

**Henderson v Westchester County Dept. of Human
Resources**

2014 NY Slip Op 32991(U)

July 23, 2013

Supreme Court, Westchester County

Docket Number: 53562/13

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 07/31/2013

Disp x Dec Seq. Nos. 1-3 Type misc.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X

GWENDOLYN HENDERSON,

Plaintiff,

-against-

Index No. 53562/13

DECISION AND ORDER

WESTCHESTER COUNTY DEPARTMENT OF HUMAN
RESOURCES, KERRY ORISTANO, MARGARET
VLYMEN, JOANNE SCARFONE, FRANK
KARINTHOLIL, KAREN WILLIAMSON, and
SALLY MENNELLA,

Defendants.

-----X

The following papers numbered 1 7 were read on these
motions:

<u>Paper</u>	<u>Number</u>
Notice of Petition, Petition and Exhibits ¹	1
Notice of Motion, Affidavits, Affirmation and Exhibits	2
Affidavit and Exhibits in Opposition	3
Affirmation and Exhibits in Reply	4
Notice of Motion, Affirmation and Exhibits	5
Reply Affidavit	6
Reply Affirmation	7

¹Exhibits must be tabbed. Plaintiff is directed to review the Part Rules.

Plaintiff is a former employee of the Westchester County Department of Human Resources who resigned her position in October 2012, after approximately six years in the Department as a Human Resources Audit Clerk (in two different units). Plaintiff claims that she was intimidated, harassed, and essentially forced to quit because of a "stressful work environment" and "the defendant's oppression against her." According to plaintiff's June 27, 2013 Affidavit, her claims against defendants are for constructive discharge, emotional distress and employment discrimination, as well as an apparent claim for breach of contract regarding the contract between plaintiff's union and Westchester County.

Defendants have made two motions to dismiss, against the original complaint and thereafter against the amended complaint. As an initial matter, the Court notes that plaintiff filed an amended complaint that did not name the Westchester County Department of Human Resources. The only defendants at this time are the six individuals named as defendants, so the aspect of defendants' motion to dismiss the Westchester County Department of Human Resources is moot.

Plaintiff's motion (which has no return date) seeks leave to file a late Notice of Claim. It does not appear that this motion was ever served on any of the defendants. Plaintiff has not submitted an Affidavit of Service for this motion to the Court,

nor is an Affidavit of Service uploaded to the e-filing system. (Although there are Affidavits of Service listed, all of them relate to the purported service of the Summons and Complaint. None relate to the motion to file the late Notice of Claim.) This motion was never served on defendants, despite the fact that counsel for defendants wrote to the Court on April 24, 2013, well before the return dates of the motions to dismiss, stating that she had noticed the unserved petition on the e-filing system. In this letter, which was also copied to plaintiff, counsel asked that if the motion were to be heard, that a return date be established, and that plaintiff should be required to serve it on defendants. There is no indication that plaintiff ever did so. As a result, the motion to file a late Notice of Claim is denied as a nullity.

Even if the motion were properly served and filed, the Court would have to deny it, however. Plaintiff has not justified the filing of a late Notice of Claim. As the Second Department recently explained, "In determining whether to grant a petition for leave to serve a late notice of claim, a court must consider whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant made an

excusable error concerning the identity of the public corporation, and whether the delay would substantially prejudice the public corporation in its defense." *Valila v. Town of Hempstead*, 107 A.D.3d 813, --- N.Y.S.2d ----, 2013 WL 2500606 (2d Dept. June 12, 2013). Here, there is no evidence that defendants gained actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Indeed, plaintiff herself states in her June 27, 2013 Affidavit that she did not decide to sue defendants until after her claim for unemployment benefits was denied in January 2013 (after her October 2012 resignation). Moreover, the delay would substantially prejudice defendants. As defendants state in their reply papers, "two or more of the alleged witnesses to the events have since retired, and at least one has moved out of state and become potentially unavailable." Thus, even if the motion seeking leave to file a late Notice of Claim were properly served and filed, it would likely be unsuccessful. *Walker v. Riverhead Cent. School Dist.*, 107 A.D.3d 727, 967 N.Y.S.2d 92 (2d Dept. 2013).

Turning to the motions to dismiss, plaintiff failed to serve properly the Summons and Complaint (and the Amended Summons and Amended Complaint) upon the individual defendants. Although plaintiff purported to use CPLR § 308(2), service on a person of suitable age and discretion at the actual place of business,

service was not completed properly. According to the Affidavit of Service, on March 27, 2013, plaintiff served a man in the Budget Office, and not the Department of Human Resources, in the same office building as the location where defendants work. The Budget Office and the Department of Human Resources are on different floors. Assuming that this service was adequate,² plaintiff was, within 20 days thereafter, required to mail (by first class mail) the summons and complaint to the actual place of business in an envelope bearing the legend "personal and confidential" and not indicating that it concerns a lawsuit. CPLR § 308(2). Plaintiff was also required to file the proof of service within 20 days from the mailing or service, whichever was later. *Id.* Instead, plaintiff sent mailings to five out of the six defendants, all to the Budget Office. None of the mailings went to defendants' actual place of business.

Plaintiff attempted to correct this by mailing the documents to the correct office. However, this was done too late. Although the Affidavits of Service state that the mailings were

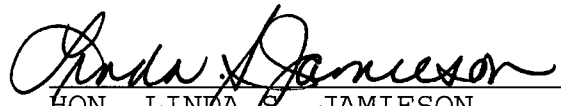
²The Court makes no finding on the subject. However, under the guidance provided by *Rosario v. NES Medical Services of New York, P.C.*, 105 A.D.3d 831, 963 N.Y.S.2d 295 (2d Dept. 2013), since this office was not "the location where [defendants] were physically present with regularity, and where they regularly transacted business," service on someone in the Budget Office was likely improper.

done on April 1, 2013,³ plaintiff states in her April 29, 2013 Affidavit that the mailings were done on April 22, 2013. This is more than 20 days after the service on March 27th. This is too late. See *New York State Higher Educ. Services Corp. v. Palmeri*, 167 A.D.2d 797, 563 N.Y.S.2d 358 (3d Dept. 1990) (where mailing was done on the 26th day, it was too late). (Additionally, there is no evidence that the appropriate legend was written on the envelopes.) Since "CPLR 308(2) requires strict compliance and the plaintiffs have the burden of proving, by a preponderance of the credible evidence, that service was properly effected," the Court must grant the motion to dismiss based on improper service. *Kearney v. Neurosurgeons of New York*, 31 A.D.3d 390, 817 N.Y.S.2d 502 (2d Dept. 2006). See also *County of Nassau v. Gallagher*, 35 A.D.3d 786, 828 N.Y.S.2d 445 (2d Dept. 2006).

Given these bases for dismissing the action, the Court need not address the remaining arguments in favor of dismissing the action.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 23, 2013


HON. LINDA S. JAMIESON
Justice of the Supreme Court

³The Court notes that the Affidavits of Service were filed on April 12, 2013. That means that there were no Affidavits of Service filed within 20 days after the late April 22nd mailing.