UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - NEW YORK CITY DEPARTMENT OF EDUCATION, Defendant.	16 Civ. 4291 (LAK) (JCF) MEMORANDUM AND ORDER
ANTHONY RICCARDO, Plaintiff, - against - NEW YORK CITY DEPARTMENT OF EDUCATION, MINERVA ZANCA, Principal of the Pan American International High School, JUAN S. MENDEZ, Superintendent of Queens High Schools, Defendants.	16 Civ. 4891 (LAK) (JCF)

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

The plaintiff, Anthony Riccardo, brings this action against the New York City Department of Education (the "DOE"), Minerva Zanca, and Juan Mendez pursuant to 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq. (the "NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin.

Code § 8-101 et seq. (the "NYCHRL").[1] By Order dated January 4, 2017, the Honorable Lewis A. Kaplan, U.S.D.J., dismissed the plaintiff's NYSHRL and NYCHRL claims against the DOE and Mr. Mendez because the plaintiff failed to plead that he filed a notice of claim pursuant to New York Education Law § 3813(1). United States v. New York City Department of Education, Nos. 16 Civ. 4291, 16 Civ. 4891, 2017 WL 57854, at *1 (S.D.N.Y. Jan. 4, 2017) (hereinafter Riccardo I). The plaintiff moves for leave to amend his complaint to allege facts showing that he satisfied the notice of claim requirement. For the reasons discussed below, the motion is denied.

Background

This case involves allegations that Ms. Zanca, the principal of Pan American International High School ("PAIHS"), discriminated and retaliated against Mr. Riccardo because he refused to assist her in discriminating against the school's African-American teachers. The facts underlying the plaintiff's claims are set forth in my Report and Recommendation on the defendants' motion to dismiss the original complaint. See Riccardo v. New York City Department of Education, No. 16 Civ. 4891, 2016 WL 7106048, at *1-2 (S.D.N.Y. Dec. 2, 2016).

[1] Mr. Riccardo's action has been consolidated with the above-captioned action brought by the United States. (Order dated Oct. 13, 2016).

Mr. Riccardo was the assistant principal of PAIHS during the 2012-13 school year. (Proposed First Amended Complaint ("Proposed FAC"), attached as Exh. 1 to Declaration of Noah A. Kinigstein dated Jan. 25, 2017, ¶¶ 16, 39). Mr. Mendez was the Superintendent of Queens County High Schools. (Proposed FAC, ¶ 8). In February 2013, Mr. Riccardo informed Ms. Zanca that he would no longer comply with her discriminatory conduct. (Proposed FAC, ¶ 33). She responded by "writing him up" with the intention of giving him an unsatisfactory ("U") rating for the school year. (Proposed FAC, ¶ 33). In April 2013, after Mr. Riccardo gave Heather Hightower, one of the school's African-American teachers, a satisfactory ("S") rating for one of her lessons, Ms. Zanca "had [Mr.] Riccardo forcibly removed from the school building by school security." (Proposed FAC, ¶ 35). In late June 2013, Ms. Zanca gave Mr. Riccardo a "U" rating for the 2012-13 school year, which terminated his probationary status as assistant principal. (Proposed FAC, ¶ 39). In September 2013, the plaintiff entered into a "stipulation" with the defendants (Proposed FAC, ¶ 52), though the terms of the stipulation are not set forth in the proposed amended complaint.

On June 26, 2013, Mr. Riccardo filed a complaint with the DOE's Office of Equal Opportunity ("OEO"). (Proposed FAC, ¶ 36). On July 23, 2013, he was interviewed by Theresa B. Wade, an OEO attorney, about Ms. Zanca's conduct. (Proposed FAC, ¶¶ 44-45).

In early August 2013, Mr. Riccardo discussed Ms. Zanca's conduct with Mr. Mendez. (Proposed FAC, ¶ 48). The DOE did not investigate Mr. Riccardo's allegations further. (Proposed FAC, ¶¶ 49-50). On September 20, 2013, Mr. Riccardo filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"). (Proposed FAC, ¶ 51).

Discussion

A. Legal Standard

Rule 15 of the Federal Rules of Civil Procedure provides that courts should "freely give" leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2); see also Foman v. Davis, 371 U.S. 178, 182 (1962); Aetna Casualty & Surety Co. v. Aniero Concrete Co., 404 F.3d 566, 603 (2d Cir. 2005). "This permissive standard is consistent with [the Second Circuit's] 'strong preference for resolving disputes on the merits.'" Williams v. Citigroup Inc., 659 F.3d 208, 212–13 (2d Cir. 2011) (quoting New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005)). The court has broad discretion over motions to amend, see McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007), and may deny such a motion for the following reasons: (1) undue prejudice to the non-moving party, (2) futility, (3) bad faith or dilatory motive, (4) repeated failure to cure deficiencies by previous amendments, or (5) undue delay, United States ex rel. Ladas v. Exelis, Inc., 824 F.3d 16, 28 (2d Cir. 2016).

Here, the defendants argue solely that the plaintiff's amendment is futile. Leave to amend should be denied as futile when the amended pleading would not survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. IBEW Local Union No. 58 Pension Trust Fund and Annuity Fund v. Royal Bank of Scotland Group, PLC, 783 F.3d 383, 389 (2d Cir. 2015). Thus, the appropriate legal standard is whether the amended pleading states a claim on which relief can be granted. See Panther Partners Inc. v. Ikanos Communications, Inc., 681 F.3d 114, 119 (2d Cir. 2012). The court should accept all facts pled as true and construe them in the light most favorable to the plaintiff to determine whether the allegations give rise to a plausible claim for relief. Id. (citing Ashcroft v. Iqbal, 556 U.S. 662, 678-80 (2009)). The defendants bear the burden of demonstrating that the proposed amendment is futile. See Allison v. Clos-ette Too, LLC, No. 14 Civ. 1618, 2015 WL 136102, at *2 (S.D.N.Y. Jan. 9, 2015); Ferring B.V. v. Allergan, Inc., 4 F. Supp. 3d 612, 618 (S.D.N.Y. 2014).

B. Analysis

New York Education Law § 3813(1) provides that no claim involving the rights or interests of a school district may be brought against the district or its officers

> unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special

> proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim.

Thus, in order to bring a claim against the DOE or its officers[2] under the NYSHRL or NYCHRL, a plaintiff must serve a written notice of claim on the governing board of the DOE within three months of the claim arising. See Bacchus v. New York City Department of Education, 137 F. Supp. 3d 214, 234 (E.D.N.Y. 2015)

Here, it is undisputed that the plaintiff did not file a formal notice of claim. He asserts, however, that his EEOC and OEO complaints may serve as substitutes for the filing of a notice of claim. (Plaintiff's Memorandum of Law in Support of Leave to File an Amended Complaint at 3). Separately, he argues that the defendants waived the defense based on the lack of a notice of claim because they negotiated a "settlement" with him. (Plaintiff's Memorandum of Law in Response to Defendants' Reply and Opposition to Plaintiff's Motion for Leave to File an Amended Complaint ("Reply") at 3-7). These arguments are without merit.

1. Notice of Claim Substitutes

The New York Court of Appeals has "repeatedly rejected . . . proposals to compromise the strict statutory notice of claim requirement because to do so would lead to uncertainty and

[2] As a school superintendent, Mr. Mendez is an "officer" under Section 3813. See Collins v. City of New York, 156 F. Supp. 3d 448, 460 (S.D.N.Y. 2016).

vexatious disputes." Varsity Transit, Inc. v. Board of Education of the City of New York, 5 N.Y.3d 532, 536, 806 N.Y.S.2d 457, 459 (2005). "Despite this clear language of strict construction, both Federal and New York State courts have considered whether documents other than a notice of claim can be deemed sufficient to satisfy the Section 3813 notice of claim requirement." Brtalik v. South Huntington Union Free School District, No. 10 CV 10, 2010 WL 3958430, at *4 (E.D.N.Y. Oct. 6, 2010) (collecting cases). Several courts in this Circuit have held that certain administrative filings, like an EEOC complaint, may satisfy the notice of claim requirement "in limited circumstances where 'the charge puts the school district on notice of the precise claims alleged, is served on the governing board of the district (and not a different arm of the district), and is served within the statutory time period.'" Legrá v. Board of Education of the City School District of the City of New York, No. 14 Civ. 9245, 2016 WL 6102369, at *3 (S.D.N.Y. Oct. 19, 2016) (quoting Brtalik, 2010 WL 3958430, at *5); see Bacchus, 137 F. Supp. 3d at 234; Grenzig v. Sachem School District, 13 CV 7278, 2014 WL 11191093, at *3 (E.D.N.Y. Feb. 11, 2014).

Here, the plaintiff does not allege that he served the EEOC complaint or the OEO complaint on the governing board of the DOE. Rather, he alleges that he served the EEOC complaint only on the

EEOC[3] and that he served the OEO complaint only on the OEO. (Proposed FAC, ¶¶ 4, 36, 51). The OEO complaint was subsequently "transferred to the DOE's Office of Legal Services." (Proposed FAC, ¶ 36). However, neither the OEO nor the DOE's Office of Legal Services constitute the governing board of the DOE. See Bacchus, 137 F. Supp. 3d at 234 (service of New York State Division of Human Rights complaint on DOE's legal department did not constitute service on DOE's governing board); cf. Gear v. Department of Education, No. 07 Civ. 11102, 2009 WL 484424, at *5 (S.D.N.Y. Feb. 24, 2009) (OEO complaint does not satisfy notice of claim requirement). Thus, the plaintiff's EEOC and OEO complaints cannot serve as substitutes for a formal notice of claim.

2. Waiver and Estoppel

In the alternative, the plaintiff asserts that the defendants waived the notice of claim defense because they entered into a

[3] The defendants attached a copy of the plaintiff's EEOC complaint to their opposition brief. (EEOC Complaint, attached as Exh. A to Declaration of Jessica Wisniewski dated Feb. 15, 2017). A stamp on the EEOC complaint indicates that the DOE's Office of the General Counsel received a copy of it on November 14, 2013. (EEOC Complaint). This does not change the analysis. First, the General Counsel's Office is not the governing board of the DOE. See Bacchus, 137 F. Supp. 3d at 234. Second, the only adverse action against Mr. Riccardo raised with specificity in the EEOC complaint is Ms. Zanca's order to have him removed from school premises in April 2013, which issued seven months before the General Counsel's Office received the complaint. Therefore, even if service on the General Counsel's Office were sufficient, the EEOC complaint would not have put the DOE on notice of any of the plaintiff's claims within the statutory time period such that it could serve as a substitute for a formal notice of claim.

"settlement" with him. (Reply at 3-7). He relies on a single, sixty-year-old case, Teresta v. City of New York, 304 N.Y. 440 (1952), to support this argument. In Teresta, the plaintiff timely served a notice of claim on the comptroller -- the proper party to serve under the applicable statute[4] -- by regular mail. Id. at 442. However, that statute required the notice of claim to be served either in person or by registered mail: service by regular mail was not permitted. Id. Despite the plaintiff's failure to comply with the procedural rule, the comptroller responded to the notice of claim by asking the plaintiff to appear "for examination," which the plaintiff subsequently did. Id. The Court of Appeals held that because "the city neither returned the notice, nor at any time objected to the manner in which it had been served until after the commencement of the trial, the statutory requirement of personal service or notification by registered letter must be deemed to have been fully and effectively waived." Id. at 442-43.

The circumstances in this case are quite different. In Teresta, the Court of Appeals relied on the fact that "an executive officer of the city actually informed plaintiff that his notice had been received and then proceeded to hold an examination in connection with the claim." Id. at 443. Here, there is no

[4] The case involved the notice of claim requirement in Section 50-e of the General Municipal Law.

allegation that the governing board of the DOE received a notice of claim, much less that it led the plaintiff to believe that he had satisfied the notice of claim requirement. Moreover, the defendants did not delay in raising the notice of claim issue. Rather, they raised it in their motion to dismiss the original complaint filed less than three months after the plaintiff initiated this action. Thus, the plaintiff's argument that the defendants waived the notice of claim defense is without merit.

Recent case law supports the proposition that equitable estoppel may bar a municipal defendant from raising a defense based on the lack of a notice of claim where the defendant "acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice." East Coast Resources v. Town of Hempstead, 707 F. Supp. 2d 401, 407 (E.D.N.Y. 2010) (quoting Bender v. New York City Health & Hospitals Corp., 38 N.Y.2d 662, 667, 382 N.Y.S.2d 18, 20-21 (1976)); accord Allocco Recycling, Ltd. v. Doherty, 378 F. Supp. 2d 348, 375 (S.D.N.Y. 2005). The plaintiff here has not alleged any facts to support such a finding. The proposed amended complaint makes a passing reference the "stipulation" solely to highlight the EEOC's determination that the plaintiff signed it under pressure to have his "U" rating changed. (Proposed FAC, § 52). The plaintiff's reply brief makes only opaque statements that the parties reached a "settlement" or

"resolution" that was "signed by the NYCDOE." (Reply at 3-4, 6). Thus, the plaintiff does not allege that he relied to his detriment on conduct by the governing board of the DOE indicating that he did not need to file a notice of claim. Accordingly, equitable estoppel does not preclude the defendants from raising the notice of claim defense.

In sum, the plaintiff fails to plead that he satisfied the notice of claim requirement, and neither waiver nor estoppel bars the defendants from raising the notice of claim defense. Therefore, the proposed amended complaint would not survive a motion to dismiss the NYSHRL and NYCHRL claims against the DOE and Mr. Mendez, and leave to amend is denied as futile.

3. Leave to Replead

Leave to replead may be denied where a court has previously identified deficiencies in the pleadings and the deficiencies remain uncorrected in subsequent pleadings. Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 168 (2d Cir. 2003); see also Foman, 371 U.S. at 182. Judge Kaplan's January 4, 2017 Order identified the plaintiff's failure to plead that he filed a notice of claim. See Riccardo I, 2017 WL 57854, at *1. That defect remains unremedied in the plaintiff's proposed amended complaint. Therefore, leave to replead is denied.

Conclusion

For the reasons discussed above, the plaintiff's motion for leave to amend (Docket no. 47 in 16 Civ. 4891) is denied.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
March 28, 2017

Copies transmitted this date to:

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