

Mohl v Town of Riverhead

2008 NY Slip Op 33556(U)

October 16, 2008

Supreme Court, Suffolk County

Docket Number: 21447-07

Judge: Peter Fox Cohalan

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INDEX # 21447-07
 RETURN DATE: 9-7-07 (001)
 9-24-07 (002)
 MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x	CALENDAR DATE: March 19, 2008
CHRISTOPHER J. MOHL,	MNEMONIC: MD; MD
	<u>PLTF'S/PET'S ATTORNEY:</u>
Plaintiff,	Steven E. Losquadro, Esq.
-against-	649 Route 25A
	Rocky Point, NY 11788
TOWN OF RIVERHEAD and RIVERHEAD POLICE	<u>DEFT'S/RESP ATTORNEY:</u>
DEPARTMENT,	Lamb & Barnosky
Defendants.	534 Broad Hollow Road
-----x	P.O. Box 9034
	Melville, NY 11747

Upon the following papers numbered 1 to 21 read on these motions to dismiss and to file late notice of claim; Notice of Motion/Order to Show Cause and supporting papers 1-7; 8-14; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 15-21; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that the motion by the defendants, Town of Riverhead and Riverhead Police Department, State of New York (hereinafter Riverhead), to dismiss the plaintiff Christopher J. Mohl's (hereinafter Mohl) complaint pursuant to CPLR §3211 and the New York Town Law §65 (3) (hereinafter Town Law) for failure to file a timely notice of claim is hereby denied and Mohl's motion for leave to file a late notice of claim with Riverhead is also denied.

The plaintiff was a Riverhead police officer who was solicited by and accepted an offer of employment as a police officer from the Village of Southampton, New York (hereinafter Southampton), on January 14, 2006. Mohl had an exit interview with the Police Chief of Riverhead, David Hegermiller (hereinafter Chief), and when he inquired about a resignation letter to terminate his employment he was told that it was unnecessary. As part of the Riverhead collective bargaining agreement, a severance pay package for accrued sick time, personal time and vacation time was requested by Mohl and he spoke with Debbie Sorenson (hereinafter Sorenson) of the Riverhead Accounting Department about payment. There was confusion within the Riverhead Accounting Department with regard to the pay package and whether the severance pay would contain payment for accumulated sick time and whether Mohl's new position with Southampton involved a resignation or a lateral transfer. Mohl was advised sometime in March 2006 that the severance package was not paid to him because of Riverhead's confusion as to his status. He was advised by Jack Hansen (hereinafter Hansen), the supervisor of the Riverhead Accounting Department, who

said that it was unclear if Mohl's lateral transfer could be considered a resignation and that additional time was needed "to investigate the matter". Hansen told Mohl that he should make an inquiry with the Suffolk County, New York Department of Civil Service (hereinafter Civil Service), which thereafter indicated that it was a local Riverhead issue.

Thereafter, Mohl claims Hansen again called him to state that the collective bargaining agreement in place addressed only "resignation" not "lateral transfers" and Riverhead had still not decided how to treat the plaintiff's movement to the Southampton police department. The Riverhead PBA was unsure how to proceed and indicated that it would institute the three step process to file a grievance. Mohl thereafter retained an attorney, Steven E. Losquadro, Esq. (hereinafter attorney), in June 2007. He had discussions with Dawn Thomas, Esq. the Riverhead Town Attorney (hereinafter Riverhead Town Attorney), who indicated that Riverhead considered Mohl's move a lateral transfer and not a resignation and refused any payment for accumulated vacation time, personal time and sick time. This lawsuit was thereafter commenced seeking compensation in the amount of \$43,538.10 for accruals of 456 hours of vacation time, 518 hours of sick time and 56 hours of personal time.

Riverhead now moves for dismissal of the plaintiff's complaint pursuant to CPLR §3211 and Town Law §65(3) arguing that the plaintiff was required to institute a lawsuit within six months from the time the action accrued. Mohl opposes the motion arguing that the action never accrued because Riverhead never denied the claim and/or Riverhead is subject to equitable estoppel by its actions from claiming untimeliness because of its failure to come to a decision and claiming it was still unsure how to classify the transfer and calculate what is owed to Mohl. Mohl also cross-moves for leave to file a late notice of claim.

For the following reasons, Riverhead's motion to dismiss pursuant to CPLR §3211 and Town Law §65(3) is hereby denied in its entirety and the motion by Mohl to file a late notice of claim is also denied as moot. The Court finds that Riverhead is estopped from raising as a defense to this action either the statute of limitations or Town Law §65(3) because of ongoing misrepresentations by Riverhead that the matter was under advisement and no decision had yet been made on how to treat Mohl's lateral transfer to Southampton and what if any accrued time would be paid.

Riverhead in support of its claim that Mohl's action must be dismissed argues that Mohl resigned on January 14, 2006 and Riverhead was required to pay him for unaccrued and unused sick time, vacation time and personal time within thirty days of his termination of employment. Riverhead argues that Town Law §65(3) required Mohl to file a written notice of claim on Riverhead within six months after the cause of action accrued. Riverhead argues that the action accrued on February 13, 2006 and that Mohl had until August 14, 2006 to file such notice and therefore Mohl is barred from maintaining this action. Mohl argues that Riverhead is estopped from arguing that his claim is barred because of the misrepresentations and outright falsehoods made by Riverhead to him about the severance payments until he retained legal representation in June 2007 and his attorney was informed

by Riverhead that it would not honor the pertinent provision of the collective bargaining agreement. Mohl claims that Riverhead is required by the collective bargaining agreement to pay him what he seeks.

Town Law §65(3) upon which Riverhead relies states in pertinent part:

“...no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued...” (Emphasis added)

The operative words above concern when the action accrued. Riverhead argues that the action accrued on February 13, 2006, thirty days after Mohl left his employment and did not receive payment for unused and accrued vacation, sick and personal time. Mohl argues the action did not accrue until his attorney was told that Riverhead did not intend to honor the collective bargaining agreement. The Court need not reach the accrual date if the Court finds Riverhead is estopped from asserting a defense of the timely filing of a notice of claim by Mohl.

The New York Court of Appeals opined in **Bender v. New York City Health & Hospital Corp.**, 38 NY2d 662, 382 NYS2d 18 (1976) that the doctrine of equitable estoppel may be asserted against a municipality in the context of an application for a late notice of claim and decisional law thereafter made very clear that an estoppel does not require a finding of bad faith on the part of a municipality, only conduct which gives the municipal defendant a strategic advantage. **Brown v. City of New York**, 264 AD2d 493, 694 NYS2d 461 (2nd Dept 1999); see also, **Wilson v. City of Buffalo**, 298 AD2d 994, 747 NYS2d 657 (4th Dept. 2002). The doctrine of estoppel will be applied against a municipality where the claimants were induced to rely on the assurances asserted by the municipality to change their position to their detriment. **Wade v. New York City Health & Hospitals Corp.**, 16 AD3d 677, 793 NYS2d 68 (2nd Dept. 2005). The Court in **Yassin v. Sarabu**, 284 AD2d 531, 727 NYS2d 620 (2nd Dept. 2001) stated it this way;

“A municipality may be estopped from asserting that a claim was untimely filed when its improper conduct induced reliance by the plaintiff who changed his or her position to his or her detriment.” citing to **Griffith v. Staten Island Rapid Transp. Operating Auth.**, 269 AD2d 596, 703 NYS2d 270 (2nd Dept. 2000).

Thus the key is whether or not Riverhead engaged in affirmative acts on which Mohl relied to his detriment and which provided Riverhead with a strategic advantage. Based on the facts established in this case, the Court finds that equitable estoppel applies to Riverhead's attempt to assert the failure of timely service of a notice of claim within the six months required under Town Law §65 (3).

In a case striking similar to the instant action but involving the New York Education Law, the Court in ***Pope v. Hempstead Union Free School District***, 194 AD2d 654, 598 NYS2d 814 (2nd Dept. 1993) in dealing with a Superintendent's lawsuit for unpaid accrual of vacation time, stated:

"It is well established that as a condition precedent to an action against a school district [*municipality*]... a notice of claim be presented to the governing body of the school district within 90 days from the accrual of the claim [*6 months in the instant case*]... However, a school district may be estopped from asserting a notice of claim defense where the school district's affirmative conduct has induced the other side to delay in presenting the notice of claim..."

Here, the Court notes that Riverhead through its representatives including its Police Chief and Sorenson and Hansen of the Riverhead Accounting Department exhibited confusion on Mohl's transfer/resignation and whether he should be treated as resigning from the Riverhead police department or given a lateral transfer to the Southampton police department and its apparent effect on whether and how his compensation for unused accrued time would be paid. The classification of resignation or lateral transfer, if Riverhead is to be believed, would have affected the payout for accrued vacation time, sick time and personal time. Riverhead's confusion delayed the payout of benefits to Mohl and lulled him into awaiting a final determination of his status, until he hired an attorney. Then and only then did Riverhead advise Mohl that it did not intend to pay him at all for any accrued time because Riverhead treated his move to Southampton as a lateral transfer and because Mohl waited too long to file a claim. This is unacceptable to the Court. Mohl failed to timely file for his accrued benefits under the collective bargaining agreement because of the misrepresentations of Riverhead that no decision had been reached on how his transfer to a sister police agency would be classified or treated.

Riverhead's failure to pay any of the accrued leave time, including the accrued vacation time required by the collective bargaining agreement demonstrates the confusion of its officials on how to treat Mohl's movement from Riverhead to Southampton. It appears that its Police Chief did not believe a formal letter of resignation was necessary and Riverhead's Accounting Department showed its confusion in that Sorenson originally appears to have indicated that the severance pay would be deposited into Mohl's account for vacation and

personal days but not sick time because Mohl's move to Southampton was being treated as a resignation, not a lateral transfer. Mohl was subsequently informed by an unidentified employee that, by order of Hansen, no monies were to be deposited. Mohl claims Hansen stated "it was unclear" if the transfer was to be considered a lateral transfer or a resignation and suggested Mohl contact Civil Service. However, Civil Service stated it was a local Riverhead issue. Mohl finally retained an attorney and advised him he never received a determination from Riverhead about his transfer/resignation to Southampton. His attorney was then advised by the Riverhead Town Attorney in July 2007 that Mohl's move would be treated as a lateral transfer not a resignation and that no payments would be forthcoming. This conduct by Riverhead shows affirmative acts upon which Mohl relied to his detriment and warrants the application of estoppel to Riverhead's attempts to now assert the defense of a failure to file a notice of claim.

In **Matter of City of New York**, 7 Misc3d 1022(A), 801 NYS2d 231 [WL1130239] (2005) an unreported decision out of the Supreme Court Kings County, the Court noted:

"...claimants have made a prima facie showing that the court may determine that the City is estopped from asserting that they are time barred from seeking to challenge the underlying administrative review procedure..... In reaching this conclusion, the court notes that it is well established that '[a] municipality may be estopped from asserting that a claim was untimely filed when its improper conduct induced reliance by a Mohl who changed his or her position to his or her detriment' " citing to **Yassin v. Sarabu**, supra. See also, **Consolidated Construction Group v. Bethpage Union Free School District**, 39 AD3d 792, 835 NYS2d 630 (2nd Dept. 2007).

Here, Riverhead clearly misrepresented its position and Mohl was lulled into delaying action while Riverhead made a determination on how to treat his transfer/resignation from Riverhead to Southampton. As noted in **Pope v. Hempstead Union Free School District**, supra above, the Court stated in affirming the lower court's determination

"We also agree that the plaintiff's second and third causes of action did not accrue until he received the check for unused sick leave on January 27, 1989, and after he unsuccessfully attempted to recover compensation for unused vacation time by letters dated January 16, 1989 and February 1, 1989, respectively."

In Pope, supra, the Court also treated Mohl's counsel's letter as "a notice of claim, thus constituting timely notice of those claims" in the second and third causes of action seeking to recover compensation for unused vacation and sick time.

Riverhead's motion to dismiss Mohl's action pursuant to CPLR §3211 and Town Law §65 (3) for failing to timely file a notice of claim is denied and the defendants are hereby equitable estopped from asserting the defense of an untimely filing of the notice of claim, dated September 2007. Mohl's motion to serve a late notice of claim attached to his cross-motion is deemed timely served on Riverhead both because of equitable estoppel heretofore indicated above and because the cause of action did not accrue until the notification by the Riverhead Town Attorney to Mohl's attorney in July 2007 that Riverhead did not intend to honor the collective bargaining agreement on compensation for accrued and unused vacation time, sick time and personal time, a period well within six months of the notification by the Riverhead Town Attorney.

For those reasons, the notice of claim deemed timely served and the cross-motion to serve a late notice of claim is denied as moot.

The foregoing constitutes the decision of the Court.

Dated: October 16, 2008



J.S.C.