

Larmarca v Paterson
2010 NY Slip Op 33084(U)
October 26, 2010
Supreme Court, Nassau County
Docket Number: 26181/09
Judge: Thomas Feinman
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

WILLIAM R. LARMARCA, SUPREME COURT
JUSTICE,

Plaintiff,

- against -

GOVERNOR OF THE STATE OF NEW YORK
DAVID A. PATERSON, THOMAS P. DINAPOLI,
AS COMPTROLLER OF THE STATE OF NEW
YORK, THE STATE OF NEW YORK, THE NYS
OFFICE OF COURT ADMINISTRATION, and
HON. ANN PFAU, AS CHIEF ADMINISTRATIVE
JUDGE OF THE STATE OF NEW YORK,

Defendants.

TRIAL/LAS PART 15
NASSAU COUNTY

INDEX NO. 26181/09

X X X

MOTION SUBMISSION
DATE: 9/29/10

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

- Order to Show Cause..... X
- Notice of Motion and Affidavits..... X
- Memorandum of Law in Support of Motion to Dismiss..... X
- Affirmations in Opposition..... X
- Memorandum of Law in Support of Opposition..... X
- Reply Affirmations..... X
- Reply Memorandum of Law..... X

RELIEF REQUESTED

The plaintiff, by way of Order to Show Cause, obtained a Temporary Restraining Order, (TRO), by the Honorable Justice Galasso, dated December 23, 2009, restraining and enjoining the defendants and their officers, agents, servants and employees, from filing or causing to be filed, any retirement papers for the plaintiff, and from acting with regard to removing any of the powers of authorization afforded to the plaintiff.

The Second Department, by way of Decision and Order on Motion, dated December 31, 2009, granted the defendants leave to appeal those provisions of the order of the Honorable Justice Galasso, Supreme Court, Nassau County, dated December 23, 2009, which prohibited the defendants from requiring the plaintiff to retire as of December 31, 2009, whereby the Second Department stayed such provisions pending the hearing and determination of the appeal, or pending determination by the Supreme Court, Nassau County, the Order to Show Cause returnable on January 11, 2010, whichever comes first.

The plaintiff, by way of the instant proceeding, seeks (a) a declaratory judgment declaring the statutory provision of Article VI, Section 25(b), unconstitutional as a violation of the plaintiff's rights to the equal protection of the laws under the Federal and State Constitutions and violations of the State and Federal age discrimination statute; (b) judgment permanently enjoining the mandatory retirement of the plaintiff and directing the Chief Administrative Judge of the Court Administration not to enforce mandatory retirement of the plaintiff; (c) granting an order that this court retain jurisdiction pending such action by the New York State legislature as may be required to effectuate this Court's Judgment; (d) judgment declaring that plaintiff complete his full elective term which expires in 2015; and for such further and different relief which the Court may deem just and proper together with all costs and judgments.

The defendants submit opposition to the Order to Show Cause and then move, by way of notice of motion, for an order pursuant to CPLR §3211(a)(7) to dismiss the instant proceeding for failure to state a cause of action. The defendants submit a Memorandum of Law in support of their motion. The plaintiffs submit opposition to the defendants' motion, and a Memorandum of Law in support of plaintiff's opposition. The defendants submit a reply affirmation and a reply Memorandum of Law.

BACKGROUND

The plaintiff, William LaMarca, Supreme Court Justice, was duly elected to the Supreme Court of the State of New York in November of 2000, for a term of fourteen years. The term commenced on January 1, 2001 and therefore, would expire on December 31, 2015. The plaintiff was 67 years old at the time of his election.

Upon reaching the age of 70, on October 8, 2003, the plaintiff faced mandatory retirement pursuant to the New York State Constitution, Article VI, Section 25. In accordance with Article VI, Section 25(b), the plaintiff made an application, and was granted, a two year extension. Thereafter, three extensions were granted, *to wit*, on September 30, 2003, plaintiff was certified for two (2) additional years, on October 4, 2007, plaintiff was recertified for two (2) additional years, and on October 4, 2007, was recertified for two (2) additional years. Plaintiff reached the age of 76 and on December 31, 2009, was mandated to retire. Plaintiff argues that the mandatory retirement provision that terminated plaintiff's elected term five (5) years before its completion solely on the ground of age, constitutes age discrimination in violation of plaintiff's due process and equal protection rights under the New York State and United States Constitution.

PLAINTIFF'S ORDER TO SHOW CAUSE

The plaintiff, by way of the instant application, the Order to Show Cause, seeks an order staying the enforcement of Article VI, Section 25(b), of the New York State Constitution, which requires the plaintiff to retire, pending a hearing on the merits of this action, so that the plaintiff will be able to continue his term as Supreme Court Justice in the County of Nassau.

The plaintiff claims that "disparate treatment" applies to the plaintiff under the plain language of the Age Discrimination in Employment Act, (ADEA), as "but-for" his age, his employment has been terminated. (*Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 23 43). Plaintiff submits that he is forced to retire solely because of the mandate of the New York State Constitution, Article VI, Section 25. Plaintiff contends that "but for" the aforementioned mandate, plaintiff would be able to serve out the remainder of his fourteen (14) year term as a Supreme Court Justice in the County of Nassau.

Plaintiff acknowledges that under *Gregory v. Ashcroft*, 501 US 452, it has been held that judges are not a "suspect class" under ADEA. However, plaintiff, by way of counsel, respectfully sets forth that in the eighteen years that have transpired since *Gregory v. Ashcroft, supra*, it is "time for the courts and judiciary to recognize the change of work force in all occupations and that age discrimination, just as discrimination based upon race, sex, creed, nationality, origin, martial status or gender has no place in our society".

Plaintiff submits there is no reasonable explanation to exclude the plaintiff, a Supreme Court Justice, from the protection of the ADEA, as there are safeguards to protect the public should a judge be deemed incompetent or incapable for fulfilling his or her duties, *to wit*, the two year extension after the age of 70, pursuant to New York State Constitution, Article VI, Section 25(b). This avenue requires a justice to undergo a physical examination and withstand the scrutiny of the Nassau County Bar Association. Plaintiff also refers to the Justices of the Supreme Court of the United States as the "best examples that one's age does not render them incapable of continuing his or her judicial functions with great intellect". Plaintiff points out that Justice Stevens is 89 years old, Justice Scalia is 73 years old, Justice Kennedy is 73 years old and Justice Ginsberg is 76 years old. Additionally, Justice Spatt of the Eastern District of New York is approximately 86 years old.

The defendants, by way of letter, delivered by hand on December 23, 2009, submitted opposition to plaintiff's application for a TRO, and incorporated the arguments set forward in such letter in defendants' opposition to the Order to Show Cause. The defendants submitted that venue is improper, that plaintiff is not an "employee" within the meaning if ADEA, that rational basis, and not strict scrutiny, is the appropriate standard to determine whether equal provisions of the United State Constitution and the State Constitution have been violated in the context of an age-based classification, and that there is no basis for emergency relief.

The defendants, in opposition, assert that plaintiff has no likelihood of success in this action. The defendants submit that plaintiff has not shown irreparable harm in the absence of injunctive relief being granted during the pendency of this action, as plaintiff has been appointed to serve as a Judicial Hearing Officer, (JHO), from January 1, 2010 through December 31, 2010, and plaintiff will not be prevented from seeking money damages if ultimately successful in this action.

DEFENDANTS' MOTION TO DISMISS

The defendants move, by way of notice of motion, to dismiss this proceeding pursuant to CPLR §3211(a)(7), for failure to state of a cause of action. The defendants submit a Memorandum of Law in support of their motion, and in opposition to plaintiff's Order to Show Cause.

The defendants, by way of motion to dismiss, at the outset, argue that the primary issue in this action is whether this Court has the power to overrule the Court of Appeals - which answer is self-evident - as this Court cannot do so. The defendants state that plaintiff's constitutional challenges to the mandatory provisions for Supreme Court Justices has been rejected in *Diamond v. Cuomo*, 70 NY2d 388, and in *Maresca v. Cuomo*, 474 US 802. The defendants respectfully submit that this Court should grant the defendants' motion to dismiss pursuant to CPLR §3211(a)(7), "which will expedite the process by which the Court of Appeals can ultimately decide whether to re-examine the issues raised by plaintiff". In *People v. Keta*, 165 AD2d 172, the Second Department has stated that "we must temper our actions with restraint in deference to the Court of Appeals' role as the State's policy-making tribunal [as the] Court of Appeals is best suited to effectively weigh the policy concerns which must be considered in order to determine whether the recognition of a separate right under the State Constitution is, in fact, required".

The defendants provide that since age is not one of the expressly-enumerated protected classes, "race, color, creed or religion", proscriptions against age-related discrimination based upon State law must rely upon either the State Constitution's more general equal protection clause, the State Constitution's due process clause, or on statutory provisions. The defendants assert that none of these State law provisions entitle plaintiff to relief.

The defendants submit that plaintiff's claim that his mandatory retirement violates State's age discrimination statute, under Executive Law §296, also known as the Human Rights Law, is baseless as the State Constitution itself specifies the challenged retirement age. Additionally, the defendants argue that the applicable three year statute of limitation period has expired as it accrued on the date that an adverse employment determination is made, *to wit*, six years ago when plaintiff turned 70.

The defendants provide that the Court of Appeals has already expressly held that the provisions for mandatory retirement in Article VI §25(b) and Judiciary Law §23 do not violate the due process clause of the Fourteenth Amendment to the United States Constitution, and have outright rejected the federal equal protection claim. (*Maresca v. Cuomo*, 64 NY2d 242; *Diamond v. Cuomo*, 70 NY2d 338). As the Court of Appeals has upheld mandatory retirement for Supreme Court Justices against federal due process challenge, plaintiff's State due process challenge is unavailing. Additionally, defendants assert, the State equal protection clause is unavailing.

Defendants assert that plaintiff cannot rely on a claim under ADEA as he is not an employee, but rather, "elected to public office". (*Diamond, supra*; *EEOC v. State of New York*, 907 F2d 316; *Gregory, supra*).

As to plaintiff's argument that he is unable to serve the full term of this elected fourteen-year term, the defendants submit that the matter was addressed in *People v. Brundage*, 78 NY 403 where the Court of Appeals stated that "the mandatory retirement of a Judge does not create a vacancy, but, rather, causes the retiring Judge's term to expire". In any event, the defendants argue that the fourteen-year term provision of Article VI §6(c) and the certification provisions of Article VI §25 are to be construed as a whole, and all parts are to be read together to determine the legislative intent.

APPLICABLE LAW

New York State Constitution, Article VI § 25(b), provides, in pertinent part as follows:

"each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy..." (Emphasis added)

Thereafter, Article VI § 25(b) provides that a judge or justice:

"shall be certificated in the manner provided by law that the services of each judge or justice are necessary to expedite the business of the court and that eh or she is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six." (Emphasis added).

New York State Constitution, Article VI § 6(c), provides, in pertinent part, as follows:

"The justices of the Supreme Court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the Supreme Court shall be chosen by the electors of the judicial district in which they are to serve. The terms of the justices of the Supreme Court shall be fourteen (14) years from and including the first day of January next after their election." (Emphasis added).

New York State Constitution, Article VI § 20, provides, in pertinent part, as follows:

"No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the court of appeals, justice of the supreme court, our judge of the court of claims unless he or she has been admitted to practice law in this state for at least ten years. No person, other than one who holds such at the effective date

of this article, may assume the office of judge of the county court, surrogate's court, family court, a court for the city of New York established pursuant to section fifteen of this article, district court or city court outside the city of New York unless he or she has been admitted to practice law in the state at least five years or such greater number of years as the legislature may determine."

Judiciary Law § 23. Age limitation on term of judicial office, provides as follows:

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section, as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section, may continue in office during the term for which he was elected or appointed." (Emphasis added).

Judiciary Law § 115(2) Retired justices of the supreme court, provides as follows:

"Any such certification shall be valid for a term of two years beginning on the date of filing the certificate. At the expiration of such term the retired justice may be certified for additional terms of two years each by the administrative board upon findings of continued mental and physical capacity and need for his services. No retired justice may serve under any such certification beyond the last day of December in the year in which he reaches the age of seventy-six." (Emphasis added).

DISCUSSION

Here, the plaintiff, Justice William LaMarca, was mandatorily retired at the end of 2003, at 70 years old. Thereafter, he applied for, and obtained, three successive two-year appointments which ended December 31, 2009. The plaintiff was then compelled to submit his retirement papers in 2009. The plaintiff also applied for designation as a Judicial Hearing Officer on November 13, 2009 for the period beginning January 1, 2010 through December 31, 2010.

Plaintiff's claim that the mandatory retirement provision violates the State's age discrimination statute, Executive Law § 296, is untimely. The limitation period began to run in 2003, when plaintiff was mandatorily retired, "upon the time of the discriminatory [act], not upon the time at which the consequences of the [act] become most painful." (*Delaware State College v. Ricks*, 449 US 250). An employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to the plaintiff. (*Cardone v. Wilens & Baker, DC*, 286 AD2d 597; *Pinder v. City of New York*, 49 AD3d 280). Here, plaintiff's mandatory retirement occurred on December 31, 2003, the year in which he turned 70, Article VI § 25(b) and Judiciary Law § 115, the mandatory retirement and certification requirements, required the plaintiff, at the age of

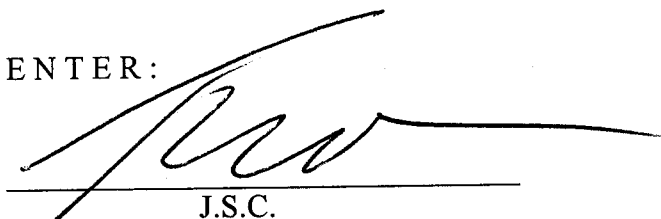
70, to retire. Although the plaintiff applied for, and obtained, three successive two year appointments which ended December 31, 2009, such appointments do not serve as a tolling of the statute. As already provided, an employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to the plaintiff, and not when its effects are felt. (*Cardone v. Wilens & Baker, P.C., supra*; *Delaware State College v. Ricks, supra*). Plaintiff's claim for violation of his due process and equal protection rights are likewise untimely. (*Board of Regents of The University of the State of New York v. Tomanio, 446 US 478*; *Delaware State College v. Ricks, 449 US 250*).

The plaintiff asserts several grounds as to why his mandatory retirement and inability to be a certified Justice after December 31, 2009 is unlawful, including that mandatory retirement constitutes age discrimination in violation of the Human Rights Law, (Executive Law §§296 *et seq.*), violations of his due process and equal protection provisions under the New York State and United States Constitutions, and asserts a claim under the Federal Age Discrimination in Employment Act. While plaintiff makes many interesting and compelling arguments worthy of further scrutiny by other Courts at the appropriate time this Court need not address those arguments since his claim is time barred.

CONCLUSION

In light of the foregoing, plaintiff's application is denied, and the defendants' application is granted, and therefore, the instant proceeding is dismissed.

ENTER:


J.S.C.

Dated: October 26, 2010

cc: Steven Cohn, Esq.
Andrew M. Cuomo, Attorney General of the State of New York

ENTERED

OCT 29 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**