Matter of Calvelos v Brann
2019 NY Slip Op 31129(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 154110/2018
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

----------X

INDEX NO. 154110/2018

In the Matter of the Application of
MANUEL CARVALHO CALVELOS,

MOTION DATE

Petitioner,

MOTION SEQ. NO. 001, 002

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- v -

CYNTHIA BRANN, Correction Commissioner of the New York City Department of Correction; THE NEW YORK CITY DEPARTMENT OF CORRECTION; and THE CITY OF NEW YORK,

DECISION AND ORDER

Respondents.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 30, 50, 51, 52 were read on this CPLR article 78 proceeding.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22- 29, 31- 49 were read on this motion to dismiss.

In this CPLR article 78 proceeding, petitioner challenges his termination by respondents (mot. seq. 001). Respondents oppose and by notice of motion, move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the petition in its entirety (mot. seq. 002). Petitioner opposes.

I. VERIFIED PETITION (NYSCEF 1)

Petitioner alleges the following pertinent facts:

On January 14, 2016, petitioner was hired as a probationary officer by respondent New York City Department of Correction (DOC) for a two-year probationary term. Petitioner was initially assigned to the George Motchan Detention Center (GMDC) on Riker's Island, where he

worked in an intake area designed to separate gang-affiliated inmates. The nature of this work led petitioner to being involved in several Use of Force (UOF) incidents.

In August 2016, DOC reassigned petitioner to the less violent inmate housing areas within GMDC. Seven months later, petitioner was moved from GMDC to the "West Facility," also on Riker's Island, where he was assigned to the communicable disease unit, which was being used for "enhanced restraints" inmates and "central monitored case" inmates. The West Facility housed the most highly assaultive inmates, and thus, petitioner was taught how to forcibly remove inmates from their cells, a practice known as "extraction."

In March or April 2017, petitioner was assigned to "Sprung 10," which housed mental observation inmates and adolescents, who were mostly gang-affiliated and highly assaultive. Thereafter, petitioner was involved in several UOF incidents with inmates.

On May 18, 2017, petitioner received a prescription reflecting that he was required to wear "Red Wing boots" for his flat feet and to prevent pain and injury. (NYSCEF 4).

On May 24, 2017, a DOC captain ordered petitioner to write a report reflecting that he must wear the Red Wing boots instead of DOC-approved boots. Petitioner wrote a memorandum to the prison's Warden, and noted that his boots were approved by the Academy upon his graduation. (NYSCEF 5). None of his supervisors had ever stated that the Red Wing boots were in violation of the uniform policy.

On June 20, 2017, petitioner received a notice to appear for an interview by the Office of Investigation Division concerning his uniform. (NYSCEF 15).

While at West Facility, petitioner discovered that correction officers and visitors were bringing contraband. Petitioner reported this in log books and directly to a number of officers and the Warden. One of the captains reprimanded petitioner, demanding to know why he was

"reporting us" and why he "keeps opening his mouth to people outside the building . . . "

On October 4, 2017, petitioner was summoned to a command discipline hearing with the Warden. At the hearing, petitioner reiterated his allegations concerning contraband. The Warden accused petitioner of being "racist" and "corrupt" and said, referencing the inmates, "what are you doing to my children?" The Warden told petitioner "I don't give a sh*t what you have to say" and took four vacation days away from him. In addition, the Warden indicated that petitioner would be fired before the end of his probationary term.

By Personnel Determination Review dated October 31, 2017, the DOC's Investigative Division recommended the termination of petitioner's employment for his conduct during two UOF incidents in 2016. (NYSCEF 24).

On November 8, 2017, petitioner filed an EEO Complaint of Discrimination with the DOC against the Warden, alleging that he was discriminated against because of his race. (NYSCEF 16).

Petitioner's employment was terminated on January 5, 2018, nine days before his probationary term ended. (NYSCEF 2).

On May 2, 2018, petitioner filed his verified petition, in which he asserts two claims: (1) that respondents violated Civil Service Law § 75-b(2)(a) as they retaliated against him based on his filing of an EEO complaint and disclosing to the DOC that the Warden was permitting contraband to enter the facility by terminating his employment; and (2) that based on the same facts, respondents discharged him in bad faith and for a constitutionally impermissible purpose and in violation of statutory or decisional law. (NYSCEF 1).

II. MOTION TO DISMISS (MOTION SEQUENCE NO. 002)

A. Contentions

1. Respondents (NYSCEF 22-28)

Respondents contend that as a probationary officer, petitioner could be fired at any time, without hearing or notice, so long as the dismissal was not in bad faith, unconstitutional, or in violation of the law. They also assert that the arbitrary and capricious standard does not apply to probationary employees. Civil Service Law § 75-b(2)(a), respondents claim, does not apply because petitioner is protected by a collective bargaining agreement.

Respondents observe that petitioner does not allege to have been terminated because he filed an internal EEO complaint, but if he did, such a claim would fail because the DOC was investigating petitioner's UOF incidents as early as 2016, one year before the filing of his EEO complaint. The DOC had a good faith basis to terminate petitioner's employment based on his conduct during UOF incidents, as reflected in the Personnel Determination Review.

2. Petitioner (NYSCEF 31-48)

Petitioner notes that his allegations are deemed to be true for the purposes of respondents' motion to dismiss, and there are numerous issues of fact yet to be determined including whether the Warden permitted the distribution of contraband to inmates, whether respondents' actions led to a substantial and specific danger to public health and safety, whether petitioner reasonably believed respondents' actions constituted improper governmental action, whether respondents retaliated against petitioner for his EEO complaint, whether the petition and attached exhibits are ample proof that petitioner was unlawfully discharged, and whether petitioner has been damaged.

Petitioner argues that respondents arbitrarily, capriciously, and illegally terminated his employment in violation of Civil Service Law § 75-b(2)(a) because he disclosed the Warden's

policy of permitting contraband into the West Facility, which petitioner reasonably believed to constitute an improper governmental action. Petitioner filed his EEO complaint on November 8, 2017, and was terminated thereafter.

Petitioner asserts that he should be afforded the opportunity to demonstrate that respondents lacked a good faith basis for his termination and to present evidentiary facts sufficient to raise an issue of bad faith, illegality, or arbitrary and capricious conduct. In addition, petitioner met his burden in providing evidence that he was discharged in bad faith and in violation of the law.

Petitioner notes that no discovery has taken place, and pursuant to CPLR 3211(d), he is entitled to discovery, including UOF reports and other incident reports, depositions, and written reports from wardens, captains, and other correctional officers.

3. Reply (NYSCEF 49)

In reply, respondents observe that petitioner ignores their arguments concerning the collective bargaining agreement's preclusive effect on claims under Civil Service Law § 75-b(2)(a), and argue that he has thus waived that cause of action. Respondents also attach a link to the applicable collective bargaining agreement, which they argue the court may take judicial notice of as it is derived from an official government website.

Respondents reiterate their argument concerning petitioner's EEO complaint.

They also assert that petitioner is not entitled to the discovery he requests, as it was improperly raised in a motion to dismiss, and in any event, discovery is not proper without leave from the court in an Article 78 proceeding.

B. Analysis

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on

the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

1. Preclusive effect of CBA

Where an employee is "subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision," he is required to assert his claim in arbitration. (*DiGregorio v MTA Metro-N. R.R.*, 140 AD3d 530, 530–531 [1st Dept 2016], quoting CSL § 75-b[3]).

While petitioner is subject to the parties' CBA, its binding arbitration provisions explicitly exclude "disciplinary matters" from its purview. (Article XXI § 1[b]; *see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009] [material derived from official government websites may be subject of judicial notice]). Respondents also fail to identify

any provision of the CBA which prevents an employer from taking adverse personnel actions. Respondents thus do not demonstrate that the CBA precludes petitioner from asserting a claim under the Civil Service Law.

As petitioner in opposition to respondents' motion asserted that he has stated a claim under Civil Service Law § 75, he did not waive the claim.

2. Civil Service Law

Pursuant to Civil Service Law § 75-b(2):

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

Civil Service Law § 75-b(2) prohibits a public employer from taking disciplinary action to retaliate against an employee for reporting improper governmental action. (*Matter of Kowaleski v New York State Dept. of Corr. Svces.*, 16 NY3d 85 [2010]). A "disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction," and thus regardless of the employee's guilt or innocence of an infraction, a determination must be made as to whether the employer's actions were motivated by retaliation. (*Id.* at 85-86).

Respondents' assertion that they terminated petitioner because of his alleged improper use of force and not retaliation is based on their personnel review, which does not constitute documentary evidence within the meaning of CPLR 3211(a)(1), as it is not "unambiguous, authentic, and undeniable." (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 677–678 [2d Dept 2017]; *see Fontanetta v Doe*, 73 AD3d 78, 87 [2d Dept 2010] [defendants' reports and memoranda constituted "letters, summaries, opinions, and/or conclusions of the defendants" rather than documentary evidence]; *see also Gleyzerman v Law Off. of Arthur Gershfeld &*

Assocs., PLLC, 154 AD3d 512 [1st Dept 2017] [CPLR 3211 motion to dismiss should have been denied as defendants' self-serving accounting not irrefutable documentary evidence]).

Moreover, as the personnel review is neither certified nor authenticated as a business record, it is not admissible and therefore also not documentary evidence. (*See Dixon v 105 W. 7t St. LLC*, 148 AD3d 623 [1st Dept 2017] [in dissent] [as copies of certificates of occupancy and work permits were not certified, they were improper basis for dismissal based on documentary evidence]; *Advanced Glob. Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007] [email was inadmissible and thus not documentary evidence]).

In any event, even if petitioner was guilty of using unlawful force, respondents submit no evidence establishing that they did not have a retaliatory motive in terminating his employment, and thus fail to demonstrate that he does not state a claim pursuant to Civil Service Law § 75-2(b). (*See Lilley v Greene Cent. School Dist.*, 168 AD3d 1180 [3d Dept 2019] [motion to dismiss should not have been granted; even if defendants' documentary evidence established a non-retaliatory basis for disciplinary action, court erred in dismissing Civil Service Law § 75-b(2) claim absent determination on whether defendants were motivated by retaliation]).

3. Probationary employment

It is well-settled that a probationary employee may be discharged for any or no reason absent proof that the discharge was in bad faith, for a constitutionally impermissible purpose, or in violation of law. (*Frasier v Bd. of Educ.*, 71 NY2d 763, 765 [1988]; *Matter of Brown v City of New York*, 280 AD2d 368 [1st Dept 2001]).

Here, petitioner claims that his termination was made in bad faith as it was in retaliation for his complaints about the contraband and his EEO complaint. To maintain a claim for retaliatory discharge, the petitioner must show that he engaged in protected activity, that his

employer was aware of that petitioner engaged in such activity, that he suffered an adverse employment action as a result, and there is a causal connection between the activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]).

Petitioner's allegations sufficiently state a claim that his termination was made in bad faith as it was in retaliation for his complaints, and respondents do not submit any undeniable documentary evidence that flatly contradicts the claim. (*See Matter of Castro v Schriro*, 140 AD3d 644 [1st Dept 2016], *affd* 29 NY3d 1005 [2017] [petitioner stated claim of bad faith termination as he alleged termination made in bad faith and provided facts showing that discharge unrelated to work performance; motion to dismiss for failure to state claim denied]).

Even if the review is deemed documentary evidence, plaintiff alleges that the review and decision to terminate him was made after he complained and was motivated by retaliation, and the review itself is dated in October 2017 but references two incidents from July 2016 as the grounds for recommending his termination. (*See e.g., Capece v Schultz*, 117 AD3d 1045 [2d Dept 2014] [petitioner established that probationary employment was terminated in bad faith as she received poor performance reviews only after making complaint to supervisor]; *Matter of Garrity v Univ. of Albany*, 301 AD2d 1015 [3d Dept 2003] [petitioner's claim that termination was in retaliation for whistleblowing stated a claim that termination of his probationary employment was in bad faith; court found it significant that he received no performance review until his termination, termination coincided with whistleblowing, and no documentary evidence confirmed respondents' claim that poor work performance was at issue before whistleblowing]; *compare Matter of Johnson v City of New York*, 281 AD2d 322 [1st Dept 2001] [allegation that probationary employment was terminated in retaliation for complaint was speculative in light of evidence of petitioner's unacceptable work performance which was documented before

complaint was made]).

Respondents therefore fail to show that petitioner does not state a claim for unlawful termination of his probationary employment.

III. VERIFIED PETITION (MOTION SEQUENCE NO. 001)

Where a motion to dismiss an article 78 petition is denied, the court is proscribed from dismissing the petition on its merits, "unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer." (*Nassau BOCES Cent. Council of Teachers by Dreaper on Behalf of Adult Educ. Instructors v. Bd. of Co-op. Educ. Servs. of Nassau Cty.*, 63 NY2d 100, 102 [1984]; CPLR 7804[f] [if motion to dismiss petition is denied, court shall permit respondent to answer]). Here, there remain issues of fact as to whether Petitioner was fired in bad faith.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondents' motion to dismiss (motion sequence 002) is denied in its entirety; it is further

ORDERED, that respondents are directed to serve an answer to the petition within five days after service of a copy of this order with notice of entry (CPLR 7804[f]); and it is further

ORDERED, that upon receipt of the answer, and any reply to petitioner, the petition will be decided on the papers.

20190425114657BJAFFE747951ED8A9F4453BA112ED597826B36

4/25/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	DENIED		GRANTED IN PART	X	OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE