[*1]

SCANNED ON 10/13/2006

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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 100893/2006
GREGG, LINDA
vs
DEPARTMENT OF EDUCATION
Sequence Number : 002
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 100893/06
MOTION DATE ~~[illegible]~~ 7/26/
MOTION SEQ. NO. 002
MOTION CAL. NO. 8

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5,6

Cross-Motion: ☐ Yes ☒ No

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

FILED
OCT 13 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/06

J.S.C.

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

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

In the Matter of the Claim for Loss Wages,
Pursuant to Notice of Claim #2004LW02135,
LINDA GREGG,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF
THE CITY OF NEW YORK,

Defendant.
----------X

Index Number	100893/2006
Mot. Submit Date	July 26, 2006
Mot. Seq. Nos.	002 & 003
Cal. Nos.	8 & 9

DECISION & ORDER

For the Plaintiff:
Linda Gregg, *pro se*
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718-592-0637

For the Defendant:
Michael A. Cardozo, Esq.
Corporation Counsel for City of New York
By: Robert Katz, Esq.
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Papers considered in review of these motions to dismiss and for summary judgment:

	Papers	Numbered
Seq. 002	Notice of Motion, Affidavits, Memo of Law.....	1,2,3
	Answering Affidavits.....	4
	Replying Affidavits.....	5
	Reply Memorandum.....	6
Seq. 003	Notice of Motion and Affidavits Annexed.....	1
	Affirmation in Opposition.....	2
	Reply and Affidavit Evidence.....	3

PAUL GEORGE FEINMAN, J.:

The motions bearing sequence numbers 002 and 003 are consolidated for purposes of a joint decision.

Plaintiff, a licensed and tenured New York State Certified teacher, brings this action to restore her to her teaching position, recover back pay, address due process and equal protection violations, and recover damages for defamation. Plaintiff seeks $500,000 dollars in damages. In the first motion, bearing sequence number 002, The Department of Education of the City of New

York moves to dismiss the complaint in its entirety based on lack of subject matter jurisdiction, res judicata and collateral estoppel, failure to state a cause of action, and statute of limitations (CPLR 3211[a][2],[5],[7], 217; N.Y. Educ. L. § 3813[1]; N.Y. Gen. Mun. L. § 50-e[2]). In the second motion, bearing sequence number 003, plaintiff moves for a default judgment and for summary judgment (CPLR 3215; 3212). At oral argument on June 28, 2006, the court converted defendant's motion from a motion to dismiss into a motion to summary judgment pursuant to CPLR 3212 (c). The motions were adjourned to July 26, 2006 and the parties were granted leave to submit supplemental papers.[1]

For the reasons stated herein, defendant's motion is granted in its entirety; plaintiff's motion is denied as academic, and the action is dismissed.

Factual and Procedural Background

After a hearing conducted by a hearing officer of the State Education Department over the course of several days in June 2004, plaintiff was found guilty in a decision dated October 20, 2004, of six specifications involving insubordination and neglect of duty, and not guilty of two other specifications (Def. Not. of Mot. Ex. C [Findings & Penalty of State of N.Y. State Educ. Dept.]). She was suspended for four months without pay and put on notice that any future transfers of school assignments must be first obeyed and then grieved, absent a recognized exception to that principle (Id. p. 16). She began her four-month suspension without pay on November 11, 2004 (Def. Not. of Mot. Ex. A, Complaint [hereinafter Complaint] ¶ 47).

In November 2004, she commenced an Article 75 proceeding in Supreme Court, New York County seeking to confirm in part and modify in part the arbitration decision (Def. Not. of

[1]By letter dated July 21, 2006, defendant indicated it would not put in further papers.

Mot. Ex. D, *Matter of Gregg-Mullings v Department of Educ.*, Sup. Ct., New York County, Ind. 115517/2004). In essence she sought a judgment confirming the arbitrator's decision as to the two specifications in her favor, and a reversal as to the other specifications, and in addition a declaration that she receive her salary for the days marked as unauthorized absences, be restored to her position with full pay for the period of suspension, and the charges expunged from her record. The Department of Education cross-moved to dismiss the petition and to confirm the arbitration award (Def. Not. of Mot. Ex. E). Gregg's petition was denied by another justice of this court on January 7, 2005, and the cross-petition was granted (Def. Not. of Mot. Exs. H, I). On appeal, the Appellate Division, First Department affirmed the *nisi prius* court. (*Matter of Gregg v Department of Educ. of City of N.Y.*, 22 AD3d 254 [2005]). The Court of Appeals denied leave to appeal (6 NY3d 714 [2006]).

In December 2004, plaintiff filed a Notice of Claim, pursuant to Gen. Mun. L. § 50-e (Aff. of James Cox, Ex. M). The Notice of Claims sets forth a claim of $58,405.28 consisting of five claims of lost wages primarily arising from the time during which she was suspended, the days which were the subject of the arbitration hearing, and five days which were the subject of a grievance proceeding which resulted in a denial (Complaint ¶¶ 52-53, 57). Her summons with notice were filed on January 20, 2006, and the Complaint, verified on March 6, 2006, was apparently filed and served thereafter.

The Complaint contains many of the same allegations concerning the events leading up to plaintiff's suspension, the arbitration hearing, the determination, and afterwards. It also alleges that plaintiff only received her salary for the period of March 14, 2005 through April 30, 2005 in her June 30, 2005 paycheck without interest (Complaint ¶ 57). In addition, she was notified that

she had been transferred as of May 2005 to a different high school and although she subsequently received an authorization letter returning her to her former school, there have been further attempts to transfer her to a different school following a reorganization (Complaint ¶¶ 72, 78, 89-90). She filed a grievance and as of the time of the drafting of the Complaint, had gone through a Step II hearing but had not yet been issued a decision from the Department of Education (Complaint ¶¶ 78-81). She claims that defendant continues to dismiss her contractual and legal claims to her teaching position, has made no good faith efforts to comply with the arbitration decision, the collective bargaining agreement, or the provisions of the Education Law, and has violated her right to due process and equal protection (Complaint ¶¶ 84-87, 92).

In addition, the Complaint also alleges that on January 24, 2005, her name and "presumed charge" was in an article in the New York Post entitled "Class Clowns Bad-Apple Teachers Stay at Full Pay," which "smeared" her "good reputation" and that she had been informed by the reporter that his information had been obtained from a copy of the arbitration hearing decision received from the Department of Education (Complaint ¶ 58; Def. Not. of Mot. Ex. J). In a January 2006 segment of "20/20," this same article was allegedly featured in a segment entitled "Stupid in America" (Complaint ¶ 88).

Defendant moves for summary judgment and dismissal of the Complaint on several grounds. It argues among other bases that the action is barred by the doctrines of *res judicata* and collateral estoppel, that plaintiff's claims are barred by the applicable statute of limitations, and that her defamation claim fails to state a cause of action or to comply with the mandatory notice of claim requirement.

Legal Analysis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Where a movant demonstrates its entitlement to summary judgment, the burden of opposing such a motion is to demonstrate by admissible evidence the existence of a material issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*See, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and accusations (*Zuckerman v City of New York, supra,* at 557). Unsubstantiated allegations are also insufficient (*Id*).

Res judicata or claim preclusion, refers to the effect of a valid and final judgment in favor of the defendant which bars the plaintiff from bringing another action on the same cause of action (5 Weinstein, Korn, Miller, New York Civ. Prac., ¶ 5011.08). When the cause of action in the subsequent suit is the same as that in the prior suit, claim preclusion will prevent the parties from raising both matters that were actually litigated and those that might have been litigated (*Drago v Buller*, 60 AD2d 518 [1st Dept. 1977]). In contrast, collateral estoppel or issue

preclusion applies when the second action is brought on a different cause of action than that asserted in the first, and applies only to issues rather than the entire causes of action (5 Weinstein, Korn, Miller, New York Civ. Prac., ¶ 5011.24). Issue preclusion prevents the parties from litigating issues that were actually litigated or necessarily determined in the earlier suit (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481 [1979]). These principles are designed to conserve judicial resources by discouraging redundant litigation, and are based on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, he or she may not be permitted to do so again (*Id.* at 485).

An examination of the Complaint finds that although plaintiff attempts to argue that her claims are separate and distinct from the events surrounding her suspension and the arbitrator's decision, with whose determination she is clearly unhappy, she is, for the most part, unpersuasive. As defendant sets forth in its memorandum of law, much of what is contained in the instant Complaint, including plaintiff's "last legal assignment," the issue of unpaid wages for days marked as "unauthorized absences," and that the arbitration decision's description of Charge 4 does not agree with Finding 4, were all asserted in the prior Article 75 proceeding, and are barred by claim preclusion.

However, certain of the claims contained in the Complaint had not ripened at the time she served her Notice of Claim. For instance, she undertook two grievance proceedings concerning lost wages, one covering 20 days, and one 5 days, which were both ultimately concluded after she served the Notice of Claim.[2] In both of those situations, however, plaintiff's recourse, after

[2]Plaintiff sought to resolution of the 20 days loss by letter to the school payroll secretary in December 2003, which lead to a Step III payroll grievance in May 2004, and a hearing before the chancellor's representative in November 2004, resulting in a denial of reimbursement of

continuing the grievance process through to its conclusion, was commencement of an Article 78 proceeding to review each of the administrative determinations (CPLR 7801[1]). Because CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination, she appears to be time barred from commencing a proceeding to review the outcome of either of these two grievances (*Carter v State of New York*, 95 NY2d 267, 270 [2000]).[3] Similarly, the Complaint states that plaintiff has commenced another grievance proceeding, apparently concerning the efforts to transfer her, but has not yet received a decision from the Department of Education. The court has no subject matter jurisdiction over this claim, as she must pursue the grievance through administrative channels and then commence a separate summary proceeding, if necessary, to review the administrative determination.

In addition, plaintiff lacks standing to assert a claim alleging a breach of the collective bargaining agreement by defendant as concerns its failure to alter her U rating. When an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement (*Board of Educ. v Ambach*, 70 NY2d 501, 508 [1987]). Instead, the employee must proceed, through the union, in accordance with the contract, and only if the union fails in its duty of fair representation can the employee litigate a contract issue directly against the employer

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salary (Complaint ¶¶ 33, 49). Plaintiff argues this decision "ignore[d] the arbitration decision." (Complaint ¶ 49). A second payroll hearing also in November 2004 involved her claim for the five days' missing wages while on administrative duties (Complaint ¶¶ 52-53). This grievance was denied by letter dated January13, 2005 (Complaint ¶ 57).

[3]Educ. L. § 3020-a(5) allows only 10 days for an employee or the employing board to make an application to State Supreme Court to vacate or modify the decision of the hearing officer pursuant to CPLR 7511.

(*Id.*). Even if plaintiff, who argues that she is entitled to "legal" rather than "contractual" relief, were entitled to turn to the court, she is precluded from this course because of the running of the statute of limitations, given that the court is restricted to an Article 78 review of the administrative determination, and that proceeding must be commenced within four months of the determination (CPLR 217; *see, e.g., Schachter v Community School Bd. Dist.*, 88 AD2d 588 [2d Dept. 1982]).

As concerns the claim of defamation, the elements of the tort are, "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard," which causes either "special harm" or constitutes "defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept. 1999], citing Restatement [Second] of Torts § 558). The statute requires that "the particular words complained of . . . be set forth in the complaint." (CPLR 3016[a]). In addition, the complaint must allege the time, place, and manner of the false statement and specify to whom it was made (*Dillon*, at 38). Here, the Complaint alleges that twice the contents of the October 20, 2004 arbitration decision were published, once on January 24, 2005 in the New York Post, and again in January 2006 on ABC's "20/20." The Complaint does not indicate the particular words at issue in either instance, although it alleges that the NY Post article "smeared her reputation," and it is silent as to the date and time of the "20/20" program or any information other than that the program mentioned the Post article. For this cause of action, plaintiff failed to serve a Notice of Claim (Educ. L. § 3813; Gen. Mun. L. § 50-e[1]a[a]). The service of a notice of claim upon the City is a condition precedent to the commencement of an action sounding in tort against the city (*Mercado v New York City Health & Hosps. Corp.*, 247 AD2d 55, 61 [1st Dept. 1998]; *Rodriguez v City of New*

York, 169 AD2d 532, 533 [1st Dept. 1991]). The Chief of the Law Division in the Office of the New York City Comptroller avers that on April 14, 2006, he searched the books and records of the Comptroller's Office for any notices of claim filed by plaintiff against defendant (Cox Aff.¶ 6). The only Notice of Claim found by Mr. Cox was the December 10, 2004 Notice of Claim, which does not contain the causes of action sounding in defamation since they allegedly accrued after the filing and service of the Notice of Claim (Cox Aff. ¶ 7). Accordingly, the allegations of defamation must be dismissed without prejudice to plaintiff's commencing a proceeding seeking permission to file a late notice of claim and then to file an amended summons and complaint, within the pertinent statute of limitations.

Turning to the Complaint's allegations of violations of due process and equal protection, the court holds that plaintiff fails to raise an issue of fact such that summary judgment and dismissal would not be appropriate. Education Law § 3020 (1) recognizes that tenured teachers have constitutionally protected interests in their rights to continued employment which cannot be deprived without due process. Here, however, the Complaint makes no allegations of receiving inadequate notice of the charges against her or that she lacked an opportunity to present her defenses *(see, Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 454, *cert denied* 444 U.S. 845 [1979]). Nor does she set forth allegations that raise questions of fact concerning possible a violation of equal protection rights.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]).

Here, defendant establishes that it is entitled to summary judgment and plaintiff does not raise any triable issues of fact. Accordingly, defendant's motion for summary judgment and dismissal of the complaint is granted in its entirety, although without prejudice to plaintiff's commencing a new action, should she desire to do so, concerning her claim sounding in defamation, after she has sought leave to file a late notice of claim and provided the claim is timely brought.

Plaintiff's motion for a default judgment and for summary judgment is, accordingly, denied as academic. Were the motion for a default judgment to be considered, it would be denied, based on the procedural posture of the parties. Defendant has since put in papers and has been a very active litigant. It would be an injudicious use of the court's time and resources to issue a default judgment, which the defendant would then move to vacate. Where a party seeks to vacate a default judgment, the court will grant the motion if that party provides a justifiable excuse for the default and a meritorious defense (*Barasch v Micucci*, 49 NY2d 549 [1980]). Here, defendant's reason for needing more time was that it was still gathering materials pertaining to the prior Article 75 proceeding and was fully investigating plaintiffs claims in the instant matter (Def. Aff. in Opp. ¶ 5). Plaintiff's pointing out that defendant explained in court that it needed more time to obtain an affidavit concerning a matter which she had not "claimed" (Pl. Reply ¶ 5), is of little persuasion, given that the affidavit of Mr. Cox established that plaintiff had not served a notice of claim for the claims of defamation and that she cannot continue to pursue those claims in this action. Defendant's defenses, as set forth above, are meritorious. Therefore, were defendant to make a motion to vacate its default, the court would grant it. It is

ORDERED that defendant Department of Education of the City of New York's motion to

dismiss, converted by the court into a motion for summary judgment, is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; without prejudice to plaintiff commencing a new cause of action claiming defamation, within the limits of the running of the statute of limitations **and** after receiving permission to serve a late notice of claim; and it is further

ORDERED that plaintiff's motion for a default judgment and summary judgment is denied as academic; and it is further

ORDERED that the defendant shall serve a copy of this Order with notice of its entry upon the plaintiff, the Trial Support Office (60 Centre St., Rm. 158), the DCM Office (80 Centre St., Rm. 102) and the Clerk of the Court (60 Centre St., Bsmt.); and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 10, 2006
New York, New York

Paul Gerges Lesmes
J.S.C.