

Sims v Ithaca City Sch. Dist.
2018 NY Slip Op 31271(U)
June 22, 2018
Supreme Court, Tompkins County
Docket Number: EF2017-0036
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 4th day of May, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

ERNEST C. SIMS,

Plaintiff,

-vs-

ITHACA CITY SCHOOL DISTRICT and
ROBERT VAN KEUREN

Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a motion filed February 16, 2018 by Ithaca City School District and Robert Van Keuren (collectively “Defendants”) seeking dismissal of this action pursuant to CPLR §3012(b). Ernest C. Sims (“Plaintiff”) filed a cross motion on May 1, 2018 seeking an order pursuant to CPLR §§3012(d) and 2005 for additional time to serve his complaint.

Plaintiff commenced this action by filing a summons with notice on February 24, 2017. The summons with notice alleges claims for, among other things, fraud, deceit, intentional misrepresentation and intentional infliction of emotional distress. Essentially, Plaintiff asserts that Robert Van Keuren (“Van Keuren”) and the Ithaca City School District (“District”) encouraged him to retire and pursue disability retirement benefits and promised to “make certain that...Plaintiff’s request for disability retirement benefits would be approved”. Defendants filed a demand for complaint on July 10, 2017 and a notice of appearance on July 24, 2017. It is undisputed that a complaint has not yet been filed and served.

Defendants granted Plaintiff several extensions to file and serve a complaint; the last of which gave the Plaintiff until September 15, 2017 to file and serve a complaint. No complaint was served and filed during the five months from the date that extension was granted and prior to Defendants’ motion. Defendants further argue that Plaintiff’s cross motion to extend the time to serve the complaint is untimely pursuant to CPLR §2215 as it was filed three days before the return date of Defendant’s motion. Additionally, on the merits of Plaintiff’s motion, Defendants argue that the Plaintiff has failed to make a showing of reasonable excuse and meritorious claim.

In his affidavit in support of his cross motion and in opposition to Defendants’ motion, Plaintiff asserts that his application for disability retirement benefits was denied and an appeal is pending. By way of reasonable excuse, Plaintiff argues that until the retirement appeal is denied, he is

unable to provide a verified complaint. He alleges that he would only pursue this action if his application for disability benefits is denied. Plaintiff provides little to support the merits of his claim.

As an initial matter, Defendants argue that Plaintiff's cross motion is untimely. Defendants correctly argue that where, as here, the affidavits submitted by Plaintiff were in support of the cross motion and in opposition to defendants' motion to dismiss, they should have been filed seven days before the return date of the motion. CPLR 2214(b). In any event, Defendants timely filed an affirmation in opposition to the cross motion and have not alleged any prejudice. Under these circumstances, the Court excuses Plaintiff's late submission. *Keller v. Merchant Capital Portfolios, LLC*, 103 AD3d 532 (1st Dept. 2013).

It has long been the rule that "[t]o avoid dismissal of an action for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action" *Khamis v. Corporate Transp. Group, Ltd.*, 135 AD3d 825, 826 (2nd Dept. 2016) [internal quotation marks, brackets and citations omitted]; *see* CPLR 3012 (d); *Amodeo v. Gellert & Quartararo, P.C.*, 26 AD3d 705, 706 (3rd Dept. 2006); *Ault v. Richman*, 299 AD2d 613, 614 (3rd Dept. 2002); *Adams v. Agrawal*, 187 AD2d 886, 887 (3rd Dept. 1992).

Here, Plaintiff asserts reasonable excuse based on an inability to verify the complaint due to an unresolved disability retirement claim. However, Plaintiff's argument goes not so much to the inability to verify his claims but rather the extent of potential damages. Plaintiff seems to argue that since he may not have damages if approved for disability retirement, he could not verify his complaint. Plaintiff alleged facts and asserted various causes of action in his summons with notice including fraud, deceit, intentional misrepresentation and intentional infliction of emotional distress. Questions regarding the extent of damages should not have prohibited the filing and serving of a verified complaint. Moreover, Plaintiff also fails to provide a reasonable excuse for not seeking leave for additional time to serve the complaint until nearly eight months

after the last extension granted by the Defendants and after the filing of Defendants' motion to dismiss.

The Court concludes that Plaintiff has failed to offer a reasonable excuse for not filing and serving a complaint in this matter.

"As to the meritorious cause of action requirement, a plaintiff seeking to avoid dismissal must submit 'an affidavit or a verified pleading containing evidentiary facts and attested by an individual with personal knowledge of those facts.'" *Abele Tractor & Equip. Co., Inc. v. RJ Valente, Inc.*, 94 AD3d 1270, 1272 (3rd Dept. 2012), *citing* *Amodeo v. Gellert & Quartararo, P.C.*, 26 AD3d at 706; *see Drake v. Bates*, 49 AD3d 1098, 1098-1099 (3rd Dept. 2008).

In Plaintiff's affidavit he alleges that in May of 2015 he met with Van Keuren of the District Human Resources Department and his Supervisor, Paul Alexander. He further alleges that Van Keuren advised that he should apply for disability retirement and that the school district would "support my application". Plaintiff fails to elaborate as to what "support my application" meant or ways in which the school district failed to do so¹. He also fails to allege any basis for concluding that Van Keuren had authority to bind the school district to any level of "support". Finally, although Plaintiff seems to argue that he was fraudulently induced to apply for disability retirement, he acknowledges that he is permanently unable to return to his job.

The Court concludes that Plaintiff has failed to set forth sufficient facts to allow the Court to find that he has a meritorious claim.

For the reasons set forth herein, The Defendants' motion to dismiss is **GRANTED** and the Plaintiff's motion to extend the time to serve the complaint is **DENIED**.

¹It is not clear what support the school district promised or even could provide since decisions regarding disability are made independently by the New York State Employees Retirement System.

IT IS SO ORDERED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: June 22, 2018
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice