

Balioni v City of New York

2023 NY Slip Op 32415(U)

July 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 523671/2022

Judge: Gina Abadi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 13th day of July 2023.

P R E S E N T:

HON. GINA ABADI,
J.S.C.

MICHAEL L. BALIONI,

Plaintiff,

Index No.: 523671/2022

Motion Seq: 3

-against-

ORDER AND
JUDGMENT

THE CITY OF NEW YORK, ET AL.,

Defendant.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	34-36, 38-42
Opposing Affidavits (Affirmations).....	44
Reply Affidavits (Affirmations).....	46
Other.....	

Upon a careful review of the entirety of the foregoing cited papers, the Order and Judgment on this motion is as follows:

Defendants City of New York and New York Police Department (collectively, the “City), together with individual defendants Inspector Joe Haward, Inspector William Taylor, Lieutenant Thomas Reed, Lieutenant Timothy Brovokos, and Deputy Inspector James King (collectively, the “individual defendants” and together with the City, “defendants”) move, pre-answer, for an order: (1) dismissing the entirety of the verified complaint, dated August 16, 2022 (the “complaint”), of plaintiff Michael L. Balioni

("plaintiff"), for failure to state a claim under CPLR § 3211(a)(7); and (2) dismissing the portion of the complaint, insofar as it is based on the alleged acts/omissions preceding August 16, 2019, as time-barred under CPLR § 3211(a)(5).¹ Plaintiff opposes.

The branch of defendants' motion which is to dismiss the entirety of plaintiff's complaint for failure to state a claim of action under CPLR § 3211(a)(7) is *granted*. From the four corners of plaintiff's complaint, no factual allegations are discerned, which taken together, manifest an actionable claim cognizable at law. The complaint fails to allege (beyond its boilerplate perfunctory language) that the complained-of acts/omissions by one or more of the individual defendants (and vicariously by the City) (collectively, the "underlying acts/omissions") were motivated, in whole or in part, by the discriminatory animus toward: (1) either plaintiff's status as a family caregiver to his minor child, as well as a caregiver/helper/protector of his then opioid-addicted wife (the first and second causes of action); and/or (2) his status as a disabled individual on account of his (medically controlled) depression (the third and fourth causes of action). *See Kwong v City of New York*, 204 AD3d 442, 445 (1st Dept 2022), *lv dismissed* 38 NY3d 1174 (2022); *Lent v City of New York*, 2021 NY Slip Op 31805(U) (Sup Ct, NY County 2021), *aff'd* 209 AD3d 494 (1st Dept 2022), *lv dismissed* 39 NY3d 1118 (2023); *Matter of Martinez v City of New York*, 206 AD3d 532, 533 (1st Dept 2022).

Likewise, the complaint fails to allege (again, beyond its boilerplate perfunctory language) that the underlying acts/omissions objectively created (or constituted), in whole

¹ The Court has rearranged the branches of defendants' motion for ease of discussion.

or in part: (1) either a form of hostile work environment for plaintiff; and/or (2) a form of unlawful retaliation toward plaintiff (rather than that of command discipline for his admitted transgressions or of otherwise permissible conduct, such as the in-house check of his mental fitness as a police officer). The complaint's recital of plaintiff's direct interactions with the individual defendants are bereft of any factual allegations that would show harassing conduct beyond "petty slights and trivial inconveniences," such as being yelled at or ignored. With respect to plaintiff's claims of differential treatment in the form of undesirable work assignments and excessive discipline for minor infractions, the complaint fails to allege (once again, beyond its boilerplate perfunctory language) any facts indicating that his protected status (either as a caregiver or as a disabled individual, or both) was a motivating factor for the individual defendants' underlying acts/omissions. *See Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 (1st Dept 2013), *lv denied* 22 NY3d 861 (2014). Even assuming *arguendo* that the underlying acts/omissions *did* amount to more than petty slights and trivial inconveniences, the complaint fails to allege a discriminatory animus sufficient to support plaintiff's hostile work environment and unlawful retaliation claims (the fifth through eighth causes of action). *See Pelepelin v City of New York*, 189 AD3d 450, 451-452 (1st Dept 2020); *Askin v Department of Educ. of City of New York*, 110 AD3d 621, 622 (1st Dept 2013).

In light of the foregoing, the remaining branch of defendants' motion to dismiss is rendered academic.

Accordingly, it is

ORDERED AND ADJUDGED that the branch of defendants' motion for dismissal of this action for failure to state a claim under CPLR § 3211(a)(7) is *granted*, and the verified complaint is dismissed in its entirety as against all defendants, without costs or disbursements; and it is further

ORDERED AND ADJUDGED that the *remaining* branch of defendants' motion for dismissal of the portion of this action as timed-barred under CPLR § 3211(a)(5) is *denied as academic*; and it is further

ORDERED that the Corporation Counsel shall electronically serve a copy of this Order and Judgment with notice of entry on plaintiff's counsel and shall electronically file an affidavit of said service with the Kings County Clerk.

The foregoing constitutes the Order and Judgment of this Court.

ENTER FORTHWITH,



HON. GINA ABADI
J. S. C.