D'Amico v City of New York
2016 NY Slip Op 32356(U)
November 29, 2016
Supreme Court, New York County
Docket Number: 153463/2016
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 5

STEVEN M. D'AMICO

INDEX NO. ~~152463/16~~ 153463/2016

MOT. DATE

- v -

MOT. SEQ. NO. 001, 002

THE CITY OF NEW YORK

The following papers were read on this motion to/for extend time (001), dismiss (002), x-mot for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s). 5-11, 16-21

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s). 13-14, 22-26

Replying Affidavits ECFS DOC No(s). 15, 27-28

In motion sequence number 001, defendants the City of New York and the New York City Department of Sanitation (collectively the "City") move for an order extending its time to answer the complaint. Plaintiff opposes the motion and cross-moves for a default judgment. In motion sequence number 002, the City moves to dismiss plaintiff's complaint. Plaintiff opposes that motion as well and again cross-moves for a default judgment. Plaintiff has also filed an amended complaint. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. For the reasons that follow, the City's motions are granted and the cross-motions are denied.

Plaintiff commenced this action on April 25, 2016 where he seeks to challenge his termination from employment with the City's Department of Sanitation ("DOS"). Plaintiff served the City on April 26, 2016 and the DOS on April 28, 2016. The City's counsel states in his affirmation that he sought an adjournment on consent of the City's time to answer the complaint. Unfortunately, the parties were unable to agree to an adjournment and the City's motion to extend was filed on May 23, 2016. Plaintiff's counsel argues that the City's motion to extend was made in bad faith and should therefore be denied. Plaintiff further seeks a default judgment against the City.

Since public policy in New York strongly favors a disposition on the merits, the Court will grant the City's motion to extend and deny plaintiff's first cross-motion for a default judgment. The City's counsel explains that the extension was sought because he would be out of the office due to previously scheduled commitments and plaintiff's counsel has otherwise failed to demonstrate that the City acted with bad faith. Alternatively, if the court were to treat the City as having defaulted in this action, and the motion as one to vacate that default and permit the City to file an answer, the court would grant such relief based upon the same reasoning. Since the court finds that the City is entitled to a reasonable extension of its time to answer, plaintiff's cross-motion for a default judgment is denied as premature.

Dated: 11-29-16

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

The court will now consider the City's second motion as a preanswer motion to dismiss. The following facts are alleged in plaintiff's amended complaint. Plaintiff, a former DOS employee, applied to work for DOS in or about late July 2014. Plaintiff completed a medical questionnaire at that time. In or about mid-September 2014, plaintiff commenced employment with DOS. In or about late October 2014, the City "learned that plaintiff was issued a prescription for suboxone, a drug which curbs addiction to pain medication." Plaintiff claims that he was placed on restricted duty because he took suboxone. In November 2014, plaintiff was permitted to return to full duty after a medical evaluation.

On January 14, 2015, plaintiff injured himself in the line of duty on Randalls Island, New York. Plaintiff went to a hospital and was advised that he should avoid physical activity. Plaintiff gave the City an "Excuse from Work or School" form from the hospital to that effect (the "doctor's note"). Plaintiff claims that he was disabled within the meaning the SHRL and CHRL because he was to avoid physical activity. Plaintiff has annexed a copy of the doctor's note to the amended complaint. The doctor's note indicates that plaintiff "needs to be excused from work" beginning January 14, 2015 through January 15, 2015. Further, the note indicates that plaintiff "may return to work but still avoid physical activity through January 15, 2015."

Plaintiff has provided an affidavit in support of the second cross-motion wherein he explains that he was injured when "the lever for the hopper to the garbage truck swing back and hurt [his] left hand, causing serious injury." Plaintiff reiterates his claim that he "requested a reasonable accommodation of a few days off and light duty work." Plaintiff does not state who he made this request to. Plaintiff's counsel argues that despite the accommodations plaintiff requested, he could still perform the essential functions of his job.

On January 22, 2015, plaintiff filed a workers compensation notice with DOS regarding his injury. On or about January 23, 2015, plaintiff was "summarily terminated." Plaintiff claims that he was discriminated and retaliated against for making requests for reasonable accommodations and/or for filing for workers compensation benefits.

Plaintiff asserts the following causes of action: [1] disability discrimination in violation of the State Human Rights Law, Executive Law § 290 *et seq.*, (the "SHRL"); [2] retaliation in violation of the SHRL; [3] disability discrimination in violation of the City Human Rights Law, Admin Code § 8-107 *et seq.*, (the "CHRL"); and retaliation in violation of the CHRL.

The City argues that plaintiff has failed to allege that he suffered from a disability within the meaning of the SHRL or CHRL. The City also argues that plaintiff has failed to allege sufficient facts to support his claim that his request for a reasonable accommodation was denied by DOS. As for the retaliation claims, the City contends that plaintiff has failed to allege that he engaged in a protected activity or that the City was aware that he engaged in a protected activity.

In turn, plaintiff claims that the amended complaint sufficiently alleges every element of his discrimination and retaliation claims. As for the protected activity in relation to the retaliation claim, plaintiff argues that providing his employer with notice of his disability and requesting an accommodation are all protected activities.

Discussion

On a motion a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the alleged facts are presumed to be true and are accorded every favorable inference (*Leon v. Martinez*, 84 NY2d 83 [1994]). However, conclusory allegations and factual claims that are inherently incredible or contradicted by documentary evidence are not entitled to such consideration (*Biondi v. Beekman Hill*

House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], affd 94 NY2d 659 [2000]). The court's inquiry is limited to determining whether the complaint states a cause of action, not whether there is evidentiary support for it (*Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). However, affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v. Orofino Realty Co.* 40 NY2d 633 [1976]).

Under the SHRL, a disability is defined as

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. Executive Law § 292 [21]

Under the CHRL, a disability "does not include reasonable accommodation or the ability to perform a job in a reasonable manner, but rather defines disability solely in terms of impairments" (*Jacobsen v. New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014] quoting *Romanello v. Intesa Snapaolo, S.p.A.*, 22 NY3d 881 [2013]; see Admin Code § 8–102[16]).

Here, assuming *arguendo* that plaintiff has alleged sufficient facts to support his claim that he had a disability as defined by either the SHRL or CHRL, plaintiff has not alleged sufficient facts to demonstrate that he requested a reasonable accommodation and therefore defendants failed to provide it. Under both the SHRL and CHRL, "an employee's request for an accommodation is relevant to the determination of whether a reasoanble accommodation can be made" (*Jacobsen*, *supra* at 835). Plaintiff was hurt on the job on January 14, 2015 and went to the hospital. He was cleared to return to work but avoid physical activity through January 15, 2015. Plaintiff alleges in conclusory fashion that he was "disabled as a result of his on-the-job injury" and therefore requested a few days off and light duty work.

Here, plaintiff has wholly to allege sufficient facts to demonstrate that he made a request for an accommodation of that the request was reasonable. Further, plaintiff has not alleged any facts which show that his termination was as a result of his request for an accommodation. As concerns these necessary elements of a discrimination claim, plaintiff has only alleged bare legal conclusions to support them and his affidavit does not rectify this problem. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v.* Spano, 13 NY3d 358 [2009]). Therefore, the City's motion to dismiss the disability discrimination claims must be granted.

As for the retaliation claims, plaintiff has failed to allege that he engaged in a protected activity. In order to state a retaliation claim, plaintiff must allege that (1) he has engaged in a protected activity, (2) DOS was aware that he participated in such activity, (3) he suffered an adverse employment action based upon the activity, and (4) a causal connection between the protected activity and the adverse action (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]). Here, plaintiff has not alleged that he opposed any discriminatory practices, and filing an internal workers compensation claim is not a protected activity (*Boyd v. Broome Community College*, 2015 WL 6962498 [NDNY 2015]). Accordingly, the retaliation claims must also be dismissed.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the City's motion to extend its time to file an answer (001) is granted; and it is further

ORDERED that the City's pre-answer motion to dismiss (002) is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motions for a default judgment are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 11-29-16
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.