

At a Term of the Court of Claims of the State of New York held in its Courtroom at 144 Exchange Boulevard, in the City of Rochester, County of Monroe, in said State on the 21st day of October 1998.

PRESENT: HON. PHILIP J. PATTI
Judge of the Court of Claims

COURT OF CLAIMS **STATE OF NEW YORK**

ANTHONY M. CAPRIA and Wife
Individually and on Behalf of their Minor Children

DECISION
AND ORDER

Claimants,

vs.

Motion Nos. M-57874
and CM-58194
Claim No. 96284

THE STATE OF NEW YORK and THE ONONDAGA
COUNTY SHERIFF'S DEPARTMENT,

Defendants.

On October 21, 1998, the following papers, numbered I to 8, were read on motion by Claimants for an order dismissing certain affirmative defenses and dismissing the claim as against Defendant Onondaga County Sheriffs Department, and on cross-motion by Defendant State of New York for an order granting summary judgment and dismissal of the claim:

Papers Numbered

Notice of Motion and Affidavit	1, 2
Notice of Cross-Motion and Affirmation and Exhibits Annexed	3, 4

Letter to the Court dated July 13, 1998 from the Onondaga County Law Department	5
Claimants' Memorandum of Law	6
Filed Papers: Claim ¹ , Answer	7, 8

Claimant, Anthony Capria, a former employee of the Onondaga County Sheriff's Department, alleges that the Defendants defrauded him into accepting retirement disability pursuant to Article 15 of the Retirement and Social Security Law and, thus, deprived him of his full wages and benefits, Claimants seek damages for lost wages and benefits and for mental and emotional distress based on the alleged fraud. 'With their motion, Claimants seek an order dismissing various affirmative defenses raised in the State's answer and, further, discontinuing the action as against the Onondaga County Sheriff's Department. The State cross-moves for an order granting summary judgment and dismissing the claim.

The facts as alleged in the claim are as follows: On December 12, 1985, Claimant², who by then had attained the rank of sergeant with the Sheriffs Department. suffered injuries in an assault by an inmate at the Onondaga County Public Safety Building. Nearly two years later, on August 11, 1987, Claimant was placed on temporary disability, allegedly for injuries relating to the assault, and on September 1, 1987, he was granted full wages and benefits pursuant to

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1. The claim is erroneously denominated as a Notice of Claim."
 2. All references to Claimant" are to Anthony Capria unless other noted,

General Municipal Law §207-c.³ Thereafter, on February 1, 1988, a Sheriff's Department representative directed Claimant to report to the office for the purpose of signing papers for accidental disability retirement through the New York State Retirement System (NYSRS). Claimant objected and refused to sign the application, whereupon the sheriff's representative informed him that the Sheriff's Department would execute the application pursuant to General Municipal Law §207-c. On March 31, 1989, NYSRS granted Claimant disability retirement status pursuant to Article 15 of the Retirement and Social Security Law, not "accidental disability retirement" status. Article 15 status has a significantly lower benefit rate than that available under accidental disability retirement status. Thereafter, Claimant requested a hearing and redetermination of the NYSRS decision. In November 1989, upon reviewing his NYSRS file, Claimant "learned for the first time that someone altered the accidental disability retirement application by crossing out the word 'accidental' and by handwriting the words 'Article 15' in its place" (Paper 7, ¶55). He also came across a note written by a NYSRS employee which, along with the altered application, led him to believe that the Sheriff's Department applied for the Article 15 benefits. The note stated "[a]dditional information has been sent under separate cover by the sheriff's department" (Paper 7, ¶56). Claimant and counsel relied on this information in developing their legal argument for the administrative hearing. That argument, based on General Municipal Law §207-c, was that the Sheriff's Department was prohibited from filing for Article 15 disability retirement as Claimant was injured in the line of duty. After a hearing held on January

3. General Municipal Law §207-c, as then in effect, provided for the payment of wages and medical and hospital expenses for, *inter alia*, deputy sheriffs injured in the performance of their duties,

18, 1990, the administrative hearing officer affirmed the NYSRS's original determination and found that the Sheriffs Department did indeed file the Article 15 retirement application.

Claimant subsequently filed an Article 78 application for reversal of the administrative determination. According to Claimant, the NYSRS filed a brief in the Article 78 proceeding dated May 18, 1992, in which it acknowledged that it had been responsible for changing Claimant's application to an application for Article 15 retirement disability. The Appellate Division, Third Department, accepted the representations by counsel for NYSRS and found that it was the NYSRS that had altered the application (Capria v Regan, 186 AD2d 845). The date of this decision was October 1, 1992, according to Claimant.

Claimant requested a new hearing before the NYSRS on or about July 24, 1996, based on new medical evidence. On April 29, 1997, after "years of investigation," he alleges that he discovered for the first time the fraud committed by the Defendant, and more importantly, the identity of the specific person employed by the Defendant responsible for the alleged alteration, of his retirement application.

Claimant argues essentially that the Defendant's jurisdictional and statute of limitations affirmative defenses should be dismissed on the grounds that his claim was timely filed. In support of his position, Claimant erroneously directs the Court to CPLR 203(f). It is clear, however, that he intends to rely upon CPLR 213(g) which, as he suggests, must be read in conjunction with CPLR 213(8) if he is to be successful in his application. CPLR 213(8) provides that an action for fraud must be commenced within six years from the time the aggrieved discovers the fraud or "could with reasonable diligence have discovered it."

CPLR 203(g) provides:

Time computed from actual or imputed discovery of facts. Except as provided in article two of the uniform commercial code or in section two hundred fourteen-a of this chapter, where the time within which an action must be commenced is computed from the time when facts were discovered, or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

Reading CPLR 203(g) and 213(8) together, the Courts have concluded that a fraud claim is timely if it is commenced within six years of when it accrues. or within two years of when the claimant discovers it, whichever is longer (1 Weinstein-Korn-Miller, NY Civ Prac ¶203.35; Bowes & Co. v American Druggists' Ins. Co., 61 NY2d 750, 752; Shannon v Gordon, _____ AD2d _____ [4/6/98]). A cause of action accrues when an actionable injury is suffered and the facts can be truthfully set forth in a claim (*see*, Snyder v Town Insulation, 81 NY2d 429; Marine Midland Bank v State of New York, 195 AD2d 871, *lv denied* 82 NY2d 661; Konigsberg v State of New York, ____ AD2d ____ 3rd Dept. [12/24/98]).

The issue of when a claimant could have discovered an alleged fraud turns upon whether the claimant possessed knowledge of facts from which he or she could reasonably have inferred that fraud had occurred (Shannon v Gordon, *supra*). A claimant may not shut his or her eyes to facts which call for investigation (*id*). In this case, Claimant's fraud claim accrued on March 31, 1989, when he lost his job and received Article 15 disability benefits instead of the more

generous accidental disability benefits that the Sheriff's Department had promised him. Claimant discovered the alleged fraud in November 1989 when he learned that the Sheriff's Department or the State had altered his benefit application without his permission. Under the six-year statute of limitations embodied in CPLR 213(8), Claimant had six years from March 31, 1989, or until March 31, 1995, to commence his claim. The two-year limitation of CFLR 203(g), which Claimant relies upon here, did not extend the time for Claimant to commence his cause of action beyond March 31, 1995. The two-year limitation would have lapsed in November 1991, two years after the date that Claimant discovered the alleged fraud. Diligence and prudence therefore dictated that Claimant should bring his claim by March 31, 1995. In this case, Claimants filed their claim in May 1997, more than eight years after the claim accrued and more than two years after the six-year statute of limitations expired. Therefore, Claimants' claim is untimely.

The Court is not persuaded that Claimant had to wait to bring his claim until April 1997 when Claimant first learned the identity of the specific State employee who authored the alteration. Claimant knew in May 1992, from a brief filed by the State in the Article 78 proceeding, that it was the State -- the only Defendant over which this Court has jurisdiction -- that had altered the application. That was all the information Claimant needed to set forth his claim. Had he filed his claim at that time, Claimant would have had available to him the full panoply of discovery provisions of the Civil Practice Law and Rules by which the identity of the actual individual who allegedly altered his application would have been uncovered.

While Claimant states that it took him years of intensive investigation to discover facts which the Court finds were readily available to him in 1989, he fails to set forth anywhere

in his papers what “investigative” techniques he used or why it took him so long to discover the obvious. The argument that he only learned of this alleged fraud on April 27, 1997 rings hollow to my ears. As a consequence, I find that his claim cannot be saved.

Claimants’ motion to dismiss the claims against Defendant Onondaga County Sheriff’s Department is granted. Claimants’ motion to strike the various defenses of Defendant the State of New York is denied. Defendant’s cross-motion for summary judgment is granted and Claim No. 96284 is dismissed.

Dated: Rochester, New York

December 31, 1998

(Signature of Philip J. Patti)

PHILLIP J. PATTI
Judge of the Court of Claims

STATE OF NEW YORK COURT OF CLAIMS

ANTHONY M. CAPRIA and Wife
Individually and on Behalf of their Minor Children

NOTICE OF ENTRY OF
A DECISION AND ORDER

Claim No. 96284

Claimants,

-vs.-

THE STATE OF NEW YORK, and THE ONONDAGA
COUNTY SHERIFF'S DEPARTMENT,

Defendants.

PLEASE TAKE NOTICE, that the annexed **NOTICE OF ENTRY OF A DECISION AND ORDER** is a true and complete copy of a **DECISION AND ORDER** entered in the above-entitled action and filed by the Court of Claims Clerk's Office on February 2, 1999.

Dated: February 10, 1999
 Syracuse, New York

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