

Thomas v Port Auth. of N.Y. & NJ
2017 NY Slip Op 31114(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 150911/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X

WILLIAM THOMAS

Plaintiff,

INDEX NO. 150911/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this application to/for Dismissal

Upon the foregoing documents, it is ordered that the motion is granted.

In this breach of contract action by plaintiff William Thomas, defendant Port Authority of New York and New Jersey (“the PA”) moves, pursuant to CPLR 3211(a)(2) and (a)(7), to dismiss the complaint. After oral argument and a review of the parties’ papers and the relevant statutes and case law, this Court **grants** the motion.

Plaintiff, a police officer for the Port Authority Police Department (“PAPD”), applied to become a Sergeant in the PAPD in 2010. He passed a written examination and was placed on a roster of

candidates. He is employed by the PAPD pursuant to a Memorandum Agreement (“the MA”) between the PA and the Port Authority Benevolent Association.

In a memorandum to plaintiff dated December 7, 2011, the PAPD advised the latter that, on December 1, 2011, the Civilian Complaint Review Board reviewed a civilian complaint made against him and sustained a charge alleging that he was out of uniform.

On November 21, 2012, the PAPD issued a Promotion Opportunity Announcement (“POA”) advising PA police officers that it was seeking qualified candidates for Sergeant positions. The POA stated, inter alia, that such a candidate had to be “[f]ree of sustained civilian complaints in the last 12 months (i.e., 11/2/11-11/2/12).”

By correspondence dated February 4, 2013, the Human Resources Department of the PA advised plaintiff that he was not qualified to be promoted to Sergeant because he did “not meet the Civilian Complaint requirement(s)” set forth in the November 21, 2012 POA.

On September 14, 2015, plaintiff filed a notice of claim against the PA in which he represented that he would be commencing an action against that entity seeking “to redress the improper denial of his promotion to the rank of Sergeant.” On February 3, 2016, plaintiff commenced the instant action seeking damages for breach of contract by filing a summons and complaint with this Court. On June 2, 2016, plaintiff filed an amended complaint against the PA. On June 8, 2016, plaintiff stipulated to allow the PA until July 22, 2016 to answer or otherwise move against the complaint. On July 22, 2016, the PA filed the instant motion seeking dismissal of the

amended complaint pursuant to CPLR 3211 (a)(2) (lack of subject matter jurisdiction) and (a)(7) (failure to state a cause of action).

An action against the PA must be “commenced within one year after the cause of action therefor shall have accrued” and a notice of claim must be served on the PA “at least sixty [60] days before such suit.” N.Y. Unconsol. Law § 7107. The timing requirements set forth in the statute are jurisdictional, and a plaintiff’s failure to file his or her lawsuit within the prescribed time period “compels the dismissal of the action for lack of subject matter jurisdiction.” *Caceres v Port Auth. of N.Y. and N.J.*, 631 F.3d 620, 624-25 (2d Cir 2011) quoting *Lyons v Port Auth. of N.Y. and N.J.*, 228 AD2d 250, 251 (1st Dept 1996).

Here, it is evident that plaintiff’s claim accrued on February 4, 2013, at which time he was advised that he did not qualify for promotion because he did not meet the civilian complaint requirement set forth in the POA. However, he did not commence the instant action until February 3, 2016, almost exactly three years later. Thus, the PA’s motion must be granted pursuant to CPLR 3211(a)(2) since this Court lacks subject matter jurisdiction over the controversy. *See Caceres v Port Auth. of N.Y. and N.J.*, 631 F.3d 620, 624-25; *Lyons v Port Auth. of N.Y. and N.J.*, 228 AD2d 250, 251.

Plaintiff maintains that his claim is not time-barred because the PA has committed “an ongoing breach that has been used to deny [him a] promotion to Sergeant in every class of candidates that has been considered since the [POA]” was issued in November of 2012. First, plaintiff’s contention is utterly conclusory. Further, his allegation that the PA had a continuing duty to

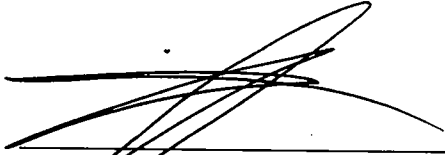
consider plaintiff for promotion is belied by the POA itself, which prohibits from promotion, inter alia, individuals against whom civilian complaints were sustained between November 2, 2011 and November 2, 2012. See Henry v Bank of Am., 147 AD3d 599, 601 (1st Dept 2017) citing Bulova Watch Co. v Celotex Corp., 46 NY2d 606, 611 (1979). Since plaintiff has, at most, alleged a breach of "one discrete contract", i.e., the MA, during a discrete time period, there was no breach of a recurring duty. See Kahn v Kohlberg, Kravis, Roberts & Co., 970 F2d 1030, 1041 (2d Cir 1992), cert denied 506 U.S. 986 (1992).

In light of the foregoing, it is hereby:

ORDERED that the motion by the defendant Port Authority of New York and New Jersey is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further,

ORDERED that this constitutes the decision and order of the Court.

5/19/2017
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT