

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17603
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_____AD3d_____

Submitted - November 20, 2007

REINALDO E. RIVERA, J.P.
ROBERT A. SPOLZINO
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2007-02048

DECISION & ORDER

Clemens Realty, LLC, appellant, v
New York City Department of Education, respondent.

(Index No. 16926/06)

Siller Wilk, LLP, New York, N.Y. (Stephen D. Hoffman and Pamela L. Kleinberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F.X. Hart and Jane L. Gordon of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Queens County (Kelly, J.), dated January 5, 2007, which granted the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) and denied its cross motion for leave to amend its complaint.

ORDERED that the order is affirmed, with costs.

Education Law § 3813(2-b) provides that no action or special proceeding shall be commenced against a school district more than one year after the cause of action arose. A breach of contract cause of action arises when the "party seeking payment should have viewed his claim as having been constructively rejected" (*Henry Boeckmann, Jr. & Assoc. v Board of Educ., Hempstead Union Free School Dist. No. 1*, 207 AD2d 773, 775; see *James McCullagh Co., Inc. v South Huntington Union Free School Dist.*, 39 AD3d 480, 481; *Matter of Mahopac Cent. School Dist. v Piazza Bros., Inc.*, 29 AD3d 699, 700; *Capstone Enterps. of Port Chester, Inc. v Valhalla Union Free School Dist.*, 27 AD3d 411, 411-412; *Dodge, Chamberlin, Luzine, Weber Architects v Dutchess*

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County Bd. of Coop. Educ. Servs., 258 AD2d 434). Here, the defendant established that the plaintiff's claim was constructively rejected more than one year before commencement of the action (see *James McCullagh Co., Inc. v South Huntington Union Free School Dist.*, 39 AD3d at 481; *D.J.H. Mech. Assoc., Ltd. v Mahopac Cent. School Dist.*, 21 AD3d 521, 522; *Dodge, Chamberlin, Luzine, Weber Architects v Dutchess County Bd. of Coop. Educ. Servs.*, 258 AD2d 434). Accordingly, the Supreme Court properly dismissed this cause of action as time-barred.

In addition, the Supreme Court also correctly dismissed the second cause of action seeking to recover damages for breach of duty of care. “[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated [citations omitted]. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; see *Sargent v New York Daily News, L.P.*, 42 AD3d 491, 493; *Brown v Wyckoff Hgts. Med. Ctr.*, 28 AD3d 412, 413; *Old Republic Nat. Tit Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680; *Briar Contr. Corp. v City of New York*, 156 AD2d 628, 629; see also *Wecker v Quaderer*, 237 AD2d 512, 513). In fact, “[s]imply alleging a duty of due care does not transform a breach of contract action into a tort claim” (*Briar Contr. Corp. v City of New York*, 156 AD2d at 629; see *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d at 680). The plaintiff failed to allege or demonstrate that the defendant owed it a legal duty independent of the contractual duty, and that the defendant breached that independent duty. Accordingly, the Supreme Court properly dismissed this cause of action as well.

In light of this determination, the plaintiff's remaining contention has been rendered academic.

RIVERA, J.P., SPOLZINO, CARNI and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court