EHRLICH, MICHELE G., Plaintiff, -against- DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK, Defendants. Index Number: 154295/2012

154295/2012

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 5202; 2013 NY Slip Op 32875(U)

November 7, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: Ehrlich v. Dep't of Educ., 2012 U.S. Dist. LEXIS 17285 (S.D.N.Y., Feb. 6, 2012)

CORE TERMS: grievance procedure, retaliation, public employee, collective bargaining agreement, Whistleblower Law, Civil Service Law, whistleblower, collectively, personnel, grievance, commence, informal, federal law, special needs, special education, teacher, state law, causal connection, proper party, negotiated agreement, union member, arbitration, disclosure, diminish, exhaust, school principal, probationary status, termination, prescribed

JUDGES: [*1] Ellen M. Coin, A.J.S.C.

OPINION BY: Ellen M. Coin

OPINION

ELLEN M. COIN, A.J.S.C.

In this action for violation of the New York Civil Service Law §75-b ("Whistleblower Law"), defendants Department of Education of the City of New York ("DOE"), City School District of the City of New York and the City of New York (collectively, "defendants") move to dismiss this action pursuant to CPLR 3211(a)(1), 3211(a)(5), and 3211(a)(7).

[3] FACTS**

According to the complaint, plaintiff Michele Ehrlich ("Ehrlich"), an ESL teacher employed by the DOE, alleges that she incurred retaliation by her employer, suffering an adverse employment action as a result of her complaints that certain special education services were not being provided in accordance with state and federal law (Complaint ¶ 1, 6, 7, 8). Ehrlich was an employee of the DOE at PS 79 in Whitestone, New York, until July 31, 2011, at which point the DOE terminated her probationary status (Complaint ¶ 9).

Ehrlich alleges that she complained to ESL Support Personnel Giuvella Peisengang, as well as to Noreen DeLuca of the Compliance for Child First Network, that a special needs child with an Individual Education Plan ("IEP") required special education services to be delivered **[*2]** in a self-contained classroom and that the school was not properly implementing the IEP (Complaint ¶ 7). In mid-October of the same year, Ehrlich also complained to the Federation for Children with Special Needs and Advocates for Children, both private advocacy groups for special needs children, that two of her ESL students did not receive IEP services commensurate with state and federal law (Complaint ¶ 7). Ehrlich maintains that since she was not a Special Education teacher, she did not know how to address precisely the DOE failure to deliver appropriate educational services (Complaint ¶ 7).

Ehrlich alleges that as a result of her actions, she suffered retaliation by the school principal, Paula Marron, and the DOE in the form of several adverse employment actions, including termination of her probationary status, unsupported and biased unsatisfactory ratings in observations of her teaching, daily surveillance and defamatory

memos **[**4]** (Complaint ¶ 9(a)-(g), 13). She contends that her complaints were an expression of a private citizen expressing concern, and that her termination was in violation of New York's Whistleblower Law.

FEDERAL COURT ACTION

Ehrlich first filed an action in Supreme **[*3]** Court, New York County, in or about April of 2011, alleging a deprivation of her rights under 42 U.S.C. §1983 and the First Amendment, in addition to her retaliation claim under New York state law.[1] Thereafter Ehrlich's state action was removed to the United States District Court for the Southern District of New York. (Plaintiff's Memorandum of Law at 1).

1 In the original action, Ehrlich also sued the school principal, Paula Marron. (Ex. A to Hallman Aff.)

On February 6, 2012, the District Court granted defendants' motion to dismiss the claims arising under federal law. The court found that Ehrlich failed to adequately allege that she was speaking as a citizen rather than as a public employee when she made her alleged complaints (Ex. B to Hallman Aff. at 5). Alternatively, the court found that Ehrlich failed to plead adequate facts to support a causal connection between her speech and the alleged adverse employment action (*Id*. at 6). Because the court dismissed the federal law claims, it declined to exercise supplemental jurisdiction over the state law whistleblower claim and dismissed that claim without prejudice (*Id*. at 7).

THE SECOND STATE COURT ACTION

In July 2012, Ehrlich commenced **[*4]** this action on her whistleblower claim (Complaint ¶ 1). Defendants move to dismiss the complaint pursuant to CPLR 3211(a) on the grounds that: (1) the Court lacks subject matter jurisdiction over plaintiff's claim; (2) plaintiff fails to state a cause of action based on §75-b; and (3) the City is not a proper party.

[5] DISCUSSION**

1. Standard of Review for Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference and determine whether the facts, as alleged in the complaint, fit into any cognizable legal theory (*Sokoloff v. Harriman Estates Dev. Corp*., 96 NY2d 409, 414, 754 N.E.2d 184, 729 N.Y.S.2d 425 [2001]).

2. The Complaint States No Claim Against The City of New York

Defendants move to dismiss the complaint as against the City of New York because the City is not Ehrlich's employer and, therefore, not a proper party. Ehrlich does not oppose this argument, nor does she allege that the City was her employer or otherwise engaged in retaliation. The City and DOE are separate legal entities (*Perez v. City of New York*, 41 AD3d 378, 379, 837 N.Y.S.2d 571 [1st Dept 2007]). **[*5]** The complaint alleges that the DOE was Ehrlich's employer, but fails to allege that the City employed her or committed any adverse employment action against her. Accordingly, the complaint must be dismissed against the City (*see Goldman v. City of New York*, 287 AD2d 689, 690, 732 N.Y.S.2d 78 [2d Dept 2011]).

3. New York State Whistleblower Law

In order to state a claim under §75-b, Plaintiff must allege the following: (1) an adverse employment action; (2) disclosure of information to a governmental body (a) regarding a violation of a law, rule or regulation that endangers public health or safety, or (b) which she reasonably believes constitutes an improper governmental action; and (3) a causal connection between the disclosure and the adverse employment action (CSL § 75-b[2][a]). **[**6]** Section 75-b(3)(b) provides in relevant part that, "[w]here an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision to resolve allegations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for **[*6]** the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator" (CSL § 75-b[3][b]).

However, "[w]here an employee is not subject to the provisions of paragraphs (a) or (b) of this subdivision, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law" (CSL § 75-b[3][c]). Therefore, an employee may sue under §75-b *only* where a collective bargaining agreement does not substitute its own grievance procedure for the relief encapsulated by the statute (*Mottironi v. Axelrod*, 133 AD2d 948, 948-49, 520 N.Y.S.2d 663 [3d Dept 1987]). Otherwise, an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement must first avail herself of the grievance procedure set forth in the agreement before she can commence an action in court (*Matter of Cantres v. Board of Educ. of City of New York*, 145 AD2d 359, 360, 535 N.Y.S.2d 714 [1st Dept 1988], citing *Matter of Plummer v. Klepak*, 48 NY2d 486, 399 N.E.2d 897, 423 N.Y.S.2d 866 [1979], *cert denied* 445 U.S. 952, 100 S. Ct. 1601, 63 L. Ed. 2d 787 [1980]).

4. Dismissal of Plaintiff's Whistleblower Claim.

Here, a valid collective bargaining agreement ("CBA") exists between **[*7]** the defendants and the United Federation of Teachers. As a public employee, Ehrlich is a union member and therefore subject to the CBA. Article 22 of the CBA contains a **[**7]** "Grievance Procedure" to encourage the prompt and informal resolution of employee complaints. The agreement defines a "grievance" as any complaint by an employee (1) "that there has been as to him/her a violation, misinterpretation or inequitable application of any of the provisions of this Agreement or (2) that he/she has been treated unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing or affecting employees." This provision also has exclusionary language, providing that a "grievance" does not "apply to any matter as to which...a method of review is prescribed by law." Where a grievance is not resolved through the steps prescribed in the CBA, the CBA provides for an arbitration process and the resulting decision "will be accepted as final by the parties" and "both will abide by it." Moreover, Article 23 of the CBA provides a mechanism for informal resolution of "special complaints" related to harassing or intimidating behavior.

Because Ehrlich is covered **[*8]** by a CBA containing a grievance procedure governing and directing the informal resolution of disputes under the Agreement, she may not sue the DOE directly, but, instead, is bound to follow the grievance procedure outlined in the CBA and exhaust all administrative remedies prior to seeking judicial relief (*Hall v. Town of Henderson*, 17 AD3d 981, 982, 794 N.Y.S.2d 231 [4th Dept 2005]; *Matter of Cantres*, 145 AD2d at 360). Accordingly, the Court finds that Ehrlich's failure to exhaust her remedies under the CBA warrants dismissal of her retaliation claim.

Ehrlich argues that she may bypass the CBA grievance procedure pursuant to §75-b(4), which provides in relevant part, "Nothing in this section shall be deemed to diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement...." (CSL § 75-b[4]). However, §75-b(4) **[**8]** does not diminish the preclusive effect of a grievance procedure set forth in Ehrlich's CBA. It merely reserves with the employee's union the opportunity to negotiate for additional protections and remedies beyond and above those afforded in the New York Civil Service Law. As long as an agreement between the employer and the **[*9]** union contains rights and remedies at minimum equivalent to those in the Civil Service Law, "a contract provision in a collective bargaining agreement may modify, supplement, or replace traditional forms of protection afforded public employees, for example, those in Sections 75 and 76 of the Civil Service Law..." (*Barrera v. Frontier Cent. School Dist.*, 249 AD2d 927, 928, 672 N.Y.S.2d 218 [4th Dept 1998]; *Matter of Cantres*, 145 AD2d at 360). Due process is satisfied by the inclusion of a grievance procedure in the CBA, irrespective of whether Ehrlich availed herself of that procedure (*Hall v. Town of Henderson*, 17 AD3d 981, 982, 794 N.Y.S.2d 231 [4th Dept 2005]). Accordingly, the Court finds Ehrlich's failure in this regard to support dismissal of her retaliation claim.

Finally, Ehrlich notes that Article 22-D(3) of the CBA states, "[n]othing contained in this Article or elsewhere in this Agreement shall be construed to deny to any employee his/her rights...under applicable Civil Service Laws and Regulations." Her argument with regard to this provision is two-fold. First, she argues that dismissal of her claim here would be contrary to the text of her CBA in the sense that she would be denied her right under § 75-b to **[*10]** pursue an action in court. Second, Erlich relies on *Medina v. Dept, of Educ*. for the proposition that where a defendant fails to make a showing as to which provisions of a CBA preclude the plaintiff from bringing suit under § 75-b, the motion to dismiss should be denied and plaintiff permitted to pursue her claim in court (35 Misc 3d 1201[A], 950 N.Y.S.2d 724, 2012 NY Slip Op 50529[U], *3 [Sup Ct, New York County 2012]).

[9]** To the contrary, the *Medina* Court noted that there the defendant relied on a website, accessible only to union employees, for provisions of the CBA (*id*). Thus, the *Medina* Court denied the motion to dismiss without prejudice

to renewal on an adequate record (*id*). Here, in contrast, defendants cite specific provisions in the publicly available CBA providing for a grievance procedure, as well as case law supporting the contention that these provisions preclude a suit in court prior to exhausting the remedies set forth in the CBA. Accordingly, the Court similarly finds that granting dismissal is appropriate in this case.

Because Erlich may not commence an action pursuant to §75-b, the Court need not reach, and will not resolve defendant's remaining grounds for dismissal.

In accordance with the foregoing, it is hereby

ORDERED **[*11]** that defendant's motion pursuant to CPLR 3211(a) is granted, the complaint is dismissed and the clerk of court shall enter judgment accordingly without costs.

This constitutes the decisions and order of the Court.

Date: November 7, 2013

ENTER:

/s/ Ellen M. Coin

Ellen M. Coin, A.J.S.C.