

Serafine v Walworth

2006 NY Slip Op 30177(U)

September 20, 2006

Supreme Court, Wayne County

Docket Number: 0058859/2006

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

ORIGINAL

PHILIP L. SERAFINE,

Plaintiff

DECISION
AND
ORDER

vs

Index No. 58859

TOWN OF WALWORTH,

Defendant

Philip L. Serafine, Pro Se
Plaintiff

Webster Szanyi, LLP
Tracy M. Fournier, Esq., of Counsel
Attorneys for Defendant

The Defendant, Town of Walworth (hereinafter "Town"), has moved for an order pursuant to CPLR §3211(a)(7), dismissing the Plaintiff's Complaint in its entirety. The Plaintiff has filed affidavits and memoranda *pro se* in opposition to the motion.

The Plaintiff commenced this action by filing a Summons and Complaint with the Wayne County Clerk on February 24, 2006. The Complaint seeks a money judgment against the Town in the amount of \$5,244.00, together with interest, as set forth in two causes of action. The

first cause of action alleges that the Town illegally deducted money from funds deposited by Serafine Farms, Inc. with the Town to ensure completion of work related to a subdivision known as Whitney Meadows. These unauthorized deductions allegedly occurred on September 25, 2001, October 28, 2001 and November 6, 2001, and totaled \$3,594.00. The second cause of action alleges that on June 25, 2003 the Town compelled Serafine Farms, Inc. to perform unnecessary construction at a cost to the Plaintiff of \$1650.00. The notice set forth on the face of the Summons states that the nature of the action is "money had and received".

The Town has moved to dismiss the Complaint, on the grounds that the Plaintiff failed to timely file and serve a Notice of Claim pursuant to GOL §50-e, which requires that the notice be served within 90 days after the tort claim arises. GOL §50-i provides for the making of an application to extend the filing period, but in no event may the Notice of Claim be served beyond the one year and ninety day statute of limitations. There is no dispute that the Plaintiff filed his Notice of Claim on July 28, 2005, well after the statute of limitations expired as to all claims raised by the Plaintiff. Therefore, the Town maintains that the Complaint must be dismissed.

In opposition, the Plaintiff argues that, since his action is based upon

a claim for "money had and received," his action sounds in contract, not tort, and the requirements of GOL §50-e are inapplicable, and the Notice of Claim filed by the Plaintiff is, in fact, merely superfluous. Since the statute of limitations which governs contract actions is six years, the Plaintiff argues that the action is not time-barred, and the Town's motion should be dismissed.

In response, the Town maintains that the Plaintiff has failed to adequately plead a cause of action for "money had and received." Further, the Town argues that the Plaintiff's claims sound clearly in tort (i.e. conversion and prima facie tort, respectively), and that he has attempted to plead equitable causes of action in order to circumvent the Notice of Claim provisions of GOL §50-i. The Plaintiff, however, reiterates in his Reply his right to set forth his claims under a contract theory of recovery.

It would initially appear that this Court must resolve the issue as to whether the Plaintiff's claims sound in tort or contract in order to decide the Town's motion. However, in its Sur-Reply Memorandum of Law, the Town correctly argues that Town Law §65(3) requires a plaintiff to serve a Notice of Claim within six months after a claim arises, in order to commence an action sounding in contract against a municipality, and said action must be

commenced with eighteen months after the cause of action has accrued. Failure to comply with these requirements results in the dismissal of the Complaint. (See, e.g., Sterngass v. Town Board of Town of Clarkston, 10 AD3d 402 (2nd Dept, 2004)).

It is undisputed that the Plaintiff failed to file any Notice of Claim within the statutory periods set forth in both GOL §50-e and Town Law §65(3), respectively. Therefore, regardless of whether the Plaintiff's claims sound in tort or in contract, he has failed to comply with the applicable condition precedent requirements imposed by law. Therefore, the Town's motion is granted, and the Plaintiff's Complaint is dismissed in its entirety.

This Decision constitutes the Order of the Court.

Dated: September 20, 2006
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice