

**Reid v Incorporated Vil. of Floral Park**

2011 NY Slip Op 31762(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 1981/11

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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MICHAEL REID,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FLORAL PARK,

Defendant.

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TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 1981/11  
Motion Seq. No.: 01  
Motion Date: 04/15/11  
**XXX**

**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition, Affidavit and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR §§ 3211(a)(5) and (7), 9801 and 9802, for an order dismissing plaintiff's Verified Complaint, in whole or in part, and moves, pursuant to CPLR § 325(d), for an order removing this action to Nassau County District Court. Plaintiff opposes the motion.

The instant matter is one based upon a breach of contract claim, in which plaintiff pleads a single cause of action alleging that defendant breached its contract with plaintiff by failing to pay the compensation plaintiff was allegedly due. The Summons and Verified Complaint were filed on February 9, 2011.

Defendant argues that plaintiff's Verified Complaint is devoid of any allegation concerning compliance with the Notice of Claim requirements of CPLR §§ 9801 and 9802 and, as such, plaintiff's Verified Complaint should be dismissed in its entirety for failure to state cause of action.

Defendant additionally argues that, "[e]ven assuming, arguendo, plaintiff's pleading deficiency can be overlooked and/or plaintiff is permitted leave to amend his complaint so as to plead compliance with the notice of claim requirement, his claims are largely time barred....in view of the requirement set forth in CPLR 9802 that a notice of claim must be filed with the village within one (1) year of the accrual of a cause of action against a village, plaintiff is precluded from pursuing his claim to the extent that he seeks purported annual salary deficiencies accruing prior to November 2, 2009. Indeed at no time prior to November 2, 2010 did plaintiff serve or file a Notice of Claim based upon the Village's purported violations of the subject agreement."

Defendant submits that it is its position that plaintiff is not really pursuing a singular breach of contract claim, but rather several distinct claims. It alleges that plaintiff's claim is that defendant breached the subject Agreement on an annual basis, between 1999-2010, by failing to pay plaintiff \$5,000.00 more than the highest ranking lieutenant. Defendant argues that, as such, plaintiff has failed to file timely Notices of Claim and is therefore barred from pursuing any claims for the purported breaches from 1999-2008.

Defendant further argues that the applicable statute of limitations served to preclude the majority of plaintiff's claims in this action. Defendant once again contends that plaintiff is alleging that defendant breached the subject Agreement on an annual basis from 1999 to 2010

and, as such, any claims based upon purported breaches from 1999 to 2008 are time barred.

Defendant also argues that plaintiff's Verified Complaint should also be dismissed to the extent that he is seeking reasonable attorney's fees. Defendant states, "[i]n this regard, it is well settled that attorney's fees generally are not awarded in the absence of an agreement between the parties providing for same, or by statute or court rule. Stated very simply, the agreement at issue in this action does not provide for attorney's fees. Nor does plaintiff's complaint cite to any statute or court rule that permits recovery of attorney's fees."

In opposition to the motion, plaintiff submits that defendant correctly asserts that plaintiff served defendant with its Notice of Claim on November 2, 2010. Plaintiff further submits that his discovery of defendant's breach of contract was "very random, and came in conversation with other lieutenants....Prior to this discovery, Plaintiff had no reason to suspect Defendant's breach."

Plaintiff argues that the absence of allegation concerning compliance with the Notice of Claim requirements of CPLR §§ 9801 and 9802 is not fatal to this action. In support of this argument, plaintiff relies upon the Court's decision in *Salesian Society, Inc. v. Village of Ellenville*, 41 N.Y.2d 521, 393 N.Y.S.2d 972 (1977). Plaintiff states, "[i]n the instant matter, since there is no issue with the filing of the notice of claim, just with the statement of compliance, Plaintiff, if the court prefers, will move to amend his Complaint. However, it is respectfully suggested that such an action would be an even greater offence to judicial economy than that proposed by the movant in the Salesian case."

Plaintiff additionally argues that no part of this action is time barred. Plaintiff states that "[d]efendant's position that Plaintiff is alleging separate causes of action per year of defendant's

breach is solely presented to aid Defendant's position, not to lead to a just conclusion of this matter. Defendant offers absolutely no legal basis for this position and it most certainly is not supported by the facts....Plaintiff brings only one cause of action, for breach of contract. Indeed this is the only course of prosecution appropriate under the Agreement, by its own terms, which state: 'The terms of this Agreement shall continue in full force for so long as Reid is appointed to and holds the Office of Commissioner of Police.' ...There is no provision that the binding nature of the Agreement is divisible year by year, as Defendant postures. Nor is the Agreement annually renewable, 'rolling' or in any other way designated to be anything but a singular agreement by both sides to fully perform its terms....Of course, because Plaintiff trusted Defendant and did not suspect Defendant's breach until it was inadvertently made known to him in July 2010, Plaintiff could not have acted sooner. However, setting aside the date of discovery, the matter should not be deemed to have accrued until July 2010 anyway, because Plaintiff, under contract with the Defendant, had not fully performed the terms of the Agreement until that date."

On a motion to dismiss pursuant to CPLR § 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory. *See Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300, 727 N.Y.S.2d 688 (2001).

With respect to defendant's argument that plaintiff is not really pursuing a singular breach of contract claim, but rather several distinct claims, the Court finds no merit to said argument. The contract/"Agreement" between plaintiff and defendant was not renewed on a yearly basis, but rather, as plaintiff argued, the terms of said Agreement were to continue in full

force for so long as plaintiff was appointed to and held the Office of Commissioner of Police. Said Agreement ended on or about June 2010, when plaintiff became aware that his tenure as Commissioner was to end. It was shortly thereafter, in approximately July 2010, that plaintiff became aware that, contrary to the terms of the Agreement (which mandate that he earn \$5,000.00 per year more than each of the lieutenants), he actually earned less than either lieutenant. It was upon further inquiry that plaintiff discovered that he has received less than either lieutenant from 1999 to the present date. Plaintiff commenced the instant matter for a single breach of contract cause of action on or about February 9, 2011, well within the statute of limitations and in compliance with CPLR §§ 9801 and 9802.

In moving for dismissal pursuant to CPLR § 3211(a)(5), a defendant must establish *prima facie* that a cause of action is time-barred. *See Philip F. v. Roman Catholic Diocese of Las Vegas*, 70 A.D.3d 765, 894 N.Y.S.2d 125 (2d Dept. 2010). Once the defendant establishes a *prima facie* case, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to timeliness. *See Lessoff v. 26 Court Street Associates, LLC*, 58 A.D.3d 610, 872 N.Y.S.2d 144 (2d Dept. 2009). Defendant failed to establish *prima facie* that plaintiff's cause of action was time-barred.

With respect to defendant's argument that plaintiff's Verified Complaint is devoid of any allegation concerning of compliance with the Notice of Claim requirements of CPLR §§ 9801 and 9802 and as such plaintiff complaint should be dismissed in its entirety for failure to state cause of action, the Court notes that compliance with the law governing liability of villages, which requires timely filing of a written verified claim, is a condition precedent to be *pleaded* and proved by the party bringing the breach of contract cause of action against the village (emphasis added). Plaintiff does not deny that he did not comply with said pleading


requirements, but instead relies on the Court's holding in *Salesian Society, Inc. v. Village of Ellenville*, 41 N.Y.2d 521, 393 N.Y.S.2d 972 (1977), which this Court does not find applicable to the instant matter. The Court in *Salesian Society, Inc. v. Village of Ellenville*, noted the "peculiar circumstances of this case." The issue that plaintiff had not pled or proved that it had served and filed a Notice of Claim was not raised by the parties at any time during the litigation of the matter (which included a trial of the matter), but rather was initiated by the Appellate Division on its own accord. The Appellate Division reversed the judgment that was rendered as a result of the trial and dismissed the Complaint on the ground that plaintiff had not pled or proven that it had filed a Notice of Claim. The Court held, "[m]oreover, though no notice had been filed and, consequently, there was no allegation to that effect in the complaint, the village never availed itself the statutory practice devices by which we now interpose the equivalents of the ancient common-law pleas in bar or in abatement or enter a general demurrer....More than that, in the entire six years between the start of the suit and the opening of trial, it in no way ever raised the matter of the notice at all, not at trial or on appeal."

In the instant matter, defendant raised the issue of plaintiff's failure to comply with the Notice of Claim requirements of CPLR §§ 9801 and 9802 at the outset of the action, prior to any preliminary conference even taking place. Plaintiff, indicated in his opposition, that he was aware of the pleading requirement and that he did not comply with said requirement. Plaintiff stated that, "[p]laintiff, if the court prefers, will move to amend his Complaint." The Notice of Claim requirements of CPLR §§ 9801 and 9802 are not a "preference of the Court," but rather mandated statutory requirements that must be followed. Despite the fact that plaintiff was aware that he should amend his Verified Complaint, he failed to cross-move to ask the Court for such relief. Consequently, the Court finds that plaintiff's Verified Complaint is devoid of any

allegation concerning compliance with the Notice of Claim requirements of CPLR §§ 9801 and 9802 and therefore, defendant's motion with respect to same is hereby **GRANTED** and plaintiff's Verified Complaint is dismissed upon these grounds.

For the record, plaintiff's request for attorney's fees and expenses would also be **DENIED**. In the absence of statutory or contractual authority, a party may normally not recover the costs of litigation. *See Plant Planters, Inc. v. Pollock*, 91 A.D.2d 1017, 457 N.Y.S.2d 890 (2d Dept. 1983); *Millman v. Brownlee*, 133 A.D.2d 221, 518 N.Y.S.2d 773 (2d Dept. 1987) *app. den.* 70 N.Y.2d 613, 524 N.Y.S.2d 431 (1987); *Hirschfield v. T.C. Sector, Inc.*, 132 A.D.2d 332, 521 N.Y.S.2d 436 (1<sup>st</sup> Dept. 1987).

This constitutes the Decision and Order of this Court.

ENTER:   
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DENISE L. SHER, A.J.S.C.  
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Dated: Mineola, New York  
June 21, 2011

**ENTERED**  
JUN 23 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE