

**McCarthy v Cotter**

2008 NY Slip Op 30094(U)

January 11, 2008

Supreme Court, Nassau County

Docket Number: 0611-07/

Judge: Daniel R. Palmieri

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

56

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**PHILIP R. MCCARTHY,**

**Plaintiff,**

**-against-**

**JAMES COTTER, GARDEN CITY PUBLIC  
SCHOOL DISTRICT,**

**Defendants.**

**TRIAL TERM PART 48**

**INDEX NO.: 010611/07**

**MOTION DATE: 8-17-07**

**SUBMIT DATE: 11-13-07**

**SEQ. NUMBER - 001**

**MOTION DATE: 10-5-07**

**SUBMIT DATE: 11-13-07**

**SEQ. NUMBER-002 &  
003**

-----x

**The following papers have been read on this motion:**

Notice of Motion, dated 8-1-07.....1  
 Notice of Cross Motion, dated 9-28-07.....2  
 Notice of Cross Motion, dated 9-28-07.....3  
 Memorandum of Law in Opposition and Support of  
 Cross Motion, dated 9-28-07.....4  
 Affirmation in Partial Opposition, dated 10-10-07.....5  
 Affirmation in Reply and in Opposition, dated 10-29-07.....6  
 Memorandum of Law in Reply and in Opposition,  
 dated 10-29-07.....7  
 Reply Affirmation, dated 11-6-07.....8  
 Letter From Counsel for Defendant Cotter, dated  
 11-30-07.....9

This motion by defendant Garden City Public School District ("School District") for an order pursuant to CPLR 3211(a)(1), (5) and (7), General Municipal Law § § 50-e, 50-i,

and Educational Law § 3813 dismissing the complaint against it in its entirety is granted.

This cross-motion by defendant James Cotter for an order directing the School District to produce that portion of a "Settlement Agreement and General Release" executed by the defendants insofar as said Agreement addresses "defense and indemnification" and declaring that such disclosure is not prohibited by any confidentiality clause; and, an order pursuant to CPLR 3025(b) permitting him to amend his answer to assert a cross-claim against the School District for contractual indemnification, is determined as provided herein.

This cross-motion by plaintiff for an order pursuant to General Municipal Law § 50-e and Educational Law § 3813 granting him leave to file a notice of claim is denied.

The defendant School District hired the plaintiff as a probationary teacher on September 1, 2004. On June 20, 2006, the plaintiff and defendant James Cotter, who also taught at the school, had an altercation. Shortly thereafter, on July 3, 2006, plaintiff's employment was terminated as a result of his resignation. On June 18, 2007, plaintiff commenced this action, *pro se*. A notice of claim was not filed.

In his complaint, the plaintiff alleges that in September, 2005, defendant Cotter sought his assistance in defrauding the School District or its insurer Triad Group and that when he refused, Cotter embarked upon a crusade of bad-mouthing him. Plaintiff alleges that he reported all of Cotter's misconduct to the School District in October 2005 but no action was taken. The plaintiff further alleges that on June 20, 2006, defendant Cotter approached him in the school library and assaulted him, as a result of which he suffered a cervical sprain in

his neck. Plaintiff alleges that he thereafter wrote to the School District's health insurance administrator on June 23, 2006, notifying her of Cotter's fraudulent insurance attempt. Plaintiff further alleges that at a meeting at the school on June 30, 2006, he was given a choice of resigning or getting fired. Thus, plaintiff alleges that he was "forced to resign" by the School District and that he was "wrongfully terminated."

The School District seeks dismissal of the action against it based upon the plaintiff's failure to file a notice of claim. In response, the plaintiff seeks leave to file said notice. While the plaintiff alleges only a claim of wrongful termination against the School District in his complaint, in support of his motion for leave to file a late notice of claim, he alleges that the School District fired him in retaliation for his reporting Cotter's health insurance fraud as well as the School District's failure to investigate it. Thus, plaintiff now attempts to allege claims pursuant to Civil Service Law § 75 and Labor Law § 740.

A notice of claim is a prerequisite to an action against a School District. General Municipal Law § 50-e, 50-i. A plaintiff who asserts state tort law claims against a municipal entity including a school district or its employees acting in the scope of their employment must file a notice of claim within 90 days of the incident giving rise to the claim and commence an action within one year and ninety days from the date on which the cause of action accrues. General Municipal Law §§ 50-e and 50-i. Similarly, Education Law § 3813 requires that a Notice of Claim be filed against a School District within three months of a claim's accrual. The notice requirement also applies to wrongful termination claims by

probationary employees. *Silvernail v Enlarged City School District of Middletown*, 40 AD3d 1004 (2<sup>nd</sup> Dept. 2007).

While a court in its discretion may extend the time to serve a notice of claim, that discretion is limited to the limitations period applicable to the claim asserted, which here is one year. Education Law § 3813(2-b); *see also, Consolidated Const. Group, LLC v Bethpage Union Free School Dist.*, 39 AD3d 792, 794-795 (2<sup>nd</sup> Dept. 2007). "It has frequently been observed that the Supreme Court does not have the authority to entertain such an application when made after the expiration of the period of limitation." *Consolidated Const. Group, LLC v Bethpage Union Free School Dist.*, *supra*, at p. 795, citing *Matter of Ricci v Harrison Cent. School Dist.*, 27 AD3d 653 (2<sup>nd</sup> Dept. 2006); *Clune v Garden City Union Free School District*, 34 AD3d 618 (2<sup>nd</sup> Dept. 2006); *Dolce v Bayport, Blue Point Union Free School Dist.*, 286 AD2d 316 (2<sup>nd</sup> Dept. 2001).

Plaintiff's termination allegedly occurred on June 30, 2006. Leave to file a late notice of claim was not sought until September 28, 2007, after the Statute of Limitations for the claims plaintiff seeks to advance expired. This court accordingly lacks discretion to grant the application for leave to file a late notice of claim. *See, Orena v New York City Health and Hospitals Corp.*, 35 AD3d 446 (2<sup>nd</sup> Dept. 2006). Plaintiff's motion is denied and the School District's motion to dismiss the complaint against it is granted.

Contrary to plaintiff's argument, a notice of claim was required here even if his claim is predicated on his being penalized for being a whistle blower. *Gorgene v Capezzi*, 238 AD2d 308 (2<sup>nd</sup> Dept. 1997), *lv den.* 95 NY2d 797 (2000). The "vindication of a public interest" exception to the notice of claim requirement does not apply to individual claims.

*Mills v County of Monroe*, 59 NY2d 307 (1983).

In any event, a notice of claim would be of no avail.

It has been held that Labor Law § 740 does not apply to a public employer such as the defendant School District. *Tamayo v City of New York*, 2004 WL 137198 (S.D.N.Y. 2004). Public employers are covered by Civil Service Law § 75-b; *Tamayo v City of New York*, *supra*; *Hanley v NYS Exec. Dept. Div. for Youth*, 182 AD2d 317 (3<sup>rd</sup> Dept. 1992). Furthermore, the Labor Law § 740 amendment prohibiting the conduct alleged here, i.e., retaliatory action by an employer against an employee who discloses or threatens to disclose an activity, policy or practice "which constitutes health care fraud," took effect on July 26, 2006. The plaintiff's proposed statutory claim based on his June 30, 2006 *de facto* discharge was not retroactive and did not even exist when it accrued. *Lloyd v Cardiology & Internal Medicine of Long Island, PLLC*, 18 Misc. 3d 1129(A) (Sup. Ct. Nassau County, Palmieri, J).

Plaintiff's Civil Service Law claim is required to be submitted to binding arbitration pursuant to the collective bargaining agreement governing his employment. Civil Service Law § 75-b(3)(b), (c).

As for defendant Cotter's application, his motion for leave to amend his Answer has been withdrawn. Cotter's motion to compel production of that portion of the "Settlement Agreement and General Release" executed by the defendants pertaining to defense and indemnification only, even if prohibited by the confidentiality clause, is denied as moot because an examination of the Notice of Amended Petition and Amended Petition filed by Cotter in a separate proceeding *James Cotter v Board of Education of the Garden City*

Union Free School District, (Index No. 019661/07) reveals that Cotter possesses a copy of that document. Cotter's remaining request for leave to disclose the contents of the Settlement Agreement and General Release dated December 18, 2006, to the extent such disclosure is necessary to determine the issues in this action, is granted subject to the execution by the parties and/or further orders of this Court governing the terms and conditions of such disclosure.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 11, 2008



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**ENTERED**

JAN 14 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

**TO: Kasowitz Benson Torres & Friedman  
Attorneys for Plaintiff  
1633 Broadway  
New York, NY 10019-6799**

**Miranda Sokoloff Sambursky  
Slone Verveniotis, LLP  
By: Steven C. Stern, Esq.  
Maria Thomas, Esq.  
Attorneys for Defendant  
Garden City Public School District  
240 Mineola Boulevard  
Mineola, NY 11501**

**Penino & Moynihan, LLP**  
**Henry L. Liao, Esq.**  
**Attorneys for Co-Defendant James Cotter**  
**180 East Post Road**  
**Suite 300**  
**White Plains, NY 10601**