

<b>Loehr v New York State Unified Ct. Sys.</b>
2012 NY Slip Op 33924(U)
July 2, 2012
Supreme Court, Westchester County
Docket Number: 13054/11
Judge: Donald F. Cerio, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
COUNTY OF WESTCHESTER SUPREME COURT

Present: Hon. Donald F. Cerio, Jr.  
Acting Supreme Court Justice

**FILED**  
JUL -6 2012  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

SUSAN NEWMAN LOEHR,  
Plaintiff/Petitioner,

**DECISION AND ORDER**

v.

Index No. 13054/11

THE NEW YORK STATE UNIFIED COURT SYSTEM,  
Defendant,

and

ANNE PFAU, as Chief Administrative Judge of the  
New York State Unified Court System,  
Respondent.

**FILED  
AND  
ENTERED  
ON 7/6 2012**

This matter comes before the Court upon Defendant/Respondent's October 14, 2011, Motion to Dismiss plaintiff's action, accompanied by the Affidavit in Support of Cross-Motion to Dismiss of Warren Brasmeister, dated October 13, 2011.<sup>1</sup> Defendant/Respondent thereafter submitted a Memorandum of Law on behalf of Respondents dated October 14, 2011, as well as a Supplemental Memorandum of Law on Behalf of Respondents dated December 22, 2011.<sup>2</sup> Plaintiff submitted Plaintiff's/Petitioner's Memorandum of Law in Opposition to Motion to Dismiss dated February 15, 2012, along with an Affidavit in Opposition to Motion to Dismiss dated February 24, 2012. Defendant/Respondent subsequently submitted a Reply Memorandum of Law on Behalf of Respondents dated March 2, 2012, as well as correspondence of March 16, 2012.<sup>3</sup>

On May 3, 2012, in Albany County Supreme Court, Attorney Robert A. Spolzino appeared and was heard on behalf of plaintiff in opposition to the motion to dismiss. Also appearing at that time was Attorney John J. Sullivan who was heard on behalf of defendants in support of the motion to dismiss.

<sup>1</sup>This motion is entitled "Notice of Cross-Motion to Dismiss."

<sup>2</sup>The Supplemental Memorandum of Law was precipitated by plaintiff/petitioner having filed an Amended Verified Complaint and Petition on December 5, 2012.

<sup>3</sup>Plaintiff/Petitioner is hereinafter referred to as plaintiff. Defendant and Respondent are hereinafter referred to as defendants.

The following reflects the Decision and Order of this Court:

### Brief History

Plaintiff, presently the Commission of Jurors for the County of Westchester, commenced the instant action by Notice of Petition and Petition dated July 27, 2011. The Petition sets forth twelve causes of action asserting various forms of relief premised upon plaintiff's position that she had been improperly and unlawfully denied salary increases as a result of the application of Chapter 276 of the Laws of 2008 and the Chief Administrative Judge's determination that any such increase in her salary would not be "warranted" nor "appropriate" as set forth in Judge Pfau's letter to plaintiff dated April 1, 2011. Thereafter, by Amended Verified Complaint and Petition verified on December 2, 2011, plaintiff asserted two additional causes of action.

Defendants had not answered this hybrid action directly, choosing, rather, to move to dismiss the petition upon the grounds that such fails to state a cognizable cause of action.

### Legal Analysis

#### a. Article 78 Action

With respect to plaintiff's Causes of Action as contained in the Amended Verified Petition and designated Second, Third and Thirteenth, as proffered pursuant to Article 78 of the Civil Practice Law and Rules, defendant has moved to dismiss upon the ground that such do not set forth cognizable causes of action and that the commencement of this action is beyond the applicable statute of limitations. In reviewing the first ground upon which dismissal is sought, this court must initially consider such allegations as contained within the petition to be true. (Matter of Long Is. Contractors' Assn. v. Town of Riverhead, 17 AD3d 590, 594, 2<sup>nd</sup> Dpt. 2005; citing Matter of Zaidins v. Hashmall, 288 Ad2d 316, 2<sup>nd</sup> Dpt. 2001). Thereafter, review must then be premised upon whether the pleading of plaintiff demonstrates the existence of a cause of action. (See Yenrab, Inc. v. 794 Linden Realty, LLC, 68 AD3d 755, 757, 2<sup>nd</sup> Dpt. 2009; Pacific Carlton Dev. Corp. v. 752 Pac., LLC, 62 AD3d 677, 679, 2<sup>nd</sup> Dpt. 2009, citing Guggenheimer v. Ginzburg, 43 NY2d 268, 1977). Upon review this court finds plaintiff's causes of action Second and Third to be sufficient. However, that cause of action designated Thirteenth must fail as plaintiff here is not a "judicial officer" as that term is defined and is, therefore, within the class of persons, i.e., non-judicial officers and employees, to whom Chapter 276 of the Laws of 2008 applies.

The secondary analysis which need be conducted as to these counts alone pertains to the statute of limitations defense raised by defendants. An Article 78 action statutorily must be commenced within four (4) months, as is relevant here, "after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty;..." (CPLR §217(1)). Plaintiff asserts that the statute of limitations did not begin to run "until the officer has rejected the petitioner's demand for compliance" citing Matter of O'Connell v. Kern, 287 NY 297 (1942). (Plaintiff's Memorandum of Law dated February 15,

2012, at Page 15, thereof). Plaintiff therefore asserts that the statute did not begin to run until April 1, 2011, when Judge Pfau issued her letter to plaintiff advising that no such raise would be forthcoming. Plaintiff commenced the action on or about July 29, 2011, and thus within the four (4) month statute.

Defendants, on the other hand, take the position that the statute began to run upon plaintiff having been promoted to her present position on November 24, 2011, and that plaintiff's efforts thereafter did not toll the running of the statute nor is the April 1, 2011, letter of Judge Pfau controlling. Consequently, commencement was therefore untimely as such should have occurred by not later than March 24, 2012. (Defendant's Reply Memorandum of Law dated March 2, 2012, at Page 3, thereof).

Upon this court's review of the facts and circumstances the plaintiff's Article 78 action is not barred by the statute of limitations as such was commenced within four months of Judge Pfau's letter of April 1, 2011. The harm allegedly caused was of a continuing nature and no final determination was made with respect to plaintiff's demands until Judge Pfau's letter was received. (See Pfingst v. Levitt, 44 AD2d 157, 3<sup>rd</sup> Dpt. 1974; Weir v. Canestrari, 130 AD2d 906, 3<sup>rd</sup> Dpt. 1987; Matter of O'Connell v. Kern, 287 NY 297, 1942; Matthews v. O'Dwyer, 194 Misc. 1056, S. Ct., New York County, 1949). As the present Article 78 is in the nature of mandamus the circumstances here are such that the statute of limitations does not bar the instant action.

#### b. Plaintiff's Complaint

Plaintiff asserts as Causes of Action Sixth, Seventh and Eighth that upon failure to pay her JG-30 deferred pay or JG-32 salary she had been denied equal protection pursuant to the Fourteenth Amendment to the United States Constitution as well as Article 1, Section 11, of the New York State Constitution. Defendants assert that there existed a rational basis related to a legitimate governmental interest to exercise the authority vested pursuant to Chapter 276 of the Laws of 2008 such that no violation of a constitutional dimension may be raised.

Plaintiff further asserts as Causes of Action Fourth, Fifth and Ninth constitutional claims that failure to pay her salary as set forth in the controlling provisions of the employment contracts is in violation of Article 1, Section 10, of the United States Constitution; that such violates her due process rights upon both state and federal constitutional grounds, and; such withheld monies are private properties taken for a public purpose without compensation and without constitutional authority. Defendants assert that no contract existed by virtue of the enactment of Chapter 276 of the Laws of 2008 and thus there can be no violation or taking with respect to a nonexistent contract nor does there exist a vested property interest in such monies.

Plaintiff's First Cause of Action claims a breach of contract to which defendants aver that no contract rights existed upon which fault may lie.

Plaintiff's Causes of Action Ten and Eleven assert statutory violations of Civil Service Law §115 and Fair Labor Standards Act, 29 USC chapter 8 §207. Defendants assert that this matter is

beyond this court's jurisdiction and that plaintiff is not otherwise entitled to monies not otherwise due her.

Plaintiff's Twelfth Cause of Action seeks attorney's fees to which defendants object.

Finally, plaintiff's Fourteenth Cause of Action seeks damages for the alleged failure of defendants to have compensated her at the grade to which a Commissioner of Jurors was entitled since November 24, 2010. Defendants assert that this cause of action is duplicative and fails to set forth a basis for relief.

A motion to dismiss pursuant to CPLR §3211(a)(7) on the ground that the complaint fails to state a cause of action cognizable in law requires this court to first consider the factual allegations as true and to construe such pleadings in the light most favorable to the plaintiff. "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,], a motion \* \* \* will fail, regardless of whether the plaintiff will ultimately prevail on the merits." (Bovino v. Village of Wappingers Falls, 215 AD2d 619, 620, 2<sup>nd</sup> Dpt. 1995; internal citations omitted). Therefore, upon such a review the ultimate viability of the cause of action is not the controlling assessment to be made by the court but, rather, at this juncture, whether upon the facts alleged a cause of action is found.

Upon a review of the allegations as set forth in plaintiff's Amended Verified Complaint and Petition as verified on December 2, 2011, and as it pertains to Causes of Action First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Fourteenth, this court finds the same to be sufficient in asserting a cognizable cause of action therein as to each and the defendants' motion to dismiss is **denied**.

#### Conclusion

Therefore, upon the facts and circumstances of this matter, and upon the relevant decisional and statutory law of the State of New York, it is

ORDERED, that defendants' motion to dismiss Causes of Action Second, Third and Thirteenth, upon the ground that such actions pursuant to Article 78 of the Civil Practice Law and Rules were commenced beyond the applicable Statute of Limitations is DENIED, and it is further

ORDERED, that defendants' motion to dismiss Causes of Action First through Twelfth and Fourteenth upon the ground that such do not evince a cognizable cause of action pursuant to Civil Practice Law and Rules §3211(a)(7) is DENIED, and it is further

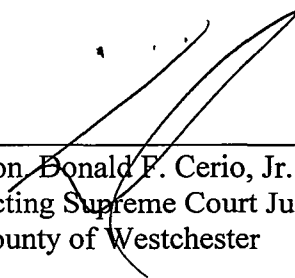
ORDERED, that defendants' motion to dismiss Cause of Action Thirteenth upon the ground that such does not evince a cognizable cause of action pursuant to Civil Practice Law and Rules §3211(a)(7) is GRANTED and same is DISMISSED, and it is further

ORDERED, that defendants are to timely answer this hybrid action pursuant to relevant statutory

authority.

Enter.

DATED: July 2, 2012  
Wampsville, New York



---

Hon. Donald F. Cerio, Jr.  
Acting Supreme Court Justice  
County of Westchester

TO: Robert A. Spolzino, Esq., Attorney for Plaintiff/Petitioner  
John J. Sullivan, Esq., Attorney for Defendant/Respondent  
Westchester County Supreme Court Clerk