

**Gastman v Department of Educ., City of N.Y.**

2007 NY Slip Op 32861(U)

September 7, 2007

Supreme Court, New York County

Docket Number: 0103814/2007

Judge: Karen Smith

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

PRESENT: HON. KAREN SMITH

PART 22

Index Number : 103814/2007

GASTMAN, DOROTHY E.

vs  
DEPARTMENT OF EDUCATION

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 9/20/07

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to dismiss the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>Memoranda</u>	<u>1</u>
Answering Affidavits — Exhibits <u>Memoranda</u>	<u>2</u>
Replying Affidavits <u>Memoranda</u>	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied  
in accordance with the attached memorandum decision  
and order

**FILED**  
SEP 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/7/07

KSS  
**HON. KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
DOROTHY E. GASTMAN,

Plaintiff,  
-against-

Index No.: 103814/2007  
Motion Seq.: 001  
Motion Date: 09/20/2007

DEPARTMENT OF EDUCATION,  
CITY OF NEW YORK,  
Defendant.

**DECISION AND ORDER**

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

**FILED**  
SEP 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendant's motion to dismiss the complaint herein is denied.

Plaintiff brought this action seeking monetary damages for alleged discrimination against her based upon her hearing disabilities in violation of; "... Section 296 of the New York State Human Rights Law and Section 8-107 of the New York City Human Rights Law" (Complaint, Paragraph Eighth). In her complaint, plaintiff alleges that she lost her hearing as a result of excessive noise in her classrooms over the years she was engaged in her occupation as a High School English teacher. Plaintiff further alleges that, although she was examined and found to be entitled to a reasonable accommodation for her hearing loss, the accommodation was never provided. Instead, plaintiff alleges she was harassed and forced to retire on a non-work related disability pension even though her disability was work related.

Defendant now moves to dismiss the complaint contending that plaintiff has failed to file a Notice of Claim as required by Education Law §3813 and that plaintiff's claim is barred by a one year statute of limitations. Plaintiff opposes the motion contending that she was forced to

retire in April of 2006, she filed her complaint in March of 2007 so that it is timely and no notice of claim is necessary because her action seeks to vindicate a public interest in; 1) requiring the New York City Department of Education to comply with New York State and New York City Human Rights Laws as well as the Americans with Disabilities Acts and 2) allowing experienced teaching professionals to continue to engage youth in the education process.

Although, in its unsworn Memorandum of Law, defendant attempts to argue issues of fact, the only sworn statement of fact defendant has provided is an affidavit by an individual who has searched defendant's records and found that no Notice of Claim has been filed with respect to claims asserted by plaintiff herein. Additionally, defendant has failed to include a copy of the complaint in its moving papers. Although this defect has been cured by plaintiff and plaintiff's papers acknowledge that no Notice of Claim has been filed, the complaint alone does not contain sufficient information for the court to conclude that, without the filing of a Notice of Claim, no viable cause of action has been stated. Depending upon the circumstances ultimately determined to exist, this action; 1) may be governed by a one year statute of limitations (see Education Law §3813), 2) may require a Notice of claim (see *Sangermano v Board of Cooperative Educational Services of Nassau County*, 290 AD2d 498 [2<sup>nd</sup> Dept, 2002]), 3) may be governed by a three year statute of limitations (see *Lane-Weber v Plainedge Union Free School District et al*, 213 AD2d 515 [2<sup>nd</sup> Dept, 1995]), and/or 4) may not require the filing of a Notice of Claim (see *Lane-Weber v Plainedge Union Free School District et al*, 213 AD2d 515 [2<sup>nd</sup> Dept, 1995] and *Board of Education of Enlarged Ogdensburg City School District v Wagner Construction Corp.*, 45 AD2d

63 [3<sup>rd</sup> Dept, 1974], *affd.*, 37 NY2d 283 [1975)]<sup>1</sup>. The court cannot engage in speculation to compensate for the absence of adequate, properly presented, factual information in order to reach the conclusion desired by the defendant. Accordingly, it is;

ORDERED that defendant's motion to dismiss this action is denied.

The foregoing constitutes the decision and order of this court.

Dated: September 7, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

**FILED**  
SEP 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>1</sup> It is also noted that, if the action is governed by a three year statute of limitations and requires a Notice of Claim, plaintiff may still move for leave to file a late Notice of Claim.