United States Of America v. New York City Department Of Education
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Plaintiffs acknowledged their lack of compliance with Section 3813, but rejoined that (a) Section 3813(2) requires a notice of claim for actions "founded upon tort," (b) the New York Court of Appeals held in *Margerum v. City of Buffalo*, 24 N.Y.3d 721 (2015), that claims under the NYSHRL are not "founded upon tort" within the meaning of N.Y. Gen. Mun. L. § 50-e, which applies to municipalities and is incorporated by reference into Section 3813(2), and (c) *Margerum* therefore requires the conclusion that a notice of claim is not required for plaintiffs' NYSHRL and NYCHRL claims. Magistrate Judge Francis rejected their argument on the basis that it ignored entirely Section 3813(1). Section 3813(1), he explained, "is narrower than section 3813(2) in that it only applies to claims against school districts and their officers, but broader than section 3813(2) in that it is not limited to claims founded upon tort. *As a result, its notice of claim requirement applies to employment discrimination claims against school districts and their officers under the NYSHRL and NYCHRL.*" R&R at 17 (emphasis added). In other words, even if plaintiffs were not required to file a notice of claim by virtue of Section 3813(2), they were under Section 3813(1).

Plaintiffs claim that was error. They point to *Carter v. City of Syracuse School District*, 656 F. App'x 566 (2d Cir. 2016), where the Court of Appeals remanded a case against a school district to consider the implications, if any, of *Margerum* with respect to the district court's prior dismissal of NYSHRL claims under the notice of claim provisions of Section 3813, a subject that had not been briefed on appeal. And, plaintiffs assert, an Eastern District decision subsequently "held that a 'notice of claim for a NYSHRL claim against a school district or its personnel is not required.'" Def. Obj. [16-cv-4844, DI 34] at 6 (emphasis omitted) (citing *Caputo v. Copiague Union Free Sch. Dist.*, 15-cv-5292 (DRH), 2016 WL 6581865 (E.D.N.Y. Nov. 4, 2016)). But neither *Carter* nor *Caputo* supports their position.

To state the obvious, *Carter* would not control here even if it had been a precedential opinion rather than a summary order on a petition for rehearing. The remand was based on the parties' failure to brief the issue on appeal and reflected no view as to the proper outcome. Indeed, the Court of Appeals explicitly left open for the district court's consideration in the first instance *Margerum*'s impact, if any, on the issue.[1]

Nor is plaintiffs' reliance on *Caputo* persuasive. *Caputo* decided that NYSHRL claims "are not tort action[s] under Education Law § 3813" based on *Margerum*'s holding that NYSHRL claims "are not tort actions under [Gen. Mun. L. § 50-e]." 2016 WL 6581865, at *6. From that premise, it concluded that the notice of claim provision of Section 3813—without differentiating between subdivisions 1 and 2—could not be applied to NYSHRL claims, "[g]iven that Education Law § 3813, like General Municipal Law 50-e, requires a notice of claim as a condition precedent to an action 'founded on tort' . . . ." *Id.* But *Caputo* overlooked a salient fact: Section 3813 contains two subdivisions, each with its own requirements. *Margerum* dealt with the question whether NYSHRL claims are "founded upon tort" within the meaning of Gen. Mun.

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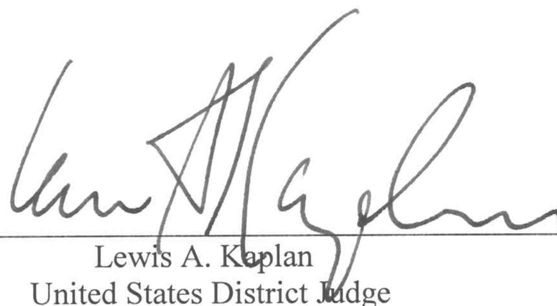
[1] The Court of Appeals withdrew its earlier opinion. Accordingly, that earlier opinion has no precedential value. *See Harper v. Scott*, 577 F. Supp. 15, 17 (E.D. Mich. 1984), *aff'd*, 803 F.2d 719 (6th Cir. 1986).

L. § 50-e. Section 50-e, however, is incorporated by reference into subdivision 2 only. But subdivision 1, unlike subdivision 2, is not limited to actions "founded upon tort." Thus, even if *Margerum* compelled the conclusion that NYSHRL claims do not require a notice of claim under subdivision 2, that case has no bearing on whether the same is true of subdivision 1. Thus, I respectfully disagree with *Caputo*.[2]

The objections to the R&R are overruled. The motion to dismiss is granted in part and denied in part as set forth in the R&R substantially for the reasons stated by Magistrate Judge Francis.

SO ORDERED.

Dated: April 4, 2017



Lewis A. Kaplan
United States District Judge

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2 Plaintiffs contend also that, even if they were required to file a notice of claim, their OEO and EEOC complaints satisfy that requirement. DI 34 at 6-8. This argument, however, "w[as] not raised before Magistrate Judge [Francis], and [was] not submitted as [an] objection[] but as [a] new argument[]." *Abu-Nassar v. Elders Futures, Inc.*, No. 88-cv-7906 (PKL), 1994 WL 445638, at *5 n.2 (S.D.N.Y. Aug. 17, 1994). Accordingly, the Court declines to consider plaintiffs' argument. *Id.*; *see also Santiago v. Meluzio*, No. 05-cv-00009 (ENV), 2006 WL 2462888, at *3 (E.D.N.Y. Aug. 24, 2006); *Virgin Enters. Ltd. v. Virgin Cuts, Inc.*, 149 F. Supp. 2d 220, 223 (E.D. Va. 2000); *Morris v. Amalgamated Lithographers of Am., Local One*, 994 F. Supp. 161, 163 (S.D.N.Y. 1998). Even if the Court were to consider it, it would conclude that plaintiffs have not alleged facts sufficient to establish that the OEO or EEOC complaints "put the school district on notice of the precise claims alleged, [were] served on the governing board of the district (and not a different arm of the district), and [were] served within the statutory time period." *Riccardo v. N.Y. City Dep't of Educ.*, No. 16-cv-4891 (LAK) (JCF), 2016 WL 7106048, at *8 (S.D.N.Y. Dec. 2, 2016), *report and recommendation adopted sub nom. United States v. N.Y. City Dep't of Educ.*, No. 16-cv-4291 (LAK), 2017 WL 57854 (S.D.N.Y. Jan. 4, 2017).