Millet v Village of Cazenovia
2014 NY Slip Op 33294(U)
December 18, 2014
Supreme Court, Madison County
Docket Number: 2014-1576
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Madison County Courthouse, Wampsville, New York, on the 24th day of October, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : MADISON COUNTY

GEORGE MILLET,

Plaintiff,

-vs-

THE VILLAGE OF CAZENOVIA AND THE VILLAGE OF CAZENOVIA POLICE DEPARTMENT and MICHAEL A. HAYES,

Defendants.

DECISION AND ORDER

Index No. 2014-1576
RJI No. 2014-0294-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on Motion the Village of Cazenovia, *et al* ("Defendants") to dismiss the Verified Complaint filed June 9, 2014 pursuant to CPLR §3211(a)(7) and § 3211(a)(8) for failing to state a cause of action and lack of jurisdiction. George Millet ("Plaintiff") cross moves to amend his Verified Complaint filed June 9, 2014 pursuant to CPLR §3025(b) and opposes the Motion to dismiss based upon the proposed Amended Verified Complaint.

In reaching a decision in this matter, the Court reviewed Defendants' Notice of Motion to Dismiss dated June 25, 2014 with Attorney's Affirmation of Kevin G. Martin, Esq. dated June 25, 2014 and supporting Memorandum of Law; Plaintiff's Notice of Cross-motion & Opposition to Defendants' Motion to Dismiss dated August 11, 2014; Affirmation of Michael D. Root, Esq. dated August 11, 2014 in support of the Plaintiff's Cross-motion with Exhibits; Affirmation of Michael D. Root, Esq. dated August 11, 2014 in Opposition to Defendants' Motion, with Exhibits; Defendants' Memorandum of Law in support of their Motion to Dismiss.

Plaintiff was a police officer with the Village of Cazenovia ("Village"). He was hired by the Village in August of 2008 as a non-competitive part-time police officer and served in this capacity until his termination on or about August 5, 2013. Plaintiff's proposed amended complaint alleges a violation of the collective bargaining agreement governing full time police officers in the Village and a violation of Civil Service Law. Plaintiff also alleges wrongful termination due to age discrimination.

Defendants argue that Plaintiff alleges insufficient facts to assert coverage under the collective bargaining agreement or under Civil Service Law. Defendants also assert that there is no basis for an age discrimination claim as the Plaintiff failed to pursue a claim with the Equal Employment Opportunity Commission; a requirement of the Age Discrimination in Employment Act.

Turning first to Plaintiff's Cross Motion for leave to amend the complaint, "[l]eave to amend is to be freely granted 'at any time,' so long as there is no prejudice or surprise to the other party" *Stokes v Komatsu*, 117 AD3d 1152 (3rd Dept. 2014) *citing CPLR 3025 [b]*; *see Webber v Scarano-Osika,* 94 AD3d 1304 (3rd Dept. 2012). In the present case, the Plaintiff's Cross Motion was made approximately 60 days after the initial filing of this action in response to Defendants' Motion to Dismiss. The proposed amended complaint merely restates and refines the causes of action but the basic core of alleged facts remain unchanged. In light of this, it cannot be said that amending the complaint in any way prejudices the Defendants. As such, the Plaintiff's Motion to amend the complaint is **granted**. The Court will address the Defendants' Motion to Dismiss as addressed to the Amended Complaint.

Turning now to the Defendants' Motion to Dismiss, the court must take each cause of action individually. Generally, "[o]n a motion to dismiss pursuant to *CPLR 3211 (a) (7)*, we are to afford the pleading a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" *Sand v Chapin*, 238 AD2d 862, 863, (3rd Dept. 1997); *see Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Whether a plaintiff can

"ultimately establish its allegations is not part of the calculus in determining [such] motion" *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see Lewis v DiMaggio*, 115 AD3d 1042, 1044, (2014). However, dismissal can be granted where evidence submitted "establish[es] conclusively that plaintiff has no cause of action" *Rovello v Orofino Realty Co.,* 40 NY2d 633, 636 (1976).

The Plaintiff's first cause of action in the Amended Verified Complaint is for a violation of his due process rights pursuant to the collective bargaining agreement between the Village and the Cazenovia Police Benevolent Association(CPBA). However, Plaintiff never pleads that he was a member of the CPBA nor that he was covered by the collective bargaining agreement in question. As such, there does not appear to be a cognizable claim under the collective bargaining agreement. Accordingly, this portion of the Plaintiff's first cause of action is dismissed.

Plaintiff also alleges a violation of his due process rights pursuant to Civil Service Law and the New York State Constitution. The complaint fails to identify the particular rights allegedly violated. As a general rule, New York is an "at-will employment" state absent some specific statutory or Constitutional protection. *See Horn v. N.Y.Times,* 100 NY2d 85 (2003); *Sabetay v. Sterling Drug,* 69 NY2d 329 (1987). Section 75 of the Civil Service provides some protections to certain classes of employees. "[A]n employee holding a position in the non-competitive class...who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position" is entitled to a hearing prior to removal from that position. CSL§75 (1)(c). However, the Plaintiff fails to allege that he has continuously held this non-competitive position for a period of five years. In fact, the Plaintiff acknowledges that he

was terminated just prior to completing his fifth year as a part time police officer. There are no alleged facts in the complaint which would allow the Court to conclude that the Plaintiff was anything but an at-will employee. Without some statutory or Constitutional protection, the Plaintiff has failed to allege any cognizable property right that was impaired by his termination. Absent alleged facts to support the claim for entitlement to process, the cause of action must be dismissed. As such, the Plaintiffs first cause of action is **dismissed.**

In the Second Cause of Action, the Plaintiff alleges age discrimination[1]. The standards for recovery under Executive Law §296 are in accord with Federal standards under title VII of the Civil Rights Act of 1964 *Ferrante v American Lung Association*, 90 NY2d 623 (1997), *42 USC § 2000e et seq. see, e.g., Matter of Laverack & Haines v New York State Div. of Human Rights,* 88 NY2d 734 (1996), 738; *Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938 (1985). "To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination" *Ferrante* at 629; *see, e.g., McDonnell Douglas Corp. v Green*, 411 US 792 (1973); *Woroski v Nashua Corp.*, 31 F3d 105, 108 (2d Cir. 1994).

Being 41 at the time of his termination, there appears to be no dispute that Plaintiff was a member of the class protected by the statute and that he was discharged from his employment

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[1]Plaintiff alleges that his inability to work on several occasions gives rise to the possibility of discrimination for health reasons but provides no other factual allegations that would bring him within the ambit of Executive Law 296 or any federal provision.

with the village. Whether he was qualified to hold the position is in dispute but the Plaintiff alleges in his complaint that he never received any indication that he did not perform his duties competently and received numerous compliments on his abilities and performance of his duties. Within the limited scope of review provided under CPLR 3211, this allegation is sufficient to satisfy the Plaintiff's burden to avoid a motion to dismiss. However, the Plaintiff's pleading as to whether the discharge occurred under circumstances giving rise to an inference of age discrimination is lacking.

"Under New York rules of procedure, conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" *Muka v Greene County*, 101 A.D.2d 965 (3rd Dept. 1984); *see Melito v Interboro-Mutual Ind. Ins. Co.*, 73 AD2d 819 (3rd Dept. 1979), 820; *Taylor v State of New York*, 36 AD2d 878 3rd (Dept. 1971); *King v Commerical Ins. Co.*, 27 Ad2d 620 (3rd Dept. 1966). Where allegations are wholly unsupported and conclusory, dismissal is warranted. *Vanscoy v Namic USA Corporation*, 234 AD2d 680 (3rd Dept. 1996).

In the present matter, Plaintiff merely alleges that age is relevant to police work and he was singled out for punishment from other officers. However, he does not even allege that the other officers were younger or allege facts that would even allow an inference that age was a factor in his "punishments" or discharge.[2] Rather, the Plaintiff merely alleges that his age was a factor without any factual allegation in support thereof. The Court is mindful of the insidiousness of

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[2]For example, Plaintiff could have alleged that he was replaced by a younger individual or that there has been a pattern terminating older employees and replacing them with younger individuals.

discrimination and the difficulties in offering facts to support such a claim. However, more than conclusory allegations are required when pleading a claim for discrimination. *See e.g. Vanscoy, supra.* As such, the Court finds the Plaintiff's pleadings insufficient to survive a motion to dismiss. For the reasons set forth herein, the Plaintiff's second cause of action is **dismissed**.

The Plaintiff's complaint contains two causes of action which are found to be deficient for the reasons set forth above. As such, the Plaintiff's complaint is **dismissed** pursuant to CPLR 3211.

CONCLUSION

Accordingly, it hereby is ORDERED that the action/petition is **DISMISSED**.

This constitutes the Decision and Order of the Court.

Dated: December 18, 2014
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice