DiPeppe v. Local 623

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HONORABLE JEROME B. SIMANDLE

OPINION

SIMANDLE, District Judge:

This matter is before the court on the motion of defendant, Local 623, United Brotherhood of Carpenters and Joiners of America ("Local 623"), to dismiss plaintiff Henry DiPeppe's Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for summary judgment, pursuant to Federal Rule of Civil Procedure 56(b). [1] Also before the court is DiPeppe's cross-motion for leave to amend his Complaint, pursuant to Federal Rule of Civil Procedure 15(a), which DiPeppe filed in lieu of opposition to Local 623's motion.

Because the court finds that Local 623 would be prejudiced by allowing DiPeppe to amend his Complaint at this late juncture, and because the court finds that the proposed Amended Complaint is futile in any event, the court denies DiPeppe's motion for leave to amend his Complaint. Additionally, because the court finds that DiPeppe has not pleaded a claim upon which relief can be granted against Local 623 in his Complaint, the court grants Local 623's motion for summary judgment and dismisses DiPeppe's Complaint with prejudice.

BACKGROUND

From March 14, 1988 through August 25, 1992, Henry DiPeppe was employed as a carpet layer by the Showboat Casino-Hotel of Atlantic City, New Jersey ("Showboat"). Throughout the period of DiPeppe's employment by Showboat, Local 623 was the recognized exclusive bargaining unit for certain Showboat employees, including DiPeppe, pursuant to a collective bargaining agreement between Showboat and Local 623. (Eggie Aff., Ex. A.)

On August 20, 1992, another carpet layer, Rob Brining, alleged that DiPeppe slashed him across the chest and abdomen with a carpet layers' tool while they were working on the 14th floor of the hotel with fellow carpet layers Frank Yanni and Scott Davenport. DiPeppe was suspended pending investigation of the incident. (Eggie Aff., Ex. B.) On August 25, 1992, Showboat discharged DiPeppe after an investigational meeting at which DiPeppe was given an opportunity to explain the August 20, 1992 incident. The notice of termination provided: "As a result of the investigation conducted

regarding the incident that occurred on August 20, 1992 and after reviewing your previous work history, you are discharged from Showboat." (Eggie Aff., Ex. C.)

On August 27, 1992, DiPeppe filed a grievance challenging his termination. [2] By letter dated September 1, 1992 from Dominick J. Burzichelli, Showboat's Labor Relations and Administration Manager, to Eustace "Bud" Eggie, Local 623's business agent, Showboat denied the grievance and affirmed its decision to terminate DiPeppe's employment:

This letter is response to a grievance I received on August 27, 1992 regarding the termination of Mr. Henry DiPeppe (Carpet Layer).

As you are aware, we met on Tuesday, August 25, 1992 with Mr. DiPeppe, Arthur Donahue (Shop Steward), Rob Brining, Frank Yanni, Roger Ireland and Scott Davenport to discuss the incident that occurred on August 20, 1992. It was this incident that triggered Mr. DiPeppe's termination.

More specifically, on the 20th, Mr. DiPeppe, who was working on the 14th floor along with Brining, Yanni and Davenport, slashed Brining with his trough across the chest and abdomen. This unsafe act alone is a terminable offence. This incident along with Mr. DiPeppe's past working history prompted Management's decision to terminate.

At the above meeting, all concerned parties were given an opportunity to give their side of the story. Therefore a hearing is not necessary and Management's decision to terminate Mr. DiPeppe remains unchanged and the grievance is denied.

If you have any questions, please contact me. (Eggie Aff., Ex. D.)

By letter dated September 9, 1992 from Eggie to DiPeppe, Local 623 advised DiPeppe that it would take no further action concerning his termination:

After reviewing your grievance answer, and conferring with Local 623's attorney, we have concluded that your case does not merit going to arbitration. Therefore, we are closing your file. (Eggie Aff., Ex. E.)

On February 19, 1993, DiPeppe commenced this action by filing a Complaint under the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). In the First Count of the Complaint, DiPeppe alleges that he "instituted a grievance" pursuant to the provisions of the collective bargaining agreement between Showboat and Local 623 because Showboat's termination of his employment was a "wrongful termination," that Local 623 was obligated to represent him in connection with his grievance pursuant to the terms of the collective bargaining agreement, and that Local 623 "negligently failed to prosecute said grievance through all available steps, with the result that plaintiff's termination of employment was sustained." (Complaint, First Count, ¶¶ 4, 5 and 7.) In the

Second Count of the Complaint, DiPeppe alleges that Local 623 "failed to advise [him] in a timely manner of any right [he] may have had to pursue said grievance on his own." (Complaint, Second Count, ¶ 2.)

DiPeppe's civil action was assigned to the Honorable Joseph H. Rodriguez. On August 20, 1993, Judge Rodriguez dismissed DiPeppe's Complaint for failure to prosecute. On June 16, 1994, DiPeppe moved to reopen his case. On February 1, 1995, Judge Rodriguez granted DiPeppe's motion to reopen his case. On October 24, 1997, DiPeppe requested that default be entered against Local 623 for failure to respond to the Complaint. On October 28, 1997, the Clerk entered default against Local 623. On April 22, 1998, Local 623 moved to vacate the default. On June 16, 1998, Judge Rodriguez granted Local 623's motion to vacate default. On June 24, 1998, Local 623 filed an Answer to DiPeppe's Complaint.

On July 1, 1998, in accordance with Local Civil Rule 7.1(f), Local 623 served its motion to dismiss/motion for summary judgment on DiPeppe's counsel. On July 24, 1998, instead of serving opposition to Local 623's motion, DiPeppe's counsel sent a letter to Local 623's counsel in which he acknowledged that DiPeppe's Complaint failed to state a claim upon which relief can be granted and requested additional time to investigate the possibility of moving for leave to amend:

I have reviewed your brief and supporting documents as well as checking the law you have cited and it would appear pointless for me to file opposing papers.

I did consider whether to make a cross-motion to amend the Complaint to allege the necessary language for a breach of the duty of fair representation. It would seem obvious that the Complaint should not fall simply for the failure to use the "magic words." To that end I did research the law further and at this point that does not seem to be a viable alternative.

There was nothing Mr. DiPeppe has told me which would appear to rise to the level needed to carry the burden of proof, even if the proper terms were alleged.

However, it may be possible that Mr. DiPeppe knows some facts which would change my mind on that point. I have sent the moving papers to him with a letter explaining why I think the motion will be granted. But I have also asked him whether he knows of any facts, not addressed by Mr, Eggie, which would form a legitimate basis for seeking to amend the Complaint.

I am going to be away this coming week and I have asked that Mr. DiPeppe put in writing any facts which he thinks should be considered. I would ask that you hold off filing the papers until the latter part of the week of August 3 to permit Mr. DiPeppe to inform me if there are any facts which he has not previously told me which would justify seeking an amendment. (Local 623's Reply Brief, Ex. 1.)

On August 13, 1998, DiPeppe's counsel served DiPeppe's cross- motion for leave to amend on Local

623's counsel. In the proposed Amended Complaint, DiPeppe alleges that Local 623 "breached its duty of fair representation owed to [him] by reason of its failure to conduct the minimally necessary investigation of the allegations against [him], to call witnesses on [his] behalf and its otherwise perfunctory handling of the proceedings which resulted in [his] termination and the grievance filed thereafter." (Proposed Amended Complaint, Count One, ¶ 4.)

In support of his motion for leave to amend, DiPeppe relies upon his Certification, in which he claims that Local 623 "was interested in getting [him] out of the job" because he "would not cooperate with [Local 623's] efforts to add employees by claiming an inability to do work which [he] knew [he] could accomplish" with in- house carpet layers while he was the foreman of Showboat's carpet laying shop. (DiPeppe Cert. at ¶ 16.) DiPeppe also denies Brining's claim that he slashed Brining with a trough, claiming that he chased after Brining with a glue-covered spat in his hand after Brining kicked him and that Brining "ran into the spat, getting glue on him." (Id. at ¶ 17.) DiPeppe claims that no one from Local 623 contacted him regarding the incident with Brining between the time he was suspended and the August 25 meeting, and that no one advised him that he was facing possible termination as a result of the incident prior to the August 25 meeting. (Id. at ¶¶ 19-21.) DiPeppe also claims that Brining was not at the August 25 meeting, and that neither Yanni nor Davenport, both of whom stated at the meeting that DiPeppe had slashed Brining with a trough, could have observed any part of the altercation between Brining and him. (Id. at ¶¶ 22-23.) DiPeppe claims that the shop steward who was at the August 25, 1992 meeting was not the shop steward on August 20, 1992 when the incident with Brining occurred, and that the foreman, whom DiPeppe claims knew that Yanni and Davenport could not have witnessed his altercation with Brining, also was not at the meeting. (Id. at ¶ 24.)

DiPeppe maintains that Local 623 should have spoken with him before the August 25 meeting to obtain his version of the incident with Brining so that they could call witnesses to contradict the statements of Yanni and Davenport, and faults Local 623 for not advising him that termination was being contemplated or for preparing him for the August 25 meeting. (Id. at ¶¶ 24-25.) DiPeppe also denies any knowledge of the grievance that was filed regarding his termination and suggests that "since no one obtained my version of the incident . . . nothing could have been submitted which would have made even a remote effort to pursuade (sic.) management to reconsider the decision to terminate me." (Id. at ¶¶ 27-28.) Finally, DiPeppe acknowledges that "any questioning about the facts after that meeting of August 25 . . . would have been too little, too late" because "[t]he decision had been made to terminate me" and "management felt that the meeting of August 25 was sufficient and would not permit a formal grievance hearing." (Id. at ¶ 29.)

On August 28, 1998, in accordance with Local Civil Rule 7.1(f), Local 623 filed the full motion packet in connection with its motion to dismiss/motion for summary judgment and DiPeppe's cross-motion for leave to amend.

DISCUSSION I. DiPeppe's Motion for Leave to Amend

A. Standard on Motion for Leave to Amend

Rule 15(a) provides that party may amend his pleading once before a responsive pleading is served, or thereafter upon leave of court or on consent from his adversary. See Fed. R. Civ. P. 15(a). The rule further provides that "leave should be freely given when justice so requires." Id. The decision whether to grant leave to amend rests with the sound discretion of the trial judge and will be overturned on appeal only upon a finding of abuse of discretion. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 654 (3d Cir. 1998) (citing Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984)).

The Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." Dole v. Arco Chem. Co., 921 F.2d 484, 486-87 (3d Cir. 1990). However, the granting of leave to amend is not automatic. See Dover Steel Co., Inc. v. Hartford Accident and Indemnity Co., 151 F.R.D. 570, 574 (D.N.J. 1993). Leave may be denied upon a showing of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1982); see also Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., 663 F.2d 419, 425 (3d Cir. 1981), cert. denied sub nom. F.D. Rich Housing of the Virgin Islands, Inc. v. Government of the Virgin Islands, 455 U.S. 1018 (1982).

The Third Circuit has emphasized that "prejudice to the non- moving party is the touchstone for denial of an amendment." Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989)(citations omitted). However, the non-moving party must show more than the mere possibility of delay or the need for additional discovery should leave be granted to defeat a motion for leave to amend. Dole, 921 F.2d at 488; Miller v. Beneficial Management Corp., 844 F. Supp. 990, 999 (D.N.J. 1993). The non-moving party bears the burden of showing that "it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." Bechtel, 886 F.2d at 652 (quoting Heyl, 663 F.2d at 426).

B. Analysis

Local 623 claims that it will be substantially prejudiced in its ability to defend this matter if DiPeppe is permitted to amend his Complaint to allege that Local 623 breached its duty of fair representation by not aggressively defending DiPeppe at the August 25, 1992 meeting that preceded his termination. Local 623 observes that DiPeppe made this allegation for the first time in response to its motion to dismiss his Complaint -- nearly six years after his termination and approximately five and a half years after he filed his original Complaint -- without offering any explanation for his failure to assert the claim earlier, despite the fact that he was aware of the alleged information that forms the basis of the claim since the inception of the litigation. (Egge Supp. Aff. at ¶¶ 4-5.) Furthermore, Local 623 notes that three key participants in the August 25, 1992 meeting are no longer readily available to Local 623

as witnesses: Ireland, DiPeppe's immediate supervisor and the person whom Local 623 believes recommended DiPeppe's termination, is no longer employed by Showboat, no longer lives in New Jersey, and his present whereabouts are unknown; Burzichelli, who convened the August 25, 1992 meeting and who upheld Showboat's decision to terminate DiPeppe, is no longer employed by Showboat; and Yanni, who claimed to have witnessed DiPeppe slash Brining with his trough and who testified against DiPeppe at the August 25, 1992 meeting, is no longer employed by Showboat and is presently suffering from an extremely serious illness. (Id. at ¶ 5.)

The court agrees that Local 623 would be substantially prejudiced in its ability to defend against DiPeppe's proposed new claim due to the unavailability of these witnesses. Among the attendees at the August 25, 1992 meeting, only Ireland and Burzichelli could shed light on the impressions and conclusions that Showboat drew from the August 25, 1992 meeting and the role that meeting played in Showboat's decision to terminate DiPeppe. If available, Ireland and Burzichelli could testify that there was nothing Local 623 could have done at the August 25, 1992 meeting or thereafter that would have affected Showboat's decision to terminate DiPeppe.

The court is dismayed by DiPeppe's failure to even attempt to explain his failure to make his allegation concerning the August 25, 1992 meeting at an earlier stage of this litigation, but it is the court's finding that Local 623 would be substantially prejudiced due to the unavailability of witnesses that compels its decision to deny DiPeppe's motion for leave to amend. Although "[d]elay alone is insufficient ground upon which to deny a motion to amend a complaint," Howze, 750 F.2d at 1212, it is axiomatic that "the risk of substantial prejudice increases with the passage of time." 6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1488 at 670 (2d ed. 1990). Much of the delay in pursuing this case was due to plaintiff's inattentiveness, resulting in administrative termination for failure to prosecute in 1993, reopening in 1995, and further delays as noted above.

In the present case, DiPeppe's unexplained delay in seeking leave to amend has been detrimental to Local 623's ability to defend against DiPeppe's proposed new claim. Thus, DiPeppe's motion for leave to amend must be denied.

The court also finds that DiPeppe's motion for leave to amend may be denied on the grounds of futility of amendment. "`Futility' of amendment is shown when the claim . . . is not accompanied by a showing of plausibility sufficient to present a triable issue." Harrison Beverage Co. v. Dribeck Importers, Inc., 133 F.R.D. 463, 468 (D.N.J. 1990). As noted below, a claim that a union breached its duty of fair representation requires proof that the union acted arbitrarily or in bad faith; mere negligence is not enough. In the proposed Amended Complaint, however, DiPeppe alleges only that Local 623 failed to conduct the "minimally necessary investigation" of the charges against him and handled the August 25, 1992 meeting and subsequent grievance in an "otherwise perfunctory" manner. (Proposed Amended Complaint, Count One, ¶ 4.) These allegations, even if assumed true for present purposes, sound in negligence, not bad faith.

Furthermore, to the extent DiPeppe's new claim is based on Local 623's failure to more aggressively represent him at the August 25, 1992 meeting, it is not well-grounded. Because the August 25, 1992 meeting was convened by Showboat as part of its investigation of the August 20, 1992 incident, Local 623 had a limited role to play at the meeting. An employer "has no duty to bargain with any union representative who may be permitted to attend [an] investigatory interview." N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 259 (1975). "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them," but "the employer . . . is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Id. Here, it is undisputed that DiPeppe had the opportunity to explain his version of the August 20, 1992 incident at the August 25, 1992 meeting. His apparent failure to do so convincingly cannot be blamed on Local 623.

Accordingly, the court denies DiPeppe's motion for leave to amend his Complaint. The court will proceed to address the merits of Local 623's motion for summary judgment.

II. Local 623's Motion for Summary Judgment

A. Summary Judgment Standard

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is "genuine" if it is supported by evidence upon which a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if a dispute about it might affect the outcome of the suit under the governing substantive law. Id. In deciding whether a genuine issue of material fact exists, the court must view the facts in the light most favorable to the non-moving party and extend all reasonable inferences to that party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party always bears the initial burden of demonstrating the absence of a genuine issue of material fact, regardless of which party ultimately would have the burden of persuasion at trial. Celotex, 477 U.S. at 323. Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. Id. at 324. The non-moving party may not rest upon the mere allegations or denials of its pleadings. Id. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. "When the record is such that it would not support a rational finding that an essential element of the non-moving party's claim or defense exists, summary judgment must be entered for the moving party." Turner v. Schering-Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990).

B. Analysis

"Because a union is authorized to act as the exclusive bargaining agent for its members, it has a duty to provide fair representation in the negotiation, administration, and enforcement of the collective bargaining agreement." Findley v. Jones Motor Freight, 639 F.2d 953, 957 (3d Cir. 1981). A union breaches that duty "when a union's conduct toward a member is `arbitrary, discriminatory, or in bad faith.'" Id. (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967)). "The union must be accorded a `wide range of reasonableness' to enable it to perform effectively, but this discretion is subject to `good faith and honesty of purpose.'" Id. (quoting Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563-64 (1976)).

In order to prevail on a claim that a union breached its duty of fair representation by failing or refusing to pursue a grievance, the plaintiff must show that the union's decision not to proceed with the grievance was arbitrary or in bad faith. Id. at 958 (citing Vaca, 386 U.S. at 192-93). "[P]roof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." Id. at 959 (quoting Bazarte v. United Transportation Union, 429 F.2d 868, 872 (3d Cir. 1970)). "In order to state a claim for breach of [the duty of fair representation], it is essential that plaintiffs allege a bad faith motive on the part of the union." Id. (quoting Medlin v. Boeing Vertol Co., 620 F.2d 957, 961 (3d Cir. 1980)). Thus, "the mere refusal of a union to take a complaint to arbitration does not establish a breach of duty, even if the member's claim was meritorious." Id. at 958 (citing Vaca, 386 U.S. at 192-93.

In the present case, DiPeppe's Complaint fails to state a claim upon which relief can be granted under the standard enunciated by the Third Circuit in Findley. In the First Count, DiPeppe alleges that Local 623 "negligently failed to prosecute [his] grievance through all available steps, with the result that [his] termination of employment was sustained." (Complaint, First Count, ¶ 4.) As noted above, a union's negligence provides no basis upon which to recover for breach of the duty of fair representation. Thus, even if DiPeppe were to prove that Local 623 was negligent in its handling of his grievance, he would not be entitled to recover for breach of the duty of fair representation. [3]

Similarly, DiPeppe alleges in the Second Count of the Complaint that Local 623 "failed to advise [him] in a timely manner of any right [he] may have had to pursue said grievance on his own." (Complaint, Second Count, ¶ 2.) However, it is undisputed that DiPeppe had no right to pursue the grievance on his own. [4] Only Local 623, as the exclusive bargaining agent for its members under the collective bargaining agreement, had the authority to pursue the grievance on DiPeppe's behalf.

Accordingly, the court grants Local 623's motion for summary judgment and dismisses DiPeppe's Complaint with prejudice.

CONCLUSION

For these reasons, the court denies DiPeppe's motion for leave to amend his Complaint, and grants Local 623's motion for summary judgment. The accompanying Order is entered.

Dated: March 31, 1999

ORDER

THIS MATTER having come before the court on the motion of defendant, Local 623, United Brotherhood of Carpenters and Joiners of America ("Local 623"), to dismiss plaintiff Henry DiPeppe's Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for summary judgment, pursuant to Federal Rule of Civil Procedure 56(b), and on DiPeppe's cross-motion for leave to amend his Complaint, pursuant to Federal Rule of Civil Procedure 15(a), and the court having considered the moving papers and the opposition thereto, and for the reasons set forth in the accompanying Opinion;

IT IS on this 31st day of March, 1999, hereby ORDERED that DiPeppe's motion for leave to amend his Complaint is DENIED; and

IT IS FURTHER ORDERED that Local 623's motion for summary judgment is GRANTED and that DiPeppe's Complaint is hereby DISMISSED WITH PREJUDICE.

JEROME B. SIMANDLE U.S. District Judge

1. The court will treat Local 623's motion as a motion for summary judgment due to Local 623's reliance upon, and the court's consideration of, matters outside the pleadings. See Hilferty v. Shipman, 91 F.3d 573, 578 (3d Cir. 1996). Local 623's framing of its motion to dismiss as a motion for summary judgment in the alternative constitutes adequate notice to DiPeppe of the potential conversion of the motion to dismiss to a motion for summary judgment. See id. at 578-79.

2. The court makes this finding notwithstanding the fact that DiPeppe now appears to deny that he filed a grievance concerning his termination. See DiPeppe Cert. at ¶ 27. It is obvious from Burchizelli's September 1, 1992 letter that someone filed a grievance concerning DiPeppe's termination. In his Complaint, DiPeppe alleges that it was he who "instituted a grievance." Complaint, Count One at ¶ 4. Indeed, even DiPeppe's proposed Amended Complaint acknowledges that a grievance was filed after his termination. See Proposed Amended Complaint, Count One at ¶ 4.

3. DiPeppe's counsel acknowledged this much in his July 24, 1998 letter to Local 623's counsel when he stated, "I have reviewed your brief and supporting documents as well as checking the law you have cited and it would appear pointless for me to file opposing papers." (Local 623's Reply Brief, Ex. 1.)

4. DiPeppe's counsel acknowledged in his August 13, 1998 letter to Local 623's counsel enclosing DiPeppe's cross-motion for leave to amend that he had "nothing to file in opposition [to the motion to dismiss] with regard to Count Two of the

Complaint." (Local 623's Reply Brief, Ex. 2.)