

Clausen v County of Suffolk
2013 NY Slip Op 32959(U)
July 1, 2013
Supreme Court, Suffolk County
Docket Number: 17285-12
Judge: Denise F. Molia
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,
Justice

VICTOR CLAUSEN,

Plaintiff,

- against -

COUNTY OF SUFFOLK, and SUFFOLK COUNTY
PROBATION DEPARTMENT,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 8/9/12
SUBMISSION DATE: 9/21/12
MOTION SEQUENCE NO.: 001 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated July 10, 2012; Affirmation in Support dated July 10, 2012;
Affirmation in Opposition dated September 5, 2012; Exhibits A through D annexed thereto;
Reply Affirmation dated September 18, 2012; Exhibit A annexed thereto; Plaintiff's
Memorandum of Law; and upon due deliberation; it is

ORDERED, that the motion by defendants, pursuant to CPLR 3211(a)(2) and (5), for an
Order dismissing the Complaint, is granted.

The instant proceeding was originally brought pursuant to New York Executive Law §296 and Suffolk County Local Law §89-13, wherein plaintiff has alleged discrimination based upon his age. During the pendency of this motion, the plaintiff has withdrawn his cause of action for alleged violation of Suffolk County Local Law §89-13, leaving the Executive Law §296 as the sole cause of action remaining in this matter.

The defendants have moved to dismiss the Complaint, alleging that the cause of action for violation of Executive Law §296 is barred by the statute of limitations, which requires that an action to recover damages against the County be commenced within one year and ninety days after the happening of the event upon which the claim is based. See, Suffolk County Law §52; General Municipal Law §50-i; Piontka v. Suffolk County Police Department, 202 A.D.2d 409, 608 N.Y.S.2d 503.

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County Law §52 states in relevant part:

1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law. **Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law.** The place of trial shall be in the county against which the action is brought. (Emphasis added).

General Municipal Law §50-i states in relevant part:

1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer firemen whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) **the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.**

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

(Emphasis added).

The nature of the plaintiff's remaining claim in the Complaint is that the County of Suffolk and the Suffolk County Probation Department unlawfully discriminated against Clausen in violation of his rights under Executive Law §296, by denying him a position in the Global Positioning Unit based on his age, and awarding said position to an employee substantially

younger than the plaintiff.

Victor Clausen retired from his position as a Senior Probation Officer with the Suffolk County Probation Department on or about December 31, 2010. It appears from the Complaint, that the plaintiff's claim arose in or about December 2009, when he was denied placement into the Global Positioning Unit. Pursuant to the provisions of County Law §52 and General Municipal Law §50-i, the plaintiff's action must have been commenced within one year and ninety days after December 31, 2009 (at the latest), or on or about March 31, 2011.

On August 22, 2011, the plaintiff moved for judicial permission to serve a late Notice of Claim upon the defendants. After oral argument, held on October 20, 2011, plaintiff was granted permission to serve a late Notice of Claim. Permission was based on the court's oral decision and a copy of the transcript of the oral argument which was so-ordered by Hon. H. Patrick Leis, III, J.S.C. on November 22, 2011. A Judgment granting the aforementioned permission was entered in the Office of the Suffolk County Clerk on December 1, 2011, and the plaintiff served the defendants with a Notice of Claim on that date. Plaintiff appeared for a General Municipal Law §50-h hearing on February 29, 2012. The Complaint was filed on June 7, 2012.

The defendants now move for a dismissal of the Complaint, maintaining that the plaintiff's claims are time-barred. The plaintiff counters that by permitting the plaintiff to file a late Notice of Claim, the Court has determined that the claim is timely, and that the issue of timeliness is now barred by the doctrine of collateral estoppel.

A review of the so-ordered transcript of the oral argument conducted on October 20, 2011, reveals that the issue of the timeliness of plaintiff's claim was not specifically discussed during argument. Although there was a request by the defendants to dismiss the action at the time of the argument, the Court declined to do so, finding that the meritoriousness of the underlying claim was not before the Court on that date. The Court indicated that the rationale for granting leave to file a late Notice of Claim was based upon the plaintiff demonstrating a reasonable excuse for its delay. The Court did not comment on the timeliness of either of the proposed causes of action set forth in the proposed Notice of Claim.

The Notice of Claim that was eventually filed set forth allegations that the defendants had violated the plaintiff's rights under Suffolk County Local Law §89-13 and New York State Executive Law §296. After the action was commenced, the plaintiff elected to discontinue the cause of action brought under Suffolk County Local Law §89-13. Whether this cause of action was timely commenced has not been determined inasmuch as it was discontinued based upon recent case law which held that such section does not authorize a private right of action.

The Court now turns to the question of whether the only remaining cause of action was timely commenced. As noted previously, the latest date for the injury to the plaintiff was December 31, 2009, when he was denied placement into the Unit to which he aspired. General Municipal Law §50-i required him to then commence an action within one year and ninety days from that date. It is uncontroverted that he failed to commence this cause of action within the required limitations period. "Although General Municipal Law §50-e(5) permits a court to grant an application to extend the time in which to serve a notice of claim, the court may not entertain

such a request filed after the one year and 90-day statute of limitations has expired (see *Schwinghammer v Sullivan W. Cent. School Dist.*, 2 AD3d 1126, 768 NYS2d 696 [2003]; *Lopez v Brentwood Union Free School Dist.*, 149 AD2d 474, 539 NYS2d 969[1989]).” Porcaro v. Town of Beekman, 15 A.D.3d 377, 378, 790 N.Y.S.2d 58, 59. Under the facts and circumstances as presented, there is nothing in the record to dispute the defendant’s contention that the cause of action brought under Executive Law §296 was not commenced in a timely manner and that the instant action, which is now solely comprised of one cause of action under Executive Law §296, must therefore be dismissed pursuant to statute.

The foregoing constitutes the Order of this Court.

Dated: July 1, 2013

Hon. Denise F. Molia

Hon. Denise F. Molia, A.J.S.C.