

**Glicksman v New York City Env'tl. Control
Bd.**

2009 NY Slip Op 30366(U)

February 19, 2009

Supreme Court, New York County

Docket Number: 109540/2008

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jane S. Solomon

PART 55

Index Number : 109540/2008
GLICKSMAN, EUGENE
 VS.
NYC ENVIRONMENTAL CONTROL BD
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

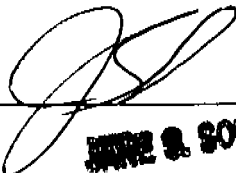
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed Decision and Order.*

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/19/09


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

-----X
EUGENE GLICKSMAN,

INDEX NO. 109540/2008

PETITIONER,

-against-

DECISION AND ORDER

NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, et al.

Motion Sequence: 001 & 002

RESPONDENTS.

-----X
SOLOMON, J.:

INTRODUCTION

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry must be filed hereon. To obtain entry, counsel or unrepresented representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Petitioner Eugene Glicksman ("Glicksman" or "Petitioner") worked as an Administrative Law Judge ("ALJ") for the New York City Taxi and Limousine Commission ("TLC") and as an Administrative Hearing Officer ("AHO") for the New York City Environmental Control Board ("ECB"). He was terminated by the TLC in September 1998 and by the ECB in September 2000.

Petitioner brought this Article 78 proceeding to challenge his termination by the ECB (motion sequence no. 001). Respondents cross-moved to dismiss. Petitioner has opposed the cross-motion and separately moved for leave to serve an amended and supplemental notice of claim (motion sequence no. 002). For the reasons stated below, Respondents' cross-motion to dismiss is granted and Petitioner's motion for leave to serve an amended and supplemental notice of claim is denied. The petition is dismissed.

FACTS

In the summer of 1998, while still employed as a per diem ALJ by the TLC, Glicksman applied for a similar position as an AHO in the Queens branch of the ECB. He was offered the position, subject to a background investigation by the New York City Department of Investigation ("DOI"), and he submitted an authorization form permitting the investigation in February 1999. He began working at the ECB in June 1999.

Glicksman was fired by the TLC on September 17, 1998 without, he claims, any prior warning or explanation. Then, the ECB terminated him by a letter dated September 14, 2000. The ECB letter reads:

Unfortunately, during the course of your background investigation, the Department of Investigation discovered certain discrepancies in the information you provided which will not allow for your continued employment as a Hearing Officer at ECB. Therefore, I regret to inform you that you can no longer continue to be employed by the Board in this capacity.

Affirmation of Eugene Glicksman in Opposition to Respondents' Cross-Motion to Dismiss ("Glicksman Aff."), Exh. 11.

After receiving no responses to requests to appeal his termination and for a "due process name-clearing hearing," in May 2001, Glicksman sued the TLC, ECB, DOI, and others in the United States District Court for the Southern District of New York. He alleged, *inter alia*, that he was

improperly terminated because the TLC disagreed with some of his decisions, which pre-trial discovery in that action showed was accurate. Nevertheless, on January 25, 2008, defendants' motion for summary judgment was granted on the grounds that: (a) Glicksman had no property rights in his positions; (b) the nature of the relief afforded by Article 78 of the CPLR was adequate to satisfy his due process rights; and (c) his first amendment claims were without merit. The Court also declined to exercise jurisdiction over Glicksman's due process claim under state law. See *Glicksman v. New York City Env. Control Bd.*, No. 01 Civ. 4048(LAP), 2008 WL 282124 (S.D.N.Y. 2008).

Shortly thereafter, in July 2008, Glicksman brought this proceeding seeking a judgment pursuant to Article 78 of the CPLR: (1) restoring his employment and granting him the income, benefits, rights, and privileges he would have continued to received if he were not terminated; (2) declaring that Respondents violated statutory and constitutional provisions under federal and state law; (3) removing allegedly defamatory records from Respondents' files; and (4) awarding \$10 million in damages and attorney's fees.

Respondents have cross-moved to dismiss the petition on the following grounds: (a) the petition is barred by the four-month statute of limitations in CPLR § 217(1);

(b)Glicksman's federal law claims are barred by the doctrines of collateral estoppel and res judicata; and (c)Glicksman's state claims are barred by his failure to file a notice of claim.

DISCUSSION

Respondents correctly argue that the petition should be dismissed as untimely under the applicable statute of limitations. An Article 78 proceeding against a public body or officer "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR § 217(1). Glicksman did not commence an Article 78 proceeding within four months of his termination, and the tolling provision in CPLR § 205(a) is inapplicable because the statute of limitations expired before he commenced his federal lawsuit.¹

Glicksman argues that this proceeding is a "hybrid" Article 78/plenary action because he seeks a declaration that his termination was in violation of various statutory and constitutional provisions. However, he cannot evade the four-month statute of limitations by relying on a request for declaratory relief. See *Solnick v. Whalen*, 49 N.Y.2d 224,

¹ Any challenge to Petitioner's September 1998 termination by the TLC is also time-barred for the same reason.

231 (1980); *Bonar v. Shaffer*, 140 A.D.2d 153, 155 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 702 (1988); *New York State Conference of Blue Cross and Blue Shield Plans v. Cooper*, 173 A.D.2d 60, 63 (3rd Dept. 1991); *Pizzardi v. Smithtown Cent. School Dist. No. 1*, 90 A.D.2d 540, 540 (2nd Dept. 1982).

In *Bonar*, the petitioner brought a proceeding to challenge a determination made by the Secretary of State. Petitioner also sought a declaration that the determination was unconstitutional. The proceeding was commenced after the four-month period specified in CPLR § 217(1), and a motion to dismiss on statute of limitations grounds was denied by the trial court. The Appellate Division, First Department reversed and dismissed the petition, holding: "the mere fact that constitutional objections are raised to an administrative determination may not serve to avoid the period of limitations applicable to a proceeding pursuant to CPLR article 78." *Bonar*, 140 A.D.2d at 155.

In any event, Glicksman's claims are without merit. As he conceded on the motion, the federal claims are barred by the doctrines of *res judicata* and *collateral estoppel*. As to the state law claims, he contends that his September 25, 2000 letters seeking review constitute the required notice of claim. However, those letters, not under oath and not served

in compliance with General Municipal Law § 50-e(3)(a),² are insufficient. None went to the Corporation Counsel for the City of New York or the Comptroller of the City of New York as required. See *Herrera v. Duncan*, 13 A.D.3d 485 (2nd Dept. 2004).

Finally, Glicksman's motion to serve an "amended" notice of claim is denied. General Municipal Law § 50-e(6) only permits a party who has properly served a notice of claim to correct "a mistake, omission, irregularity or defect made in good faith . . . not pertaining to the manner or time of service thereof." His last argument, that his federal lawsuit constituted compliance with the notice of claim requirement, ignores that it was commenced more than 90 days after his termination.

² That provision provides:

The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

CONCLUSION

Based on the foregoing, it hereby is

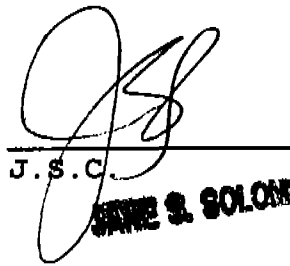
ORDERED and **ADJUDGED** that Respondents' cross-motion to dismiss the petition is granted and the petition is dismissed; and it further is

ORDERED and **ADJUDGED** that Petitioner's motion for leave to serve an amended and supplemental notice of claim is denied; and it further is

ORDERED and **ADJUDGED** that the Clerk of the Court shall enter judgment accordingly with costs and disbursements as taxed.

Dated: February 19, 2009

ENTER:



J.S.C.
JANE S. SOLOMON

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be furnished hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 147B).