SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice PART 15

Index Number : 154650/2012
FRANCE, CHRISTOPHER A.
vs.
HOUSING AUTHORITY
SEQUENCE NUMBER : 001
DISMISS ACTION

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

DECISION IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION / ORDER

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

Dated: 3-21-13

MAR 21 2013

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

_____, 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

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

----------X

CHRISTOPHER A. FRANCE,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and NEW YORK CITY DEPARTMENT OF INVESTIGATIONS,

Defendants.

----------X

DECISION/ORDER
Index No.: 154650/12
Seq. No.: 001

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

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	
REPLYING AFFIDAVITS	
EXHIBITS	3-4
STIPULATIONS	
OTHER	

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

Defendant New York City Department of Investigation, (hereinafter, "DOI"), moves for an Order dismissing the complaint pursuant to CPLR§ 3211(a)(7), on the ground that plaintiff has failed to state a cause of action. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

Plaintiff alleges that he has been employed by the Office of the Inspector General for defendant New York City Housing Authority, ("NYCHA"), since July 17, 1989. His position is that of Chief Investigator. Plaintiff alleges that on May 4, 2010, he met with his Supervisor, Inspector General Kelvin Jeremiah and various others, to discuss his written comments and response to a 2009 Performance Evaluation. When plaintiff was asked if he believed that he should have been granted a recent promotion to Assistant Inspector General, he stated that he should have been promoted instead of John Graham Forbes. When promoted, Mr. Forbes, was under the age of forty, and had been employed by defendant since February 2005. Plaintiff alleges that Mr. Jeremiah responded "At your age, there is no way that I am going to promote and groom you for management over a younger investigator." Additionally, in response to plaintiff's stating "so I am being discriminated against because of my age,?" Mr. Jeremiah stated "I know you and your racial discrimination views."

Plaintiff subsequently filed a charge of discrimination with the Equal Employment Opportunities Commission, *pro se.* He then commenced a federal lawsuit on September 13, 2011, in the U.S. District Court for the Southern District of New York, similarly, *inter alia*, asserting claims of discrimination and retaliation under the Age Discrimination and Employment Act, 29 U.S.C. § 621, et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. On June 25, 2012, the federal suit was dismissed as untimely. However, the Federal Court dismissed plaintiff's state and local law discrimination claims without prejudice. Plaintiff then commenced the instant suit on July 18, 2012, alleging age discrimination under State and Local laws: NYCHA filed an Answer and DOI filed the instant motion.

Positions of the parties:

DOI first argues that plaintiff has failed to state a cause of action relating to it, in that defendant NYCHA is a public authority separate and apart from the City of New York. It also argues that plaintiff has failed to demonstrate beyond "mere conclusory and speculative terms," how he considers himself to be "employed" by both defendant NYCHA and defendant DOI. DOI further argues that plaintiff's age discrimination claims are merely his "belief" that he should have been promoted to Assistant Inspector General, and fails to allege that said promotion opportunity was ever available to him, that he was eligible for said promotion, or that he even applied for it, thereby undermining his complaint. Additionally, DOI argues that plaintiff provides no specific details as to what his views and opinions on racial discrimination were or are; how they are and/or should be protected activity; and what the causal connection is between his opinions and the adverse employment action complained of.

Plaintiff asserts that he has adequately pled an age discrimination and retaliation complaint. He argues that his complaint "clearly gives defendants fair and adequate notice" of his claims and the circumstances and events that they emanate from. He asserts that Mr. Jeremiah's "direct quote" "speaks volumes about his discriminatory intent and that this discriminatory intent was a motivating factor in denying the Plaintiff a promotion." Plaintiff also argues that the issue of whether or not he will ultimately prevail in proving his allegations is extraneous to the Court's determination on the instant motion.

Conclusions of law:

It is well settled that "[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept

all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v. Martinez, 84 N.Y.2d 83,87 [1994]; *see also* Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 [1977]; Breytman v. Olinville Realty, LLC, 54 A.D.3d 703, 704 [2d Dept. 2008], *lv. dismissed* 12 N.Y.3d 878 [2009]; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144[2002]; Lupski v. County of Nassau, 32 A.D.3d 997 [2d Dept. 2006]).

The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see* Morone v. Morone, 50 N.Y.2d 481 [1980]; Gertler v. Goodgold, 107 A.D.2d 481 [1st Dept. 1985], *affirmed* 66 N.Y.2d 946 [1985]). Where evidence is submitted by the movant in support of the CPLR§3211(a)(7) motion, the court must determine whether the proponent of the pleading actually has a cause of action, not whether he/she has stated one (*see* Leon v. Martinez, supra; Rovello v. Orofino Realty Co., 40 N.Y.2d 633 [1976]; Simos v. Vic-Armen Realty, LLC, 92 A.D.3d 760 [2d Dept. 2012]; Fishberger v. Voss, 51 A.D.3d 627 [2d Dept. 2008]).

In the context of a motion to dismiss, employment discrimination cases are generally analyzed under a more lenient notice pleading standard, whereby the plaintiff need not plead specific facts, but must give defendants "fair notice" of the nature and grounds of his/her claims (*see* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 [2002]; Vig v. New York Hairspray Co., LP, 67 A.D.3d 140, 144 [1st Dept. 2009], *rearg denied* 19 N.Y.3d 1008 [2012]). However, "bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true on a motion to dismiss" (JFK Holdings Co., LLC

v. City of New York, 68 A.D.3d 477 [1st Dept. 2009], quoting O'Donnell, Fox & Gartner v. R-2000 Corp., 198 A.D.2d 154 [1st Dept. 1993]). It is well settled that NYCHA is a "distinct municipal entity not united in interest with [the] City" (Torres v. New York City Hous. Auth., 261 A.D.2d 273, 275 [1st Dept. 1999]). It is independent of the City of New York (*see* Roberts v. New York City Office of Collective Bargaining, 33 Misc.3d 1224(A), 943 N.Y.S.2d 7794, 2011 WL 5840146, 2011. The Housing Authority is not an alter ego of the City of New York and notice to the City may not be imputed to the Authority (*see* Pavone v. City of New York, 170 A.D.2d 493 [2d Dept. 1991]; Seif v. City of New York, 218 A.D.2d 595 [1st Dept. 1995]).

In the case at bar, the first deficiency in plaintiff's complaint is that it fails to establish with any semblance of certainty, what specific entity employs him, and how the DOI is a proper party to the instant suit. It is not clear how DOI and NYCHA are related, particularly in view of the fact that they are totally different and distinct entities. It is not even clear how the Office of the Inspector General is related to NYCHA. Does the Inspector General's Office have a division that deals specifically with NYCHA? Interestingly, plaintiff fails to verify who his employer actually is and how both defendant entities became subjects of his suit.

Additionally, plaintiff has sued the DOI and not the City of New York. It is well settled that DOI is an agency within a public corporation, the City of New York (*see* Rosenbaum v. City of New York, 8 N.Y.3d 1 [2006]). Also, pursuant to New York City Charter § 396 "All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law." *(see* Siino v. Department of Educ. of City of New York, 44 A.D.3d 568, [1st Dept. 2007]).

"Under New York law, departments which are merely_administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued" (Hall v. City of White Plains, 185 F. Supp.2d 293, 303 (S.D.N.Y. 2002); *see also* Lauro v. Charles, 219 F.3d 202, 205 n. 2 (2nd Cir. 2000)).

Moreover, even if the issue of the legitimacy of having either or both defendants involved in the suit was non-existent, the complaint does not establish any cognizable theory, but merely advances bare conclusions and allegations. Indeed, plaintiff's entire case seems premised upon two statements allegedly made by his superior, one relating to plaintiff's opinions regarding racial discrimination and one relating to his age. However, other outstanding questions exist which still undermine the legitimacy of the complaint. At the very least, plaintiff would be required to specify what his views are and why he believes that they are the impetus of any animus exhibited by his superior, and adversely affected his chances for a prospective promotion.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that DOI's motion to dismiss the complaint for failure to state a cause of action is granted; and it is further

ORDERED that defendant NYC Department of Investigations is not a proper party to this matter and as such, all complaints against it are hereby dismissed; and it is further

ORDERED that defendant-movant shall serve a copy of this order on all other parties and the Trial Support Office, (60 Centre Street, Room 158).

it is further

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

DATED: March 21, 2013

ENTER:

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