

**Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME,
AFL-CIO v Town of Riverhead**

2010 NY Slip Op 30709(U)

March 19, 2010

Supreme Court, Suffolk County

Docket Number: 44050/2008

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

CIVIL SERVICE EMPLOYEES
 ASSOCIATION, INC., LOCAL 1000,
 AFSCME, AFL-CIO, SUFFOLK COUNTY
 LOCAL 852, TOWN OF RIVERHEAD UNIT,

Plaintiff,

-against-

TOWN OF RIVERHEAD, TOWN OF
 RIVERHEAD BOARD OF TRUSTEES,
 TOWN OF RIVERHEAD WATER DISTRICT,

Defendants.

ORIG. RETURN DATE: MARCH 6, 2009
 FINAL SUBMISSION DATE: MAY 28, 2009
 MTN. SEQ. #: 001
 MOTION: MG

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Upon the following papers numbered 1 to 8 read on this motion _____
TO DISMISS

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in
 Opposition and supporting papers 5, 6; Replying Affirmation and supporting papers 7, 8;
 it is.

ORDERED that this motion by defendants, TOWN OF RIVERHEAD, TOWN OF RIVERHEAD BOARD OF TRUSTEES, and TOWN OF RIVERHEAD WATER DISTRICT (collectively "defendants"), for an Order, pursuant to CPLR 3211 (a) (5) and (7), dismissing the complaint herein, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition to the instant application from plaintiff CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. ("plaintiff"); and it is further

ORDERED that plaintiff's request for leave to amend its complaint to change an incorrect date recited therein, is hereby **DENIED** in the absence of a proper application for such relief.

This is an action sounding in breach of contract, wherein plaintiff alleges that defendants violated the terms of a Stipulation, dated April 22, 2004 ("Stipulation"), by which the parties had resolved a prior contract grievance under a collective bargaining agreement by and between the "TOWN OF RIVERHEAD" and "CSEA, Local 1000 AFSCME, AFL-CIO," made and entered into on August 1, 2004, and effective January 1, 2004 through and including December 31, 2007 ("CBA"). Plaintiff alleges, in paragraph "9" of its verified complaint, that "two employees were appointed in September 2006 as Water Treatment Plant trainees and were then hired as permanent Water Treatment Plant Operators on June 15, 2006. At no time were the more senior Water Treatment Plant Operators given an opportunity to express their preference to work a weekend day or not."¹ Plaintiff further alleges, in paragraph "12" of its complaint, that "[t]he Defendants, in refusing to comply with the [Stipulation] and in failing to allow senior Water Treatment Plant II Operators first preference to choose not to work a weekend day, have violated the [Stipulation], entered into by Plaintiff and Defendant and said violation constitutes a breach of contract thereof." In sum, plaintiff claims that defendants violated the Stipulation and CBA by failing to give first preference to senior Water Treatment Plant II Operators with respect to the right to refuse to work weekend assignments.

Defendants have now filed the instant motion to dismiss plaintiff's complaint in its entirety, arguing, among other things, that plaintiff failed to commence this action within the applicable eighteen (18) month statute of limitations provided by Town Law § 65 (3), and that plaintiff failed to exhaust its administrative and contractual remedies under the CBA. Defendants argue that contrary to plaintiff's contention, the Stipulation is devoid of any provision by which Water Treatment Plant II Operators have seniority rights over Water Treatment Plant I Operators. Defendants contend that pursuant to the Stipulation, seniority preference for work schedules applies only within each separate Water Treatment Plant Operator job title.

Specifically, the Stipulation provides in pertinent part:

1. The Water District will schedule weekend work as follows:
 - a. Upon employment of any additional Water Treatment Plant I Operators, the most senior Water Treatment Plant I Operator (seniority being determined based upon length of service in that title), who is regularly scheduled to work a Saturday or Sunday

As will be discussed more fully, *infra*, by affirmation in opposition to the instant application plaintiff seeks to amend its complaint to correct an alleged error in the date of permanent hire of the two employees. Plaintiff indicates that the correct date of permanent hire is June 15, 2007.

will have first preference to choose not to work a weekend day. Newly promoted Water Treatment Plant I Operators, following a six month training period, may have a weekend as a part of their regularly scheduled work week.

b. Upon employment of additional Water Treatment Plant II Operators, the most senior Water Treatment Plant II Operator (seniority being determined based upon length of service in that title), who is regularly scheduled to work a Saturday or Sunday will have first preference to choose not to work a weekend day. Newly appointed Water Treatment Plant II Operators, following a six month training period, may have a weekend as a part of their regularly scheduled work week.

(Stipulation, ¶ [1] [a] and [b]).

Based upon the foregoing, defendants argue that the two Water Treatment Plant employees hired in September of 2006 were eligible to work weekends beginning in March of 2007, following their six-month training period. Plaintiff has conceded this argument. As no weekend work schedule accommodations were allegedly offered to the more senior Water Treatment Plant Operators at that time, defendants contend that plaintiff's cause of action accrued in March of 2007. Defendants allege that when the complaint was filed on December 11, 2008, more than eighteen (18) months had elapsed since the accrual of the claim, thereby rendering this action untimely pursuant to Town Law § 65 (3).

Further, defendants argue that plaintiff failed to exhaust the contractual and administrative remedies provided by the CBA for grievances arising thereunder, namely a three-step procedure culminating in binding arbitration. As such, defendants similarly contend that plaintiff's claim is barred. In addition, defendants allege that plaintiff's claim against defendants TOWN OF RIVERHEAD BOARD OF TRUSTEES and TOWN OF RIVERHEAD WATER DISTRICT must be dismissed based upon lack of privity of contract. Defendants allege that the TOWN OF RIVERHEAD BOARD OF TRUSTEES and the TOWN OF RIVERHEAD WATER DISTRICT are not parties to the CBA or the Stipulation. Accordingly, defendants claim that plaintiff lacks privity of contract with these defendants and therefore cannot assert a claim against them for breach of contract.

In opposition, plaintiff alleges that this action was timely commenced, and that the action is not barred by plaintiff's failure to exhaust administrative remedies. Plaintiff argues that there is an error in the date of hire recited in the

complaint, and that if a requested amendment is granted, the action would be timely. Plaintiff alleges that the complaint erroneously indicates that the date of permanent hire for the two new employees was June 15, 2006, whereas the actual date is June 15, 2007, which is the date plaintiff alleges the cause of action accrued. Moreover, plaintiff claims that the action is based upon a violation of the Stipulation, not the CBA, which does not contain a provision concerning the method of resolving a dispute arising thereunder. The Court notes that plaintiff has not refuted defendants' claim of lack of privity of contract between plaintiff and defendants TOWN OF RIVERHEAD BOARD OF TRUSTEES and TOWN OF RIVERHEAD WATER DISTRICT.

A defendant may move to dismiss an action as time-barred, pursuant to CPLR 3211 (a) (5), based upon the running of the applicable statute of limitations (see CPLR 3211 [a] [5]). When a defendant moves to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

On this record, the Court is unable to determine whether plaintiff's sole cause of action for breach of contract against defendants is time-barred by the eighteen (18) month statute of limitations applicable to contract actions against towns (see Town Law § 65 [3]; *Schirmer v Town of Harrison*, 294 AD2d 347 [2002]). Plaintiff's complaint recites that two "employees" were originally "appointed" in September of 2006 as Water Treatment Plant "trainees," and were subsequently "hired" as permanent "Water Treatment Plant Operators" on June 15, 2006. However, plaintiff fails to indicate whether these trainees were hired as Water Treatment Plant I Operators or Water Treatment Plant II Operators on June 15, 2006. Thus, it is unclear to the Court when these two employees began "employment" for the purposes of the Stipulation. Although plaintiff now contends that the true date of permanent hire was June 15, 2007, and seeks to amend its complaint as such, plaintiff's request must be **DENIED**, as plaintiff failed to seek such affirmative relief either by prior motion on notice to defendants or by cross-motion in response to the instant motion (see CPLR 2214; 2215).

In any event, plaintiff concedes that the new employees were eligible to work weekends in March of 2007. A breach of contract cause of action accrues, and the statute of limitations begins to run, upon the occurrence of the breach (see e.g. *County of Rockland v Kaeyer, Garment & Davidson Architects, P.C.*, 309 AD2d 891 [2003]). The Court finds that the essence of this dispute, as framed by plaintiff, is whether the more senior Water Treatment Plant Operators were denied the opportunity to express their preference not to work a weekend

day after two new employees were hired in September of 2006. As such, it appears that the date of accrual was March of 2007, after the employees completed a six-month training period. Eighteen months hence from March of 2007 was September of 2008, and this action was commenced on December 11, 2008, beyond the statute of limitations provided by Town Law § 65 (3).

Even assuming, *arguendo*, that this action was timely, the Court finds that plaintiff failed to state a cause of action for breach of contract against defendants. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (see *e.g.* *Flomenbaum v New York University*, ___ AD3d ___, 2009 NY Slip Op 8975 [1st Dept]; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360 [Sup Ct, Nassau County 2008]). In order to survive a motion to dismiss for failure to state a cause of action, a complaint alleging breach of contract need only contain statements sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action; such complaint is not required to meet any heightened level of particularity in its allegations (see CPLR 3013, 3016, 3211 (a) (7); *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2009]).

Initially, the Court finds that plaintiff's claim against defendants TOWN OF RIVERHEAD BOARD OF TRUSTEES and TOWN OF RIVERHEAD WATER DISTRICT must fail based upon lack of privity of contract, as it is undisputed that these two defendants were not parties to the CBA or the Stipulation. Next, plaintiff's complaint paraphrases and misstates the language of the Stipulation by combining two paragraphs, subparagraphs (a) and (b) of paragraph (1) cited above, as follows:

Upon employment of any additional Water Treatment Plant I (or II) Operators, the most senior Water Treatment Plant Operator, who is regularly scheduled to work a Saturday or Sunday will have first preference to choose not to work a weekend day. Newly promoted Water Treatment Plant I (or II) Operators, following a six month training period, may have a weekend as a part of their regularly scheduled work week

(Plaintiff's Verified Complaint, November, 2008, ¶ [8]).

A review of the above reveals that plaintiff combined the two separate provisions of the Stipulation relating to Water Treatment Plant I

Operators and Water Treatment Plant II Operators, and failed to include the parenthetical appearing in both provisions concerning how seniority is determined. The Court notes that the CBA and Stipulation conflict with respect to the definition of seniority, as the CBA provides that “[s]eniority shall be computed from the date of employment” (CBA, Art. VI, [2]), while the Stipulation provides that seniority is “based upon length of service in that title” (Stipulation, ¶ [1] [a] and [b]). The two separate paragraphs in the Stipulation insure that Plant I Operators have seniority rights over less senior Plant I Operators, and Plant II Operators have seniority rights over less senior Plant II Operators. As discussed, plaintiff’s complaint alleges that defendants failed to allow senior Water Treatment Plant II Operators first preference to choose not to work a weekend day. However, plaintiff fails to allege that additional Water Treatment Plant II Operators were employed, and that the most senior Water Treatment Plant II Operator who was regularly scheduled to work a Saturday or Sunday was not given first preference to choose not to work a weekend day. There is no indication anywhere in this record that either new employee held the title of Water Treatment Plant II Operator during the applicable time period. Thus, upon favorably viewing the facts alleged in plaintiff’s verified complaint, and affording plaintiff “the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff’s complaint fails to state a breach of the Stipulation.

For the reasons delineated hereinabove, defendants’ motion to dismiss plaintiff’s complaint is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: March 19, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court