Hanna v Klein
2007 NY Slip Op 32213(U)
July 10, 2007
Supreme Court, New York County
Docket Number: 0102436/2006
Judge: Joan Madden
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SCANNED ON 7/23/2007

[* 1]

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

PRESENT: Hon Joan A. Madden, *Justice* PART 11

Index Number : 102436/2006
HANNA, AZAR G.
VS
KLEIN, JOEL I.
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE 4/26/07
MOTION SEQ. NO.
MOTION CAL. NO.

is motion to/for reargument

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

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
JUL 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 18, 2007 [signature] J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

---X

AZAR G. HANNA,

Index No. 102436/06

Plaintiff,

-against-

JOEL I. KLEIN, Chancellor of the New York City Department of Education, and the NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

---X

JOAN MADDEN, J.:

Defendants Joel I. Klein ("Klein") and the New York City Department of Education ("DOE") move for leave to reargue this court's decision and order dated October 12, 2006 ("the original decision"), asserting that the court erred in applying the notice of claim provision from General Municipal Law §50-e, rather than Educational Law §3813. Upon reargument, defendants request that the court dismiss the complaint based on plaintiff's failure to file a notice of claim. Plaintiff Azar G. Hanna opposes the motion, which is granted for the reasons below.

Plaintiff, who was born in Egypt, was initially hired by the DOE in 1982 to work in the Division of School Facilities as a General Supervisor of Building Maintenance. He continued to hold various positions within the DOE for the next 11 years. On or about September 26, 2003, Plaintiff submitted his resume in response to a vacancy announcement that was posted by the DOE for the position of Deputy Director of Facilities Management Services ("FMS"). Klein is the Chancellor of the DOE, and the DOE is responsible for filling the position of Deputy Director of FMS.

This action arises out of plaintiff's allegation that the DOE discriminated against him on the basis of his national origin when he was not selected for promotion to the position of Deputy Director of FMS. Plaintiff alleges that during his job interview, Deputy Director John O'Connell

"denigrated the plaintiff by treating his qualifications for the position as ludicrous." The promotion was given to Michael Hahn ("Hahn"), who is Caucasian, had previously held the position of Acting Deputy Director of FMS.

On June 21, 2006, defendants moved to dismiss the action as time-barred based on plaintiff's failure to file a timely notice of claim pursuant to New York Education Law §3813, which they asserted is a condition precedent to commencement of the action. In its original decision, the court denied defendants' motion on the grounds that plaintiff was not required to file a notice of claim for a cause of action for unlawful discriminatory practices under Executive Law §296, and held that it could not be determined, based on limited documentary evidence submitted by defendants in support of their motion, when the statute of limitations began to run.

Defendants now move for reargument of the original decision, arguing that the court should have applied the notice of claim provision set forth in Education Law §3813, which requires that a notice of claim be filed in actions against the DOE brought under Executive Law §296.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979); see also, William P. Phal Equipment Corp. v. Kassis, 182 AD2d 22 (1st Dept. 1992).

In this case, reargument is granted, and upon reargument, the complaint must be dismissed based on plaintiff's failure to file a notice of claim as required under Education Law §3813. In its original decision, this court relied on Morrison v. New York City Police Department, 214 AD2d 394 (1st Dept. 1995), in finding that a notice of claim is not required in actions against a municipality or municipal agency brought under Executive Law §296. Here,

however, plaintiff has brought action against the DOE, and must therefore comply with the notice of claim provision set forth in Education Law §3813, even though plaintiff asserts a cause of action for discrimination under Executive Law § 296. See Education Law §3813(1); Mills v. County of Monroe, 59 N.Y.2d 307, 308 (1983), cert. denied, 464 U.S. 1018 (holding that the notice of claim requirement in Education Law §3813(1) applies when a plaintiff seeks "private relief, damages, or reinstatement for employment discrimination" in violation of the State or City Human Rights Law); see also Sangermano v. Board of Cooperative Educational Services of Nassau Co., 290 AD2d 498 (2d Dept 2002).

With respect to the statute of limitations issue, Education Law §3813 (2-b) provides that, "no action or special proceeding shall be commenced against any entity specified in subdivision one of this section *more than one year after the cause of action arose*." (emphasis added). A claim under Education Law §3813 (2-b) accrues when the "administrative action becomes 'final and binding' when it 'has an impact' upon the petitioner who is thereby aggrieved." A.C. Transportation, Inc. v. Board of Education of the City of New York, 253 AD2d 330, 337 (1st Dept), lv. denied, 93 NY2d 808 (1999), quoting, Matter of Edmead v. McGuire, 67 NY2d 714, 716 (1986). In this case, the one-year statute of limitations accrued when plaintiff was not hired for the position or, at the very latest, when he received of a letter dated November 5, 2003, informing him that another candidate had been hired for the position. As this action was not commenced until on or about February 17, 2006, which is well after the expiration of the statute of limitations in November 2004, it must be dismissed as untimely.

Furthermore, contrary to plaintiff's position, the timeliness of his claim does not present a factual question to be determined after discovery. At the time of the original decision, plaintiff submitted an affidavit denying receipt of the November 5, 2003 letter. However, defendants have submitted an affidavit from William Wilson, Director of Human Resources at the DOE's Office

of School Support Services, averring that after Mr. Hahn was selected for the position, his office sent a letter signed by him, dated November 5, 2003, to each of the fourteen unsuccessful candidates who applied for the position (including plaintiff) informing them that another candidate had been selected for the position. He also states that his office has retained a copy of the letter sent to each unsuccessful applicant for the position, and that their records "reflect that a letter dated November 5, 2003 was mailed to Mr. Hanna, informing him that he had not been selected for the position" (Wilson Affidavit para. 7).

Under these circumstances, plaintiff's allegation that he never received the November 5, 2003 letter is insufficient to rebut the presumption of receipt based on the statements in Wilson's affidavit. Matter of Nelson Management Group, Ltd. (New York State Div. of Housing and Community Renewal), 259 A.D.2d 411 (1st Dept.), lv. denied, 93 N.Y.2d 814 (1999); Matter of Cohen (Dept. of Housing Preservation and Development of the City of New York), 246 A.D.2d 393 (1st Dept. 1998); Dowling v. Holland, 245 A.D.2d 167 (1st Dept. 1998). In any event, plaintiff, who works for the DOE, cannot reasonably claim that he was not aware that he did not get the position for the approximately twenty-seven months that elapsed from Mr. Hahn's appointment to the commencement of the lawsuit.

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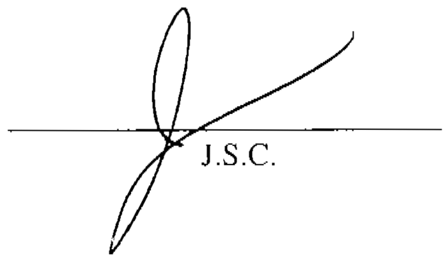
In view of the above, it is

ORDERED that defendants' motion for leave to reargue is granted and, upon reargument, the motion to dismiss is granted and the complaint is dismissed.

DATED: July 10 2007



J.S.C.