STEUBEN COUNTY
SURROGATE'S COURT
CHAMBERS
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Hon. Marianne Furfure
Surrogate

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May 11, 2016

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RE: Village of Arkport vs. Horan and Mauro
Index No.: 2011-0387CV

Dear Counsel:

Enclosed please find a copy of my Decision with respect to the above-referenced matter. The original has been filed with the Steuben County Clerk's Office by copy of this correspondence.

Very truly yours,

Marianne Furfure

Marianne Furfure
Acting Supreme Court Justice

MF/kaw
Enc.
CC: Supreme Court Clerk w/original

State of New York **Supreme Court**
County of Steuben

VILLAGE OF ARKPORT,

Plaintiff,

vs.

MARGARET HORAN and ROBERT MAURO,

Defendants.

DECISION
Index No. 2011-0387 CV

Appearances: *John W. Vogel,* Dansville for Plaintiff

Edward J. Degnan, Canisteo for Defendant Margaret Horan

Andrew J. Roby, Canisteo for Defendant Robert Mauro

This matter comes before the Court for decision after trial on the Village of Arkport's (plaintiff) action to recoup payments made to defendants for unused vacation, sick, and personal leave which plaintiff claims were unauthorized.

Previously, plaintiff filed a motion for summary judgment, claiming that there was no local law, ordinance or resolution providing for payment of unused vacation, sick, and personal leave and, therefore, the payments to defendants were unauthorized and constituted an illegal and improper gift of public funds. Defendants filed a cross motion for summary judgment claiming that the benefits were part of an employment contract, given to defendants when they were hired, as an additional form of compensation for work performed.

This Court found, as a matter of law, that there was no statutory authority allowing employees to carry over unused vacation, sick, and personal leave from year to year, or to be reimbursed for the unused days. However, the Court denied plaintiff's motion for summary judgment finding that defendants had raised a question of fact as to whether the prior Village Board had authorized an employee benefits package which included payment for accrued but unused leave time, thereby, contractually authorizing the payments made to defendants. Further, the Court noted that, even in the absence of statutory or contractual authority, under certain equitable circumstances, an employee could receive payment for accrued but unused benefits.

The Court also denied defendants' cross motion for summary judgment finding that, although defendants presented a document which they characterized as an employment contract, the document was unsigned and defendants presented no evidence to establish who created the document, how it was maintained, and who was authorized to establish the terms of employment for the Village.

Based on the denial of both summary judgment motions, the issues to be resolved at trial were whether the benefits statements constituted employment contracts; whether there were equitable considerations which would allow defendants to keep the payments they received; and whether plaintiff established a prima facie case of conversion or fraud against Defendant Horan, as alleged in the third and fourth causes of action in the Complaint.

A non-jury trial was held on November 4, 2015. At that time, plaintiff called two witnesses. Both witnesses were current employees of the Village who had not been employed by the Village at the time defendants were paid for their unused sick and vacation time. Robin Allison, the current Village Treasurer, testified from her review of the Village books and records, that defendants were paid during 2006 and 2007 for accumulated sick, vacation and personal time by checks signed by the Mayor or Defendant Horan who was the Village Treasurer at the time. She also testified to the minutes of the Board from November 20, 1997, which contained a resolution authorizing payment of certain accrued benefits to David S. Robinson, Jr. when he retired as Clerk-Treasurer for the Village. Her search of the Village records showed there had been no Board resolutions, regulations or ordinances authorizing the payments made to the defendants. She acknowledged that she had no knowledge of the custom and practice of the Village regarding the payment of accrued but unused sick, vacation and personal time during the years 2001 through 2007. Although she testified that the Village records did contain yearly salary and fringe benefit statements for each defendant, she had no knowledge of who created those documents or how they were approved.

Jennifer Bush (Bush) testified that she was employed as the Village Clerk since August of 2010. She had no personal knowledge of the Village practices or procedures regarding Village employees prior to August 2010. She also searched the Village records and found only the 1997 resolution pertaining to David S.

Robinson, Jr. and the minutes of a Village Board meeting on September 20, 2007, (Plaintiff's Exhibit 2) which referred to payments made to another Village employee, Ron Kennell. At that meeting the Village Deputy Clerk/Treasurer commented that at a prior budget meeting, the Board decided to pay that employee for accumulated time when he left employment and here forward they wanted to "clear out" the time at the end of the fiscal year. However, no formal resolution or ordinance to that effect was found. There was also no formal resolution or ordinance found authorizing the payments made to Mr. Kennell. Both Kennell's and Robinson's benefits were paid upon their retirement. At the time defendants were paid, they were still active employees for the Village. Although Bush testified that, during the time defendants were employed, the Board approved an Abstract of checks written by the Village Treasurer, she could find no record in the Abstract that set forth what the checks represented. The Abstract only listed to whom the check was paid and an amount.

The defendants called no witnesses at the trial and moved to dismiss the complaint. The Court dismissed plaintiff's claim for punitive damages and defendants' Section 1983 cause of action and reserved decision on the remaining causes of action.

As a threshold matter, defendants moved to dismiss the complaint on the grounds that the Board never authorized plaintiff to institute this legal action and, therefore, plaintiff lacked the legal capacity to file suit. Plaintiff opposed this motion

and contends that the Board did pass Resolution 10-26 on March 8, 2011, authorizing plaintiff to proceed with this legal action. Neither the Board meeting minutes from March 8, 2011, nor Resolution 10-26 were offered into evidence to support plaintiff's claim.

Plaintiff argued that, even if the Board did not pass an authorizing resolution, defendants waived their right to raise this defense because they did so for the first time during defendants' closing statements at the end of the trial, rather than in a motion to dismiss or in a responsive pleading, as required by CPLR 3211 (e). Plaintiff is correct. Because defendants did not raise this defense as required by statute, they waived their right to do so (*Vrooman v. Village of Middleville, Herkimer County*, 91 AD2d 833, 834 [4th Dept. 1982]). Defendants' motion to dismiss the complaint on this basis is denied.

Plaintiff argues that the payments defendants received constitute payments in violation of General Municipal Law §92 and Article VIII of the New York State Constitution because there was no ordinance, resolution or employment contract which authorized the payments. Plaintiff alleges that Defendant Horan (Horan) received unauthorized gross payments totaling $25,749.00 in 2006 and 2007 for unused vacation and sick leave which she claims she accrued from 2001-2007, and Defendant Mauro (Mauro) received unauthorized gross payments totaling $14,339.00 for leave he claimed to have accrued during the same period. Plaintiff introduced six of Horan's benefit statements, beginning in 2001-2002 and concluding

2006-2007, and two similar documents for Mauro, one from 2002-2003 and another from 2004-2005 which were contained in their personnel file. These documents set out the employees' base salary, Social Security/Medicare paid, a list of holidays observed by the Village, and the number of vacation, sick and personal days allotted to each employee. Plaintiff claims these statements are not contracts, but rather documents given to defendants to inform them of the salary and benefits package provided by the Village. Plaintiff argues that all of the statements were unsigned except one, and none of the statements addressed or referenced an employee's right to accrue unused vacation, sick and personal days from year to year, or to be paid for unused days accrued over a period of years.

Defendants argue that plaintiff has failed to present sufficient evidence to establish a prima facie case. Defendants contend that plaintiff failed to call three witnesses who were Board members during the time the events in controversy occurred. Defendants claim that these individuals were material witnesses who could have testified to the Village's policy and practice of paying other employees for accrued but unused time. Defendants contend that the Court cannot infer from plaintiff's incomplete evidence that the payments to defendants were not authorized. Defendants urge the Court, as trier of fact, to draw a negative inference against plaintiff based on this incomplete or missing evidence. Defendants did not raise this claim prior to the close of proof but only in their post-trial memorandum of law. It appears that the witnesses defendants assert should have been called were former Village board members or employees, equally available to either side.

Contrary to defendants' claim, plaintiff's evidence established a prima facie case that the benefits statements were not proof that the payment of accrued but unused sick, vacation or personal time was part of defendants' employment contract. The Village produced the official records of the Village in which any action by the Board would be contained. These records contained no resolution, regulation or ordinance authorizing the payments. Only Mauro's 2002-2003 statement was signed by the Mayor and only one of Horan's statements stated that she had the right to be reimbursed for unused days accrued. Although Horan's 2006-2007 statement does contain a provision stating Horan my collect unused vacation, sick, and personal leave on an annual basis, there was no explanation as to why this notation appears on the Horan statement, who added the statement, and whether the Board was aware of this additional language or authorized it in any way. Therefore, it has minimal evidentiary value. Therefore, plaintiff established a prima facie case that no express contractual authorization existed allowing for payments to defendants for accrued but unused leave. Without other sufficient evidence of an express contract, defendants' claim that the benefits statements are employment contracts entitling defendants to the payments they received must fail.

Defendants claim that, even if the benefits statements do not qualify as express contracts, the parties had implied contracts for reimbursement of unused leave based on plaintiff's long practice of paying other employees for accrued but unused benefits. Plaintiff opposes defendants' claim and argues that the Village was

unaware that Horan was writing these reimbursement checks and that she had no authority to do so.

Where no written contract exists, a contract may be implied where inferences can be drawn from the facts and circumstances of the case and the intention of the parties is indicated by their conduct (*Rocky Point Properties, Inc. v. Sear-Brown Group, Inc.*, 295 AD2d 911, 912 [4th Dept. 2002]; *Pache v. Aviation Volunteer Fire Company.*, 20 AD3d 731, 732 [3rd Dept. 2005]). Generally, an implied agreement based on the conduct of the parties is as binding as an express agreement and differs only in the manner in which the agreement was established (*Jemzura v. Jemzura*, 36 NY2d 496, 503-504 [1975]; *Matter of Boice*, 226 AD2d 908, 910 [3rd Dept. 1996]). However, when the Legislature has assigned the authority to enter into contracts to a specific municipal officer or body or has prescribed the manner in which the contract must be approved, no implied contract to pay for benefits furnished by an agreement which does not comply with statutory restrictions can obligate or bind the municipality (*Seif v. City of Long Beach*, 286 NY 382, 387 [1941]; *Pache v. Aviation Volunteer Fire Company*, Id.; *H&R Project Associates, Inc v. City of Syracuse*, 289 AD2d 967 [4th Dept. 2001]; *Town of Oneonta v. City of Oneonta,* 191 AD2d 891 [3rd Dept. 1993]; *Lutzken v. City of Rochester*, 7 AD2d 498, 500 [4th Dept. 1959]).

Village Law provides that the board of trustees has the general authority to manage and protect the property of the Village, and the mayor has the authority to execute all contracts in the name of the Village (Village Law Sections 4-400(1)(i), 4-

412(1)). GML §92 recognizes that the governing board of each village has the power to grant vacation, sick leave and personal leave with pay, by local law, ordinance or resolution. There is no evidence that the Board authorized the payments or gave authority to the Mayor to do what defendants claim.

In this case, even though there was no express contractual authorization for payments made to defendants, they argue that the Board was authorized to pay defendants for their accrued but unused leave because the Village had a long-standing policy and practice of paying other employees for accrued but unused leave. In support of this claim, defendants cite the cases of two former Village employees who, upon retirement, received payment for accrued but unused leave. By Board resolution, David Robinson (Robinson) was paid for his accrued but unused vacation and sick leave, upon his retirement from the Village. Ronald Kennell (Kennell) received payment for unused leave when he retired with Board approval, but no local law, ordinance or resolution was passed authorizing this payment.

The law is well-settled that "if not expressly authorized by statute, local law, resolution or pursuant to a contract term, a public employee may not be paid for unused (leave)" (*Karp v. North Country Community College*, 258 AD2d 775, [3rd Dept. 1999]). "(P)ayments made without such authority are deemed public gifts" and are prohibited (*Karp v. North Country Community College*, Id.). Although the Board may have acted contrary to law or made an administrative error when compensating other employees for accrued but unused leave, this does not validate defendants'

claim that they are entitled to similar compensation (*Parrino v. Albertson Water District,* 118 AD3d 802, 803 [2nd Dept. 2014]). Because the law requires express authorization for the payment of accrued but unused leave, a contract based on prior conduct may not be implied between the parties to provide "rough justice" and thereby force liability on the Village when statutory law specifically prohibits such payments (*Parsa v. State of New York*, 64 NY2d 143, 147 [1984]; *Karp v. North Country Community College*, Id.). Therefore, even though the payments made to Kennell were statutorily unauthorized, defendants cannot rely on this as a basis for their claim.

Defendants alternatively argue that the Fair Labor Standards Act (FLSA), a federal law which is binding on state and local governments, and its implementing regulations, provide that employers are allowed to pay their employees for accrued but unused vacation, sick, and personal leave, if it is the custom and practice of the employer to do so. Defendants contend that, because the Village had a custom and practice of paying employees for accrued but unused leave, the payments defendants received were authorized by federal law. Defendants also claim that federal law allows employers to pay employees for accrued leave at any time, thereby negating plaintiff's claim that the payments were unauthorized because defendants were not retiring or retired when they received payment.

The FLSA is a federal minimum wage and compensation law which establishes a forty (40) hour maximum work week and sets overtime compensation rates for employees who work beyond the statutory maximum work week, (*Chavez*

v. City of Albuquerque, 630 F.3d 1300, 1304 (10th Circuit, 2011]). The FLSA Section 207(o), and its implementing regulation 29 CFR Section 553.21, provides that local government employees may receive, in lieu of overtime compensation, compensatory time. Compensatory time given in lieu of overtime compensation is required to be paid at a rate of at least one and one-half hours for each hour of employment (29 USC Section 207(o)(1)). FLSA Section 207(e)(2), and its implementing regulation 29 CFR 778.218(a), exclude vacation, sick, and personal leave from the definition of compensatory time because vacation, sick and personal time are paid at the employee's regular hourly rate. FLSA Section 254 addresses an employer's relief from liability and punishment for failure to pay minimum wages or overtime compensation. This section provides that, although in certain circumstances, none of which apply here, an employer is not liable for failure to pay minimum wage and overtime compensation, the employer may assume such liability by entering into a written or oral contract with the employee, or by following a custom or practice with the employee. Finally, 29 CFR Section 553.27, which speaks to payments for unused compensatory time, provides that payments for accrued compensatory time may be made at any time.

Vacation, sick, and personal time is referred to in 29 CFR Section 778.218 (a) as "idle hours" which are paid at a rate equal to the employee's regular rate and are not made as compensation for hours of employment. This is what distinguishes vacation, sick, and personal time from compensatory time given in lieu of overtime. While an employer may give an employee compensatory time in lieu of overtime pay,

the compensatory time must be given at a rate of not less than one and one-half times the employee's regular rate (29 USC Section 207(a)(1)). Therefore, defendants' claim that the payments they received were authorized by custom and practice, relying on FLSA Section 254, and that payments could be made at any time, relying on 29 CFR Section 553.27, are not applicable to this case because they refer to minimum wage and overtime compensation, not payment for accrued but unused leave.

Even if the FLSA applied to payment of accrued but unused leave, defendants' claim that the Village had a long-standing custom and practice of paying other employees for such leave fails. Defendants relied on evidence presented by plaintiff which established that two employees who were retiring were paid for accrued but unused leave. In this case, even if the Village had a policy and procedure of paying retiring employees for accrued but used leave, neither defendant had announced an intent to retire, nor was in the process of retiring. Therefore, none of the payments made to either defendant would have qualified as payments authorized by the Village based on custom and practice.

Defendants further claim that the Board was aware of, and approved, payments to defendants because the Board approved the Abstract of Vouchers (Abstract), which is a compilation of monthly lists of checks written from the Village general account and presented to the Board for approval. The Abstract spanned a period of time from January 19, 2006 through February, 2007, but did not contain vouchers for July through December, 2006, or January 2007. None of the checks

written by Horan which are at issue here, including the check signed by the Mayor, were listed in the Abstract and, therefore, defendants' claim that the Board was aware of the checks written to defendants and approved the payments, is without support. Even if the checks were listed in the Abstract, there was no proof that the Abstract indicated that they were issued for payment of accrued time.

Defendants also argue that they are entitled to keep unused leave payments even in the absence of statutory or contractual authorization to do so based on equitable principles. Defendants contend that, because vacations are not gifts given to the employees but rather are conditions of employment, an employee must be allowed to use the time earned or receive compensation for it, relying on the case of *Clift v. City of Syracuse*, (45 AD2d 596 [4th Dept. 1974]). In *Clift,* due to the demands of his job, the plaintiff had been promised he would receive leave when his work schedule allowed. However, he was terminated before he was able to use his accrued vacation leave. Here, there was no evidence presented that defendants were prevented from using their time due to the demands of their jobs, or that defendants were promised that they could accrue vacation, sick, and personal days and use that time later. Therefore, the holding in *Clift* does not support their claim that they are entitled to keep the payments they received, without demonstrating that the Village discharged them without affording them the opportunity to use their vacation time.

Defendants also cite the case of *Matter of Teachers Assn., Cent. High School Dist. No. 3 (Board of Educ., Cent. High School Dist. No. 3, Nassau County)*, (34

AD2d 351, 353-354 [Nassau Co. 1970]), which dealt with a collective bargaining contract that allowed reimbursement for unused vacation and sick leave as a form of deferred compensation to be collected upon the death or retirement of the employee. However, here there was no collective bargaining agreement or other employment-type contract which provided for deferred compensation.

The case of *Emerling v. Village of Hamburg* (255 AD2d 960, 962 [4th Dept. 1998]), also cited by defendants for their claim that municipal employees, not covered by a contract, can accumulate benefits for which they must be reimbursed, is distinguishable. The employees in *Emerling* submitted proof that rules and regulations were in effect throughout their years of employment which granted the employees medical benefits "until the employee's or official's death". In this case, defendants presented no evidence of any rules or regulations that existed during their years of employment granting them payment for accrued but unused leave.

Defendants further argue that the Village should be estopped from claiming that the payments were unauthorized. Defendants argue that they were promised certain benefits when they were hired, they performed the work required to get the benefits, the Village paid them for the benefits, and this proves that the payments defendants received were authorized.

Generally, the doctrine of estoppel may not be applied against the state or one of its sub-divisions unless manifest unjust results (*Karp v. North Country Community College,* 258 AD2d 775 [3rd Dept. 1999]; *Piscitella v. City of Troy*, 229 AD2d 767, 77 [3rd Dept 1996]). Even then there must be a showing of a municipality's misconduct

such as fraud, misrepresentation, deception, or similar affirmative conduct, that induced justifiable reliance by a party who then changes position to his detriment. (*Yassin v. Sarabu*, 284 AD2d 531 [2nd Dept. 2001]; *Matter of Branca v. Board of Educ., Sachem Cent. School Dist. at Holbrook,* 239 AD2d 494, 496 [2nd Dept. 1997]; *Oneonta v. City of Oneonta*, 191 AD2d 891, 892 [3rd Dept. 1993]); *Allen v. Board of Educ. of Union Free School Dist. No. 20.* 168 AD2d 403, 404 [2nd Dept. 1990]).

In this case, defendants presented no evidence to support a finding that the Village's conduct was based on fraud, misrepresentation, deception, or similar affirmative conduct. They have failed to prove that the defendants were promised the benefits they received. Neither have defendants proven a change in position to their detriment. Therefore, the very limited application of the estoppel exception against a municipality is not applicable in this case *(Daleview Nursing Home v. Axelrod,* 62 NY2d 30, 33 [1984]).

Defendants also claim that there is no precedent for reimbursement to a municipality for payments erroneously made. However, that is incorrect. Municipalities can recoup money paid by mistake (*Daleview Nursing Home v. Axelrod,* Id.; see, *Parrino v. Albertson Water District,* 118 AD3d 802, 803 [2nd Dept. 2014]). In this case, although defendants may have equities in their favor given that they have already received payment for unused leave, the larger issue here is the protection of the general public's funds (*Daleview Nursing Home v. Axelrod,* Id.). Harsh as it may seem, the law provides that it is better that an individual may occasionally have to bear the consequences of a municipality's error than to create

a precedent which would be very difficult for the public to protect against (*Daleview Nursing Home v. Axelrod,* Id.). Therefore, plaintiff has proven that it is entitled to recoup the payments erroneously paid to the defendants.

Plaintiff also charges Horan with conversion and fraud. The conversion cause of action is based on plaintiff's claim that Horan "intentionally, knowingly, wrongfully, improperly, and illegally converted the funds of the Plaintiff to her own use." To establish conversion, plaintiff must prove that Horan intentionally exercised control over the Village property without authority to do so, and thereby interfered with the Village's right of possession *(Simpson & Simpson, PLLC v. Lippes Mathias Wexler Friedman LLP,* 130 AD3d 1543, 1545 [4th Dept, 2015]). The fraud cause of action is based on plaintiff's claim that Horan held a position of trust based on her authority to sign Village checks and present them for payment, and that she breached this trust by fraudulently and wrongfully taking money from the plaintiff for her own use. To prove fraud, plaintiff must prove a misrepresentation of a material fact which is false, and known by defendant to be false, made to induce reliance by the other party, justifiable reliance of the other party, and injury *(Brenner v. American Cyanamid Co.*, 288 AD2d 869, 870 [4th Dept, 2001]).

Plaintiff acknowledges that Horan had the authority to write checks against the Village and present them for payment, but claims that she did not have the authority to write the checks at issue here because there was no contractual authority providing for these payments, and none of the checks Horan wrote were presented to the Board for approval. Plaintiff claims this proves that Horan's actions were

intentional and illegal. However, plaintiff called no witnesses, nor presented other proof, to establish that Horan was aware that there was no authorization for these payments, especially in view of the statement made at the September 20, 2007, Board meeting which referenced payments for accrued leave.

Plaintiff also claims that the Board was unaware of Horan's activities based on plaintiff's contention that none of the reimbursement checks written by Horan appeared in the Abstract the Board reviewed and approved each month. However, the current Village Clerk was not familiar with Village policy before she was hired in 2010 and there was no evidence of what policy and procedure for reviewing payroll were in place when Horan was employed by the Village. As a result, the evidence plaintiff presented was insufficient to prove that Horan either converted or fraudulently took the money she received. Therefore, these causes of action are dismissed.

Based upon the above, plaintiff is awarded judgment in the amount of $25,749.00 against defendant Horan and judgment in the amount of $14,339.00 against defendant Mauro.

Plaintiff's counsel to submit judgment.

Dated: May 11, 2016.

ENTER:

Marianne Furfure

Hon. Marianne Furfure
Acting Supreme Court Justice