DaCosta v New York City Dept. of Bldgs.
2021 NY Slip Op 30169(U)
January 14, 2021
Supreme Court, New York County
Docket Number: 153892/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

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DENNIS DACOSTA,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF BUILDINGS, CITY OF NEW YORK

Defendants.

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INDEX NO. 153892/2020

MOTION DATE 06/15/2020, 08/25/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

Plaintiff, Dennis DaCosta, commenced this action against his former employer, defendants City of New York and New York City Department of Buildings (DOB) (collectively, defendants or the City) to recover damages stemming from an alleged retaliatory separation of employment related to plaintiff's forced retirement on February 28, 2019 and the DOB's interference with plaintiff's prospective employment with the New York City Health and Hospitals Corporation (HHC).[1] In motion sequence 001, plaintiff now moves to amend the notice of claim to add claims for defamation and tortious interference stemming from the DOB's alleged May 2019 retaliatory conduct, namely, that the DOB unjustly interfered with plaintiff's prospective employment with HHC, causing the HHC to withdraw their offer of employment to plaintiff. In motion sequence 002, defendants move pursuant to CPLR 3211(a)(5) and (7) to dismiss plaintiff's complaint. Both motions are opposed and consolidated for joint disposition. For the forgoing reasons below, and after oral argument, wherein counsel for plaintiff conceded that the proposed tortious interference claim is not viable, plaintiff's motion is denied, and defendants' motion is granted.

BACKGROUND

Plaintiff was employed as the Executive Director of the Office of Internal Affairs and Discipline at the DOB from September 4, 2018 until February 28, 2019 (NYSCEF # 17,

[1] The court notes that plaintiff's complaint alleges that he was terminated from his employment with the DOB, when in fact, as all the parties agree, he resigned.

complaint at ¶ 11). Plaintiff alleges he was forced to resign from his position in retaliation for reporting a complaint concerning his supervisors to the City's Department of Investigations (DOI) (*id.* at ¶ 7). Specifically, the complaint alleges that after plaintiff notified the DOI of a potential conflict of interest involving his supervisors, plaintiff's supervisor, Alexandra Fisher (Fisher) "[r]efused to interact with him, generally sidelined him, progressively stripped him of responsibilities, and was ultimately responsible for his termination from employment, on or about February 28, 2019" (*id.* at ¶¶ 11, 77-86).

Plaintiff further alleges that Fisher and the DOC continued to retaliate against plaintiff after he left the DOB, including "[m]andat[ing] that [plaintiff's] former IAD coworkers not to have any contact with him," withholding "promised networking assistance and favorable references at the time of the termination of his employment," and "blacklisting" plaintiff, in order to "negatively impact his ability to secure employment with a City employer" (*id.* at ¶¶ 87-90). One such instance of blacklisting, plaintiff alleges, occurred on May 6, 2019, after the HHC made a preliminary offer of employment to plaintiff (*id.* at ¶ 92). Plaintiff claims, on information and belief, that the HHC contacted the DOB as part of a background review, at which point the DOB "defamed and/or slandered [plaintiff], and injured [plaintiff]'s professional character," resulting in the HHC revoking its preliminary offer of employment (*id.* at ¶¶ 93-95).

Plaintiff filed the notice of claim May 22, 2019, and a General Municipal Law § 50-h hearing took place on August 23, 2019. Plaintiff filed the summons and complaint on June 4, 2020, alleging claims for a violation of Civil Service Law (CSL) § 75-b, tortious interference with a prospective contract, and defamation.

DISCUSSION

I. Plaintiff's motion for leave to file a late notice of claim

General Municipal Law (GML) § 50-e(5) provides that a court may extend the 90-day notice of claim filling deadline up to the expiration of the 1-year and 90-day statute of limitations for claims against the City (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012] [the failure to seek a court order excusing an untimely notice of claim within one year and 90 days after accrual of the claim requires dismissal of the action]). "In deciding whether a notice of claim should be deemed timely served under [GML] § 50-e (5), the key factors considered are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense" (*id.*). Moreover, the presence or absence of any one factor is not determinative" (*id.*).

Further, "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Matter of Among v City of New York*, 308 AD2d 333 [1st Dept 2003]). "The statute is remedial in nature, and therefore should be liberally construed" (*Matter of Grajko v City of NY*, 150 AD3d 595, 597 [1st Dept 2017]).

Here, plaintiff fails to demonstrate that defendants will not be substantially prejudiced by the late notice of claim. Plaintiff's principal argument—that defendants had notice of the proposed claims by way of the initial notice of claim and the subsequent 50-h hearing—is unsupported by the record. Indeed, plaintiff's notice of claim focuses squarely on his separation of employment with the DOB and makes no mention of any defamatory statements by defendants (NYSCEF # 5). Further, while plaintiff claims that he detailed the "DOB's May 2019 tanking of [plaintiff's] job offer" from the HHC at the 50-h hearing, he does not attach the transcript from the hearing, or any objective proof supporting his argument (NYSCEF # 3, pla affirm at 4). Plaintiff also fails to offer a reasonable excuse as to plaintiff's failure to timely file a notice of claim concerning plaintiff's novel claims. Plaintiff moved for leave to file a late notice of claim on June 14, 2020, almost thirteen months after the notice of claim was filed and events that serve as the basis for plaintiff's claim for defamation.

Plaintiff's further contention that his claim pursuant CSL § 75-b obviates the necessity of a notice of claim for his proposed claim for defamation is unsupported by citation to legal authority. Whether this action proceeds on the CSL § 75-b claims is not determinative of whether plaintiff is required to file a notice of claim for his novel claim.

Accordingly, plaintiff's motion for leave to file a late notice of claim alleging defamation is denied. As discussed below, even if the court granted plaintiff's motion to file a late notice of claim, the claim for defamation would still fail.

II. Standard for motions to dismiss

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal citations omitted]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). "While factual allegations set forth in a complaint should be accorded every favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration" (*M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]).

III. Plaintiff's Civil Service Law § 75-b claim

In support of the branch of their motion to dismiss plaintiff's CSL § 75-b claims, defendants argue: 1) that plaintiff fails to allege that his working conditions were so intolerable that he was forced to resign; 2) that plaintiff did not allege facts related to a violation of the law or regulation; and 3) that plaintiff failed to establish that "but for" his disclosure of the conflict of interest concerning his supervisors, he would have received employment from the HHC. According to CSL § 75-b(2)(a):

> "A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee . . . 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. "Improper governmental action" shall mean any action by a public employer or employee . . . which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation."

In order to state a claim under CSL § 75-b, a plaintiff must allege:

> "(1) an adverse personnel action; (2) disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which she reasonably believes constitutes an improper governmental action; and (3) a causal connection between the disclosure and the adverse personnel action."

(*Burns v Cook*, 458 F Supp 2d 29, 44 [ND NY 2006]).

Here, plaintiff fails to allege that he suffered an adverse personnel action. In order to establish a claim of constructive discharge, as plaintiff argues here, "a plaintiff must show that the employer deliberately ma[de his] working conditions so intolerable that [he was] forced into an involuntary resignation" (*Stetson v NYNEX Serv. Co.*, 995 F 2d 355, 360 [2d Cir 1993]) [internal citations and quotation marks omitted]). Defendants correctly argue that the constructive discharge test is not met where, as here, "the employee is simply dissatisfied with a change in his job assignments" (*Morris v Schroder Capital Mgmt. Int'l*, 7 NY3d 616, 622 [2006] [finding no constructive discharge where plaintiff was dissatisfied with the nature of his assignments]; *see Viera v Olsten/Kimberly Quality Care*, 63 F Supp 2d 413, 418 [SD NY 1999] ["A change in job responsibilities with no decrease in pay or benefits does not reach the threshold required for a viable constructive discharge claim"], citing *Pena v Brattleboro Retreat*, 702 F 2d 322, 325 [2d Cir 1983] and *Stetson*, 995 F 2d at 360). Further, other than conclusory allegations that he was sidelined and progressively stripped of responsibilities, plaintiff does not offer specific facts demonstrating how his supervisors made his workplace intolerable (*see Tepperwien v Entergy Nuclear Operations, Inc.*, 606 F Supp 2d 427, 447 [SD NY 2009] ["(p)laintiff offers only conclusory assertions that he felt marginalized, unsafe, and stressed. These generalities are no substitute for concrete evidence of working conditions that are objectively intolerable"], *affd in part*, 663 F3d 556 [2d Cir 2011]).

Plaintiff's argument in opposition that the DOB gave him an ultimatum that if he did not quit, he would be terminated, is submitted to the court for the first time by counsel for plaintiff's affirmation in opposition, and is not otherwise mentioned in the complaint, and thus, insufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). To the extent plaintiff addressed the purported ultimatum in the 50-h hearing, plaintiff fails to attach the hearing transcript to his opposition.

Plaintiff's additional allegations, including that the DOB interfered with plaintiff's prospective employment with the HHC and the DOB "restricting [plaintiff's] access to networking and favorable references," also fail in that they do not concern an action against plaintiff that affect "compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance" (CSL § 75-b[1][d]).

In any event, the court finds that plaintiff's CSL § 75-b claim is time-barred. Claims for retaliation pursuant to CSL § 75-b must be commenced within one year of the alleged retaliatory action (CSL § 75-b[3][c]; *Donas v City of New York*, 62 AD 3d 504, 505 [1st Dept 2009]). Here, plaintiff filed the complaint on June 4, 2020, more than one year after his resignation from the DOB and the DOB's alleged sabotage of plaintiff's employment opportunity with the HHC. Further, plaintiff's claims of ongoing retaliatory acts by the DOB are nonspecific and warrant dismissal (*see Donas*, 62 AD3d at 505 ["(a)bsent any details of new discrete acts, rather than the effects of past acts . . . plaintiff's allegations [of ongoing retaliatory acts] are insufficient to establish a continuing violation claim"]). Accordingly, plaintiff's claims pursuant to CSL § 75-b are dismissed.

Plaintiff, in a footnote contained in his opposition, requests leave to file an amended complaint to add, among other things, that his separation from employment with the DOB was the result of a constructive discharge. Plaintiff's informal request is denied, as he fails to file a motion or cross-motion seeking such relief.

IV. Plaintiff's claim for defamation

In support of their motion to dismiss plaintiff's claim for defamation, defendants argue in principal that plaintiff's complaint fails to plead the alleged defamatory statement, who made the statement, and when it was made. "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Mayer v Riordan*, 55 Misc 3d 1203[A] [Sup Ct, NY County 2017], citing *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Further, CPLR 3016(a) requires that in a defamation suit, that "the particular words complained of shall be set forth in the complaint." Here, plaintiff's complaint fails to set forth the particular words allegedly constituting defamation and "[t]he time, place, and manner of the false statement and specify to whom [the statements were] made" (*Dillon*, 261 AD2d at 38).

In opposition, plaintiff cites to *Ramsay v Mary Imogene Bassett Hosp.* (113 AD2d 149 [3d Dept 1985]), for the proposition that he is entitled to discovery on the limited issue of the

statements pursuant to CPLR 3211(d). However, *Ramsay* is not on point. First, the court in *Ramsay* found that "the alleged facts 'may' exist to justify discovery under CPLR 3211(d)," because in part, the plaintiff was already aware that his former employer circulated "certain statements that plaintiff alleges were false, biased and misleading" to prospective employers (*id.* at 151), whereas here, plaintiff speculates as to the existence of such a statement. And second, the court in *Ramsey* granted the plaintiff's motion for discovery on the basis that the plaintiff was "[u]nable to determine whether any defamatory statements were made within one year prior to interposition of the claim," (*id.* at 153) unlike here, where plaintiff seeks facts essential to plead his claim for defamation. Thus, plaintiff fails to demonstrate under CPLR 3211(d) "that facts essential to justify opposition may exist but cannot then be stated."

In any event, "plaintiff must first assert a cognizable meritorious defamation claim to obtain discovery and cannot seek discovery to remedy the defects in his pleading" (*Naderi v North Shore-Long Island Jewish Health System*, Sup Ct, NY County, Feb 28, 2014, Kern, J. [denying plaintiff's motion for pre-dismissal discovery pursuant to CPLR 3211(d) concerning "who made defamatory statements, when they were made and to whom they were made"], *affd* 135 AD3d 619, 620 [1st Dept 2016]). As discussed above, plaintiff has failed to plead a claim for defamation. Accordingly, the dismissal of plaintiff's claim for defamation is appropriate.

Additionally, plaintiff's defamation claim is also dismissed on the basis that the alleged defamatory statements concerning plaintiff's allegation that the DOB interfered with his prospective employment at the HHC were made on May 6, 2019, over one year prior to the filing of the instant complaint (*see* CPLR 215(3); *Biro v Conde Nast*, 171 AD3d 463, 464 [1st Dept 2019]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to file a late notice of claim is denied; and it is further

ORDERED that defendants' motion pursuant to CPLR 3211(a)(5) and (7) is granted, and plaintiff's claims under CSL § 75-b, and for tortious interference and defamation are dismissed; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

1/14/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

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

153892/2020 DACOSTA, DENNIS vs. NEW YORK CITY DEPARTMENT OF
Motion No. 001 002