[* 1]

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

PRESENT: ~~EMILY JANE GOODMAN~~ PART 17

Index Number : 109909/2010
SAMUELSEN, JOHN
VS.
NYC TRANSIT AUTHORITY
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Motion to change venue or dismiss is decided per attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/16/11

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
----------X

JOHN SAMUELSEN, as PRESIDENT of LOCAL 100, TRANSPORT WORKERS UNION OF GREATER NEW YORK,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY a/k/a MTA NEW YORK CITY TRANSIT and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Defendants.

----------X

Index No. 109909/10

Emily Jane Goodman, J.:

In this action to declare that the terms of a collective bargaining agreement violate PAL § 1203-a (3) (b), defendants New York City Transit Authority a/k/a MTA New York City Transit (Transit Authority) and Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA)(together, defendants) move to change the venue of this action to Kings County, or, in the alternative, to dismiss the complaint pursuant to CPLR 3211 (a) (1), (2), (4) and (7).[1]

---

[1]Despite this enumeration of statutory subsections, defendants are not seeking dismissal under CPLR 3211 (a) (2) (lack of jurisdiction) or (a) (4) (prior pending action), but are seeking dismissal under (a) (7) (failure to state a cause of action) and (5) (statute of limitations), a section they do not reference in their Notice of Motion. However, the parties have had notice of the actual grounds for the motion, and there has been no prejudice.

I. Background

The Transit Authority is a public benefit corporation created pursuant to Public Authorities Law (PAL) § 1201 *et seq.*, charged with providing, among other things, bus service to the City of New York. Under PAL 1210 (2), "[t]he employment, promotion and continuance of employment of all employees of the [Transit Authority] shall be governed by the provisions of the civil service law ... ." Further, "[e]mployees of the [Transit Authority] shall be subject to the provisions of the civil service law." *Id.*

MaBSTOA is also a public benefit corporation, created by PAL § 1203-a, and is a subsidiary of the Transit Authority. MaBSTOA was created in 1962 to take over the bus routes of two bankrupt private bus lines, and so also provides bus service to certain areas of the City of New York. Plaintiff Samuelsen is the president of Local 100, Transport Workers Union of Greater New York (TWU), a union representing both Transit Authority and MaBSTOA employees, pursuant to a collective bargaining agreement (CBA) and other writings.

Employees of MaBSTOA do not take civil service examinations to procure their jobs, as do Transit Authority employees, and, as a result, are not civil service employees. Neither are they members of the New York City Employees' Retirement System (NYCERS), as are Transit Authority employees. These facts are

supported by statute, pursuant to PAL § 1203-a (3) (b), which states that MaBSTOA employees "shall not become, for any purpose, employees of the city or of the transit authority and shall not acquire civil service status or become members of the New York city employees' retirement system ... ." MaBSTOA employees may be terminated at any time, without cause stated or a hearing, as long as the termination does not violate the Constitution, statute or contract. *Matter of Bergamini v Manhattan and Bronx Surface Transit Operating Authority*, 62 NY2d 897 (1984). Courts recognize that the Transit Authority and MaBSTOA are separate entities. *See Matter of Romaine v New York City Transit Authority*, 34 AD3d 486 (2d Dept 2006); *Reis v Manhattan and Bronx Surface Transit Operating Authority*, 161 AD2d 288 (1st Dept 1990).

In 2002, the parties entered into a Memorandum of Understanding (MOU) (Notice of Motion, Ex. C), which was incorporated into the CBA. In the MOU, the parties agreed to, among other things, the standardization of contractual pay and work practices. As an example, one area addressed by the MOU concerned "job picks," by which, under a newly combined Transit Authority and MaBSTOA seniority list, defendants' bus operator employees could choose location and other job assignments.

The MOU contained a provision (Consolidation provision) (Notice of Motion, Ex. C, Attachment E) ensuring

further uniformity in certain work practices of the Transit Authority and MaBSTOA. In the Consolidation provision, the parties "agreed to the elimination of the artificial distinction between MaBSTOA and the Transit Authority" (*id.* at 1), and, by its terms, the Consolidation provision called for the "free movement and commingling of equipment and personnel between MaBSTOA and Transit Authority," except as modified in the provision. *Id.* According to TWU, the above agreements have blurred the line between Transit Authority employees and MaBSTOA employees, in that MaBSTOA employees can now work in Transit Authority facilities, and receive job assignments from the Transit Authority.

In 2010, TWU commenced an arbitration of a grievance concerning the order of layoffs within the two authorities. By order to show cause, defendants moved in the Supreme Court, Kings County, to stay the arbitration, claiming that an award would result in violations of Civil Service Law (CSL) § 80, and PAL § 1203-a. Defendants complain that TWU, in bringing the grievances and arbitration, relied on the validity and enforceabilty of the MOU that they now seek to disavow. The Kings County court (Vaughan, J.) granted the motion, and the arbitration was stayed. Notice of Motion, Decision, Ex. F. This decision is currently being appealed. *Id.*, Notice of Appeal, Ex. G.

TWU has filed a second grievance, in August 2010, which,

according to defendants, again relies on the validity of the Consolidation provision.

II. Arguments

TWU, in the complaint, states that the MOU and Consolidation provision run afoul of PAL § 1203-a (3) (b), in that these agreements effectively make MaBSTOA employees de facto employees of the Transit Authority. TWU states that as a result of the agreements "employees of MABSTOA are, for almost all purposes, employees of NYCHA. MABSTOA employees regularly work in NYCTA facilities; they receive job assignments, direction and supervision for NYCTA supervisors. MABSTOA employees are disciplined and in some cases terminated by NYCTA officials. MABSTOA employees are paid from an account maintained by NYCTA Other than not having civil service status or participating in a different pension system, MABSTOA employees working for NYCTA are for all purposes indistinguishable for NYCTA employees" (Complaint ¶ 12). Defendants, in opposition, note that the agreements in question do not cover any procedures for hiring, promoting, and layoff or reinstatement of employees because those practices are governed by the Civil Service Law for NYCHA employees, and, by contract regarding MaBSTOA employees. Defendants also maintain that TWU cannot now turn its back on agreements negotiated in good faith, by sophisticated parties.

Defendants request a change of venue of this action to

King's County, based on the assertion that the action is "inextricably intertwined" with the King's County proceeding. Defendants' Memorandum of Law, at 4. In the event of the failure of this application, defendants seek the dismissal of the action. Defendants argue that the contracts are enforceable as written, and do not violate any statutory provisions.

Defendants also maintain that TWU cannot now seek to dismantle contractual provisions upon which it relied in the Kings County proceeding, raising issues of both equitable and judicial estoppel. Defendants further suggest that the action is barred by the statute of limitations and laches, because, allegedly, any complaint as to the contractual provisions accrued upon the execution of the MOU in 2002, and that a challenge to the contracts should have been brought at that time, as an Article 78 proceeding.

III. Discussion

A. Venue

Defendants' argument for a change in venue is based only on the fact that a prior proceeding was commenced in Kings County, and raised an issue under PAL § 1203-a (3) (b). Defendants assert that the proceeding is, essentially, still in progress, as it is being appealed to the Appellate Division, Second Department.

Under CPLR 505 (a), "[t]he place of trial of an action by or

against a public authority constituted under the laws of the state shall be in the county in which the authority has its principal office or where it has facilities involved in the action." Under CPLR 505 (b), "[t]he place of trial of an action against the New York city transit authority shall be in the county within the city of New York in which the cause of action arose ... ."

CPLR 505 (a) has been interpreted to apply to New York City agencies. *See Montesano v New York City Housing Authority*, 47 AD3d 215 (1st Dept 2007). TWU does not dispute that MaBSTOA, as intimated by its name, has facilities involved in the action in New York County. Therefore, this court is a proper venue for suits against MaBSTOA.

New York County is also a proper venue for the Transit Authority, as the agreements were executed here, and there is no question that the cause of action on those contracts arose here. Thus, TWA's choice of venue is proper.

Defendants do not cite to the section of the CPLR upon which they request a change of venue, but it is, presumably, CPLR 510. In order to change venue under CPLR 510, defendants must show that "(1) the county designated for that purpose is not a proper county; or (2) there is reason to believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by

the change." *Id.*

Defendants' sole basis for a change in venue is the presence in that county of a completed proceeding to stay an arbitration involving issues similar to the area of inquiry as in the present matter. Apparently, defendants believe that the fact that an appeal is pending in Kings County is sufficient nexus to this action to require a change in venue. However, the presence of another, similar, proceeding is not a ground for a change in venue under CPLR 510. As such, defendants have failed to present any of the requirements for a change of venue, and the application is denied.

B. Dismissal

I. Equitable and Judicial Estoppel

Defendants argue that TWU is equitably estopped from denouncing the MOU, having acted under it, and having received substantial benefits to their employees under it for over eight years. Defendants note that TWU does not deny that the MOU was a result of fair negotiations between the parties. The argument for judicial estoppel is based on TWU's alleged reliance on the validity of the agreements in its opposition to the Kings County proceeding to stay the arbitration, and in its further grievance.

Parties who accept the benefits of a contract may be estopped from denying the validity of that contract. *See Svenska Taendsticks Fabrik Aktiebolaget v Bankers Trust Company*, 268 NY

73 (1935); *R.A.C. Holding, Inc. v City of Syracuse*, 258 AD2d 877 (4th Dept 1999); *Savasta v 470 Newport Associates*, 180 AD2d 624 (2d Dept 1992), *affd* 82 NY2d 763 (1993). However, if upholding the contract would violate public policy, there can be no estoppel. *See Matter of City of New York (Public School 69 and Intermediate School 72)*, 80 AD2d 611 (2d Dept 1981)(estoppel may apply unless the agreement contravenes public policy). Therefore, estoppel could not be applied here to validate the contract should the MOU and the Consolidation provision be found to violate PAL 1203-a (3) (b), as that would certainly be against public policy. This reasoning would equally apply to judicial estoppel. TWU's actions in reliance on the MOU and Consolidation provision in the proceeding to stay arbitration could not legalize a contract which violates a statute of the State.

ii. Statute of Limitations and Laches

Defendants maintain in their original papers that the present action is barred by the statute of limitations because any dispute as to the enforceabilty of the MOU should have been addressed at the time of the negotiation of the agreement, and that such a challenge should have been in the nature of an Article 78 procedure. Alternatively, defendants argues that the delay in asserting a violation of the PAL amounts to laches.[2]

---

[2]Defendants are silent in response to TWU's opposition to these arguments, and appear to concede that there is no ground to apply the statute of limitations or the doctrine of laches.

As TWU argues, the statute of limitations on an action claiming a violation of a statute does not begin to run where there is alleged a continuous violation of that statute. *See Matter of Cash v Bates*, 301 NY 258 (1950); *Matter of DeLuca*, 282 App Div 607, 611 (3d Dept 1953)(statute of limitations does not apply to a "continuing failure on the part of [defendant] to obey a [statutory] mandate ... "); *O'Brien v Mayor of City of New York*, 113 Misc 2d 388, 390 (Sup Ct, NY County 1982)(statute of limitations does not apply if a plaintiff "alleges a continuing failure of the [defendants] to obey a mandate of the [law] ... "). As TWU is claiming a continuing violation of the PAL, the statute of limitations has not run on this action. For the same reason, laches is also not applicable.

iii. Dismissal under CPLR 3211 (a) (7)

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994).

TWU's claim is that the MOU and Consolidation provision, as written, and in its implementation, transform MaBSTOA employees into Transit Authority employees. *See* TWU Memorandum in

Opposition, at 10, 11, 12, 14.

The Consolidation provision, on its face, pertains to the elimination of the "artificial distinction between MaBSTOA and the Transit Authority," and lists several areas where the agencies will enjoy parity, such as "the free movement and commingling of equipment and personnel between MaBSTOA and Transit Authority" except as modified by further agreement. *Id.*, ¶ 1. Section 2 provides that "all contractual pay and work practices at MaBSTOA shall be standardized at the Transit Authority level" except for certain employees who will proceed under MaBSTOA rules for vacation and holiday pay, and other benefits, for a limited amount of time after the agreement is ratified. Section 3 relates to a hiring ratio.[3]

While the Consolidation provision is certainly broadly worded, seeking, as it does, to create a "seamless bus system" promoting a certain level of equality among employees of both agencies in the conditions of employment (Consolidation Provision, as 1), it does not state or imply that MaBSTOA employees will henceforth be hired as civil servants, pursuant to

---

[3]In ¶14 of its Reply Affirmation, Transit Authority raises the possibility that the hiring ratio, if interpreted as anything other than a "general goal or guideline" would "violate the Civil Service Law, the Public Authorities Law, public policy, and essentially be a requirement for featherbedding." TWA's action has not raised this argument, and is based solely on the contention that the Public Authorities Law has been violated because MaBTOA employees have effectively become NYCTA employees. Accordingly, the Court will not address this argument.

civil service tests, or that they will become members of NYCERS. As a result of this fundamental distinction, MaBSTOA employees are hired by MaBSTOA, and Transit Authority employees are appointed by the Transit Authority, pursuant to the Civil Service Law, and promotion and termination procedures are distinct (*see Matter of Bergamini v Manhattan and Bronx Surface Transit Operating Authority*, 62 NY2d 897, *supra*). Thus, despite MaBSTOA's employees' inclusion in Transit Authority positions, with rights similar to those of Transit Authority employees, the Court cannot conclude that, given this fundamental difference, the MOU and its consolidation provision violates PAL § 2103-a (3) (b). Accordingly, TWU is not entitled to a declaration that the MOU and its Consolidation provision "is void and unenforceable to the extent that they have effectively made employees of MABSTOA into employees of the NYCTA."

III. Conclusion

Defendants' motion to change the venue of this action to Kings County is denied. As to dismissal of the action, although TWU is not estopped from bringing this action, and the action is not barred by the statute of limitations or laches, nevertheless, TWU has failed to plead facts to support that the MOU and Consolidation provision violate PAL § 1203-a (3) (b), or that defendants have implemented these writings in such a way as to violate the statute.

Accordingly, it is

ORDERED that the part of defendants New York City Transit Authority a/k/a MTA New York City Transit and Manhattan and Bronx Surface Transit Operating Authority's motion seeking to change the venue of this action to Kings County is denied; and it is further

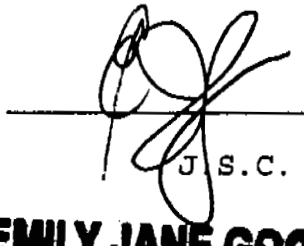
ORDERED that the part of this motion seeking dismissal of the action is granted, and the action is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court

Dated: May 16, 2011

ENTER:



J.S.C.

EMILY JANE GOODMAN