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CARBONE v. THE STATE OF NEW YORK, #2001-015-177, Claim No. 97853, Motion No. M-63480

Synopsis

State's summary judgment motion to dismiss claim asserted under Fair Labor Standards Act (FLSA) denied except as to portions of claim which accrued more than six months prior to filing of claim and as to relief sought which is equitable in nature.

Case Information

UID:	2001-015-177
Claimant(s):	FRANK D. CARBONE, JAMES E. HASSAN, JOHN W. BURKE, EDWARD KUSTYN, THOMAS GADOMSKI, JAMES H. HAYS, ROBERT I. BERGER and JOSEPH L. CONRAD By order of this Court dated July 31, 2000 the caption of this claim was amended sua sponte to reflect the only properly named defendant. Attorneys for both parties have erroneously referenced the claim of Mildred Wennar, as Executrix of the Estate of James B. Wennar (Claim No. 98752) which has not been joined or consolidated with the instant claim. References to the Wennar claim in the papers submitted on this motion have been ignored by the Court.
Claimant short name:	CARBONE
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	By order of this Court dated July 31, 2000 the caption of this claim was amended sua sponte to reflect the only properly named defendant. Attorneys for both parties have erroneously referenced the claim of Mildred Wennar, as Executrix of the Estate of James B. Wennar (Claim No. 98752) which has not been joined or consolidated with the instant claim. References to the Wennar claim in the papers submitted on this motion have been ignored by the Court.
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	97853
Motion number(s):	M-63480
Cross-motion number(s):	
Judge:	FRANCIS T. COLLINS
Claimant's attorney:	Bloomberg & MagguilliBy: Michael C. Magguilli, Esquire
Defendant's attorney:	Honorable Eliot Spitzer, Attorney General By: Kathleen M. ResnickAssistant Attorney General
Third-party defendant's	

attorney:
Signature date: September 14, 2001
City: Saratoga Springs
Comments:
Official citation:
Appellate results:
See also (multicaptioned case)

Decision

The motion of the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing those portions of the claim which accrued more than six months prior to February 23, 1998 is granted. In all other respects the motion is denied. Although the affirmation in opposition to the motion indicates that it is also offered in support of a "cross-motion" for late claim relief *nunc pro tunc* the affirmation was not accompanied by a notice of [cross] motion and therefore was not properly made pursuant to CPLR 2215;(Briger v State of New York, 95 AD2d 887; Siegel, New York Practice § 239 at 403 (3d ed) and the Uniform Rules for the Court of Claims § 206.8(a)). Even if the defendant may be said to have waived the notice of motion requirement by submitting an affirmation in opposition to the cross-motion (*see*, Fox Wander W. Neighborhood Assn. v Luther Forest Community Assn., 178 AD2d 871), the claimants have failed to support the purported cross-motion by an affidavit or affirmation. Instead, the sole document submitted in support of the cross-motion is an unsworn memorandum of law submitted by claimants' attorney. Even were the Court to consider the purported cross-motion, an unsworn memorandum of law is a clearly inadequate basis upon which to base such a request for relief and, certainly, to establish entitlement to the relief requested (*see*, Du Four v Blaw-Knox Corp., 89 AD2d 900). The claimants' are described in the claim as current or former employees of the Department of Environmental Conservation Division of Law Enforcement and identified as Environmental Conservation Officers and current or former employees of the New York State Park Police bearing the title Park Policeman. The claim filed on February 23, 1998 seeks to recover unpaid overtime compensation allegedly earned by the claimants for the period from September 19, 1992 to the present together with liquidated damages and attorneys fees pursuant to the Fair Labor Standards Act of 1938, (FLSA) 29 USC § 201 *et seq*. The claim alleges that claimants worked hours in excess of the maximum specified in the FLSA (29 USC § 207) including compensable hours spent actually at work sites and during call back status as well as on call when claimants were engaged to wait by the defendant and prevented from effectively using the time for their own purposes. In the first cause of action set forth in the claim claimants seek a determination of overtime based on a forty hour workweek[1]. In the second cause of action claimants state that in the event it may be determined that claimants are employees covered under the limited overtime exceptions set forth in 29 USC § 207 (k)[2] then claimants allege in the alternative that the State must pay overtime compensation to claimants at a rate not less than one and one-half times their regular rate of pay for hours worked in excess of 43 hours in a 7 day work period. The third cause of action asserts that the defendant has failed and continues to fail to make, keep and preserve adequate and accurate time records pursuant to 29 USC § 211 (c) and 215 (a) (5) and 29 CFR Part 516.

The State moved to dismiss the claim alleging the Court lacks jurisdiction because (1) the claim seeks equitable relief which this Court is not statutorily authorized to grant (e.g. declaratory judgment, accounting, article 78 relief); (2) the claim seeks to recover damages for causes of action accruing more than 6 months prior to the service and filing of the claim; and (3) the claim itself is not in compliance with the requirements of Court of Claims Act § 11 (b). Specifically, the defendant alleges that the claim fails to state the time and place where the claim arose, the nature of the claim, the items of damage alleged and the total sum claimed.

The claimants, through their attorney's affirmation opposed the motion and as noted above failed to make a proper cross-motion despite a request for such relief in counsel's affirmation in opposition (*see*, Briger v State of New York, *supra*).

It is now established that the Court of Claims has jurisdiction to entertain a claim for money damages arising out of alleged violations of the Fair Labor Standards Act of 1938 (29 USC 201 *et seq*). It has further been established that the State has the right to determine the parameters of its waiver of sovereign immunity including the claimants' mandated compliance with the statutorily established conditions precedent to an action in this Court set forth in sections 10 and 11 of the Court of Claims Act. Included among such is the condition that the claim be filed and served upon the Attorney General within six months of its accrual pursuant to Court of Claims

Act § 10 (4). While it is clear that timely service and filing of a claim or service of a notice of intention is a jurisdictional prerequisite in the Court of Claims (*see* Mallory v State of New York, 196 AD2d 925, 926) where, as here, it is alleged that damages are continuing dismissal is appropriate only as to that portion of the claim accruing more than six months prior to filing with the Court (*see* Bergmann v State of New York, 281 AD2d 731; Alston v State of New York, 281 AD2d 741). "A continuous course of conduct extends the accrual period of a claim until such conduct terminates" (Mahoney v Temporary Commn. Of Investigation of State of N.Y., 165 AD2d 233, 240) so long as the claim is "predicated on continuing unlawful acts and not on continuing effects of earlier unlawful conduct" (Selkirk v State of New York, 249 AD2d 818, 819).

Since claimants herein, like those in Alston, *supra* and Bergmann, *supra* alleged continuing violations of the FLSA the Court finds that the claims of the named claimants accruing prior to August 23, 1997 (i.e., six months prior to the February 23, 1998 filing) are barred as untimely while claims accruing on and after such date are timely.

Based upon this determination the Court rejects the defendant's argument that the lack of a specific accrual date requires dismissal pursuant to Court of Claims Act § 11. The relevant pleadings assert that the named claimants are or were employees of the State of New York who are or were entitled to be paid overtime compensation pursuant to the FLSA and who have not been paid such compensation beginning on a date certain and continuing to the present. Such claimants are individually named and their street addresses are set forth on attachment "A" appended to the claim. As current or former State employees whose employment records are or should be in the custody of the defendant the Court finds the information provided in the claim and its attachment sufficient to permit the State to investigate the allegations using its own records (*see*, Grumet v State of New York, 256 AD2d 441). The Court declines to dismiss the claim for lack of specificity in the pleading.

The defendant, however, is correct with regard to its request to dismiss those portions of the claim which seek equitable relief (i.e., a declaratory judgment, an accounting and relief in the nature of an article 78 proceeding). In the case of Ozanam Hall of Queens Nursing Home, Inc. v State of New York, 241 AD2d 670, the Appellate Division, Third Department restated the jurisdiction of this Court and the test to be applied as follows:

> "Fundamentally, although 'in determining claims for money damages against the State, the Court of Claims may apply equitable considerations and perhaps, to some extent, may grant some sort of incidental equitable relief' (Psaty v Duryea, 306 NY 413, 417, 118 NE2d 584), that court's primary jurisdiction is limited to actions seeking money damages against the State in appropriation, contract or tort cases (*see*, Court of Claims Act § 9(2); Psaty v Duryea, *supra* at 416, 118 NE2d 584; Sidoti v State of New York, 115 AD2d 202, 203, 495 NYS2d 280). As such, the Court of Claims has 'no jurisdiction to grant strictly equitable relief with the return of the money to follow as a consequence of the equitable relief, if granted' (Psaty v Duryea,, *supra*, at 416-417, 118 NE2d 584 [citations omitted]). The question, then, is '[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim' (Matter of Gross v Perales, 72 NY2d 231, 236, 532 NYS2d 68, 527 NE2d 1205)."

Applying the Ozanam standard it is obvious that while the Court may entertain that portion of the claim seeking money damages the Court's limited jurisdiction cannot be found to encompass the clearly equitable relief sought by claimants. The portions of the claim seeking a declaratory judgment, an accounting and relief in the nature of mandamus and prohibition are hereby dismissed as being beyond the jurisdiction of this Court.

The defendant's motion is, therefore, granted except as provided herein.

September 14, 2001
Saratoga Springs, New York

HON. FRANCIS T. COLLINS
Judge of the Court of Claims

The Court considered the following papers:

1. Notice of motion dated May 7, 2001;

2. Affirmation of Kathleen M. Resnick dated May 7, 2001, with exhibits;
3. Affirmation of Michael C. Magguilli dated June 20, 2001, with exhibits;
4. Affirmation of Kathleen M. Resnick dated June 26, 2001

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[1]29 USC § 207 (a) (1) requires that an employee whose work week is longer than 40 hours receive compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the rate at which he is employed.
[2]29 USC § 207 (k) provides that: "No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of *** any employee in law enforcement activities *** if (1) in a work period of 28 consecutive days the employee receives[,] for tours of duty which in the aggregate exceed *** the average number of hours (as determined by the Secretary [of Labor] ***) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975 [,] *** compensation at a rate not less than one and one-half times the regular rate at which he is employed."
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