

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

2008 NY Slip Op 30534(U)

February 28, 2008

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
Justice

PART 62

Index Number : 103814/2007
GASTMAN, DOROTHY E.
VS.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. _____
MOTION DATE 2/28/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3

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 *by dependant for leave to*
renew its prior motion to dismiss and, upon renewal, for
an order dismissing the complaint, is
decided in accordance with the attached
memorandum decision and order.

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

FILED
FEB 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/28/08

K.S.S.
HON. KAREN SMITH
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 62

-----X

DOROTHY E. GASTMAN,

Plaintiff,

-against-

DEPARTMENT OF EDUCATION,
CITY OF NEW YORK,

Defendant.

-----X

Index No.: 103814/07
Motion Seq.: 002
Motion Date: 2/21/08

FILED
FEB 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant Department of Education, City of New York's motion for leave to renew its prior motion to dismiss, pursuant to CPLR 2221(e), is granted and, upon renewal, this Court's prior decision and order entered September 17, 2007 is vacated and defendant's motion to dismiss the complaint is granted, for the reasons stated more fully below.

Plaintiff brought this action alleging that her employer, defendant Department of Education, discriminated against her based on her hearing disabilities in violation of the New York State Human Rights Law, Executive Law § 296, and the New York City Human Rights Law, NYC Administrative Code § 8-107. Plaintiff alleges that her hearing was impaired as a result of excessive noise in her classrooms over the years she was employed as a high school teacher. According to plaintiff, although she was examined and found to be entitled to a reasonable accommodation for her disability, she received no accommodation and was instead harassed and forced to retire on a "non-work related disability pension," despite the fact that her disability was work related.

Defendant moved to dismiss the complaint contending that plaintiff failed to file a notice of claim pursuant to Education Law § 3813 and that the claim is barred by the one-year statute of limitations. Plaintiff opposed the motion, arguing that her cause of action accrued when she was forced to retired in April 2006 and she commenced this action in March 2007, making the action timely. Plaintiff further argued that no Notice of claim is necessary in her action because it seeks to vindicate a public interest.

On September 7, 2007, this Court denied defendant's motion to dismiss the complaint, finding that

[d]epending 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 [2d 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 [2d 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 [2d Dept 1995] and *Board of Education of Enlarged Ogdensburg City School District v Wagner Construction Corp.*, 45 AD2d 63 [3d Dept 1974], *aff'd* 37 NY2d 283 [1975]).

Subsequently, on December 18, 2007, the Court of Appeals clarified the issues raised in defendant's motion to dismiss in *Amorosi v South Colonie Independent Central School District, et al.* (2007 NY Slip Op 9904). There, the petitioner worked as a part-time guidance counselor for the school district and alleged that she was discriminated against on the basis of sex after she returned from maternity leave, ultimately resulting in her being asked to resign. Petitioner sought

leave of the Supreme Court to serve a late notice of claim, contending that CPLR 214(2) provides a three-year statute of limitations. Supreme Court granted leave, but on appeal the Appellate Division, Second Department reversed, holding that Education Law § 3813(2-b) unambiguously imposes a one-year statute of limitations.

Defendant in the instant action now moves for renewal of this Court's prior motion based on the Court of Appeals decision in *Amorosi*, contending that the decision is an intervening clarification of the law which bears directly on this case and alters the legal basis of this Court's prior determination of its motion to dismiss. Plaintiff opposes defendant's motion to renew, arguing that "[t]he doctrine of the law of the case provides that once an issue is judicially determined, it is not to be considered in the same litigation."

As is relevant here, a motion to renew pursuant to CPLR 2221(e)(2) must be based on a change in the law that would affect the prior determination. The doctrine of the law of the case is not an absolute mandate on the court, particularly in extraordinary cases such as when the law affecting the previous determination has changed or been clarified. (See *Foley v Roche*, 86 AD2d 887 [2d Dept 1982]). In such circumstances, a motion to renew pursuant to CPLR 2221 is the appropriate vehicle to seek the relief defendant requests.

While plaintiff argues that *Amorosi* would not and does not change the reasoning of this Court's prior determination because, as plaintiff describes it in her opposition papers, this Court found that "this action was brought within the one-year Statute of Limitations and the Notices of Claim [*sic.*] was presented to Defendant many times over the years. . .," plaintiff's understanding of the prior determination is entirely inaccurate. Rather, in denying defendant's prior motion to dismiss, this Court found that, under then-existing case law, defendant's motion papers were

insufficient to meet its burden of proof that plaintiff's claims were barred by the statute of limitations, in part, because it was unclear from the submissions whether a one-year or a three-year statute of limitations applied. In addition, the Court explicitly stated in the prior decision and order that "plaintiff's papers acknowledge that no Notice of Claim has been filed." Nowhere in that decision did this Court find that plaintiff had served defendant with a notice of claim. Likewise, plaintiff's claim that defendant is barred from moving to renew because defendant did not appeal this Court's prior determination is without merit, as CPLR 2221 does not require an appeal prior to making a motion to renew. Defendant here has met its burden of establishing that the law this Court relied upon in its prior determination has changed or been clarified by the Court of Appeals, in such a manner as to affect the outcome of the prior motion and, therefore, its motion to renew must be granted.

Turning now to the merits of defendant's motion to dismiss, it is clear from the Court of Appeals' clarification in *Amorosi* that defendant's motion must be granted. As discussed above, the *Amorosi* Court clarified that a cause of action alleging discrimination in violation of Executive Law § 296 is subject to the prescriptions of Education Law § 3813. (*Amorosi v. South Colonie Independent Central School Dist., et al.*, 2007 NY Slip Op 9904 at *2). Pursuant to Education Law § 3813(1), to maintain a claim against defendant Board of Education, plaintiff must present to such defendant "a written verified claim upon which such action or special proceeding is founded . . . within three months after the accrual of such claim." A claimant who fails to present timely notice may apply for an extension of time, which may be granted in the discretion of the court, except that under no circumstance may such extension exceed the statute of limitations for commencing such an action. (Education Law § 3813[2-a]). Section 3813(2-b),

states that:

Except as provided in subdivision two of this section and, notwithstanding any other provision of law providing a longer period of time in which to commence an action or special proceeding, no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose.

The court in *Amorosi* made clear that, “[d]espite any provision for a longer statute of limitations, such as the three-year statute of limitations in CPLR 214(2) . . . , the one-year limitation prescribed in Education Law § 3813(2-b) should govern discrimination claims against a school district.” (2007 NY Slip Op 9904 at *5).

In order for plaintiff to successfully oppose defendant’s motion to dismiss, therefore, plaintiff must be able to establish that a notice of claim was presented within three months of plaintiff’s cause of action accruing or, alternatively, that plaintiff sought and was granted an extension of time in which to present her notice of claim, not to exceed one year from the date her cause of action accrued. Plaintiff does not contend that she served a single notice of claim upon defendant. Rather, she submits a series of letter and email correspondence between plaintiff and Hubert Guscott, Director of Medical Leaves and Benefits, Dr. Elizabeth Arons, Chief Executive of the Division of Human Resources, and Joel Klein, Chancellor, between May 16, 2006 and July 17, 2006. Plaintiff contends that the contents of this correspondence sufficiently provided notice as required under Education Law § 3813(1) and that such notice was

timely, as her cause of action did not accrue until she retired on April 19, 2006.¹

Plaintiff's reliance on *Mennella v Uniondale Union Free School District*, 287 AD2d 636 [2d Dept 2001], for the proposition that her letter and email correspondence constitutes a notice of claim upon the Board of Education is misplaced. In *Mennella*, after recognizing that a condition precedent to commencing an action against a school district is presentation of "a written verified claim" to the governing body of the school district, the court held that a petition to the Commissioner of Education, which provided "the necessary information as to the nature of the claim, the time when, the place where, and the manner in which the claim arose," can constitute the functional equivalent of a notice of claim. (287 AD2d 636, 636-7 [2d Dept 2001]). That exception, as defendant points out, is a narrow one. The petition at issue in *Mennella* contained - in one document - all of the requisite information of a notice of claim, was verified pursuant to the requirements of Education Law § 3813(1), and was served upon the Commissioner of Education. Plaintiff in this case, on the other hand, sent numerous communications, each addressing different aspects of her complaints, to various officials employed by the Department of Education, none of which plaintiff alleges were verified or submitted to the "governing body of the school district." Under these circumstances, as a matter of law, it cannot be said that plaintiff's letters and emails "constitute the functional equivalent of a notice of claim." (*Mennella v Uniondale Union Free School District*, 287 AD2d at 637).

Pursuant to Education Law § 3813(2-a), plaintiff may seek leave to serve a late notice of claim, but under no circumstance may leave be granted for service more than one year after the

¹ As will be discussed in more detail below, the Court does not get to the issue of the date on which plaintiff's cause of action accrued because, as plaintiff failed to properly serve notice of claim, under no analysis can her action be considered timely.

date that plaintiff's cause of action accrued. Even accepting, *arguendo*, plaintiff's claim that her cause of action did not accrue until the date of her retirement, April 19, 2006, the last date upon which plaintiff could have timely served a late notice of claim was April 19, 2007. As plaintiff failed to serve a notice of claim within three months of her retirement or to seek leave to serve a late notice of claim upon defendant prior to April 19, 2007, and a notice of claim is a condition precedent for commencing or maintaining an action against defendant, upon renewal, defendant's motion to dismiss the complaint must be granted.

Accordingly, it is

ORDERED that defendant's motion for leave to renew is granted; it is further

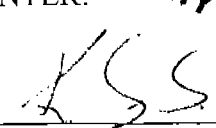
ORDERED that, upon renewal, defendant's motion to dismiss is granted; it is further

ORDERED that movant serve a copy of this decision and order, together with notice of entry hereof, upon all parties and upon the Clerk of the Court (60 Centre St.) and the Clerk of the DCM Part (80 Centre St.) within 30 days of entry; it is further

ORDERED that, upon service of this decision and order, together with entry hereof, the Clerk is directed to enter judgment accordingly.

Dated: February 28, 2008
New York, New York

ENTER:


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

FILED

FEB 28 2008

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