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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

MICHAEL REID,

Plaintiff,

-against-

INCORPORATED VILLAGE OF FLORAL PARK,

Defendant.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 013984/11

MOTION SUBMISSION DATE: 1-13-12

MOTION SEQUENCE NO. 1

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation	X

Defendant moves for an Order pursuant to CPLR §§ 3211(a)(5) and (7), CPLR §§ 9801 and 9802, for partial dismissal of plaintiff's complaint and pursuant to CPLR § 325(d) for removal of this action to Nassau County District Court. Plaintiff opposes the motion.

Plaintiff served the defendant with a Notice of Claim pursuant to CPLR § 9802 on November 2, 2010 and this action was commenced with the filing of a Summons and Verified Complaint on September 28, 2011. The complaint sets forth a single cause of action for breach of the 1999 employment contract between the parties and alleges the defendant breached the contract by failing to pay the plaintiff the salary he was entitled to from 1999 through 2010.

In moving for dismissal pursuant to CPLR 3211(a)(5), a defendant must establish *prima facie*, that a cause of action is time barred (*see Philip F. V. Roman Catholic Diocese of Las Vegas*, 70 AD3d 765 [2nd Dept. 2010]). Once the defendant establishes a *prima facie* case, the burden shifts to the plaintiff to bring forth facts of an evidentiary nature that would establish the action was timely filed or which would create an issue of fact as to timeliness (*see Lessoff v. 26 Court Street Associates, LLC*, 58 AD3d 610 [2nd Dept. 2009]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.,* 98 ny2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed (*see Leon v. Martinez*, 84 NY2d 83 [1994]). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (*see Aberbach v. Biomedical Tissue Services,* 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.,* 5 NY3D 11 [2005]).

Pursuant to CPLR § 9802, "no action shall be maintained against the village upon or arising out of a contract of the village unless the same shall be commenced within eighteen months after the cause of action therefor shall have accrued, nor unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued" .

Plaintiff alleges that he was employed as a police officer by the Village of Floral Park since 1976 and that he became police commissioner in 1993. On July 20, 1999, plaintiff and defendant entered into a contract. Pursuant to that contract, the terms of his annual compensation as Commissioner were to be $5,000.00 more than the total earnings of the highest ranking lieutenant employed by the Incorporated Village of Floral Park Police Department. Throughout the plaintiff's tenure, there were only two lieutenant positions actively filled in the Incorporated Village of Floral Park Police Department. In June of 2010 plaintiff became aware that his tenure as the Commissioner was going to end and that he would revert to the position of lieutenant. In July of 2010 plaintiff asked the two existing lieutenants to divulge what each of their salaries were. The plaintiff learned that, contrary to the terms of his contract, he was actually being paid less than his subordinates rather than the $5,000.00 more which was mandated under his contract and that he had been paid less than each of the lieutenants since 1999.

Defendant argues that plaintiff is not pursuing a single breach of contract claim, but rather several distinct claims. They allege that plaintiff's claim is that the defendant repeatedly breached the subject agreement on an annual basis between 1999 and 2010, by failing to pay the plaintiff $5,000.00 more than the highest ranking lieutenant. Defendant argues that as a result of these claims being several distinct claims, each cause of action accrued each year the contract was breeched and that the plaintiff failed to timely file a Notice of Claim for ten of the twelve years in question. They argue

that only two of the claims are viable based on the fact that plaintiff filed his Notice of Claim on November 2, 2010 and claim the two causes of action together seek damages in the amount of $10,000.00 and that the monetary value of the damages claimed falls within the jurisdiction of the Nassau County District Court pursuant to CPLR § 325(d).

Defendant further argues that pursuant to CPLR § 9802 the applicable statute of limitations against the Village is 18 months, and that the plaintiff should be precluded from pursuing claims to the extent that they accrued prior to March 28, 2010, 18 months prior to the date the plaintiff commenced the action by the service of a Summons and Verified Complaint.

It is worth noting that the Hon. Denise L. Sher found no merit to this identical argument on a motion to dismiss and a motion to reargue this precise issue, and in fact, dismissed the prior case, filed under Nassau County Supreme Court Index Number 001981/11, as a result of a pleading deficiency in the Verified Complaint and not because the court agreed with defendant's argument that this cause of action is actually several distinct claims rather than a single cause of action for breach of contract.

With respect to the defendant's claim that plaintiff is not really pursuing a singular breach of contract claim, but rather several distinct claims, this court finds no merit and no authority which would support such an argument and in fact the defendant has not provided this court with any controlling case law which would support their argument. In fact, it appears that a contract claim asserted under CPLR § 9802 accrues when the claimant should have viewed his claim as having been rejected (*see Arnell Construction Corp. v. Village of North Tarrytown*, 100 AD2d 562, 563 [2nd Dept. 1984]). It is well settled that "A cause of action for breach of contract accrues and the

statute of limitations begins to run from the time of the breach" *(HP Capital, LLC v. Village of Sleepy Hollow*, 68 AD3d 928, 929 [2nd Dept. 2009], *quoting Fourth Ocean Putnam Corp v. Interstate Wrecking Co.*, 108 AD2d 3, 7 [1985]. As a general rule, accrual occurs when all of the factual elements necessary to maintain the lawsuit and obtain relief come into existence (*see Ely-Cruikshank Co v. Bank of Montreal*, 81 NY2d 399, 406 [1993]; *HP Capital, LLC v. Village of Sleepy Hollow*, 68 AD3d at 929, *supra*)

Under the circumstances of this case, the plaintiff believed the Village had been paying him in accordance with the contract since 1999 and he had no reason to suspect otherwise. Except in cases of fraud, where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when the liability for wrong has arisen even though the injured party may be unaware of the wrong or injury (*see Ely-Cruikshank Co v. Bank of Montreal*, 81 NY2d 399, 406 [1993]; CPLR § 213 (2),(8)). The plaintiff alleges that the defendant intentionally deceived the plaintiff and that as a result of that deception he was not aware that he had not been paid according to the terms of the 1999 contract until 2010. This court will not allow the defendant to hide behind that alleged deception in order to advance a lack of notice or statute of limitations defense which is arguably based on misinforming or deceiving the plaintiff.

In evaluating the present case under the body of controlling case law, it appears that the plaintiff's cause of action did not accrue at the end of each contract year, as asserted by the defendant, but rather the claimed would have accrued once the plaintiff viewed his claim as being rejected (*see Morano Construction Corporation v. Village of*

Highland Falls, 213 AD2d 528 529 [2nd Dept. 1995;*Arnell Construction Corp. v. Village of North Tarrytown*, 100 AD2d at 563; *Hammond Lane Mechanicals v. Village of Potsdam, St. Lawrence*, 119 AD2d 876 [3rd Dept. 1986]). It certainly follows that in order to assert a claim and have a claim rejected the plaintiff would have to have knowledge of the alleged breach in order to ask for the remaining money due and owing.

In considering a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211, the pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Dana v. Malco Realty, Inc.,* 51 AD3d 621 [2nd Dept. 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2nd Dept. 2006]). The court must determine whether factual allegations are discerned from the pleadings' four corners which, taken together, manifest any cause of action cognizable at law (*see 511 W. 232nd Owners Corp. V. Jennifer Realty Co.*, 98 NY2d at 151-152, *supra*). Under the circumstances, and applying that standard, triable issues of fact exist as to whether the defendant breached the contract with the plaintiff.

Thus, in accepting plaintiff's facts as true and according plaintiff every favorable inference, the facts alleged in the complaint and in the affirmation in opposition with supporting exhibits sufficiently state a cause of action for breach of contract. Whether plaintiff can provide sufficient evidence to substantiate the facts alleged and ultimately prevail is not at issue. Further, the documents submitted by defendant referenced above are insufficient to warrant dismissal under CPLR §§ 3211(a)(5) and (7); CPLR §§

9801 and 9802 or removal under CPLR § 325(d).

Accordingly, defendant's application to dismiss plaintiff's complaint pursuant to CPLR §§ 3211, 9801 and 9802 is DENIED. Defendant's application to remove the matter to the Nassau County District Court pursuant to CPLR § 325(d) is DENIED as moot.

This constitutes the Decision and Order of the Court.

Dated: March 7, 2011

JAMES P. McCORMACK, A.J.S.C.