

Volchok v City of New York

2007 NY Slip Op 33833(U)

November 26, 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

PRESENT: **EILEEN A. RAKOWER**
J.S.C.

PART **Part 5**

Index Number : 105137/2006
VOLCHOK, SUSAN
VS.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : # 002
DISMISS COMPLAINT (AMENDED)

_____ *tice*

INDEX NO. 105137-06
MOTION DATE _____
MOTION SEQ. NO. #002
MOTION CAL. NO. _____

_____ id on this motion to/for _____

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

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

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

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/26/07


EILEEN A. RAKOWER J.S.C.
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 -

Mot. Seq.:
002

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION, and
FORDHAM UNIVERSITY,

Defendants.

DECISION/ORDER

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Plaintiff brings this action alleging, *inter alia*, employment discrimination, breach of contract and fraud arising from termination of her employment on December 16, 2005. Defendants the City of New York and the New York City Department of Education and Joel Klein, Chancellor of the Department of Education ("City") move to dismiss the amended complaint pursuant to CPLR 3211(a)(7) on the grounds that plaintiff's claims are barred by her failure to file a timely notice of claim. Defendant Fordham University also moves, by separate motion, to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff opposes City's motion but does not oppose defendant Fordham University's ("Fordham") motion.

Plaintiff alleges she was accepted into the NYC Teaching Fellows Program in mid 2005. She states that she satisfied her initial training and testing requirements and was hired by City as a teacher at Wadleigh Secondary School for Performing and Visual Arts ("the school") As part of the Fellows Program, plaintiff was also enrolled in the Master's Degree program at Fordham. In the Fall of 2005, plaintiff was accused of improper conduct by students and was removed from the classroom. After an investigation conducted by the principal, it was determined that plaintiff had engaged in "verbal abuse" and "corporal punishment." On December 16, 2005 plaintiff was terminated from her job.

* 3]

Plaintiff, who is Caucasian, alleges that the principal and the guidance counselor at the school, who are both African American, concocted a plan to have her terminated. Plaintiff alleges that under the statute which formed the Fellows Program, City was obligated to employ her for three years and that the principal's findings, which led to her termination, were false and without basis.

On April 13, 2006 plaintiff filed her complaint and served City with a notice of claim on that same date. On February 12, 2007, plaintiff moved for an order deeming her late notice of claim timely served *nunc pro tunc*. The motion was denied by the Honorable Sheila Abdus-Salaam, because it was filed beyond the one year statute of limitations period for commencing an action against the Department of Education.

§3813 of the New York Education Law state, in relevant part:

No action or special proceeding, for any cause whatever . . . relating to district property or property of schools . . . or involving the rights or interests of any district or any such school shall be prosecuted or maintained 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 an action or special proceeding is founded was presented to the governing body of said school district within three months of the accrual of such claim . .

City, in support of its motion, argues that since leave to file a late notice of claim was denied, plaintiff's action should now be dismissed. Plaintiff, in opposition, argues that not all of her causes of action require a notice of claim. Specifically, she argues that no notice of claim is required for her (1) breach of contract claim; (2) federal constitutional claim; (3) employment discrimination claim and ; (4) claim that may be converted to an Article 78.

CPLR 3211(a)(7) states:

Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

[* 4]

Initially, plaintiff's claims for breach of contract required a timely notice of claim to be filed. Thus, those claims are dismissed. (*Parochial Bus Systems, Inc. v. Board of Education*, 60 N.Y.2d 539[1983]).

Plaintiff argues that although she does not explicitly make Federal due process claims in her complaint, she made the state due process claim broad enough so that it would implicitly include violations under the Federal Constitution. Claim "Four" of the amended complaint states, in relevant part:

Plaintiff's expectation of continued employment gave rise to a property interest protected by the New York State Constitution. The inducements and benefits afforded to plaintiff by virtue of the NYC Teaching Fellows program gave rise to a property interest protected by the New York State Constitution. Accordingly, the City and Department of Education could not legally deprive plaintiff of those property interests without affording to plaintiff appropriate due process . . . by virtue of the foregoing, the City, the Department of Education and Klein have violated plaintiff's rights under the New York State Constitution.

Claims brought for violation of due process under the New York State Constitution require the filing of a timely notice of claim. (*South Salina Street, Inc. v. City of New York*, 68 N.Y.2d 474[1986]). Thus the due process claims must be dismissed.

Failure to file a timely notice of claim for an employment discrimination action which is brought under either state or federal civil rights statutes shall be fatal unless the action has been brought to vindicate a public interest. (*Mills v. County of Monroe*, 59 N.Y.2d 307[1983]). Actions that vindicate a public interest are ones that are brought to protect an important right, which seek relief for a similarly situated class of the public, and whose resolution would directly affect the rights of that class. (*Id.* at 311). Here, plaintiff's allegations against City refer only to conduct against her individually. The failure to timely file a notice of claim requires dismissal of plaintiff's claim for employment discrimination.

A notice of claim is not a condition precedent to a special proceeding brought pursuant to CPLR article 78 seeking either judicial enforcement or judicial review. (*Community Counseling & Mediation*, 2007 WL 3293366[1st Dept. 2007]; *Piaggone v. Board of Educ., Floral Park-Bellrose Union Free School Dist.*, 92 A.D.2d 106[2nd

Dept. 1983]). Thus, plaintiff's third claim sounding as an article 78 claim remains.

Wherefore it is hereby

ORDERED that defendants the City of New York and the New York City Department of Education and Joel Klein, Chancellor of the Department of Education motion to dismiss is granted and claims One, Two, Four, Five, and Six are severed and dismissed as against said defendants; and it is further

ORDERED that defendants are directed to serve an answer to the complaint as to the one surviving claim asserted as claim three within 10 days after service of a copy of this order with notice of entry.

DATED: November 26, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
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NEW YORK
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