

**Gray v City of New York**

2006 NY Slip Op 30417(U)

April 17, 2006

Supreme Court, New York County

Docket Number: 116607/2004

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. LEVINMAN

PART 52

*Justice*

Gray Simpson

INDEX NO.

116607104

MOTION DATE

1-11-06

MOTION SEQ. NO.

02

MOTION CAL. NO.

10

- v -

City

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*All annexed  
decision &  
order*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision & order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

**FILED**  
APR 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/17/06

2197

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

SIMPSON GRAY,  
Plaintiff,  
  
against

Index Number 116607/2004  
Oral Arg. Date Jan. 11, 2006  
Mot. Seq. No. 002  
Cal. No. 10

CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF EDUCATION, MICHAEL  
BLOOMBERG, Mayor of the City of New York, JOEL  
KLEIN, Chancellor of the New York City Public Schools,  
DENISE J. HALLET, THERESA EUROPE, in their  
individual capacities as well as their capacity as  
employees of the City of New York and the New York  
City Department of Education,  
Defendants.

**DECISION AND ORDER**

-----X

**For the Plaintiff:**  
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**FILED**  
APR 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to dismiss:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affidavits and Memo of Law.....	<u>1,2</u>
Affidavit in Opposition.....	<u>3</u>
Reply Memo of Law.....	<u>4</u>
Plaintiff's Addendum to Memo of Law.....	<u>5</u>
Reply Memo in Response to Addendum.....	<u>6</u>

**PAUL GEORGE FEINMAN, J.:**

Plaintiff, a tenured New York City public school teacher, sues the City of New York, the Mayor, the School Chancellor, the Department of Education (the Department), Denise J. Hallet, Director of the Department's Office of Field Services, and Theresa Europe, the Department's counsel, for breach of contract and illegal discrimination. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (5) and (7), primarily on the ground that plaintiff failed to

comply with the requirements of Education Law § 3813 and General Municipal Law § 50-e for filing a notice of claim against a municipal entity. For the reasons stated below, defendants' motion is granted in part and otherwise denied.

#### *Factual Background*

Due to disciplinary charges against plaintiff, the Department suspended him from his classroom teaching assignment in December 1998. The Department issued plaintiff an Unsatisfactory Rating (U rating) for five consecutive school years, from 1998 through 2003, and removed him from the list of those eligible for transfers and promotions. During those five years, plaintiff continued to be employed at the Department, in positions he describes as menial, such as mail room filer and "gofer."

In March 2003, two arbitration hearings were held on the disciplinary charges. Plaintiff alleges that the Department was not able to prove that he had committed any wrong. The case against plaintiff was settled through a Post-Charge Stipulation of Settlement (Settlement) on March 18, 2003. In the Settlement, the Department agreed to withdraw the charges against plaintiff with prejudice, to assign him to the Committee on Special Education (CSE), and to reverse his U ratings to Satisfactory Ratings (S ratings). Plaintiff agreed to waive his right to any legal claims against the Department in relation to the charges, except to enforce the Settlement.

The Settlement did not specify a time for performance. Plaintiff learned that the Department had not changed his ratings on August 26, 2003, when his application for a transfer was denied on the basis of his U ratings.

Plaintiff and the Department then began negotiations. A lawyer from the teachers' union represented plaintiff. The lawyer wrote a March 30, 2004 letter to plaintiff that revealed the content of the negotiations. According to the letter, the Department was "reprocessing" the

correction of the U ratings to S ratings, and it did not appear that the U ratings were still in the computer system. The letter stated that the Department had advised plaintiff that he would be assigned to the CSE and that once that took place, the Department would be in compliance with the Settlement. The letter further stated that it was on January 7, 2004 that the attorney learned that plaintiff was assigned to job duties that were in violation of the Settlement, and if that the Department did not reassign plaintiff to appropriate duties, plaintiff had to serve a notice of claim no later than April 7, 2004.

*Plaintiff's Complaint*

Plaintiff alleges that he attempted to resume his career as a classroom teacher and also to obtain a higher, supervisory position within the school system. He alleges that from March 2003 until the date of filing this complaint, he made more than 100 applications, all of which the Department rejected. The reason for the rejections, according to plaintiff, is the continued existence of the U ratings. Plaintiff alleges that defendants breached the specific provisions of the Settlement in regard to the ratings and the CSE assignment. In addition, he alleges that defendants refused to allow him to resume teaching or to obtain a higher position for discriminatory reasons.

The complaint sounds in breach of the Settlement, misrepresentation, discrimination because of race, age, religious beliefs, and/or gender in violation of Article I, Section 11 of the New York State Constitution, the New York State Human Rights Law § 296 (1) (a), and the New York City Administrative Code § 8-107 (1) (a), retaliation in violation of the Human Rights Law § 296 (1) (e), and violation of plaintiff's Fourteenth Amendment due process rights, pursuant to 42 USC § 1983. The misrepresentation cause of action alleges that defendants deceived plaintiff into believing that co-defendant Europe was authorized to sign the Settlement on behalf of the

Department, and that she was not so authorized. Plaintiff seeks money damages, including punitive damages.

### *Defendants' Motion*

Defendants move to dismiss on the grounds that: 1) plaintiff filed his notice of claim after the time for doing so had lapsed; 2) the notice of claim fails to name all of the defendants; 3) the complaint includes causes of action that are not included in the notice of claim; 4) the complaint fails to state a cause of action against the City and the individual defendants; and 5) the 42 USC § 1983 claim should have been brought in an Article 78 proceeding.

### *Legal Analysis*

In determining whether to grant a motion to dismiss based upon a failure to state a cause of action, the court must liberally construe the pleadings and accept the facts alleged as true (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1<sup>st</sup> Dept 1998]). The court will grant the motion to dismiss only if the facts as alleged fail to fit within any cognizable legal theory (*id.*). To obtain dismissal of a cause of action pursuant to CPLR 3211 (a) (5), on the ground of the statute of limitations, the defendant must establish that the time to sue has expired (*Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]). If the defendant succeeds, then the burden is on the plaintiff to show why the statute of limitations should not apply (*id.*).

No action can lie against the Department of Education unless it receives a notice of claim within 90 days after the accrual of such claim (Education Law § 3813 [1], [2]; General Municipal Law § 50-e [1]). The action itself must be filed within one year of the claim accruing (Education Law § 3813 [2-b]). Failure to adhere to the time limitation for presenting the notice of claim or filing the action is a fatal defect necessitating dismissal of the action (*Parochial Bus Sys. v Board of Educ. of City of New York*, 60 NY2d 539, 547 [1983]). The action will also be dismissed if

the notice of claim has not been presented to the correct party (*id.*).

The purpose of serving the notice of claim before commencing the action is to promptly alert a school district of claims against it, so that an investigation may be made while the facts are readily available, before it is too late for the investigation to be efficient (*id.*; *Kellogg v Office of Chief Med. Examiner of City of New York*, 24 AD3d 376, 379 [1<sup>st</sup> Dept 2005]). The notice of claim must apprise the proper defendant of the nature of the claim and the time when, the place where, and the manner in which the claim arose (General Municipal Law § 50-e [2]).

1. Service on Department of Education

Education Law § 3813 (1) requires that a notice of claim be served upon the "governing body" of the Board of Education. Defendants contend that the complaint should be dismissed, because plaintiff improperly served the notice of claim upon the Comptroller of the City of New York, instead of the Board of Education (*see Campbell v City of New York*, 203 AD2d 504, 505 [2d Dept 1994] [the Board of Education and the City of New York are separate entities, and service of a notice of claim upon the City does not constitute service upon the Board]). Plaintiff responds that service was proper, as his suit is against the Department of Education, not the Board. As noted by another court, the status of the Department is ambiguous.

The legislation, in order to provide for greater mayoral control of the schools, effected a wholesale transfer of power from the Board of Education to a chancellor, hired by and serving at the pleasure of the mayor. The Board of Education's only remaining powers relate to citywide educational policy issues. (Education Law §§ 2554, 2590-g, and 2590-h, as amended by L 2002, c 91 ... .)

Significantly, the Department of Education is nowhere mentioned in the legislation and has no independent legal status. Rather, the Department of Education is a mayoral agency, just as are all the other city departments, with its chancellor, rather than its commissioner, answerable to the mayor.

(*Perez v City of New York*, 9 Misc 3d 934, 935 [Sup Ct, Bronx County 2005]).

The Comptroller's office is the proper place to serve a notice of claim on a City agency,

including the Department of Education (*Roberts v Rivers*, NYLJ, April 1, 2003, at 19, col 3 [Schack, J.]). Plaintiff alleges that when he attempted to serve the notice of claim at the Department's headquarters at 52 Chambers Street, in Manhattan, he was told to take it to the Comptroller's office. The Comptroller accepted service for the Department. A note from the Comptroller's office to plaintiff refers to the Department of Education as the relevant agency in his case and as a City agency. The court thus concludes that plaintiff served the notice of claim on the appropriate body and that dismissal of the action on this basis is denied.

## 2. Sufficiency of Notice of Claim

The sufficiency of a notice of claim is judged by whether it includes enough information to enable the municipality to adequately investigate the claim, and a theory of liability not mentioned in the notice of claim generally may not be asserted in a subsequent lawsuit (*Wanczowski v City of New York*, 186 AD2d 397, 397 [1<sup>st</sup> Dept 1992]; *Soto v City of New York*, 161 AD2d 246, 246 [1<sup>st</sup> Dept 1990]). Here, the one-page notice of claim alleges that the Department violated the terms of the Settlement. It further states that the Department "assigned claimant to a position that he did not agree to, nor ... was claimant consulted; and the Department of Education violated other provisions" in the Settlement (Notice of Claim, ¶ 3). However, the complaint contains causes of action sounding in breach of contract, misrepresentation, and unlawful discrimination. Defendants are correct that the causes of action not contained in the notice of claim may not be asserted in this action. It is not enough, as plaintiff alleges, that the causes of action arise out of the same incident. What matters is the *nature* of the claim and the theory of recovery (*Wanczowski* at 397). Here, the notice of claim is entirely silent as to anything but breach of contract. It gives no hint as to the nature of other claims or the facts upon which they might be based.

In addition, Education Law § 3813 (1) provides that “[n]o action or special proceeding, for any cause whatever” can be maintained against the governing body of a school district or officer of a school district unless a notice of claim is filed. This rule would seem to preclude all those claims not mentioned in the notice of claim. In regard to the claims of discrimination based on the New York State Constitution, the New York State Human Rights Law, and the New York City Administrative Code, where a plaintiff seeks private relief, damages, or reinstatement for employment discrimination, the filing of a timely notice of claim is a condition precedent to suit (*Matter of Cayuga-Onondaga Counties Bd. of Co-op. Educ. Services v Sweeney*, 89 NY2d 395, 400 [1996]; *423 South Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 490 [1986]; *Sangermano v Board of Co-op. Educ. Services of Nassau County*, 290 AD2d 498, 490 [2d Dept 2002]). As plaintiff seeks only private relief in the form of monetary damages, he should have included the discrimination claims in his notice of claim. Therefore, defendants’ motion to dismiss the claims based on discrimination and retaliation in violation of the state human rights laws and on misrepresentation must be dismissed. The claim of breach of contract shall remain in the complaint, as the only cause of action based on state law mentioned in the notice of claim.

### 3. Notice to Parties

Where an entity has been properly served with a pleading such that, although omitted or misnamed in its caption, the recipient reasonably should have been put on notice that it was a target of the lawsuit, jurisdiction is acquired and the error of the caption may be treated as a mere irregularity (*see Gleicher v Schachner*, 149 Misc 2d 218, 220 [Civ Ct, Kings County 1990]; *Schwartzberg v State of New York*, 121 Misc 2d 1095, 1097 [Ct Cl], *affd* 98 AD2d 902 [3d Dept 1983]; *see also Glover v Jack D. Weiler Hosp. of Albert Einstein Coll. of Medicine*, 256 AD2d 137, 137 [1<sup>st</sup> Dept 1998]). Here, the caption of the notice of claim names the City of New York

as the only defendant, and defendants argue that the failure to name all of the defendants in the caption is a defect necessitating dismissal against the unnamed defendants.

The one-page notice of claim states, at paragraphs two and three, that the “Department of Education” wronged plaintiff in different ways. No doubt exists that these references gave the Department notice about plaintiff’s claims. Defendants do not allege otherwise and the Comptroller’s office sent plaintiff a note which refers to the Department as the agency concerned. Not being named in the caption did not prevent the Department from learning of the claim.

Applying the same principle to the particular notice of claim at bar, the court finds that the omission in the caption may be treated as an insignificant irregularity insofar as it concerns the Department.

The individual defendants present a different case. Actions against school employees for actions taken within the scope of their employment require the filing of a notice of claim with the proper entity (Education Law § 3813 [2]). Service of the notice of claim on the individual is not required (General Municipal Law § 50-e [b]). Here, although the notice of claim alleges that defendants breached the Settlement, that mention is insufficient to alert the Department of a claim against the individuals involved in the Settlement. Where the notice of claim fails to mention a particular employee and/or fails to set forth a theory for imposing liability on that employee, the municipality has no basis for investigating whether or not the claimant has a valid claim against that employee (*White v Averill Park Cent. School Dist.*, 195 Misc 2d 409, 411-412 [Sup Ct, Rensselaer County 2003]).

As a practical matter, failure to name the defendants may not matter in this case. Given that the notice of claim is based entirely on breach of the Settlement, discovering which school officials interacted with plaintiff in regard to the Settlement would probably be an easy matter,

even if they were not named in this action. Nonetheless, the question of prior notice remains and an action may not be maintained against an individual employee not named anywhere in the notice of claim. This means that the breach of contract claim may not be maintained against any individual in his or her official capacity, the only capacity in which the Mayor and the School Chancellor are sued. Hallet and Europe are sued in both capacities.

Where school officials are sued in their individual capacities, a notice of claim is not required (*see Gorgone v Capozzi*, 238 AD2d 308, 310 [2d Dept 1997]). Now, the question is whether this action may be maintained against Hallet or Europe in their individual capacities. The complaint alleges no wrongdoing by Hallet or Europe in their personal capacities. The complaint clearly indicates that the conduct complained of occurred during the discharge of these defendants' duties within the scope of their employment. The complaint thus fails to state a cause of action against either one in her personal capacity.

In sum, one state law cause of action, that based on breach of contract, remains to plaintiff. It may be maintained against the Department and the City, and not against the individual defendants in any capacity.

Defendants also argue that the complaint fails to state a claim against the City. Defendants' arguments are based on the separate nature of the City and the Board of Education. As stated earlier, this action is against the Department, which is a City agency. Defendants do not address whether the Department and the City are united in interest, such that the Department's liability will affect the City (*see Cuello v Patel*, 257 AD2d 499, 500 [1<sup>st</sup> Dept 1999]). The court will not dismiss this action as against the City.

### 3. The Federal Law Claim

Notice of claim requirements do not apply to claims based on 42 USC § 1983 (*Felder v*

*Casey*, 487 US 131, 138-140 [1988]; *Jamieson v Poughkeepsie City School Dist.*, 195 F Supp 2d 457, 467 [SD NY 2002]; *Sangermano*, 290 AD2d at 499; *Gorman v Sachem Cent. School Dist.*, 232 AD2d 452, 453 [2d Dept 1996]; *Wanczowski*, 186 AD2d at 397). Plaintiff did not need to plead the Section 1983 claim in the notice of claim in order to maintain it in this action.

Defendants maintain that the federal claim should be dismissed because it should have been brought in an Article 78 proceeding. A plaintiff seeking redress because a public official or governmental body breached a contract, need not bring an Article 78 proceeding (*Mitchell v Board of Educ. of City School Dist. of City of New York*, 15 AD3d 279, 281 [1<sup>st</sup> Dept 2005]). Here, plaintiff's claims regarding due process are mixed with his contract claims and it is more efficient for all the claims to be brought in one proceeding.

CPLR 7806 provides that in an Article 78 proceeding, any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner. The damages sought by plaintiff for violation of his Section 1983 rights are not incidental to any primary relief; the damages are the primary relief (*see Loftin v New York City Dept. of Social Services*, 267 AD2d 78, 78 [1<sup>st</sup> Dept 1999]; *Raykowski v New York City Dept. of Transp.*, 259 AD2d 367, 368 [1<sup>st</sup> Dept 1999]).

The due process claim will not be dismissed on the basis that it should have been brought in another proceeding. Also, given that this constitutes defendants' only argument against the Section 1983 claim, it will not be dismissed for any reason. The claim remains as against the entity defendants and the individual defendants in their official capacities. As stated above, the complaint states no cause of action against any individual in her or his personal capacity.

#### 4. Statute of Limitations

A breach of contract cause of action accrues and the limitations period begins to run at

the time of the breach (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]). When a contract, like the Settlement, does not specify time of performance, the law implies a reasonable time (*Webster's Red Seal Publs. v Gilberton World-Wide Publs., Inc.*, 67 AD2d 339, 343 [1<sup>st</sup> Dept 1979], *affd* 53 NY2d 643 [1981]). What constitutes a reasonable time depends upon the particular circumstances, and the cause of action accrues as soon as that reasonable time has expired (*see Boone Assoc., L.P. v Leibovitz*, 13 AD3d 267, 267 [1<sup>st</sup> Dept 2004]; *Escobar v Gonzalez*, 277 AD2d 93, 93 [1<sup>st</sup> Dept 2000]).

It may be said that the reasonable time expires and the breach occurs when the plaintiff should be reasonably certain that the defendant will not honor the contract (*Mitchell*, 15 AD3d at 280-281 [breach occurred when the plaintiff became aware that defendant's decision not to perform was final]; *Block v Teachers Ins. & Annuity Assn. of Am.*, 286 AD2d 298, 299 [1<sup>st</sup> Dept 2001] [the accrual of plaintiff's breach of contract claims arose when her request for reconsideration was denied]; *Matter of Chanecka v Board of Educ., Broome-Tioga BOCES*, 243 AD2d 1011, 1012 [3d Dept 1997] [breach dated from time that petitioner was made fully aware that defendant would not retroactively reinstate him]; *Helmer-Cronin Constr., Inc. v Beacon Community Dev. Agency*, 156 AD2d 543, 543-544 [2d Dept 1989] [breach of contract claim accrued when the plaintiff "should have viewed his claim as having been constructively rejected"]; *Arnell Constr. Corp. v Village of North Tarrytown*, 100 AD2d 562, 563 [2d Dept 1984], *affd* 64 NY2d 916 [1985] [the breach of contract occurred when the plaintiff's bill was expressly rejected]).

Defendants contend that plaintiff's claims accrued when he discovered, on August 26, 2003, that the Department had not changed his ratings. According to defendants, that means that the last day for plaintiff to file the notice of claim was November 26, 2003. As plaintiff filed the

notice of claim on April 6, 2004, defendants argue that this action must be dismissed. In contrast, plaintiff argues that his claim did not accrue until the post-Settlement negotiations stopped being productive, in March 2004. Alternatively, he alleges that the earliest date that his claim accrued was on January 7, 2004, when his union attorney discovered that plaintiff had not been reassigned pursuant to the Settlement. Either date would have made the April 6, 2004 filing of the notice of claim timely.

As of August 2003, the Department had not complied with the Settlement provisions that it would change the ratings and reassign plaintiff. However, defendants fail to establish that that was when they finally rejected plaintiff's claims. The union attorney's letter alleges that the parties were engaged in discussions about the Settlement between January 7, 2004 and March 30, 2004, during which time defendants apparently indicated that they would comply with the Settlement. There is no allegation that defendants expressly informed plaintiff that they would not comply with the Settlement. In addition, plaintiff alleges that defendants themselves, by their continued communications with plaintiff, created an ambiguity as to whether or when they would comply with the Settlement (*see Mitchell*, 15 AD3d at 280-281; *A.C. Transport., Inc. v Board of Educ. of City of New York*, 253 AD2d 330, 337 [1<sup>st</sup> Dept 1999]). Given the claim that defendants created the uncertainty as to the time of breach, it was reasonable for plaintiff to determine when he did, that they would not comply with the Settlement. Plaintiff filed the notice of claim in a timely fashion, and the complaint will not be dismissed on this basis.

#### *Conclusion*

The first cause of action for breach of contract may be maintained as against the City and the Department. The twenty-fifth, and last, cause of action based on 42 USC 1983 may be maintained as against the City, the Department, and the individual defendants in their official

capacities. Accordingly, it is

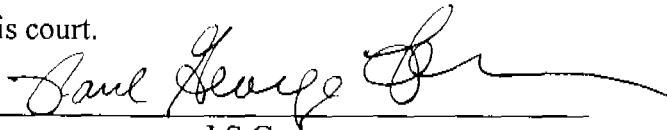
ORDERED that defendants' motion to dismiss the complaint is granted to the extent that the second through the twenty-fourth causes of action are dismissed, and the entire complaint is dismissed as against defendants the Mayor, the Chancellor, Theresa Europe, and Denise J. Hallet in their personal capacities, and is otherwise denied; and it is further

ORDERED that defendants shall serve an answer to the remaining causes of action in the complaint within 20 days of service of a copy upon them of a copy of this order with notice of entry. It is further

ORDERED that if the parties have not previously been issued a case scheduling order or entered into a preliminary conference order, the DCM Clerk shall schedule a preliminary conference for as soon as practicable.

This constitutes the decision and order of this court.

Dated: April 17, 2006  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE