

**Fair v City of Mount Vernon**

2018 NY Slip Op 34159(U)

April 24, 2018

Supreme Court, Westchester County

Docket Number: Index No. 68901/17

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
LARRY FAIR,

Plaintiff,

-against-

Index No. 68901/17  
Motion Seq. Nos. 001, 002  
Decision and Order

CITY OF MOUNT VERNON, MAYOR RICHARD  
THOMAS, RALPH UZZI, NEIL CARRETTA,  
JACENE THOMAS and PRESTON THOMAS, in  
their individual capacities,

Defendants.

-----X  
EVERETT, J.

The following papers were read on the motions:

001 Notice of Motion/Affirmation in Supp/Exhibits A-J/Memorandum of Law  
(docs 2-14)

001 and 002 Affirmation in Opp to Motion and Cross Motion /Exhibits A-D (docs 25-29)

001 Reply Affirmation/Exhibit K/Memorandum of Law in Further Supp (docs 33-35)

002 Notice of Cross Motion/Affirmation in Supp/Exhibits A-B3 (docs 17-22)

002 Reply Affirmation/Exhibit A (docs 30-31)

Defendants City of Mount Vernon, Mayor Richard Thomas, Ralph Uzzi, Jacene Thomas and Preston Thomas jointly move, under motion sequence number 001, for an order, pursuant to CPLR 3211 (a) (2) and (7), dismissing the complaint as against them. Defendant Neil Carretta moves, under motion sequence number 002, for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint as against him. The motions, under motion sequence numbers 001 and

002, are consolidated for disposition, and upon the foregoing papers, the motion is granted to the extent set forth below, and is otherwise denied.

The following facts are taken from the pleading, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff Larry Fair (Fair), an African American male who was employed as a sanitation laborer by defendant City of Mount Vernon (City) since on or about April 16, 1990, commenced the instant action sounding in racial discrimination, hostile work environment, retaliation and failure to pay overtime premium compensation, by filing a summons and complaint in the Office of the Westchester County Clerk on November 13, 2017. According to the seven count complaint, in or about 1998, Fair was assigned to work inside City Hall at 1 Roosevelt Square, Mount Vernon, New York, and perform maintenance and custodial work. Fair's normally scheduled work hours were Mondays to Fridays from 7:30 a.m. to 3:30 p.m., with occasional night shifts from 3:30 p.m. to 9:30 p.m. Also according to the complaint, Fair's problems at work began in or about January 2016, which coincides with the time when defendant Mayor Richard Thomas (Mayor Thomas) commenced his term as Mayor of the City.

Fair alleges that there were weeks during 2016, when he worked in excess of 40 hours, and should have received, but was denied, full overtime compensation. He identifies April 7, 19 and 16, 2016, as dates when he did not receive full overtime compensation for work performed.

Fair complains that, it was around that time that he became a target of discrimination, harassment and retaliatory actions by the City's Department of Public Works (DPW) Commissioner, defendant Ralph Uzzi (Uzzi), by the DPW maintenance foreman, defendant Neil

Carretta (Carretta), and by members of Mayor Thomas' family, defendants Jacene Thomas (J. Thomas) and Preston Thomas (P. Thomas).

In his complaint, Fair explains that, beginning in January 2016, Carretta started making remarks to him about how "black" he was (complaint ¶¶ 34, 35). On or about February 10, 2016, Carretta allegedly told him "you're in trouble now because we have a white Commissioner," that being Uzzi (*id.*), and "the Commissioner is going to believe anything I say before he believes anything from any black worker" (*id.* ¶¶ 37, 38).

Next, Fair explains that he was not permitted to work overtime on the days he was scheduled to do so, those being February 27, 2016, April 18-22, 2016, and May 9, 10 and 31, 2016, and that his overtime work was given to other City workers, who were Caucasian. Fair asserts that, when he complained about the situation and about not getting paid for overtime work he performed on April 7, 2016, Carretta told him "you're not going to win. The commissioner is not going to let a black worker tell him how to do his job," and that, in response to Fair's complaints about being denied the right to work overtime on April 18, 2016, Carretta threatened to call the police (*id.* ¶¶ 42, 43).

Fair alleges that Mayor Thomas has supervisory authority to assign City work responsibilities, to recommend discharge, transfer or discipline and to set policies, and that, because of the Mayor's authority, he spoke with him, in or about April 2016, about his concerns about racial discrimination. Mayor Thomas reportedly asked Fair, during that conversation, "how long are you going to give me to take care of this?" (*id.* ¶¶ 47, 49). Fair contends that, despite his conversation with the Mayor, and Mayor Thomas' verbal indication that he would look into the situation, no action was taken to address his racial discrimination problems, and on

April 19 and 20, 2016, he filed written complaints with the City's human resources department. Fair also contends that he filed a union grievance in or about April 2016, about his unpaid overtime.

After Fair took these steps, Carretta reportedly threatened to terminate him, saying "[w]e're going to get you out of here. We're gonna get you fired or removed from City Hall" (*id.* ¶ 54). Fair noticed that, following his complaints in April 2016, his job responsibilities and overtime opportunities were reduced. He also noticed that, with respect to overtime assignments, Uzzi was giving preferential treatment to Caucasian City employees over African American City employees, and that Uzzi was making the African American service workers wait outside the building while their paper work was being processed, but not the Caucasian service workers.

Fair also alleges that, on or about October 5, 2016, Carretta said to him "O [sic] you think I am a racist?" and informed him (Fair) that he would not get overtime for the rest of the week. Then, on October 6, 2016, Uzzi reportedly threatened to terminate Fair for complaining about discrimination, saying to Fair "[h]ow long would you last without your job?" (*id.* ¶¶ 57, 58).

Fair further alleges that, it was after he verbally complained about racial discrimination and about a hostile work environment during a City Counsel meeting held on October 12, 2016, and the filed a written complaint of racial discrimination with the Mayor and with the City's human resources department, that J. Thomas made several improper remarks to him. On November 3, 2016, J. Thomas reportedly told Fair "that she was going to 'fuck' him up," and that she was going to "come after him," and she repeatedly referred to him as a "nigger" (*id.* ¶ 62). Finally, on November 3, 2016, P. Preston reportedly threatened Fair with bodily harm in response to Fair's complaints and for "going after his brother," Mayor Thomas (*id.* ¶ 64).

Fair contends that the totality of these incidents and actions caused him overwhelming stress, and he suffered a panic attack (*id.* ¶¶ 67, 68). Fair further contends that he left his job, on or about October 12, 2017; because he was unable to endure any longer, the humiliation, degradation, and embarrassment caused by the ongoing discrimination, hostile work environment and retaliation. It is Fair's position that he was constructively terminated from his job, and his complaint contains the following causes of action.

The first cause of action charges the City, Uzzi and Carretta with discrimination in violation of the New York State Human Rights Law, by discriminating against him based on his race. The second cause of action charges the City, Uzzi and Carretta with subjecting Fair to a hostile work environment, in violation of the New York State Human Rights Law, because of his race. The third cause of action charges all defendants with retaliating against Fair for his complaint of discrimination in violation of the New York State Human Rights Law. The fourth cause of action charges the City, Uzzi and Carretta with discrimination in violation of the Westchester County Human Rights Law, by discriminating against him based on his race. The fifth cause of action charges the City, Uzzi and Carretta with subjecting Fair to a hostile work environment, in violation of the Westchester County Human Rights Law, because of his race. The sixth cause of action charges all defendants with retaliating against Fair for his complaint of discrimination in violation of the Westchester County Human Rights Law, and the seventh cause of action charges the City with wilfully failing to pay Fair overtime compensation in violation of New York Labor Law § 663 (1), et seq. In conjunction with the allegations, Fair accuses Mayor Thomas, Uzzi, J. Thomas and P. Thomas with aiding and abetting the retaliatory conduct.

Defendants now move to dismiss the complaint.

In deciding a motion under CPLR 3211 (a) (7), the motion court must liberally construe the pleading, “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To be successful on a CPLR 3211 (a) (7) motion, movant must show that the complaint does not state a cognizable cause of action (*id.*). A dismissal may be obtained under CPLR 3211 (a) (1), only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law (*id.*).

Acknowledging that the allegations must be accepted as true for the purpose of the motion, defendants argue that the complaint, nevertheless, must be dismissed, and they offer the following additional facts, as supported by documentary evidence, in support of their position. Defendants point out that Fair filed a municipal grievance with his union, Teamsters & Chauffeurs Union Local No. 456 (Union), on or about April 27, 2016, and that his grievance was referred to arbitration, and assigned case number 01-16-0004-1900. In his filing, Fair grieved that he was “improperly denied overtime assignments of 4 hours on February 27, 2016, 6 hours on April 7, 2016 and overtime assignments on April 18 to April 22, 2016,” in violation of “Article VI, Section 6 and all other relevant sections,” and that he was seeking “payment for all overtime assignments not provided” (notice of motion, exhibit E). By letter dated September 21, 2016, Fair was advised by labor counsel for the Union that a demand for arbitration was being filed with the American Arbitration Association with respect to his grievance (*id.* exhibit H). By letter dated October 10, 2017, the American Arbitration Associate notified the Union and the City that an arbitration was scheduled for November 15, 2017, with respect to Fair’s grievance

that the City failed to offer him overtime assignments (*id.* exhibit I). Defendants next point out that, by letter dated November 15, 2017, Fair advised the Union that he was “withdrawing the grievance without prejudice and that the services and representation of Local 456, I.B.T. are no longer needed in reference to my case,” in that he was electing to seek redress through the courts with the assistance of counsel of his own choosing (*id.* exhibit F).

Defendants argue that Fair’s allegations related to overtime and pay must be dismissed, because Fair was bound by the terms of the collective bargaining agreement (CBA) in effect between the City and the Union, to adhere to the CBA’s grievance procedures before seeking court assistance. Fair does not meaningfully address this point.

It is well established that:

“[a]n aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his [or her] union and employer must first avail himself [or herself] of the grievance procedure set forth in the agreement before he [or she] can commence an action in court”

(*Muller v New York City Dept. of Educ.*, 142 AD3d 618, 621 [2d Dept 2016] [internal quotation marks and citations omitted]).

An examination of the motion papers and record reveals that Fair’s complaints to Uzzi and Carretta, began with, and centered upon, issues related to his overtime assignments and pay. An examination of the CBA reveals that the issues of overtime assignments (referred to in the CBA as “premium time”) and pay for such work are explicitly covered under CBA Article VI, and that issues related to the mandatory grievance process are covered under CBA Article XVIII. CBA Article XVIII specifically provides that: “[s]hould an employee or the Union feel that the rights and privileges established under the contract have been violated, they shall file a grievance pursuant to procedures hereafter outlined.” Given the mandatory nature of the directive, Fair

does not have the option of seeking relief through the courts, without first availing himself of the CBA's grievance procedure. Therefore, those aspects of the complaint, which are predicated on Fair's allegations that he was denied overtime and pay in violation of the CBA, are dismissed without prejudice to pursue by grievance.

The gravamen of defendants' motion to dismiss the second cause of action alleging a hostile work environment in violation of the New York State Human Rights Law, is that Fair's allegations are inadequate to establish the violation. New York recognizes the existence of a hostile work environment: "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004] [internal quotation marks and citation omitted]). Fair's allegations that he was repeatedly subjected to racial slurs and/or derogatory remarks about his race, in the above-referenced manner, such that it permeated the workplace and caused adverse employment decisions, including overtime assignments and pay, are sufficient to state a cause of action for hostile work environment against the City, Uzzi and Carretta. Contrary to defendants' contentions, the question at this juncture is not whether Fair can establish his cause of action for a hostile work environment, but whether he has stated one (*Leon v Martinez*, 84 NY2d at 87-88), defendants have not met their burden of offering a defense that requires its dismissal at this pre-discovery stage of the proceedings. Furthermore, although the purported use of racial slurs and insults by Uzzi and/or Carretta, as Fair's supervisors, "without the knowledge or acquiescence of the employer does not constitute an unlawful discriminatory practice actionable under the State Human Rights Law," where, as here, it is alleged that his employer (the City) failed to promptly

act upon his verbal and written complaints, the employer may be considered a party to the discriminatory conduct (*id.*, at 311, 328-329).

New York State's Human Rights Law also prohibits an employer from retaliating against an employee for complaining about discriminatory practices. Although defendants read the complaint as alleging that the purported retaliatory conduct occurred prior to Fair's verbal and written complaints, precluding this cause of action, the Court does not read the complaint in a similar manner. Fair states this cause of action by alleging that he engaged in a protected activity (by complaining about discriminatory practices, starting in or about early April 2016), that defendants were aware that he did so (by confronting them verbally and in writing), that he was then subjected to adverse employment actions (both his job responsibilities, and his opportunities for overtime and payment for overtime, were reduced following his complaints in April 2016), and that there exists a causal connection between his protected activity and the adverse employment action (*id.* at 313). Once again, the question before the motion court is whether the complaint states a cause of action for retaliation in violation of the New York State Human Rights Law, not whether it has been established, and the Court finds that Fair sufficiently states this claim. The question as to whether the alleged adverse employment actions occurred as a result of Fair's complaints, is a question of fact for the jury.

The fourth, fifth and sixth causes of action are dismissed on the ground that the Westchester Human Rights Law "does not expressly provide a private cause of action" to an aggrieved employee (*Garcia v Yonkers Board of Educ.*, 188 F Supp 3d 353, 363 [SD NY 2016]).

Also dismissed is the seventh cause of action for violation of New York's Labor Law. Like the first cause of action, the seventh cause of action seeks damages based on Fair's claim

that the City violated his rights with respect to overtime compensation. For the reasons set forth above, this cause of action is dismissed without prejudice to proceed via the grievance procedure set forth in the CBA.

As to that aspect of the motion that seeks a dismissal of the complaint as against J. Thomas, the motion is granted. The complaint alleges that J. Thomas is the sister of Mayor Thomas and a resident of the City, and that, when she made her offensive statements to Fair, she was aiding and abetting the retaliatory conduct committed by other defendants. Absent from the complaint is any allegation or indication that J. Thomas was, at any relevant time, anything other than a private citizen, who was neither a City employee, nor a person who was empowered by the City to make decisions about its employees, including Fair. Neither in the complaint, nor in response to the motion, does Fair offer a legal basis for holding this private citizen liable for either employment discrimination, or aiding and abetting employment discrimination or retaliatory conduct (*see Trovato v Air Express Intl.*, 238 AD2d 333, 334 [2d Dept 1997]).

The causes of action are also dismissed as against P. Thomas. Although it is alleged that he was a City employee, the complaint lacks any allegations as to what position he held at the time of his allegedly offensive statements and conduct. Omitted are any allegations that P. Thomas held a supervisory position over Fair, or that he was otherwise empowered by the City to make decisions about its employees, including Fair (*id.*). Other than claiming that P. Thomas was personally offensive, Fair offers no allegations as to the manner in which he purportedly aided and abetted the retaliatory conduct of others.

Also dismissed are the allegations against Mayor Thomas, except those complaining that Mayor Thomas aided and abetted the retaliatory conduct by failing to take action in response to

Fair's verbal and written complaints. In other words, it is alleged that Mayor Thomas should be held liable for acquiescing in, and thereby condoning, the alleged retaliatory conduct against Fair (see *Forrest v Jewish Guild for the Blind*, 3 NY3d at 311; *Sormani v Orange County Community Coll.*, 240 AD2d 724, 725 [2d Dept 1997]).

Accordingly, it is

ORDERED that, to the extent Fair's first cause of action for discrimination in violation of the New York State Human Rights Law is premised on the actions of defendants City of Mount Vernon, Ralph Uzzi and Neil Carretta in allegedly denying him his share of overtime and overtime pay, the motion is granted and the first cause of action is dismissed without prejudice to plaintiff's right to pursue a grievance in this regard in the manner prescribed in the Collective Bargaining Agreement; and it is further

ORDERED that the motion to dismiss the second cause of action for hostile work environment in violation of the New York State Human Rights Law against defendants City of Mount Vernon, Ralph Uzzi and Neil Carretta is denied; and it is further

ORDERED that the motion to dismiss the third cause of action for retaliation against all defendants in violation of the New York State Human Rights Law is: (1) granted and the complaint is dismissed as to defendants Jacene Thomas and Preston Thomas with costs and disbursements to said defendants as taxed by the Clerk upon submission of an affirmed bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; (2) granted as to defendant Mayor Richard Thomas, except as to that aspect of the cause of action that alleges that defendant Mayor Richard Thomas aided and abetted the alleged retaliatory conduct; and the motion is otherwise denied; and it is further

ORDERED that the motion to dismiss the fourth, fifth and sixth causes of action are granted and the fourth, fifth and sixth causes of action are dismissed; and it is further

ORDERED that the motion to dismiss the seventh cause of action is granted and the seventh cause of action is dismissed without prejudice to pursue this claim via a grievance in the manner prescribed in the Collective Bargaining Agreement; and it is further

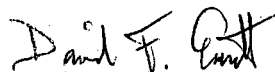
ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in courtroom 811, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on Monday, May 21, 2018 at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
April 24, 2018

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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