

Flowers v New York City Dept. of Educ.
2022 NY Slip Op 31102(U)
March 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 521430/2019
Judge: Consuelo Mallafré Meléndez
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At an IAS Term, Part 20 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of March 2022.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

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DEBRA FLOWERS,
Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, SHEILA S. GORSKI, COMMUNITY SCHOOL SUPERINTENDENT OF DISTRICT 32, in her official and individual capacity, PHYLLIS RAULLI, PRINCIPAL OF P.S./I.S. 384K FRANCES E. CARTER SCHOOL, in her official and individual capacity,

Index No. 521430/2019
DECISION & ORDER
Motion Sequence 001

Defendants.

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Hon. Consuelo Mallafre Melendez

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 1, 5, 9, 10, 11, 15 – 16, 19, 20 – 21, 24 – 32, 34 – 38, 40, 43 – 45, 47, 49 – 50

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant THE NEW YORK CITY DEPARTMENT OF EDUCATION (“DOE” or “BOE”) moves to dismiss the Complaint pursuant to CPLR 3211(a)(7). Defendant now moves to dismiss on the grounds that: (1) Plaintiff failed to file a timely Notice of Claim; (2) Plaintiff’s claims are barred by *res judicata*; (3) Plaintiff has failed to exhaust her administrative remedies; (4) Plaintiff’s state law claims for retaliation under CSL § 75-b, intentional and/or negligent infliction of emotional distress, and defamation and libel are time-barred by their relevant statutes; and (5) Plaintiff fails to state a claim under the relevant statutes for her state law claims. Plaintiff filed her Opposition Papers – Affidavit in Opposition to Motion, Memorandum of Law in Opposition, and Exhibits A through Y.

Plaintiff, Debra Flowers, was a probationary teacher at Frances E. Carter Public School. On August 30, 2017, Ms. Flowers received a letter of Denial of Completion of Probation with the New

York City Department of Education effectively terminating her employment appointment in 60 days. She appealed the dismissal in accordance with the provisions of Section 4.3.2 of the Bylaws of the New York City Department of Education on August 31, 2017. The decision on appeal was issued on June 26, 2018 by the Community Superintendent who reaffirmed the Denial of Completion of Probation Service effective on the close of business October 30, 2017. Ms. Flowers' last day of employment was October 30, 2017. Subsequently, Ms. Flowers' mailed a Notice of Claim on August 16, 2018 by certified mail. The Office of the New York City Comptroller acknowledged the Notice of Claim on September 19, 2018.

Defendant received by personal service on the Office of the Corporation Counsel a Summons and Complaint filed in the Supreme Court of the State of New York, County of Kings on or about October 17, 2019. Defendant removed the case to the United States District Court for the Eastern District of New York on November 4, 2019. Ms. Flowers alleged Defendants BOE, Sheila S. Gorski, and Phyllis Raulli violated her first amendment rights by retaliating against her for exercising her freedom of speech allegedly in violation of 41 U.S.C. § 1983. On February 5, 2021 the United States District Court for the Eastern District of New York dismissed with prejudice Ms. Flowers' First Amendment claim under 42 U.S.C. § 1983 and her state-law claims were remanded to state court. Ms. Flowers' state law claims allege retaliation in violation of New York Civil Service Law Section 75-b (CSL § 75-b), tort claims under New York law for intentional and/or negligent infliction of emotional distress, and defamation.

A claim against the City must adhere to CPLR § 217 and New York General Municipal Law § 50-e. CPLR § 217- a mandates that no action be commenced against a public entity, such as the City, unless a timely Notice of Claim is served within the time limits of General Municipal Law § 50-e. *See* N.Y. Gen. Mun. § 50-e. Pursuant to General Municipal Law § 50-e, the timely filing of a Notice of Claim is a statutory condition precedent to suit against a municipal entity and a Notice of Claim must be served within a ninety-day statutory period. (*See Sun v. City of New York*, 131 A.D.3d 1015 [2d Dept. 2015]). Without the filing of a timely Notice of Claim, a lawsuit against a municipality cannot proceed. General Municipality Law § 50-e(1)(a) provides, in relevant part:

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 . . . the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim

arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

Additionally, under New York Education Law § 3813(1) a claim must be served within three-months after the accrual of the action. New York Education Law § 3813(1) provides, in relevant part:

“an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim”. (N.Y. Educ. Law § 3813(1)).

It is also well established that “(a) claim accrues for purposes of Education Law § 3813 when it matures and damages become ascertainable” (*See Board of Ed. of Enlarged Ogdensburg City School Dist. v. Wager Const. Corp*, 37 N.Y.2d 283 [1975]; *Pope v. Hempstead Union Free School Dist. Bd. of Educ.*, 194 A.D.2d 654 [2d Dept. 1993]; *Scherman v. Board of Educ. School Dist. No. 1, Town of Hempstead, et. al*, 44 A.D.2d 831 [2d Dept. 1974]).

Here, Plaintiff fails to meet the three-month notice requirement and the ninety-day requirement which is a condition precedent to this action (N.Y. Educ. Law § 3813(1); N.Y. Gen. Mun. § 50-e). Reviewing the dates, in the light most favorable to the pro se litigant, the latest date the claim would have matured and become certain was the last day of employment on October 30, 2017. (*See Board of Ed. of Enlarged Ogdensburg City School Dist. v. Wager Const. Corp*, 37 N.Y.2d 283 [1975]; *Pope v. Hempstead Union Free School Dist. Bd. of Educ.*, 194 A.D.2d 654 [2d Dept. 1993]; *Scherman v. Board of Educ. School Dist. No. 1, Town of Hempstead, et. al*, 44 A.D.2d 831 [2d Dept. 1974]). Thus, the three-month notice requirement and the ninety-day requirement began to run on October 30, 2017. Defendants established that the Notice of Claim was filed after on or about January 30, 2018, the last date by which it could have been filed. The City Employment Claim Form which included Ms. Flowers' Notice of Claim was mailed on August 16, 2018 making it over six months late.

Ms. Flowers argues that the Notice of Claim began to run when she received a decision from the appeal hearing on July 2, 2018. This is incorrect because the claim matured on the last day of employment which was on October 30, 2017. (*See Board of Ed. of Enlarged Ogdensburg City School Dist. v. Wager Const. Corp*, 37 N.Y.2d 283 [1975]; *Pope v. Hempstead Union Free School Dist. Bd. of Educ.*, 194 A.D.2d 654 [2d Dept. 1993]; *Scherman v. Board of Educ. School Dist. No. 1, Town of*

Hempstead, et. al, 44 A.D.2d 831 [2d Dept. 1974]). Accordingly, Defendants establish their prima facie burden to grant the motion to dismiss in their favor.

The Plaintiff's actions must also be dismissed because she failed to comply within the applicable statute of limitations. An action against BOE and its employees must proceed "within one year and ninety days after the happening of the event upon which the claim is based" except in wrongful death actions (*See* N.Y. Educ. Law § 3813(2); NY Gen. Mun. § 50-i(1); *See Sun v. City of New York*, 131 A.D.3d 1015 [2d Dept. 2015]). An employee is deemed a "public employee" when they are appointed by a public employer and can be sued for an alleged retaliatory action in that capacity. (New York State Civil Service Law Section 75-b ("CSL § 75-b"). Here, the Plaintiff's claims of retaliation, intentional and or/negligent infliction of emotional distress, and defamation against the Defendant accrued no later than the date of her discontinuance of employment, which was on October 30, 2017. To comply with the statute of limitations, Ms. Flowers was required to have filed her complaint against BOE and its employees on or about January 30, 2019. As she failed to do so the Complaint filed against the Defendant on September 30, 2019 is untimely. Therefore, Plaintiff's causes of action for retaliation, intentional and/or negligent infliction of emotional distress, and defamation are time barred. *See Sun v. City of New York*, 131 A.D.3d 1015 [2d Dept. 2015].

The file reflects Sheila S. Gorski and Phyllis Raulli have not been served in this matter. As the statute of limitations has run, there can be no action against them. (*See* N.Y. Educ. Law § 3813(2); NY Gen. Mun. § 50-i(1); *See Sun v. City of New York*, 131 A.D.3d 1015 [2d Dept. 2015]).

It is noted that even if the notice of claim was timely filed and the complaint adhered to the appropriate statute of limitations, this action must nevertheless be dismissed for failure to exhaust administrative remedies. When an individual is subject to a collective bargaining agreement ("CBA"), they must first utilize their administrative remedies. *See* CSL § 75-b(3)(b); *In Matter of Robinson v. New York City Transit Authority*, 226 A.D.2d 467 [2d Dept. 1996] (no CSL § 75-b claim if CBA with arbitration provision); *In Matter of Andrea Muller v. New York City Dept. of Educ.*, 142 A.D.3d 618 [2d Dept. 2016] ("an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement must first avail herself of the grievance procedure set forth in the agreement before she can commence an action in court") (internal citations omitted).

Ms. Flowers failed to address her CSL § 75-b claim in grievance filings through her union or in her Article 78 proceeding, which was dismissed as time-barred. *See*, generally, Verified Petition; *see also Kelly v. County of Dutchess*, 176 A.D.3d 1060 [2d Dept. 2019] (CSL § 75 hearings subject

to Article 78 proceeding); Board of Educ. of Yonkers City School Dist. v Yonkers Mun. Civil Service Com'n, 248 A.D.2d 613 [2d Dept. 1998] (CSL § 76 hearings subject to Article 78 proceeding); *Matter of Roberts v. Board of Collective Bargaining of the Off. of Collective Bargaining*, 90 A.D.3d 440, 440 [1st Dept. 2011] (“The express provisions of Civil Service Law §§ 75 and 76 limit the appealability of a final agency determination to an article 78 proceeding or an appeal to the Civil Service Commission”) (internal quotation omitted)). As at no time during the grievance process or Article 78 proceeding did Plaintiff pursue a claim under CSL § 75-b, she has failed to exhaust her administrative remedies.

In accordance with the aforementioned, Defendant has met their burden on their respective motion to dismiss. “On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), the factual allegations in the pleading must be deemed true, and the petitioner must be afforded the benefit of every favorable inference” (*Stukes v. City of White Plains*, 163 A.D.3d 970 [2d Dept. 2018] quoting (*Matter of Better World Real Estate Group v. New York City Dept. of Fin.*, 122 A.D.3d 27, 36 [2d Dept 2014])).

As this matter runs afoul of notice of claim requirements and was commenced outside of the statute of limitations and plaintiff failed to exhaust her administrative remedies, the court will not address the other arguments that Defendant raises in support of their motion to dismiss. Accordingly, Defendant’s motion to dismiss is Granted and the Complaint is Dismissed in its entirety.

This constitutes the decision and order of the court.

ENTER.



Hon. Consuelo Mallafre Melendez
J. S. C.