

**DeMarzo v Urban Dove, Inc.**

2017 NY Slip Op 32612(U)

November 21, 2017

Supreme Court, Kings County

Docket Number: 500466/13

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21<sup>st</sup> day of November, 2017.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X  
JENINE M. DEMARZO,

Plaintiff,

- against -

**DECISION AND ORDER**

Index No. 500466/13

THE URBAN DOVE, INC.,  
URBAN DOVE TEAM CHARTER SCHOOL,  
JAI NANDA, and MARIANNE ROSSANT,

Defendants.  
-----X

Mot. Seq. No. 9-10

The following e-filed papers read herein:

NYSCEF Docket No.

Notice of Motion, Affidavits (Affirmations),  
Memoranda of Law, and Exhibits Annexed \_\_\_\_\_  
Affirmations (Affidavits) in Opposition and Exhibits Annexed \_\_\_\_\_  
Reply Affirmations \_\_\_\_\_

96-106, 114-119,  
121, 125-130,  
131, 133

The plaintiff Jenine M. DeMarzo (hereafter, the plaintiff), an allegedly disabled individual, commenced this action against her former employer, the defendant Urban Dove Team Charter School (hereafter, the School); her alleged joint employer, The Urban Dove, Inc. (hereafter, Urban Dove); the Chairman of the Board of Directors of the School (hereafter, the Board), the defendant Jai Nanda (hereafter, Nanda); and the School Principal, the defendant Marianne Rossant (hereafter, Rossant); alleging that the defendants violated the New York State Human Rights Law (Executive Law art 15; hereafter, the State HRL) and the New York City Human Rights Law (Administrative Code of City of New York § 8-101, et seq.; hereafter, the City HRL) by subjecting her to a hostile work environment based on her disabilities (the first and second causes of action, respectively). She further alleges that the defendants retaliated against her in violation of the State and City HRL by terminating her employment because of her prior written complaint of disability discrimination to the

Board (hereafter, the discrimination complaint) (the third and fourth causes of action, respectively). She lastly alleges that, at an office meeting between her and the defendant Rossant, the latter falsely imprisoned her by blocking her exit from the office (the fifth cause of action). By stipulation, dated March 3, 2014, the plaintiff discontinued this action against the defendant Urban Dove (NYSCEF No. 23). Hereafter, the term “defendants” collectively refers to the School, Nanda, and Rossant.

Before the Court are (1) the defendants’ motion for summary judgment dismissing the amended complaint against them for failure to serve a notice of claim (Seq. No. 10), and (2) the plaintiff’s motion for partial summary judgment on liability on her claim of retaliation under the City HRL against the School and Nanda (Seq. No. 9).

#### *Defendants’ Motion*

The defendants contend that the amended complaint should be dismissed as against them for failure to serve a notice of claim before the inception of this action. In response, the plaintiff concedes that she did not serve a notice of claim before the inception of this action and, moreover, that she does not oppose summary judgment in favor of the School on that ground (*see* Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, at 1 [NYSCEF No. 121]). Thus, the branch of the defendants’ motion for summary judgment dismissing the amended complaint against the School for failure to serve a notice of claim is *granted* without opposition. This leaves for consideration whether all or a portion of the amended complaint should be dismissed against the remaining defendants Nanda and Rossant.

The governing statute is Education Law § 3813 (2), which provides, in relevant part, that:

“[N]o action or special proceeding *founded upon tort* shall be prosecuted or maintained . . . against any teacher or member of the supervisory or administrative staff or employee *where the alleged tort* was committed by such teacher or member or employee acting in the discharge of his duties within the scope

of his employment and/or under the direction of the board of education, trustee or trustees, or governing body of the school unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law” (emphasis added).

Whereas Education Law § 3813 (2) dictates that no action “where the alleged tort” was committed by any teacher or member of administrative staff may be commenced “unless a notice of claim shall have been made and served,” an action brought under the State or City HRL is not a “tort” claim within the meaning of the statute (*see Lane-Weber v Plainedge Union Free School Dist.*, 213 AD2d 515, 516 [2d Dept 1995], *lv dismissed* 87 NY2d 968 [1996]; *see also Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458, 1460 [4th Dept 2013]; *Doe v Belmare*, 31 Misc 3d 904, 908-909 [Sup Ct, Kings County 2011, Knipel J.] [collecting authorities]). Thus, the branch of the defendants’ motion for summary judgment dismissing the amended complaint for failure to serve a notice of claim is *denied* as to the plaintiff’s disability discrimination and retaliation claims against Nanda and Rossant (the first, second, third, and fourth causes of action). On the other hand, the plaintiff’s claim of false imprisonment against Rossant is a “tort” claim within the meaning of Education Law § 3813 (2) because the latter was allegedly acting within the scope of her employment, and in the performance of her work duties, for the School at the time of its alleged commission. Thus, the remaining branch of the defendants’ motion for summary judgment dismissing the amended complaint for failure to serve a notice of claim is *granted* as to the plaintiff’s false imprisonment claim against Rossant (the fifth cause of action). To summarize, this action is continued against Nanda and Rossant on the plaintiff’s disability discrimination and retaliation claims against them (the first, second, third, and fourth causes of action).

#### ***Plaintiff’s Motion***

As noted, the plaintiff moves for partial summary judgment on liability on her claim of retaliation under the City HRL against the School and Nanda. In light of the dismissal of the amended complaint against the School for failure to serve a notice of claim, the branch

of her motion for partial summary judgment on liability as against the School is *denied* as moot. This leaves for consideration the remaining branch of the plaintiff's motion for partial summary judgment on liability on her claim of retaliation under the City HRL against Nanda.

In support of her motion, the plaintiff contends that she was reprimanded one day after she complained about the disability discrimination, permitting an inference of a causal connection between her complaint and her subsequent discharge. Viewing the plaintiff's contention in the light most favorable to Nanda as the non-movant (*see Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 [2016]), the facts are not so undisputed as to support it as a matter of law. Contrary to the plaintiff's position, the jury may reasonably find that (1) the basis for Nanda's reprimand of the plaintiff was non-pretextual, and (2) the acts and omissions referred to in the reprimand, rather than her discrimination complaint, were considered in determining whether to discharge her. Moreover, the jury may reasonably find that Nanda's subsequent reprimand of the plaintiff – a matter about which the plaintiff is entirely silent in her moving papers – was non-pretextual (*see Letter*, dated December 16, 2012 [NYSCEF No. 130]). The record further discloses a triable issue of fact as to whether the plaintiff was disabled. Accordingly, the remaining branch of the plaintiff's motion for partial summary judgment on liability on her claim of retaliation under the City HRL against Nanda is *denied* (*see e.g. Macchio v Michaels Elect. Supply Corp.*, 149 AD3d 716, 720 [2d Dept 2017]; *Teran v JetBlue Airways Corp.*, 132 AD3d 493, 494 [1st Dept 2015]).

Based on the foregoing and after oral argument, it is

ORDERED that the defendants' motion in Seq. No. 10 for summary judgment dismissing the amended complaint because of the plaintiff's failure to serve a notice of claim is *granted* to the extent that (1) the amended complaint against the School is dismissed in its entirety, and (2) the fifth cause of action for false imprisonment against Rossant is dismissed; and the defendants' motion in Seq. No. 10 is otherwise *denied*; and it is further

