

<b>Gonzalez v Supporting Staff Assoc. of Coll. of Physicians &amp; Surgeons Columbia Univ. Local 693 SEIU</b>
2008 NY Slip Op 30053(U)
January 10, 2008
Supreme Court, New York County
Docket Number: 0600423/2006
Judge: Jane S. Solomon
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INDEXED ON 1/11/2008  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 85

Justice

Index Number : 600423/2006  
**GONZALES, OTTO J.**  
vs.  
**SUPPORTING STAFF**  
SEQUENCE NUMBER : # 001  
SUMMARY JUDGMENT

INDEX NO. 600423-06  
MOTION DATE 9/14/07  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

ere read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-5  
6-7

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 enclosed memorandum decision and order.

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

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-10-08

JANE S. SOLOMON 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 55

----- X  
OTTO J. GONZALEZ,

Plaintiff,

Index No. 600423/06

- against-

SUPPORTING STAFF ASSOCIATION of  
THE COLLEGE of PHYSICIANS & SURGEONS  
COLUMBIA UNIVERSITY LOCAL 693 SEIU,  
a labor organization,

DECISION AND ORDER

Defendant.  
----- X

JANE S. SOLOMON, J.S.C.:

In this action involving plaintiff's claim that defendant breached its contractual obligation to pay him a pension for life, defendant Supporting Staff Association (SSA) moves for summary judgment dismissing the complaint. The motion is granted, and the action is dismissed as untimely.

Plaintiff Otto J. Gonzalez (Gonzalez) is the former president of SSA. This action was commenced by filing the summons and verified complaint on February 9, 2006. The first cause of action, which sounds in breach of contract, alleges that SSA agreed in writing to create and adequately fund a retirement account to provide monthly payments to him, and made payments from 1992 until October 1997, when SSA stopped making payments as a result of the appointment of an interim trustee in a federal action. The second cause of action seeks to recover under a quasi-contract theory.

SSA served an answer generally denying the allegations of

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the verified complaint, and asserting four affirmative defenses: that the action is barred by the Statute of Frauds; the Statute of Limitations; that Gonzalez has unclean hands; and that the complaint does not state a cause of action.

In support of its motion for summary judgment, SSA submits the affidavit of Victor Rivera (Rivera), the current president of SSA, who succeeded plaintiff in 1998. Rivera states that Gonzalez's presidency of SSA terminated as a result of the appointment of Hon. Kathleen A. Roberts (Roberts), former United States Magistrate, as receiver of SSA by federal court order in 1997. Roberts issued a report dated September 14, 1998, which is annexed to the moving affidavit (Roberts report).

The Roberts report contains an analysis of the financial transactions of SSA from 1990 through 1998. After noting "a remarkable lack of financial controls and accountability with respect to the expenditure of SSA funds," Roberts states that none of the minutes of Executive Board meetings provided to her "[r]eflects consideration and approval of the commitments and expenditures of SSA funds made by [plaintiff] as President." She also writes that "Of particular concern is the accounting and reporting of transactions to Mr. Gonzalez as a pension." (Roberts report, Bates Stamp number 1087).

The Roberts report further states that plaintiff engaged in a "clear conflict of interest and breach of fiduciary duty by

[\* 4 ]

determining [his] own compensation." The report notes that the SSA constitution provides that the Executive Board determines the compensation of officers, and prohibits any officer from voting on his or her own compensation. The Constitution and By-laws of SSA are submitted as an exhibit to the moving affidavit.

In footnote 2 on page 7 of the Roberts report, there is an entry questioning the inclusion on the draft LM-2 Report (Labor Organization Annual Reports), for a \$23,801 liability to New England Mutual Insurance. The footnote states: "Mr. Gonzales received a pension in the form of payments to The New England Financial Group for a money market or stock fund." The entry further states that SSA's accountant informed Roberts that he had been instructed to include this entry on the LM-2 by Gonzalez.

Footnote 12 of the Roberts report states that Gonzalez's annual salary is stated as \$12,000 in the 1996 and 1997 LM-2 Reports because "Mr. Gonzalez apparently wished to receive a salary of no more than \$12,000 per year to avoid penalties associated with his receipt of Social Security benefits." Rivera asserts that this violates federal law. Gonzalez has not submitted any affidavit or other evidence denying the allegation that the purpose of the pension was to evade the Social Security income limitations.

Footnote 8 states that for 1997 Gonzalez received a pension in the form of payments to New England Financial Group.

[\*5]

The Rivera affidavit also exhibits a copy of the May 31, 1995 minutes of the "Finance Committee S.S.A.," which contains the following as resolution 1: "[e]ffective June 5, 1995, Otto Gonzalez's pension increases to \$2,500 per month, based on cost of living adjustment. Arrangements confirmed with and by John Lynch of New England Securities." The minutes list four attendees: Gonzalez, Paul Moore, Executive Director, Rayman Lui, Accountant, and Susan Moore, "Recording Minutes."

Rivera asserts that none of the attendees of the "Finance Committee, S.S.A.," was authorized by the SSA constitution to make distributions of SSA funds, that Gonzalez was barred by the constitution from voting on his own compensation, and that only the Executive Board of SSA was authorized to make financial decisions. Rivera also states that Gonzalez did not meet the minimum qualifications under the constitution to be an officer or director because he had not been a member in good standing of SSA for 30 months prior to election. Gonzalez does not challenge these assertions.

Clearly, the purported action by the "Finance Committee" does not satisfy the requirement of the Constitution and By-Laws of the SSA, Article V (B) (13), and is thus a nullity. That section provides: "[t]he Executive Board shall have the power to fix the compensation of officers of the Association. However, no officer may vote on his compensation" (Ex. 1 to moving

plaintiff's claimed pension. There is no affidavit from a person with knowledge of the facts or other proof in admissible form. Nevertheless, the Volk letter is considered because plaintiff alleges that it is proof that SSA was aware of a continuing obligation to provide him with a pension.

According to Volk, the first indication of a pension for plaintiff is in the April 12, 1988 minutes of defendant's Executive Board. Those minutes, which are not before the court, allegedly state that the Board met with a representative of New England Life Insurance Co., to set up a \$200,000 life insurance policy owned by SSA (apparently on plaintiff's life), with SSA as beneficiary.

According to Volk, the April 12, 1988 minutes state that the Executive Board set up a pension plan for plaintiff with monthly payments of \$1,250 for a period of ten years. Volk was unable to find a copy of any pension plan or the life insurance policy. Volk states that correspondence indicates that SSA did make payments, but there are no records available pertaining to the New England Life account for the period April 12, 1988 through December 31, 1993.

Volk states that on February 24, 1993, the New England Life policy was cancelled and the net cash surrender value of \$44,801.06 was deposited into SSA accounts. Volk states further that a letter dated April 7, 1993, signed by Gonzalez as

president of SSA, to New England Mutual Life cancelled the automatic withdrawal of \$1,250 to "the Plan." Volk notes that there are no Executive Board minutes terminating "the Plan," or stating the value of the pension account as of April 7, 1993.

Volk next describes a new transaction. SSA sent a \$46,500 check, dated July 9, 1993, to New England Mutual Life, which sent SSA a notice that an automatic withdrawal of \$1,500 (apparently monthly) would commence immediately from a specified Chemical Bank Account. Volk's letter states that unspecified minutes dated May 31, 1995, increase the pension contributions to \$2,500. Based on Volk's listing of attendees, these minutes are apparently the minutes of the "Finance Committee, S.S.A.," exhibited to the moving affidavit. The letter also states that no further payments were made "to the pension of Mr. Gonzalez" after SSA was placed in receivership.

SSA argues that the action must be dismissed as untimely because it was brought more than six years after the last payment to Gonzalez; that it is barred by the Statute of Frauds; and that it is preempted by ERISA. Because the action is untimely, I need not reach SSA's affirmative defenses of ERISA preemption and Statute of Frauds.

With respect to ERISA, counsel for Gonzalez argues in his brief that ERISA is inapplicable because there is no plan. If Gonzalez does not choose to invoke the provisions of ERISA, that

is his election. In any event, it would not be possible to determine the issue of ERISA preemption in the absence of any evidence or even allegations setting forth the terms of the alleged contract to pay Gonzalez a pension. "Ordinarily it is essential to set forth the relevant portions of the contract claimed to have been breached" (Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chipetine, 221 AD2d 284, 287 [1<sup>st</sup> Dept 1995]).

The applicable statute of limitations for contractual and quasi-contractual claims is six years (see CPLR 213 (1) and (2); McDermott v City of New York, 50 NY2d 211 [1980]). If the limitations period is measured from October 1997, the action is time-barred, unless a ground for tolling is established. If, however, as Gonzalez argues, a new cause of action arises each month that the pension is not paid, the action would be timely for all monthly payments claimed within six years of commencement.

Gonzalez relies on Phoenix Acquisition Corp. v Campcore, Inc. (81 NY2d 138 [1993]), a case involving a claim against a guarantor of an installment contract. There, the creditor elected not to exercise its right to accelerate the entire principal upon the failure, more than six years prior to the complaint, to pay one installment. The issue was whether the debtor's "default on one installment payment under its promissory note triggered the Statute of Limitations accrual against the

entire debt" (id. at 140).

In Phoenix, the court reversed the award of summary judgment to the creditor and remitted for determination of whether the condition of notice to the guarantor was a condition precedent, or a "positive condition ... that could mitigate a creditor's claim by the amount of damages resulting from the alleged failure to notify" (id. at 144). The court differentiated demand and installment obligations for timeliness purposes, stating that "separate causes of action accrued as installments of the loan indebtedness became due and payable" (id. at 141). The court stated further: "[d]emand and installment obligations are critically distinct in this context and warrant different considerations and results under the Statute of Limitations' microscope" (id. at 143).

The rule of Phoenix does not apply here because a separate cause of action for each individual pension payment may only be asserted if the underlying pension obligation is asserted within the applicable six-year limitations period (see Walsh v Andorn, 33 NY2d 503 [1974]). In Walsh, the Court of Appeals stated: "We cannot agree that multiple causes of action for individual installment payments can exist separate from the underlying cause of action for the right to the pension. To the contrary, the enforceability of the right to the installments derives from and depends upon the enforceability of the primary right to the

pension" (id. At 506-507).

Gonzalez's cause of action accrued in October 1997, because that was the date when he first could have maintained a cause of action based on the alleged failure to continue to pay him the alleged pension (see Witherbee v Republic Steel Corp., 106 AD2d 734, 735 [3d Dept 1984]).

The Volk letter provides further proof that Gonzalez is not entitled to prevail. It shows that Gonzalez was compensated during the course of his employment in part through a method denominated a "pension"; that payment coincided with his employment at SSA and provided only for ten years of payments; that insurance companies provided a vehicle for these payments but they stopped in 1995; and that any arrangement to pay him through a purported pension plan (the existence of which he specifically denies) ended once Roberts became trustee in October 1997. To date, Gonzalez has not challenged the legitimacy of Roberts's decision to put an end to the payment scheme, or her conclusions regarding the propriety of how SSA managed his compensation (see, Stephenson v Hotel Employees and Restaurant Employees Union Local 100, 6 NY3d 265 [2006]).

Finally, Gonzalez contends that this motion should be denied so he may conduct further discovery. In light of the foregoing, however, there is no showing that further discovery would bolster his claim, especially since he admits in the verified complaint

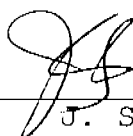
that SSA stopped payments in October 1997.

In sum, the period of limitations commenced in October 1997, it expired in October 2003, and this action commenced in 2006 is time-barred. Accordingly, it hereby is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed, and the Clerk shall enter judgment accordingly.

DATED: January 10, 2008

E N T E R:

  
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J. S. C.

**JANE S. SOLOMON**

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