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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

Index Number : 109221/2006
HACKSHAW, ROCK HERMON
vs
DEPARTMENT OF EDUCATION
Sequence Number : 001
DISMISS ACTION

INDEX NO. 109221/2006
MOTION DATE 5/9/07
MOTION SEQ. NO. 001
MOTION CAL. NO. 6

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
AUG 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/6/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
ROCK HERMON HACKSHAW,
Plaintiff,

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION, f/k/a NEW YORK CITY BOARD OF EDUCATION, and THE UNITED FEDERATION OF TEACHERS, a/k/a UFT,
Defendants.
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Index Number 109221/2006
Mot. Seq. Nos. 001 & 002
Cal. Nos. 5 & 6

DECISION AND ORDER

For the Plaintiff:
Terry S. Hinds, Esq.
The Hinds Firm
928 Utica Avenue
Brooklyn NY 11203

For Defendant DOE:
Michael A. Cardozo, Esq.
Corporation Counsel, New York City
By: Ivan A. Mendez, Esq.
100 Church Street
New York NY 10007
(212) 788-8688

For Defendant U.F.T.:
New York State United Teachers
James R. Sandner, Esq.
By: John H. Jurgens, Esq.
Yvonne M. Mariette, Esq.
52 Broadway, 9th Floor
New York NY 10004

Papers considered in review of this motion to dismiss:

	Papers	Numbered
Seq. No. 001	Notice of Motion, Memo of Law	1,2
	Affirmation in Opposition	3
	Replying Affirmation	4
Seq. No. 002	Notice of Motion	1
	Atty's Aff, in Supp. of Motion to Dismiss	2
	Aff. in Opp. to UFT's Motion to Dismiss	3
	Atty's Reply Aff.	4

PAUL G. FEINMAN, J.:

The motions bearing sequence numbers 001 and 002 are consolidated for the purposes of decision.

Defendant New York City Department of Education, formerly known as the Board of Education (hereinafter "DOE"), moves to dismiss the complaint pursuant to CPLR 103(c), 217, 1003, 3211(a)(2), (5), (7), and (10), and Education Law § 3813. Separately, co-defendant United Federation of Teachers ("UFT") moves to dismiss the complaint pursuant to CPLR

3211(a) (5), and 217(2) and (2)(a). For the reasons which follow, both motions are granted.

Background

Plaintiff is a teacher in the employ of the New York City Department of Education (DOE), and a member of the United Federation of Teachers. According to his verified complaint, plaintiff was hired by the DOE in about May 1996 and worked until June 28, 2000 in various teaching venues. During this time, he obtained a Master's Degree from Fordham University and worked to fulfill all requirements so as become fully certified and gain a permanent teaching license. By June 2000, he was one step below having a provisional teaching license (UFT Atty. Aff. in Supp. Ex. 8, Ver. Compl. [hereinafter "Ver. Compl."] ¶¶ 17, 19, 20).[1] In his first years, his annual evaluations from the DOE were favorable and his ratings were satisfactory. However, in 2000, plaintiff avers that the assistant principal "seemed to be out for" him, as seen in certain memoranda contained in plaintiff's personnel file (Ver. Compl. ¶ 53).

On June 28, 2000, the last day of the 1999-2000 school term, plaintiff and the other teachers at the institution where he was working were asked to sign their year-end evaluations and told that the principal would countersign the forms later. Plaintiff claims he was told a copy would be mailed to his home and that he signed the form and noted that he had been given a Satisfactory ("S") rating. He never received a copy at his home, and has never been able to obtain the original that he signed (Ver. Compl. ¶ 23). At some unknown subsequent point in

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[1]The DOE improperly failed to include a copy of the verified complaint in its papers, although its motion seeks dismissal of the complaint (see CPLR 2214[a], [c]). The Court has requisitioned the County Clerk's file rather than delay the resolution of this motion by denyingit with leave to renew upon a complete set of papers and given that the UFT did annex the complaint to its later filed moving papers.

time, plaintiff contends the "S" was changed to an Unsatisfactory ("U") rating (Ver. Compl. ¶ 16; ex. A). According to the printed "Rules and Instructions" printed at the bottom of the second page, where a "U" rating is issued, a copy is supposed to be distributed to the employee, but plaintiff avers he did not receive a copy (see Ver. Compl. Ex. A, second page). Also according to the Rules, appeals of a "U" rating are to be made in writing "within three weeks after receipt of such adverse evaluation (exclusive of the summer vacation)," and are to be made to either the Executive Director of the Division of Personnel or the Director, Office of Appeals and Reviews. (Ver. Comp. Ex. A, second page).

In September 2000, plaintiff was not re-certified for classroom fitness (Ver. Compl. ¶ 19). After many unanswered telephone calls to the principal, he was finally informed by DOE officials that he had not timely completed his certification requirements within the four-year time frame (Ver. Compl. ¶ 27). There was no mention of the "U" rating (Ver. Compl. ¶ 28). He was told he would be taken off the payroll and would have to pursue obtaining certification through the State Education Department (Ver. Compl. ¶ 29). In February 2001, an evaluation form indicated that he "should be" eligible for state certification as of September 1, 2000, but that he lacked his Master's Degree and had not submitted a copy of his "Child Abuse Recognition Certificate," nor had the Superintendent submitted an OT-11 form (Ver. Compl. ¶¶ 19-20; ex. B). In April 2001, he received a letter from defendant stated that the New York State Education Department had disapproved his State Temporary License based on his failure to acquire an OT-11 and the Child Abuse certificate, rendering him unable to serve as a preparatory provisional teacher (Ver. Compl Ex. C). These conclusions were at least partly incorrect, as plaintiff had been previously informed the DOE that he had been awarded a Master's Degree in 1997, and had

submitted a copy of the Child Abuse Recognition Certificate which he had received in August 1997 (Ver. Compl. ex. D).[2] Later that year, plaintiff learned that "DOE personnel" had told a friend of a friend that he had been "released from [one of his positions] because he was caught sleeping in the classroom" (Ver. Compl. ¶ 54).

Plaintiff appears to assert that he approached his union, the UFT in about October 2000, to seek its help and support in returning to the classroom and getting back on track for certification (Ver. Compl. ¶¶ 29, 30).[3] Although he had "numerous" meetings with representatives over a several year period, he got "no satisfaction" (Ver. Compl. ¶ 30).

According to plaintiff, both the DOE and the UFT advised him to resign and await a provisional license from the State Department of Education and then attempt to re-enter the City system (Ver. Compl. ¶ 33). He obtained his provisional license from the Department of Education in February 2003 (Ver. Compl. ¶ 33; ex. H). However, he then discovered that his personnel file, stored at the DOE offices in Brooklyn, included a copy of the 1999-2000 performance review showing an overall "U" rating and other "visibly obvious" changes. He approached the UFT and on April 29, 2003, completed the Unsatisfactory Rating Appeal Intake Form, indicating that he would file a grievance based on his April 15, 2003 discovery of the "U" rating (Ver. Compl. Ex. G). He also signed an appeal form on April 29, 2003 concerning the "U" rating (Ver. Compl. Ex. G). However, the DOE informed the UFT on May 6, 2003 that the appeal was "untimely" and would not be accepted (Ver. Compl. Ex. G). Plaintiff was allegedly

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[2]It appears that the OT-11 form was completed as of May 2, 2001 (Ver. Compl. ex. I).

[3]The documents attached to his complaint, admittedly representing only some of his interactions with the union, establish only that he sought to challenge the "U" rating in 2002-2004, which was "untimely" according to the union (Ver. Compl. ex. G).

informed by the UFT of the DOE decision thereafter (UFT Atty. Aff. in Supp. ¶ 16).

According to plaintiff, at a DOE hearing on January 15, 2004, the 1999-2000 review was "deemed fraudulent," and his fitness for classroom duty was "reaffirmed" (Ver. Compl. ¶ 34; see also ¶ 38). He does not submit any documentation to substantiate this fact. Other information in his file of a disparaging character was also allegedly found not creditworthy based on his not having signed an acknowledgment of receipt and reading the particular documents (Ver. Compl. ¶ 51). No substantiation of these determinations is included in plaintiff's papers.

In April 2004, plaintiff sought to reopen his appeal of the "U" rating, but was informed by the UFT by letter dated April 22, 2004, that "Ritchie Davgin inquired last Friday in Brooklyn–they would not reopen your appeal. Sorry and good luck." (Ver. Compl. Ex. G).

Plaintiff eventually completed his certification, holds a permanent license as of October 2005, and has worked as a substitute teacher since October 2003 (Ver. Compl. ¶ 21). The "U" rating apparently remains in his file and has, according to plaintiff, impeded his obtaining a full time permanent teaching position (Ver. Compl. ¶ 37). He has come to believe that there is a vendetta against him as shown by the changing of his year-end review from "S" to "U," and continuing with his ineffectual attempts to discern how and why his file was changed, and to have the file corrected so that he can be gainfully employed. He traces the animosity to the years following a change to the principal and assistant principal, after which a "purge" or "housecleaning" brought in many new individuals friendly to the principal and many of the staff felt unappreciated and diminished; he believes he may have been disliked by his supervisors for being a politically active (Ver. Compl. ¶¶ 11-15, 47, 49). Plaintiff also contends that there is a racial undertone to many of these decisions. He argues that the DOE has engaged in a pattern of

inaction and unwillingness to resolve the problems faced by him, hiding instead behind its claim that his efforts are untimely (Ver. Compl. ¶ 60). He alleges that the DOE has undertaken "a continued series of extreme and outrageous acts" against him (Pl. Memo of Law, p. 5). He also argues that the UFT was or should have been aware of the "U" rating at the time it was issued, was dilatory in not more aggressively representing him and challenging the DOE's policies, and has conspired against him by entering into an agreement with the DOE regarding the handling of his grievances (Ver. Compl ¶¶ 65-72).

Plaintiff commenced his action by filing a summons with notice on June 30, 2006. Simultaneously, he served a notice of claim upon the Department of Education, alleging "fraud, forgery, racial discrimination and negligence, amongst other factors," which "came about when I worked as a teacher . . . in 2000 [and] . . . [a]fter signing my evaluation for said year, the document was tampered with fraudulently." (Aff. in Opp. Ex. A). In November 2006, both the DOE and the UFT served demands for service of the complaint. The verified complaint was filed on January 31, 2007 and includes an affidavit stating that copies of the complaint were mailed to both defendants on November 25, 2006 (see UFT Mot. Atty. Aff. in Supp. Ex. 6). Plaintiff seeks compensatory damages including lost wages and benefits, loss of business opportunities and status within the community, the costs of the lawsuit, punitive damages, interest, and reinstatement to his full time position retroactively.

The UFT moves to dismiss pursuant to CPLR 3211(a)(5) based on the running of the four-month statute of limitations for commencing an action against an employee organization, as set forth under CPLR 217(2)(a). It argues that even if the running of the statute of limitations were to commence with plaintiff's receipt of its April 22, 2004 letter stating that the DOE would

not reopen the appeal, the statute ran nearly two years before plaintiff commenced this action.

The Department of Education moves to dismiss on several grounds. It argues that plaintiff failed to comply with the notice of claim requirements under Education Law § 3813, nor did he timely seek leave to file a late notice of claim within the statutory period and the period to file has now expired. It also argues that because plaintiff is challenging the validity of determinations made by the Board of Education, he should have commenced this proceeding pursuant to CPLR Article 78, and that such a proceeding is now barred because of the expiration of the four-month statute of limitations period. It further argues that plaintiff failed to join the State Department of Education, which issues teachers licenses, and that the court does not have jurisdiction over any claim concerning employer practices as the Public Employment Relations Board has exclusive non-delegable jurisdiction.

Legal Analysis

In determining a motion pursuant to CPLR 3211(a), the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *accord Campaign for Fiscal Equity, Inc. v State of N.Y.*, 86 NY2d 307, 318 [1995]). "In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." (*P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept. 2003]). Allegations consisting of bare legal conclusions or factual claims which are either inherently incredible or clearly contradicted by documentary evidence, are not entitled to such

consideration (*Franklin v Winard*, 199 AD2d 220, 220 (1st Dept. 1993). In order for a defendant to prevail in a motion to dismiss, he or she must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, NEW YORK PRACTICE, § 265 [3d ed.]).

UFT's Motion to Dismiss

CPLR 217 (2)(a) provides that an action complaining of a breach of duty of fair representation brought against an "employee organization" subject to article 14 of the Civil Service Law, must be commenced within four months of the date the employee knew or should have known of the breach, or four months from the date he or she suffered actual harm, whichever is later. The UFT is an employee organization subject to Article 14 of the Civil Service Law (UFT Atty. Reply ¶ 20).

Plaintiff argues that his claims survive any statute of limitations defense because the UFT discriminated against him beginning in 2003 and every year thereafter by refusing his "numerous requests for representation," thus triggering the continuing violation doctrine, and because defendant acted with negligence and discriminatory intent, resulting in his inability to acquire a permanent teaching position from 2004 to the present (Aff. in Opp. to UFT Mot. pp. 2-3). He has not, however, specifically articulated nor documented the allegedly numerous denials by the UFT for representation, other than the fact that the UFT sought an appeal in April 2004 and was denied. Nor has he made sufficient specific allegations that would give rise to a claim of discrimination. He alleges, rather, that the UFT attempted to bring an appeal on his behalf in April 2003 after he discovered the "U" rating, and again in 2004, and that the DOE denied the appeal and reopening the appeal because it was deemed untimely. He offers nothing to show that

the UFT acted with animus or that it acted negligently in 2003, 2004, or in the years following. Because he has not established ongoing wrongdoing by the UFT which would negate the necessity for applying the four-month statute of limitations set forth in CPLR 217(2)(a), the motion by the UFT to dismiss the complaint as against it is granted.

DOE's Motion to Dismiss

Section 3813 of the Education Law states in subsection (1) that "[n]o action or special proceeding, for any cause whatsoever, except as hereinafter provided" may be brought against "any school district, board of education . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim." An action sounding in tort requires a notice of claim to be made and served in compliance with section 50-e of the General Municipal Law, with the action to be commenced within one year and ninety days of accrual (Educ. L. § 3813[2], citing Gen. Mun. Law § 50-i). The court may extend the time to serve a notice of claim, but the extension may not exceed the time limited for the commencement of an action (Educ. L. § 3813[2-a]). Except for tort actions, "no action or special proceeding shall be commenced against any entity . . . more than a year after the cause of action arose" (Educ. L. § 3813[2-b]). The failure to present a claim within the statutory time limitation is a fatal defect (*Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983], citing *Walker & Co. v Board of Educ.*, 44 NY2d 918 [1978]; *Pugh v Board of Educ.*, 30 NY2d 968 [1972]). However, claims of illegal discrimination, where the public is affected, are not subject to the notice provisions or the abbreviated statutes of limitations contained in the General Municipal Law or

the Education Law (*see, e.g., Summers v County of Monroe*, 147 AD2d 949, 949 [4th Dept.], *app. dismissed* 74 NY2d 735 [1989] [wage disparities between male and female employees]).

Plaintiff's claims are grounded in the alleged falsification of his 1999-2000 year-end evaluation, which he only discovered in April 2003. He alleges an ongoing conspiracy by the DOE to deny him a permanent position, and that the DOE's actions have been motivated by racism and his national origin. He argues that because he alleges continuing acts of discrimination, neither the notice provisions nor the statutes of limitations of the Education Law or the General Municipal Law, apply (Memo of Law at 5, citing *Barash v Estate of Sperlin*, 271 AD2d 558 [2d Dept. 2000] [plaintiff's claims constituted a continuing wrong which accrued anew each time defendants collected income and profits from the owned property and failed to give plaintiff the proper percentage thereof]).

The continuing wrong doctrine requires "concrete factual allegations of a continuing conspiracy or concerted course of action" (*Misek-Falkoff v International Bus. Machines, Inc.*, 162 AD2d 211, 211 [1st Dept.], *lv denied* 76 NY2d 708 [1990]). Where such is sufficiently asserted, the abbreviated statutes of limitations contained in the General Municipal Law or the Education Law will not be applied. The complaint sets forth a specific allegation of fraud in the changing of the "S" rating to a "U" rating sometime between June 2000 and April 2003. It alleges a defamatory statement made in 1997 that he was released from one position because he was found sleeping on the job. It suggests there were ongoing racial tensions. It also alleges an ongoing conspiracy by the DOE fueled by racism and prejudice against his national origin, consisting of continuing "extreme and outrageous acts" which include possible bureaucratic bungling of paperwork and are otherwise not clearly explicated except for the fact the DOE

continues to deny plaintiff a permanent full time position.

Even when the court accords all favorable inferences to plaintiff's complaint, it fails to find that plaintiff establishes ongoing wrongful acts or discriminatory intent on the part of the DOE. The specific instances of inappropriate actions on the part of the DOE allegedly occurred in the years between 1997 and 2003 or perhaps 2004. The argument that there is a discriminatory basis for the fact that plaintiff has been unable to acquire a permanent teaching position due to the "U" rating, is not sufficiently pleaded and is based on broad conclusory allegations without an factual allegations to establish such a claim. Notably, it is typical that the existence of a "U" rating impedes a teacher's career within the City of New York, and teachers frequently attempt to challenge and expunge such ratings (*see, e.g., Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763 [1988] [fired probationary teacher successfully challenged termination]; *Altman v New York City Dept. of Educ.*, 2006 N.Y. Misc. LEXIS 3676; 236 N.Y.L.J. 102 [Sup. Ct., NY County 2006 [Feinman, J.] [fired probationary teacher unsuccessfully challenged "U" rating]). Thus, that plaintiff has not been given a permanent teaching assignment because of the "U" rating does not in itself suggest a discriminatory motive on the part of the DOE. The complaint fails to set forth with any sort of specificity other acts taken by the DOE, in particular recent acts, which could be understood for purposes of this motion to be based in illegal discrimination or to show a continuous course of conduct. As the continuing wrong doctrine is not applicable, and the claims of discrimination are insufficiently articulated, the statute of limitations is governed by the Education Law provision. Plaintiff is barred from

commencing an action because his notice of claim is, at a minimum, nearly two years late.[4] Moreover, even were the statute of limitation not at issue, as plaintiff improperly filed his notice of claim simultaneously with the commencement of this action, the complaint would be dismissed. Pursuant to both the Education Law and General Municipal Law, he was required to file his notice of claim at least 30 days prior to commencement of the action. Because he did not, he could not set forth in the complaint, as he must pursuant to section 3813(1) of the Education Law and section 50-i(b) of the General Municipal Law, an accurate claim that at least 30 days elapsed since the service of the notice and that the adjustment or payment of the claim has been neglected or refused. Failure to make this statement requires that the complaint be dismissed on this ground alone (*see, Perkins v City of New York*, 26 AD3d 483, 485 [2d Dept. 2006], citing *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]).

Because commencement of the action is time-barred, plaintiff's request made in his motion papers for a name-clearing hearing need not be addressed. Nor does the court need to address defendants' argument concerning the failure to join the New York State Education Department, and whether the court has subject matter jurisdiction. It is

ORDERED that the motion by the Department of Education bearing sequence number

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[4]Had plaintiff timely filed a notice of claim, his allegation sounding in fraud would survive the running of the statute of limitations because in 2003, when plaintiff discovered the "U" rating, the time in which an action based upon fraud was "computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it." (CPLR 213 [8). Only in 2004 was the statute amended to require that the time to commence an action in fraud "shall be the greater of six years form the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213[8]). Defendant DOE has incorrectly cited the amended version of the statute. The issue is academic, however, as stated above.

001 and the motion by the United Federation of Teachers bearing sequence number 002 are both granted, and the complaint is dismissed in its entirety with prejudice; with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of appropriate bills of costs; 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: August 6, 2007
New York, New York

J.S.C.