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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

MEREDITH A. FEINMAN, RUTH MARKOVITZ, and ESTHER D. MILLER
Plaintiffs,

INDEX NO.: 007141/2010
MOTION DATE: 3/8/2011
MOTION SEQUENCE: 001

-against-

THE COUNTY OF NASSAU, JOHN CIAMPOLI, Nassau County Attorney, and GEORGE MARAGOS, Nassau County Comptroller
Defendants.

The following papers read on this motion:

Notice of Defendants' Motion to Dismiss, Lisa A. Cairo Affirmation in Support of Motion, Georgette Schiller Affidavit, and Exhibits 1
Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion 2
Lisa A. Cairo Reply Affirmation 3

PRELIMINARY STATEMENT

Defendants County of Nassau, John Ciampoli, and George Maragos move to dismiss the plaintiffs' Complaint under CPLR § 3211(a)(5) because the statute of limitations precludes a cause of action and under CPLR § 3211(a)(7) for failure to state a cause of action.

This action arises from allegations that the County of Nassau has failed to abide by Ordinance 543-1995, as currently amended . The plaintiffs claim that Sections 5.2 and 4.1 of the Ordinance, and the County's prior interpretation of the language "employees hired on or after," requires the County to determine the plaintiffs' contributions, if any, toward their health insurance plans, according to an "initial employment date" that gives the plaintiffs credit for their

prior public service to the State of New York. The Nassau County Comptroller has taken the position that Section 4.1 of the Ordinance, which requires that "employees hired on or after January 1, 2002" must contribute a portion of their pay toward their health insurance plans, applies to employees with an actual date of hire on or after January 1, 2002, regardless of any credit for prior public service that is available under Section 5.2 of the same Ordinance. On the other hand, the Nassau County Comptroller has interpreted Section 3.7 of the same Ordinance, which requires that "employees hired on or after April 1, 2000" are subject to certain limits with regard to accumulation of sick days, do not apply to employees with an actual hire date after April 1, 2000 but whose history of prior public service yields an "initial employment date" that is prior to April 1, 2000.

DISCUSSION

Defendants move to dismiss plaintiffs breach of contracts claims under CPLR § 3211(a)(5) on the ground that the statute of limitations precludes the plaintiffs' breach of contracts claims before April, 12, 2004. However, the plaintiffs concede that the Statute of Limitations would preclude them from asserting any damages from breach of contract before April 12, 2004, and therefore they have limited their claim of breach of contract to damages since April 12, 2004. This portion of defendants' motion is therefore moot.

Defendants also move to dismiss the Complaint under CPLR § 3211(a)(7) for failure to state a cause of action. When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction and the court must determine only whether the plaintiff has a cause for relief under any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass',. Inc.* 70 A.D.3d 928 [2d Dept. 2010]). Thus, a pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]). Conversely, allegations that state only legal opinions or conclusions, rather than factual statements, are not afforded any weight. (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]).

First Cause of Action for Unjust Enrichment

The plaintiffs challenge the Nassau County Comptroller's interpretation and application of the Ordinance as regards the plaintiffs' contributions to their health insurance that are required by the Ordinance. The plaintiffs allege that the contributions that the Nassau County Comptroller has taken from them and applied to their health insurance plans has "unjustly enriched" the county. However, the County has not "received any benefit, let alone unjust enrichment. As the Court of Appeals has indicated, the "essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*Paramount Film Dist. v. State of NY*, 30 NY2d 415, 421 [1972]). And, a claim for unjust enrichment or restitution will generally require consideration whether "a benefit has been conferred on the defendant under mistake of fact or law, [whether] the benefit still remains with the defendant, [whether] there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." (*Id.*)

The plaintiffs' contribution toward a small portion of their health insurance premium cannot be considered tortious or fraudulent. Moreover, it is not clear that the State or County has been inequitably conferred a benefit that it has retained. Like in *Paramount*, "the [plaintiffs' contributions] defrayed the cost of [plaintiffs' health insurance plan], a program which, at least, was intended to further the interests of both the [employees] and the public." (30 NY2d at 421-22). Plaintiffs have not stated a valid cause of action for unjust enrichment.

Second Cause of Action for Breach of Contract

The plaintiffs allege in a Second Cause of Action that plaintiffs' employment agreement with the County of Nassau incorporated the benefits conferred on County employees by the Ordinance in question. Thus, it is alleged that the County's charges to plaintiffs for a contribution toward their health insurance premiums was a violation of the terms and conditions of their employment agreements with the County of Nassau. Defendants do not challenge the legal validity of plaintiffs' cause of action for breach of contract, relying on their arguments with regard to the statute of limitations. As has already been addressed, the plaintiffs concede that the Statue of Limitations applies to their claims for breach of contract and they only claim damages

since April 12, 2004. The plaintiffs allegations state a valid cause of action for breach of contract.

Third Cause of Action for Declaratory Judgment

Under *NYC Health and Hosp. Corp. v. McBarnette*, 84 NY2d 194 [1994],[1] a cause of action for declaratory relief challenging an action of an administrative agency may be governed by Article 78 of the CPLR, even if it is not ostensibly brought as an Article 78 action. In this case, CPLR § 7803(3) authorizes judicial review of the Nassau County Comptroller's interpretation and application of the Ordinance for "an error of law... or abuse of discretion." Generally, a construction given to statutes and regulations by the agency responsible for their administration will be upheld if not irrational or unreasonable. (*Matter of Frishman v. Schmidt*, 61 NY2d 823, 825 [1984]). Such deference to an agency interpretation is particularly appropriate when the enabling legislation reflects an intent to delegate certain regulatory authority to the agency, or the legislation provides the agency some discretion in implementing the statute through its special expertise. In such cases, "abuse of discretion" is the appropriate standard for review. However, when the challenge to an agency's construction of a statute or regulation alleges a plain "error of law" and presents only a "question... of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency... [and] courts are free to ascertain the proper interpretation from the statutory language and legislative intent." (*Gaffney v. Village of Mamaroneck*, 21 AD3d 1031 [2d Dept. 2005]; *Matter of Rosen v. Pub. Empl. Rel. Bd.*, 72 NY2d 42, 47-48 [1988]).

In this case, there is little reason to conclude that the Nassau County legislature delegated to the Nassau County Comptroller any special discretionary or rule-making authority with regard to whether employees were "hired on or after January 1, 2002" and whether they were to be credited with prior public service under Section 5.2 of the Ordinance. The only question presented is whether it was "error of law" to conclude that the plaintiffs should not be credited

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[1] The decision also disapproved and disavowed the Court of Appeal's earlier decision in *Matter of Lakeland Water Dist. v. Onondoga Cty. Water Auth.*, 24 NY2d 400 [1969], which had held that Article 78 of the CPLR was not available to challenge "quasi-legislative" (as opposed to quasi-judicial) determinations by administrative agencies, and that such actions should be brought as declaratory actions. (84 NY2d at 203 n.1).

with prior public service under Section 5.2 of the Ordinance, in order to determine whether they should be considered "hired on or after January 1, 2002" for purposes of their contributions to their health insurance plans. The plaintiffs have stated a valid cause of action under CPLR § 7803(3) to challenge the Nassau County Comptroller's interpretation and application of the Ordinance.

The defendants' motion to dismiss the plaintiffs' Complaint is granted in part and denied in part, and further, it is ORDERED that plaintiffs' First Cause of Action alleging unjust enrichment is dismissed.

This constitutes the Decision and Order of the Court.

DATED: May 11, 2011

J.S.C.