Fair v City of Mount Vernon
2019 NY Slip Op 34457(U)
September 5, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68901/2017
Judge: Charles D. Wood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (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-

DECISION & ORDER
Index No. 68901/2017
Sequence Nos. 3&4

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

Defendants.

---x

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 56 through 124, were read in connection with defendant City of Mount Vernon ("the City"), Mayor Richard Thomas ("the Mayor") and Ralph Uzzi ("Uzzi") (collectively, "Municipal Defendants") motion for summary judgment on the grounds that plaintiff failed to file a Notice of Claim; plaintiff cannot establish a prima facie case of race discrimination, hostile work environment retaliation against any moving defendant; and cannot establish a basis for imposing personal liability against the Mayor on the claim of aiding and abetting the alleged retaliatory conduct (Seq 3); and a similar motion by Neil Carretta (Seq 4).

Plaintiff, an African American male who was employed as a sanitation laborer by the City since on or about April 16, 1990, commenced this action against defendants sounding in racial discrimination, hostile work environment, and retaliation. Plaintiff alleges that there were weeks during 2016, when he worked in excess of 40 hours and was denied full overtime

compensation. It was around that time that he allegedly became a target of discrimination, harassment by the City's Department of Public Works (DPW), Commisioner Uzzi by the DPW maintenance foreman, defendant Neil Carretta and by members of the Mayor's family. The totality of incidents and actions caused him overwhelming stress, and he suffered a panic attack. He left his job on or about October 12, 2017, because he was allegedly unable to endure the alleged ongoing discrimination, hostile work environment, and retaliation.

Based upon this court's (Everett, J.) prior Decision and Order dated April 24, 2018, (NYSCEF Doc No. 37) adjudging defendants' motions to dismiss, the causes of action in plaintiff's complaint that remain are: the Second Cause of Action for hostile work environment in violation of the New York State Human Rights Law ("NYSHRL") against the City, Uzzi, and Caretta; the Third Cause of Action for retaliation against the City, Uzzi and Caretta, and to the limited extent against Mayor Richard Thomas for aiding and abetting the alleged retaliatory conduct[1].

NOW, upon the foregoing papers, the motions are decided as follows:

Plaintiff concedes that he did not file a notice of claim in this matter with the City, but argues that he was not required to do so. This court disagrees. The defense of failure to file a notice of claim was raised in defendants' answers, second affirmative defense.

One of the relevant statutes for filing requirements of a notice of claim is General Municipal Law § 50-e [1] [a], which provides:

> "In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall

---

[1]The causes of action against Jacene Thomas and Preston Thomas were also dismissed.

comply with and be served in accordance with the provisions of this section within ninety days after the claim arises" (GML §50-e).

In addition, GML§ 50-I (1) "precludes commencement of an action against a city '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,' unless a notice of claim has been served in compliance with [GML §] 50-e" (General Municipal Law §50-i [1]); (Fethallah v N.Y. City Police Dep't, 150 AD3d 998 [2d Dept 2017]).

In further interpretation of these statutes, the Court of Appeals held that the notice of claim requirements of General Municipal Law §§ 50–e and 50–i, did not apply to the firefighters' disparate treatment racial discrimination claim under the New York State Human Rights Law. In reaching this determination, the Court stated that "[h]uman rights claims are not tort actions under 50–e and are not personal injury, wrongful death, or damage to personal property claims under 50–i. Nor do we perceive any reason to encumber the filing of discrimination claims" (Margerum v City of Buffalo, 24 NY3d 721, 730 [2015]). Thus, service of a notice of claim is not a condition precedent to commencement of an action based on the Human Rights Law in a jurisdiction where GML §§ 50–e and 50–i, provide the only notice of claim criteria. That is not the situation here.

Section 265 of the Mount Vernon City Charter provides for a notice of claim (in relevant part):

"The City shall not be liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights of any name or nature whatsoever, whether casual or continuing, arising at law or equity, alleged to have been caused or sustained in whole or in part, by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the city or any of its agents, officers, or employees, unless a written notice of claim shall have been made and served in compliance with Section 50-e of the General Municipal Law, nor unless an action shall be commenced thereon within one year after

the happening of such accident or injury or the occurrence of such act, omission, fault or neglect." (NYSCEF Doc No. 73).

In the aftermath of the Margerum case, courts have not applied a broad-based standard that negates the mandate to file a notice of claim in a case involving discrimination rights. For instance, the Third Department analyzed similar notice of claim language as contained in the City's Charter:

> "We find no error, however, in Supreme Court's dismissal of petitioners' employment discrimination claim based upon their failure to comply with the notice of claim condition precedent imposed by respondent's charter (see City of Kingston Charter §C17-1[C]). Respondent's charter requires service of a notice of claim on respondent's Common Council as a condition precedent to the commencement of any "civil action for damages or injuries to person or . . . invasion of personal or property rights of any name or nature whatsoever . . . arising at law or in equity, alleged to have been caused or sustained . . . by or because of any . . . wrongful act . . . misfeasance or negligence on the part of [respondent] . . . within 90 days after the happening of the accident or injury or the occurrence of the act . . . [out] of which . . . the claim arose" (City of Kingston City Charter §C17-1 [C]); (Farrell v City of Kingston, 156 AD.3d 1269, 1271–72 [3d Dept 2017]).

Here, the City Charter, requires a notice of claim to be filed to bring a lawsuit against for "any cause whatever". In this analysis of the requirement to file a notice of claim, the language is key. Importantly, the language in City's City charter is much broader than the General Municipal Law in that it is not limited to claims founded upon tort (*see* United States v New York City Dep't of Educ., No. 16CIV4291LAKJCF, 2017 WL 435940, at 6 (S.D.N.Y. Jan. 31, 2017). In contrast to GML §§ 50–e(1) and 50–i (1), City Charter Section 265 broadly requires the filing of a notice of claim as a condition precedent to an "action...for any cause whatever," which includes the plaintiff's causes of action pursuant to the Human Rights Law. Accordingly, plaintiff's reliance upon Margerum case is misplaced, as noted by other courts (Seifullah v City of New York, 161 AD3d 1206, 1206–07 [2d Dept 2018]; Williams v NYC Health & Hosps., 62 Misc3d 462, 466–67 [Kings Cty Sup. Ct. 2018]).

In Seifullah v City of New York, 161 AD3d 1206 [2d Dept. 2018], the Second Department found that the filing of a notice of claim was a condition precedent to continuing plaintiff's action against the Department of Education of the City of New York and others and that the plaintiff's reliance upon Margerum, was misplaced insofar as in contrast to GML §§ 50-e (1) and 50-i (1), as the applicable notice of claim provision for a claim against the Department of Education, "broadly require[d] the filing of a notice of claim as a condition precedent to an 'action...for any cause whatever'.

In light of these precedents, it becomes clear, that whether a notice of claim is required against a particular municipal entity turns upon whether the language of the notice of claim provision limits the definition of "tort" claims to those involving personal injury, wrongful death or property damages; or is broader, such as the notice of claim under the City Charter (*see* Williams v NYC Health & Hosps., 62 Misc3d 462, 470 .

Accordingly, since service of a notice of claim is a condition precedent to this action, the City has demonstrated prima facie entitlement to summary judgment.

In opposition, plaintiff argues that even if a notice of claim was required to be filed (which it contends is not), its purpose is to put the municipality on notice of any injury and potential lawsuit. Plaintiff continues that the City was already aware of plaintiff's potential claims, given his three prior complaints in writing, his verbal complaint to the Mayor and his public complaint at the City Council meeting. Therefore, the City cannot claim to be prejudiced by the failure to file a notice of claim.

These arguments sound in ones for leave to file a late notice of claim. However, the court is unaware of any application by plaintiff for leave to file a late notice of claim, but if there was one, under General Municipal Law §50–e(5), a court considering a petition for leave

to serve a late notice of claim upon a municipal corporation must consider various factors including:

> "...whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter (see General Municipal Law § 50–e[5]). In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves. Additional factors relevant to whether a petition for leave to serve a late notice of claim should be granted include whether the petitioner has demonstrated a reasonable excuse for failing to serve a timely notice of claim and whether the delay has substantially prejudiced the municipal corporation in its ability to defend the claim on the merits" (Whittaker v New York City Bd. of Educ., 71 AD3d 776, 777 [2d Dept 2010]).

Here, plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim, and taking into consideration that the grievances were in 2016, and that plaintiff letter of resignation was October 24, 2017, filing a notice of claim now would not be a reasonable delay (M.L. v City of New York, 173 AD3d 848 [2d Dept 2019]). Thus, under these circumstances, without more, the court in its discretion, would not grant an extension to file a late claim.

As for the individual defendants, although the complaint named the individual defendants in their individual capacities, it alleged hostile work environment, retaliation, and the other causes of action by them as part of their employment, and thus, the notice of claim requirement applies (Kassapian v City of New York, 155 AD3d 851, 855 [2d Dept. 2017]). Plaintiff has failed to demonstrate that the alleged unlawful acts occurred outside the scope of employment (Zwecker v Clinch, 279 AD2d 572 [2d Dept 2001]).

In addition, this action does not fall within the public interest exception to the notice of claim requirement, since the complaint seeks to vindicate the private rights of plaintiff, and the

disposition of the claim will not directly affect or vindicate the rights of others (Kassapian v City of New York, 155 AD3d at 854. As individual defendants were acting in their official capacity, they are not liable for any injurious consequences of their official, discretionary action (Tesciuba v Koch, 215 AD2d 222 [1st Dept 1995]).

Specifically, as for defendant Carretta, the notice of claim requirements in 265 of the City Charter applies to the claims against Carretta, who is identified as a defendant in his individual capacity. His alleged discriminatory statements against plaintiff were made while acting in the discharge of his duties within the scope of his employment with Mount Vernon as a maintenance foreman.

The NYSHRL allows for individual liability if defendant had an ownership interest in the employer or has the authority to hire and fire employees or if the defendant aided and abetted the unlawful discriminatory acts. Plaintiff does not disagree with Carretta that he did not have an ownership interest in the City or had authority to make personnel decision. Rather, plaintiff argues that Carretta is individually subject to suit under the Human Rights Law since he aided and abetted the discriminatory and retaliatory conduct plaintiff was forced to endure. Allegedly, Carretta directed to plaintiff a number of the unwelcome racial comments including, telling him "You're really black" and telling him that he was in trouble now that the City had a white commissioner.

However, Caretta cannot be held liable as an aider and abettor unless the City is found to be liable in the first instance. It follows that Caretta cannot be held liable under Executive Law §296 (6) for aiding and abetting his own violation of the Human Rights Law (Med. Exp. Ambulance Corp. v Kirkland, 79 AD.3d 886, 888 [2d Dept 2010]).

Taking into consideration the parties' submissions, and the case law, defendants established their entitlement to judgment as a matter of law by demonstrating that plaintiff failed to serve the requisite notice of claim before commencing the action and the conduct complained of occurred during the discharge of individual defendants' duties within the scope of their employment. An action against a government official in his official capacity is functionally equivalent to an action against the municipality (Rosen & Bardunias v County of Westchester, 228 AD2d 487 [2d Dept 1996]). Plaintiff failed to raise triable issues to preclude summary judgment.

This constitutes the Decision and Order of the court.

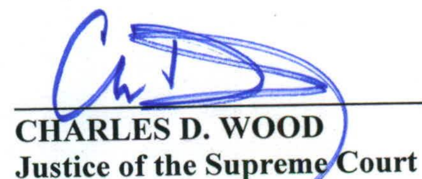
NOW, therefore, it is hereby

ORDERED, that the motion for summary judgment (Seq 3) by defendants City of Mount Vernon, Mayor Richard Thomas and Ralph Uzzi is granted, and the Complaint is dismissed as against these municipal defendants; and it is further

ORDERED, that the motion for summary judgment (Seq 4) by Neil Carretta is granted and the Complaint is dismissed as against Neil Carretta.

This case shall be marked disposed. The Clerk shall mark his records accordingly.

Dated: September 5, 2019
White Plains, New York



CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF