

Gordon v Professional Staff Congress/CUNY

2025 NY Slip Op 33934(U)

October 9, 2025

Supreme Court, New York County

Docket Number: Index No. 157025/2024

Judge: Carol Sharpe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL SHARPE PART 52M

Justice

-----X		INDEX NO.	<u>157025/2024</u>
MILLICENT GORDON,			11/01/2024,
	Plaintiff,		11/08/2024,
			11/12/2024,
	- v -		03/10/2025,
			03/10/2025,
PROFESSIONAL STAFF CONGRESS/CUNY,		MOTION DATE	<u>03/10/2025</u>
PROFESSIONAL STAFF CONGRESS, WELFARE			002 003 004
FUND/CUNY, THE CITY UNIVERSITY OF NEW YORK,			005 006 007
LAGUARDIA COMMUNITY COLLEGE, TEACHERS		MOTION SEQ. NO.	<u>008</u>
RETIREMENT SYSTEM OF THE CITY OF NEW YORK,			
NEW YORK CITY OFFICE OF LABOR RELATIONS/GHI,			
CLARISSA GILBERT-WEISS, JOHN DOE			
	Defendant.		

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 37, 38, 65, 79, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 20, 21, 22, 23, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 80, 81

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 69, 70, 71, 107

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 72, 73, 74, 83, 108

were read on this motion to/for MODIFY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 75, 76, 109

were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 77, 78, 82, 110

were read on this motion to/for EXTEND - TIME.

Defendant PSC-CUNY Welfare Fund (“PSC Fund”) filed a motion seeking to dismiss plaintiff’s complaint with prejudice pursuant to CPLR 3211(a)(5) and (7) (“Mtn. Seq. #2”), on the grounds that the causes of action are time-barred and fail to identify any acts or omissions by PSC Fund warranting the relief plaintiff seeks. Plaintiff filed opposition and PSC Fund filed a reply. This motion is granted.

Professional Staff Congress/CUNY, AFT Local 2334 (“PSC CUNY”) also filed a motion to dismiss plaintiff’s action with prejudice pursuant to CPLR 3211(a)(5) and (7) (“Mtn Seq. 3”), on the grounds that the claims are time-barred, and fail to satisfy the applicable pleading standards as against PSC CUNY. Plaintiff filed opposition, and PSC CUNY filed a reply. This motion is granted.

Defendants New York City Office of Labor Relations s/h/a New York City Office of Labor Relations/GHI, Teacher’s Retirement System of the City of New York (“TRS”), The City University of New York (“CUNY”), and LaGuardia Community College (“LCC”)(collectively “Municipal Defendants”) filed a motion to dismiss plaintiff’s action pursuant to CPLR 3211(a)(5) and (7) (“Mtn. Seq., #4”), on the grounds that the claims are time-barred, the claims should have been brought in an Article 78 proceeding, plaintiff failed to properly file a notice of claim per Education Law §6224, and plaintiff fails to state a claim for relief. Plaintiff filed opposition, and Municipal Defendants filed a reply. This motion is granted.

Plaintiff later filed a motion seeking to amend the caption to correct the name of PSC Fund (“Mtn. Seq. #5”); a motion to correct its reply in opposition to Mtn. Seq. #3, as it should have been addressed to PSC Fund under Mtn Seq. #2 (“Mtn. Seq. #6”); a motion seeking to extend time to file opposition to Mtn. Seq. #3 (“Mtn. Seq. #7”); and finally, a motion seeking to extend time to file opposition Mtn. Seq. #4 (“Mtn Seq.# 8”). These motions are all denied as moot.

Plaintiff was employed as a tenured professor at LLC since 1995, and was allegedly injured in a workplace accident in November 1999. Although she eventually returned to work, she was later

placed on long term disability in 2001. In May 2002, Ms. Gordon applied for Tier IV Accidental Disability Retirement with TRS, but her application was denied as TRS determined that no workplace accident had occurred, pursuant to Administrative Code of the City of New York §13-551. Ms. Gordon contacted PSC Fund about the denial and was instructed by the Director of Pension and Welfare Fund Benefits that she should address the matter directly with TRS. There is no evidence that Ms. Gordon thereafter contacted TRS.

Plaintiff alleges that between 2002-2012 she was without health and retirement pension benefits for herself and her dependent child because of TRS's fraudulent denial of her disability application, and since then her benefits have been intermittently activated and deactivated. In 2012, Ms. Gordon contacted PSC Fund again and a representative told her to fill out a new Tier IV Accidental Disability Retirement application and that it would be backdated to address the period Ms. Gordon alleges she did not have access to benefits. Ms. Gordon alleges that this representative entrapped her into filing the second application which she believes caused additional problems. Pursuant to her complaint (NYSCEF Doc. #1), Ms. Gordon is receiving some benefits, but is still not receiving retiree benefits, or the retroactive benefits and back salary to which she claims to be entitled from 2002-2012.

Plaintiff commenced this action by filing a summons and complaint on August 1, 2024, and alleges that the defendants acted in a "coordinated fashion" (NYSCEF Doc. #1, p. 18) to violate her rights under New York Public Employees' Fair Employment Act (the "Taylor Act"); Article V, Section 7 of the New York State Constitution; the Teacher's Retirement System of the City of New York Tier III/IV Contract dated June 1993; and the Administrative Code of the City of New York §13-551. Plaintiff's claims are fraudulent denial of benefits, breach of contract, breach of fiduciary duty, and failure of duty of fair representation under the Taylor Act. Plaintiff is seeking compensatory damages in the amount of \$1,114,228.00 for lost benefits and pay, punitive damages for the actions

of the defendants which she defines as “willful and contumacious” (*id.*), injunctive relief ordering the defendants to correct plaintiff’s records and process her claims, and for attorney’s fees and costs.

Pleadings which are the subject of a CPLR 3211 motion to dismiss are liberally construed, the court is to accept the facts as alleged in the complaint to be true, accord plaintiff “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, 614 NYS2d 972, 638 NE2d 511 [1994]). “We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one...” (*Chanko v Am. Broad. Cos. Inc.*, 27 NY3d 46, 52, 29 NYS3d 879, 49 NE3d 1171 [2016]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 389 NYS2d 314, 357 NE2d 970 [1976] (“Under CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss... affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.”)).

CPLR 3211(a)(5) provides for dismissal of an action if it is time-barred. The initial burden is on the defendant to establish that the cause of action is untimely. “Thereafter, the burden was upon the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely” (*Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611, 872 NYS2d 144 [2nd Dept 2009]). “The plaintiff has the burden of establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies [internal citation omitted]” *Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844, 989 NYS2d 365 [2nd Dept 2014]; (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669-670, 64 NYS3d 228 [2nd Dept 2017]).

Plaintiff argues that her action should be deemed timely based on the continuing violation (or continuous wrong) doctrine as there were “ongoing, repeated acts of misconduct” by the defendants

and the “claims are timely if harm persists within the statutory period” (NYSCEF Doc. #24, ¶2). ““The continuous wrong doctrine is an exception to the general rule that the statute of limitations “runs from the time of the breach though no damage occurs until later’ (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402, 615 NE2d 985, 599 NYS2d 501 [1993]). The doctrine ‘is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act’ (*Selkirk v State of New York*, 249 AD2d 818, 819, 671 NYS2d 824 [3d Dept 1998])” (*Henry v Bank of Am.*, 147 AD3d 599, 601, 48 NYS3d 67, 69-70 [1st Dept 2017]). “The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive trespass [internal citations omitted]. The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission” (*Covington v Walker*, 3 NY3d 287, 292, 786 NYS2d 409, 411-12, 819 NE2d 1025, 1027-28 [2004]). The doctrine “may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct” (*Selkirk*, 249 AD2d at 819). It is applicable where “there is one tortious act complained of because ‘the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff and it does not change as a result of ‘continuing consequential damages’” (*Tiburcio v Grant Ave. Bronx Realty Corp.*, 238 AD3d 433 [1st Dept 2025]).

The statute of limitations for an action for fraud, pursuant to CPLR §213(8), is six years from the date the cause of action accrued or two years from the time the fraud was discovered. Pursuant to CPLR §213(2), a breach of contract action must also be commenced within six years from the date of the alleged breach. Pursuant to CPLR §214(4), a breach of fiduciary duty claim has a statute of limitations of three years, unless there is an allegation of fraud, as there is here, then pursuant to CPLR §213(8), the applicable statute of limitations becomes six years. Finally, the statute of limitations for breach of duty of fair representation under the Taylor Act is four months from the date the employee

(or former employee) knew or should have known the breach occurred, or four months from the date the employee suffers actual harm (CPLR §217(2)(b)). Applying these time frames to plaintiff, without considering the continuous wrong doctrine, the denial of the Tier IV Accidental Disability Retirement occurred on August 8, 2002. If this is the date the alleged fraud occurred, then plaintiff would have had to file her action no later than August 8, 2008. If plaintiff is using the date that her second Accidental Disability Retirement application was approved as discovery of the fraud, which was July 5, 2013, then plaintiff should have filed her summons and complaint by July 5, 2015. For the breach of contract and the breach of fiduciary duty actions, plaintiff should have filed by August 8, 2008. For the breach of duty of fair representation action, plaintiff should have filed an action by December 8, 2002. Plaintiff did not file this action until August 1, 2024.

Plaintiff relies on the *Henry* case in its opposition, arguing that there were repeated acts of misconduct preventing the accrual of claims at any one point in time. However, the court in *Henry* rejected the argument that the doctrine applied under very similar circumstances. The plaintiff in *Henry* alleged two separate instances of fraudulent behavior, one six years after the other, claiming the bank enrolled him in certain programs without his consent. The plaintiff considered the ongoing monthly fees he was required to pay for these programs as the continuous wrong doctrine, thereby tolling the statute. However, the court determined that the monthly payments were really lingering consequences of the original alleged wrongful act, not separate and distinct fraudulent acts. The doctrine is intended to apply to “continuing unlawful acts and not on the continuing effects of earlier unlawful conduct” (*Henry*, 147 AD3d at 601).

Ms. Gordon was aware that her retirement status was incorrect and that benefits were not being applied from the time she received the denial letter in 2002. Each year within the statutory period that passed without receiving any retirement benefits was a continuing effect of the 2002 denial of disability retirement benefits, and an opportunity for Ms. Gordon to bring the action. She also had

an opportunity in 2013, when she received the approval letter for the same benefits for which she had been previously denied. Plaintiff argues that the action is timely because she was notified in 2022 that her retirement status was not properly recorded in the defendants' systems. The only evidence of this may be the letter from TRS dated November 2, 2022 (NYSCEF Doc. #29, p. 10), which recounts plaintiff's disability retirement filings in 2002 and 2012, and explains that TRS is unable to address the period of time Ms. Gordon was without benefits because she had not taken any steps to appeal TRS's rejection of her application in 2002. This letter, which does not appear to be complete, does not contain any new information that was not already known to plaintiff in 2002 or 2013. The Court notes that the letter does state that medical records were not provided by Ms. Gordon in 2002, while the August 8, 2002, letter states that medical records were received and reviewed. However, whether the medical records were received or not, Ms. Gordon was long aware that her disability retirement was not approved. There is no documentary evidence provided showing that plaintiff made any attempt to resolve these issues at any point between 2002 and 2012, including commencing any appeal of the rejection letter. Plaintiff had ample opportunity to bring an action then, and at several points in time thereafter, but did not do so until 2024. Accordingly, this Court finds that the statute of limitations has expired on each of plaintiff's claims.

While this Court finds that defendants have provided sufficient evidence that the claims for fraud, breach of contract, breach of fiduciary duty, and breach of duty of fair representation should be dismissed, it is unnecessary to consider them further as the statute of limitations have expired for each of those claims. Accordingly, plaintiff's actions as against all defendants must be dismissed. It is hereby:

ORDERED, that PSC Fund's motion to dismiss pursuant to CPLR 3211(a)(5) and (7) is granted with prejudice; it is further

ORDERED, that PSC CUNY’s motion to dismiss pursuant to CPLR 3211(a)(5) and (7) is granted with prejudice; it is further

ORDERED, that Municipal Defendant’s motion to dismiss pursuant to CPLR 3211(a)(5) and (7) is granted with prejudice; and it is further

ORDERED, that Mtn. Seq. 5, Mtn. Seq. 6, Mtn Seq. 7, and Mtn. Seq. 8, all filed by plaintiff, are each denied as moot.

This constitutes the Decision and Order of the Court.

E N T E R:

October 9, 2025
DATE



HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE