to effect service in opposition papers, but nearly every department of the Appellate Division repeatedly has held that such a request could not be granted in the absence of a cross-motion. The Appellate Division held this way *despite an already pending motion under CPLR § 306-b*. In fact, here, both the majority and the dissent at the Appellate Division agreed with the applicability of this rule (App. at A8, A9). Therefore, defendants' attempt to rely on their opposition papers in plaintiff's motion under CPLR § 306-b must be rejected, and they cannot obtain dismissal under that provision because they have not moved for it.

2. Assuming, Arguendo, That Defendants Could Rely On Their Opposition Papers In Plaintiff's Motion Under CPLR § 306-b, They Still Are Not Entitled To Relief Under That Provision Because They Already Had Consented To Personal Jurisdiction At the Time That They Filed Those Papers.

CPLR 320 unambiguously provides, one, that "a defendant appears . . . by making a motion which has the effect of extending the time to answer"[4] and, two, that "an appearance of the defendant is *equivalent to personal service of the summons upon him*." N.Y. CPLR 320(a), (b) (McKinney's 2019) (emphasis added). The sole qualification to this rule is if "an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211." *Id.* 320(b). The directive of CPLR 3211 with respect to an objection to personal jurisdiction is that it is waived if a party makes a motion under subdivision (a) of that rule without raising it. *Id.* 3211(e). In the context of this statutory framework, a motion under CPLR 3211 is "the proper procedural course to follow to contest improper service." *Frerk v. Mercy Hosp.*, 99 A.D.2d 504, 505 (2d Dep't 1984).

Furthermore, if a party files a motion under CPLR 3211(a) without objecting to service in that motion, then the party has waived any objection to

[4] Of course, a motion under CPLR 3211(a) extends the time to answer in an action. N.Y. CPLR 3211(f) (McKinney's 2019).

service or personal jurisdiction because that party has appeared — which, again, is "equivalent to personal service of the summons upon him." *Addesso v. Shemtob*, 70 N.Y.2d 689 (1987); N.Y. CPLR 320(b). In fact, this was the exact scenario that this Court addressed in *Addesso*. There, the defendant filed a motion under CPLR 3211(a)(7) to dismiss the initial complaint, and the plaintiff then amended the complaint. *Addesso*, 70 N.Y.2d at 690. In its answer to the amended complaint, the defendant pled an affirmative defense based on defective service of the initial complaint. *Id.* However, this Court squarely upheld the lower courts' holdings that the defendant had waived this defense because an objection to service "should have been made in the earlier CPLR 3211(a) motion to dismiss." *Id.*[5]

Here, the facts nearly are identical to those in *Addesso* because defendants filed a motion under CPLR 3211(a) without objecting to service in that motion, which means that they have appeared in this action (App. at A45-A55). According to the CPLR, this appearance is the "equivalent to personal service of

[5] The provision of CPLR 3211(e) that requires a litigant to move for dismissal based on defective service within 60 days of raising it in a responsive pleading does not affect this Court's holding in *Addesso*. That provision only requires that if a litigant raises defective service as a defense in an answer, she or he must move for dismissal based on that defense within 60 days of pleading it. N.Y. CPLR 3211(e) (McKinney's 2019). That provision does not mention — let alone alter — the fundamental rule that an objection to personal jurisdiction is waived by making a motion under CPLR 3211(a) without raising that objection in that motion. *See id.* In fact, the legislative history of that provision establishes that it was merely intended to ensure that objections to service were promptly resolved in litigation, which is consistent with the raise-it-or-waive it rule pertaining to personal jurisdiction and CPLR 3211(a) motions. N.Y. Bill Jacket, 1996 S.B. 4842, Ch. 501 (1996).

the summons upon [them]." More importantly, the fact that they objected to the failure to serve in opposition to plaintiff's motion under CPLR § 306-b is irrelevant because at that point, they had already filed their motion under CPLR 3211(a) nearly four months earlier (App. at A46, A49; R. at 155). Specifically, defendants filed their motions on June 15, 2015, which was well before plaintiff filed her motion on October 9, 2015 (*id.*). Therefore, through their appearance, defendants had effectively been served at the time that they opposed plaintiff's motion. Accordingly, their argument that they objected to service through their opposition to plaintiff's motion must be rejected.

POINT II

THE SIMPLE FACT IS THAT THE AMENDED COMPLAINT WAS FILED *BEFORE* THE TIME FOR DEFENDANTS TO RESPOND EXPIRED, AND DEFENDANTS *EVEN CONTINUE TO ADMIT* THAT THEY TREATED IT AS CONTROLLING.

As discussed in the Appellant's Brief, the literal text of CPLR 3025(a) permits for an amendment at any time before a responsive pleading is due, which, for a complaint, is not until 20 or 30 days after service of the complaint. N.Y. CPLR 3025(a) (McKinney's 2019). Additionally, even if a pleading is improperly amended without leave, that is a waivable defect and an opposing party cannot object to that improper amendment if that party treated that pleading as though it were controlling in the litigation. *He-Duan Zheng v. American Friends*

of Mar Thoma Syrian Church of Malabar, 67 A.D.3d 639, 640 (2d Dep't 2009); *Jordan v. Altagracia Aviles*, 289 A.D.2d 532, 533 (2d Dep't 2001). This includes filing a motion under CPLR 3211(a) that is addressed to the merits of that amended pleading. *He-Duan Zheng*, 67 A.D.3d at 640.

Here, defendants' arguments simply defy reality, as well as several provisions of the CPLR. First, with respect to the City, it illogically argues that because the 20 or 30-day time period to respond to the original complaint had not yet begun, that the amended complaint was not served before it expired. Simply put, however, the temporal reality is that the time before that time period begins run also is before that period expires. Thus, the City's argument easily is dismissed.

With respect to the BPBA, its argument also easily is dismissed. As discussed in the Appellant's Brief, the notion that a plaintiff would be allowed to endlessly delay service easily is dispelled by CPLR 3211(a)(8) and CPLR § 306-b, each of which allows a defendant to have an action dismissed if the summons and original complaint are not served within the prescribed time periods (Appllt. Br. at 33). Hence, if a plaintiff amends after delaying service, then a defendant can nevertheless obtain dismissal of the action in a pre-answer motion to dismiss or

even a later motion under CPLR § 306-b. The fact that defendants did not avail themselves of this relief does mean that it does not exist or that it does not abrogate the very dangers that are the staple of the BPBA's argument on this issue.

More importantly and regardless of defendants' arguments, the amended complaint is controlling because both defendants made motions based on the merits of that complaint (*see* App. at A45-A55). Specifically, they filed motions under CPLR 3211(a)(5), which required that they use the allegations in the amended complaint to establish an accrual date (*id.*). Additionally, their motions were pursuant to CPLR 3211(a)(7), which, of course, required them to accept the allegations in the amended complaint as true (*id.*). Thus, defendants did not reject the amended complaint as a nullity and move to dismiss based on defective service, but, instead, they accepted the amended complaint as a valid vehicle for plaintiff's causes of action when they used it for their motions. They even argue in their briefs that they acted "reasonably" by doing so.

Furthermore, at least with respect to their motions under CPLR 3211(a)(5), this obviously was a ***strategic decision*** by defendants because ignoring the original complaint and treating the amended complaint as the commencement document would have rendered the first and second causes of action untimely.

Now defendants want to have their proverbial cake and eat it too by arguing that the amended complaint is effectively a nullity, except that it should be controlling on the timeliness of the first and second causes of action. However, defendants cannot shapeshift their arguments as we proceed up the judicial ladder — simply put, they relied on the merits of the amended complaint for their motions to dismiss and they now are bound to it.

Lastly, plaintiff stresses the sheer unbelievability of defendants' argument that they were completely unaware of the existence of the original complaint until the motion under CPLR § 306-b. As if it were not noticeable enough that the word "AMENDED" was *handwritten in the caption* on the first page of the *typed* document, the reality of the NYSCEF system belies this claim by defendants. In particular, merely locating this case on the NYSCEF system — as defendants had to in order to file their motions — and clicking on the hyperlink literally would bring the original complaint right before defendants' eyes. Of course, the amended complaint also clearly had "NYSCEF DOC. NO. 3" at the *top of the page*, and logic dictates that the first two filed documents were the summons and the original complaint (*id.* at A24). Thus, defendants obviously knew that the original complaint existed and had access to it, but, instead, wishfully disregarded it because doing so was favorable to the merits of their motions.

In sum, the amended complaint remains controlling because it was served before defendants' time to respond to the original complaint expired and defendants nevertheless treated it as controlling in their motions. Regardless, even if the amended complaint is held to be a nullity, this action should be reinstated and proceed on the original complaint because the first two causes of action were still timely and plaintiff still stated a claim in those causes of action, as well as in her fourth cause of action in the original complaint. Truthfully, it makes no difference whether this action proceeds on the original or the amended complaint; however, since each of the lower courts and defendants have litigated the amended complaint up to this point, it should remain controlling.

POINT III

PLAINTIFF HAS STATED A CLAIM AGAINST THE BPBA BECAUSE IT IS A CORPORATION AND THE AMENDED COMPLAINT INCLUDES A WEALTH OF ALLEGATIONS THAT THE BPBA AFFIRMATIVELY MANIPULATED THE HEARING PROCEDURE.

First and foremost, the rule requiring ratification by every member of an association applies only to an *unincorporated* association, which is limited to that unique organizational structure. *See Palladino v. CNY Centro*, 23 N.Y.3d 140, 146-47 (2014) (discussing *Martin v. Curran*, 303 N.Y. 276, 279-80 (1951)). Apparently, here, the BPBA does not even know its own corporate form because it

is a corporation, but it is making an argument that applies only to an unincorporated association (App. at A47 ("defendants[sic] Buffalo Police Benevolent Corporation, *Inc.*") (emphasis added). Therefore, this part of the BPBA's argument must be rejected because the *Palladino* and *Martin* analysis simply do not apply.

With respect to the duty of fair representation, the general standard to state a claim for a breach of this duty is that the allegations[6] must describe conduct by a union that is arbitrary, discriminatory, or undertaken in bad faith. *E.g.*, *Civil Service Bar Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York*, 64 N.Y.2d 188, 196 (1984). More specifically, a claim is adequately stated through allegations that a union failed to perform anything less than a "cursory" investigation or engaged in affirmative conduct that resulted in the termination of the union member. *See Thomas v. Little Flower for Rehabilitation & Nursing*, 793 F.Supp.2d 544, 549 (E.D.N.Y. 2011) (plaintiff stated claim based on allegations that union failed to provide adequate representation at arbitration and made false representations to plaintiff regarding status of grievance); *Ghartey v. Saint John's Queens Hosp.*, 727 F.Supp. 795, 797 (E.D.N.Y. 1989) (plaintiff stated

[6] Again, the allegations in the amended complaint must be assumed as true, must be construed in plaintiff's favor, and must be construed liberally. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

claim based on allegations that union "failed to investigate the underlying allegations against plaintiff, to make more than a cursory preparation, to make any argument on plaintiff's behalf at the hearing, or to present witnesses the Union was advised would disprove the accusations"); *Tomney v. International Center for the Disabled*, No. 02 Civ. 2461(DC), 2003 WL 1990532 at *7 (S.D.N.Y., Apr. 29, 2003) (producing documents during a hearing that caused plaintiff to be fired).[7]

Here, plaintiff clearly has stated a claim against the BPBA that goes well beyond mere negligence or tactical errors by the BPBA — even though it certainly has committed those as well (App. Br. at 38-40). Importantly, the BPBA has not cited any part of the record to dispute plaintiff's allegations, which, again, must be assumed as true, must be construed in her favor, and must be construed liberally. Most notably, plaintiff has alleged that: (1) the BPBA did not allow plaintiff to attend her own hearing (App. at A27 (¶ 47)); (2) the BPBA manipulated the hearing process by allowing one charge to be *arbitrarily* withheld from the other charges in order to manufacture a record of prior disciplinary action against plaintiff (*id.* at A32 (¶ 79)); (3) the BPBA prevented plaintiff from testifying in her own defense (*id.* at A31 (¶¶ 74-75)); and (4) the BPBA withheld evidence in the

[7] Each of these cases were applying New York law. *See Thomas v. Little Flower for Rehabilitation & Nursing*, 793 F.Supp.2d 544, 549 (E.D.N.Y. 2011); *Ghartey v. Saint John's Queens Hosp.*, 727 F.Supp. 795, 797 (E.D.N.Y. 1989); *Tomney v. International Center for the Disabled*, No. 02 Civ. 2461(DC), 2003 WL 1990532 at *7 (S.D.N.Y., Apr. 29, 2003).

form of documents and witnesses (*id.* at A30-A32 (¶¶ 68-78)). Therefore, plaintiff has alleged much, much more than negligent representation or tactical errors.

More importantly, there is no evidence in the record to support any legitimate reason for why the BPBA acted in this manner, which means that these actions were either arbitrary or in bad faith. Furthermore, plaintiff's allegations give rise to a *reasonable inference* that the BPBA *discriminated* against plaintiff by treating her differently from its other members who were facing charges at the time. Namely, the BPBA *deviated* from the hearing procedure when it had or allowed plaintiff's charges to be decided out of order, as they were more recent than other pending charges (*id.* at A26 (¶¶ 44-46)). Therefore, when construing these allegations liberally and assuming them to be true and when drawing all inferences in her favor, plaintiff has alleged specific conduct that can be viewed as arbitrary, discriminatory, and in bad faith. This is especially the case when the BPBA has offered nothing in the record to explain its conduct.

POINT IV

PLAINTIFF'S DUE-PROCESS CLAIM IS NOT TIME-BARRED BECAUSE IT, IN FACT, IS NOT AN ARTICLE 75 PROCEEDING, AND SHE HAS ADEQUATELY STATED CLAIM BECAUSE SHE HAS ALLEGED THAT THE CBA WAS NOT FOLLOWED AND WHETHER THE CBA WAS FOLLOWED WAS NOT ADDRESSED BY THE ARBITRATOR.

The City raises the following three arguments for the dismissal of the fourth cause of action: (1) that the CBA afforded adequate protections; (2) that this action really is an action to reverse the arbitration award; and (3) that the arbitrator determined the issues raised in this action. With respect to the first argument, plaintiff clearly alleged that she was not allowed or given the opportunity to invoke the protections in the CBA and, therefore, whether or not those protections were adequate is irrelevant (App. at A27, A30, A32 (¶¶ 48, 64, 66, 81)). In other words, as argued at length in the Appellant's Brief, the relevant allegations — which must be construed liberally and accepted as true — are that the CBA was not followed, and plaintiff thereby was deprived of her due-process protections (Appllt. Br. at 38-40). Turning to the second argument, it easily is dismissed because the reality is that this is not a proceeding under Article 75, as there is no such claim in the amended complaint and this action was not brought under that Article (*see* App. at A20-A42).

Lastly, with respect to the third argument, res judicata does not apply to the arbitrator's award because the issue of whether or not the CBA was followed obviously was not presented to the arbitrator (*see* R. at 99-127). Instead, the arbitrator only determined the veracity of the charges against plaintiff and whether those charges warranted the termination of her employment (*see id.*). The arbitrator neither analyzed the sufficiency of the procedural protections that plaintiff had or did not have, nor did he analyze whether the CBA was followed in any way whatsoever (*see id.*). Therefore, when construing the allegations liberally, when assuming them to be true, and when affording plaintiff all reasonable inferences, she clearly has alleged that she was deprived of the protections in the CBA — including specifying the ways in which she was deprived.

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CONCLUSION

Therefore, for the foregoing reasons and those discussed at length in the Appellant's Brief, plaintiff respectfully requests that this Court: (1) reverse the dismissal of the first, second, and fourth causes of action; (2) remit the matter to the trial court on either the original complaint or the amended complaint; and (3) grant plaintiff such other and further relief that this Court deems just and proper.

Dated: March 12, 2019
Saratoga Springs, New York

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