At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York heard on submission.

PRESENT: HON. GERALD A. KEENE
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT COUNTY OF TOMPKINS

CHRISTOPHER MILLER,
Plaintiff,

vs

CITY OF ITHACA, NEW YORK; EDWARD VALLELY, in his individual and official capacity as Chief of Police; JOHN BARBER, in his individual and official capacity as Deputy Chief of Police, PETE TYLER, in his individual and official capacity as Deputy Chief of Police; and JOHN DOE (S) and/or JANE DOE(s), in his individual and official capacity,
Defendants.

DECISION & ORDER
Index No. 2018-0176
RJI No. 2018-0224-C

GERALD A. KEENE, Acting J.S.C.

Christopher Miller (hereinafter "Plaintiff" or "Miller"), a former police officer for the City of Ithaca, New York for approximately 10 years, filed this action in the New York State Supreme Court claiming violations of the New York State Human Rights Law and the City of Ithaca Municipal Code. Defendant Edward Vallely (hereinafter "Vallely" or "defendant") was the Chief of Police for the City of Ithaca Police Department. Defendant John Barber (hereinafter "Barber" or "defendant") was the Deputy Chief of Police for the City of Ithaca Police Department and later became the Acting Chief of Police and eventually the Chief of Police. Defendant Pete Tyler (hereinafter "Tyler" or "defendant") was the Deputy Chief of Police for the

City of Ithaca Police Department. Defendant John Doe (s) and Jane Doe (s) are individuals, officers, representatives, agents and/or employees of the defendants whose identities are unmentioned at this time.

On October 19, 2015, the plaintiff filed the instant complaint in Tioga County Supreme Court. The preliminary statement in the plaintiff's complaint states that the nature of this action is to recover for retaliation for opposing and participating in proceedings challenging racial discrimination and/or discrimination on the basis of disability, in violation of the New York State Human Rights Law and Chapter 215 of the Ithaca City Municipal Code.

Background and Procedural History

On October 5, 1999, the plaintiff applied to be a police officer with the City of Ithaca Police Department (hereinafter "IPD"). In his employment application the plaintiff claimed that he was never "dismissed or discharged from any employment for reasons other than lack of work or funds" and that he never "resign[ed] from any employment rather than face dismissal." Unbeknown to the defendants, the plaintiff's application failed to identify two prior employers. One of the employers, the Town of Vinton, Virginia Police Department, recommended the plaintiff be discharged from his employment due to various incidents involving his job performance and not following directions from supervisors. The plaintiff told the defendants that he was unable to get a job as a police officer in Virginia. The plaintiff was also employed at Cargill Incoroprated. He was suspended from his employment there due to a few work place incidents and was eventually terminated.

On September 7, 2000, the plaintiff became a sworn Police Officer for the City of Ithaca. Throughout his time at the IPD the plaintiff was written up and reprimanded for a variety of

infractions and issues. During this time, the plaintiff filed an allegation of discrimination with the New York State Division of Human Rights (hereinafter "NYSDHR"). The plaintiff continued to work for IPD. On May 13, 2009, the plaintiff was assigned to a STOP-DWI shift desk duty. Following the shift the plaintiff wrote down the license plates of four vehicles that he claimed to have stopped during the shift. IPD conducted an investigation and it was suggested that the plaintiff did not stop any of the cars that he claimed to have stopped during that shift. The plaintiff was issued a notice of discipline and received sanctions. In July 2009, the plaintiff filed another discrimination charge with the NYSDHR but continued to work for IPD. The plaintiff went on administrative leave from August 2009 until December 2009.

On September 22, 2009, the Tompkins County District Attorney Gwen Wilkenson, was made aware of the STOP-DWI allegations. She wrote a letter to defendant Vallely stating in sum and substance that due to the plaintiff's conduct, she made a determination that the plaintiff had credibility issues that would have to be disclosed to criminal defendants and that the District Attorney's Office would not use the plaintiff as a prosecution witness. Upon his return from administrative leave, the defendants placed the plaintiff on permanent desk duty allegedly because his value as a witness had been undermined by his prior conduct and apparent pattern of dishonesty.

In the springtime of 2010, the defendants learned that the plaintiff had previously been employed as a police officer at the Vinton Police Department in Vinton, Virginia. The defendants learned the plaintiff had been terminated during his probationary period with the police department for a variety of reasons.

On May 20, 2010, the plaintiff filed a federal lawsuit against the defendants asserting that

he was discriminated against in connection with his employment on account of his race and gender and that he was retaliated against for engaging in protective activity pursuant to Title VII of the Civil Rights Act of 1964, as amended; 42 U.S.C. §§ 1981 and 1983; New York State Human Rights Law ("hereinafter "HRL"); and the New York Constitution(*see* Miller v. City of Ithaca, et al., No. 3:10-CV-00597 (N.D.N.Y.)).

On June 1, 2010, the plaintiff was issued a notice of discipline by the defendants seeking his termination/dismissal for incompetence or misconduct. Specifically, the defendants claimed that the plaintiff failed to disclose to the City of Ithaca Police his previous employment, and/or termination (or voluntary resignation) from the Vinton Police Department. Defendants claimed that the plaintiff failed to inform the defendants or falsified his employment history from 1997-2000. The plaintiff was suspended with pay and benefits. Under the collective bargaining agreement with the Police Benevolent Association (hereinafter the "Union"), the plaintiff elected to grieve the notice of discipline and demanded arbitration.

In September and October 2012, a federal jury trial was conducted. The jury found in the plaintiff's favor on the retaliation claims and found against the plaintiff in his race discrimination claims. Specifically, the jury found that the defendants retaliated against the plaintiff by issuing the June 1, 2009 notice of discipline and by assigning the plaintiff certain patrol beats. The jury imposed liability upon the City of Ithaca. The jury awarded damages in the amount of $2,000,004.00. The verdict was vacated by the U.S. District Judge Thomas J. McAvoy on December 21, 2012. An appeal is currently pending before the U.S. Court of Appeals for the Second Circuit.

On October 27, 2012, the Arbitrator issued a ruling and found that the jury's verdict had

no effect on his authority to issue an award in Arbitration. In February 2013, the Arbitrator issued his award, finding that the City had proved by clear and convincing evidence that there was just cause to terminate Miller's employment based on misconduct. Specifically, the arbitrator found that Miller had committed Perjury in the Second Degree, a Class E Felony, in violation of the New York Penal Law. The Arbitrator found that plaintiff intentionally lied on his job application to the City of Ithaca by concealing a prior job in law enforcement where he was terminated for cause. The Arbitrator decided that the plaintiff should be immediately discharged due to his misconduct.

On October 19, 2015, the plaintiff filed the instant complaint in Tioga County Supreme Court. On February 16, 2016, the defendants were served the complaint for the instant matter. The defendants moved to remove the complaint to the U.S. District Court for the Northern District of New York (case No. 3:16-cv-00271 (GLS/DEP) and moved to Dismiss the Complaint. The plaintiff filed a Motion to Remand. On November 27, 2017, U.S. District Judge Gary L. Sharpe, ordered that the case be remanded to Supreme Court in Tioga County for all further proceedings. The defendants made an application to change venue to Tompkins County. The plaintiff opposed. Venue has been transferred to Tompkins County by this Court.

In the instant case, the plaintiff's complaint alleges that this case is an action to recover for retaliation for opposing and participating in proceedings challenging racial discrimination and/or discrimination on the basis of disability, in violation of New York State Human Rights Law and Chapter 215 of the Ithaca City Municipal Code. The plaintiff alleges that at the Workers' Compensation Board hearings, the defendants required an armed guard to be present to unlawfully suggest that the plaintiff posed a threat to the physical safety and well-being of others.

The plaintiff argues that other claimants at the Workers' Compensation Board hearing are not subject to such embarrassment and public humiliation. The plaintiff alleges that this treatment was unlawful and based on a perception of the plaintiff's mental disability, was done to attempt to intimidate and ridicule the plaintiff and was retaliatory. The plaintiff alleges that the defendants' conduct was a violation under the New York State Human Rights Law and Chapter 215 of the Ithaca City Municipal Code.

MOTION TO DISMISS

On May 24, 2018, the defendant moved this Court to dismiss the Complaint pursuant to CPLR § 3211. The defendants submitted an affirmation of Paul E. Wagner (with exhibits 1-4) and memorandum of law in support of defendants Motion to dismiss. The defendants argue that the plaintiff's complaint, originally filed in the Tioga County Supreme Court and ultimately transferred to this Court on the defendants' Motion to Change Venue, is deficient on its face and should be dismissed pursuant to CPLR § 3211.

The defendants argue that the plaintiff is seeking to avoid the arbitration decision by inventing a new claim for "retaliatory refusal" to dismiss the arbitration award. The defendant argues that the plaintiff is attempting to circumvent the Federal Arbitration Act and the procedures for determining whether an arbitration award may be vacated. The defendant contends that the plaintiff's cause of action concerning the security guards at the plaintiff's Workers' Compensation hearing has been heard by the jury in previous litigation. Therefore, these claims are barred by res judicata and would also be barred by the statute of limitations.

The defendants also argue that the plaintiffs complaint is an "end-around" the Arbitration Award which is prohibited by the Federal Arbitration Act and therefore the complaint is not

viable in State Supreme Court. The defendants argue that the plaintiff cannot manufacture a state or municipal law cause of action that would allow him to evade the effects of a valid arbitration provision. Therefore, the defendant argues that the plaintiff's first two causes of action must be dismissed.

The defendant further argues that the third and fourth causes of action are barred by the statute of limitations, which is three years under the New York Human Rights Law and the Ithaca Municipal Code. Further, the defendants argue that the third and fourth causes of action assert the same factual allegations made by the plaintiff in his original complaint and is therefore estopped from raising the same allegations again in a separate complaint pursuant to CPLR § 3211 (1)(a) and the principles of res judicata. The defendant contends that the allegations in the present case duplicate the allegation made in previous litigation with the same parties and should be dismissed.

The plaintiff opposes the defendants' motion to dismiss the complaint. On July 13, 2018, the plaintiff submitted an affirmation of A.J. Bosman (with exhibits A-D) and memorandum of law in opposition to the defendants motion to dismiss. Further, the plaintiff submitted an amended complaint against the defendants. The plaintiff alleges that the nature of the action is to recover for retaliation for opposing and participating in proceedings challenging racial discrimination on the basis of disability in violation of NYSHRL and Chapter 215 of the Ithaca City Municipal Code. The plaintiff alleges facts regarding, that he was seeking compensation arising from work- related physical and mental injuries, that he was diagnosed with Post Traumatic Stress Disorder and attended New York State Workers' Compensation Board hearings

at that time. The plaintiff alleges that on or abut May 14, 2013, the defendants required an armed guard to be present to unlawfully suggest that the plaintiff posed a threat to the physical safety and well being of others. The plaintiff contends that other participants are not subject to such retaliatory embarrassment and public humiliation. The Plaintiff alleges that this treatment was unlawful and based on the plaintiff's mental disability was undertaken to attempt to intimidate and ridicule the plaintiff and was retaliatory in violation of Human Rights Law and Chapter 215 of the Ithaca City Municipal Code. The plaintiff alleges that as a direct and proximate result of the defendant's unlawful acts, he sustained injury and harm in his loss of salary and benefits in the termination of his employment and is therefore entitled to compensation. Further, the defendant argues that he is not seeking to vacate the arbitration award but is seeking to enforce his New York statutory rights. The plaintiff further argues that the third cause of action and the fourth cause of action are not time barred by the statute of limitations or precluded by the doctrine of res judicata. The plaintiff asserts that the summons and complaint were filed on October 19, 2015, in the Tioga County Clerk's Office and that the Workers' Compensation Board hearing at issue was on May 14, 2013, which was less than three years prior to filing the complaint.

The defendants oppose the plaintiff's motion to amend the complaint without leave of court since it was untimely and lacks merit.

CONCLUSIONS OF LAW

The defendants move to dismiss the plaintiff's complaint pursuant to CPLR § 3211. On a motion to dismiss for failure to state a cause of action, the court is concerned with whether the

pleading states a cause of action, rather than to determine the facts (*see* Stukuls v. State, 42 N.Y.2d 272 (1977)). Further, a court should not determine whether a claim is supported by the evidence (Niagara Mohawk Power Corp. v. State, 300 A.D.2d 949 (3rd Dept., 2002); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (1st Dept., 2002). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (Roni LLC v. Arfa, 18 N.Y.3d 846 (2011); *citing* EBCI I, Inc. V. Goldman, Sachs & Co., 5 N.Y.3d 11 (2005); Khoury v. Khoury, 78 A.D.3d 903 (2nd Dept., 2010); DePetris & Bachrach, LLP v. Srour, 71 A.D.23d 460 (4th Dept., 2010)).

Generally, for the purposes of a motion to dismiss for legal insufficiency, the factual allegations of the complaint must be accepted as true (Pallidino v. CNY Centro, Inc., 70 A.D. 3d 1450 (4th Dept., 2010). The court must give the complaint liberal construction, and provide plaintiffs with the benefit of every favorable inference which may be drawn from the complaint (Gjonlekaj v. Sot, 308 A.D.2d 471 (2nd Dept., 2003); Sud v. Sud, 211 A.D.2d 423 (1st Dept., 1995). Therefore, the court accepts every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability to ultimately establish the allegations before the trier of fact (219 Broadway Corp. v. Alexander's , Inc, 46 N.Y.2d 889 (1979). The court only determines whether the facts as alleged fit within any cognizable legal theory (RBE Northern Funding Inc., v. Stone Mountain Holdings, LLC, 78 A.D.3dc 807 (2nd Dept. 2010)).

A motion to dismiss pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law (Mpg Assoc., Inc. v Randone, 2012 N.Y.

Slip Op. 33684[U], 9 Sup Ct, Nassau County (2012); *citing* Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002)). When determining such an application, the Court must liberally construe the pleading in the complaint. Further, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. (Id.; *citing* Leon v. Martinez, 84 N.Y.2d 83 (1994)). The Court must view the pleadings in the light most favorable to the non-moving party (I. Shulman and Son Inc., v. Jorling Realty Co., 98 N.Y.2d 144 (3rd Sept., 1993). Therefore, a motion to dismiss must be denied, if from the pleadings' four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law or unless the complaint fails to state a cause of action (Fort Ann Cent. School Dist. v. Hogan, 206 A.D.2d 723 (3rd Dept., 1994); Smith v. Clark, 730 N.Y.S. 2d 896 (4th Dept 2001)).

It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR § 3025(b); Marquina v Pellegrini, 2008 N.Y. Slip Op. 32514[U] (Sup Ct, Queens County 2008); *citing* Wirhouski v. Armoured Car & Courier Serv., 221 A.D.2d 523 (2nd Dept., 1995)). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." (Branch v. Abraham & Strauss Dept. Store, 220 A.D.2d 474 (2nd Dept.. 1995)). The Court has discretion to allow the plaintiff to amend the complaint.

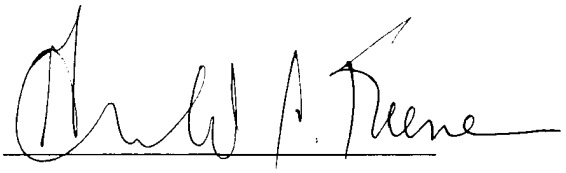
Based upon a review of the submissions and the arguments of the parties, for all of the above reasons, it is

ORDERED, that defendants' motion to dismiss the complaint is hereby denied; and it further

ORDERED, that plaintiff's request for leave to amend the complaint is granted.

This shall constitute the Decision and Order of the Court.

Dated: September 28, 2018



Hon. Gerald A. Keene
Acting Supreme Court Justice

cc: Mary C. Hodges, Chief Clerk, Tompkins County Supreme Court

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