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

PRESENT: RAKOWER Justice

PART 5

Barry Smuckler

-v-

City et al.

INDEX NO. 112267/08

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6
Replying Affidavits	7, 8, 9, 10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
APR 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/7/09

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Application of
BARRY SMUCKLER,

Petitioner,

-against-

Index No. 112267/08

DECISION and ORDER

Mot. Seq. 001

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION a/k/a BOARD OF EDUCATION OF THE CITY OF NEW YORK, JOEL KLEIN, Chancellor of the New York City Department of Education a/k/a Board of Education of the City of New York,

Respondents.

----------X

HON. EILEEN A. RAKOWER:

Petitioner Barry Smuckler ("Petitioner") brings this Petition pursuant to CPLR Article 78 seeking a judgment from the court either declaring Petitioner to have obtained tenure by estoppel and directing a hearing pursuant to §3020-a of the Education Law; or alternatively (2) annulling Respondents' determination which denied Petitioner certification of completion of probation for failing to comply with applicable procedures.

Currently before the court is Respondents' Cross-motion to Dismiss Petitioner's Amended Petition pursuant to CPLR §§3211(a)(5), 3211(a)(7), 217, and 7804(f).

Petitioner was appointed to a position as a mathematics teacher at Queens Vocational and Technical High School on September 3, 2002. Pursuant to Education Law §3014(1), Petitioner's employment commenced with a probationary term of three years, ending on September 1, 2005. Petitioner's performance evaluations indicated that his performance was "satisfactory" for the 2002-2003 and 2003-2004 school years. However, in or around June 2005, at the end of the 2004-2005 year (the third and final year of Petitioner's probationary

period), Petitioner alleges that he was advised by Principal Denise Vittor that he would be receiving an evaluation of "unsatisfactory," but that Vittor explicitly advised him that she was not going to recommend discontinuance of service. However, on June 21, 2005, Principal Vittor and Superintendent Robert Klein recommended "denial of certification of completion of probation" ("denial of certification") on Petitioner's performance evaluation form for the 2004-2005 school year. On June 23, 2005, Petitioner signed an acknowledgment of receipt of the evaluation.

Respondents allege that, on June 17, 2005, a letter from Superintendent Klein was sent to Petitioner's home address informing him of the decision to deny certification and of Petitioner's termination, effective August 19, 2005. Petitioner claims that he did not receive the letter at this time. Further, Petitioner alleges that, relying on Principal Vittor's statement that she would not recommend discontinuance of Petitioner's employment, he did not understand that denial of certification meant that he was being terminated. In addition, in late June of 2005, Petitioner received a class assignment for the following school year.

Petitioner appeared for work on Tuesday, September 6, 2005 (the first day of the 2005-2006 academic year and five days after the completion date of his probationary period) and received a teaching schedule. Petitioner claims that Principal Vittor was aware that he worked the entire week - attending staff meetings, teaching his scheduled classes, and stepping in for an absent teacher on an emergency basis - and registered no objection of any kind.

On Monday, September 12, 2005, Principal Vittor informed Petitioner that he was being given an immediate discontinuance of service, and handed him the June, 17, 2005 letter from Superintendent Klein. Petitioner alleges that this was the first time he had ever seen the letter. Following receipt of Superintendent Klein's letter, Petitioner exercised his right to appeal his "unsatisfactory" evaluation and the denial of certification pursuant to the collective bargaining agreement between the Department of Education and the United Federation of Teachers; and a hearing before a committee designated by the Chancellor was held on December 1, 2006. Petitioner's appeal was denied by *Queens High School* Superintendent Bonnie Laboy by letter dated April 28, 2008. Petitioner alleges that he received this letter on or after May 9, 2008.

After receiving the letter from Superintendent Laboy, Petitioner claims that he consulted with an attorney and was advised that he had obtained tenure by estoppel and was entitled to a hearing pursuant to Education Law §3020-a. Petitioner, acting *pro se*, commenced the instant Article 78 proceeding on September 9, 2008. Petitioner subsequently retained counsel, and the parties entered into a stipulation permitting Petitioner to submit an Amended Petition.

Accordingly, Petitioner has filed an Amended Notice of Petition, Amended Petition, and a Memorandum of Law in Support of the Petition. Annexed to the Petition as exhibits are Petitioner's Certificate of Salary Status; Petitioner's performance evaluations for the 2002-2003, 2003-2004, and 2004-2005 school years; Petitioner's class assignment for the term beginning September 2005; Petitioner's teaching schedule; a copy of the agenda for a teachers' conference on September 7, 2005 which contains handwritten notes allegedly taken by Petitioner at the conference; a class assignment sheet dated September 9, 2005; an emergency assignment sheet on September 9, 2005; a paycheck for the time Petitioner worked in September 2005; the June 17, 2005 letter terminating Petitioner; a printout of the New York City Department of Education's "New York City Public Schools, the Appeal Process;" a letter dated April 28, 2008 from Queens High School Superintendent Bonnie Laboy affirming the denial of certification of completion of probation; Petitioner's initial *pro se* Article 78 Petition; and the Stipulation entered into between Petitioner and Respondents permitting Petitioner to file Amended Petition.

Respondents now cross-move for dismissal of the Amended Petition on the grounds that: (1) Petitioner has failed to file a Notice of Claim pursuant to Education Law §3813; (2) Petitioner's challenge to his termination is time-barred by the four month statute of limitations set forth in CPLR §217; (3) Petitioner is barred by laches to the extent Plaintiff contends that he is entitled to mandamus relief; and (4) Petitioner's challenge to his performance evaluation is also precluded by CPLR §217. In so doing, Respondents have submitted a Notice of Cross-Motion to Dismiss the Amended Petition and Memorandum of Law in Support. Petitioner has responded by filing an Affirmation and a Memorandum of Law in Opposition. In reply, Respondents have submitted a Memorandum of Law in Further Support of their cross-motion.

CPLR §3211 states, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (5) the cause of action may not be maintained because of ...statute of limitations; or
> >
> > (7) the pleading fails to state a cause of action

The court, on a motion to dismiss an action pursuant to CPLR 3211(a)(7), must accept the factual allegations of the complaint as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83[1994]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268[1977]).

A teacher may invoke the doctrine of tenure by estoppel when a school board accepts his or her continued services but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term (*McManus v. Bd. of Educ.*, 87 N.Y.2d 183, 187 [1995]). However, "a probationary teacher who is aware that a board of education intends to deny him tenure[] may validly waive his right to tenure and be employed for an additional year without acquiring tenure as a *quid pro quo* for re-evaluation and reconsideration of the tenure determination at the end of the extra year" (*Juul v. Bd. of Educ.*, 428 N.Y.S.2d 319, 321 [2nd Dept. 1980], *aff'd* 55 N.Y.2d 648 [1981]).

In *Juul*, the petitioner was informed at the end of his third year of teaching that, while he was not being granted tenure, the board was willing to reconsider the matter and grant petitioner an additional year of probation if he agreed to waive his tenure rights. Petitioner then signed a written waiver wherein he explicitly waived any claim to tenure by estoppel and stipulated with the board that, at the end of the end of the extra year, the board may either grant or deny tenure. At the end of the additional year of probation, the petitioner was advised of the board's intention to deny him tenure. He then commenced an Article 78 proceeding by order to show cause, challenging the denial and arguing that the agreement was violative of public policy. In holding that the agreement was enforceable, the Second

Department concluded that "the public policy of this State is not violated by certain knowing and voluntary waivers of the protections afforded by the Education Law."

Here, Petitioner similarly waived his right to tenure after his third year of teaching. While Petitioner states that he did not receive the June 17, 2005 letter, Petitioner received unequivocal notice that he was being denied tenure in the form of his 2004-2005 performance evaluation. Aside from receiving marks of "unsatisfactory," the section titled "RECOMMENDATION BY PRINCIPAL OR OTHER APPROPRIATE SUPERVISOR" has the following checked off: "I recommend denial of certification of completion of probation," followed by Principal Vittor's signature, dated June 21, 2005. Just below that, the section titled "SUPERINTENDENT'S RECOMMENDATION" reads, "I recommend denial of certification and completion of probation," followed by Superintendent Klein's signature, dated June 21, 2005. Below that, Petitioner signed his name on June 23, 2005, acknowledging receipt of the report. In light of the foregoing, no reasonable person in Petitioner's position could possibly conclude that he was entitled to tenure when he arrived for work the next year.

Accordingly, when Petitioner returned to work in September of 2005, he remained a probationary employee who could be terminated at any time and for any reason, and thus he was not entitled to a hearing prior to termination (*see Tucker v. Bd. of Educ.*, 82 N.Y.2d 274, 279 [1993]).

Nor is Petitioner entitled to a day's pay for every day in which notice of the denial of tenure was allegedly lacking (*see id.* at 277-78), since Petitioner was obligated to file a Notice of Claim pursuant to Education Law §3813(1), which states that:

> No action or special proceeding, for any cause whatever... or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such

> claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment...

While the courts recognize certain exceptions in which the filing of a Notice of Claim is not required because the proceeding seeks to vindicate a public interest, litigants who seek to vindicate private rights must file a Notice of Claim in order to bring an action against a school district or board of education (*Cayuga-Onondaga Counties Bc. of Coop. Educ. Servs. v. Sweeny*, 89 N.Y.2d 395, 400 [1996]). Here Petitioner is seeking to vindicate his own private rights in that he is challenging his termination as a probationary employee. Accordingly, he was obligated to file a Notice of Claim within three months of his termination in order to pursue this Article 78 Petition. Having failed to do so, he is barred from challenging his termination (*see Silvernail v. Enlarged City School Dist. of Middletown*, 2007 NY Slip Op 4501 [2nd Dept. 2007]).[1]

Even if Petitioner were able to establish that he was tenured by estoppel, Petitioner would nevertheless be precluded from asserting his wrongful termination claim due to his untimeliness in pursuing the claim. The parties dispute whether the Amended Petition should be treated as one for certiorari to review or for mandamus to compel; the significance being that the nature of relief sought is determinative of the accrual date for Petitioner's claims. In a petition for a writ of mandamus to compel, accrual occurs when, after the petitioner makes a demand, the respondent refuses to perform a duty enjoined upon it by law (*see Waterside Assocs. v. New York State Dept. of Env. Cons.*, 72 N.Y.2d 1009, 1010 [1988]). In order for the act to properly be considered one subject to a writ of mandamus to compel, the petitioner must have a clear legal right to the relief sought, such that the right to performance of the duty admits of no reasonable doubt or controversy (*see Assoc. Of Surrogates & Supreme Court Reporters v. Bartlett*, 40 N.Y.2d 571, 574 [1976]). In addition, the nature of the performance sought by the petitioner must be purely ministerial in nature, such that the act does not call for the exercise of any discretion on the part of the respondent (*see New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 [2005]). An act is discretionary - and thus not subject

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[1]In addition to being barred from asserting these claims for his failure to timely file a Notice of Claim, Petitioner is also precluded from any potential recovery by the applicable four-month statute of limitations, discussed in greater detail below.

to mandamus relief - if it "involves the exercise of reasoned judgment which could typically produce different acceptable results...." (*id.*) (citation omitted).

The court finds that Petitioner's Amended Article 78 Petition, while purporting to be a petition for mandamus to compel, is in actuality a petition for certiorari to review. In *Triana v. Board of Education*, 2008 N.Y. Slip Op 607 [1st Dept. 2008], the petitioner, a former teacher, brought an Article 78 Petition challenging her termination by the New York City Board of Education on the grounds that she had become tenured by estoppel, and thus her termination was null and void as violative of Education Law §§2573(5) and 3020-a. While the lower court treated the challenge as a petition for mandamus to compel, the First Department observed that "the gravamen of the petition is a challenge to [respondent's] determination to terminate petitioner's employment, which is more in the nature of certiorari to review" (*id.* at *3).

It is well settled that a teacher who alleges wrongful termination and seeks reinstatement must commence an Article 78 proceeding within four months of the date of the termination (*see Altman v. New York City Dept. of Educ.*, 2006 N.Y. Misc. LEXIS 3676, 13-14 [Sup. Ct. New York Cty. 2006]) (*citing Mateo v. Board of Educ.*, 285 A.D.2d 552 [2nd Dept. 2001]; *Bonilla v. Board of Educ. of City of New York*, 285 A.D.2d 548 [2nd Dept. 2001]). Accordingly, viewing the Amended Petition a light most favorable to Petitioner, the instant action accrued on September 12, 2005: the date on which he alleges he first received notice of his termination. In order to bring a timely challenge to Respondents' decision to terminate him, Petitioner was thus obligated to commence an Article 78 proceeding by January 12, 2006. Since Petitioner commenced the instant proceeding on September 9, 2008, he is clearly barred by the applicable statute of limitations.

Petitioner's timely challenge to the Chancellor's review of his "unsatisfactory" rating pursuant to the Board of Education's bylaws does nothing to alter this conclusion, as it is also well settled that bringing such a challenge does not toll the statute of limitations with respect to an employee's termination (*see Altman* at 14) (*citing Mateo; Bonilla*). The right of a probationary teacher to review of a Chancellor's decision pursuant to the Board of Education's bylaws derives solely from a collective bargaining agreement and "does no more than establish an optional procedure under which a teacher may ask the Chancellor to reconsider and

reverse his initial decision, a decision which is final and which, when made, in all respects terminates... employment... under Education Law §2573(1)(a)" (*Frasier v. Bd. of Educ.*, 71 N.Y.2d 763, 767 [1988]; *see also Johnson v. Bd. of Educ.*, 737 N.Y.S.2d 392, 393 [2nd Dept. 2002]) In *Johnson*, the petitioner commenced an Article 78 proceeding challenging his termination, as well as his "unsatisfactory" rating. Although petitioner brought the petition within four months of the decision to uphold petitioner's "unsatisfactory" rating, the proceeding was commenced more than four months after petitioner's termination. The Second Department held that so much of the petition that challenged the termination and sought reinstatement was time barred; but that the petition was timely with respect to the challenge to the "unsatisfactory" rating. Accordingly, the petitioner's only available remedy was expungement of the "unsatisfactory" rating from his records (*id.* at 393; *see also Andersen v. Klein*, 2008 NY Slip Op 3046 [1st Dept. 2008]).[2]

It should be noted that even if this court were to find that the Amended Petition is rightly a petition for mandamus to compel, the outcome would remain the same. Although, as noted above, the statute of limitations on a mandamus petition begins to run only upon a respondent's refusal to perform a duty enjoined upon it by law, a petitioner will be precluded from asserting his claim by principles of laches if he fails to make a demand for performance within a reasonable time (*Rapess v. Ortiz*, 99 A.D.2d 413, 414 [1st Dept. 1984]) (citations omitted).

Petitioner alleges that he was misled by Respondents, in that (1) Principal Vittor explicitly told Petitioner that he was not going to be terminated; and (2) Petitioner's June 17, 2005 termination letter set forth Petitioner's right to appeal the "unsatisfactory" rating before the Chancellor's Committee (Petitioner's theory being that this implied that the Chancellor's hearing was his only potential recourse). Accordingly, Petitioner asserts that he did not become aware of his rights until consulting with an attorney on or around May 9, 2008, after receiving the decision affirming his performance evaluation.

With respect to the allegedly misleading letter, the First Department has flatly rejected Petitioner's contention that the letter's reference solely to procedures

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[2]The respondents therein conceded that the petition was meritorious insofar as it challenged the "unsatisfactory" rating.

pursuant to the collective bargaining agreement and the Board of Education's bylaws misled him into believing that these procedures were his exclusive remedy (*see Lipton v. New York City Bd. of Educ.*, 284 A.D.2d 140 [1st Dept. 2001]; *see also Altman* at 15 (...the First Department has... rejected the argument that these notices are misleading because while mentioning review procedures under the collective bargaining agreement, they do not mention a right to judicial review."))

As for Principal's Vittor's assurance that Petitioner would not be terminated in June 2005, Respondents correctly assert that, to the extent Petitioner was misled by this statement, any confusion dissipated on September 12, 2005 when Petitioner was verbally advised of his termination and handed the June 17, 2005 termination letter. At this moment Petitioner was undeniably aware of all the facts which give rise to his purported right to relief (*i.e.*, that Petitioner was being terminated without the statutorily-mandated pre-termination hearing he claims that he was entitled to as an employee tenured by estoppel) (*see Rapess* at 414). Accordingly, since Petitioner waited approximately three years to bring the instant Article 78 Petition, his application would be barred by principles of laches (*See Altman* at 14) (petitioner's waiting nearly nine months after receiving "unsatisfactory" rating to make demand for reversal of evaluation unreasonable and barred by laches.).

Accordingly, under either form of Article 78 review, Petitioner has failed to timely assert his claim that he was improperly terminated without a hearing as a tenured employee.

Finally, turning to Petitioner's challenge of his "unsatisfactory" rating, Petitioner's failure to file a Notice of Claim pursuant to Education Law §3813 is fatal to this portion of the Amended Petition for the same reasons as set forth with respect to Petitioner's termination.

Wherefore, it is hereby

ORDERED that Respondents' cross-motion to dismiss the Amended Complaint is granted and the Amended Petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 7, 2009

EILEEN A. RAKOWER, J.S.C.