SHORT FORM ORDER

INDEX NUMBER: 25474-2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 07-30-2009
Motion Submit Date: 08-19-2009
Motion Sequence No.: 001 MOTD
CASEDISP

X

EDWARD J. LaSALLE,

Plaintiff,

-against-

BOARD of EDUCATION OF THE BRIDGEHAMPTON UNION FREE SCHOOL DISTRICT, COUNTY OF SUFFOLK, STATE OF NEW YORK,

Defendant.

X

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Riverhead, New York 11901

Attorney for Defendant
Guercio & Guercio, LLP
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In this wrongful termination action, the Defendant, Board of Education of the Bridgehampton Union Free School District ("Defendant" or "School District") moves, by Notice of Motion (motion sequence number 001) for an Order, pursuant to **CPLR § 3212** granting the Defendant Summary Judgment, dismissing the Plaintiff's Complaint, on the ground that there exist no material issues of fact to be tried and that Defendant is entitled to Judgment as a matter of law.

It is Defendant's position 1) that the Plaintiff, a former Spanish teacher in the subject school district, was hired as an "at-will" employee and was never given a contract for a specific term, permitting the Plaintiff's termination at any time, for any permissible

reason; 2) that the salary notice, which Plaintiff received from Defendant contained a condition subsequent, which did not occur prior to the date the Plaintiff reached an earnings limit imposed on retirees under the age of 65; 3) that Plaintiff voluntarily resigned his position on November 6, 2006; and 4) that the School District had the right to terminate Plaintiff "for cause", assuming he was a term employee, in light of the mandatory provisions of the **Retirement and Social Security Law §§ 211 and 212.** Plaintiff opposes the motion, arguing 1) that his salary notice constituted a contract of employment for the 2006-2007 school term; 2) that Plaintiff was involuntarily terminated without cause; and 3) that there exist questions of fact as to whether the School District could have continued his employment for the several days between the date he was terminated and the date that the Department of Education approved his waiver application under **§§ 211 and 212, supra**. Thus, Plaintiff states he is entitled to a jury trial.

In June, 2006, Plaintiff received a document signed by Dr Youngblood, the Superintendent of Schools for the Defendant. The writing stated that "YOU ARE NOTIFIED THAT YOUR ANNUAL SALARY FOR THE 2006-2007 school year as tch21 is:. . . " The document then set forth a salary and asked the Plaintiff to sign his acceptance , which he did and dated the document, June 5, 2006. A handwritten note on the document states "Pending NYS waiver for Retiree". The Defendant's advertisements for the teaching position stated that the Defendant had an opening for a Spanish Teacher, for Grades 7-12, and included a "START DATE" of September 5, 2006. The Defendant passed a Resolution, appointing the Plaintiff on June 12, 2006, stating that : "(t)he Board of Education of the Bridgehampton UFSD approves Mr. Edward LaSalle as a Spanish teacher, certified in Spanish, 7-12, at a salary of B.A. + 40, Step 23, effective September 5, 2006, pending N.YS. Education Department waiver for employment retiree". On June 12, 2006, the Defendant's Superintendent forwarded a letter to the Plaintiff stating, in

pertinent part , "(o)n behalf of the Board of Education of the Bridgehampton UFSD, I am pleased to inform you that at the June 12, 2006 Board of Education Meeting, you were approved as Spanish Teacher, at a salary of B.A. + 40, Step 23, effective September 5, 2006, pending NYS Education Department waiver for employment of retiree".

Under Section 212 of the **NYS Retirement and Social Security Law**, a retiree from the State system, who is less than 65 years old, is permitted to return to public employment without diminution of retirement earnings if the post employment retirement earnings do not exceed the legislatively designated amount. In 2006, this amount was set at $27,500.00. Where a retiree will earn more than the designated limit, he/she, may only provide services to a public employer, without diminution of retirement allowances, if the specific requirements of **Section 211** of that law are met. In essence, **Section 211** requires that the Commissioner of Education approve a waiver based on the employer's application, setting forth that other non-retirees are not available to perform the duties. It is Plaintiff's claim that, for the 2006-2007 school year, which was the second year in which this situation existed, the Defendant first made its **Section 211** application too early to be approved (ie , in June 2006); reapplied in September 2006, and then, in a panic and without checking with the Department of Education, terminated Plaintiff in early November 2006, as he was about to reach the $27,500 limit. Plaintiff also states that the Defendant's employees lied to him about having checked to see if and when the approval was to come through and then ignored his letters to them, after he learned it had in fact come about on November 9, 2006.

To obtain Summary Judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Goldberger v Brick & Ballerstein, Inc, 217 Ad 2d 682, 629 NYS 2d 814 (2d Dep't 1995) (internal citations omitted).

The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of Summary Judgment. Zayas v Half Hollow Hills Cent. School District, 226 AD 2d 713, 641 NYS 2d 701 (2d Dep't 1996).

In the absence of a constitutionally impermissible purpose, a statutory prohibition, or an express limitation in a party's contract of employment, an employer maintains the right to terminate an employment at will at any time and such right remains unimpaired throughout the employment duration. Smalley v The Dreyfus Corp, 10 NY 3d 55, 853 NYS 2d 270, 882 NE 2d 882 (2007).

Defendant has clearly, in the Court's view, met its prima facie case in support of its motion based on the current state of the law on "at-will" employment. This decision derives from significant appellate authority, in an opinion of the Fourth Department, affirmed by the Court of Appeals and, quite relevant to this case. The Fourth Department stated, in Tysen v Hess, 109 AD 2d 1068, 487 NYS 2d 206 (4th Depot 1985), aff'd, 66 NY 2d 943, 489 NYS 2d 778, 498 NE 2d 747 (1985), that an annual salary notice from a school district, even where it contained a 10 month term, did not create a contract of employment for a specific term, limiting the school district's right to treat the employee as one "at-will". Under the situation herein, based upon the clear documentary evidence set forth, Plaintiff was given no more than a salary notice. Neither that notice, the advertisement, the Board resolution, nor the subsequent letter even mentioned a term. As such, Plaintiff was an employee "at-will", and, therefore, terminable, for any permissible purpose. Even assuming, arguendo, that Plaintiff's allegations are correct, regarding the School District's initial (too) early and subsequent (too) late applications in 2006 for a **§ 211** waiver, and assuming the Plaintiff is correct that he was terminated involuntarily, the School District had the right to do so, there being no statutory nor contractual bar.

As Defendant has set forth its entitlement to judgment as a matter of law, under current case law, as applied to the undisputed documents set forth in the papers, Plaintiff cannot meet the shifted burden sufficiently to raise a triable issue of fact. Accordingly, Judgment, in favor of Defendant, dismissing the Complaint is granted pursuant to **CPLR § 3212**.

This constitutes the ***DECISION*** and ***JUDGMENT*** of the Court.

Dated: September 29, 2009
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.