[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 108091/2010

FINKEL,LEONARD

INDEX NO. _____

VS

NEW YORK CITY HOUSING

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

VACATE

CAL #39

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Petition ~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ~~ORDER~~ JUDGMENT

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/21/10

OCT 21 2010

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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LEONARD FINKEL,

Petitioner,

-against-

THE NEW YORK CITY HOUSING AUTHORITY and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ,

Respondents.

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Index No.	108091/10
Motion Date:	8/24/10
Motion Seq. No.:	001
Calendar No.:	39

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:	**For respondent NYDHR:**	**For respondent NYCHA:**
Douglas Rosenthal, Esq.	Caroline J. Downey, GC	Mindy Merlinger Blackstock, Esq.
The Rosenthal Law Firm, P.C.	State Div. of Human Rights	Sonia M. Kaloyanides, Esq.
350 Broadway, Suite 214	One Fordham Plaza, 4th floor	250 Broadway, 9th floor
New York, NY 10013	Bronx, NY 10458	New York, NY 10007
212-625-8300	718-741-8400	212-776-5019

By notice of petition dated June 17, 2010, petitioner seeks a judgment vacating the April 23, 2010 dismissal of his complaint for lack of jurisdiction issued by the New York State Division of Human Rights (DHR) in *Leonard A. Finkel v New York City Housing Authority*. By answer and verified answer dated respectively July 14, 2010 and July 26, 2010, respondents DHR and the New York City Housing Authority (NYCHA) oppose the petition and seek a dismissal and sanctions.

I. UNDISPUTED FACTS AND PROCEDURAL BACKGROUND

A. Petitioner's employment

Petitioner began working for respondent NYCHA on January 19, 1972 as a housing assistant, and remained employed there until his retirement in 1996. The job entailed interviewing applicants for public housing, evaluating their applications, and occasionally

inspecting housing property and conditions. (Verified Petition [Pet.], Exh. C at 4).

On February 18, 1998, petitioner unsuccessfully applied for a promotion to assistant manager. (*Id.* at 7). On March 22, 1988, he applied for sick leave and underwent a cataract operation. His sick leave application was approved on April 5, 1988, and was effective from March 28 through May 31, 1988. Petitioner returned to work on May 26, 1988, with a note from his doctor reporting that petitioner was able to return to work, but that "due to his extreme myopia," was still unable to perform "detailed work such as annual reviews." (*Id.* at 8). He was thereupon advised that he could not return to work absent an ability to perform all the aspects of his job, and that he could either extend his medical leave or report to work for full duty. (*Id.* at 8).

On June 6, 1988, NYCHA's personnel director asked petitioner's doctor whether petitioner was "presently able to perform the duties of a Housing Assistant which tasks include the completion of forms as well as the reading and interpretation of various materials. . ." (*Id.* at 8). By letter dated July 14, 1998, petitioner was informed that his approved leave had expired, and that if NYCHA did not hear from him before August 1, he would be subject to a disciplinary hearing and possible termination. (*Id.* at 8). Petitioner's doctor declined to respond to the letter from the director of personnel given the voluminous documentation required by NYCHA. (*Id.* at 8).

B. HUD complaint

On May 18, 1998, petitioner filed a complaint with the Office or Fair Housing and Equal Opportunity (FHEO) of the Office of Housing and Urban Development (HUD), alleging violations of section 504 of the Rehabilitation Act of 1973, specifically that his employer, a recipient of federal financial assistance from the HUD, discriminated against him on the basis of

his handicap. (Pet., Exh. C at 2). During the course of the ensuing investigation, on November 17, 1988, NYCHA requested that petitioner advise as to what settlement he would accept and what kind of accommodation or auxiliary aids he would need. In reply, petitioner stated that he needed only an enlargement of the font on the annual review forms and apartment inspection forms, and as a settlement he would accept: 1) no retaliation; 2) back pay to May 26, 2008; 3) reinstatement; 4) enlarged reading material; 5) training; 6) the assistant manager position; 7) reopening of the manager's position exam; and 8) the difference in pay he would have received as an assistant manager. Petitioner received a reply on January 10, 1989 from NYCHA's chairman, informing him that NYCHA was unable to determine the appropriate accommodation without an opthamological evaluation. (*Id.* at 7-8).

On January 19, 1989, HUD concluded that NYCHA had violated section 504 by denying petitioner, based on his disabilities, the opportunity to return to work despite the existence of reasonable accommodations to enable him to perform the essential functions of his job, and that NYCHA had no legitimate non-discriminatory reason for refusing to allow him to work. It thus found the following necessary to remedy the violations: reinstate petitioner to his position as housing assistant and provide him with re-training, provide him with back pay from May 26, 1998, and enlarge the forms that he would be required to review. It also found necessary that there be no retaliation or harassment. NYCHA was not found, however, to have violated section 504 in denying petitioner a promotion to assistant manager. (*Id.* at 9; Exh. D).

Petitioner and NYCHA were informed of their right to request a complete review of HUD's findings, so long as the requesting party brought new and material evidence. (*Id.*). If neither party did so, and an informal resolution could not be reached, there would be an issuance

of non-compliance, and NYCHA would be required to comply within 10 days or risk enforcement proceedings. (*Id.*).

Both parties requested review. (Pet., Exh. E). However, because neither presented new and material evidence, review was declined. (*Id.*). Accordingly, by letter dated September 19, 1989, HUD made a final and formal determination of NYCHA's non-compliance in violating section 504, and ordered that it had 10 days within which to comply or risk enforcement proceedings. (*Id.*).

C. Events subsequent to initial findings

In October 1989, petitioner refused to attend a two-week training session for housing assistants, claiming that it was unrelated to his job duties. Later that month, he stopped reporting for work on the basis that NYCHA had not paid him the back pay as ordered. (Verified Answer of NYCHA [NYCHA Ans.], Exh 2 at 12).

By letter dated December 18, 1990, NYCHA offered petitioner a settlement which it considered as providing him with full relief under section 504 and gave him 30 days within which to accept. As petitioner did not accept the offer within the 30-day period, by letter dated January 29, 1991, HUD dismissed his complaint and notified him of his right to file a civil action. (NYCHA Ans., Exh. 1).

D. Eastern District of New York case

Some time in 1990, petitioner filed suit in the Eastern District of New York arising out of the aforementioned events, additionally alleging religious discrimination. He alleged, *inter alia*, that NYCHA had discriminated against him based on his disability by refusing to reinstate him on May 26, 1988 and by failing to accommodate his visual impairment upon reinstating him on

June 12, 1989. (NYCHA Ans., Exh. 2).

In a memorandum and order dated August 18, 1993, the court granted NYCHA's motion for an order summarily dismissing all of petitioner's claims. Although the court acknowledged that petitioner was an "individual with handicaps" under Section 504, it found that he did not establish that he was "otherwise qualified" to perform his job functions, as his doctor "plainly indicated that [petitioner] could not perform detailed work" necessary for his position. The court also found that NYCHA had undertaken reasonable measures to accommodate petitioner's disabilities, but **was** unable to follow through because of petitioner's failure to cooperate. Petitioner's claims under New York Executive law were also found meritless. (*Id.*). The Second Circuit Court of Appeals affirmed (29 F3d 621 [2d Cir 1994]), and *certiorari* was denied by the United States Supreme Court (513 US 1093 [1995]).

E. Retirement

On December 14, 1996, petitioner retired from NYCHA and was provided a pension in the form of a life-time monthly allowance of $994.79. (Pet. ¶ 14, Exh. G).

F. 2010 administrative proceeding

On March 11, 2010, nearly 14 years after his retirement, and more than 20 years after HUD's determination that he was entitled to back pay, petitioner commenced an administrative proceeding with the DHR against NYCHA, pursuant to Executive Law, Article 15, alleging violations of Executive Law § 296 and acknowledging that the most recent date of discrimination occurred on December 31, 1988. (Pet., Exh. A). On the complaint form provided by DHR, he alleged discrimination in his employment because of his religion and visual handicap, and alleged the following acts of discrimination: refusal to re-employ, suspension, harassment or

intimidation, denial of accommodation for his disability, and violations of Section 504 of the 1973 Rehabilitation Act. Boxes for the indication of a denial of a promotion or pay raise, a denial of leave time or other benefits or a payment of a salary lower than others in the same title were not checked by petitioner. (*Id.*).

By letter dated March 15, 2010, DHR informed petitioner that it had no jurisdiction over his case as the last alleged act of discrimination occurred in 1988, and as it may only hear actions for events occurring within the last year. (Pet., Exh. B). Petitioner responded by letter received by DHR on March 26, 2010, claiming that he was within the statute of limitations because "Federal Law Public Law 111-2 of the 111th Congress states every time NYCHA has a payroll the window of opportunity of suing for discrimination opens." (Original Administrative Record [Record]).

Petitioner also complained that he had been falsely charged in an illegal hearing which resulted in his suspension, that NYCHA had refused to accommodate his visual handicap, and that upon his return from cataract surgery, it refused to send him to a doctor for evaluation and refused to give him work. (*Id.* at 1). He also alleged that HUD had failed to enforce its final determination, and that it had allowed NYCHA to dictate the terms of a settlement in his absence, and complained that NYCHA had never provided him with "back pay with salary and benefits" and that he continued to suffer public humiliation as a result. (*Id.* at 4). He also contended that a federal judge "ruled that the NYCHA was entitled to a hearing before funding was cut off." (*Id.* at 6).

On April 23, 2010, DHR issued a determination and order of dismissal for lack of jurisdiction, wherein it found that it had no jurisdiction to hear petitioner's complaint because it

was not filed within one year of the allegedly unlawful discriminatory practice as required by Executive Law § 297.5. It also informed petitioner that the statute of limitations under the Human Rights Law in state court is three years, and that, in addition to his to right to appeal this determination in New York State Supreme Court, he was entitled under Executive Law § 297.9 to bring a lawsuit in any court of appropriate jurisdiction as if there had been no administrative decision. (Record).

On June 17, 2010, petitioner filed the instant notice of petition in response to DHR's determination. By letter dated July 6, 2010, before submitting its answer, counsel for DHR advised petitioner's counsel that the action is time-barred and thus frivolous notwithstanding the Lilly Ledbetter Fair Pay Act of 2009 (Act), and barred by the federal decision. (Answer of DHR [DHR Ans.], Exh. 6). The correspondence includes copies of the 1993 federal decision dismissing petitioner's complaint. Counsel for DHR advises that if the action was not discontinued, sanctions would be sought pursuant to 22 NYCRR 130-1.1. (*Id.*).

II. CONTENTIONS

Petitioner contends that DHR's decision is arbitrary and capricious absent any recognition that the Act ensures that, for the purposes of the statute of limitations, an unlawful act occurs each time compensation is paid resulting from the discriminatory decision or practice. Specifically, he alleges, each monthly retirement check he receives is affected by the discriminatory decision not to give him back pay, and that therefore, his complaint was timely.

In response, respondents deny that the decision is arbitrary or capricious, and maintain that DHR properly determined that the action is time-barred, arguing that the Act does not apply because it does not amend New York State law, is inapplicable to claims already adjudicated, and

only applies to compensation discrimination which petitioner does not allege. Additionally, respondents contend that the action is barred because it was already adjudicated in a final decision in federal court, and request sanctions for frivolous litigation.

DHR also maintains that Executive Law § 298, not Article 78, constitutes the exclusive means of review here, that the 2010 complaint was properly dismissed as untimely, and that the discrimination complaint was found meritless in federal court.

III. ANALYSIS

A. New York Human Rights Law

Pursuant to Executive Law § 296, it is unlawful for an employer to discriminate against an individual on the basis of his disability, by refusing to hire or employ, or to discriminate in compensation, terms, conditions or privileges of unemployment. (Executive Law § 296[1][a]). A discriminatory practice includes "a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities," or "a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services," unless the allegedly discriminating party can show that steps to accommodate the disability would "fundamentally alter the nature of such facilities, privileges, advantages or accommodations," or a refusal to provide auxiliary aids and services "would result in an undue burden." (Executive Law § 296[c][i], [ii]).

An individual claiming unlawful discrimination may file a complaint with DHR, which, after serving a copy on the respondent, must conduct an investigation. (Executive Law §§ 296, 297.1). The complaint must be filed within one year after the alleged unlawful discriminatory

practice. (Executive Law § 297.5). If DHR finds that it has no jurisdiction, it must dismiss the complaint. (Executive Law § 297.2). If it finds that it has jurisdiction and there has been discrimination, it may undertake measures to eliminate it by conference, conciliation, and persuasion, and issue an order embodying the resulting agreement. (Executive Law § 297.3).

A complainant may challenge an administrative dismissal of a complaint by notice of petition and, where there has been no hearing, this court has jurisdiction. (Executive Law § 298). Except in extraordinary circumstances, the court may consider the evidence submitted to DHR division and objections raised for the first time. (*Id.*). Jurisdiction in this court is exclusive, subject to appellate review in the same manner as in a special proceeding. (*Id.*).

Alternatively, if DHR has dismissed the complaint as untimely, the complainant retains the right to bring a lawsuit in the appropriate jurisdiction as if no complaint had been filed with DHR. (Executive Law § 297.9).

The First Department has held that where "an exclusive review procedure by a specified court is expressly provided for by statute, a proceeding under Article 78 is not maintainable." (*Application of Maloff v City Commn. on Human Rights*, 45 AD2d 834 [1st Dept 1974]). However, as no party disputes that the standard of review is whether DHR's decision to dismiss petitioner's complaint was arbitrary or capricious, and given the regular application of this standard (*see eg, Rauch v New York State Div. of Human Rights*, 73 AD3d 930 [2d Dept 2010]; *Tribune Entertainment Corp. v New York State Div. of Human Rights*, 210 AD2d 11 [1st Dept 1994]; *Matter of Arcata Graphics Co. v New York State Div. of Human Rights*, 175 AD2d 663 [4th Dept 1991]), the petition is deemed properly brought and will be reviewed pursuant to the agreed upon standard.

B. Statute of limitations

Claims under New York Human Rights Law must be brought within three years of the alleged discriminatory act. (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 307 [1983]; *Clauberg v State of New York*, 19 Misc 3d 942, 948 [Ct Cl 2008]). Discrete actions, including those alleging discriminatory pay decisions, accrue on the date that the wrongful act occurs (*Clauberg*, 19 Misc 3d at 948-949]).

Petitioner's claim of timeliness depends on the Lilly Ledbetter Fair Pay Act of 2009, which extends the limitations period for certain discrimination claims under federal law where the aggrieved party continues to suffer the effects of a discrimination decision in the form of continuing lost wages. (*Siri v Princeton Club of New York*, 59 AD3d 309, 310 [1st Dept 2009]). The Act was designed to overrule legislatively the United States Supreme Court decision in *Ledbetter v Goodyear Tire and Rubber Co., Inc.*, 550 US 618 (2007), where the plaintiff had discovered that she had been receiving a lower salary for 20 years due to gender discrimination. Under Title 42 of the United States Code, a claim for discrimination must be filed with the EEOC within 300 days of the alleged discriminatory act. (42 USC § 2000e-5[e][1]), and the Court held that the period commenced at the time the decision was made to pay Ledbetter a discriminatory wage, and did not toll with each successive paycheck. Thus, absent any evidence of Goodyear's discriminatory motives within the 300 day period, Ledbetter's claims were dismissed as untimely.

In the wake of *Ledbetter*, stronger legislation combating employment discrimination was urged. (*See* White House Press Release, Office of the Press Secretary, Remarks by the President upon Signing the Lilly Ledbetter Bill [White House Press Release] [Jan. 29, 2009, available at

http://www.whitehouse.gov/the-press-office/remarks-president upon-signing-lilly-ledbetter-bill).

Congress promptly introduced a bill in Ledbetter's name which specifically amends section 706(e) of the Civil Rights Act:

> For the purposes of this section, an unlawful employment practice occurs, with respect to discrimination in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Respondents assert that the Act is not applicable to the instant state matter, does not apply to an action that does not allege discriminatory compensation, and does not apply retroactively or to an action adjudicated before the Act's effective date.

Although the Act, by its express language, applies only to claims under federal law, and the limitations period only to claims filed with the EEOC, New York's application of employment discrimination law generally duplicates federal law, including the calculation and tolling of the limitations period, even where the limitations period itself differs. (*See eg Cortes v City of New York*, 700 F Supp 2d 474, 486-487 [SD NY 2010]; *Quinn v JP Morgan Chase & Co.*, 12 Misc 3d 1160[A], 2006 NY Slip Op 50980[U] [Sup Ct, New York County 2006] [applying Supreme Court precedent determining timeliness]). Accordingly, courts applying state law have applied the Supreme Court's *Ledbetter* analysis (*Henry v Wyeth Pharm., Inc.*, 2007 WL 4526525, * 4 [SD NY 2007]; *Clauberg*, 19 Misc 3d at 948-949; *cf Staff v Pall Corp.*, 233 F Supp 2d 516, 522 [SD NY 2002] [applying federal precedent to statute of limitations under New York Human Rights Law]), and have since assumed that analysis under the Act applies to state cases (*Grant v Pathmark Stores, Inc.*, 2009 WL 2263795 [SD NY 2009]; *Siri*, 59 AD3d 309, 310).

As amended, the Act extends the limitations period "when an individual becomes subject to a discriminatory compensation decision or *other practice* is adopted." (42 USC § 2000e-5[e][3][A] [italics added]). It thus contemplates a cause of action for a discriminatory decision that continues to affect an individual each time compensation is paid, even if the action is not based on a discriminatory compensation decision. Consequently, the Act may not apply exclusively to compensation discrimination claims.

Although the Act has been held to have retroactive effect "to all claims of discrimination in compensation under Title VII . . . that are pending on or after May 28, 2007,"(*Grant*, 2009 WL 2263795 at * 9), it is not and could not have been intended to affect cases which have already been adjudicated (*Aneja v M.A. Angeliades, Inc.*, 2010 WL 199681, * 3 [SD NY 2010]), as President Obama acknowledged when signing the law, noting that it was too late for the Act to provide a remedy for the litigant for whom it was named. (Press Release). Nor could Congress, in the absence of express language, be presumed to have intended to compel state courts to reopen cases that had been adjudicated in state or federal courts. (*See Aneja*, 2010 WL 199681 at * 3 [declining to reopen case following Fair Pay Act; "Congress cannot legislatively overrule decisions made by the courts"]). As the Supreme Court has held that Congress has no authority to mandate that Article III courts reopen cases previously adjudicated in federal courts (*id.*), then Congress could not and would not compel state courts to do so. And, as states enjoy great latitude in structuring their courts free from interference from Congressional legislation (*Howlett by Howlett v Rose*, 496 US 356, 372 [1990]), Congress could not have intended to abrogate New York's bar on relitigating matters which have been finally adjudicated.

Moreover, the decision not to exercise jurisdiction over a 20-year-old claim, when

measured by the standard of arbitrariness and capriciousness, should be upheld. Here, DHR informed petitioner that it could not hear his complaint, as an action must be brought within one year of the last act of discrimination, and even advised petitioner as to his rights to proceed. DHR could have reasonably concluded that even under the Act the limitations period would not extend further, and even if it had sought to determine whether an extension was justified, petitioner provided it with an insufficient basis for doing so absent any indication in his complaint as to how the failure to provide back pay in 1988 continued to affect his retirement pay, and there were no facts before DHR, nor are any alleged here, even tending to prove that the decision not to pay petitioner back pay was due to discriminatory motives or that the retirement checks continue to be affected by a discriminatory decision. (*See Grant*, 2009 WL 2263795, * 9 ["no reasonable juror could find that the plaintiff has provided sufficient evidence of discriminatory pay"]).

C. *Res judicata*

Claims are barred or precluded where they had been brought and adjudicated in a final judgment on the merits in a prior proceeding, where the claims arise "out of the same factual grouping . . . even where the later claim is based on different legal theories or seeks dissimilar or additional relief." (*Latino Officers Ass'n v City of New York*, 253 F Supp 2d 771, 781 [SD NY 2003]; *Yoon v Fordham Univ. Faculty and Admin. Ret. Plan*, 263 F3d 196, 200 [2d Cir 2001]). Thus, where an action was decided on its merits in federal courts, the decision applies to new actions in state courts (*Bettis v Kelly*, 68 AD3d 578 [1st Dept 2009]), and to decisions of administrative bodies, so long as the party had a "full and fair opportunity" to litigate the issues (*Josey v Goord*, 9 NY3d 386, 390 [2007]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

All of the facts presented in this petition and to DHR have been adjudicated in federal court where each instance of alleged discrimination was addressed. As petitioner's federal action was commenced several years after the date from which he alleges he is owed back pay, he would have and should have been able to bring a claim for failure to pay in that action. His state law claims, which are identical to those advanced in his federal case, were found meritless. Although DHR's decision does not reflect that it considered that petitioner's claims had already been adjudicated in federal court, petitioner had not made DHR aware of the federal action. A remand to consider these issues would be futile, and would have the effect of rewarding petitioner for his own failure to disclose.

Sanctions are inappropriate.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition is dismissed.

This constitutes the decision and order of the court.

ENTER:

Barbara Jaffe, JSC

DATED: October 21, 2010
New York, New York

BARBARA JAFFE