

Plummer v Quinn

2010 NY Slip Op 31656(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 110813/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. M. d. v.
Justice

PART 11

Plummer, Viola

INDEX NO. 110813109

MOTION DATE ~~5/27/10~~ 2/4/10

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Quinn, Christine

The following papers, numbered 1 to _____ were read on this ^{P. filed} motion to/for Article 78 relief

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{petition} is decided in accordance with the annexed memorandum Decision Order + Judgments.

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 24, 2010

[Signature]
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: PART 11

-----X
VIOLA PLUMMER,

Index No.: 110813/09

Petitioner,

-against-

CITY COUNCIL SPEAKER CHRISTINE QUINN, THE
CITY OF NEW YORK,

Respondents.

-----X

JOAN A. MADDEN, J.

FILED
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NEW YORK

In this Article 78 proceeding, Petitioner Viola Plummer ("Plummer") seeks to compel defendants New York City Council Speaker Christine Quinn ("Quinn") and City of New York ("the City") to reverse an action taken by Quinn in firing Plummer, to reinstate Plummer to her position as Chief of Staff for Council member Charles Barron, and to pay plaintiff monetary damages. Defendants cross move to dismiss the petition as untimely and as barred by the doctrine of res judicata. For the reasons stated below, defendants' cross motion is granted.

BACKGROUND

Plummer was the Chief of Staff for New York City Council member Charles Barron from September 2005 through July 9, 2007. Christine Quinn is the Speaker of the City Council of New York. This proceeding arises out of Plummer's termination by Quinn on July 9, 2007 as a result of comments she made before and after a City Council meeting held on May 30, 2007 debating and voting on the re-naming of a section of Gates Avenue in the Bedford-Stuyvesant section of Brooklyn after "Sonny Abubadika Carson," an African-American political activist. During the debate and vote, which led to spontaneous comments from throughout the chambers,

Plummer “shouted out ‘that’s a lie’ and ‘liar’ in response to Council member Nelson and Respondent Quinn, who she believed were making false comments about and were assassinating the character of her late friend and comrade in struggle Sonny Abubadika Carson.” Petition ¶ 24.

Following the meeting, Plummer gathered with a group of people, including the media, on the steps outside of City Hall to discuss the events of the meeting and commented that because Council member Leroy Comrie had abstained from voting in favor of naming the street after Carson, “his political aspirations to be Queens Borough President were over, even if it meant ‘assassinating’ his ‘ass.’” Petition ¶ 27. Plummer went on to state that she was talking about ‘assassinating’ Comrie’s political career.

On June 28, 2007, Speaker Quinn’s Chief of Staff, Charles Meara gave Plummer a letter, which stated that as a result of Plummer’s comments during the meeting and after, she was suspended without pay for six weeks. The letter went on to specify terms of conduct that Plummer must follow and indicated that if she did not acknowledge and agree to the terms of the letter, she would be terminated. The next day, on July 29, Plummer filed an action in the United States District Court for the Southern District of New York against Quinn alleging her First Amendment rights and her Fourteenth Amendment due process rights were violated and that Quinn violated 42 U.S.C. § 1981 and her equal protection rights. In addition, Plummer alleged state causes of action for defamation and the intentional infliction of emotional distress.

After the federal action was filed, the City Council revised the June 28, 2007 letter sent to Plummer following discussions with the parties and the District Court Judge in an attempt to resolve the federal action. The revised letter required Plummer to agree not to engage in further disruptive action. Plummer refused to sign the letter. On July 9, 2007, Quinn through her Chief of Staff sent Plummer a letter terminating her employment.

Following her termination, Plummer amended her complaint in the federal action to add the City as a party. The amended complaint removed all the procedural due process claims and common law state claims but added claims under the parallel provisions of the State constitution. After expedited discovery, defendants moved for summary judgment dismissing the complaint in its entirety.

By order dated January 24, 2008, the District Court granted defendants' summary judgment motion to the extent of dismissing the due process and discrimination claims but denied summary judgment as to the First Amendment claims. The defendants appealed to the United States Court of Appeals for the Second Circuit. On April 7, 2009, the Second Circuit reversed the District Court with respect to its denial of the motion to dismiss the First Amendment claims and remanded the action to the District Court for dismissal of the entire amended complaint.

On July 29, 2009, Plummer commenced this Article 78 proceeding. The petition alleges that Quinn acted outside of her authority in terminating Plummer, and that Quinn's actions and the City's implementation of the termination were violations of procedure, violations of the Rules of the City Council, arbitrary and capricious, or, in the alternative, abuses of discretion.

Respondents cross move to dismiss on the grounds that the petition is untimely and barred by res judicata. With respect to the timeliness issue, respondents argue that since Plummer was terminated on July 9, 2007, but did not commence this proceeding until July 29, 2009, the claim is barred by the four-month statute of limitations set forth in CPLR 217(1). Respondents further contend that as the federal action was decided "on its merits," the six month tolling provision in CPLR 205(a) is unavailable. Respondents also argue that based on the federal action, the doctrine of res judicata bars the petition.

Plummer responds that since neither the District Court nor the Second Circuit addressed the issue of whether Speaker Quinn acted outside her authority, the determination was not “on the merits,” so CPLR 205(a) is applicable. She contends that because she filed this proceeding within six months of the dismissal of the federal action, this proceeding is timely filed. She further argues that as the issue of whether Quinn acted outside her authority was never decided, she did not have “a full and fair opportunity to litigate the issue,” so the doctrines of res judicata and collateral estoppel are inapplicable.

DISCUSSION

Article 78 proceedings are subject to a four month statute of limitation period as provided by CPLR 217(1):

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.

CPLR 217(1). See DeMilio v. Borghard, 55 NY2d 216, 222 (1982) (affirming dismissal of action as time barred because it was brought more than four months from the date of termination). In cases involving administrative determinations, the statute of limitations begins when the party receives notice of the determination. Gruber v. New York State Division of Housing and Community Renewal, 151 AD2d 426, 428 (1st Dept 1989); See also, Edmead v. McGuire, 67 NY2d 714, 716 (1986). Here, Plummer was terminated and made aware of her termination on July 9, 2007. Therefore, Plummer was required to bring an Article 78 proceeding within four months, by November 7, 2007. Thus, as she did not commence this proceeding until June 28, 2009, it must be dismissed as untimely.

Moreover, contrary to Plummer’s position, the toll provided under CPLR 205(a) is not applicable here. CPLR 205(a) tolls the statute of limitations for six months after the dismissal of a prior action. It provides that:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Therefore, if an action arises out of the same occurrence or transaction or series of occurrences or transactions as a previous action that was dismissed for reasons other than by “voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits,” the statute of limitations will extend for six months after the first action ends. CPLR 205(a). See Gesegnet v. Hyman, 285 AD 2d 719, 721 (3rd Dept 2001) (extension of time for subsequent state action allowed under CPLR 205(a) because District Court had amended its opinion to indicate its dismissal was “without prejudice”). Cf. Caplan v. Winslett, 218 AD2d 148, 154 (1st Dept 1996) (CPLR 205(a) unavailable to subsequent state action as second action did not arise from “the same transaction or occurrence”).

As the dismissal of the federal action based on the summary judgment motion is a “final judgment on the merits,” the toll provided under CPLR 205(a) does not apply. See A.C. Green Electrical Contractors, Inc. v. SMG Const. Inc., 279 AD2d 287, 287 (1st Dept 2001) (plaintiff could not commence new action under CPLR 205(a) raising the same claims as prior action because summary judgment of first action was a “final judgment on the merits”). Plummer contends that as the issue of whether Quinn exceeded her authority was never reached, the federal action did not terminate “on its merits.” In support of her position, Plummer points to language of both the District Court and Second Circuit opinions, indicating that courts were not

addressing the issue. However, “[t]he proviso in CPLR 205 (a) that the toll is inapplicable when the prior action was dismissed on the merits is essentially a corollary of the principle of res judicata that ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.’” Yonkers Contracting Co., Inc. v. Port Authority Trans-Hudson Corp., 93 NY2d 375, 379 (1999), quoting O’Brien v. City of Syracuse, 54 NY2d 353, 357 (1981) (dismissal of prior action with prejudice precluded application of CPLR 205(a) to subsequent action notwithstanding that court in prior action did not adjudicate the merits of the breach of contract claim). Therefore, even if the federal courts did not reach the issue of whether Quinn was acting outside of her authority, as this action is based on the same occurrence or transaction or series of occurrences and transactions as the federal action, CPLR 205(a) is unavailable and the four month statute of limitations provided by CPLR 217(1) governs.

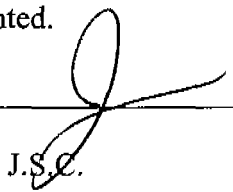
Accordingly, as this proceeding was not commenced until July 28, 2009, which is almost two years after the four month limitations period expired on November 7, 2007, this proceeding is barred by the four month statute of limitations and must be dismissed as untimely. Thus, the court need not reach whether this proceeding is also barred by the doctrine of res judicata.

CONCLUSION

In view of the above, it is

ORDERED that defendants’ cross motion to dismiss is granted.

Dated: June 24 2010



 J.S.C.

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JUL 02 2010
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