Matter of Smith (Brenner)
2012 NY Slip Op 33718(U)
May 23, 2012
Supreme Court, New York County
Docket Number: 000557-12
Judge: Steven M. Jaeger

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the Matter of the Application of RENITA SMITH,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

DANIEL BRENNER, Superintendent of Schools, Roslyn Union Free School District, the BOARD OF EDUCATION OF THE ROSLYN UNION FREE SCHOOL DISTRICT, and the ROSLYN UNION FREE SCHOOL DISTRICT,

Respondents

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 000557-12
XXX
MOTION SUBMISSION
DATE: 4-4-12

MOTION SEQUENCE
NOS. 1 and 003

The following papers read on this motion:

Notice of Petition	X
Affirmation in Reply	X
Notice of Cross-Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Respondents' Memorandum of Law in Support of Cross-Motion	X
Verified Petition	X

This is an Article 78 proceeding wherein petitioner seeks to review and reverse a determination of the Board of Education of the Roslyn Union Free School District ("the Board") dated September 16, 2011 which terminated petitioner's employment. Petitioner also seeks a judgment ordering petitioner to be "reinstated into her former position of Account Clerk with all back pay and other benefits

otherwise due. . . ." Petitioner further requests that the proceeding be transferred to the Appellate Division on the issue of substantial evidence. (CPLR §§ 7803[4]; 7804[g]).

The Board cross-moves to dismiss the petition: pursuant to CPLR 3211(a)(5) on the grounds that petitioner is time-barred by the four month statute of limitations set forth in CPLR 217; and pursuant to CPLR 3211(a)(7) on the grounds that petitioner failed to serve the District, Board and Daniel Brenner with a notice of claim and failed to plead compliance with Education Law § 3813(1). The cross-motion also constitutes respondents' objections to transfer the instant proceeding pursuant to CPLR §§ 7804(f) and (g).

In or about October 2007, petitioner was hired to be an Account Clerk with the District. As an Account Clerk, petitioner was responsible for receiving documents and invoices from the District's vendors and ensuring that in turn, the District's claims auditor received these documents so the District could ensure that vendors were paid.

On May 17, 2011, Renita Smith was served with disciplinary charges pursuant to Civil Service Law § 75. The Statement of Charges contained nineteen (19) charges of alleged misconduct and/or incompetence.

On or about June 8, 2011, Renita Smith interposed an answer to the Statement of Charges and exercised her right to demand a hearing on said charges.

A hearing was held on June 9, 2011, June 30, 2011, July 7, 2011 and July 12, 2011 before Joseph E. Wooley, Hearing Officer. At the hearing, both sides presented witnesses and introduced evidence. A verbatim transcript of the proceedings was made.

On August 18, 2011, petitioner served the District Clerk, Donald Brenner, Superintendent; Joseph C. Dragone, Assistant Superintendent for Business and Susan Warren, Assistant Business Administrator with a notice of claim. This notice of claim provided, in pertinent part, as follows:

> The nature of claim is:
>
> > Violation of Title VII of the Civil Rights of Act of 1964, as amended (race discrimination)
> >
> > Violation of New York State Human Rights Law, New York State Executive Law § 296 (race discrimination)
> >
> > Arbitrary and capricious actions
> >
> > * * *
>
> The items of damage or injuries claimed are (do not state dollar amount):
>
> > Damage to professional career and reputation
> > Loss of salary and benefits

Physical and emotional pain and suffering
Emotional distress
Embarrassment
Humiliation
Attorney's fees

In a Report and Recommendation dated September 21, 2011, Hearing Officer Wooley found Renita Smith guilty of misconduct and/or incompetence with reference to all charges, except one, to wit: Charge 12. The Hearing Officer stated:

> "Having found the respondent guilty of eighteen of the nineteen charges preferred, it needs to be pointed out that not all of those charges standing alone would merit the same penalties. However, in the aggregate the respondent has been found guilty of an overwhelming examples of incompetence and misconduct." (Exhibit C, p. 95).

The Hearing Officer concluded:

> "Termination is the only measure that adequately addresses the charges [sic] which the respondent has been found guilty of." (Exhibit C, p. 96).

The Hearing Officer then submitted his Report and Recommendation to the Board.

In a letter dated September 16, 2011, respondent Brenner advised Renita Smith as follows:

> "Please be advised that the Board of Education of the Roslyn Union Free School District, at its meeting held last night,

> terminated your employment in the district effective today, September 16, 2011.
>
> "A copy of the Board Resolution concerning your employment is attached. You are hereby directed to surrender all district property in your possession. Your service to the district has concluded."

In January 2012, petitioner commenced the instant Article 78 petition.

Renita Smith argues that: "a review of the record reveals that respondents' determination is arbitrary, capricious, not supported by substantial evidence, discriminatory, in bad faith, procedurally improper, an abuse of discretion, unfair, unreasonable, excessive, disproportionate to the offenses alleged and the circumstances hereof, shocking to one's sense of fairness, and without reasonable basis in fact and law; . . . this proceeding must be transferred for disposition to a term of the Appellate Division of the Supreme Court of the State of New York in and for the Second Department [pursuant to CPLR § 7804(g)]; and . . . Renita Smith is entitled to judgment, pursuant to Article 78 of the Civil Practice Law and Rules, reviewing, annulling, rescinding and reversing respondents' determination dated September 16, 2011 which terminated [her] employment with the District effective September 16, 2011 and a further judgment ordering that she be reinstated into my former position of Account Clerk with all back pay and other benefits otherwise due her." (¶¶ 16, 17 and 18 of Petition).

In opposition and in support of the cross-motion, respondent requests dismissal of the instant petition prior to and instead of transfer to the Appellate Division on the grounds that: the instant proceeding seeking Article 78 is time-barred as it was commenced more than four months after the challenged determination to terminate petitioner became final and binding; and petitioner failed to serve the District, Board and Daniel Brenner with a notice of claim and failed to plead compliance with the notice of claim requirements set forth in Education Law § 3813.

Education Law § 3813(1) provides, in relevant part, that:

> "No action or special proceeding . . . involving the rights or interests of any district . . . shall be prosecuted or maintained against any school district . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

The notice of claim required by Education Law § 3813(1) is a statutory condition precedent to an action or proceeding against a school board *(McClellan v Alexander Central*, 201 AD2d 898 [4th Dept 1994]; *Matter of Board of Educ.* (*Wagner Constr. Corp.*), 37 NY2d 283, 289 [1975]) except one to vindicate a

public interest (*Union Free School Dist. v New York State Human Rights Appeal Bd.*, 35 NY2d 371, 380 [1974]). Failure to comply with the provisions of Section 3813(1) mandates dismissal of the petition (*see, Parochial Bus. Sys. v Board of Educ.*, 60 NY2d 539, 547 [1983].

These requirements do not apply when a litigant seeks only equitable relief (*Sheil v Melucci*, 94 AD3d 766 [2nd Dept 2012]; *see Civil Serv. Empls. Ass'n, Inc. v Board of Educ. of City of Yonders*, 73 AD3d 557, 558-558 [2nd Dept 2011]; *Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522 [1st Dept 2010], *affd* 18 NY3d 457; *Matter of Trehy v Commack Union Free School Dist.*, 93 AD2d 891 [2nd Dept 1983], *revd on the grounds*, 61 NY2d 658, 659; *Ruocco v Doyle*, 38 AD2d 132, 133-134 [2nd Dept 1972], *cf. Matter of Yagan v Bernardi*, 256 AD2d 1225, 684 NYS2d 117 [4th Dept 1998]).

The Court rejects the contention that petitioner was not required to file a notice of claim because she sought only "equitable relief," i.e., reinstatement to her Civil Service position. Petitioner's request for "back pay and other benefits otherwise due," in addition to reinstatement, indicated that petitioner sought not only her reinstatement as a vindication of a public interest, but also the vindication of her private rights to back pay and benefits; she is, therefore, not exempt from the requirements of Education Law § 3813 (*see Spedding v Bowman*, 152 AD2d

971, 972 [4th Dept 1989]; *Sephton v Board of Educ.*, 99 AD2d 509 [2nd Dept 1984], *lv denied* 62 NY2d 605; *Todd v Board of Educ*, 272 App Div 618 [4th Dept 1947], *affd* 297 NY 873; *McClellan v Alexander Central, supra).*

"As a condition precedent to an action against a school district, Education Law § 3813(1) requires that a notice of claim be presented to the governing body of the school district within three months from the accrual of the claim." *Clune v Garden City Union Free School District*, 34 AD3d 618 [2nd Dept 2006]. Accrual generally equates with the date upon which damages are ascertainable. *Santini v City of New York*, 266 AD2d 119 [1st Dept 1999]; *Castagna & Son v Board of Educ. of City of New York*, 151 AD2d 392 [1st Dept 1989].

The Court disagrees that the notice of claim dated August 18, 2011 meets the requirements of Education Law § 3813(1).

"In order for a document to be a valid substitute for a notice of claim, certain elements must be present including the 'nature of the claim, the time when, the place where and the manner in which the claim arose . . . and, where an action in contract is involved, the monetary demand and some explanation of its computation.' " *(F&G Heating Co. v Board of Educ.*, 103 QAD2d 791, 794 [2nd Dept 1984], *lv dismissed* 64 NY2d 1109, quoting *Parochial Bus. Sys. v Board of Educ.*, 60 NY2d 539, 547, *supra).*

The within Article 78 proceeding involves the Board's determination dated September 26, 2011. Said determination was made after the August 18, 2011 notice of claim was served. Thus, the notice of claim did not constitute a valid notice of claim.

Accordingly, respondents' cross-motion to dismiss the petition on the grounds that petitioner failed to comply with the notice of claim requirements of Education Law § 3813 is granted.

Inasmuch as dismissal on this ground is warranted, the Court need not consider dismissal on the other ground.

In view of the foregoing, the cross-motion is granted and the petition is dismissed.

This constitutes the Decision and Order of the Court.

Dated: May 23, 2012

STEVEN M. JAEGER, A.J.S.C.