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Foy v State of New York
2021 NY Slip Op 21037
Decided on February 16, 2021
Court Of Claims
Sise, J.
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Court of Claims

<p style="text-align:center">Jahn Foy, Claimant,</p> <p style="text-align:center">against</p> <p style="text-align:center">The State of New York, Defendant.</p> <p>[FN1]</p>
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APPEARANCES:

For Claimant:

JAHN FOY, PRO SE

For Defendant:

HON. LETITIA JAMES, ATTORNEY GENERAL

BY: Ellen S. Mendelson, Esq.

Assistant Attorney General

Richard E. Sise, J.

Claimant brought this action seeking to be reinstated to his position as a New York State Court Officer and for a declaratory judgment that a stipulation he signed regarding the terms of his continued employment is void. He also requests money damages for his alleged wrongful [*2] termination. Defendant has moved to dismiss the claim on the grounds that the claim was not timely filed or served, that the court lacks jurisdiction to issue the declaratory judgment sought here or to order that claimant be reinstated to his position.

Claimant alleges that on February 7, 2019 he entered into a stipulation with the Office of Court Administration which provided that he could be fired immediately if he was late for work more than three times in any consecutive four-week period, or was late for work more than a total of thirty minutes in any consecutive four-week period, or if he reported to his assigned post late more than three times in any consecutive four-week period. According to claimant, he was called into a meeting on December 10, 2019. The purpose of the meeting is not made clear in the claim but involved some discussion of lateness issues regarding claimant. Claimant alleges that sometime prior to the meeting he had made an inquiry about an incident report in which he was named. He asserts that the report was falsified and that he was attempting to have the report corrected. He further contends that the December 10th meeting was provoked by his efforts regarding that incident report. As alleged in the claim, his termination on February 18, 2020 was done in bad faith and under false pretenses. The claim also makes a vague reference to a decision made by a Judge Silver and argues that the decision was made without adequate consideration of the circumstances surrounding claimant's termination.

As defendant correctly argues, the court does not have jurisdiction to make a declaratory judgment with respect to the stipulation regarding claimant's continued employment (*see* Court of Claims Act § 9 [9-a] [power to make a declaratory judgment limited to controversies involving the obligation of an insurer to indemnify or defend a defendant in this court]; *cf.* CPLR 3001 [power of Supreme Court to render a declaratory judgment]). Defendant also correctly argues that this court does not have the power to order such equitable relief as reinstatement (*Koerner v State of New York*, 62 NY2d 442 [1984]).

Whether the claim was timely filed and served depends on a number of considerations; the date of accrual, the time within which the claim must be filed and served, the dates of filing and service and any tolls or suspensions that may apply. The latest date for any event alleged in the claim is February 18, 2020, the date on which claimant was terminated, and, because the date when the claim arose must be alleged in the claim (Court of Claims Act § 11 [b]), this represents the latest possible date of accrual. Under Court of Claims Act § 10 the claim for wrongful termination, to the extent one exist here (*see Piro v Bowen*, 76 AD2d 392, 397 [2d Dept 1980] [the general rule is that a discharged public employee cannot recover unpaid salary until they prove their right to the position from which they were discharge]), had to be filed and served within 90 days of accrual (*see Sager v County of Sullivan*, [145 AD3d 1175](#) [3d Dept 2016] [treating claim for wrongful termination based on retaliatory action as a tort]). The claim, however, was not filed until July 21, 2020, and not served until November 17, 2020, which is nearly nine months after the February 18, 2020 date of accrual. Thus, the claim was not served within the period of time prescribed by section 10.

Claimant argues, however, that he has been afforded additional time to file and serve his claim by Executive Order 202.8 issued on March 7, 2020 by Governor Cuomo in response to the COVID-19 public health emergency. The executive order, extended seven times and to the extent [*3] it applies here, ultimately expired on November 4, 2020, [FN2] was issued pursuant to authority vested in the Governor by Executive Law § 29-a. The executive order provides in part that:

" any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

The executive order makes pointed reference to the Court of Claims Act and is clear in stating that any specific time limit for the commencement of any legal action is tolled. A toll suspends the running of the applicable period of limitation for a finite time period, in this instance, 30 days [EN3], and "[t]he period of the toll is excluded from the calculation of the time in which the [claimant] can commence an action." (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505, n 8 [2020]). The amount of time covered by the original executive order and all extensions is 242 days. The number of days between when the claim accrued, February 18, 2020, and when claimant accomplished service on November 17, 2020, is 273 days. Subtracting the period of the toll, 242 days, from the period of time between accrual and service, 273 days, results in a difference of 31 days. Therefore, on November 17, 2020, 59 days remained before the expiration of time to serve and file the claim.

While defendant inexplicably failed to advise the court of Executive Order 202.8 and then, once raised by claimant, neglected to address its impact here, a number of commentators have noted that the authority afforded the governor by Executive Law § 29-a (1) is to "temporarily suspend any statute" and that the statute does not specifically authorize a toll and that a suspension of a period of limitation is fundamentally different from a toll. Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension. Thus, if the executive orders discussed above worked a suspension rather than a toll, any time period affected by those orders expired on November 4, 2020. As such, the claim here, served on November 17, 2020, would be untimely.

Executive Order 202.8, as noted, provides for a toll, as do Executive Order 202.67 and Executive Order 202.72, the last two executive orders addressed to time limits for the commencement, filing or service of a legal action. Thus, it is clear that a toll, and not a suspension, was intended and the question becomes whether the statute authorizes a toll. The [*4] primary consideration in the construction of a statute is to ascertain and give effect to the intention of the legislature (McKinney's Cons Laws of NY, Book 1, Statutes § 92). The legislative intent is to be ascertained from the words and language used and the statutory language is generally construed according to its natural and most obvious sense without resorting to an artificial or forced construction. (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Focusing on the phrase "suspend any statute" in Executive Law § 29-a (1), the statute demonstrates a far reaching application. Considering that the legislature extended the authority for the governor to suspend to "any statute", that power should not be read in the narrow context of statutes involving time limitations where a 'suspension' represents a term of

art. Moreover, a statute must be construed as a whole reading the various sections together to determine legislative intent ([Matter of Plastic Surgery Group, P.C. v Comptroller of the State of NY, 34 NY3d 507](#), 516 [2019]; *Loehr v New York State Unified Court System*, 150 AD3d 716 [2d Dept 2017]). In that regard, consideration must be given to the language in Executive Law § 29-a (2) which provides that "[s]uspensions pursuant to subdivision one of this section shall be subject to the following standards and limits" and in paragraph "d" of subdivision two, which provides that the implementing executive order "... may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions". The language in subdivision two, paragraph "d" makes clear that something other than a straightforward suspension of a statute is authorized. The governor is also permitted to modify the terms and conditions of a statute. Here, Executive Order 202.8, and its successors, can reasonably be characterized as implementing a temporary alteration of the timely filing and service provisions in Court of Claims Act § 10, a modification. As such, the tolls were authorized and the claim is not untimely.

Albany, New York

February 16, 2021

Footnotes

[Footnote 1:](#) The caption of the action has been amended to reflect the only proper defendant.

[Footnote 2:](#) The extensions of E.O. 202.8 are found in: E.O. 202.14, E.O. 202.28; E.O. 202.38; E.O. 202.48; E.O. 202.55; E.O. 202.60 and E.O. 202.67. E.O. 202.72 announced that the tolls were no longer in effect as of November 4, 2020.

[Footnote 3:](#) Executive Law §29-a limits the duration of directives authorized by its provisions to 30 days, but provides that the governor may extend the directive for additional periods not to exceed 30 days each.

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