

**Carter v Incorporated Village of Ocean Beach**

2010 NY Slip Op 33819(U)

October 29, 2010

Sup Ct, Suffolk County

Docket Number: 0010452/2010

Judge: Jr., John J.J. Jones

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO.: 0010452/2010  
SUBMIT DATE: 7/28/2010  
MTN. SEQ.#: 001

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 SUFFOLK COUNTY

COPY

Present:

HON. JOHN J.J. JONES, JR.  
Justice

MOTION DATE: 001 - 5/27/2010  
002 - 6/30/2010  
MOTION NO.: 001-MG 002-XMG

-----X  
EDWARD CARTER, FRANK FIORILLO, KEVIN LAMM,  
JOSEPH NOFI, and THOMAS SNYDER, :

Plaintiffs, :

-against- :

INCORPORATED VILLAGE OF OCEAN BEACH, :  
OCEAN BEACH POLICE DEPARTMENT, ACTING :  
DEPUTY POLICE CHIEF GEORGE B. HESSE, :  
individually and in his official capacity, SUFFOLK :  
COUNTY, ALISON SANCHEZ, individually and in :  
her official capacity, TYREE BACON, individually, :  
and PATRICK JOHN CHERRY, individually, :

Defendants. :

-----X

Upon the following papers numbered 1 to 29 read on this motion and cross-motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers 10-18; Answering Affidavits and supporting papers 8-9; 19-25; Replying Affidavits and supporting papers 26-27; 28-29; Other \_\_\_\_\_; it is

**ORDERED** that this motion by defendant, Suffolk County (County), and the separate motion by defendant, Alison Sanchez, deemed herein to be a cross-motion, for an order dismissing the complaint against them is granted, and the action is severed against said

defendants and shall otherwise proceed against the remaining defendants.

Plaintiffs, Edward Carter, Frank Fiorillo, Kevin Lamm, Joseph Nofi were employed as part-time seasonal Police Officers in the Incorporated Village of Ocean Beach, Suffolk County, until they were terminated from their employment on April 2, 2006. Plaintiff Thomas Snyder was also employed as an Ocean Beach Police Officer until his employment was terminated on or about April 20, 2006. By the filing of a summons and complaint on March 19, 2010, plaintiffs seek recovery under the first cause of action against the Village of Ocean Beach (Ocean Beach), the Ocean Beach Police Department (OBPD), and the County pursuant to NY Civil Service Law § 75-b, under the second cause of action for defamation *per se*, and under the third cause of action against defendants Police Chief George B. Hesse, Ocean Beach, the OCPD, the County and Sanchez for negligent retention and supervision of allegedly unfit employees. Before the commencement of this action, plaintiffs brought an action in the United States District Court for the Eastern District of New York for relief under federal law as well as state law arising out the same facts. The complaint in the federal action, filed on March 21, 2007, sets forth numerous allegations of police brutality, filing of false charges, official cover-ups and other misconduct in the OCPD, as well as claims for retaliation in violation of the plaintiffs' due process and other constitutional rights. It was also alleged that plaintiffs' employment with the OBPD was unlawfully terminated in retaliation for complaints they made about police misconduct. By Opinion and Order of the Court dated February 19, 2010 (Feuerstein, J.), the federal claims were dismissed and the Court declined to exercise jurisdiction over the state claims.


Movants now seek dismissal of the claims against them in this action on numerous grounds. Under the first cause of action, plaintiffs seek recovery pursuant to NY Civil Service Law § 75 for the alleged wrongful termination of their employment in April 2006. The County was not plaintiffs' employer, however, so the claim can not stand. Moreover, plaintiffs did not assert any claim against the County for recovery under NY Civil Service Law § 75 in the federal action, as the eighth cause of action in the federal complaint specifically asserts that "Defendants OBPD and Ocean Beach were 'public employers'" whose termination of plaintiffs' employment "was an 'adverse personnel action'" within the meaning of the statute. Rather, the claim was asserted for the first time in this action, commenced nearly four years after the claim allegedly arose. A claim under the "whistleblower" statute is governed by a one-year statute of limitations (*see Dobson v Loos*, 277 AD2d 1013, 716 NYS2d 220 [4<sup>th</sup> Dept 2000], citing NY Civ Serv Law § 75-b[3][c]; NY Labor Law § 740[4][a]) and, therefore, the claim as against the County of Suffolk is untimely.

Plaintiffs also seek recovery for defamation arising out of internet blog postings allegedly made by Alison Sanchez who, according to the allegations in the complaint, was "the Suffolk County Civil Service official responsible for overseeing civil service compliance in Ocean Beach." It is alleged in the complaint that plaintiffs Fiorello, Nofi and Lamm met with Sanchez to discuss their allegedly wrongful termination from employment with Ocean Beach, that Sanchez told plaintiffs that they would not be successful in appealing their termination,

and that she made such statements “with an intent to deceive Plaintiffs and prevent them from seeking legal recourse in connection with their termination.” While plaintiffs now seek recovery against both the County and Sanchez based on alleged defamatory blog postings made by Sanchez in 2006, they made no claim for defamation against these moving defendants in the federal action, having asserted only that “Defendants Hesse and OBPD published defamatory statements about Plaintiffs. . .” Plaintiffs’ cause of action for defamation against the County and Sanchez was not tolled by the federal action, therefore, and the applicable statute of limitations for such claim expired prior to the commencement of this action.

While plaintiffs also asserted a claim for negligent retention and supervision of unfit employees in the federal action, their complaint alleged that the defendants Hesse, Ocean Beach, OBPD and Suffolk County Civil Service “deliberately retained and advanced the careers of uncertified and unqualified personnel who served alongside Plaintiffs as police officers.” In this action, plaintiffs claim that the retention of uncertified police officers “posed a constant threat to public safety and to Plaintiffs’ own safety” but no claim of injury is asserted. While a party may be held liable for foreseeable injuries proximately related to the absence of adequate supervision (see *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297 [2010]), liability will not lie absent a showing that such negligence proximately caused injuries sustained (see *Harris v Five Point Mission Camp Olmstedt*, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]). Furthermore, there is no dispute that Village of Ocean Beach, not the County, employed the officers in the Ocean Beach Police Department. Such claim must be dismissed as against the County and Sanchez pursuant to CPLR 3211 (a) (7) for failure to state a cause of action (see *Davidovici v Fritzson*, 49 AD3d 488, 853 NYS2d 594 [2d Dept 2008]).

DATED: 29 Oct. 2010

  
 HON. JOHN J. JONES, JR.  
 J.S.C.

CHECK ONE:  FINAL DISPOSITION

NON-FINAL DISPOSITION

TO:

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**Suffolk County Attorney**

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