Thygesen v North Bailey Volunteer Fire Co., Inc.
2011 NY Slip Op 34292(U)
August 1, 2011
Supreme Court, Erie County
Docket Number: I2010-5237
Judge: Donna M. Siwek
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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ERIE COUNTY
CLERK'S OFFICE

WILLIAM THYGESEN,

Plaintiff,

v.

Index No. I2010-5237

NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN G. HOLMES, Individually and in his Capacity as Fire Chief of the NORTH BAILEY FIRE COMPANY, DANIEL STROZYK, Individually and in his Capacity as Investigator for the NEW YORK STATE DIVISION OF STATE POLICE, and NEW YORK STATE DIVISION OF STATE POLICE,

Action No. 1

Defendants.

WILLIAM J. THYGESEN,

Plaintiff,

v.

Index No: I2010-10144

NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN HOLMES, Individually and in his capacity as President of the NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., DAVID HUMBERT, Individually and in his capacity as Fire Chief of the NORTH BAILEY VOLUNTEER FIRE COMPANY, INC.,

Action No. 2

Defendants.

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SIWEK, J.,

MEMORANDUM DECISION

Defendants North Bailey Volunteer Fire Company, Inc. (hereinafter referred to as "North Bailey"), Warren G. Holmes and David Humbert have moved for an order dismissing the complaint pursuant to CPLR §3211(a) and CPLR §3211(c). Plaintiff moved for an order pursuant to CPLR §3217 dismissing without prejudice the second cause of action in the amended complaint in Action No. 1 and pursuant to CPLR §602 consolidating Actions 1 and 2 for trial. At the time of oral argument of the motions, the relief sought by the plaintiff was granted. This decision will address the defendants' motion to dismiss.

Plaintiff seeks damages by virtue of the defendants' alleged violations of the New York Executive Law §§296(1) and 296(16) (first, third causes of action), New York State Human Rights Law (HRL), §40-c New York Civil Rights Law (CRL) (second cause of action), U.S.

Constitution (fourth cause of action) and common law defamation (fifth and sixth causes of action). Plaintiff asserts that he was discriminated against based upon his sexual orientation and criminal arrest record. Defendants claim that the Complaint fails to state a cause of action under the HRL because plaintiff was not an employee of North Bailey; and fails to state a cause of action under the CRL because he failed to notify the New York State Attorney General of this suit; he failed to file a Notice of Claim and because North Bailey is not an independent political subdivision or cognizable legal entity that can be sued.

1. Notice of Claim Requirement

The defendants argue that the plaintiff failed to serve the defendants with a Notice of Claim as required by General Municipal Law §50-e, a condition precedent to bringing suit and that the failure to name the proper defendant, the Town of Amherst, serves as a basis to dismiss the entire complaint. The Town of Amherst (hereinafter referred to as "Town") established a fire protection district known as North Bailey Fire Co., Inc., Fire Protection District No. 18 (hereinafter referred to as "North Bailey"). The Town contracts with North Bailey to provide fire protection services within the fire protection district. The defendants assert that North Bailey is not a cognizable legal entity separate from the Town of Amherst that can be sued. *Miller v. Savage*, 273 A.D.2d 695 (3d Dept. 1997); *Haskell v. Chautauqua County Fireman's Fraternity, Inc.*, 184 A.D.2d 12 (4th Dept. 1992).

The defendants note a distinction between "fire protection districts" and "fire districts". A "fire district" is an independent political sub-division whose "members" are employees of the district, not the town. The "fire district" (as opposed to the town) appoints its own members,

furnishes fire and ambulance service and is liable for negligence on the part of its members. A "fire district" is empowered to insure itself against liability and may use its own independent taxing power to pay claims against it. (See, Town Law §§174 and 176; *Nelson v. Garcia*, 152 A.D.2d 22, 24 (4th Dept. 1989).

On the other hand, through the establishment of a "fire protection district", a town expressly assumes the duty to provide fire protection within the fire protection district. No independent entity is created, and the Town controls the fire district's operations. Members of a "fire protection district" are deemed officers, employees or appointees of the town, and the town is liable for any negligence on the part of such members. See, *Sawyer v. Town of Lewis*, 2003 N.Y. Slip. Op. 51751U, 5 (N.Y. Sup. Ct. 2003); see also, *Miller v. Savage*, 237 A.D.2d 695 (3d Dept. 1997); *Haskell v. Chautauqua County Fireman's Fraternity, Inc.*, 184 A.D.2d 12 (4th Dept. 1992). Therefore, the defendants argue that even if the court were to accept that plaintiff's volunteer fire fighter status made him a "employee" sufficient to state a claim under the HRL, he would be considered an employee of the Town, as opposed to North Bailey. Because the plaintiff did not serve a Notice of Claim and did not name the Town as a defendant, the plaintiff's failure to comply with General Municipal Law §50-e bars his claim.

The plaintiff argues that there is no provision under General Municipal Law §50-e for service of a Notice of Claim on a fire company incorporated as a not-for-profit corporation. Plaintiff concedes that a Notice of Claim is required for a "fire district", but because North Bailey operates as a fire company in a "fire protection district" created by the Town, not a municipal fire district governed by elected fire commissioners, a Notice of Claim is not required. By extension, because the Town had no control or involvement in the incident alleged in the

complaint and has no legal obligation to indemnify the defendants for their intentional torts, "there is no entity upon which to serve a Notice of Claim and service of such is not a prerequisite to suit". Plaintiff further argues that his removal involved the fire company's internal affairs governed by its by-laws and constitution, rather than the procedural requirements set forth in Gen. Mun. Law §209-l. Finally, even if a Notice of Claim requirement were attributable to the claims in this case, his Civil Rights causes of action survive as they are not subject to the requirements of a Notice of Claim.

To the extent that the plaintiff would be considered an employee, we find that his employer would be the Town of Amherst by virtue of the creation of the fire protection district, as opposed to a fire district because a fire protection district is not a cognizable legal entity. Because a notice of claim is a condition precedent to a suit brought against a municipality, those tort claims in the complaint subject to the notice of claim requirement are dismissed.

Turning to the question of whether plaintiff's civil rights and constitutional claims require a notice of claim, New York and Federal case law hold that a notice of claim is not required for civil rights actions brought under 42 USCA §1983. Thus, this defense is inapplicable to the plaintiff's §1983 claim.

2. Human Rights Claim

Even assuming that North Bailey is a proper defendant, the defendants also seek dismissal of plaintiff's complaint because the plaintiff was never an employee of North Bailey; a condition precedent to bringing suit under the HRL. The plaintiff began serving as a volunteer firefighter for North Bailey on September 6, 1977 and was expelled for misconduct unbecoming

a member of North Bailey following a disciplinary hearing on May 24, 2010. In order to establish a claim under the Human Rights Law, an individual must be an "employee" of an entity. The New York State Court of Appeals has held that because the HRL seeks to remedy the same type of discrimination as Title VII of the Civil Rights Act, federal case law is applicable to plaintiff's state law claims. *Matter of Aurecchione v. NYS Div. of Human Rights*, 98 N.Y.2d 21 (2002). Title VII defines an "employee" as an individual employed by an employer. The question of whether someone is an employee under Title VII turns on whether he or she has received direct or indirect remuneration from the alleged employer. *York v. Assn. of The Bar*, 286 F3d 122, 126 (2d Cir. 2002). Where the purported employee gains no financial benefit, no employment relationship exists. The Second Circuit has reviewed the type of "financial benefits" which would be considered remuneration. Items such as salary or other wages, employee benefits (health insurance, vacation, sick pay) or the promise of any of the foregoing constitute the type of remuneration required to define an employee. Retirement pensions, life insurance, death benefits, disability insurance and some medical benefits may also be sufficient in certain cases. Such benefits must meet a minimum level of "significance" or "substantiality" in order to find that an employment relationship exists in the absence of more traditional compensation.

The defendants assert that plaintiff's complaint is defective because it fails to allege that he was an employee of North Bailey or that he received remuneration for his volunteer work, and they rely upon the affidavit of Fire Chief, defendant David Humbert. The only benefit arguably derived by the plaintiff by virtue of his membership with North Bailey is a "Service Awards Program", whereby North Bailey volunteer fire fighters, who have attained the age of 55, are

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eligible to receive a certain monetary sum for participation in or completion of certain designated activities. The defendants claim that the receipt of such benefits does not establish an employment relationship or meet the criteria of the remuneration test under the HRL; and as such, plaintiff's claims under the Human Rights Law must be dismissed. See, *Keller v. Niskayuna Consolidated Fire District 1*, 51 F. Supp. 2d, 233 (N.D.N.Y. 1999). (volunteer fire fighter failed to establish that the benefits available under the District's Service Award Program constitute compensation sufficient to create an employer-employee relationship). See also, *Evans v. Wilkinson*, 609 F. Supp 2d 489, 494-96 (D. Md. 2009).

The plaintiff counters this claim asserting that there is a triable issue of fact as to whether the benefits derived through the Service Awards Program constitute compensation sufficient to establish an employment relationship to sustain a Human Rights Law claim. He cites additional benefits available to volunteer fire fighters through the Benevolent Association and the Volunteer Fire Fighters Benefit Law §1 as supporting his argument that he has, at the very lest, raised a question of fact as to whether he was an employee for the purposes of Executive Law §296(1) and Civil Rights Law §40-d.

The defendants have met their burden on this motion to establish that the plaintiff's status as a volunteer firefighter does not establish the type of employment relationship required to sustain a N.Y. Human Rights claim. Other than the participation in the *de minimus* Service Rewards Program, the record is devoid of any evidence to establish the type of remuneration required to sustain a claim. See, *Keller, supra.*; *Evans, supra.* Accordingly, the foregoing constitutes an independent and additional basis to dismiss plaintiff's Human Rights claim.

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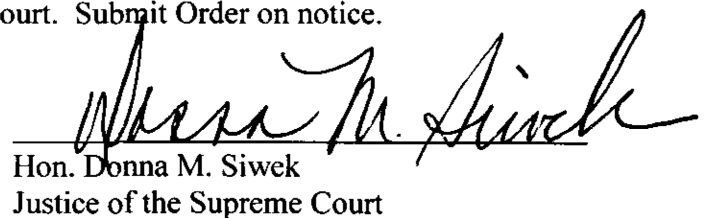
3. Civil Rights Claim

The defendants assert that plaintiff's CRL claim must be dismissed as plaintiff has failed to serve the requisite notice on the New York State Attorney General as a condition precedent or simultaneous with bringing suit as required by CRL §40-d. We note that plaintiff commenced a second action and notified the Attorney General in order to cure this defect, and the two actions have been consolidated. Taken in conjunction with our finding herein as to the inapplicability of the Notice of Claim requirement to the Civil Rights claim, that portion of the defendants' motion seeking dismissal of the Civil Rights claim is denied.

4. Constitutional Claims

Finally, the defendants assert that the court lacks jurisdiction to decide claims arising under the United States Constitution and that plaintiff's claims for relief under the Fourth, Fifth and Fourteenth Amendments of the United State Constitution must be dismissed for lack of jurisdiction. *See,* 28 USC §1331. Plaintiff counters that his claims pursuant to the United States Constitution, while not specifically pled as such, arise under 42 U.S.C. §1983 and that this court has concurrent jurisdiction over those claims.

To the extent that plaintiff asserts a §1983 claim, this court has jurisdiction; and as such, that portion of defendants' motion to dismiss plaintiff's constitutional claims due to lack of jurisdiction is denied. This is the Decision of the Court. Submit Order on notice.



Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: August 1, 2011