Index No. 150914/17

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

PHILIP NOBILE,

Plaintiff,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; CARMEN FARINA, in her official capacity as Chancellor of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and, KAREN SCOTT, in her official capacity as Superintendent, District 14 of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Matter No. 2017-003354

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SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 150914/17
I.A.S. Part 46
(Billings, J.)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in support of their cross motion to dismiss the complaint and in opposition to plaintiff's motion for a preliminary injunction seeking to prevent defendants from taking any action to enforce the Stipulation of Settlement ("Stipulation"), dated October 7, 2016, and plaintiff's letter of irrevocable retirement.

On January 27, 2017, plaintiff, a former teacher with the New York City Department of Education ("DOE")[1], filed the instant complaint alleging that the Stipulation is

[1] DOE is, formally, the Board of Education of the City School District of the City of New York.

unenforceable and that in enforcing the Stipulation, defendants violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the New York State Constitution as well as his right to a hearing under Education Law § 3020-a. Plaintiff also sought a temporary restraining order ("TRO") seeking declaratory and injunctive relief to prevent defendants from implementing the Stipulation, which made plaintiff's retirement effective January 31, 2017, the same date as the resignation letter. On January 29, 2017, plaintiff filed a Motion for a Preliminary Injunction. The parties appeared before this Court on January 30, 2017, and the Court denied the TRO and set a return date for the preliminary injunction motion.

Defendants now oppose plaintiff's motion for a preliminary injunction and cross move to dismiss the Complaint. The Complaint must be dismissed in its entirety for failure to state a cause of action. All of plaintiff's causes of action rely entirely on the single claim – that plaintiff had the right to rescind the Stipulation of Settlement even after he agreed to it before the hearing officer, even after it was signed by counsel for the parties and plaintiff himself, and even after the DOE performed its primary responsibilities under the Stipulation. Plaintiff cannot establish that the Stipulation of Settlement is unenforceable because, pursuant to CPLR 2104, the Stipulation became binding on the parties on October 7, 2016. Plaintiff has no right to rescind the agreement or his irrevocable resignation. Consequently, plaintiff's waiver of his right to a § 3020-a hearing is also binding and plaintiff has no property interest in DOE employment and no due process rights under the Constitutions or statute. Accordingly, defendants respectfully request that the complaint be dismissed in its entirety, with costs.

In addition, plaintiff's motion for a preliminary injunction must be denied for failure to meet both the legal and evidentiary prerequisites and because the relief being sought

under the guise of preliminary relief is actually the ultimate relief being demanded in the Complaint. The purpose of an injunction is to maintain the status quo before the party seeking the injunction is irreparably harmed. Here, the status quo is that, as of January 31, 2017, plaintiff was no longer an employee of DOE. Rather than maintaining the status quo, plaintiff is seeking a mandatory injunction, requesting that this Court grant him the ultimate relief sought – a declaration that plaintiff's rescission of the Stipulation of Settlement was valid and binding and reinstatement to his position with DOE with all the benefits associated with reinstatement.

Moreover, even if the Court does not treat plaintiff's application as a request for a mandatory injunction, his preliminary injunction request must be denied because plaintiff cannot show a likelihood of success on the merits, or that he has/will be irreparably been harmed, or that the equities balance in his favor.

STATEMENT OF FACTS

Plaintiff was a tenured teacher with the DOE. Cmpl. ¶ 5. On April 21, 2016, plaintiff was brought up on charges pursuant to § 3020-a of the Education Law. Id. at ¶ 14. Hearing Officer Mary J. O'Connell held a pre-hearing conference in the § 3020-a proceeding on October 7, 2016, at which plaintiff was represented by counsel of his choice, supplied by the New York State United Teachers ("NYSUT"), Christopher Callagy, and DOE was represented by attorney Jordana Shenkman. During the pre-hearing conference, after the Hearing Officer had denied plaintiff's motion to dismiss the charges, the parties reached a settlement agreement. Affirmation of Jordana Shenkman, dated February 14, 2017, ("Shenkman Aff.") ¶ 3. The agreement was recorded in a document entitled "Post-Charge Stipulation of Settlement" ("Stipulation"). Id. at ¶ 5; Shenkman Aff. Exhibit A. The Stipulation provided that DOE would discontinue the disciplinary hearing against plaintiff and plaintiff would irrevocably retire from the DOE effective close of business January 31, 2017. Id. A letter of irrevocable retirement effective January 31, 2017 signed by plaintiff and annexed to the Stipulation as Exhibit A. Id. The parties notified the Hearing Officer of the settlement and she then went on the record and asked plaintiff a series of questions regarding his desire to enter into the Stipulation and his understanding of provisions of the Stipulation and the consequences of signing it (the "Allocution"). Shenkman Aff. Exhibit B at pp. 16-20. The hearing transcript show that plaintiff confirmed that:

- he had settled the charges,
- he had the advice of counsel during the negotiations,
- plaintiff understood the provisions of the Stipulation of Settlement,
- the terms had been explained to him by counsel,

- plaintiff understood that he was bound to the Stipulation of Settlements,
- plaintiff knew he could refuse the Stipulation of Settlement and move forward with a § 3020-a hearing, and
- by signing the Stipulation of Settlement he was "waiving [his] right to a hearing and that th[is] settlement agreement [was] binding and irrevocable."

Id. at pp. 18, 19:14-18. Plaintiff also confirmed that he freely waited his rights to a hearing and was entering into the Stipulation of his own free will and without any coercion or duress. Id. at 19:20-25. The Hearing Officer then closed the matter. Id. at p. 20. The § 3020-a was ended in accordance with the agreement.

Immediately thereafter, the parties signed the written agreement: plaintiff and his attorney Mr. Callagy and DOE attorney Ms. Shenkman signed on behalf of the defendants. Shenkman Aff. ¶ 9. The Stipulation also contained a signature line for plaintiff's supervisor, District 14 Superintendent Karen Watts[2], who was not present at the pre-hearing conference and did not sign the agreement on October 7, 2016. Id. at ¶¶ 5-6. Ms. Shenkman took the document so that she could forward it to Superintendent Watts to sign, which the Superintendent did on October 13, 2016. Id. at ¶ 12.

On Tuesday, October 11, 2016, after the Stipulation had been executed, Mr. Callagy informed Ms. Shenkman that plaintiff wished to rescind the agreement and his irrevocable retirement. Id. at ¶13. The DOE did not accept plaintiff's rescission. Effective January 31, 2017, plaintiff retired from DOE.

[2] The Pleadings incorrectly identify the District 14 Superintendent as "Karen Scott."

Defendants oppose plaintiff's motion for a preliminary injunction and now cross move to dismiss the amended complaint in its entirety.

ARGUMENT

POINT I

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

On a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be afforded a liberal construction . . . [The Court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (N.Y. 1994) (internal citations omitted). However, factual allegations "'that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.'" Skillgames, LLC v. Brody, 1 A.D.3d 247, 250 (1st Dep't 2003) (citations omitted).

Here, plaintiff has failed to plead facts that would show that the Stipulation is unenforceable or that he was denied his due process rights or Education Law § 3020-a rights. Accordingly, the Complaint should be dismissed.

A. The Stipulation of Settlement is an Enforceable Agreement

It is well-settled that stipulations of settlement that conform with the requirements of CPLR 2104 are binding. See Matter of Dolgin Eldert Corp., 31 N.Y.2d 1, 8 (1972); see also Hallock v. State of New York, 64 N.Y.2d 224, 228 (1984). CPLR 2104 states that "an agreement between parties or their attorneys relating to a matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Id.; see

Velazquez v. St. Barnabas Hosp., 57 A.D.3d 251 (1st Dep't 2008) (oral settlement is enforceable under CPLR 2104 if the parties agree to the terms in the presence of the Court, and the case is then marked and entered settled by the court clerk). CPLR 2104 is applicable to proceedings other than other those in New York state court, and applies to administrative proceedings. See Kleinmann v. Bach, 239 A.D.2d 861, 862 (3rd Dep't 2003) ("While the statute does not specifically address stipulations made during the course of arbitration proceedings, we have held such stipulations binding in certain circumstances.").

Here, the Stipulation is undoubtedly an enforceable settlement agreement under CPLR 2104 – both as an oral agreement made in open court and also as a writing signed by the parties or their attorneys. The Stipulation became binding on the parties during the pre-hearing conference when the Hearing Office reviewed the agreement with parties and plaintiff confirmed for the Hearing Officer that he had accepted defendants' offer to allow him to irrevocably retire in exchange for DOE discontinuing the § 3020-a hearing. Shenkman Aff., Exhibit A at pp. 17-19. Further, the parties reduced the agreement to writing and both parties, i.e., plaintiff (and his attorney) and the DOE attorney, signed it on October 7, 2016. Shenkman Aff. ¶ 9; Cmpl. ¶ 20. Consequently, pursuant to CPLR 2104, the Stipulation is enforceable. It need only be added that the DOE fully performed its part of the stipulation: it cancelled the § 3020-a hearing and made no effort to continue the prosecution of those charges. This is an end to this case and the complaint must be dismissed.

Plaintiff claims that Stipulation is unenforceable because he rescinded the agreement prior to Superintendent Watts signing the Stipulation. Cmpl. ¶¶ 38-40. This depends on two separate incorrect assertions of law: (1) that the Stipulation was not binding until the Superintendent signed and (2) that plaintiff could rescind at will at any time before the

Superintendent signed. However, as explained in the above paragraph, the oral agreement was binding. Further, because the DOE's attorney signed the Stipulation on behalf of the DOE, Superintendent Watts's signature was not required for the creation of binding settlement agreement. See Hallock, 64 N.Y.2d at 228 (stipulations made pursuant to CPLR 2104 are binding on a party whose attorney agreed to the stipulations even if his attorney exceeded his authority in agreeing to the terms).

Plaintiff, nonetheless, seeks to be relieved of the consequences of the Stipulation because he no longer wants the agreement – a classic case of "buyer's remorse." However, the law is clear that "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." Hallock, 64 N.Y.2d at 230. Plaintiff does not allege that any fraud, collusion, mistake or accident. Rather, he has simply changed his mind. Plaintiff claims that the parties did not intend the agreement to become binding until Superintendent Watts signed the agreement and he had a right to rescind his irrevocable retirement until Superintendent Watts signed. Cmpl. ¶ 39. The Stipulation, however, is clear on its face and does not contain such a condition precedent or right of rescission. Therefore, the Stipulation must be enforced according to the plain meaning of its terms. MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (N.Y. 2009) ("It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'") (quoting Greenfield v Philles Records, 98 NY2d 562, 569 (N.Y. 2002)).

In support of his claim, plaintiff relies on parol evidence: he alleges that Ms. Shenkman told him on October 7, 2016 that the Stipulation was not "effective" until it was "executed by all parties."[3] Cmpl. ¶ 39. He claims that Ms. Shenkman's comment proves that he had a "right to rescind" up until the point when Superintendent Watts signed the Stipulation. Id. at ¶¶ 39-41. This contradicts both plaintiff's Allocution in open administrative proceedings at which he acknowledged that the Stipulation was binding on him and also contradicts the writing itself.

"Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement." Schron v Troutman Saunders LLP, 20 N.Y.3d 430, 436 (2013) (emphasis supplied). Here, the Stipulation could not be clearer; it is unambiguous. Plaintiff irrevocably retired from the DOE effective January 31, 2017. Shenkman Aff., Exhibit A at ¶ 2. Moreover, the Stipulation contains an integration/merger clause which provides that written agreement contains all the terms and conditions agreed upon by the parties. Id. at ¶ 10; see Schron, 20 N.Y.3d at 436 ("where a contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'") (quoting Matter of Primex Intl. Corp. v Wal-Mart Stores, 89 NY2d 594, 599 (N.Y. 1997)). Consequently, plaintiff cannot introduce parol evidence to avoid the consequences of the agreement.

The Stipulation of Settlement is an enforceable agreement and became binding on the parties on October 7, 2016. Plaintiff's claim that the Stipulation not "effective" until it was

[3] For the purpose of this motion only, defendants accept plaintiff's version of the alleged conversation.

signed by Superintendent Watts is nothing more than a red herring. Accordingly, plaintiff fails to state a cause of action and the Complaint should be dismissed.

B. Plaintiff Is Estopped From Denying The Settlement

"The doctrine of equitable estoppel 'rests upon the word or deed of one party which is rightfully relied upon by another who, as a result, changes his position to his injury, so that it would be inequitable to permit the first to enforce rights inconsistent therewith'" Jackson v. Triborough Bridge & Tunnel Auth., 155 Misc. 2d 715, 722 (Sup. Ct. N.Y. Co. 1992) (citing 57 NY Jur 2d, Estoppel, Ratification, and Waiver, § 13 [1986]). In the instant case, plaintiff made an agreement and the DOE relied on that agreement to its detriment. The DOE cancelled the § 3020-a hearing and has not taken any steps to pursue the charges lodged against plaintiff. It did so in reliance on an agreement which plaintiff stated, in an open administrative forum, he understood, agreed to, and knew that he would be bound, that is, the Allocution. In these circumstances plaintiff is barred by estoppel from denying the Stipulation of Settlement. Thus, again, the settlement agreement is binding and enforceable. Thus, the Complaint must be dismissed.

C. Plaintiff Was Not Denied Process

Plaintiff contends that he was denied due process and his rights under § 3020-a because defendants refused to accept his rescission of the Stipulation of Settlement and restore his § 3020-a hearing to the trial calendar. Cmpl. ¶ 54. Plaintiff admits that the § 3020-a hearing

was ended in full performance of the Stipulation of Settlement and yet now asserts this as a cause of action.[4]

Plaintiff had a property interest in his employment and would have received a § 3020-a hearing that far surpassed the constitutional minima of the process constitutionally due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985) ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."). Education Law § 3020-a sets the procedures which afford more than required by Loudermill; it provides for a full trial-type hearing for teachers charged with disciplinary violations or incompetence. These procedural protections can be waived by the teacher. Abramovich v. Bd. of Educ., 46 N.Y.2d 450, 454 (1979). It is well-settled that § 3020-a procedures are waivable through stipulations of settlement and that such a waiver does not constitute a denial of due process. Id. at 455. This is especially true where a hearing officer "inquired not only into the petitioner's understanding of its precise conditions but also as to his grasp of the nature and extent of the rights he was waiving." Id. at 457. The Allocution here proves beyond peradventure that the Abramovich conditions were met – plaintiff understood that the Stipulation was binding and the terms and condition of that Stipulation. Plaintiff waived his

[4] The Due Process Clauses of the United States and New York Constitutions are coextensive. See Cent. Savings Bank v. City of New York, 280 N.Y. 9 (1939); Manshul Constr. Corp. v. New York City Constr. Auth., 192 A.D.2d 659, 596 (2d Dep't 1996).

right to process and also his property interest in employment. As plaintiff had no property interest any longer, it was extinguished by the Stipulation; plaintiff had no right to further process under the United States Constitution, the New York Constitution, or any statute.

Here, plaintiff was not denied due process or his rights pursuant to § 3020-a. He admits that defendants gave him notice § 3020-a charges against him and scheduled a hearing. Cmpl. ¶¶ 14-19. Plaintiff's hearing did not occur only because he agreed to Stipulation of Settlement. Id. at 18-19. The fact that plaintiff experienced buyer's remorse several days later does not change this.

Accordingly, the Complaint must be dismissed for failure to state a cause of action.

POINT II

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF.

To obtain the extraordinary remedy of a preliminary injunction, under Article 63 of the CPLR, plaintiff bears the burden of showing that he has satisfied each of the following prerequisites: (1) a clear right to the relief sought (also articulated as a likelihood of success on the merits); (2) that they will suffer irreparable injury if the preliminary injunction is not granted; and (3) that the balance of the equities tip in their favor. W.T. Grant v. Srogi, 52 N.Y.2d 496 (1981); Cohen v. State Dep't of Social Servs., 323 N.Y.S.2d 603 (2d Dep't 1971), aff'd, 30 N.Y.2d 571 (1972).

The purpose of a preliminary injunction is "to preserve the status quo until a decision on the merits." Hoppman v. Riverview Equities Corp., 226 N.Y.S.2d 805, 806 (1st Dep't 1962); Moody v. Filipowski, 146 A.D.2d 675, 678 (2d Dep't 1989) (same); Tucker v. Toia, 54 A.D.2d 322, 325 (4th Dep't 1976) ("the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits"). Such relief is a drastic remedy which should not be granted unless a clear legal right to it is established under law. Orange Cnty. v. Lockey, 111 A.D.2d 896, 897 (2nd Dep't 1985).

Here, plaintiff resigned on October 7, 2016, when he agreed to the settlement, signed the irrevocable retirement letter, and signed the Stipulation. In this case the, plaintiff is actually seeking a mandatory preliminary injunction in that the requested relief would require the defendants to take specific conduct, i.e., reinstating plaintiff's employment (which is the ultimate relief sought). See Second on Second Café v. Hing Sing Trading, 66 A.D.3d 255, 264 (1st Dep't 2009) ("[A] mandatory preliminary injunction (one mandating specific conduct), by which the

movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action.") (internal citations omitted). A mandatory preliminary injunction may be granted "[w]here the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties." Id. at 265 (emphasis added) (citing Bachman v. Harrington, 184 N.Y. 458, 464 (1906)). "[M]andatory preliminary injunctions are not favored and should not be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed." SHS Baisley, LLC v Res Land, Inc., 18 A.D.3d 727, 728 (2nd Dep't 2005). The case law is clear,

> [I]njunctions which in effect determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at all, are granted with great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile.

Xerox Corp. v. Neises, 31 A.D.2d 195, 197 (1st Dep't 1968).

A. A Mandatory Injunction is Not Available to Plaintiff

Plaintiff has failed to present the Court with an "unusual situation" requiring the extraordinary relief of a mandatory injunction. A mandatory preliminary injunction, by definition, requires the defendant/respondent to affirmatively act to maintain the status quo in favor of the plaintiff/petitioner. Second on Second Café, 66 A.D.3d at 264. However, here, plaintiff asks this Court to do the exact opposite – plaintiff requests that the Court reinstate him to his former position as a tenured teacher, thereby disturbing the status quo and awarding him the ultimate relief he seeks in this matter. See St. Paul Fire & Marine Ins. Co. v York Claims

Serv., 308 AD2d 347, 349 (1st Dep't 2003) (reversing an order for a preliminary injunction where the order disturbed the status quo and gave plaintiff the ultimate relief sought in the case). Accordingly, the relief requested by plaintiff is unavailable and the petition must be denied.

B. Plaintiff Cannot Show Irreparable Harm

For purposes of a preliminary injunction, "irreparable" harm is "a continuing harm resulting in substantial prejudice by the acts sought restrained if permitted to continue pendente lite." Chrysler Corp. v. Fedders Corp., 63 A.D.2d 567, 569 (1st Dep't 1978). The harm must be imminent and certain, resulting in injury which cannot be remedied by money damages. Here, plaintiff has not suffered, and will not suffer, any irreparable injury if the Court denies the preliminary injunction.

Conclusory, vague or conjectural assertions of harm are insufficient to justify the drastic remedy of injunctive relief. See J.S. Anand Corp. v. Aviel Enter., Inc., 148 A.D.2d 496, 497 (2d Dep't 1989) (stating that bare conclusory allegations are insufficient to sustain movant's burden of proof to show irreparable injury); L & J Roost, Ltd. v. Dep't of Consumer Affairs of the City of New York, 128 A.D.2d 677, 679 (2d Dep't 1987); Kaufman v. Int'l Bus. Machs. Corp., 97 A.D.2d 925 (3d Dep't 1983), aff'd 61 N.Y.2d 930 (1984). Consequently, the movant must come forward with proof "supplying evidentiary detail" in support of her claim of irreparable injury. See Armbruster v. Gipp, 103 A.D.2d 1014 (4th Dep't 1984); Siegmund Strauss, Inc. v. East 149th Realty Corp., 13 Misc. 3d 1209(A), 824 N.Y.S.2d 758 (Sup. Ct., N.Y. Co. 2006) (citing David D. Siegel, New York Practice 499 (3d ed., West 1999)).

It is well established that "loss of employment does not constitute irreparable harm" for purposes of a preliminary injunction. See Valentine v. Schembri, 212 A.D.2d 371 (1st Dep't 1995); Hill v. Reynolds, 187 A.D.2d 299 (1st Dept 1992)); see also Cohen, 30 N.Y.2d at 572; Suffolk Cnty. Ass'n of Mun. Emp., Inc. v. Cnty. of Suffolk, 163 A.D.2d 469, 470 (2d Dep't

1990); De Lury v. City of New York, 48 A.D.2d 595, 597 (1st Dep't 1975). Irreparable harm is, by definition, harm that cannot be remedied by money damages. See Sampson v. Murray, 415 U.S. 61, 90 (1974). Indeed, the law is clear in this Department: an employee who has been terminated is not irreparably harmed because if the termination determination is ultimately annulled, the employee is entitled to reinstatement and back pay. See Valentine, 212 A.D.2d at 372 (Even if "[petitioner] is terminated, and that termination is later annulled, he will be entitled to reinstatement and backpay, and thus not irreparably harmed").

Here, the only "irreparable harm" plaintiff points to is his loss of salary. Plaintiff cites two Second Circuit cases in an effort to establish that the loss of his employment constitutes irreparable harm. While both of the cited cases discuss the importance of wages to employees; neither case provides that the loss of an individual's employment constitutes irreparable harm for the purposes of a preliminary injunction. See Buffalo Teachers Federation v. Tobe, 464 F.3d 362 (2nd Cir. 2006) (upholding the implementation of a city-wide wage freeze); Condell v. Bress, 983 F.2d 415 (2nd Cir. 1993) (declaring unconstitutional a statute which imposed a five-day payroll lag on public sector employees). Similarly futile for plaintiff is his citation to Simulinas v City of New York, 2013 N.Y. Slip. Op. 30263U, 2013 N.Y. Misc. LEXIS 509 (N.Y. Sup. Ct. Jan. 31, 2013), a case in which the court granted a TRO prohibiting defendants from placing the plaintiff on an involuntary leave of absence for alcohol abuse treatment without first giving him a hearing. In granting the preliminary injunction, the court in Simulinas explained that the plaintiff "will be irreparably injured if he is stripped of his employment or his freedom (with or without pay) and his dignity." Id. at 10. The facts here are simply not analogous. Plaintiff is not being labeled an alcoholic and is not being "stripped of his dignity" in connection with the loss of employment. Plaintiff in Simulinas had not waived his rights under the

disciplinary statute. Rather, plaintiff in the instant case is receiving exactly what plaintiff bargained for and plaintiff here waived both his constitutional and statutory rights. Simulinas is therefore entirely inapplicable.

Plaintiff cannot show irreparable harm; therefore, the preliminary injunction should be denied.

C. Plaintiff Cannot Show a Likelihood of Success On The Merits

The requirement of showing a likelihood of success should be seen as a protection against the exercise of the court's formidable power to create new entitlement in cases where the moving party's position is without legal foundation, as it is here. See Tucker, 54 A.D.2d at 326. Here, as explained in Point I, above, plaintiff cannot show a likelihood of success on the merits because the Stipulation is clearly enforceable.

In his Motion for a Preliminary Injunction, plaintiff primarily relies on one case, Cohen v. Klein, 6 Misc. 3d 1015(A) (Sup. Ct. NY Co. 2003), in which the court found that a stipulation of settlement was unenforceable. Although the plaintiff in Cohen, like plaintiff here, was a New York City school teacher facing disciplinary charges who agreed to irrevocably retire, the similarity ends there. In Cohen, § 3020-a proceedings had not yet been commenced against him when he was presented with the stipulation. In sharp contrast to the instant case:

- Cohen was not represented by counsel,
- did not receive an allocution in open administrative tribunal (the stipulation was signed before the charges were filed),
- DOE had given Cohen the impression that the retirement was revocable;
- Cohen rescinded before any DOE official signed the stipulation; and
- DOE had allowed Cohen to work after the effective date of his retirement.

It should be emphasized that, in Cohen, because the stipulation was signed before charges filed, no "action" was pending, no statement was made in open quasi-judicial forum, and so CPLR 2104 was inapplicable to court's analysis. Cohen is completely inapposite and is more a symptom of plaintiff's desperation for some sort of precedent to support the insupportable.

Accordingly, the preliminary injunction must be denied because plaintiff cannot establish a likelihood of success on the merits.

D. Balance of Equities

Finally, plaintiff's motion must be denied because he cannot satisfy his burden of showing "that the irreparable injury to be sustained … is more burdensome [] than the harm cause to defendant through imposition of the injunction." See London Paint & Wallpaper Co., Inc. v. Kesselman, 2015 NY Slip Op 31398[U], *6, 2015 N.Y. Misc. LEXIS 2744 (Sup. Ct., N.Y. Co. July 27, 2015) (quoting McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.. Inc., 114 A.D.2d 165, 174 (2nd Dep't 1986).

As described above, defendants have fully performed their part of the bargain. They have ended plaintiff's § 3020-a hearing and are not proceeding any further on those charges. Plaintiff cannot show a likelihood of success on the merits of the underlying complaint or that he will be irreparably harmed if the preliminary injunction is not granted. Accordingly, plaintiff cannot show that the burden placed on him through a denial of the present injunction request is more burdensome than the harm caused to defendants. Requiring the DOE to put plaintiff back in his position and continue to pay him his salary and benefits, which it would likely be unable to recover should defendants prevail, tips the balance of equities in the defendants' favor.

CONCLUSION

For the foregoing reasons, defendants respectfully request that their cross-motion to dismiss be granted, that plaintiff's motion for injunctive and other relief be denied, that the Complaint be dismissed in its entirety, that judgment be entered for defendants and that defendants be granted costs, fees, and disbursements, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 14, 2017

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