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Orchestra Must Face Music In Pension Exit Suit, 2nd Circ. Told

By **Danielle Nichole Smith**

Law360 (October 4, 2019, 4:19 PM EDT) -- A musicians union has urged the Second Circuit not to revive allegations that it tricked a Jewish orchestra into signing a collective bargaining agreement by promising to make a \$1.1 million pension withdrawal liability disappear, saying the orchestra was responsible for the consequences of pulling out of its pension fund.

The Associated Musicians of Greater New York Local 802, AFM, AFL-CIO said in its brief Thursday that none of the events that led to the \$1.1 million withdrawal liability being assessed against Neshoma Orchestra and Singers Inc. were the fault of the union.

And even if the union had lied and told Neshoma that it would make the liability go away if the orchestra signed a successor collective bargaining agreement — as Neshoma has contended — that lie didn't create the liability and damages the orchestra is facing, the union contended.

The plain and simple fact is that "the predicament Neshoma now faces is one of its own doing," the union said.

U.S. District Judge John G. Koeltl also correctly found that the claims Neshoma lodged against the union were preempted by the National Labor Relations Act under the U.S. Supreme Court's 1959 precedent in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, the union said.

Assuming the orchestra's allegations are true, as required at the motion-to-dismiss stage, they amount to an unfair labor practice that the National Labor Relations Board would have jurisdiction over, the union argued.

Harvey S. Mars, an attorney for the Associated Musicians of Greater New York Local 802, told Law360 on Friday that he's optimistic the Second Circuit will affirm the judge's "well-reasoned decision" in the case.

Neshoma filed the third-party complaint against the Associated Musicians of Greater New York Local 802 in June 2017 amid its dispute with the American Federation of Musicians and Employers' Pension Fund and its trustees over a \$1.1 million liability the fund assessed.

The orchestra claimed, among other things, that the fund assessed the withdrawal liability in 2015 at the demand of the Associated Musicians of Greater New York Local 802, which wanted to put pressure on Neshoma during labor negotiations.

When the parties eventually reached an agreement, the union promised that the fund would take back the assessment if Neshoma signed, according to the third-party complaint. Yet, the fund has continued to press for the withdrawal liability, the orchestra said.

However, Judge Koeltl dismissed the orchestra's claims in May 2018, finding that they were based on bad-faith negotiation allegations and preempted by the NLRA. After the judge later held in April that Neshoma **owed the fund** more than \$1.1 million in withdrawal liability and more than \$500,000 between interest and damages, the orchestra appealed to the Second Circuit, challenging both the liability and the dismissal of its claims against the union.

Neshoma told the appeals court that the fund shouldn't have been awarded summary judgment on the withdrawal liability because the orchestra adequately demanded an Employee Retirement Income Security Act arbitration over the assessment.

The fund had been allowed to place "unconscionable barriers in the arbitration process and then sidestep the arbitration forum based upon an employer's inability to comply with these unconscionable barriers," the orchestra said. According to Neshoma, the orchestra was required to pay roughly \$8,200 up front for arbitration while the fund had to pay nothing.

The orchestra further argued that the lower court wrongly found its claims against the union to be preempted by the NLRA when the Second Circuit held that courts had the authority to "ascertain the existence of contracts, separate and apart from collective bargaining agreements, between employers and unions."

The American Federation of Musicians and Employers' Pension Fund and its trustees also filed a brief at the Second Circuit contesting Neshoma's appeal, saying the lower court hadn't erred in finding that Neshoma didn't initiate arbitration in time. The orchestra didn't try to file for arbitration until two months after the deadline, the fund said.

The pension fund sued Neshoma in April 2017, alleging that the orchestra had stopped making payments to the pension fund after July 2012. The fund told Neshoma that it owed a \$1.1 million withdrawal liability as a result, but the orchestra didn't pay up, according to the suit.

Counsel for the fund declined to comment Friday. Counsel for Neshoma didn't respond Friday to a request for comment.

Neshoma is represented by Ira A. Sturm of Raab Sturm & Ganchrow LLP.

The fund and its trustees are represented by Patricia McConnell of Meyer Suozzi English & Klein PC.

The union is represented by Harvey S. Mars of the Law Office of Harvey S. Mars LLC.

The case is Neshoma Orchestra and Singers v. American Federation of Music, case number 19-1093, in the U.S. Appeals Court for the Second Circuit.

--Editing by Jack Karp.