| **Santostefano v Middle Country Cent. Sch. Dist.** |
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| 2016 NY Slip Op 32862(U) |
| August 22, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 16/600777 |
| Judge: Jerry Garguilo |
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E-FILE

SHORT FORM ORDER INDEX NO. 16/600777

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 3/1/16
FINAL SUBMISSION DATE: 8/3/16
MOTION SEQ#001, 002
MOTION: 001-MG; 002-XMD;
CASEDISP

GUY SANTOSTEFANO,

Plaintiff,

-against-

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT, KAREN LESSLER, and ROBERT A. GEROLD,

Defendants.

PLAINTIFFS' ATTORNEY:
KYLE T. PULIS, ESQ.
ONE SUFFOLK SQUARE, STE 240
ISLANDIA, NY 11749

DEFENDANTS' ATTORNEY:
THOMAS M. VOLZ, PLLC
280 SMITHTOWN BLVD.
NESCONSET, NY 11767

Upon the following e-filed papers numbered 3 to 15 read on this motion to dismiss the complaint and cross motion for leave to amend the pleadings; Notice of Motion/Order to Show Cause and supporting papers 3 - 5; Notice of Cross Motion and supporting papers 10 - 13; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 14 - 15; Other ____; and upon due deliberation; it is,

In this action, plaintiff seeks to rescind and vacate the Agreement he made with his former employer, defendant Middle Country Central School District ("the District") and defendants Karen Lessler and Robert A. Gerold, on the grounds that plaintiff was induced by his attorney to execute the agreement under duress and that defendants misrepresented orally that the agreement would be kept confidential.

The record reveals that the parties executed a termination agreement in lieu of an Education Law § 3020-a hearing on August 6, 2015. The District agreed to pay plaintiff his salary of $107,659 and severance pay in the amount of $28,500. There is no dispute that plaintiff has cashed the checks as they were received.

Paragraph 8 of the Agreement provides:

> Should the District be asked by a prospective employer to provide a reference for [plaintiff], the District shall respond by indicating [plaintiff's] dates of employment, the titles in which he served and that he resigned effective August 6, 2015. If a specific request is made by a prospective employer regarding the filing of 3020-a charges, the District will confirm that charges were filed and will advise that the charges were withdrawn.

Paragraph 10 of the Agreement provides that, *inter alia*, plaintiff releases and shall hold harmless the [defendants] from any and all liability, and voluntarily waives any right he may have had to assert any claims against defendants.

Paragraph 11 of the Agreement provides, *inter alia*, that plaintiff agreed that he was given seven days following the execution of this Agreement in which to revoke it.

Paragraph 14 of the Agreement provides, in part, that ". . . each party has entered into this agreement openly, knowingly, willfully, freely and without coercion or duress. . ."

Paragraph 16 provides that each party has been represented by counsel throughout these proceedings and that each has consulted with counsel concerning the ramifications of this Agreement.

Paragraph 17 provides, in part, that "[plaintiff] acknowledges that he has entered into this agreement freely, knowingly, openly, without threat of force, coercion or duress, . . . he voluntarily he waives any statutory, contractual or Constitutional rights he may have had. . ."

Paragraph 19 provides, in part, that "no other agreement, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or bind any of the parties hereto. . ."

The record further reveals that after the parties executed this Agreement, plaintiff applied to other school districts for employment, and learned that the District would not provide a recommendation and disclosed that Education Law § 3020-a charges had been filed against him. To date, plaintiff has been unable to secure a new teaching position. This action was commenced on January 19, 2016.

The complaint is inartfully drafted without specified causes of action. The complaint contains allegations that the District misrepresented what it promised orally during negotiations of the Agreement. In addition, the complaint alleges that plaintiff executed the Agreement under duress.

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (8). Plaintiff cross-moves to amend the complaint.

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (***Teitler v Max J. Pollack & Sons***, 288 AD2d 302, 733 NYS2d 122 [2d Dept 2001]). As a general rule, on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (***Gruen v County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 [2d Dept 1992]). The sole criterion is whether the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law (***Davis v CCF Capital Corp.***, 277 AD2d 342, 717 NYS2d 207 [2d Dept 2000]).

Initially, plaintiff failed to fulfill the condition precedent of serving a notice of claim upon defendants as required by Education Law § 3813 within three months from the date the parties executed the Agreement. Therefore, personal jurisdiction over the District was not obtained (see NY Education Law § 3813 [1]; ***Vail v Board of Coop. Educ. Servs.***, 115 AD2d 231, 232, 496 NYS2d 145 [4th Dept 1985], lv denied 67 NY2d 606; see also, ***Matter of Coger v Davidoff***, 71 AD2d 1044, 420 NYS2d 517 [3d Dept 1979]).

It has long been held that the notice of claim requirement of section 3813 of the Education Law is a condition precedent to bringing an action against a school district or a board of education and failure to present a claim within the statutory time limitation or to notify the correct party is a fatal defect (***Parochial Bus Systems,Inc. v Board of Educ.***, 60 NY2d 539,470 NYS2d 564 [1983]; ***McClellan v Alexander Cent. School Bd. of Educ.***, 201 AD2d 898, 607 NYS2d 812 [4th Dept 1994]). Failure to file a timely notice of claim has been held a jurisdictional defect and precludes any claims associated therewith (See ***Peek v Williamsville Bd. of Educ.***, 221 AD2d 919, 635 NYS2d 374 [4th Dept 1995]). Here, the Agreement was executed on August 6, 2015. Plaintiff's time to serve a notice of claim upon defendants was on or before November 6, 2015. Therefore, plaintiff has failed to satisfy a condition precedent to commencing this action.

In addition, the Agreement resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. By executing the Agreement, plaintiff agreed that he was not coerced to sign the Agreement, that he entered into the Agreement freely and without duress, that he was represented by counsel while negotiating the Agreement, that no oral agreements would bind

the parties, that plaintiff would hold the defendants harmless and that plaintiff would waive any right to bring an action against the defendants. Therefore, the motion to dismiss the complaint is granted.

Turning to the cross motion to amend the complaint, it is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025[b]; ***Thomas Crimmins Contracting Co. v New York***, 74 NY2d 166, 544 NYS2d 580 [1989]; ***McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.***, 59 NY2d 755, 463 NYS2d 434 [1983]). However, in order to conserve judicial resources, an examination of the proposed amendment is warranted (***Non-Linear Trading Co. v Braddis Assocs.***, 243 AD2d 107, 675 NYS2d 5 [1st Dept 1998]; ***East Asiatic Co. v Corash***, 34 AD2d 432, 312 NYS2d 311 [1970]), and leave to amend will be denied where the proposed pleading is palpably insufficient as a matter of law (***Bankers Trust Co. v Cusumano***, 177 AD2d 450, 576 NYS2d 546 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]); ***Bencivenga & Co., CPAs, P.C. v Phyfe***, 210 AD2d 22, 619 NYS2d 33 [1st Dept 1994]).

Here, the proposed amended complaint adds allegations which seek to support plaintiff's averments that the District misrepresented its oral agreement in the executed Agreement as to what the District would convey to prospective employers. Such amendment is without merit, inasmuch as, *inter alia*, the parties agreed that oral agreements not expressly conveyed in the Agreement would not be binding upon the parties and plaintiff waived his right to commence an action against defendants. Therefore, the amended allegations in the proposed amended complaint are without merit, and the cross motion is denied.

Accordingly, it is

***ORDERED*** that under the circumstances presented, defendants' motion to dismiss the complaint is granted; and it is further

***ORDERED*** that plaintiff's cross motion for leave to amend the complaint is denied.

DATED August 22, 2016

J.S.C.

**HON. JERRY GARGUILO**