

**Smith v New York City Dept. of Homeless Servs.**

2009 NY Slip Op 32826(U)

December 1, 2009

Supreme Court, New York County

Docket Number: 401068/09

Judge: Saliann Scarpulla

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

PRESENT: **SALIANN SCARPULLA**  
*Justice*

PART 52

*Smick, Janette*

INDEX NO. 401068/09

MOTION DATE 9/23/09

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

NYC Dept. of Homeless Services

The following papers, numbered 1 to 4 were read on this motion to/for dismissal

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**PAPERS NUMBERED**

1

2

3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with accompanying memorandum decision.

*This constitutes Decision and Order of the Court.*

**FILED**

DEC 03 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: December 1, 2009

*Saliann Scarpulla*  
**SALIANN SCARPULLA** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X  
JEANNETTE R. SMITH,

Plaintiff,

Index Number 401068/09  
Submission Date 09/23/09  
Mot. Seq. No. 001

-against-

**DECISION & ORDER**

NEW YORK CITY DEPARTMENT OF HOMELESS  
SERVICES and THE CITY OF NEW YORK,

Defendants.

-----X

**Appearances: For Plaintiff :**  
Tuckner, Sipser, Weinstock & Sipser  
By William Sipser, Esq.  
120 Broadway, 18<sup>th</sup> Floor  
New York, New York 10271  
212-766-9100

**For Defendant the City of New York:**  
Corporation Counsel of the City of New York  
By Jamie M. Zinaman, Esq.  
100 Church Street, Room 2-111  
New York, New York 10007-2601  
212-788-0887

Papers considered in review of this motion for dismissal:

Papers	Numbered
Affirm. in Supp. with Exhib. Attached.....	<u>1</u>
Affirm. in Opp.....	<u>2</u>
Affirm. in Reply.....	<u>3</u>

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**HON SALIANN SCARPULLA, J.:**

Plaintiff Jeannette R. Smith ("Smith") commenced this action against defendants New York City Department of Homeless Services and the City of New York (collectively "the City") in March 2009, alleging numerous discriminatory employment actions taken in violation of New York City Administrative Code ("Administrative Code") § 8-107.

Smith alleges that since 2002 she has been discriminated against on the basis of gender, ethnic, and racial identity.

The City moves to dismiss part of plaintiff's complaint pursuant to CPLR 3211(a)(5) based upon the expiration of the three-year statute of limitations as to the violations that took place prior to March 2006. In opposition, Smith maintains that despite the fact that certain alleged discriminatory employment acts occurred more than three years prior to the commencement of this action, Smith's complaint is timely in its entirety pursuant to the "continuing violation" doctrine. In reply, the City asks the Court to adopt *National Railroad Passenger Corp. v Morgan*, 536 U.S. 101 (2002), in which the United States Supreme Court held that under federal law, the "continuing violation" doctrine applies only to hostile work environment claims as opposed to claims alleging "discrete" discriminatory acts.

**Discussion**

When considering a dismissal motion based on the pleadings, the sole criterion is whether the factual allegations within the four corners of the complaint, if taken together, manifest a timely cause of action cognizable at law. CPLR 3211(a); see *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 (1977). The Court presumes the allegations of the complaint to be true and accords them every favorable inference, except insofar as they consist of bare legal conclusions or are inherently incredible or flatly contradicted by documentary evidence. *Beattie v Brown & Wood*, 243 A.D.2d 395 (1st Dept 1997).

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Pursuant to Administrative Code § 8-502(d), a discrimination action brought under Administrative Code § 8-107 “must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence . . .” Prior to the United States Supreme Court’s decision in *National Railroad Passenger Corp.*, the Second Circuit, interpreting federal law, held that when plaintiff experienced a continuous practice and policy of discrimination, the commencement of the statute of limitations period was tolled until the last discriminatory act in furtherance of it. *Cornwell v Robinson*, 23 F.3d 694, 704 (2<sup>nd</sup> Cir. 1994) (citations omitted).

While discrete incidents of discrimination not stemming from discriminatory policies or mechanisms would not amount to a continuing violation, “a continuing violation could be found where there was proof of specific ongoing discriminatory policies and practices, or where specific and related instances of discrimination were permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice.” *Cornwell*, 23 F.3d at 704 (citations omitted). A properly pled “continuing violation” entitled plaintiff to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period. *Id.*

The New York courts adopted the Second Circuit’s “continuing violation” rule for claims brought under local, state, and federal anti-discrimination statutes. *See e.g., Kent v The Papert Co., Inc.*, 309 A.D.2d 234, 241 (1<sup>st</sup> Dep’t 2003); *Sier v Jacobs Persinger &*

*Parker*, 276 A.D.2d 401, 402 (1<sup>st</sup> Dep't 1997); *Walsh v Covenant House*, 244 A.D.2d 214, 215 (1<sup>st</sup> Dep't 1997); *see also Clark v State of New York*, 302 A.D.2d 942, 944 (4<sup>th</sup> Dep't 2003).

In *National Railroad Passenger Corp.*, the United States Supreme Court narrowed the applicability of the continuing violation doctrine under federal anti-discrimination statutes solely to claims of hostile work environment, because the nature of such claims necessarily involves repeated conduct. *National Railroad Passenger Corp. v Morgan*, 536 U.S. 101, 115 (2002). As to the discrete acts of discrimination, under the current federal law, each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice that triggers the statute of limitations. *National Railroad Passenger Corp.*, 536 U.S. at 114. Once lapsed, the statute of limitations may not be tolled, revived or extended.

Recently, in *Williams v New York City Housing Authority*, 61 A.D.3d 62 (1<sup>st</sup> Dep't 2009), *lv denied* \_\_\_ N.Y.3d \_\_\_, 2009 NY Slip Op 81649, \*1 (sexual harassment), *Phillips v City of New York*, 2009 N.Y. Slip. Op. 5990, \*11 (1<sup>st</sup> Dep't 2009) (disability discrimination), and *Vig v The New York Hairspray Co., L.P.*, 2009 N.Y. Slip. Op. 6466, \*6 (1<sup>st</sup> Dep't 2009) (disability discrimination), the Appellate Division, First Department, reminded the lower courts that they must separately analyze discrimination cases arising in New York City under the more expansive New York City's 2005 Local Civil Rights Restoration Act ("the Restoration Act").

The core of the Restoration Act was the revision of Administrative Code § 8-130, the construction provision of the New York City Human Rights Law. The Restoration Act clarified and reinforced that construction of New York City Human Rights Law should be more expansive and remedial than, and independent of, its federal and state counterparts. *Williams*, at 61 A.D.3d at 66. The Restoration Act provides that the provisions of the City HRL were previously construed too narrowly to ensure protection of the civil rights of all persons covered by law, and mandates that the interpretations of the state or federal provisions should be viewed as a “floor” below which the City’s Human Rights law cannot fall rather than a “ceiling” above which the local law cannot rise. *Williams*, 61 A.D.2d at 67-68 (quoting Restoration Act § 1).

In *Williams*, the First Department approved of the post-*National Railroad Passenger Corp.* viability of the “continuing violation” rule, as applied to claims arising in New York City and alleging discrete discriminatory acts. The First Department found that, unlike the more restrictive federal law,

“the Restoration Act’s uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period.” *Williams*, 61 A.D.3d at 72-73.

This Court must analyze Smith’s discrimination allegations in light of the First Department’s holdings in *Williams*, *Phillips* and *Vig*. Smith’s complaint includes a string of allegations of discriminatory and retaliatory actions taken by the City for the past seven

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years. The City argues that Smith's allegations present an account of numerous isolated incidents of discrimination allegedly premised on several different racial, gender, and cultural discriminatory theories with no underlying common thread to constitute a pattern or practice of discrimination for the purposes of the continuing violation doctrine.

Under New York law, employment discrimination cases are generally reviewed under notice pleading standards, whereby plaintiff need only give "fair notice" of the nature of the claim and its grounds. See *Vig v The New York Hairspray Co., L.P.*, 2009 N.Y Slip. Op. 6466, \*4 (1<sup>st</sup> Dep't 2009). Considering that the New York City Human Rights law is broader than either its state or federal counterpart, and viewing the complaint in a light most favorable to Smith, it is premature, at this juncture, to find that Smith has not experienced a continuing pattern or practice of discrimination at the hands of the City for the purposes of the continuing violation doctrine. See *Brightman v Prison Health Servs., Inc.*, 62 A.D.3d 472, 472 (1<sup>st</sup> Dep't 2009) (finding a claim for retaliation sufficiently stated under New York liberal pleading standards; see Administrative Code of City of New York § 8-130; *Williams v New York City Hous. Auth.*, 61 A.D.3d 62, 66 (1<sup>st</sup> Dep't 2009). Therefore, the City's motion to dismiss part of Smith's complaint as barred by the three-year statute of limitations under Administrative Code § 8-107 is denied without prejudice to renew at the close of all discovery.

In accordance with the foregoing, it is


ORDERED that the motion of defendants New York City Department of Homeless Services and the City of New York pursuant to CPLR 3211(a)(5) dismissing the complaint in part is denied in its entirety with leave to renew at the close of all discovery; and it is further

ORDERED that the parties report for a preliminary conference to DCM Courtroom in Room 103 at 80 Centre Street, New York, New York on January 13, 2009, at 2:00 p.m.

This constitutes the decision and order of the Court.

Dated: New York, New York  
December 1, 2009

ENTER:

  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE