Gill v. Phoenix Energy Management, Inc. Doc. 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL O. GILL, Plaintiff, -against- PHOENIX ENERGY MANAGEMENT, INC., Defendant.	:	**MEMORANDUM AND ORDER** **15-CV-1102 (DLI)(RML)**

DORA L. IRIZARRY, Chief United States District Judge:

After filing charges of disability discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), plaintiff Carl O. Gill ("Plaintiff") commenced this action against his former employer, Phoenix Energy Management, Inc. ("Defendant" or "Phoenix") on March 3, 2015. Plaintiff alleges that Phoenix discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act ("ADA"), as amended 42 U.S.C. §§ 12101 *et seq.*, the N.Y. Exec. Law §§ 290 *et seq.*, and the N.Y.C. Admin. Code §§ 8-101 *et seq.* (*See* Complaint ("Compl.") ¶¶ 27-38, Dkt. Entry No. 1.) Plaintiff also asserts retaliation claims under the ADA and New York Worker's Compensation Law. (*See* Compl. ¶¶ 39-46.) Finally, Plaintiff alleges that Phoenix denied him leave under the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.* (*See* Compl. ¶¶ 47-50.) Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Defendant moves to dismiss the complaint in its entirety for failure to state a claim. (*See* Def.'s Mem. in Supp. of Mot. to Dismiss ("Def's Mem."), Dkt. Entry No. 7.) Plaintiff opposes. (*See* Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Pl.'s Opp'n), Dkt. Entry No. 14.) For the reasons set forth below, Defendant's motion is granted and the Complaint is dismissed in its entirety. Plaintiff's request to amend the Complaint is denied because granting leave to amend would be futile.

Dockets.Justia.com

BACKGROUND

Plaintiff was initially hired by Phoenix Energy Management, Inc. as a welder in August of 2000. (*See* Ex. B to the Decl. of Deanna D. Panico, dated June 9, 2015 ("July 2015 Panico Decl."), Dkt. Entry No. 7-1.) In February 2013, Plaintiff suffered a broken left thumb while working as a shop coordinator. (*See* Ex. C to July 2015 Panico Decl., at 25.)[1] As a result, Plaintiff was out of work on Worker's Compensation for four months. (Compl. ¶ 9.) In April 2013, Phoenix fired Plaintiff by sending a letter to his residence that Plaintiff claims he never received. (*Id.* ¶ 10.) In June 2013, Plaintiff was prepared to return to work and contacted Defendant to request reemployment. (*Id.*) Defendant granted the request and reduced Plaintiff's salary, vacation time, and employment tasks. (*Id.*) After some time, Defendant reinstated Plaintiff to his previous hourly pay. (Ex. C to July 2015 Panico Decl., at 4.)

In February 2014, Plaintiff requested leave under the Family Medical Leave Act in order to see his daughter who was ill. (Compl. ¶ 18.) Defendant denied the request. (*Id.*) Shortly thereafter, Plaintiff again requested FMLA leave, this time for himself, and Defendant again denied the request. (*Id.* ¶ 19.) In April 2014, Plaintiff was terminated by Defendant a second time. (*Id.* ¶ 22.) Subsequently, in June 2014, Plaintiff met with his union, Defendant, and an Arbitrator and allegedly signed a settlement agreement under "duress." (*Id.* ¶ 25.)

On November 15, 2013, Plaintiff filed a complaint ("EEOC Complaint") alleging disability discrimination with the EEOC due to his April 2013 discharge. (*See* Ex. B to July 2015 Panico Decl.) Plaintiff alleged that Defendant had discriminated against him on the basis

[1] The Court may take judicial notice of the December 2, 2014 and December 15, 2014, New York State Unemployment Insurance Appeal Board Transcripts attached as Exhibits C and D to the July 2015 Panico Decl. *See Dutton v. Swissport USA, Inc.*, 2005 WL 1593969, at *1 n. 1 (E.D.N.Y. July 1, 2005).

of a disability.[2] (*Id.* at 2.) In the EEOC Complaint, Plaintiff stated that he had broken his left thumb while on the job and was placed on permanent disability for four months. (*Id.*). After the four months elapsed, Plaintiff returned to work and was informed that he was discharged. *(Id.*) Plaintiff asserted that Defendant took this adverse action because of his broken left thumb. (*Id.* at 3.) Plaintiff also stated that his broken left thumb no longer prevented him or limited him from doing anything. (*Id.*) On August 13, 2014, the EEOC issued Plaintiff a Notice of Dismissal and Right to Sue letter ("Right to Sue letter").[3] (*See* Ex. F to July 2015 Panico Decl.) The Right to Sue letter stated that "The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." (*Id.*) Plaintiff claims he received the Right to Sue letter on December 3, 2014. (Compl. ¶ 26.)

On March 3, 2015, Plaintiff commenced the instant action asserting six claims. (*See* Compl. ¶¶ 27-50.) Plaintiff asserts two claims pursuant to the ADA for discrimination on the basis of his disability and for retaliation for filing the November 15, 2013, charge with the EEOC. (*See* Compl. ¶¶ 27-30, 39-42.) Plaintiff further alleges that he was denied leave under the FMLA. (*See* Compl. ¶¶ 47-50.) Finally, Plaintiff asserts three claims under New York State and New York City law for retaliation and disability discrimination. (*See* Compl. ¶¶ 31-38, 43-46.) Defendant moves to dismiss the Complaint in its entirety for failure to state a claim, and Plaintiff opposes. Plaintiff alternatively requests leave to amend the Complaint and has submitted a proposed First Amended Complaint along with his memorandum of law in

[2] The Court has considered Plaintiff's EEOC Intake Questionnaire. In ruling on a motion to dismiss in an employment discrimination case, "it is proper for [a] court to consider the plaintiff's relevant filings with the EEOC." *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 565-66 (2d Cir. 2006).

[3] The Court may consider the Right to Sue letter on a motion to dismiss because it is incorporated by reference in the Complaint, (*see* Compl. ¶ 26), and because it is integral to the Complaint. *See Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001); *Everson v. New York City Transit Auth.*, 216 F. Supp.2d 71, 77 n. 4 (E.D.N.Y. 2002).

opposition to Defendant's motion. (*See* Ex. F to the Decl. of Kenneth W. Richardson, dated July 1, 2015 ("July 2015 Richardson Decl."), Dkt. Entry No. 9; 13.)

STANDARD OF REVIEW

Under Rule 8(a) of the Federal Rules of Civil Procedure, pleadings must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Pleadings are to give the defendant "fair notice of what the claim is and the grounds upon which it rests." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), overruled in part on other grounds by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Twombly*, 550 U.S. at 555).

Under Rule 12(b)(6), a defendant may move, in lieu of an answer, for dismissal of a complaint for "failure to state a claim upon which relief can be granted." To resolve such a motion, courts "must accept as true all [factual] allegations contained in a complaint," but need not accept "legal conclusions." *Iqbal*, 556 U.S. at 678. For this reason, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to insulate a claim against dismissal. *Id*. "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). Notably, courts may only consider the complaint itself, documents that are attached to or referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit,

and matters of which judicial notice may be taken. *See, e.g.*, *Roth v. Jennings*, 489 F. 3d 499, 509 (2d Cir. 2007).

DISCUSSION

I. Timeliness of Plaintiff's ADA Claims

To pursue a cause of action under the ADA, a plaintiff must file a complaint within ninety days of receiving a right to sue letter from the EEOC. *See* 42 U.S.C. § 2000e–5(f)(1); *Id.* § 12117(a) (applying the Title VII limitations period to claims brought under the ADA); *Tiberio v. Allergy Asthma Immunology of Rochester*, 664 F.3d 35, 37 (2d Cir. 2011).

In this Circuit, there is a rebuttable presumption that, "[a]bsent sufficient evidence to the contrary, it is presumed that a plaintiff received his or her right to sue letter three days after its mailing." *Johnson v. St. Barnabas Nursing Home*, 368 F. App'x 246, 248 (2d Cir. 2010) (Summary Order); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996). Where the EEOC provides notice, it is assumed that the agency mailed the notice on the date shown on the document. *See Sherlock*, 84 F.3d at 526. The EEOC issued Plaintiff the Right to Sue letter on August 13, 2014, and it is presumed that Plaintiff received it on August 16, 2014. Accordingly, Plaintiff was required to commence this law suit by November 14, 2014.

Relying on the presumption, Defendant asserts that Plaintiff's ADA claims should be dismissed as untimely because Plaintiff did not initiate this action until March 3, 2015, more than ninety days after he presumptively received the Right to Sue letter. (Def's Mem. at 5-6.) Plaintiff argues that his claims are timely because he received the Right to Sue letter on December 3, 2014 and was required to file suit within ninety days of receipt, or by March 3, 2015, the day the Complaint was filed. (Pl.'s Opp'n at 5.) The Court agrees with Plaintiff that his ADA claims are timely.

The presumption articulated above is rebuttable. *Sherlock*, 84 F.3d at 526. The Second Circuit has stated that, "[i]f a claimant presents sworn testimony or other admissible evidence from which it could reasonably be inferred either that the notice was mailed later than its typewritten date or that it took longer than three days to reach her by mail, the initial presumption is not dispositive." *Id.* In cases where the Complaint alleges that the right to sue letter was received more than three days after the mailing date, several courts within this Circuit "have held that the principle in Rule 12(b)(6) motions that a pleading's factual allegations must be taken as true applies to allegations that a plaintiff did not receive his EEOC letter within three days after the EEOC mailed it." *Froehlich v. Holiday Org., Inc.*, 2012 WL 4483006, at *4 (E.D.N.Y. Sept. 27, 2012) (collecting cases and quoting *Newell v. New York City Dep't of Transp.*, 2010 WL 1936226, at *2 (E.D.N.Y. May 12, 2010)); *see also Dubreus v. N. Shore Univ. Hosp.*, 2012 WL 5879110, at *5 (E.D.N.Y. Nov. 20, 2012); *Spruill v. NYC Health & Hosp.*, 2007 WL 2456960, at *5 (S.D.N.Y. Aug. 23, 2007).

Here, the Complaint alleges that "Plaintiff received a Notice of Right to Sue letter on December 3, 2014." (Compl. ¶ 26.) Accepting this allegation as true, as the Court must do, there is no basis to dismiss Plaintiff's ADA claims on the ground that they are untimely. Significantly, this is not a case where the alleged date of receipt in the Complaint squarely is contradicted by other allegations or documents attached to the Complaint. *See Romain v. Capital One, N.A.*, 2013 WL 6407731, at *3 (E.D.N.Y. Dec. 9, 2013); *Johnson v. St. Barnabas Nursing Home*, 568 F. Supp.2d 399, 400 (S.D.N.Y. 2008), *aff'd*, 368 F. App'x 246 (2d Cir. 2010).

II. ADA Discrimination Claim

The ADA establishes that no covered entity "shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring,

advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To adequately plead a discrimination claim under the ADA, a plaintiff must show that: "(1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability." *McMillan v. City of New York*, 711 F.3d 120, 125 (2d Cir. 2013). While a plaintiff is not required to make out a *prima facie* case in order to survive a motion to dismiss, the elements of the claim are instructive in analyzing whether a plaintiff has alleged sufficient facts giving rise to a claim. *See Bernadotte v. New York Hosp. Med. Ctr. of Queens*, 2014 WL 808013, at *7 (E.D.N.Y. Feb. 28, 2014).

Under the ADA, the term "disability" means "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Major life activities include performing manual tasks, eating, lifting, and working. 42 U.S.C. § 12102(2)(A). To determine if a major life activity is substantially limited, courts in this Circuit rely on the EEOC regulations. *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998). Under those regulations, "[t]he term substantially limits shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA and is not meant to be a demanding standard." *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 69 n.3 (2d Cir. 2014) (quoting 29 C.F.R. § 1630.2(j)(1)(i)). Accordingly, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

Here, Defendant argues that Plaintiff has not alleged sufficiently a disability within the

meaning of the ADA. (Def's Mem. at 7-9.) The Court agrees. Multiple courts within this Circuit have noted that "temporary disabilities do not trigger the protections of the ADA because individuals with temporary injuries are not disabled persons within the meaning of the act." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F. Supp.3d 426, 436 (E.D.N.Y. 2015) (collecting cases); *Dudley v. New York City Hous. Auth.*, 2014 WL 5003799, at *34 (S.D.N.Y. Sept. 30, 2014). Plaintiff's alleged disability is a "broken left thumb, for which he was out on Worker's Compensation for 4 months." (Compl. ¶ 9.) After those four months, Plaintiff was "ready to return to work." (Compl. ¶ 11.) In his EEOC Complaint, Plaintiff noted that his broken thumb "no longer prevent[ed] [him] or limit[ed] [him] from doing anything." (*See* Ex. B to July 2015 Panico Decl., at 3.) These contentions are insufficient to allege a disability under the ADA because Plaintiff's injury was temporary and there are no allegations that complications arose from the injury. *See Holmes v. New York City Dep't of City Wide Administrative Services*, 2015 WL 1958941, at *4 (S.D.N.Y. Apr. 30, 2015); *Zick v. Waterfront Comm'n of New York Harbor*, 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012). Accordingly, this claim is dismissed.

Even if Plaintiff properly had alleged that his broken left thumb was more than a temporary disability, the Complaint does not contain any facts that show what major life activity was substantially limited due to his thumb injury. Plaintiff does not allege that any activity at all was ever limited as a result of the broken thumb, but merely states that, along with the injury to his left thumb, he suffers from a different "serious medical condition." (Compl. ¶ 9.) Having alleged no facts at all, the Court cannot conclude that Plaintiff's condition substantially limited a major life activity and the claim must be dismissed. *See Adams v. Citizens Advice Bureau*, 187 F.3d 315, 316-17 (2d Cir. 1999); *Dechberry v. New York City Fire Dep't*, 124 F. Supp.3d 131, 151-52 (E.D.N.Y. 2015) ("Without any factual specificity as to the alleged disability claimed and

the major life activities affected, the Complaint fails to plead that plaintiff was disabled.").[4]

Aside from alleging an impairment that substantially limits a major life activity, Plaintiff also may meet the ADA's definition of disability if there is "a record of such an impairment" or if the individual is "being regarded as having such an impairment." 42 U.S.C. § 12102(1). The Second Circuit has held that, "[A]n individual meets the requirement of 'being regarded as having such an impairment' if the individual shows that an action (e.g. disqualification from a job, program, or service) was taken because of an actual or perceived impairment, *whether or not* that impairment actually limits *or is believed* to limit a major life activity." *Hilton v. Wright*, 673 F.3d 120, 129 (2d Cir. 2012) (quoting H.R. Rep. No. 110-730, pt. 1, at 14 (2008)) (emphasis in original).

Here, the Complaint does not contain any allegations from which the Court could conclude that Plaintiff was either regarded as having such an impairment or demonstrating a record of such an impairment. Nonetheless, even if the Complaint included these allegations, the ADA states that the "being regarded as having such an impairment" prong does not apply "to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). Here, Plaintiff was "ready to return to work" in June of 2013 or four months after he suffered the broken left thumb. (Compl. ¶¶ 9-11.) Hence, his injury was a transitory impairment, and his claim does not survive dismissal. *See Zick*, 2012 WL 4785703, at *5.

III. ADA Retaliation Claim

Plaintiff also asserts a claim under the ADA for retaliation based on his decision to file the EEOC Complaint. (Compl. ¶¶ 39-42.) Defendant argues that Plaintiff failed to exhaust

[4] Given that Plaintiff has failed to state a claim, the Court does not reach the question of whether a properly asserted claim would have been barred by the executed Release Agreement.

administrative remedies on this claim prior to initiating this action. (Def's Mem. at 9-10.) The Court agrees, and this claim is dismissed.

The Second Circuit has held that a plaintiff asserting claims under the ADA "must exhaust certain administrative remedies before initiating suit in the district court." *Hodges v. Holder*, 547 F. App'x 6, 7 (2d Cir. 2013) (Amended Summary Order). However, a plaintiff still may raise "those claims that either were included in or are reasonably related to the allegations contained in [his] EEOC charge" in the complaint. *Id.* "This Circuit has recognized that '[a] claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made.' In this inquiry, 'the focus should be on the factual allegations made in the [EEOC] charge itself, describing the discriminatory conduct about which a plaintiff is grieving." *Williams v. New York City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (*per curium*) (internal citations omitted).

As an initial matter, the Court deems this claim abandoned. Although, Defendant moved to dismiss this claim on three separate grounds, Plaintiff neither disputes Defendant's arguments, nor defends this claim in anyway. Where, as here, Plaintiff fails to address Defendant's arguments in his opposition, the Court deems Plaintiff's silence as a concession that Plaintiff is abandoning his claim. *See Sternkopf v. White Plains Hosp.*, 2015 WL 5692183, at *8 n. 9 (S.D.N.Y. Sept. 25, 2015) ("Because Plaintiff failed to address Defendant's exhaustion defense in his opposition, I could regard Plaintiff's silence as a concession with respect to that argument."); *Robinson v. Fischer*, 2010 WL 5376204, at *10 (S.D.N.Y. Dec. 29, 2010) ("Federal courts have the discretion to deem a claim abandoned when a defendant moves to dismiss that claim and the plaintiff fails to address in their opposition papers defendant's arguments for

dismissing such a claim."). Because Plaintiff abandoned this claim, the Court need not address Defendant's remaining arguments. *See Martinez v. Sanders*, 2004 WL 1234041, at *3 (S.D.N.Y. June 3, 2004).

Even if it were not abandoned, Plaintiff's claim would not survive dismissal because the Complaint does not contain any allegations showing that the retaliation claim was administratively exhausted prior to commencing the instant action. Defendant asserts, and the Court finds, that Plaintiff's EEOC charge is related only to Plaintiff's claim of disability discrimination. (Def's Mem. at 9-10.) Here, the EEOC Complaint makes no mention of termination or retaliation for filing an EEOC complaint and contains no statements that would lead an individual investigating Plaintiff's claims to inquire about any alleged retaliatory actions aside from the April 2013 termination, which occurred months before Plaintiff filed the EEOC Complaint. Without a single supporting allegation, the claim must be dismissed. *See O'Hara v. Mem'l Sloan-Kettering Cancer Ctr.*, 27 F. App'x 69, 70-71 (2d Cir. 2001) (Summary Order) ("The scope of an EEOC investigation cannot reasonably be expected to encompass retaliation when [Plaintiff] failed to put the agency on notice that [Plaintiff] had engaged in the type of protected activity that is the predicate to a retaliation claim."); *Sussle v. Sirina Prot. Sys. Corp.*, 269 F. Supp.2d 285, 314 (S.D.N.Y. 2003) (noting that ADA retaliation claim "must still be dismissed because the Plaintiff failed to exhaust his administrative remedies when he did not include allegations of retaliation in the Charge he filed with the EEOC").

IV. FMLA CLAIM

Plaintiff alleges that Defendant denied him leave in violation of the Family Medical Leave Act. (Compl. ¶¶ 47-50.) Although Defendant moves to dismiss Plaintiff's Complaint in its entirety and devotes substantial attention to this claim in its brief, Plaintiff neither addressed

any of Defendant's arguments nor mentioned the merits of his FMLA claim in his opposition brief. Accordingly, this claim also is deemed abandoned and is dismissed.[5] *See Peacock v. Suffolk Bus Corp.*, 100 F. Supp.3d 225, 230 n. 1 (E.D.N.Y. 2015); *McLeod v. Verizon New York, Inc.*, 995 F. Supp.2d 134, 143 (E.D.N.Y. 2014) ("[C]ourts in this circuit have held that '[a] plaintiff's failure to respond to contentions raised in a motion to dismiss claims constitute an abandonment of those claims.'") (internal citation omitted); *Rivera v. Balter Sales Co. Inc.*, 2014 WL 6784384, at *3 (S.D.N.Y. Dec. 1, 2014) ("Plaintiff has not responded to Defendants' arguments concerning the FMLA claims in his opposition to the motion. A plaintiff's failure to respond to contentions raised in a motion to dismiss claims constitutes an abandonment of those claims.").

V. Reasonable Accommodation Claim

In his opposition brief, Plaintiff, for the first time, raises a reasonable accommodation claim under the ADA. This claim was not included in Plaintiff's Complaint and is not considered by the Court. A represented party, as is the case here, cannot amend their pleading through an opposition brief. When this occurs, the Court will not consider the newly raised claim. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998); *see also Willner ex rel. Willner v. Doar*, 2013 WL 4010205, at *5 (E.D.N.Y. Aug. 5, 2013) ("These allegations are nowhere to be found in plaintiff's amended complaint. Plaintiff may not amend his complaint through motion papers and the Court will not consider this newly raised claim."); *Yarborough v. Queens Auto Mall, Inc.*, 2010 WL 1223584, at *2 (E.D.N.Y. Mar. 23, 2010).

However, even if the Court considered the reasonable accommodation claim, it would fail for the same reasons as the ADA discrimination claim. To establish a claim for failure to

[5] Since Plaintiff has not defended this claim and has not asserted it in the proposed First Amended Complaint, the Court need not reach Defendant's other arguments regarding this claim.

accommodate under the ADA, a plaintiff must demonstrate that: "(1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *McMillan*, 711 F.3d at 125-26 (quoting *McBride v. BIC Consumer Products Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009)). As stated above, Plaintiff has not alleged sufficiently a disability within the meaning of the ADA; therefore, this claim is dismissed.

VI. State and Local Law Claims

Under 28 U.S.C. § 1367(c)(3), "a district court 'may decline to exercise supplemental jurisdiction' if it 'has dismissed all claims over which it has original jurisdiction.'" *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting 28 U.S.C. § 1367(c)(3)). A district court's discretion is guided by "balanc[ing] the traditional 'values of judicial economy, convenience, fairness, and comity.'" *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors … will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill*, 484 U.S. at 350 n. 7.

Along with his federal claims, Plaintiff asserts three state and city law claims. (*See* Compl. ¶¶ 31-34; 35-38; 43-46.) Considering the above factors, there is no justifiable reason for the Court to exercise supplemental jurisdiction over Plaintiff's remaining claims. These claims are dismissed without prejudice.

VII. Leave to Amend

In the alternative, Plaintiff seeks leave to amend the Complaint. (Pl.'s Opp'n, at 6.) Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given

when justice so requires." Fed. R. Civ. Proc. 15. Nonetheless, the district court has discretion to grant or deny leave to amend. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). The court may deny leave "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Id.*

"An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6)." *Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). "The adequacy of a proposed amended complaint to state a claim is to be judged by the same standards as those governing the adequacy of a filed pleading." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

In his opposition brief, Plaintiff writes, "This [amended] complaint only contains claims related to disability discrimination. Plaintiff withdraws all other claims." (*See* Pl.'s Opp'n, at 6 n. 1.) While the Court is puzzled why, in light of this statement, the proposed First Amended Complaint still contains claims for retaliation, the Court nonetheless assumes that Plaintiff means what he says. Therefore, the only federal claim the Court considers in the proposed First Amended Complaint is for ADA discrimination. (*See* Ex. F to "July 2015 Richardson Decl." ¶¶ 31-34.)

In this case, Plaintiff's ADA discrimination claim, is dismissed with prejudice because any amendment would be futile. In his proposed First Amended Complaint, Plaintiff now alleges that the injury to his left thumb severely limited his ability to perform essential life and work functions. *(See id.* ¶ 12.) Without more, the addition of this bare allegation does not save Plaintiff's ADA discrimination claim from dismissal. The proposed First Amended Complaint leaves the Court to speculate what activities are severely limited, and whether any of those

activities are major life activities.[6] Courts have routinely dismissed complaints on this very ground. *See Sternkopf*, 2015 WL 5692183, at *7; *Dohrmann-Gallik v. Lakeland Cent. Sch. Dist.*, 2015 WL 4557373, at *7 (S.D.N.Y. July 27, 2015); *Davie v. New York City Transit Auth.*, 2003 WL 1856431, at *4 (E.D.N.Y. Apr. 9, 2003) (dismissing ADA claim where "[plaintiff] fails to detail how his disability substantially limits a major life activity"). Any amendment also would be futile given that Plaintiff's four-month thumb injury does not qualify as a disability within the meaning of the ADA, and since Plaintiff's statements to the EEOC unequivocally show that this injury did not limit him in any way, Plaintiff cannot have it both ways. No further pleading would change the temporary nature of Plaintiff's injury.

CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss is granted. The Court declines to exercise supplemental jurisdiction over Plaintiff's state and local law claims. Plaintiff's federal claims are dismissed with prejudice and his state and local law claims are dismissed without prejudice.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2016

/s/
DORA L. IRIZARRY
Chief Judge

[6] It is unclear from the amended complaint whether Plaintiff intended to assert a claim for failure to accommodate under the ADA. To the extent, if any, that Plaintiff's proposed Amended Complaint asserts such a claim, that claim is futile for the same reasons.