To be Argued by:
DAVID M. LEE
(Time Requested: 15 Minutes)

APL-2018-00074
Appellate Division Docket No. CA 17-00249
Erie County Clerk's Index No. 801776/2015

Court of Appeals
of the
State of New York

ANN VANYO,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT CITY OF BUFFALO

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STATEMENT OF THE CASE

On October 16, 2014, the plaintiff Ann Vanyo was terminated from her employment as a Buffalo Police Officer, in accordance with an arbitration opinion and award that was issued pursuant to the grievance procedure set out in the collective bargaining agreement between defendants City of Buffalo and Buffalo Police Benevolent Association (PBA) (Appx. 31, ¶¶72-73) (AD R. 93-127).

Plaintiff commenced this action against the defendants by filing a summons and complaint (original complaint) on February 10, 2015 (AD R. 29-51). The original complaint was never served.

Plaintiff was represented by the law firm of Hogan Willig, PLLC when the original complaint was filed. However, a dispute arose between plaintiff and Hogan Willig concerning legal fees pertaining to plaintiff's prior divorce (AD R. 157, ¶4). The dispute could not be resolved and on April 10, 2015, Hogan Willig withdrew its representation of plaintiff in the present matter (AD R. 77; 158, ¶6).

On May 21, 2015, plaintiff, proceeding pro se, filed an amended complaint (Appx. 20–42). The defendants were served with the amended complaint on May 26, 2015 (AD R. 164, 165). In her amended complaint, plaintiff alleges that (1) the PBA breached its duty of fair representation towards her; (2) the

City breached the CBA in terminating her employment; (3) defendants conspired to breach the CBA and the duty of fair representation in order to terminate her; (4) the City violated her federal constitutional rights to procedural due process; and (5) the City committed gender discrimination against her (Appx. 32-40).

On June 15, 2015, defendants each moved pursuant to CPLR 3211(a) to dismiss the amended complaint as time-barred and for failure to state a cause of action (Appx. 45-48; 49-56). Plaintiff, through her new counsel, opposed these motions (AD R. 152-54). In addition, on October 8, 2015, over seven months after the service period expired, plaintiff moved pursuant to CPLR 306-b for an order extending her time to serve the original complaint (AD R. 155-60). The City opposed plaintiff's motion and asked the trial court to dismiss the original complaint pursuant to CPLR 306-b (AD R. 167-69, ¶¶12-22). The trial court denied plaintiff's 306-b motion, granted defendants' motions, and dismissed the original complaint and the amended complaint. Plaintiff appealed to the Appellate Division, Fourth Department.

By a 3-2 vote, the Appellate Division affirmed, the majority concluding that the trial court did not abuse its discretion in denying plaintiff's 306-b motion for an extension of time to serve the original complaint. The dissent agreed with this conclusion and also agreed with respect to the majority's

dismissal of plaintiff's third through fifth causes of action. However, disagreeing with the majority on a number of procedural points, the dissent would have reinstated plaintiff's first and second causes of action.

Plaintiff appealed to this Court as of right pursuant to CPLR 5601(a) based on the double dissent at the Appellate Division. Plaintiff's appeal, as limited by her brief, seeks to reverse the dismissal of her first, second, and fourth causes of action.

QUESTIONS PRESENTED

The questions presented on this appeal are (1) whether plaintiff's first and second causes of action are time-barred and (2) whether plaintiff's fourth cause of action fails to state a cause of action, and is barred by the statute of limitations and the doctrine of res judicata. For the reasons set forth below, it is respectfully submitted that the Court should answer these questions in the affirmative.

ARGUMENT

POINT I

PLAINTIFF'S FIRST AND SECOND CAUSES OF ACTION ARE TIME-BARRED.

There is no dispute that the applicable statute of limitations with respect to plaintiff's first and second causes of action is four months, which began to run on October 16, 2014

when plaintiff was terminated from her employment. See CPLR 217(2)(a), (b); Yoonessi v. State, 289 A.D.2d 998, 999 (4th Dept. 2001), *lv denied* 98 N.Y.2d 609 (2002); Obot v. New York State Dep't of Corr. Servs., 256 A.D.2d 1089, 1090 (4th Dept. 1998); see generally Bd. of Educ., Commack Union Free Sch. Dist. v. Ambach, 70 N.Y.2d 501, 508 (1987). Therefore, the statute of limitations expired on February 16, 2015. Because the applicable statute of limitations is four months, plaintiff was required to effect service of the original complaint within 15 days after expiration of the statute of limitations, i.e., on or before March 3, 2015. See CPLR 306-b.

A. The original complaint.

Plaintiff timely filed the original complaint but she never served it, in violation of CPLR 306-b. Both the majority and the dissent at the Appellate Division agreed that the trial court did not abuse its discretion in denying plaintiff's motion for an extension of time to serve the original complaint.

Late service is permissible under CPLR 306-b only "upon good cause shown or in the interest of justice." The good cause standard requires plaintiff to demonstrate "reasonably diligent efforts at service" in order to be granted an extension of time for service. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105 (2001). Under the broader interest of justice alternative, courts may consider all relevant factors, including

the lack of reasonable diligence in effecting service, the expiration of the statute of limitations, whether plaintiff has a meritorious cause of action, the length of delay in service, the promptness of plaintiff's request for the extension of time, and prejudice to the defendant. See Id. at 105-06. Notably, law office failure generally does not constitute good cause. And the interest of justice standard will accommodate law office failure only where the default in service was due to mistake, confusion or oversight, none of which are revealed in this record. Id. at 104-05. When Hogan Willig withdrew on April 10, 2015, the time within which to serve the original complaint, insofar as plaintiff's first and second causes of action were concerned, had already expired as of March 3, 2015. Thus, in this regard, plaintiff's pro se status is irrelevant to the determination of whether an extension of time to serve was warranted under CPLR 306-b.

Leader involved consolidated appeals in three cases. In one of the cases, Hafkin v. North Shore Univ. Hosp., the lower court denied plaintiffs' request for an extension of time to serve, where, as here, although the statute of limitations had expired, plaintiffs had no explanation for their failure to serve the defendant or any excuse for their nearly eight month delay in making the motion for an extension. The Court discerned no abuse of discretion in Hafkin, and nor should it here.

Plaintiff does not argue in her brief that the lower court abused its discretion in denying her 306-b motion. Instead, plaintiff argues that under the commencement-by-filing system, her first and second causes of action were timely interposed within the four-month limitations period. True enough, but it does not matter. When faced with a 306-b motion, the language of the statute gives the court two options: the court can either dismiss the action without prejudice, or extend the time for service in the existing action. However, as explained in Henneberry v. Borstein, 91 A.D.3d 493, 495 (1st Dept. 2012), a dismissal "without prejudice" is impossible where, as here, the statute of limitations has expired by the time the court decides the motion. This is because a dismissal for failure to effect service is jurisdictional, and the six-month recommencement privilege of CPLR 205(a) is inapplicable where an action has been dismissed for lack of personal jurisdiction. See Vincent C. Alexander, 2012 Supp. Practice Commentaries, CPLR C306-b:3.

In Henneberry, after the statute of limitations expired, the trial court (1) dismissed plaintiff's timely filed action for lack of personal jurisdiction based on improper service, without prejudice to the filing of a new action, and (2) granted plaintiff an extension of time to effect service pursuant to CPLR 306-b. 91 A.D.3d at 495. For the reasons stated

in the preceding paragraph, the court found that this ruling was not feasible, held that the lower court should have limited its ruling to granting plaintiff an extension of time to effect service, and modified the lower court's order accordingly. Id. Thus, the court's decision in Henneberry turned on the merits of plaintiff's motion for an extension. That is, the court found that plaintiff deserved extra time because, unlike here, the plaintiff made a diligent, albeit defective, attempt to serve defendants within the relevant time period. Id. at 496.

Finally, although relief pursuant to CPLR 306-b requires a motion, the plaintiff here did in fact make a motion pursuant to that section. The defendants moved to dismiss the amended complaint under CPLR 3211(a). In its opposition to plaintiff's motion, the City also asked the court to dismiss the original complaint pursuant to CPLR 306-b, thereby objecting to personal jurisdiction based on plaintiff's failure to serve process. Plaintiff recognizes in her brief that an objection to the timeliness of service under 306-b is jurisdictional in nature (Pl. Brief at 33). Put simply, all of the substantive issues discussed above were before the lower courts and decided on the merits. The dissent's view – that the lower court erred in dismissing the original complaint without a 306-b motion by defendants – unnecessarily places form over substance, in contravention of the CPLR and this Court's precedent. See CPLR

104 (“The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding”); CPLR 2001 (at any stage of an action, the court may disregard mistakes and irregularities that do not affect the substantial right of a party); Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., 67 N.Y.2d 138, 142 (1986) (defendant’s specification of only CPLR 5015 did not preclude court from treating defendant’s motion as having been also made pursuant to CPLR 317, as a basis for vacating a default judgment).

In sum, while plaintiff timely interposed her first and second causes of action in the original complaint, the original complaint was properly dismissed because the supreme court did not abuse its discretion under CPLR 306-b in denying plaintiff’s motion for an extension of time to serve it.

B. The amended complaint.

The Appellate Division properly dismissed plaintiff’s amended complaint as well. There is no dispute that plaintiff’s amended complaint was filed without leave of court or stipulation of the parties. Although a party is permitted to amend its pleading once without leave of court, an amendment as of course must be done within one of the three time periods specified in CPLR 3025(a). The stated time periods are (1) within 20 days after its service, (2) any time before the period

for responding to it expires or (3) within 20 days after service of a responsive pleading. There are multiple ways a defendant can appear in an action. Importantly, however, the defendant's obligation to appear does not arise until service is completed. See CPLR 320(a) ("An appearance shall be made within twenty days after service of the summons . . ."); Rosato v. Ricciardi, 174 A.D.2d 937 (3rd Dept. 1991) (vacating default judgment against defendants because service was not complete and therefore no duty to appear arose). Here, the timeframes stated in CPLR 3025(a) are inapplicable because the triggering event to set the timeframes in motion never occurred. For instance, it would make no sense to say that the statute of limitations "expired" before the plaintiff even has a claim. A claim must accrue before it can "expire." Similarly, it would not make sense to allow plaintiff to utilize the CPLR 3025(a) timeframes before they even begin. Because none of the time periods that permit amendment without leave apply here, plaintiff's amended complaint should be treated as a legal nullity. See Khedouri v. Equinox, 73 A.D.3d 532, 533 (1st Dept. 2010) (plaintiff's amended complaint was a "nullity" pursuant to CPLR 3025(a) where it was made without leave of court and beyond the time allowed as of right).

If the Court does not treat the amended complaint as a legal nullity, plaintiff's first and second causes of action in

the amended complaint are untimely because they do not relate back to the original complaint. For the relation-back doctrine to apply, the original timely filed complaint must give notice of the occurrences to be proved in the amended complaint. See CPLR 203(f); Buran v. Coupal, 87 N.Y.2d 173, 180 (1995) ("the 'linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period"), citing Schiavone v. Fortune, 477 U.S. 21, 31 (1986). Here, the original complaint was never served on the defendants. As such, it did not give defendants notice of the occurrences sought to be proved in the amended complaint. The original complaint did not give defendants notice of anything.

The dissent states that the majority's reliance on Buran is misplaced because that case involved an attempt to add a new party, not a new claim. It is true that the relation-back standard for adding new parties in stricter than that for adding new claims. This is so because a new defendant is a complete stranger to the action, as opposed to a defendant who is fully aware that a claim is being made against him or her with respect to the occurrences involved in the suit. See Duffy v. Horton Mem'l Hosp., 66 N.Y.2d 473, 477 (1985) ("if the new defendant has been a complete stranger to the suit up to the point of the requested amendment, the bar of the Statute of Limitations must be applied"). Here, the defendants were not participants in this

litigation up to the point of the amended complaint. They were complete strangers. For all intents and purposes, the defendants were new parties in the amended complaint since they were never served with the original complaint. Moreover, the statute for adding a new claim ***itself*** proclaims that notice is the key element. See CPLR 203(f) (a new claim will relate back only if the original complaint gave the defendant notice of the occurrences forming the basis of the new claim).

Finally, defendants did not waive any objection to the propriety of the amended complaint. They specifically challenged the amended complaint in pre-answer motions to dismiss. To the extent that defendants did not advance certain contentions in the lower courts, new contentions may be raised for the first time in this Court unless they "could have been obviated or cured by factual showings or legal countersteps." Telaro v. Telaro, 25 N.Y.2d 433, 439 (1969) ("No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court"). Here, defendants' contentions raise questions of law appearing on the face of the record. The issues could not have been avoided or cured by plaintiff in the courts below. In fact, plaintiff has fully addressed these issues in her appellant's brief. They should be available in this Court.

For the reasons stated above, the Appellate Division properly affirmed the trial court's dismissal of the original complaint and amended complaint.

POINT II

PLAINTIFF'S FOURTH CAUSE OF ACTION FAILS TO STATE A CAUSE OF ACTION AND IS BARRED BY THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF RES JUDICATA.

If the Court does not dismiss plaintiff's complaints in their entirety, plaintiff's fourth cause of action should be dismissed for failure to state a cause of action. Plaintiff alleges that the City violated her procedural due process rights guaranteed by the U.S. Constitution, based on allegations pertaining to certain acts and omissions of the ***PBA*** (Appx. 37, ¶111). In any event, even affording plaintiff's complaints a liberal construction, an employee's procedural due process rights are satisfied through grievance procedures provided for in a CBA, as a matter of law. See Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 197-98 (1979); Adams v. Suozzi, 517 F.3d 124, 128 (2d Cir. 2008) (collecting cases); Mermer v. Constantine, 131 A.D.2d 28, 29-30 (3rd Dept. 1987). Plaintiff's reliance on McMahon is misplaced because the village there did not allow a firefighter to challenge the denial of benefits to him thorough a CBA. See McMahon v. Bd. of Trustees of Vill. of Pelham Manor, 1 A.D.3d 363 (2nd Dept. 2003). In other words, in

McMahon, unlike here, the employee was left with no means of redress under the CBA. The amended complaint makes plain that plaintiff has been heard in every instance where she was brought up on disciplinary charges by the City (Appx. 21-32). In view of the procedural rights afforded to plaintiff through the CBA, she has no claim for the denial of procedural due process.

Furthermore, in Point I of its Appellate Division brief, the City argued that plaintiff's plenary action is in the nature of a CPLR Article 75 proceeding, challenging the opinion and award rendered by the arbitrator pursuant to the grievance procedures set forth in the CBA. The Appellate Division did not consider this issue in its opinion. Should this Court consider the issue, plaintiff's fourth cause of action – pleaded in the original complaint filed on February 10, 2015 – should be dismissed on the ground that it was untimely filed pursuant to the applicable 90-day statute of limitations of CPLR 7511(a), based on plaintiff's admission that she received formal notice of her termination pursuant to the arbitration opinion on October 16, 2014 (Appx. 31, ¶¶72-73). See Green v. Manhattan Cmty. Bd. 10, 129 A.D.3d 588 (1st Dept. 2015) (holding that a proceeding commenced pursuant to CPLR Article 78 was time-barred since it was in the nature of a CPLR Article 75 proceeding challenging an arbitration award rendered pursuant to the grievance procedures in a CBA).

Finally, the City also stated in Point I of its Appellate Division brief that the doctrine of res judicata can attach to an arbitration award. The doctrine of res judicata precludes a party (or those in privity with a party) from relitigating a claim from a prior proceeding between the same parties involving the same subject matter. See People ex rel. Spitzer v. Applied Card Sys., Inc., 11 N.Y.3d 105, 122 (2008); In re Hunter, 4 N.Y.3d 260, 269 (2005). "Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." Green v. Santa Fe Indus., Inc., 70 N.Y.2d 244, 253 (1987). Thus, a prior determination in an action brought by a union can be binding in a later action by a union member. See Weisz v. Levitt, 59 A.D.2d 1002 (1977).

The doctrine of res judicata "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." Hunter, 4 N.Y.3d at 269. The rule also applies with equal force to arbitration awards. See Matter of Ranni's Claim, 58 N.Y.2d 715, 717 (1982) ("It is settled that the doctrine of res judicata is applicable to arbitration awards and may serve to bar the subsequent relitigation of a single issue or an entire claim); Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261 (2d Cir. 1997) (under New

York law, arbitrator's award never confirmed or entered as a judgment in state court could have res judicata effect).

Applying these principles to the case at hand, plaintiff should be precluded from litigating her claim alleging a deprivation of procedural due process. Plaintiff was represented by the PBA in the arbitration proceeding and the PBA never took the position that the City failed to follow the procedures in the CBA or deprived plaintiff of those procedures (AD R. 113-19). Res judicata should operate to preclude litigation of plaintiff's fourth cause of action that could have been raised in the prior arbitration.

CONCLUSION

For the reasons stated above, the order of the Appellate Division should be affirmed.

Dated: Buffalo, New York
February 6, 2019

Respectfully submitted,

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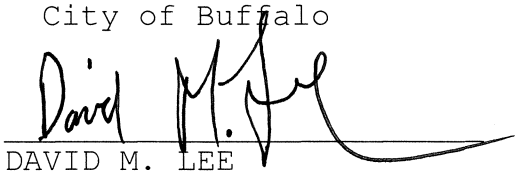
By: 
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CERTIFICATION OF WORD COUNT

I hereby certify pursuant to 22 NYCRR 500.13(c) that the total number of words in the body of this brief is 3,286.

Dated: Buffalo, New York
February 6, 2019

DAVID M. LEE