UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE

Blethen Maine Newspapers, Inc., d/b/a Portland Press Herald	)	
	)	Civil Action No. 2:08-cv-00197-GZS
Plaintiff,	)	
v.	)	
Portland Newspaper Guild, Local 31128	)	
Defendant.	)	

DEFENDANT'S MOTION TO STRIKE WITH INCORPORATED MEMORANDUM OF LAW

NOW COMES Defendant, Portland Newspaper Guild, Local 31128 (hereinafter "the Union"), pursuant to F.R.Civ.P. 12(f) and hereby moves the Court to strike Paragraph 40 of the Complaint as impertinent and scandalous, and constituting a misrepresentation to the Court. Specifically, all allegations that the Collective Bargaining Agreement ["the CBA"] requires that Plaintiff's grievance be handled in a more "expedited" manner than it has been are false, and are based on Plaintiff's artful quotation of sections of the CBA, and failure to provide the Court with the actual terms of the Grievance and Arbitration clause of the CBA.

The Complaint at Paragraph 40 states:

> 40. Article X also states that "expeditious resolution of grievances in the best interests of both parties and the employees affected," Article X, sec. 3, and that the parties "shall endeavor to settle all grievances in less than the…specified time limits." Article X, sec. 5.

Based on its characterization of the grievance and arbitration provisions of the CBA set forth in Paragraph 40 quoted above, Plaintiff thereafter alleged at Paragraphs 43 and 44 that

> 43. Specifically, when Plaintiff requested that the Union agree to a joint submission and an expedited arbitration, pursuant to Article X, sec. 4 ("expeditious resolution of grievances is in the best interest of both parties and the employees affected") and Article X, sec. 5 (providing that the parties will try to expedite resolution of disputes), the Union refused.
>
> 44. This refusal to cooperate in the timely resolution of an urgent dispute of critical importance over the interpretation of the contract constitutes a breach of the 2007 Agreement by the Union. It also constitutes a breach of the Union's obligation to act in good faith and deal fairly with Plaintiff in the performance of its obligations under the 2007 Agreement.

The entire Complaint is premised on the concept that the CBA requires the parties to cooperate in obtaining a more "expeditious resolution of grievances" than is provided for in the CBA: see Complaint at Paragraphs 21, 22, 23, 24, 43, 44, and 45.

The Plaintiff's characterizations of the provisions for "expeditious handling" of grievances, set out in Paragraph 40 of the Complaint, is incomplete, and constitutes a misrepresentation of the terms of the Contract, and constitutes a lack of candor and an attempt to mislead the Court.

In fact, the parties in their CBA agree to expeditious handling on a specific basis: the parties agreed that

> [i]t is recognized by the parties that expeditious resolution of grievances is in the best interests of both parties and the employees affected. *To that end*, within sixty (60) calendar days of discovery, which shall be automatically extended by thirty (30) days with notice to the Publisher and which may be further extended by written request made to the Publisher and mutually agreed between the parties, the grievance process must be initiated as set forth in the following provisions…" (emphasis supplied)

A specific schedule of "expedited treatment", with multiple steps and specified periods for response, was agreed to.

The two quoted Sections of Article X of the CBA state in full as follows:

ARTICLE X GRIEVANCE PROCEDURE, ARBITRATION, NO STRIKE - NO LOCKOUT

…….3. It is recognized by the parties that expeditious resolution of grievances is in the best interests of both parties and the employees affected. To that end, within sixty (60) calendar days of discovery, which shall be automatically extended by thirty (30) days with notice to the Publisher and which may be further extended by written request made to the Publisher and mutually agreed between the parties, the grievance process must be initiated as set forth in the following provisions.

a. Non-discharge grievances:

(1) Settlement of non-discharge grievances shall first be attempted by the head of the department or his/her designee and the departmental Guild representative or his/her designee within the time period specified in Section 2 herein. If the grievance is not settled within fourteen (14) calendar days after the first meeting of the above named persons, the grievance shall be reduced to writing by the grieving party, stating the basis for the grievance and the provisions of the Agreement allegedly violated and referred to the Publisher- Guild Grievance Committee within seven (7) calendar days following the end of the fourteen (14) day period referred to above. The party against whom the grievance is filed shall give its answer to the grievance in writing to the Publisher-Guild Grievance Committee prior to or no later than the first meeting of the Publisher-Guild Grievance Committee to discuss the grievance.

(2) The Publisher-Guild Grievance Committee shall meet to resolve the grievance within seven (7) calendar days after receipt of the written grievance which shall be either hand delivered or sent by certified mail, and signed for with a receipt. If the grievance is not resolved within twenty-one (21) calendar days after the date of the first meeting, either party may, within thirty (30) calendar days thereafter refer the matter to arbitration in the manner hereinafter provided.

(3) If the matter is not referred to arbitration within the thirty (30) calendar day period, the grievance shall be deemed to have been withdrawn with prejudice, except in instances where the failure of the grieving party to advance the matter in a timely fashion was inadvertent and for good cause shown such as the illness, incapacity or absence from the state of the person or persons responsible for notifying the other party of

> the grieving party's desire to arbitrate the matter. A grievance deemed withdrawn due to a failure of the grieving party to advance the matter in timely fashion shall not constitute a precedent for any future case of the same or similar nature.
>
> b. Dismissed employees: [Text Omitted]…….
>
> 5. The parties agree they shall endeavor to settle all grievances in less time than the foregoing specified time limits. However, for a variety of reasons, extension of the time limits set forth herein may be needed in order to achieve resolution of a matter. In such cases, the parties may by mutual agreement, in writing, agree to such extension.

1. The Complaint at Paragraph 40 misrepresents and misstates the agreement of the parties for "expeditious resolution of grievances," by specifically omitting the actual guidelines which the parties have agreed to, and which the Union has at all times followed. By so misrepresenting the terms of the Agreement, the Plaintiff imposes upon the Court, misleads the Court, and engages in a lack of candor with the Court.

As Judge Woodcock has stated "although the motion to strike remains available for the extraordinary case, this is one weapon in the strategic arsenal that is more effective when used sparingly." *Randall v. Potter,* 366 F. Supp. 2d 120 (2005). With that in mind, Defendant focuses solely on one serious misrepresentation made in the Complaint, because the Court cannot properly assess Defendant's other Motions to Dismiss without knowing the actual terms of the CBA's grievance and arbitration procedure, which is cited by Plaintiff as the basis for all of its claims.

While a motion to strike is not intended to provide the opportunity for the Court to determine disputed questions of fact, in this case there is no dispute as to the actual wording of the Collective Bargaining Agreement**,** a copy of which is provided to the Court herewith as Attachment A.

The contents of the Collective Bargaining Agreement are not in dispute: they have merely been mischaracterized and misrepresented to the Court in Paragraph 40 of the Complaint.

Although the court will typically not consider documents or statements outside of the pleadings in determining a 12(f) Motion, a court may consider documents which are in incorporated by reference into the Complaint, and the instant Complaint includes the CBA by reference. See *County Vanlines, Inc. v. Experian Information Solutions, Inc.*, 205 F.R.D. 148 (S.D.N.Y. 2002). As Judge Carter stated in *Coffin v. Bowater*, 224 FRD 289 (2004):

> … When considering a motion to dismiss, a court generally will not consider documents outside of the complaint unless they are "expressly incorporated therein" *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Exceptions to this rule exist "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff's claim; or for documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3(1st Cir. 1993).

While Plaintiff acknowledges that mere allegations that portions of pleadings are “patently untrue” are not a valid ground for a 12(f) Motion, where the attached documentary evidence clearly establishes the misrepresentation in Plaintiff’s Complaint, a 12(f) motion to strike may be considered.

Where pleadings are “obviously false” and injurious to Plaintiffs, a 12(f) motion to strike may be granted. *Pessin v. Keeneland Association*, 45 F.R.D. 10 (E.D.Ky. 1968). Upon motion, the Court may strike from a pleading any “redundant, immaterial, impertinent, or scandalous matter.” Moreover, Rule 12(f) may support a motion to strike where the material in the pleading is prejudicial to the opposing party. See *Berke, et al. v. Presstek, Inc., et al.*, 188 F.R.D. 179; 198 U.S.Dist. LEXIS 22568 (D.C.N.H. 1998, McAuliffe). See also 5(A) Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §1382. Prejudice occurs when a challenged pleading or allegation confuses the issues before the court. *Hoffman-Dombrowski v. Arlington International Racecourse, Inc.,* 11 F.Supp. 2d 1006, 1009 (N.D. Ill. 1998). As Judge McAuliffe

noted in *Berke, supra*, where "plaintiff's specific allegations at Paragraphs [in the complaint]…are patently false, those… allegations are stricken."

It is also clear that Rule 12(e) may be used to strike "spurious" claims. See *Anchor Hocking Corp., v. Jacksonville Electric Authority,* 419 F.Supp. 992 (M.D. Fla. 1976).

WHEREFORE Defendants move for the Court to strike paragraph 40 of the Complaint, to replace Paragraph 40 with the actual text of Article X, Sections 3 and 5 of the CBA, and to strike all references thereafter in paragraphs 21, 22, 23, 24, 43, 44, and 45 to "expedited" dispute resolution procedures in the Collective Bargaining Agreement.

Dated this 8th day of July 2008.

/s/ Jonathan S. R. Beal
Jonathan S.R.Beal Fed. Bar #1191
Attorney for Defendant
P.O. Box 1400
Portland, ME 04104
207 879 1556(p) 207 879 2447 (f)
jbeal@maine.rr.com

/s/ Barbara L. Camens
Barbara L. Camens, *Pro Hac Vice*
Attorney for Defendant
Barr & Camens
1025 Connecticut Ave., Suite 712
Washington, D.C. 20036

/s/ Quinn Philbin
Quinn Philbin, Esq. *Pro Hac Vice*
Attorney for Defendants
Barr & Camens
1025 Connecticut Avenue N.W. , Suite 712
Washington D.C. 20036

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Defendant's Motion to Strike with Incorporated Memorandum of Law dated July 8, 2008 on each of the parties via U.S. Mail, postage prepaid, on July 8, 2008:

Mark A. Hutcheson, Esq.
Harry J.F. Korrell, Esq.
Summer Stinson , Esq.
Davis, Wright, Tremaine, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

All other parties listed on the Notice of Electronic Filing have been served electronically

Dated this 8th day of July 2008

/s/ Jonathan S. R. Beal

Jonathan S.R.Beal Fed. Bar #1191
P.O. Box 1400
Portland, ME 04104
207 879 1556(p)
207 879 2447 (f)
jbeal@maine.rr.com