

Volchok v New York Dept. of Educ.

2007 NY Slip Op 32067(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0105137/2006

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER
J.S.C.

PRESENT: _____

PART **Part 5**

Index Number : 105137/2006

VOLCHOK, SUSAN

vs

DEPARTMENT OF EDUCATION

Sequence Number : 001

AMEND CAPTION/PARTIES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED
 JUL 6 2007
 NEW YORK COUNTY CLERK'S OFFICE

PARTS NUMBERED	
1	1
2	3
3	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: June 29, 2007


EILEEN A. RAKOWER 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: PART 5

-----X
SUSAN VOLCHOK,

Plaintiff,

Index No.
105137/06

- against -

**ORDER AND
DECISION**

THE NEW YORK DEPARTMENT OF EDUCATION,
CITY OF NEW YORK, JOEL I. KLEIN, LINDA MILNER,
KAREN WATTS, JECROIS JEAN-BAPTISTE and
THE UNITED FEDERATION OF TEACHERS,

Defendants.

Mot. Seq. 001

FILED

-----X
EILEEN A. RAKOWER, J.S.C.

JUL 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff is a former teaching fellow who was in a program sponsored by the City New York and the New York City Department of Education (City) in which she attended classes at Fordham University (Fordham). Joel Klein is the Chancellor of the Department of Education (DOE). Linda Milner, Karen Watts and Jecrois Jean-Baptiste are teachers (the teachers) employed by DOE and members of the United Federation of Teachers (UFT), a union that represents DOE teachers. Plaintiff was fired from her position as a teaching fellow in December, 2005. Thereafter, she filed this action alleging, *inter alia*, racial discrimination, breach of contract and fraud. Plaintiff now files this motion seeking an order from the Court pursuant to CPLR § 3025 (b) for leave to amend her pleadings and CPLR §1003 to add Fordham as a defendant in this action and to extend her time to serve process, *nunc pro tunc*, on the teachers and the UFT. City opposes this motion on behalf of the teachers stating that Plaintiff has demonstrated neither good cause for her delay or that such addition was in the interest of justice (CPLR §306-b). Additionally, City disputes that Plaintiff was unable to name Fordham as a defendant until she "recently obtained" certain discovery from City. UFT also opposes Plaintiff's motion arguing that the statute of limitations for a claim regarding UFT's duty of fair representation has expired.

CPLR § 3025 (b) states, in pertinent part:

A party may amend his pleading, or supplement it by setting

forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . .

CPLR §1003 states, in pertinent part:

Parties may be added at any stage of the action by leave of the court . . .

Since leave to amend pleadings should be liberally given, (*Yandolino v. Alpha Taxi Corp.*, 126 A.D.2d 468[1st Dept. 1987]), Plaintiff's motion to add Fordham as a party and amend her pleadings in regard to Fordham is granted.

Plaintiff argues that it was an oversight by the law office that the teachers were not timely served and City is not prejudiced by their addition because their employer, DOE, was timely served. City argues that the Court should consider Plaintiff's lack of diligence noting that she was apprised by a City attorney some four months before this motion was filed that the teachers had not been served and, in fact, City offered her assistance in doing so (City's exhibit B). Additionally, City avers that Plaintiff's claim lacks merit. Lastly, City notes that Plaintiff failed to file a timely notice of claim against the teachers and, in fact, she filed a petition (index # 102186/07) just days before this motion seeking leave to file a late notice of claim against the teachers. Because Plaintiff's petition to file a late notice of claim against the teachers was denied by the Honorable Sheila Abdus-Salaam on June 19, 2007, the motion to extend the time for service upon the teachers is denied as moot.

Plaintiff argues that she should also be permitted to extend her time to serve process on UFT. Plaintiff argues that UFT has not be prejudiced because all of the documentation and other evidence necessary to the defense in this matter is controlled by City, DOE and UFT. However, Plaintiff faces a similar problem with UFT as it did with the teachers. UFT argues that CPLR § 217(2)(a) states that the statute of limitations within which to proceed against a union for breach of its duty of fair representation is "four months [from] the date the employee or former employee knew or should have known that the breach . . . occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later." Here, the date that plaintiff suffered actual harm was the date that she was fired, December 16, 2005. Accordingly, Plaintiff's failure to serve UFT within the applicable limitations

period is fatal to her application for an extension of time to serve UFT and her motion must be denied. (*Jimenez v. United Federation of Teachers*, 239 A.D.2d 265 [1st Dept. 1997]).

Wherefore, it is hereby

ORDERED that the Plaintiff's motion for leave to amend the complaint to add Fordham as a defendant is granted, and the amended complaint in the proposed form, except as limited by this decision, shall be served, along with a copy of this order, on all parties within 20 days, with notice of entry thereof; and it is further

Ordered that Plaintiff's motion for an extension of time within which to serve process on Linda Milner, Karen Watts and Jecrois Jean-Baptiste is denied as moot, and it is further

ORDERED that Plaintiff's motion for an extension of time within which to serve process on the United Federation of Teachers is denied; and it is further

ORDERED that the caption shall be amended to read :

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

SUSAN VOLCHOK

Plaintiffs,

Index No.
105137/06

- against -

THE CITY OF NEW YORK, NEW YORK
CITY DEPARTMENT OF EDUCATION, JOEL I.
KLEIN and FORDHAM UNIVERSITY,
Defendants.

-----X

and it is further

ORDERED that Plaintiff must serve a copy of this order on both the Trial Support Office (room158) and the County Clerk so that their records may be altered to reflect the changes.

All other relief requested is denied.

This constitutes the decision and order of the Court.

DATED: June 29, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
JUL 06 2007
NEW YORK
COUNTY CLERK'S OFFICE