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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

JOSEPH C. ANDRUZZI,

Plaintiff,

- against -

THE COUNTY OF NASSAU, LORNA GOODMAN, "JANE" FINEMAN, ELIZABETH BOTWIN and THOMAS R. SUOZZI,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 10944/03
Motion Seq. Nos.: 6, 7

The following papers have been read on this motion:

	Papers Numbered
Defendants' Motion for Summary Judgment	1
Defendants' Memorandum of Law	2
Plaintiff's Affidavit in Opposition	3
Defendants' Affirmation in Opposition	4
Defendants' Reply Affirmation	5
Plaintiff's Cross-Motion for Partial Summary Judgment	6

Motion pursuant to CPLR §3212 by the defendants, County of Nassau, Lorna Goodman, "Jane" Fineman, Elizabeth Botwin and Thomas R. Suozzi, for summary judgment dismissing the plaintiff's complaint, is denied.

Cross-motion pursuant to (1) CPLR §3212[g] by the plaintiff, Joseph C. Addruzzi; and (2) for partial summary judgment on his seventh, fifteenth and sixteenth causes of action, is denied.

In March of 1995, the plaintiff, Joseph C. Andruzzi, was hired by the defendant, County of Nassau as a Deputy County Attorney, and executed a three-year, "Employment Commitment" agreement pursuant to which he was to serve as an exempt, "at will" employee in the County's Malpractice Bureau (Cmplt., ¶¶ 8-10; Andruzzi Dep., 182-183; Famighetti Aff., Exh, "D").

At some point towards the end of 1998 – and with the acquiescence of his supervising Bureau Chief – the plaintiff claims that he began taking on significant and additional special assignments, which materially increased his work load and hours worked (Andruzzi Dep., 145-160; Cmplt., ¶¶ 32-34). Additionally, and allegedly due to chronic staffing problems and budget limitations in the County Attorney's Office, attorneys were often asked or required to work extraordinary overtime hours to complete their work – for which no additional, salary and/or cash remuneration was provided (Cmplt., ¶¶ 32-36; Andruzzi Dep., 125-126; 134, 136; 243). The plaintiff asserts that as an alternative means of remuneration for the extra work performed, the County Attorney's office adopted a policy of offering compensation time to employees, which accrued on a yearly basis (Cmplt., ¶¶ 32-33; Andruzzi Dep., 122-129; 134-137; 210-212; Gallagher Aff., ¶¶ 4-6).

The plaintiff contends – and the County defendants do not dispute – that "comp" time benefits awarded under the County policy and were usable by currently employed individuals (Gallagher Aff., ¶¶ 4-6). The plaintiff further asserts, however, that accrued but unused time would also be payable "to exhaustion" upon an attorney's separation from service, so as to provide a continuing paycheck and other payroll benefits (Cmplt., ¶¶ 33-40; Gallagher Aff., ¶¶ 4-6).

Specifically, and as amplified by his deposition testimony, the plaintiff claims that discharged Deputy County Attorneys who possessed accrued compensatory at termination, were routinely permitted "burn down" that accrued time "to exhaustion" prior to being formally terminated on the books; in other words, these discharged attorneys were permitted – as the plaintiff has framed it – "to transition out of public service over a period of time and with a continuing paycheck and payroll fringe benefits in exchange for extraordinary commitment of extra hours and extra work" (Cmplt.,¶¶ 36-39; 50-H Dep., 33-34; Andruzzi Dep., 95-100, 111-114, 133-136).

The plaintiff further argues, *inter alia*, that: (1) the foregoing, "transitional" policy was common knowledge in the office and applied to outgoing attorneys; (2); that he had relied on this alleged benefit and the defendants' assurances, which also served as an inducement for the extra and additional work which had been assigned to him; and (3) that he had discussed the alleged, post-termination portion of the compensation pay policy on a number of occasions with various

supervisors – all of whom reaffirmed its existence and applicability (Cmplt.,¶¶ 36-39; Andruzzi Dep., 95-100, 123-140).

On April 17, 2002, shortly after the County Executive, Thomas R. Suozzi assumed office, the plaintiff was allegedly summoned by Suozzi appointees/co-defendants, Elizabeth Botwin and County Attorney Lorna Goodman, and informed that he was to be discharged effective two days later on Friday, April 17, 2002 (Andruzzi Dep., 62-65, 69).

The plaintiff asked why he was being terminated, and Goodwin and/or Botwin allegedly told him the firing was not a "for cause" discharge and that "there were no reasons for * * * [his] termination (Andruzzi Dep., 68, 69; Cmplt., ¶ 10). Goodman then produced a computer print-out on which the plaintiff's accumulated compensation time had been listed – some 1493 hours at that point – pushed the document across the table toward him and then stated that, "you are not getting this" (Cmplt., ¶¶ 52-56; Andruzzi Dep., 63, 69-70, 77; Opp., Exh., "3").

At some point during the same meeting, Goodman or Botwin also informed the plaintiff that he could elect to resign, but the plaintiff rejected this offer. He then allegedly requested permission to be placed on leave as against his accrued compensatory time in accordance with the office policy, but that request was denied (Andruzzi Dep., 68, 69 *cf.,* 50-H Dep., 67-68; Cmplt., ¶¶ 60-64, 70).

With respect to the issue of compensation pay, the plaintiff claims that prior to his April, 2002 termination, there had been rumors circulating throughout the office and elsewhere to the effect that the new Suozzi administration had adopted a policy of terminating employees with "significant compensatory time accruals" (Andruzzi Dep., 75-76; 98-104). The plaintiff's complaint is more definitive and claims that the Suozzi administration adopted an "express policy and directive" by which department heads were ordered to identify employees with significant accrued leave benefit for potential discharge (Cmplt., ¶¶ 47-50). The plaintiff testified, however, that to his knowledge, he was the only deputy county attorney discharged under the alleged Suozzi, compensation discharge policy (Andruzzi Dep., 98).

Within a few days after his termination, the plaintiff wrote to County

Attorney Goodman and recounted that at his termination meeting, the County had refused to pay for – or otherwise allow him to utilize – his accrued compensation time and did not supply any specific reason for his discharge. In a responsive letter dated April 22, 2002, co-defendant Botwin replied briefly that, "[a]s you were informed, we have reviewed the office's organization, and decided to let you go."

Significantly, there is no dispute that the County Attorneys's office had authorized compensation time benefits for attorneys during the course of the plaintiff's employment – although the defendants deny that compensation benefits were ever payable or paid after termination (Gallagher Aff., ¶¶ 4-5).

The defendants have also submitted time sheets which indicate that between January of 2002, and his discharge some three months later, the plaintiff had already used some 235 hours of his accrued, compensation time (Famighetti Aff., at 7-8; Exh., "K"). The plaintiff does not argue that he was prevented from using his accrued compensation time during his prior employment – which he utilized "as much as [legally] possible" (Andruzzi Dep., 212). Moreover, the plaintiff was apparently permitted to – and did – engage in the outside, private practice of law during his County employment (Andruzzi Dep., 154-155; 252-260, 289-290). In July of 2003, the plaintiff commenced the within *pro se* action and thereafter served a 235 paragraph complaint containing twenty-two separately captioned causes of action alleging claims sounding in, *inter alia,* "defamatory innuendo," breach of contract, prima facie tort, tortious interference with contractual relations or "expectancy" of employment, and violation of state and federal constitutional rights (28 U.S.C. § 1983).

By order dated December 13, 2004, this Court dismissed the complaint but on appeal, the Appellate Division modified the order by reinstating the plaintiff's second through fourth, seventh, and fifteenth through eighteenth causes of action. In its decision, the Appellate Division determined that the foregoing claims stated actionable claims – albeit based solely upon the defendants' alleged representations that the plaintiff would be compensated for, *inter alia*, accrued compensation time upon leaving the County's employ (*Andruzzi v. County of Nassau,* 34 AD3d 607, 608).

More particularly, and while discharged public employees generally

cannot recover accrued benefits absent express contractual or statutory authority (*see e.g., Baksh v. Town/Village of Harrison*, 38 AD3d 808, 809; *Karp v. North Country Community College*, 258 AD2d 775; *Gratto v. Board of Educ. of Ausable Valley Central School,* 271 AD2d 175, 176; *Briggs v. Town of Portland*, 256 AD2d 1091; *Grishman v. City of New York,*183 AD2d 464, 465; *Matter of Rubinstein v. Simpson*, 109 AD2d 885, 886 *see also*, General Municipal Law § 92 [1]), the Appellate Division relied upon an equity-based, special exception to the general rule. In accord with this principle, public employees "may be entitled to recover for unused time if – after being assured they could utilize the accrued time – they are then "discharged without being given the opportunity to use the time and without being compensated for its monetary value" (*Andruzzi v. County of Nassau, supra*, at 608 *see also*, *Kornfeld v. County of Nassau,* 27 AD3d 743, 744; *Garrigan v. Incorporated Village of Malverne*, 12 AD3d 400, 401; *Gendalia v. Gioffre*, 191 AD2d 476, 477; *Clift v. City of Syracuse,* 45 AD2d 596).

Here, the plaintiff alleged that he was "led to believe that his accrued compensatory leave benefits could be used after termination to provide a continuing paycheck and payroll benefits" – allegations which therefore "suggested "that [he] * * * was lured into a disadvantageous position" (*Andruzzi v. County of Nassau, supra*, at 608). Similarly, and as to the plaintiff's related constitutional claims, the Court relied upon the same factual predicate and concluded that "discharging an employee without opportunity to use and without compensation for accrued leave time deprives the employee of property without due process of law in violation of State and Federal Constitutions" (*Andruzzi v. County of Nassau, supra*, at 608; *Clift v. City of Syracuse, supra*).

Discovery has been conducted and the County defendants now move for summary judgment dismissing the complaint.

The plaintiff opposes the application and has cross-moved for an order: (1) pursuant to "specifying * * *facts * * * deemed established for all purposes in the action" (CPLR §3212[g]); and (2) for partial summary judgment with respect the seventh, fifteen and sixteenth cause of action, which allege respectively, an unconstitutional taking, unlawful termination and deprivation of property without due process under the State and Federal Constitutions and pursuant to 18 U.S.C. §§ 1983 (Cmplt., ¶¶ 138-143; 176-184).

The parties' respective applications for, *inter alia*, summary judgment should be denied.

In support of their motion, and in opposition to the plaintiff's cross-motion, the defendants have denied that compensation benefits were payable upon termination in any variant – or that an office policy relative to the post-discharge payment of accrued compensation benefits ever existed. Specifically, the defendants have submitted, *inter alia,* the affidavit of the plaintiff's former supervisor and current torts bureau chief – James N. Gallagher – who has asserted, *inter alia*, that while compensation time was awarded and could be permissibly utilized by current employees (Gallagher Aff., ¶¶ 6-7), neither he nor anyone else in the office ever promised or represented that discharged attorneys would be paid for unused compensation time – much less that they would be permitted to utilize that time "to exhaustion" prior being formally terminated on the record (*see*, Gallagher Aff., ¶¶ 4-5 [Famighetti Aff., Exh., "G"]).

The plaintiff, however, has testified to the contrary and offered an opposing factual account of the key events at issue, *i.e.*, he has stated, among other things that: (1) he was informed by various and specifically identified supervisors (including James Gallagher) that he would be able to utilize his accrued compensation upon termination "to exhaustion" prior to formal, record termination; and (2) that he performed the additional work which had been assigned to him in reliance upon these alleged assurances and promises (Andruzzi Dep., 125-127; 131-133; 136-137, 176-178)(*Andruzzi v. County of Nassau, supra*, at 608 *see also*, *Kornfeld v. County of Nassau, supra,* 27 AD3d 743, 744).

Viewing these conflicting assertions and claims "in the light most favorable to * * *[the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 105-106 [2006]), questions of fact have been presented which cannot be summarily resolved on a motion for summary judgment. Specifically, factual questions and credibility-dependent matters exist with respect to, *inter alia*, the key issue previously identified by the Appellate Division; namely, whether the plaintiff was, in fact, "led to believe that his accrued compensatory leave benefits could be used after termination to provide a continuing paycheck and payroll benefits" (*Andruzzi v. County of Nassau, supra*, at 608)(*see also*, *Kornfeld v. County of Nassau,* ___Misc3d___, *affd*, 27 AD3d 743, 744 (Order of Galasso J.,

dated June 29, 2004, at 2).

The fact that the plaintiff was an "at-will" employee and/or that there is no express statutory or contractual authority supporting a post-termination award of accrued compensation time – as the defendants repeatedly point (Defs' Brief at 3-5; 24-25) – while correct (*cf., Smalley v. Dreyfus Corp.*, 10 NY3d 55, 58 [2008]), is not determinative. The plaintiff does rely upon explicit statutory or contractual authority, and in any event, the equitable principle applied by the Appellate Division allows recovery absent such express authority (*see e.g., Kornfeld v. County of Nassau, supra,* 27 AD3d 743, 744; *Garrigan v. Incorporated Village of Malverne, supra,* 12 AD3d 400, 401).

The Court is also unpersuaded by the County's argument that the equity-based doctrine relied on by the Appellate Division is inapplicable as a matter of law because the plaintiff was able to utilize portions of his accrued compensation time prior to discharge (*cf., Rubinstein v. Simpson, supra,* 109 AD2d 885, 886). There is nothing in the Appellate Division's holding which would suggest that the plaintiff's pre-termination ability to use compensation time would preclude him from recovering the value of the remaining, unpaid benefits which he was denied.

Although a previously issued order resolving a CPLR §3211 motion is not necessarily determinative or "law of the case" with respect to a subsequent, post-discovery summary judgment motion such as those made at bar (*e.g., Mobarak v. Mowad*, 55 AD3d 693, 865; *Thompson v. Lamprecht Transport*, 39 AD3d 846; *Del Castillo v. Bayley Seton Hosp.*, 232 AD2d 602, 604), the Appellate Division sustained the plaintiff's remaining claims precisely because he was allegedly assured that his "accrued compensatory leave benefits could be used *after termination* to provide a continuing paycheck and payroll benefits" (*Andruzzi v. County of Nassau, supra*, at 608 [emphasis added]; *Kornfeld v. County of Nassau, supra,* 27 AD3d 743, 744; *Clift v. City of Syracuse, supra* , 45 AD2d 596).

Similarly unavailing is the County's attempt to distinguish the Fourth Department's holding in *Clift v. City of Syracuse, supra* – a leading, pro-employee accrued benefits case also cited by the Appellate Division. In *Clift,* while the discharged employee was "rarely able to use" to use his yearly, accrued

vacation time during his employment (45 AD2d at 597), *Clift* does not hold that an employee's pre-discharge ability to make some use of accrued benefits automatically precludes him or her from asserting an equity-based claim to accrued, but unused benefits upon termination (*Clift v. City of Syracuse*, *supra*, 45 AD2d 596, 597 *see also*, *Kornfeld v. County of Nassau, supra,* 27 AD3d 743, 744 *cf., Rubinstein v. Simpson, supra*, 109 AD2d at 888; *Grishman v. City of New York, supra,*183 AD2d 464, 465).

The Court further notes that in their brief on the prior appeal, the County also attempted to distinguish *Clift* – arguments which the Appellate Division apparently found to be unpersuasive, since it cited *Clift* with approval in further support of its holding (*Andruzzi v. County of Nassau, supra*, at 608; County Brief on Appeal at 10-16 *see also* , *Kornfeld v. County of Nassau, supra,* 27 AD3d 743, 744; *Garrigan v. Incorporated Vil. of Malverne, supra*, 12 AD3d 400; *May v. Board of Educ. of Ballston Spa Cent. School Dist.,* 170 AD2d 920; *Alberti v County of Nassau*, ___Misc3d___, NYLJ, September 7, 2006, at 24, col 3 [Supreme Court, Nassau County 2006]).

Nevertheless, as this Court reads the Appellate Division's decision, the Second Department did not hold that the plaintiff – an "at-will" employee – generally possessed a constitutional property right to "continued employment as a Deputy County Attorney" (Andruzzi Opp. Aff., ¶ 5). Rather, the Appellate Division's narrowly framed holding – and its sole rationale for reinstating the previously dismissed, "constitutional" claims – was that the plaintiff had acquired a property right in the accrued, but then unused compensation time he had accumulated, but which he was precluded from "use[ing] after termination * * *" (*Andruzzi v. County of Nassau, supra,* at 608).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489), and credibility determinations should not be made on the motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Lawson v. Rutland Nursing Home, Inc.,* 65 AD3d 572; *Pearson v. Dix McBride, LLC*, 63 AD3d 895). Further, and "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its

opponent's proof, but must affirmatively demonstrate the merit of its claim or defense'" (*Fromme v. Lamour*, 292 AD2d 417, *quoting from*, *George Larkin Trucking Co., v. Lisbon Tire Mart*, 185 AD2d 614, 615 *see generally*, *Vittorio v. U-Haul Co.*, 52 AD3d 823; *Pappalardo v. Long Island R. Co.*, 36 AD3d 878).

With respect to that branch of the plaintiff's cross motion which is for relief pursuant to CPLR §3212[g], the Court notes that in 2007, the plaintiff made the very same type of application, which this Court denied (Order of Martin, J., dated December 17, 2007; [Famighetti [Opp] Aff., Exh., "U"]). In denying the motion, this Court determined that the papers submitted failed to establish the plaintiff' s entitlement to the discretionary relief sought under CPLR§3212[g], *i.e.*, an order "specifying * * *facts * * * deemed established for all purposes in the action" (CPLR §3212[g]).

A review of the documents now submitted in support of the plaintiff's latest application, reveals that the proposed order attached to the cross motion is, in large part, word-for-word identical to the order previously submitted and rejected by this Court (*see*, Famighetti [Opp] Aff.,¶¶ 4-8, *compare,* Exhs., "T" *with* "S"). Under these circumstances, the Court declines to revisit its previously issued determination and, in any event, concludes in its discretion that the current record similarly fails to support an award of relief pursuant to CPLR §3212[g](*see,* Order of Martin, J., dated December 17, 2007, at 2).

Lastly, after reviewing the record the Court finds that the imposition of sanctions upon the plaintiff is not warranted (22 NYCRR § 130-1.1).

The Court has considered the parties' remaining contentions and concludes that neither movant has established entitlement to the sought upon their respective applications.

Accordingly, it is,

ORDERED the motion pursuant to CPLR §3212 by the defendants, County of Nassau, Lorna Goodman, "Jane" Fineman, Elizabeth Botwin and Thomas R. Suozzi, for summary judgment dismissing the plaintiff's complaint is denied, and it is further,

ORDERED that cross-motion by the plaintiff, Joseph C. Andruzzi,

pursuant to CPLR §3212[g] and for partial summary judgment on his seventh, fifteenth and sixteenth causes of action, is denied.

The foregoing constitutes the decision and order of the Court.

SO ORDERED.

A.J.S.C.

Dated: December 18, 2009