

Figaro v City of New York

2014 NY Slip Op 34042(U)

April 17, 2014

Supreme Court, Bronx County

Docket Number: 22780/13

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PATRICIA FIGARO,

DECISION AND ORDER

Plaintiff(s), Index No: 22780/13

- against -

THE CITY OF NEW YORK AND NEW YORK CITY
POLICE DEPARTMENT, RAYMOND KELLY,
COMMISSIONER OF THE NYC POLICE DEPARTMENT,
AND ARNOLD WECHSLER, ASSISTANT COMMISSIONER
OF THE NYC POLICE DEPARTMENT, ALL BEING
SUED IN THEIR INDIVIDUAL AND PROFESSIONAL
CAPACITIES,

Defendant(s).

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In this action for discrimination based on race, color and gender, defendants move seeking an order, *inter alia*, pursuant to CPLR § 3211(a)(5), dismissing the instant action on grounds that it is barred by the applicable statute of limitations. Specifically, defendants aver that the applicable three-year statute of limitations expired no later than 2006 and insofar as this action was commenced in 2013, approximately seven years later, the action is time barred. Plaintiff opposes the instant motion averring, *inter alia*, that insofar as her employment relationship with defendants did not terminate until 2011, the instant action was brought within the applicable statute of limitations.

For the reasons that follow hereinafter, defendants' motion is

granted.

This is an action for alleged racial, color, and gender discrimination in violation of New York State Human Rights Law (New York State Executive Law § 296) and the New York City Human Rights Law (N.Y.C. Admin. Code § 8-107). To the extent relevant, plaintiff's complaint, filed on August 5, 2013, alleges that from January 13, 1992 through November 1, 2003, she - a dark-skinned, African American female- was employed by defendants as a police officer. On November 1, 2003, as a result of an injury she sustained on September 20, 2002, plaintiff retired from defendant's employ. Specifically, the incident involved plaintiff's attempt to apprehend an individual who jumped the turnstile within a subway station. As plaintiff tried to apprehend the individual, the individual wrestled plaintiff's gun from her and fired. Immediately thereafter, plaintiff's partner Jose Barieto (Barieto), a light-skinned Hispanic male, who had been in the restroom, fired six shots at the individual. As a result of the foregoing, plaintiff fractured her ankle and was, thus, forced to retire. Upon her retirement, plaintiff did not receive a "good guy letter," which would have enabled her to carry a pistol upon her retirement. Moreover, on January 13, 2011, plaintiff received a commendation from defendants for her conduct during the incident within the subway station and Barieto received an honorable mention for the same incident. Barieto was thereafter promoted to detective.

Plaintiff's complaint has six causes of action. The first three allege discrimination in violation of the New York State Human Rights Law on grounds that plaintiff was denied a promotion to detective while in the employ of defendants based on race, color, and gender. For those same reasons plaintiff also alleges that she was denied a "good guy letter" upon retirement and was also given a commendation rather than an honorable mention for the incident within the subway station. The remaining three causes of action allege discrimination in violation of the New York City Human Rights Law on identical grounds and for the very same reasons.

Defendants' motion seeking dismissal of plaintiff's claims as time-barred is hereby granted.

On a motion to dismiss pursuant to CPLR § 3211(a)(5), the court must construe all allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *Sabadie v Burke*, 47 AD3d 913, 914 [2d Dept 2008]; *Matter of Schwartz*, 44 AD3d 779, 779 [2d Dept 2007]). A defendant seeking to dismissal of an action as barred by the applicable statute of limitations, bears the burden of establishing that the applicable statute of limitations expired prior to the commencement of the action (*Swift v New York Medical College*, 25 AD3d 686, 687 [2d Dept 2006]; *Gravel v Cicola*, 297 AD2d 620, 620 [2d Dept 2002]; *Duran v Mendez*, 277 AD2d 348, 348 [2d Dep 2000]). If defendant meets his

burden, in order to avoid dismissal, it is incumbent upon the plaintiff to present evidence establishing that the cause of action falls within an exception to the statute of limitations (*Gravel* at 621).

It is well settled that to the extent that the liability imposed by a violation of the New York City Human Rights Law is statutory, the statute of limitations to commence a plenary action for a claim thereunder is three years from the date of the violations alleged (CPLR § 214[2]; (*Acosta v Loews Corp.*, 276 AD2d 214, 217 [1st Dept 2000]; *Alimo v Off-Track Betting Corp.*, 258 AD2d 306, 306-307 [1st Dept 1999]; *Teller v America West Airlines, Inc.*, 240 AD2d 727, 727 [2d Dept 1997])). Similarly, a plenary action premised on a violation of the New York State Human Rights Law must also be commenced within three years of the accrual of the violations alleged (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 307 [1983]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 409 [1st Dept 2009]). A cause of action under either the City or State Human Rights Law accrues on the date that an adverse employment action is made (*Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]; *Alimo* at 306-307).

Here, inasmuch as the complaint alleges that plaintiff retired on November 1, 2003, it is clear that as of that date there was no longer an employment relationship between her and the defendants. As such, any claims pursuant to the City and State Human Rights Law

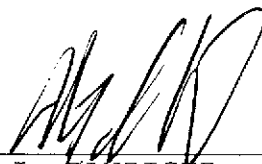
- namely adverse employment action - had to accrue no later than the date she retired. Insofar as "[a]n action is commenced by filing a summons and complaint or summons with notice" (CPLR § 304), here, this action was commenced on August 5, 2013, well after the expiration of the applicable statute of limitations. Accordingly, defendants establish entitlement to dismissal of this action and plaintiff fails to establish the applicability of any exception warranting denial of the instant motion. Plaintiff's contention that an employment relationship between the parties continued until 2011, as evinced by the commendation plaintiff received from the defendants, is meritless. Plaintiff fails to plead that the employment relationship continued beyond November 1, 2003. More importantly, assuming *arguendo*, that plaintiff had made such an allegation within her complaint, to the extent that it is premised solely on the receipt of a commendation received approximately eight years after her retirement, it is hard to fathom how she can credibly argue that this sole act is tantamount to a continuing employment relationship. It is hereby

ORDERED that plaintiff's complaint be dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : April 17, 2014
Bronx, New York



MITCHELL J. DANZIGER, J.S.C.