PETITIONER-APPELLANT'S APPENDIX

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E.D.N.Y. – Bklyn.
18-cv-5866
Cogan, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of March, two thousand nineteen.

Present:

Richard C. Wesley,
Raymond J. Lohier, Jr.,
Richard J. Sullivan,

Gerald Nelson,

Plaintiff-Appellant,

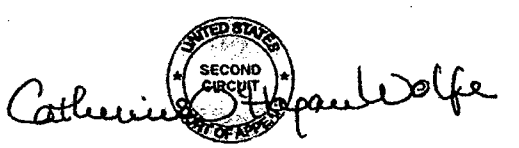
v. 18-3275

Local 1181-1061, Amalgamated Transit Union,
AFL-CIO, et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand and nineteen,

Present: Richard C. Wesley,
Raymond J. Lohier, Jr.,
Richard J. Sullivan,

Circuit Judges,

Gerald Nelson,

Plaintiff - Appellant,

v.

Local 1181-1061, Amalgamated Transit Union, AFL-CIO, MV Transportation, Inc., Jessica D. Ochs, Michalaire Phantor,

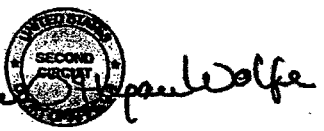
Defendants - Appellees.

ORDER
Docket No. 18-3275

Appellant Gerald Nelson filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



c/m

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GERALD NELSON,

Plaintiff,

- against -

AMALGAMATED TRANSIT UNION LOCAL 1181-1061, AFL-CIO, MV TRANSPORTATION, INC., JESSICA D OCHS, and MICHALAIRE PHANTOR,

Defendants.

ORDER

18-cv-5866 (BMC) (LB)

COGAN, District Judge.

This action constitutes the second time in three years that plaintiff *pro se* has commenced suit in state court challenging an implementation agreement for an arbitration award in plaintiff's favor entered into by his former employer and union (and their agents). Defendants removed the first action to this Court based on complete preemption, which the Court found proper, and the Court dismissed plaintiff's claims on the merits. See Nelson v. Amalgamated Transit Union Local 1181-1061, AFL-CIO, No. 15-cv-672, 2015 WL 1529723 (E.D.N.Y. April 3, 2015), aff'd, 652 F. App'x 47 (2d Cir. 2016), cert. denied, 137 S. Ct. 1592 (2017).

Plaintiff cannot keep using different state court procedures to raise the same claim that has already been rejected in this Court. The state unemployment benefits that he received before he was reinstated with backpay were properly deducted from his backpay compensation from his employer. The arbitrator expressly held that income plaintiff received that was in any way related to his loss of employment should be deducted from his backpay award, his union and his

employer implemented that instruction in their agreement, this Court upheld their agreement, the Second Circuit affirmed this Court, and the Supreme Court declined to hear the case. The first time he raised it, plaintiff's claim simply failed on the merits. Raising it again makes it frivolous and malicious.

For both reasons, the Court dismisses it *sua sponte* pursuant to 28 U.S.C. § 1915. Plaintiff is cautioned that if he continues to file frivolous actions, an injunction may be entered against him prohibiting him from filing any actions in this Court without the Court's leave. The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
October 22, 2018

C/M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GERALD NELSON,

Plaintiff,

- against -

AMALGAMATED TRANSIT UNION LOCAL 1181-1061, AFL-CIO, MV TRANSPORTATION, INC., JESSICA D OCHS, and MICHALAIRE PHANTOR,

Defendants.

ORDER

18-cv-5866 (BMC) (LB)

COGAN, District Judge.

This case is before the Court on plaintiff *pro se*'s post-judgment motion to remand the action to state court. He contends that the case was improperly removed because he had not served a complaint in his state court action and there was therefore no basis upon which to ascertain removability. He had served a summons with notice, as permitted by New York procedure, and had obtained an Order to Show Cause from the state court supported by his affidavit. Defendants removed based on plaintiff's affidavit.

A case can be removed not only on the basis of a complaint, but also on the "initial pleading," if the pleading discloses enough information to show that the case is removable. "The history and text of section 1446(b) clearly make the defendant's receipt of 'the initial pleading' the relevant triggering event, which is any pleading (and *not necessarily the complaint*) containing sufficient information to enable the defendant to intelligently ascertain the basis for removal." Whitaker v. Am. Telecasting, Inc., 261 F.3d [illegible] (2d Cir. 2001) (emphasis added).

Here, plaintiff's affidavit in support of his Order to Show Cause in state court averred that "[d]efendants cannot deduct unemployment benefits from a back pay agreement." That affidavit gave defendants all the notice that they (and this Court) needed to know that plaintiff was attempting to relitigate the labor dispute which he had previously filed in state court. Defendants removed that prior action based on complete preemption, and this Court had dismissed it on the merits. When plaintiff made the same claim in his second state court action – specifically, in his affidavit in support of his Order to Show Cause – defendants properly removed it based on the same complete preemption that formed the basis for removing the first case.

Since the Order to Show Cause with plaintiff's affidavit was the "initial pleading setting forth the claim for relief," defendants properly removed the case. Plaintiff's motion [7] to remand is therefore denied.

SO ORDERED.

Digitally signed by
Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
December 21, 2018