

Britt v City of New York
2013 NY Slip Op 31847(U)
August 5, 2013
Sup Ct, New York County
Docket Number: 100820/2012
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 100820/2012
BRITT, KEENAN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS *CAL # 14*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8-5-13
AUG 05 2013

[Signature]
_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X

KEENAN BRITT,

Plaintiff,

-against-

DECISION/ORDER
Index No. 100820/2012
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION; DENNIS
WALCOTT, CHANCELLOR OF NEW YORK CITY
DEPARTMENT OF EDUCATION; NANCY GRILLO,
ADMINISTRATIVE DIRECTOR OF NEW YORK
CITY DEPARTMENT OF EDUCATION; JOSHUA
LAUB, PRINCIPAL OF BANANA KELLY HIGH
SCHOOL OF NEW YORK CITY DEPARTMENT OF
EDUCATION; ERMA BROWN, HUMAN RESOURCES
DIRECTOR FOR NEW VISIONS CFN 562 OF NEW
YORK CITY DEPARTMENT OF EDUCATION;
JOSELYN SANTANA, TEACHER AT BANANA
KELLY HIGH SCHOOL;

Defendants.

-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR§ 3211(a)(5) and §3211(a)(7), dismissing
the Complaint on the grounds that it is barred by the doctrines of res judicata and collateral estoppel,

fails to comply with applicable Notice of Claim requirements, fails to state a cause of action and because the City of New York is not a proper party to this action. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the motion in part.

Factual and procedural background:

On July 1, 2009, plaintiff accepted a provisional position as a Computer Service Technician with the Board of Education (“BOE”). He was assigned to Bronx Coalition Community High School. Subsequently, via letter dated September 18, 2009, he was informed by the BOE, that he would be terminated effective close of business on October 2, 2009, due to budgetary constraints.

However, also via letter, dated October 13, 2009, plaintiff was then informed that despite the elimination of his provisional Computer Service Technician position, he was still entitled to retreat to his permanent Computer Aide, Level I position. Plaintiff had been on a leave of absence from this position while working as a provisional Computer Service Technician. Plaintiff was directed to report to Nancy Grillo, Director of BOE’s Administrative Employees Unit, the following day to discuss his prospective reassignment.

In the meantime, plaintiff had taken and passed an open competitive Civil Service exam for permanent employment to the Computer Service Technician title. This, however, is not the same title series as the Computer Aide title series. On November 24, 2009, Felisha Alers, Business Manager of Banana Kelly High School (“Banana Kelly”), informed Nancy Grillo by e-mail, that Principal Laub had approved plaintiff’s permanent appointment to the Computer Service Technician, Level II, at the school, subject to a one year probationary period and a salary of \$43,055.00. On the same day, Ms. Grillo spoke with plaintiff, reiterating that he would be required to serve a one year

probationary period following permanent appointment to the Computer Service Technician Level II title and would also be required to resign his other permanent Computer Aide position.

Plaintiff complied with these directives and subsequently began work in his new capacity on November 25, 2009. On January 16, 2010, Banana Kelly advised Ms. Grillo that plaintiff's salary as set forth in the BOE computer records system, was actually higher than he was had been earning. On January 19, 2010, Ms. Grillo responded, noting that payroll had only finalized plaintiff's new salary on January 15, 2010, and that the records then reflected the accurate salary of \$43,056.00. On July 9, 2010, plaintiff filed a salary grievance alleging that his salary had been unfairly reduced from \$51,631.00 to \$43,056.00.

Defendants allege that throughout his employment at Banana Kelly, plaintiff exhibited difficulty interacting with both students and faculty. His behavior resulted in numerous complaints emanating from teachers and students. Additionally, plaintiff was frequently absent. By November 23, 2010, he had been absent 56 times in less than a year since the beginning of his probationary period. Therefore, in accordance with BOE rules, plaintiff's probationary period was automatically extended day for day for each day he was not performing full duty. His probationary period was extended until February 16, 2011.

On or about February 1, 2011, plaintiff was offered an agreement that would extend his probationary period for an additional six month period. He initially refused to agree to said extension, but did so only after indicating on the agreement that he was "forced to sign under duress." On February 2, 2011, plaintiff received his probationary report from Principal Loeb. Noting plaintiff's negative behavior, Principal Loeb recommended that he be terminated, and plaintiff was terminated that day. Consequently, in 2012, plaintiff filed an Article 78 proceeding

alleging he was terminated in bad faith and seeking reinstatement and back pay. In a decision dated December 20, 2011, Justice Alexander W. Hunter, denied said proceeding, finding that the BOE's termination of plaintiff was justified "due to his excessive absences, negative attitude, and poor work performance." (See Exhibit "D," at 2).

Positions of the parties:

Defendants argue that Justice Hunter's decision already addressed and decided plaintiff's employment claims. Thus, since plaintiff's claims arising out of his termination were brought to a final conclusion, all other claims arising out of the same transaction are barred by the doctrine of res judicata. Additionally, defendants argue that plaintiff's claims were necessarily decided in his previous Article 78 proceeding wherein he was afforded a full and fair opportunity to contest the prior determinations. Justice Hunter expressly rejected the denial of due process/reversion of right claims made in the previous Article 78 proceeding. Thus, plaintiff is also collaterally estopped from asserting these claims in the instant action.

Defendants also argue that plaintiff's Notice of Claim is "inadequate," in that New York Education Law §3813 requires a plaintiff to file same prior to commencing any suit against the BOE. Moreover, Education Law § 3813(2) requires that "a notice of claim shall have been made and served in compliance with section 50-e of the general municipal law." GML § 50-e requires that a notice of claim be filed within ninety days after the claim arises. In the instant action, plaintiff filed a Notice of Claim on April 11, 2011, three months subsequent to his termination. Said Notice of Claim alleges that "[t]he claim is based upon Respondent's arbitrary and capricious, wrongful, and bad faith termination of Claimant's employment as a probationary computer service technician Level 2 effective February 2, 2011." Therefore, defendants argue that plaintiff's putative causes of action

alleging prima facie tort, breach of contract, tortious interference, conspiracy, intentional and negligent infliction of emotional distress necessitate dismissal.

Defendants also argue that plaintiff fails to assert a cause of action in prima facie tort in that New York does not recognize a cause of action based on prima facie tort for the wrongful discharge of an at-will employee. Plaintiff asserts that “defendants Grillo and Laub caused defendant [BOE] to breach its contractual obligations to plaintiff by vitiating his permanent status in his underlying Civil Service title without due process.” (See Complaint ¶44). Defendants argue that there was no contract between plaintiff and the BOE to breach, in that he was appointed to his earlier Computer Aide position after taking a Civil Service exam.

Defendants argue that plaintiff fails to state a cause of action for tortious interference. They argue that this claim is entirely conclusory and speculative in that nothing in the Complaint remotely indicates the existence of a contract between plaintiff and a third party; or that defendants had knowledge of that contract, or that they intentionally induced the third party to breach a non-existent contract. Defendants also argue that plaintiff has failed to establish a cause of action for conspiracy, in that there is no civil action for conspiracy, as it is not an independent tort. Defendants further argue that plaintiff also fails to state a cause of action for intentional or negligent infliction of emotional distress. It is well settled that claims of intentional infliction of emotional distress against governmental bodies are barred as a matter of public policy. Lastly, defendants argue that the City of New York is not a proper party to this action in that the City and the BOE are separate legal entities, in that the BOE is not a department of the City of New York.

Plaintiff responds that defendants’ primary argument in their motion to dismiss is that the instant action is barred by collateral estoppel and/or res judicata because Justice Hunter previously

denied his Article 78 petition based on the same operable facts, is now meaningless in light of the fact that Justice Hunter's decision has been unanimously reversed by the First Department, Appellate Division on January 14, 2013. The Appellate Division also remanded the case back for a factual hearing as to whether Ms. Grillo unlawfully and wrongfully deprived plaintiff of his underlying permanent Civil Service rights as a computer aide.

Defendants respond that in the Britt I Appeal, the First Department specifically found only one triable issue of fact-whether plaintiff voluntarily accepted the appointment to the probationary Computer Service Technician, Level II position at Banana Kelly, and whether he should have reverted back to the civil service title of Computer Aide upon the termination of his probationary employment.

Conclusions of law:

It is well settled that the Board of Education continues to exist as a separate and distinct entity from the City of New York (see Education Law§ 3590-g[2]; *Perez ex rel. Torres v. City of New York*, 41 A.D.3d 378 [1st Dept. 2007], *lv dismissed* 16 N.Y.3d 733 [2011] citing *Gonzalez v. Esparza*, 2003 U.S. Dist. LEXIS 13711, * 5, 2003 WL 21834970, * 2 [S.D.N.Y.] [changes in statutory scheme regarding interplay between Board and City best described as “political”]; see also *Gold v. City of New York*, 80 A.D.2d 138, 140 [1st Dept. 1981]; *Montgomery-Costa v. City of New York*, 26 Misc. 3d 755, 2009 N.Y. Slip Op. 29461 (Sup Ct. NY County 2009)).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City of New York's motion to dismiss is granted and the complaint and any cross-claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

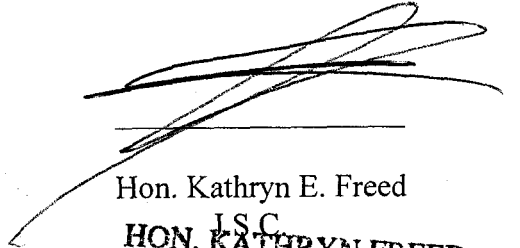
ORDERED that plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled' and is further

ORDERED that the parties are to appear for a preliminary conference on September 10, 2013, at 2:00 pm in Room 103 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: *Aug. 5*, 2013
AUG 05 2013

ENTER:


Hon. Kathryn E. Freed
HON. ^{J.S.C.} KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
AUG 12 2013
NEW YORK
COUNTY CLERK'S OFFICE