To be Argued by:
CATHERINE CREIGHTON, ESQ.
(Time Requested: 15 minutes)

Appellate Division Docket No. CA 17-00249
Erie County Index No. 801776/2015

Court of Appeals

of the

State of New York

Docket No.
APL-2018-00074

ANN VANYO,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

(APPEAL NO. 2)

BRIEF FOR DEFENDANT-RESPONDENT BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.

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Corporate Disclosure Statement

Pursuant to Rule 500.1(c)

The Buffalo Police Benevolent Association, Inc. is certified labor organization representing Police Officers employed by the City of Buffalo. It has no parents, subsidiaries or affiliates.

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QUESTIONS PRESENTED

1. Whether Plaintiff's first and second causes of action were timely interposed when the Plaintiff never served the complaint that introduced those claims?

The trial court and majority at the Appellate Division answered "No."

2. Whether Defendants consented to personal jurisdiction when they moved to dismiss the action immediately upon being served with a complaint?

The trial court and the majority at the Appellate Division answered "No."

3. Whether Plaintiff properly amended the original complaint when she failed to serve the original complaint on Defendants and Plaintiff allowed approximately four additional months to pass?

The trial court and the majority at the Appellate Division answered "No."

4. Whether Plaintiff stated a cause of action for deprivation of due process or violation of Defendant PBA's duty of fair representation?

The trial court and Appellate Division answered "No."

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Before reviewing the relevant facts and long procedural history surrounding this appeal, the PBA must make two preliminary points. First, since filing the original and amended complaints, Plaintiff-Appellant Ann Vanyo has made allegations with no evidentiary support, and indeed many have no basis in reality. Most of the allegations against the PBA have been obvious mischaracterization or untruth. However, as discussed below, since even the unfounded allegations fail to state a valid claim against the PBA, this discussion refers only to the allegations Vanyo has made before the courts.

Second, contrary to Vanyo's point in her brief to this Court, the attorneys for Defendant-Responded Buffalo PBA have represented the Union throughout the relevant period. (*See* Brief for Plaintiff-Appellant Ann Vanyo, p. 40 n. 11). In representing the PBA during this time, Catherine Creighton of Creighton, Johnsen & Giroux did indeed have personal knowledge of much of the complained-of behavior by the PBA and interactions between the PBA and Vanyo. As such, the representations of Ms. Creighton in opposing Vanyo's action before the trial court should have at least equal weight to the self-serving allegations made in the amended complaint.

The Buffalo Police Benevolent Association ("PBA") is the exclusive bargaining representative for sworn police officers employed within the City of

Buffalo Police Department with the civil service job classifications of police officer, detective, detective sergeant, police lieutenant, police captain and police inspector. (App. at A20). The City and the PBA have been parties to a series of collective bargaining agreements for decades. (*Id.* at A21).

During the time Ann Vanyo was an employee of the Buffalo Police Department ("BPD" or "Department"), the City of Buffalo ("City") disciplined her on a number of occasions, and the PBA consistently filed multiple grievances challenging those disciplinary actions. The City suspended Vanyo on October 15, 2012. (*Id*. at A22). The PBA filed a grievance on her behalf, challenging the discipline. *Id*. After rescinding the suspension, the City placed her in a light-duty assignment. The PBA objected to the assignment, filed a grievance challenging it, arbitrated the grievance, and won the arbitration. (*Id*. at A23). In 2013, Vanyo was suspended again, and the PBA again challenged the decision and diligently moved the matter to arbitration. *Id*. The PBA prevailed on Vanyo's behalf yet again, and an arbitration award, dated December 16, 2013, was issued in her favor. *Id*.

Thereafter, on January 14, 2014, the City suspended Officer Vanyo again. *Id*. As a result of the suspension, the PBA moved in State Supreme Court to confirm the December 16, 2013 arbitration award. (*Id*. at A24). The City opposed the petition, taking the position that the arbitration award permitted it to re-suspend Officer Vanyo, assuming it complied with the terms of the collective bargaining agreement

("CBA") between the PBA and the City. *Id*. The PBA and City resolved its dispute over application of the December 2013 arbitration award by agreeing the City would pay Vanyo $6,000 for lost overtime opportunities. *See id*. Throughout this time, except for a two-week period, then-Officer Vanyo received her full pay.

Soon after this, for reasons unrelated to Vanyo, the PBA and City negotiated a Memorandum of Agreement, effective May 5, 2014, which partially amended the CBA, so as to set out clearly the due process requirements for disciplining any PBA member going forward.[1] (*Id*. at A25). As in any public-sector union-employer relationship, the PBA and City are the parties to any such arbitration, with the PBA representing the grievant's interests by challenging the City's attempt to impose discipline. Upon Vanyo's request, the PBA bargained with the City and they agreed that her seven (7) outstanding discipline cases would be the first to go through the discipline triage process, in order for her standing with the BPD to be resolved sooner. (*See id*. at A26). Pursuant to the MOA, on June 17, 2014 the PBA and the City engaged in triage arbitration of six disciplinary charges pending against Officer Vanyo. (*See id*. at A27).

[1] Plaintiff's amended complaint included a copy of the parties' 2014 Memorandum of Agreement regarding the discipline triage process, marked as Exhibit C. *See* R. at 59 ¶39; App. at A25 ¶39. However, the exhibits attached to the amended complaint, including Exhibit C, were not included in the record on appeal before the Appellate Division or this Court.

After hearing the evidence and arguments, Labor Arbitrator Jeffrey M. Selchick issued six arbitration awards, dated June 27, 2014. (*Id.* at A27-A28). The basic substance of those decisions is summarized in Vanyo's complaint. *See*, *e.g.*, (*id*. at A27-28). The arbitrator dismissed one case, and applied an increasingly-severe series of penalties in the remaining cases, including suspending Vanyo.[2] *Id.*

In the seventh case, case number 2012-316, the City requested termination as the penalty. Therefore, the PBA exercised its authority to hold a full arbitration hearing before arbitrator Selchick, and the hearing was held on July 23, 2014. (*See id*. at A30). At the hearing, the PBA presented an opening statement, documentary evidence, and witnesses to the Arbitrator. (R. at 94; 113-17 (summarizing the PBA's arguments before the Arbitrator)). The PBA and City filed post-hearing briefs on September 17, 2014, making extensive arguments regarding the evidence received and their legal significance. *See id*. Arbitrator Selchick issued an Opinion and Award dated October 14, 2015. (R. 93 *et seq.*). He found Vanyo guilty of the charges the City preferred against her in case number 2012-316, and he found that discharge was the appropriate penalty. (R. 127). To summarize, those charges were that after learning her boyfriend had been unfaithful, Vanyo went to the workplace

[2] Contrary to Plaintiff's assertions in her brief before this Court, the PBA did indeed present Arbitrator Selchick with evidence her criminal charges in case number 2012-307, had been dismissed. However, the Arbitrator still found Vanyo guilty of the Departmental disciplinary charges, noting that there is a different standard of proof used in arbitration, compared with a criminal case. *See* App. at A28.

and home of the woman with whom her boyfriend had cheated, made threats, made the woman fearful for her safety, and told the woman she would ruin her career prospects, all while on duty, in uniform, using a BPD patrol car, and armed with a service weapon. (*See* R. 96-98).

In a lengthy written decision, the Arbitrator was thorough in his review of the evidence and the reasons for his findings, summarizing the rationale behind his decision:

> Respondent [Ann Vanyo] allowed her personal emotions to guide her conduct and she abandoned any pretense of pursuing her professional responsibilities. Respondent forgot her duty, went outside of her role as a Police Officer and spent her time and effort responding to and allowing her emotions over her romantic life to control her course of action. That is simply not acceptable conduct for a Police Officer. . . . Respondent has demonstrated time and time again her inability to comport herself with the high standard of behavior the City can reasonably demand of its Police Officers. The City cannot, and should not, await further poor judgment or actions on Respondent's part before taking decisive action to remove her from her position as Police Officer.

(R. 124-27). For those reasons, Arbitrator Selchick found termination of Vanyo's employment was the appropriate penalty, and she was terminated effective October 16, 2014. (*Id.* at 127; App. at A31).

More than seven (7) months later, Vanyo filed a summons and complaint on May 21, 2015, alleging that the City breached the CBA, and alleging that the PBA failed in its duty to represent her. App. at A20 *et seq.* Months later, it was revealed

that Appellant had filed a Summons and Complaint in February 2015, but had failed to serve it on either Defendant-Respondent.

On December 2, 2015, the parties appeared before the Supreme Court, County of Erie, before Justice Catherine Nugent Panepinto and presented oral arguments. By Order Granted on January 20, 2016 and dated February 5, 2016, the Court granted Defendant-Appellant PBA's Motion to Dismiss in all respects and denied Plaintiff-Appellant's Complaint with prejudice. (App. at A15 *et seq*.).

When Vanyo appealed, the Appellate Division majority affirmed the trial court. (*Id*. at A5-A15). The majority held the trial court did not abuse its discretion in denying Vanyo's request for an extension of time to serve the original complaint, and that the first and second causes of action were properly dismissed as untimely. (*Id*. at A6). The majority also held the claims in the amended complaint did not relate back to the original complaint because the original complaint was never served, and thus failed to put defendants on notice of its contents. (*Id.* at A7). It went on to hold defendants did not waive their right to object to Vanyo's failure to serve on time because they immediately objected upon receiving the amended complaint. (*Id*. at A8). Two justice at the Appellate Division dissented, finding defendants were on notice of the existence of the original, unserved complaint, that defendants failed to make a second motion to dismiss under CPLR §306-b, and that Vanyo essentially had unlimited time to amend. (*Id.* at A9-A11).

ARGUMENT AND ANALYSIS

The trial court's decision should be affirmed, and all Vanyo's causes of action should be dismissed in their entirety. Vanyo's position on the procedural points attempts to distract from the simple fact that she failed to file a complaint anywhere close to the statutory deadline. This discussion attempts to address the arguments raised by Vanyo and the Appellate Division's dissent in the order in which they arose. However, since the arguments interlock and rely upon each other, the points presented here do the same.

Because it was not timely served, and indeed was never served, the complaint was properly dismissed and Vanyo's request for more time to serve was properly denied. For the same reason, the PBA never consented to personal jurisdiction in the case, since it moved to dismiss the amended complaint upon receiving it, and argued to dismiss it as untimely through many rounds of papers after it learned of the existence of the original complaint. The claims in Vanyo's amended complaint also did not relate back to those in the original, since the original was never served and thus never put defendants on notice of its contents. Vanyo's position regarding her right to amend the complaint months after failing to serve it is outrageous; she attempts to receive all the perceived benefits of the February and May 2015 complaint with none of the responsibilities attached to those filings. That argument must be rejected as fundamentally contrary to the clear purposes of the CPLR.

Finally, Vanyo's action against the PBA fails in substance as well. The allegations she raises regarding the PBA's conduct amount to either a mere disagreement with its strategic decisions over the years-long story of the Union attempting to defend her, or an entirely undeserved accusation of negligence. Such allegations, even if they were true, do not state a valid claim against a labor union.

I. VANYO FAILED TO TIMELY SERVE A COMPLAINT AND HAD NO GROUNDS FOR AN EXTENSION TO SERVE, AND THE COMPLAINT WAS PROPERLY DISMISSED.

Vanyo's arguments throughout this lengthy process, as well as the number and complexity of procedural strata, obscure the simple but critical facts. The first of these is that she never served the original complaint. Another is that she did not serve the amended complaint within the clear requirements for a complaint alleging a union's violation of its duty of fair representation ("DFR"). When Vanyo was forced to confront this clear timeline, she belatedly requested an extension to serve the original complaint, and the Supreme Court properly denied the request.

Plaintiff filed the original complaint on February 10, 2015. (App. at A5). She never served either the PBA or the City with the summons or complaint. *Id*. Of course, neither Defendant knew about the complaint's existence for the next three months. Later, on May 21, 2015, Vanyo filed a summons and complaint she called "amended," despite never serving an original complaint. *Id*. This so-called amended complaint was served on the PBA on May 26, 2015. *Id*.

The bedrock of Vanyo's suit is that the PBA violated its duty of fair representation towards her. The latest possible time for the claim to have started to run was when she was terminated on October 16, 2015. *See id.* CPLR section 217 sets a statute of limitations for a DFR claim of four (4) months. The limitations period for the claim, then, ended February 16, 2016. *Id*.

CPLR section 306-b provides an additional fifteen (15) days for service of a claim that has a limitations period of four months, including a DFR claim, following the day the limitations period expires. The last possible date for service of Vanyo's complaint, then, was March 2, 2016. NY CPLR §306-b. It is undisputed Vanyo failed to serve the original complaint on or before this date. In fact, she never served the original complaint.

Vanyo hopes to dodge the significance of this fact by arguing for an expanded view of the CPLR's treatment of service and time limits. Plaintiff's highlighting of the fact that CPLR §203 was amended in 1992 to adopt the "commencement by filing" model misses the clear fact that the CPLR still requires timely service of a complaint. For example, as Vanyo notes later in her argument, the CPLR allows for dismissal based on service under sections 3211 or 306-b.

CPLR §306-b allows for dismissal of a complaint when a plaintiff fails to serve it even after the additional time for service the statute provides. As the statute says, the court may decide whether the plaintiff requesting an extension for time to

serve has shown doing so would be for good cause or in the interest of justice. NY CPLR §306-b. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001).

To show "good cause," a plaintiff must make a threshold showing that she made reasonably diligent attempts to serve on time. *Id*. at 104. The small number of cases where courts granted a request for an extension show the limited grounds for such a decision. A party who had a legitimate problem finding the defendant's address, or a court's own error in dictating a valid method of service were grounds for an extension. *See Greco v. Renegades, Inc.*, 307 A.D.2d 711 (4th Dep't 2003); *Stephens v. New York State Executive Board of Parole Appeals*, 297 A.D.408 (3d Dep't 2002). The Second Department of the Appellate Division summarized the limited grounds by saying an extension was most likely to be granted when a plaintiff's failure to serve "is a result of circumstances beyond the plaintiff's control." *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26, 32 (2d Dep't 2009). Courts have been clear that failure to attempt to serve a defendant within the extra time provided by CPLR §306-b means an extension will not be granted for good cause. *Valentin v. Zaltsman*, 39 A.D.3d 852 (2d Dep't 2007); *Kazimierski v. New York University*, 18 A.D.3d 820, 820 (2d Dep't 2005).

Here, it is undisputed that Vanyo failed to make any attempt to serve the PBA within the limitations period or the additional time allowed under CPLR §306-b.

There can thus be no doubt that she fails to show "good cause," and the Supreme Court properly denied the request.

In order to show that an extension would be in the interest of justice under CPLR §306-b, a plaintiff must show the balance of several factors is in her favor: "expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105-06 (2001). A court may also consider other relevant factors' significance. *Id*. at 106. The majority of the cases where courts have granted an extension involved relatively short time periods of about a month or less between the expiration of the time for service and a plaintiff's request; longer delays usually led to courts denying the request. *See, e.g., Hine v. Bambara*, 66 A.D.3d 1192 (3d Dep't 2009); *Johnson v. Concourse Village, Inc.*, 69 A.D.2d 410 (1st Dep't 2010).

The considerations applicable to Vanyo's failure to serve the PBA cannot conceivably weigh in her favor. The last day she had a right to serve the original complaint was March 2, 2016. She never did serve it, and instead served the amended complaint on the PBA on May 26, 2016 – eighty-five (85) days after the last allowable day for service. (*See* App. at A-5; NY CPLR §306-b). As discussed *infra*, Section V, Vanyo's allegations categorically fail to state a claim against the Union; the PBA's resources and time were devoted to Vanyo on a massive scale,

allowances were made for her at many turns, and the Union advocated for her with maximum effort and diligence. Such a weighing of factors could also include appraisal of Vanyo's argument that Defendants should have been on notice of the original complaint because of the handwritten note that the second complaint was amended and its document number on the electronic filing system. As discussed in more detail *infra*, Section II, this factor cannot weigh heavily in Plaintiff's favor because it wrongly attempts to move the burden of notice from her shoulders to those of the case's defendants. The fair and reasonable way of putting a party on notice that it is being sued is service of a complaint, as established in the CPLR and New York State's court system. Since Vanyo failed to do this, it was not the responsibility of the PBA to engage in detective work before responding to the complaint.

Relatedly, the fact that the PBA and City did not file a separate motion to dismiss the complaint under CPLR §306-b should not undermine the Supreme Court's dismissal. First, both Defendants acted reasonably and in good faith in treating the complaint that was served on them as the start of Vanyo's lawsuit. Since Plaintiff failed to serve the complaint filed in February 2016, the PBA had no valid reason to treat the complaint it received in late May 2016 as anything but the case's first filing. It was not on notice of the original complaint until its existence was revealed later in litigation. Accordingly, once it learned of the original complaint and the fact that it was not served, both defendants argued the original complaint

should be dismissed under CPLR §306-b. The trial court was fully justified in doing so. The reasonableness of Defendants' treatment of Vanyo's failure to serve the original complaint is discussed *infra*, Section II.

Second, the authority upon which Vanyo relies in arguing the Supreme Court dismiss the complaint under CPLR §306-b is not on point. Plaintiff's brief cites three cases and a treatise section, none of which state, even implicitly, section 306-b's use of "upon motion" means a defendant must make a separate motion to dismiss a complaint under the statute. *See* Brief for Plaintiff-Appellant Ann Vanyo at 29.

In *Komanicky v. Contractor*, the Appellate Division held the plaintiff's failure to serve the defendants was grounds for dismissal under CPLR §306-b, and plaintiff did not show ground for an extension for service. *Komanicky v. Contractor*, 146 A.D.3d 1042, 1044 (3d Dep't 2017). The court in *Matter of Ontario Sq. Realty Corp. v. LaPlant* did the same. *Matter of Ontario Sq. Realty Corp. v. LaPlant*, 100 A.D.3d 1469, 1469 (4th Dep't 2012). *Lee v. Colley Group McMontebello, LLC* had the same holding. *Lee v. Colley Group McMontebello, LLC*, 90 A.D.3d 1000 (2d Dep't 2011). The cases say nothing to the effect that a defendant must make a formal motion to dismiss under section 306-b in order for a court to hold the plaintiff failed to properly serve. Vanyo appears to acknowledge as much, stating simply that "[t]here is no valid reason why the same requirement should not likewise be required when seeking to dismiss." (Brief for Plaintiff-Appellant Ann Vanyo at 29).

Plaintiff's handling of the complaint against the PBA and City failed to put them on notice according to state law's requirements, and her conduct did not meet the criteria for the granting of an extension under CPLR §306-b to correct that flaw. For all of these reasons, the Supreme Court was correct in refusing Vanyo's request for yet more time to serve the complaint.

II. THE PBA DID NOT CONSENT TO PERSONAL JURISDICTION.

The PBA cannot fairly be said to have consented to personal jurisdiction in Vanyo's suit, and the complaint was thus properly dismissed for untimeliness. The question before the Court is whether the PBA properly requested the original complaint be dismissed by doing so when it learned of the original complaint rather than in its first motion to dismiss, and thus whether the Supreme Court had authority to dismiss the case for lack of personal jurisdiction. This makes the essential question whether the PBA acted reasonably in treating the amended complaint – the first document it was served – as the commencement of the case.

As the Union has made clear throughout, it treated the complaint served on it in May 2015 as the commencement of the lawsuit. When it learned Vanyo had filed an earlier version of the complaint but not served it on the Defendants, the PBA promptly argued in its responding papers that the amended complaint should be dismissed under CPLR §306-b for lack of service. The City did the same. The PBA and City only learned Vanyo had filed a petition in February 2015 when her

responsive papers made reference to it and argued the amended complaint should relate back to the February one. As soon as Vanyo raised this, the PBA filed further responding papers arguing the May complaint's claims did not relate back, and that Vanyo's failure to serve the earlier one meant it should be dismissed under CPLR §306-b. Indeed, it was not until the PBA requested dismissal under section 306-b and drew Vanyo's attention to that statute that she, in turn, requested an extension under it. *See* R. at 14, lines 9-13. Given that the May complaint was filed months after the limitations period's and grace period's expirations, Vanyo's request for an extension was never, as she has claimed, "defensive." (*See* NY CPLR §306-b; Brief for Appellant-Plaintiff Ann Vanyo at 13; R. at 1, lines 16-24).

None of the parties' responding papers were included in the record that was submitted to the Appellate Division, with the exception of an affirmation by Vanyo's attorney dated September 9, 2015. However, Vanyo does not dispute that the PBA requested the Supreme Court dismiss the action in its papers, once it learned of the existence of the February complaint. (*See* Brief for Plaintiff-Appellant Ann Vanyo at 24, 29; R. at 12 (transcript of counsel for Vanyo acknowledging PBA's argument regarding CPLR § 306-b)). Furthermore, the Supreme Court's two Orders and Judgements of the case note the PBA filed Reply papers and several sets of sur-reply papers, in response to various supplemental papers by Plaintiff. (*See* App. at A-16, A-18).

This sequence is worth highlighting once again because it makes clear the PBA reacted in the only reasonable way to Vanyo's failure to serve the complaint: once it was put on notice that there was a previous, unserved complaint filed months earlier, it asked the Supreme Court to dismiss the complaint for failure to serve, in addition to the other grounds upon which it had already moved for dismissal. (*See* R. at 15-16).

Plaintiff argues that the PBA and City were put on adequate notice of the February complaint's existence by way of the amended complaint's docket number, and the fact that the May complaint was filed with the word "amended" handwritten above the typed document designation. (Brief for Appellant-Plaintiff Ann Vanyo at 27-28). She even makes the ludicrous suggestion that the Defendants could have viewed the February complaint through NYSCEF before they were served with anything, implying it was their fault they failed to divine the complaint's existence. (*Id*. at 28, n. 10). Vanyo accuses the PBA and City of deliberately ignoring these hints to serve their purposes. (*Id*. at 27).

This is a desperate attempt to deflect responsibility for Vanyo's utter failure to put the PBA on notice that she was suing the Union on time, and it cannot be successful before this Court. Neither the CPLR, nor decades of case law applying it, nor the 1992 amendment to section 306-b say a party may notify a defendant she is suing it through obscure clues, nor do they make service of a complaint optional

or discretionary in timing. CPLR §3211(a)(8) allows for dismissal of a complaint when a plaintiff does not serve the defendant with it. CPLR §306-b allows for dismissal of a complaint when a plaintiff does not serve the defendant with it within the extended timeframe the statute provides. A plaintiff must request that a court make such a dismissal as soon as it has reason to know of the defect in service, and that is exactly what the PBA did. This occurred in responsive papers because the PBA did not know of the original complaint at the time it moved to dismiss the amended complaint.

For these reasons, the PBA did not passively consent to personal jurisdiction. Rather, it moved to dismiss Vanyo's complaint upon several grounds. Once it had a genuine reason to know of an earlier, never-served complaint, it also asked the court to dismiss the complaint for failure to serve it. Plaintiff's complete lack of any attempt to serve the Defendants cannot now be used as her defense. The Supreme Court and Appellate Division properly concluded the complaint must be dismissed for lack of personal jurisdiction.

III. THE AMENDED COMPLAINT DID NOT RELATE BACK TO THE ORIGINAL COMPLAINT.

The Supreme Court and Appellate Division were correct in finding the claims in Vanyo's amended complaint did not relate back to the original complaint. (*See*

App. at A-7; R. at 4). It should be beyond dispute that proper notice to a defendant within the required limitations period is a critical part of the relation back doctrine.

The plain words of the CPLR provision that describes the relation back doctrine explicitly state a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, *unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading*." NY CPLR §207(f) (emphasis added). As the U.S. Supreme Court acknowledged, when it comes to applying the relation back doctrine, "[t]he linchpin is notice, and notice within the limitations period." *Schivone v. Fortune*, 477 U.S. 21, 31 (1986); *see Buran v. Coupal*, 87 NY2d 173, 180 (1995).

As the Appellate Division reasoned in rejecting the relation-back argument, Vanyo never gave the PBA or City notice of the February complaint's contents, until serving an amended version of the complaint on the parties on May 26, 2015. (App. at A-7). The PBA had no notice of Plaintiff's allegations until three months after the expiration of the limitations period and period for service. *See* NY CPLR §306-b; NY CPLR §217(2)(a).

While the relation back doctrine under CPLR §203(f) has been applied generously in allowing the addition of claims past the expiration of the statute of limitations, that generosity has been reserved for plaintiffs who properly serve a

defendant in the first place. For example, in cases where a plaintiff seeks to add a new party by arguing it is united in interest with a defendant already part of a case, this Court will allow the addition – and the attendant relation back of claims – only if the already-participating defendant was served; without service on one, neither potential defendant has any reason to know they should prepare for a lawsuit. *See Mondello v. New York Blood Center*, 80 NY2d 219 (1992); NEW YORK PRACTICE, David D. Seigel §49 (5th ed. 2011).

Vanyo argues that the Appellate Division mistakenly relied on such a case, *Buran v. Coupal*, which she attempts to distinguish as involving the requirements for adding a party to a suit. (*See* Brief for Appellant-Plaintiff Ann Vanyo at 21, n. 7; *Buran v. Coupal*, 87 NY2d 173 (1995)). However, to support the argument that the claims in the amended complaint relate back to those in the original, Plaintiff then cites a case that engages in the same analysis. (*See* Brief for Appellant-Plaintiff at 21-22). That case, *Scheff v. St. John's Episcopal Hospital*, fails to support Platiniff's position for the same reason as in *Mondello*. In *Scheff*, the party that the plaintiff attempts to add as a defendant later in the process was an employee of a defendant *who had already been properly served and who was participating in the case*. *Scheff v. St. John's Episcopal Hosp.*, 115 A.D.2d 532, 535 (2d Dep't 1985). Based on this, the Appellate Division, Second Department reasonably decided the

employee who had not been served was united in interest with the other defendant, and was thus on sufficient notice of the need to prepare for a suit. *Id*.

The same is not true here. It is undisputed that Vanyo failed to serve any defendant until months after the statute of limitations had run. There was no defendant participating in the case whose participation put another on sufficient notice of the suit. Neither the PBA nor City could have known of the suit's existence until late May of 2015. Thus, the sole authority Plaintiff cites as directly on point regarding relation back instead proves why the claims in the amended complaint cannot relate back.

Plaintiff attempts to subvert the black-letter requirement of service by arguing the Defendants were on notice because of their participation in the alleged wrongdoing against Ann Vanyo. First, this point begs the question by relying on the truth of the allegations against the PBA and City, whereas those allegations are wholly unsupported. More important, the argument fundamentally misstates the notice requirement of the relation back doctrine.

Perversely, Vanyo argues the PBA was on notice of the suit because the Union participated in the discipline arbitration process before her employment was terminated. (Brief for Ann Vanyo at 22-23). The PBA did indeed participate in the arbitration process – by *representing* Ann Vanyo and defending her vigorously against the City's many attempts to discipline her. The assertion the Union knew

one of its members would sue it after fighting on that member's behalf for two years is absurd and deserves no attention.

IV. VANYO'S AMENDMENT OF THE COMPLAINT WITHOUT LEAVE WAS NOT CONTROLLING, AND DID NOT RESCUE THE VIABILITY OF THE ORIGINAL COMPLAINT.

Plaintiff Vanyo wishes to benefit from the February 2015 filing of the original complaint by saying it made the case timely, yet avoid the attendant responsibility of serving it on anyone. To do this, she attempts to alchemically transform her failure to serve a complaint in state court – an unequivocal defect that means her complaint must be dismissed – into a benefit; she argues her failure to serve made her free to file an amended complaint three months later, then serve that one. The dissent at the Appellate Division repeated this line of reasoning. (App. at A11).

First, a point made in the Appellate Division's majority decision must be repeated. The PBA did not waive its right to object to Plaintiff's amendment of the complaint without leave because it moved to dismiss the amended complaint instead of answering it. (App. at A7-8; A45). Of course, since the PBA was never served with the original complaint, this was its first response to Vanyo's lawsuit.

The heart of Plaintiff's argument here is answered by the fact that the claims in the amended complaint did not relate back to the original complaint, as argued *supra*. However, to the extent a part of her argument remains, it can be dismissed quickly by applying common sense and basic fairness. The disagreement on this

point between Plaintiff and Defendants, as well as between the majority and dissent at the Appellate Division, comes down to a question: can a plaintiff refuse to serve a complaint, then, long after the expiration of the statute of limitations and the CPLR's window for service of the complaint, finally serve a nearly-identical complaint without the court's permission?

Plaintiff and the dissent argue CPLR §3025(a) allows a party to amend a complaint without leave if this occurs before the time for responding to the complaint expires. (Brief for Ann Vanyo at 30-33). Since the time for responding to the original complaint had not expired – and in fact would never expire, since she never served it – Vanyo was free to amend. (*Id.*; App. at A11-12).

If this position were put into effect, it would render the CPLR's service requirements moot. The time for answering the complaint had not expired only because Vanyo never served it on any party. Under the argument, Vanyo was free to file the complaint, refuse to serve it on a defendant, then file an amended complaint years later and serve that one, making the action timely. It makes Vanyo's failure to follow the CPLR's requirement of service a weapon that she can wield to extend the time for putting Defendants on notice endlessly.

The argument stretches the clear meaning of CPLR §3025 well beyond breaking. The provision allows a plaintiff to amend a complaint before a defendant has responded in turn, because doing so creates no confusion in the sequence of

litigation. Section 3025 provides no basis for extending a plaintiff's time to serve a complaint or a grace period for complying with any statute of limitations. This, nonetheless, is how Vanyo treats the provision.

The sole case upon which Plaintiff relies directly has little to do with the context facing the Court here. In *O'Keefe v. Baiette*, the Second Department held a plaintiff could amend a complaint eight days after filing an original complaint. *O'Keefe v. Baiette*, 72 A.D.3d 916, 917 (2d Dep't 2010). The case says nothing about a situation where a plaintiff attempts to amend a complaint three months later, and about as long since the statute of limitations has expired. The court there also appeared to remand the case so it could be dismissed for failure to serve the defendants. *Id*.

For these reasons, Vanyo was required to seek leave to amend the original complaint. She failed to do so. The amended complaint was thus filed improperly under the CPLR, and both Defendants moved to dismiss it. The amendment should not be allowed because Vanyo did it out of turn, and she cannot use the amendment as a way to get around her obligation to serve the original complaint.

V. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE PBA.

Even under the liberal standards that favor a plaintiff faced with a motion to dismiss, Plaintiff Vanyo has failed to allege a legitimate cause of action against the PBA. The actions on the part of the Union that she alleges amount to disagreements

over its strategic choices in representing her. Under decades-old authority concerning proper union action in such circumstances, the PBA acted well within its discretion in representing Vanyo, and indeed went far beyond the minimum standards of its duty towards a member. As such, the trial court was correct in dismissing the action for failure to state of a cause of action, and the Appellate Division was proper in affirming that conclusion.

A. Plaintiff failed to state a claim against the PBA for deprivation of her due process rights.

It continues to be unclear from the history of Vanyo's papers whether she intends or intended to bring the fourth cause of action, for depravation of due process, against the PBA in addition to her claim against the City. The amended complaint's recitation of the fourth cause of action under the Fourteenth Amendment appears to be directed at the City only, naming only the City in the caption for that cause of action. (App. at A-36-38). However, that same section also refers to allegations of PBA conduct, albeit all of them mischaracterized or invented. *Id*. Plaintiff's brief before this Court also refers to the actions of "defendants," and makes allegations specific to the Union's behavior in arguing for the survival of its cause of action for deprivation of due process. (App. at A38-A40). The Appellate Division clearly treated the cause of action as standing only against the City, and held Vanyo failed to state of cause of action. (App. at A8).

In making her due process argument before this Court, Vanyo argues the surviving due process violations arose entirely under the collective bargaining agreement between the PBA and City. (*See* Brief for Ann Vanyo, pp. 36-41). Courts have held that the procedural due process concerns raised in such a claim are addressed by means of a grievance procedure in a CBA. This Court has held that the provisions of a union contract can provide adequate due process, obviating a claim under section 1983. *See Matter of Abramovich v. Bd. of Ed. of Cent. Sch. Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 N.Y.2d 450, 454 (1979); *Dye v. New York City Tr. Auth.*, 88 A.D.2d 899, 899 (2d Dep't 1982), *aff'd* 57 NY2d 917 (1982). In particular, a grievance procedure addresses due process concerns. *See Matter of Barrera v. Frontier Cent. School Dist.*, 249 A.D.2d 927, 927-28 (1998); *Hall v. Town of Henderson*, 17 A.D.3d 981, 982 (4th Dept 2005); *Mermer v. Constantine*, 131 A.D.2d 28, 29-30 (3d Dep't 1987).

There can be no question that Vanyo availed herself of the procedural due process rights found in the parties' CBA. Even according to her own allegations, the PBA challenged all the instances of discipline the City took against her by filing respective grievances, and each of those went through the contract's grievance procedure and to the final step of arbitration. (*See* App. at A38-A40). The Labor Arbitrator the parties selected to hear all discipline cases ultimately decided then-

Officer Vanyo should be terminated from her employment in his arbitration decision. (*See* R. at 93 *et seq.*).

In representing Vanyo regarding all seven grievances, the PBA and its attorneys made oral arguments to the arbitrator, presented exhibits, examined witnesses, cross examined the City's witnesses, and submitted a lengthy post-hearing brief to the Arbitrator. The process in which Vanyo was able to participate was the result of decades of bargaining between the PBA and City, and continues to be the way the PBA challenges discipline imposed by the City, on behalf of its members.

The remaining aspects of Vanyo's due process allegations against PBA, if she brings the cause of action against the Union, are discussed below, since the allegations she makes about the PBA are the same with respect to the first and fourth causes of action.

B. Plaintiff failed to state a claim against the PBA for violation of its duty of fair representation.

In addition to the points above, the allegations Vanyo makes regarding the PBA's conduct are simply a restatement of the allegations she made in alleging the PBA violated its duty of fair representation. Because of this, she fails to state a claim against the PBA regarding both the first and fourth causes of action – DFR and deprivation of due process – for overlapping reasons.

Legal analysis of public-sector unions' duty of fair representation comes primarily from the New York Public Employment Relations Board ("PERB"), the agency responsible for interpreting and applying the standard found in the Civil Service Law. *See* NY Civil Service Law §207-a(2). However, this Court has made clear that the foundational private-sector case law regarding the duty of fair representation, crystalized in the U.S. Supreme Court case of *Vaca v. Sipes*, applies to public-sector unions in New York. *See Baker v. Bd. of Educ. Of the W. Irondequoit Cent. Sch. Dist.*, 70 N.Y.2d 314 (1987), 20 PERB ¶ 7512; *Vaca v. Sipes*, 386 U.S. 171 (1967). Under this authority, a union violates its duty of fair representation when it acts in a way that is "arbitrary, discriminatory, or in bad faith," when representing a member. *Vaca*, *supra*, at 190.

As a threshold matter, Vanyo's allegations regarding the PBA's alleged wrongdoing fails because she did not allege in the complaint – or, in this case, the amended complaint – that the PBA's conduct was ratified by all the Union's members. In the recent case of *Palladino v. CNY Centro, Inc.*, this Court held that a plaintiff's DFR claim must allege that a union's conduct was ratified by "every single member" of the organization, as a voluntary unincorporated association, in order to state a valid cause of action. *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140 (2014) (citing *Martin v. Curran*, 303 N.Y. 276 (1951)); *see Lahendro v. N.Y. State United Teachers*, 88 A.D.3d 1142 (3d Dep't 2011). Vanyo failed to make any such

allegation, and her DFR claim against the PBA thus fails as a matter of law. *See* App. at A-20 *et seq*.

Every one of Vanyo's DFR-related allegations fails to state a claim. The body of authority on the standard is very deferential to a union's strategic and pragmatic decision making role, as long as its strategy and decisions are not arbitrary, discriminatory, or made in bad faith. In representing a union member, a union is not even required to file a grievance over alleged wrongdoing by the employer, nor to explain to a member why it decided so. *See United Fed'n of Teachers (Lattimore)*, 38 PERB ¶ 4551 (2005). A union's error in judgment in making decisions about employee representation does not violate its duty of fair representation, as long as there is no evidence it was improperly motivated. *Transp. Workers' Union (Perry)*, 38 PERB ¶ 3014 (2005); *Elmira Teachers Ass'n, N.Y. State United Teachers & Benson*, 13 PERB ¶ 3070 (1980); *United Fed'n of Teachers, AFL-CIO*, 48 PERB ¶ 4549 (2015). A union is free to make decisions about how to handle grievances according to its own priorities, even if that results in a particular grievance being delayed for years, again, assuming such decisions are not improper in motivation. *United Federation of Teachers (Freedman)*, 34 PERB ¶ 4547 (2001). Along the same lines, a union's conduct is not a violation of the standard when it acts carelessly, ineptly, or ineffectively. *See Civil Serv. Technical Guild (Maltsev)*, 37 PERB ¶ 3021 (2004); *Pub. Emps. Fed'n (Levy)*, 33 PERB ¶ 3061 (2000).

Courts have applied the DFR standard with just as much deference to unions' decision making authority as PERB. This Court and the Appellate Division have found that a union's negligence is not sufficient to find a violation of the DFR standard. *See Smith v. Sipe*, 67 N.Y.2d 928 (1986); *CSEA, Inc. v. PERB & Diaz*, 1321 A.D.2d 430 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796 (1988). In applying this principle, the Appellate Division, Fourth Department said a plaintiff alleging a DFR violation must prove "fraud, deceitful action, or dishonest conduct or evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." *Mellon v. Benker*, 186 A.D.2d 1020, 1021 (4th Dep't 1992); *see Badman v. Civil Serv. Empls. Assn.*, 91 A.D.2d 858 (4th Dep't 1982). The court in another case summarized the heavy burden a plaintiff alleging a violation has by saying the arbitrary prong of the DFR standard is only met by showing the union's "conduct can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational." *Grassel v. PERB*, 34 PERB ¶ 7035 (Sup. Ct. Kings Co. 2001), *aff'd*, 301 A.D.2d 522 (2d Dept 2003). PERB summarized the depth of its deference to unions' judgment by following the language of the U.S. Supreme Court decision in *Air Line Pilots Ass'n Int'l v. O'Neill*, saying a union's conduct "may constitute evidence of a breach of the duty only if it can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *See State of New York (State University of New York at Buffalo) & United University*

Professions (Yoonessi), 29 PERB ¶ 3075 (1996) (citing *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991)).

While the strength of this standard makes clear Vanyo has failed to allege conduct that could violate the duty, PERB has also addressed situations directly parallel to the conduct to which Vanyo objects – the union's actions and decisions in processing and resolving the grievances over her discipline. The agency has said "a union is and must be afforded a wide range of reasonableness in making decisions associated with the processing of a grievance." *Pub. Emps. Fed'n, AFL-CIO (Reese)*, 29 PERB ¶ 3027, *aff'g* 29 PERB ¶ 4530 (1997); *see District Council 37, AFSCME*, 28 PERB ¶ 3062 (1995). Under this deference, a union has the discretion to simply not pursue a grievance, even if it had earlier decided the grievance had merit. *CSEA (Casto)*, 25 PERB 4578 (1992). A union was found to have acted within its rights by determining, for example, that a grievance lacked merit, even after the Commissioner of the public employer determined there had been a violation of the union contract. *Gordon v. Bd. of Educ.* 167 A.D.2d 509 (2d Dep't 1990).

A grievant's disagreement with the union's choices in presenting a case and making arguments to an arbitrator does not qualify as a DFR violation. *See Amalgamated Transit Union, Local 1056*, 43 PERB ¶ 3027 (2010). PERB has said that a greivant's "apparent dissatisfaction with tactical decisions made by [the union's] attorney in preparing the brief does not state a claim of a breach of the duty

of fair representation." *Id*. Allegations regarding a union's policy of processing grievances to expedited arbitration, rather than a full arbitration hearing do not state a claim for a DFR violation. *See Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO (Sinacore)*, 31 PERB ¶ 3029 (1998).

Settling a grievance without the grievant's participation is not a violation of a union's duty. *Hudson Valley Community College Faculty Association (Dansereau)*, 15 PERB ¶ 3080 (1982). This same rule exists regarding grievances over an employee's discipline; the union is free to settle or resolve them as it sees fit, without even consulting the employee subject to the discipline, and regardless of an employee's dissatisfaction with the resolution of such grievances after the fact. *Utica Teachers Ass'n (Dietz)*, 36 PERB ¶ 3019 (2003); *State of New York (State University of New York at Buffalo) & United University Professions (Yoonessi)*, 29 PERB ¶ 3075 (1996); *AFSCME, Counsel 66 and Local 2055 and Capital Dist. Off-Track Betting Corp. (Gregory)*, 26 PERB ¶ 3036 (1993). As the U.S. Supreme Court has stated in summarizing the DFR standard, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, (1953); *see Utica Teachers Ass'n (Dietz)*, 36 PERB ¶ 3019 (2003).

Under this authority, Vanyo has failed to state any claim against the PBA. Under even the most basic analysis, her allegations fail to state a DFR claim because she does not allege the PBA's actions were arbitrary, discriminatory, or in bad faith,

within the meaning of the case law. *See Vaca v. Sipes*, 386 U.S. 171 (1967). Instead, she alleges in various ways that the Union's actions and decision were negligent, making her dissatisfied with its representation of her. Such accusations do not state a claim for violation of a union's duty of fair representation. *See Civil Serv. Technical Guild (Maltsev)*, 37 PERB ¶ 3021 (2004); *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991).

Even if they could be proven true, the specific allegations Vanyo turns to in discussing her surviving claims against the defendants fail to allege conduct by a union that violates the law. The allegation that she was not informed that six of the seven grievances challenging her disciplinary charges were being submitted to triage arbitration fails to state a DFR claim. (*See* Brief for Ann Vanyo, at 39; App. at A27, A30; *Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO (Sinacore)*, 31 PERB ¶ 3029 (1998); *United Federation of Teachers (Freedman)*, 34 PERB ¶ 4547 (2001)). The related allegation that she was not sufficiently included in the settlement of those grievances also fails to state a claim under PERB's case law. (*See* Brief for Ann Vanyo, at 39; *Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO (Sinacore)*, 31 PERB ¶ 3029 (1998); *Hudson Valley Community College Faculty Association (Dansereau)*, 15 PERB ¶ 3080 (1982); *CSEA (Casto)*, 25 PERB 4578 (1992)). The same is true of her complaint that she was not sufficiently included in the decision to resolve the seventh charge in a full

arbitration. (Brief for Ann Vanyo at 39; *Amalgamated Transit Union, Local 1056*, 43 PERB ¶ 3027 (2010); *Utica Teachers Ass'n (Dietz)*, 36 PERB ¶ 3019 (2003)).

The allegations that Vanyo was "deprived of effective, competent representation" in the resolution of those six disciplinary charges at triage and the final disciplinary charge at a full hearing also fail to allege a violation of the DFR standard as a matter of law. She alleges that certain witnesses were not contacted or presented at the hearing, evidence was not sufficiently reviewed, and certain arguments were not made to Arbitrator Selchick. (Brief for Ann Vanyo, at 39; App. at A28-A31). PERB has explicitly ruled none of this conduct is sufficient to state a claim for a DFR violation. *Utica Teachers Ass'n (Dietz)*, 36 PERB ¶ 3019 (2003); *State of New York (State University of New York at Buffalo) & United University Professions (Yoonessi)*, 29 PERB ¶ 3075 (1996); *Amalgamated Transit Union, Local 1056*, 43 PERB ¶ 3027 (2010).

Her allegation that the same arbitrator should not have resolved all seven of her disciplinary charges also fails to state a claim. First, there is no authority for the proposition that such circumstances would state a claim for a violation of a union's duty of fair representation or any other claim. Second, the written agreement the PBA and City made that created the triage arbitration process, in which Vanyo was given priority in resolving her case, explicitly named Arbitrator Jeffrey Selchick as the arbitrator who would resolve all discipline cases, whether in triage or in full

hearings. Again, nothing in the law suggests such an arrangement would violate the Union's duty towards its members or should even be viewed as ill-advised.

Ultimately, Vanyo voices a litany of strategic and tactical decisions made by the PBA and its attorneys, about which she has a simple difference of opinion. Her opinion on these questions does not provide her with a cause of action against the Union. *See Amalgamated Transit Union, Local 1056*, 43 PERB ¶ 3027 (2010). The allegations she makes are often gross and deliberate mischaracterizations of the PBA's actions, or fabrications designed to state a claim that would ultimately fail for lack of evidence. However, even these attempts fail, since they cannot be considered viable claims against the PBA in any light. *Pub. Emps. Fed'n, AFL-CIO (Reese)*, 29 PERB ¶ 3027 (1997); *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991); *Vaca v. Sipes*, 386 U.S. 171 (1967). Since Plaintiff-Appellant Vanyo failed to state any valid claim against the PBA on the law, her action against the PBA should be dismissed in its entirety.

CONCLUSION

For all of these reasons, Plaintiff Ann Vanyo's action against the PBA was properly dismissed. Vanyo's complaint was never served, and the amended complaint after a period that almost doubled the statute of limitations on her claims. The PBA acted reasonably in treating the first complaint that was served on it as the commencement of the action, and challenged the legitimacy of Vanyo's claim

immediately. For the same reasons, the claims in the amended complaint did not relate back, and the amendment without leave was not proper. Even if these severe procedural defects somehow did not destroy Vanyo's ability to bring her suit, the contents of her complaint fail to state any claim against the Union. The allegations supporting the claims amount to Vanyo's displeasure at being terminated and an attempt to punish the labor organization that fought for her interests for years, for lack of any remaining recourse. The PBA respectfully requests the dismissal of Plaintiff's claims against Defendant PBA by the Supreme Court and Appellate Division be affirmed in full.

Dated: February 13, 2019

Respectfully Submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: February 13, 2019

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