STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THOMAS ANTHONY, BRIAN CARROLL, DON CLICKNER, JAMES CONNORS, MICHAEL DECKER, SR., MICHAEL DECKER, JR., THOMAS DOWLING, W. MICHAEL ELLIS, DOMINIC FRUSCIO, THOMAS HOLMES, ED MARKHAM, JACQUELINE MCCORMACK (WIFE OF DECEASED, THOMAS MCCORMACK), FRANK MCGROUTY, DOMINIC MOFFRE, PAUL S. MURPHY, ED OGDEN, DONALD PANICHI, SIMONE RAZZANO, ROBERT REMILLARD, SCOTT SKINNER,
Plaintiffs,

DECISION, ORDER AND JUDGMENT

ORIGINAL

Index No.: 2002-18

-against-

CITY OF WATERVLIET, NEW YORK and MICHAEL MANNING as MAYOR OF CITY OF WATERVLIET, NEW YORK,
Defendants.

(Supreme Court, Albany County, Special Term)
(Hon. Gerald W. Connolly, Presiding)

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Connolly, J.:

The plaintiffs remaining in this action, Thomas Anthony, Don Clickner, James Connors, Michael Decker, Jr., Thomas Holmes, Dominic Fruscio, Frank McGrouty, Donald Panichi, Simone Razzano and Robert Remillard (herein Plaintiffs)[1] are moving for an order granting summary

judgment against the defendant determining, *inter alia*, that as a matter of law, defendants are liable to plaintiffs to reimburse their Medicare Part B premiums. Defendants City of Watervliet, New York ("City") and Michael Manning as Mayor of City of Watervliet, New York (herein "Defendants") oppose the motion and have filed a cross-motion for summary judgment dismissing the amended complaint.

Standard

A party moving for summary judgment must demonstrate that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment" in the moving party's favor (CPLR §3212 [b]). "Thus, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action." (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014][internal citations and quotations omitted]). Summary judgment is a drastic remedy, which should only be granted when it is clear that there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiffs' motion for summary judgment

Plaintiffs have alleged in their amended complaint[2], *inter alia*, that each plaintiff is a retiree

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[2]The September 23, 2019 Decision and Order of the Court permitted plaintiffs to amend their complaint. Prior to such amendment, the parties had each moved for summary judgment. The parties via a May 11, 2020 So Ordered stipulation agreed, *inter alia*, (i) to withdraw their original motion and cross-motion for summary judgment without prejudice, (ii) that plaintiffs would file and serve an amended complaint with allegations concerning the claim of plaintiff's Dominic Fruscio, (iii) that defendants' counsel would file and serve an answer to the amended complaint and (iv) that plaintiffs' counsel would file a new motion for summary judgment to which defendants would respond. Such newly submitted summary judgment motions by plaintiffs and defendants are to be determined herein.

and that their rights are dictated by the relevant collective bargaining agreement ("CBA") in effect at the time of their retirement between the City and the Watervliet Uniformed Firefighters Association, Local 590, IAFF, AFL-CIO ("Union"), that the City is required both under these contracts and according to past practice to reimburse the plaintiff retirees for their Medicare Part B premium payments, that the City has breached its binding contracts with plaintiffs and is obligated to reinstitute its practice of reimbursing the plaintiffs for such payments and compensate plaintiffs for any payments that were not reimbursed.

Plaintiffs assert that pursuant to contract language, the City continued a longstanding practice of fully reimbursing retirees and their spouses for their Medicare Part B premium payments upon submission of proof of payment and that the practice developed prior to January 1, 1992 and continued until July 1, 2017 when the City discontinued such reimbursements. The submitted complaint contains two causes of action for breach of contract; one for persons who are already participating in Medicare Part B and a separate cause of action for those persons who have yet to begin participating in Medicare Part B.

Plaintiffs assert that on or about November 6, 2017, as a result of a grievance-arbitration between the City and the Union, Arbitrator John Budacs determined that the City violated Article II Section 11 of the CBA entered into on January 1, 2013 which ran through December 31, 2016 (and at the time of the Arbitration Opinion and Award remained in effect) when it discontinued reimbursing Medicare Part B premiums. The Arbitrator determined that the City should provide Medicare Part B premium reimbursement to all active bargaining unit members who retired following January 31, 2017 upon submission of acceptable proof that payment of coverage was made. Plaintiffs assert that they retired under the same or similar contract language or were the intended beneficiaries of such language and the longstanding practice that the arbitrator found was violated and the City is accordingly collaterally estopped from arguing: (i) that the continuance of

the City's health insurance plan without such premium reimbursement does not violate the contract and the similar language in prior contracts, and/or (ii) that plaintiffs are not intended beneficiaries of this language.

Plaintiffs requested relief in their amended complaint is that (A) the Court declare the rights and other legal relations of all plaintiff retirees and the City created by reason of the aforementioned contracts, past practice and court order, specifically: (i) each plaintiff retiree's rights are dictated by the contract in effect at the time of his retirement; (ii) the City is required, under these contracts and according to its past practice, to reimburse the plaintiff retirees for their Medicare Part B premium payments; (iii) the City has breached its binding contracts with plaintiffs; (iv) the City is obligated to reinstitute its practice of reimbursing the plaintiffs for their Medicare Part B premium payments; (v) the City is obligated to compensate the plaintiffs for any Medicare Part B premium payments that were not reimbursed; (vi) the City is obligated to continue providing Medicare Part B premium reimbursements for plaintiffs who have retired under any of the aforementioned contracts, regardless of whether they have already become eligible for Medicare; and (B) the Court order and direct the defendants to account for and pay to each plaintiff retiree any and all outlays and expenditures made by each plaintiff because of the wrongful change in the City's health care coverage, together with the plaintiffs' attorney's fees, costs and disbursements of this action.

In support of such contentions, plaintiffs have submitted copies of the relevant CBAs applicable to the plaintiffs. Plaintiffs have alleged in their amended pleadings that each of the plaintiff retirees belonged to the Union and/or is a third party beneficiary of the specific CBA in effect at the time he retired and may enforce the contract against the City as appropriate. Plaintiffs have also submitted affidavits from each of the plaintiffs in which such plaintiffs aver, *inter alia*, as to which collective bargaining agreement was in effect at the time of their retirement.

year of their retirement, those being the CBA in effect for January 1, 2004-December 31, 2006; the CBA in effect for January 1, 2007 through December 31, 2008; and, the CBA in effect for January 1, 2009 through December 31, 2012.

Plaintiff Anthony averred *inter alia* that he was a paid professional firefighter for the City until he retired due to a job-related disability in 2005 and was at all times employed as a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of such employment. He avers that the CBA in effect at the time of his retirement had effective dates of January 1, 2004 through December 31, 2006. He avers that on or about 2006, he became Medicare eligible and was required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and was required to pay his Medicare Part B premium costs which, he alleges, according to the contract language and longstanding interpretive practice, required the City to reimburse him.

Plaintiff Connors averred *inter alia* that he was a paid professional firefighter for the City for 21 years until he retired in 2009 and was at all times employed a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2009 through December 31, 2012. He avers that on or about May 16, 2029, he will become Medicare eligible and will be required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and at such time will be required to pay his Medicare Part B premium costs in alleged violation of the contract language and longstanding interpretive practice, which required the City to reimburse him.

for 15 years until he retired in 2010 due to an on the job injury and resulting disability and was at all times employed a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2009 through December 31, 2012. He avers that on or about April 21, 2037, he will become Medicare eligible and will be required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and at such time will be required to pay his Medicare Part B premium costs in alleged violation of the contract language and longstanding interpretive practice, which required the City to reimburse him.

Plaintiff Holmes averred *inter alia* that he was a paid professional firefighter for the City for 26 years until he retired on December 26, 2006 and was at all times employed as a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2004 through December 31, 2006. He avers that on or about August 2, 2017, he became Medicare eligible and was required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and was required to pay his Medicare Part B premium costs which he alleges according to the contract language and longstanding interpretive practice, required the City to reimburse him.

Plaintiff McGrouty averred *inter alia* that he was a paid professional firefighter for the City for 27 years until he retired on December 27, 2007 and was at all times employed as a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire

employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2007 through December 31, 2008. He avers that on or about September 30, 2017, he became Medicare eligible and was required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and was required to pay his Medicare Part B premium costs which he alleges according to the contract language and longstanding interpretive practice, required the City to reimburse him.

Plaintiff Panichi averred *inter alia* that he was a paid professional firefighter for the City for 29 years until he retired on December 31, 2006 and held the rank of Battalion Chief when he retired. He avers that he during his time with the department he was a member of the Union. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2004 through December 31, 2006. He avers that on or about August 4, 2018, he became Medicare eligible and was required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and was required to pay his Medicare Part B premium costs which he alleges according to the contract language and longstanding interpretive practice, required the City to reimburse him.

Plaintiff Razzano averred *inter alia* that he was a paid professional firefighter for the City for 25 years until he retired in 2006 and was at all times employed a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2004 through December 31, 2006. He avers that on or about November 2019 (because he became eligible for social security disability), he would become Medicare eligible and will be required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and at such time will be required to pay his Medicare Part B premium costs

the City to reimburse him.

Plaintiff Fruscio averred *inter alia*, that he was a paid professional firefighter for the City for 11 and one-half years until he retired in on March 14, 2015 due to an on the job injury and resulting disability and was at all times employed a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2013 through December 31, 2016. He avers that on or about December 13, 2038, he will become Medicare eligible and will be required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and at such time will be required to pay his Medicare Part B premium costs in alleged violation of the contract language and longstanding interpretive practice, which required the City to reimburse him.

Plaintiff Remillard averred *inter alia* that he was a paid professional firefighter for the City for 35 years until he retired on August 21, 2012 and was at all times employed as a member of the Union that represents all paid firefighters employed by the City of Watervliet, except the Fire Chief. He avers that the City and the Union were parties to CBAs for the entire length of his employment as a firefighter for the City. He avers the CBA in effect at the time of his retirement had effective dates of January 1, 2009 through December 31, 2012. He avers that on or about July 9, 2015, he became Medicare eligible and was required to enroll in Medicare including Medicare Part B in order to continue his health insurance coverage with the City and was required to pay his Medicare Part B premium costs which he alleges, according to the contract language and longstanding interpretive practice, required the City to reimburse him.

Finally, Plaintiff Clickner averred *inter alia* that he was a paid professional firefighter for the

three and one-half years he was Chief of the Watervliet Fire Department and was not a member of the Union, however, he avers that he received the same benefits that he received as a paid firefighter and member of the Union. He avers he retired in May of 2011 due to injuries suffered on the job and the City and he settled his claim for NYS General Municipal Law Section 207-a(2) benefits as well as his health insurance benefits in retirement in a separate agreement. He asserts that he was to get fully paid health insurance in retirement "which is exactly what the paid firefighters received pursuant to their union contract in effect in 2011 (1/1/2009 - 12/31/20212 union contract)." (Clickner Aff., ¶5).

Plaintiff Clickner avers that he does not have a copy of his settlement agreement with the City but recently verified the existence of that agreement and the fact that it addresses his fully paid health insurance benefits (being the same as firefighters who retired under the contract in effect in 2011) with former City Manager Mark Gleason. He avers that his health insurance in retirement was to be the same as the health insurance received by the firefighters governed by the Union contract in effect in 2011.

Plaintiff Clickner has further submitted an undated letter from Mark Gleason which asserts that during the late winter and early spring of 2011 he and the then Director of Finance for the City entered into discussions with plaintiff Clickner as to the terms of his retirement as Fire Chief for the City. He asserts in the letter that Mayor Michael Manning directed the Director of Finance and Mr. Gleason to be the sole Administration employees involved in the discussions and Mayor Manning had a close personal relationship with the Chief that prevented him from being involved. Mr. Gleason sets forth in the letter that it is his recollection that the Director of Finance assured plaintiff Clickner "that he would maintain his 100% health insurance benefit that he received in retirement in perpetuity" (Plaintiffs' exhibit 12A).

As noted above, the plaintiffs have also submitted the relevant CBAs applicable to them and

it is noted that Article II, Section 11 of each CBA provides, in pertinent part, as follows:

> Health Insurance: The present health insurance shall continue in force. Current health insurance options include: the Empire Plan, and the Capital District Physicians Health plan (CDPHP). The City shall continue to pay one hundred percent (100%) of the cost for each member of the bargaining unit and his dependents who were employed prior to January 1, 1995. Any member of the bargaining unit appointed as a firefighter after January 1, 1995 shall, pay part of their health insurance costs through payroll deduction pursuant to the following schedule:
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> | | | |
> |---|---|---|
> | First Year of Service | 1st-12th month | 30% of costs |
> | Second Year of Service | 13th-24th month | 30% of costs |
> | Third Year of Service | 25th-36th month | 30% of costs |
> | Fourth Year of Service | 37th-48th month | 30% of costs |
> | Fifth Year of Service | 49th-60th month | 30% of costs |
>
> After 60th month of service City pays 100% of Health Insurance costs.
>
> Employees hired on or after July 1, 2004 shall, together with their dependents, have the same benefits under this section as present employees except they shall contribute [*] of the premium costs for individual and for dependent coverage throughout their employment with the City and throughout their retirement.
>
> For employees who are currently employed by the fire department prior to July 1, 2004, the City will pay 100% of their health insurance costs during their employment and retirement provided they have fulfilled the 30% health insurance contribution as described in the existing contract.
>
> * In the 1/1/09 - 12/31/12 contract, the contribution was reduced from 15% to 10%

Plaintiffs note that the above provision provides that for employees employed by the fire department prior to July 1, 2004, the City will pay 100% of their health insurance costs during their employment and <u>retirement</u> [emphasis added]. Further, plaintiffs Connors, Holmes, Razzano, Remillard, McGrouty, Panichi, Fruscio and Anthony each aver that he was not subject to the 30% health insurance contribution as they each were employed prior to January 1, 1995 (see Article II, Section 11, first paragraph), and plaintiff Decker, Jr. avers that he fulfilled the 30% health insurance contribution requirement.

Plaintiffs argue that the City breached its contractual obligation on July 1, 2017 when it unilaterally ceased reimbursing Medicare Part B premiums. Plaintiffs allege that on or about

to active employees concerning the language of Article II Section 11 of the CBA in place from January 1, 2013 through December 31, 2016, which language is similar to that at issue herein[3], and the City's discontinuance of the Medicare Part B premium reimbursement with respect to such active employees, Arbitrator John Hudacs determined and held in his Opinion and Award ("Opinion"), in pertinent part:

> Based upon the findings and conclusions reached in the preceding opinion the Arbitrator finds that the City of Watervliet did violate Article II Section 11 of the firefighters' contract when it discontinued reimbursing Medicare Part B premiums. The grievance is AFFIRMED.
> Accordingly in remedy the City shall provide Medicare Part B premium reimbursement to all active bargaining unit members who retire following January 31, 2017 upon submission of acceptable proof that payment of coverage is made.

Plaintiffs argue that because Arbitrator Hudacs required the City to reimburse Medicare Part B premiums to all active bargaining unit members who retired following January 31, 2017 based upon health insurance provisions in the 2013-2016 CBA that was identical to that in the 2004-2012 CBAs, defendants should be collaterally estopped from denying the existence of such contractual obligation herein with respect to the plaintiff retirees. Plaintiffs argue that each of them is the intended beneficiary of the contract provisions in effect at the time they retired, that they retired under the same or similar relevant health insurance contract language as that in the 2013-2016 CBA at issue before Arbitrator Hudacs and further that it was the City's longstanding practice to reimburse such premiums.

Finally, plaintiffs note that Defendants raised certain affirmative defenses in their Amended Answer and note Defendants' fourth, fifth, sixth and seventh affirmative defenses. Such defenses assert (i) that the amended complaint fails to state cause of action, (ii) that the Arbitrator's Opinion

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[3]The only differences in the pertinent first three sections of Article II, Section 11 of the CBA for the time period January 1, 2013 through December 31, 2016 from the CBAs at issue herein are (I) the current health insurance option was changed to "the Capital District Physicians Health Plan (CDPHP)" and (ii) the contribution for employees hired on or after July 1, 2004 remained at 10% (such contribution having been changed from 15% in the

by its own terms only applies to firefighters retiring subsequent to January 31, 2017 and accordingly, plaintiffs' reliance is misplaced; (iii) that by Order and Judgment dated May 12, 2017 (Platkin, J.) the Court stayed arbitration of any claims for reimbursement of Medicare Part B premiums for persons retiring on or before January 31, 2017 and plaintiffs' reliance upon the Arbitrator's Opinion is therefore misplaced; and, (iv) decisions and holdings applying the Taylor Law (*see* Civil Service Law §§200-214), such as the Arbitrator's Opinion, have no bearing on court actions for breach of contract and accordingly, plaintiffs' reliance upon such Opinion is misplaced.

In response to these defenses, plaintiffs argue that while the grievance-arbitration resulting in the Arbitrator's Opinion did not and could not include the claims of plaintiff retirees (citing to *Buff v Village of Manlius*, 115 AD3d 1156 [4th Dept 2014]) as such retirees were not members of the Union after their retirement, the issue before the Court was fully presented during arbitration and the City had a full and fair opportunity to argue the matter which involved identical issues and contract language and where the arbitrator used the same principles of contract interpretation that would be used by the Court if the matter had first been fully litigated in this forum.

Plaintiffs further argue that collateral estoppel can be asserted against a public employer to prevent manifest injustice and that the facts of this case support such application.

Defendants' cross-motion for summary judgment and opposition

In support of their cross-motion for summary judgment and in opposition to the plaintiffs' motion, Defendants initially argue that they are entitled to summary judgment regarding the claim of Plaintiff Clickner. They argue that the collective bargaining unit represented by the Union includes all firefighters employed by the City except the Fire Chief and that Plaintiff Clickner retired from employment with the City as Fire Chief. They argue that the health insurance provisions in the collective bargaining agreements apply to "each member of the bargaining unit and his dependents" and defendants argue that since Plaintiff Clickner was not in the bargaining unit, the language

regarding health insurance does not apply to him. Defendants argue that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms and that the Court had previously determined that the other Plaintiffs who retired as Chiefs had no contractual right to health insurance during retirement however, since Plaintiff Clickner claimed that there may be a separate agreement in existence which granted him such benefit, the Court declined to dismiss his claim.

In further support of such arguments, Defendants have submitted, *inter alia*, a copy of plaintiff Clickner's deposition testimony in which he testified that the position of Chief is outside of the collective bargaining unit (Clickner Dep., pg 10), that as of January 2, 2008, which is the date of the offer of employment as Chief of the Watervliet Fire Department with the City, he did not have a written agreement with the City which contained the terms and conditions of his employment as Chief though he testified he had a "handshake with the mayor" (*Id.* at 10-11). Included as Exhibit A to such plaintiff's deposition testimony is an offer letter from defendant Manning offering such plaintiff an appointment to the position of acting "Chief of the Watervliet Fire Department" and further providing, *inter alia*, that he would "[r]eceive the standard benefits package offered to all non-union employees. Please refer to the City's Personnel Handbook for complete details..." (Clickner Dep., Exhibit A).

Defendant Clickner testified to a settlement with the City concerning an injury (*Id.* at 11-12). Included as Exhibit B to his deposition testimony was a 2012 Workers' Compensation Board Settlement Agreement. Defendant Clickner testified to the existence of a Forbearance Agreement with the Mayor (included as Exhibit C to his deposition testimony) which would permit such plaintiff to have outside employment while he was receiving certain benefits (*Id.* at 13). He further testified to signing a General Release dated January 13, 2012 pursuant to which, in consideration of receipt of four hundred thousand dollars, such plaintiff would release the City from, *inter alia*, causes

of action, suits, proceedings and judgments by reason of injuries sustained in the course of his duties as a firefighter prior April 30, 2013[4]. (*see Id.* at 15; Exhibit D to his deposition testimony).

Defendants assert that Mr. Clickner admitted he did not have any additional agreements in the affidavit he submitted in support of the motion for summary judgment and during his deposition and the only evidence to support his claim of a separate agreement providing him the 100% health insurance benefits he was arguing he possessed is an unsworn and undated "letter" from a former General Manager for the City that plaintiff Clickner testified was written after the instant litigation had commenced (*see Id* at 36). Further, a review of such letter provides that it is Mr. Gleason's recollection that the former Director of Finance had "assured" plaintiff Clickner that he would maintain his health insurance benefit. Defendants assert that oral promises are insufficient to bind a municipality where a state or local law provides that a contract may be made only be specified officers or boards and in a specified manner and that a municipality cannot be held to promises made by unauthorized officials regarding retiree health insurance.

Plaintiff Clickner testified that he was not aware of whether the Finance Manager referred to in Mr. Gleason's letter had ever gone to the "council" to get any agreement with respect to his health insurance approved and further presented "Exhibit F, Handbook" for identification which has been submitted as Exhibit F to the plaintiff's deposition testimony. Defendants argue that the agreements that exist with respect to Mr. Clickner do not contain any requirement to provide health insurance to him during his retirement or reimburse his Medicare Part B premiums and since such plaintiff has no contract addressing his terms of employment as Fire Chief, his terms of employment are governed by "the City of Watervliet Personnel Policy for Full Time Employees", which defendants assert has been submitted as Exhibit F to Plaintiff Clickner's deposition testimony and

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[4] Plaintiff testified that he accepted such monies "in exchange for whatever [his] rights were under General Municipal Law Section 207-A" (*Id.* at pg 15). General Municipal Law §207-A is entitled "Payment of salary,

makes no provision for health insurance during retirement nor Medicare Part B premium reimbursement.

Defendants have also submitted the July 9, 2018 affidavit of Jeremy Smith (submitted to the Court by defendants in support of their earlier motion to dismiss) who averred that he was the General Manager of the City of Watervliet since June 15, 2017, the prior Acting General Manager from December 6, 2016 until June 15, 2017, and City Clerk from January 6, 2014 until December 6, 2016. Mr. Smith averred that he reviewed the City's records regarding Mr. Clickner, including City Council resolutions and his personnel file and avers that he found the Settlement Agreement, Forbearance Agreement and General Release referenced by Mr. Clickner in his deposition testimony and a resolution approving the Forbearance Agreement. He asserts that neither the Settlement or Forbearance Agreement contained any requirement that the City provide health insurance to Mr. Clickner during his retirement. He further averred that in the absence of any agreement specifically addressing Mr. Clickner's right to health insurance during his retirement, his terms and conditions of employment are set forth in the City's personnel policy for full time employees which does not make any provision for health insurance during retirement or Medicare Part B reimbursement.

Defendants argue that the City is not precluded from litigating whether the collective bargaining agreements require the City to reimburse Medicare Part B premiums to retirees. Defendants argue that while arbitrator awards are entitled to collateral estoppel effect and will bar a party from litigating an issue resolved in an arbitration proceeding, a party seeking to invoke collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination. Defendants argue that Arbitrator Hudacs did not decide the same issue presented in this action as here plaintiffs seek a declaration that the City is required to reimburse Medicare Part B premiums paid by persons retiring prior to January 31, 2017 while the arbitration involved only current and active firefighters (not retirees). Defendants further argue that on page 7

of the Arbitrator's Opinion, the parties jointly agreed that "the present arbitration does not apply to existing retirees", the arbitrator noted that the Association admitted that "the issue related to present bargaining unit members once they retire and become Medicare eligible" and that the City and Union "had stipulated that the Union will not seek to pursue arbitration on behalf of" prior retirees after the City commenced a proceeding to stay the arbitration. Further, the remedy contained in the Arbitrator's Opinion was expressly limited to "active bargaining unit members who retire following January 31, 2017". Accordingly, defendants argue that the issue presented was never presented to the arbitrator and accordingly, collateral estoppel does not prevent the City from litigating the issues which are now before the Court.

Defendants also argue in opposition that there is no proof in the record that plaintiffs have met the contractual obligation to fulfill their 30% health insurance contribution. Each relevant CBA provided the City would be obligated to pay 100% of the plaintiff retiree's health insurance costs provided they have fulfilled the 30% health insurance contribution as described in the existing contract. Defendants argue that plaintiffs have failed to submit proof that they have fulfilled the 30% contribution and having failed to establish this condition was met, plaintiffs' motion for summary judgment must be denied.

Finally, defendants argue that the language in the collective bargaining agreements regarding retiree health insurance is unambiguous and summary judgment in favor of defendants is therefore required. Defendants note that the relevant language set forth in Article II, Section 11 reads "[f]or employees who are currently employed by the fire department prior to July 1, 2004, the City will pay 100% of their health insurance costs during their employment and retirement provided they have fulfilled the 30% health insurance contribution as described in the existing contract."

Defendants argue that "100% of their health insurance costs" as set forth in the relevant CBAs relate only to those costs associated with the health insurance plans the City provides to its

retirees. In addition to the language above, defendants argue that the phrase "health insurance" appears in Article II, Section 11 of the relevant CBAs five times and each reference is addressing the actual insurance plan(s) that the City is providing to its employees. Defendants argue that when the entire section is read, it becomes clear that each reference to "health insurance" is meant to address only those insurance plans provided by the City. In addition, defendants argue that the agreements state that the current "health insurance" options are limited to two specifically named plans. Defendants argue that if these are the only two "health insurance" options, then the reference to "health insurance" costs in Article II, Section 11 must also be referring to the plans offered by the City and Medicare Part B, offered by the federal government, is not a plan offered by the City.

Defendants also argue that the phrase "health insurance costs" is used in two other places in Article II, Section 11 and relate to the premium contribution rate required by current employees which contribution rate is based upon the cost of the health insurance plan being provided by the City. Defendants' counsel argues that the contribution rate is not calculated using the cost of any plan other than the two plans offered by the City and accordingly, Defendants argue there is no basis to conclude that the "health insurance costs" for retirees should be anything other than the cost of the plans that the City provides.

Finally, Defendants argue that "[a]lternatively, the language in the collective bargaining agreements regarding retiree health insurance is ambiguous and accordingly, summary judgment is inappropriate" (Defendants' Memorandum of Law Heading Point V). Defendants assert that "[p]laintiffs argue that the language in Article II, Section 11 requires the City to reimburse the Medicare Part B premiums of those retirees participating in Medicare", and that "'100% of their health insurance costs'" includes the cost of Medicare." (MOL, Point V). Defendants argue that the language unambiguously does not require the City to reimburse Medicare Part B to retirees (as discussed above), however, if the Court finds plaintiffs' interpretation is also reasonable, defendants

submit that the language is ambiguous as a matter of law.

Opposition to Cross-Motion/Reply

Plaintiffs assert that they have no new facts and circumstances to add to the claim of Plaintiff Clickner but that the letter of former City Manager Mark Gleason, attached to Plaintiff Clickner's affidavit, creates a triable issue of fact.

Plaintiffs further argue that the City is precluded from litigating the issue before the Court and that the facts and circumstances presented to the Court are no different in any material way from other Third Department, Appellate Division case law citing to *Gooshaw v City of Ogdensburg*, 67 AD3d 1288 (3d Dept 2009) and *Holloway v City of Albany*, 168 AD3d 1133 (3d Dept 2019). Plaintiffs argue that the arguments now made by Defendants' counsel are in no way different from the arguments made and rejected in those cases.

Plaintiffs argue that their status as retirees is irrelevant with regard to the contract language interpreted by Arbitrator Hudacs to require Medicare Part B premium reimbursement for active firefighters where the retirees retired subject to identical contract language and as the reimbursement benefit cannot be enjoyed by any of them until they retire and reach Medicare age eligibility.

Plaintiffs further contend that the affidavits submitted by such plaintiffs in support of the instant motion provide unrebutted evidence that they have met their contractual conditions and Defendants are trying to create a triable issue of fact where there is none. Plaintiffs contend that every submitted affidavit contains a statement in substance that they either fulfilled the 30% contribution requirement or were exempt from it because they were hired prior to January 1, 1995.

As to the Defendants' ambiguity arguments, Plaintiffs argue that any ambiguity in the subject health insurance language was resolved by Arbitrator Hudacs Arbitrator's Opinion which was confirmed by the Albany County Supreme Court and accordingly, summary judgment in favor of the plaintiffs is appropriate.

Discussion as to Plaintiff Clickner

Initially, as to Plaintiff Clickner, the Court, via Decision and Order dated October 2, 2018 dismissed the action as against the plaintiff Fire Chiefs however the Court denied a motion to dismiss as to Plaintiff Clickner based upon his averment that another agreement existed which provided that he was to receive fully paid health insurance in retirement. The October 2, 2018 Decision provided, in pertinent part, as follows:

> As to plaintiff Clickner, he avers that he retired as the Fire Chief and for the last three and one-half years of employment with the City as a paid professional firefighter, he was not a member of the Union. He asserts, however, that he received the same benefits that he received as a paid firefighter and member of the Union. He avers that in May 2011 he retired due to injuries suffered while on the job and settled his claim with the City. He avers that such settlement agreement provides that he was to get fully paid health insurance in retirement which is what the Union firefighters received pursuant to their contract in effect in 2011. He avers that he does not have a copy of such settlement agreement but that a FOIL request has been made for the relevant documents.
>
> In reply, the City has provided a copy of a Workers' Compensation Board settlement agreement of January 13, 2012 which notes the existence of a companion agreement regarding the resolution of all claims pursuant to 207-a of the General Municipal Law. A Forbearance agreement has also been submitted dated September 6, 2011which notes that such plaintiff and the City were, inter alia, "discussing a final compromise and resolution of the City's obligation to pay benefits pursuant to General Municipal Law Section 207-A". A City Resolution was included concerning the Forbearance Agreement dated September 1, 2011. Finally, a General Release was submitted dated January 13, 2012 from such plaintiff with respect to the City concerning injuries sustained in the course of his duties as a firefighter prior to April 30, 2011. It is unclear, however, whether these are the only agreements involving plaintiff Clickner and the City given the language of the Forbearance agreement and resolution and accordingly, the City has not demonstrated entitlement based upon the record of dismissal of plaintiff Clickner's claims at this juncture.

In support of his motion for summary judgment, plaintiff Clickner has failed to provide a copy of any such agreement but instead has submitted an undated unverified letter from Mr. Gleason, then General Manager for the City of Watervliet, which does not demonstrate the existence of any written agreement providing such benefits.

In support of their cross-motion for summary judgment, Defendants, *inter alia*, note the

failure of Plaintiff Clickner to provide any such separate agreement and the fact that the undated unverified letter from Mr. Gleason was written after this litigation had commenced. Defendants further argue that the Court has already held in its prior October Decision that oral promises are insufficient to bind a municipality where a state or local law provides that a contract may be made only by specified officers or boards and in a specified manner. Defendants also argue that now dismissed plaintiffs Carroll and Ellis had made similar claims of oral promises however such claims were dismissed.

In its Decision, the Court noted Defendants argued that the Watervliet City Charter requires the City Council to approve all agreements, the Mayor to sign all agreements and the Corporation Counsel to endorse all agreements in excess of $250.00 (*see* Watervliet Charter §§23, 48, and 57. The Court stated that "[a] municipal contract which does not comply with statutory requirements or local law is invalid and unenforceable" and even where a plaintiff attempts to seek recovery on a theory of implied contract, "[w]here a statute or local law provides that a contract may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the [municipality]" (*Infrastructure Mgmt. Sys., LLC v County of Nassau*, 2 AD3d 784 [2nd Dept 2013][internal citations and quotations omitted]). Accordingly, based upon the record, Plaintiffs have failed to demonstrate *prima facie* entitlement to summary judgment with respect to its claims concerning Plaintiff Clickner. Further, Defendants have demonstrated their *prima facie* entitlement to summary judgment dismissal of the claims of Plaintiff Clickner. In their opposition to Defendants cross-motion, Plaintiffs argue that they have no new facts and circumstances to add to the claim of Plaintiff Clickner but that the letter of former City Manager Mark Gleason, attached to Plaintiff Clickner's affidavit, creates a triable issue of fact. As discussed above, however, the claim of Plaintiff Clickner, raised via affidavit, and

the unsworn undated post-litigation commencement letter of Mr. Gleason concerning the existence of an alleged unwritten oral contract is insufficient to raise a triable issue of fact and deny dismissal of his claims against the Defendants.

Discussion as to Collateral Estoppel

"The doctrine of collateral estoppel can apply to findings rendered as the result of an arbitration proceeding" (*Gooshaw v City of Ogdensburg*, 67 AD3d 1288 [3d Dept 2009]). "Arbitration awards are entitled to collateral estoppel effect and will bar a party from relitigating a material issue or claim resolved in the arbitration proceeding after a full and fair opportunity to litigate" (*Holloway v City of Albany*, 169 AD3d 1133 [3d Dept 2019]). Accordingly, it must be determined that Defendants had a full and fair opportunity to litigate the issues and Plaintiffs, as the party seeking to invoke collateral estoppel, have the burden of "show[ing] the identity of the issues between those resolved in the arbitration awards and those in play here" (*Id.* at 1134 [internal citations and quotations omitted]).

The record reflects that the arbitration award was rendered after a formal evidentiary hearing "at which time both parties appeared with their witnesses and proof. A full opportunity was afforded to the parties to be heard, offer evidence and argument and to examine and cross examine witnesses. Witnesses were duly sworn. Both parties submitted written letter briefs as closing statements which were received by the Arbitrator on September 25, 2017." The Opinion noted the appearances for the parties, which included the Corporation Counsel and General Manager for the City and Atty. Jordan for the Union. Based upon the record, the arbitration award was rendered after a formal evidentiary hearing at which the parties were represented by counsel, and afforded defendants a full and fair opportunity to litigate the issues therein (*see Holloway, supra* at 1134).

Further, based upon the record, plaintiffs have demonstrated the identity of the issues

between those resolved in the arbitration awards and those in play here[5]. The submitted Opinion stated that the issue to be decided was whether the City violated "Article II, Section 11 of the Firefighter's contract when it discontinued reimbursing Part B premiums" (Opinion, pg. 2). The plaintiffs have submitted the 2004, 2007 and 2009 [and 2013 CBA] which each contain identical contract language with respect to the obligation of the City to pay 100% of the health insurance costs of employees employed by the fire department prior to July 1, 2004 during their employment and retirement provided they met certain health insurance contributions. Accordingly, Plaintiffs have met their *prima facie* burden (*see generally, Holloway, supra; Gooshaw, supra*).

In opposition, Defendants argue that Arbitrator Hudacs did not decide the same issue presented in this action as Plaintiffs seek a declaration that the City is required to reimburse Medicare Part B premiums paid by persons retiring prior to January 31, 2017 while the arbitration involved only current and active firefighters (not retirees). Such assertion that the same issue was not presented has been denied by the Third Department, Appellate Division on similar facts as these (*see Holloway, supra*) and fails to raise a triable issue of fact.

While Defendants argue the parties to the arbitration agreed that "the present arbitration does not apply to existing retirees", that the Union admitted at the arbitration that "the issue related to present bargaining unit members once they retire and become Medicare eligible", that the City and Union "had stipulated that the Union will not seek to pursue arbitration on behalf of" prior retirees after the City commenced a proceeding to stay the arbitration, and the remedy contained in the

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[5]The Arbitrator noted that for a considerable number of years the City had been reimbursing retired firefighters for their premium payments for Medicare Part B upon their enrolling at age 65 and proving that premium payments were made but determined that as of July 2017, the City would no longer reimburse such costs. The issue before the Arbitrator was whether the City was obligated (pursuant to Article II, Section 11 of the 2013 CBA) to present bargaining unit members (i.e. active employees) once they retired and became Medicare eligible to reimburse such Medicare Part B premiums. The Opinion notes that the Arbitrator considered, *inter alia*, Article II, Section 11, as well as the past practice of the parties, which he was entitled to consider (*see Holloway, supra* at 1134-1135) (pursuant to which the City had been reimbursing retired firefighters for such Medicare Part B health insurance premiums for more than 40 years) and determined that Medicare Part B reimbursement of retirees was covered under Article II, Section 11 of the 2013 CBA. Plaintiffs have demonstrated via the submission of the 2004, 2007 and 2009

Opinion was expressly limited to "active bargaining unit members who retire following January 31, 2017", such arguments fail to raise a triable issue of fact as to the applicability of collateral estoppel or more specifically, that such assertions denied the City a full and fair opportunity to litigate the issues therein nor that there was an identity of the issues between those resolved in the arbitration Opinion and those at issue in this action.

Additionally, Defendants argue in opposition that there is no proof in the record that Plaintiffs have met the contractual obligation to pay the required health insurance contribution. Defendants argue that each CBA provided that the City would be obligated to pay 100% of their health insurance costs provided plaintiffs had fulfilled the 30% health insurance contribution as described in the existing contract and as Plaintiffs have failed to submit proof that they have fulfilled the 30% contribution and having failed to establish this condition was met, Plaintiffs' motion for summary judgment must be denied. Such issue fails to raise a triable issue of fact. Plaintiffs specifically addressed such matter in each of their submitted affidavits and either averred as set forth above that they had met such requirement or that they were exempt from such contribution requirement pursuant to the relevant CBA. Defendants have not controverted such averments and accordingly have failed to raise a triable issue of fact.

Finally, to the extent that Defendants seek summary judgment dismissing the action on the grounds that the language in the CBAs is unambiguous or alternatively, if the Court finds "that Plaintiffs' interpretation is also reasonable" that the language is ambiguous (and deny summary judgment on such basis), the Court need not address such assertions as it has determined that Arbitrator Hudac's Opinion and his finding that the City is obligated to reimburse retired firefighters for their Medicare Part B premium payments is dispositive of the claims raised here and the City is estopped from claiming otherwise.

To the extent Plaintiffs' seek attorneys' fees they have failed to demonstrate that they are

entitled to the same pursuant to the terms of a contract or statute and accordingly, such request is denied.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Based upon the foregoing, it is

ORDERED and ADJUDGED that Plaintiffs' motion for summary judgment is granted as to Plaintiffs Connors, Decker Jr., Holmes, Razzano, Remillard, McGrouty, Panichi, Anthony and Fruscio and is denied as to Plaintiff Clickner; and it is further

ORDERED and ADJUDGED that Defendants' cross-motion for summary judgment is granted solely to the extent that the claims of Plaintiff Clickner against Defendants are in all respects denied; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant City is required to reimburse Plaintiffs Connors, Decker Jr., Holmes, Razzano, Remillard, McGrouty, Panichi, Anthony and Fruscio for Medicare Part B premium payments that were not reimbursed and to continue providing Medicare Part B premium payment reimbursement for such plaintiffs.

This constitutes the Decision/Order/Judgment of the Court. The original Decision/ Order/Judgment is being returned to the attorney for the Plaintiffs. A copy of this Decision/ Order/Judgment and all other original papers are being delivered to the Albany County Clerk's Office. The signing of this Decision/Order/Judgment shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry, and notice of entry.

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SO ORDERED.
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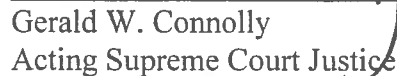

Dated: August 13, 2020
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion for Summary Judgment dated June 30, 2020; Affidavit of Thomas J. Jordan, Esq. dated June 30, 2020; Exhibits to Plaintiffs' Motion for Summary Judgment 1A-19;
2. Notice of Cross-Motion of Summary Judgment dated July 17, 2020; Affidavit of Brian S. Kremer, Esq. dated July 20, 2020 with exhibits A-C (including Defendants Exhibits A-F to Exhibit B); Defendants' Memorandum of Law dated July 17, 2020;
3. Reply Affidavit of Thomas J. Jordan, Esq. dated July 27, 2020; with exhibits 1-3;
4. Decision and Order dated September 23, 2019.