

Ruotolo v Mussman & Northey

2012 NY Slip Op 30860(U)

April 3, 2012

Sup Ct, NY County

Docket Number: 109449/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
SALIANN SCARPULLA
NEW YORK COUNTY

Index Number : 109449/2008

RUOTOLO, ANGELO

vs

MUSSMAN & NORTHEY

Sequence Number : 002

SUMMARY JUDGMENT

PART 19

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

decided per the memorandum decision dated April 3, 2012
which disposes of motion sequence(s) no. 2

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/3/12

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
ANGELO RUOTOLO,

Plaintiff,

- against-

Index No.: 109449/2008
Submission Date: 12/15/2011

MUSSMAN & NORTHEY, BONNIE MUSSMAN,
and REBECCA NORTHEY,

Defendants.

----- X

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Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Mem of Law in Support.	2
Aff of Angel Ruotolo	3
Aff of Boyd Lemon	4
Aff of Edward Mamet	5
Reply Mem of Law	6

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this legal malpractice action, defendants Mussman & Northey ("M&N"),
Bonnie Mussman ("Mussman") and Rebecca Northey ("Northey") (collectively
"defendants") move for summary judgment dismissing the complaint.

Plaintiff Angelo Ruotolo ("Ruotolo") is a former New York City Police
Department ("NYPD") officer. In June 2003, while still employed with the NYPD,

Ruotolo commenced a civil rights action in the United States District Court for the Southern District of New York (“the civil rights action”) against the City of New York and several NYPD supervisors (collectively “the City defendants”). Non-party William Rold (“Rold”) initially represented Ruotolo in the civil rights action.

In the civil rights action Ruotolo alleged that the City defendants retaliated against him for writing a report (“the Report”) about the possible health effects of environmental contamination in the 50th precinct, where Ruotolo served as a Command Safety Officer. Ruotolo alleged that after writing the Report, the City defendants arbitrarily denied him time off and overtime, reassigned him repeatedly, and disciplined him for trivial reasons. Ruotolo asserted claims that these retaliatory actions violated the First Amendment and Due Process clauses of the U.S. Constitution, and various state whistleblower laws.

In November 2003, the City defendants moved to dismiss Ruotolo’s complaint, arguing that the Report was not protected by the First Amendment because Ruotolo prepared it in his capacity as a public employee, not as a private citizen. On August 25, 2004, Judge Stein denied the City’s motion with respect to the First Amendment and Due Process claims but granted the motion with respect to the state whistleblower claims.

Then, in February 2004, the NYPD charged Ruotolo with visiting an out of borough location while on duty, subsequently placed him on modified duty and confiscated his firearms. Ruotolo eventually retired from the NYPD without a permit to carry a firearm as a civilian. Also, by mid-2004 conflicts had arisen between Ruotolo and

Rold, his attorney in the civil rights action, and, in May, 2004, Rold withdrew as counsel for Ruotolo. Thereafter, M&N began representing Ruotolo in the civil rights action.

On October 13, 2004, M&N moved to amend and supplement Ruotolo's initial complaint in the civil rights action to add allegations concerning the City defendants' placing Ruotolo on modified duty and confiscating his firearms. Ruotolo's motion to amend was granted on August 2, 2005.

According to defendants, Ruotolo also wanted to assert a separate Due Process claim based on the NYPD's confiscation of his firearms and suspension of his firearm privileges. Defendants purportedly told Ruotolo that this claim was not viable and that he should retain separate counsel to pursue available state law remedies. Ruotolo denies that defendants ever advised him to retain separate counsel for this claim.

Ruotolo was deposed in March, 2005, while Ruotolo's motion to amend was pending. At the deposition, Ruotolo testified about a conversation he had about the Report with a Police Benevolent Association ("PBA") attorney in April 2000. The PBA attorney came to the 50th precinct while Ruotolo was on duty. The PBA attorney asked Ruotolo about the Report and purportedly told Ruotolo that he was at the precinct specifically to speak with him about the Report. Ruotolo's supervisor was also at the meeting. Defendants were unaware of the conversation between Ruotolo and the PBA attorney prior to Ruotolo's deposition.

In November, 2005, the City defendants moved for summary judgment dismissing the civil rights action, arguing that no reasonable juror could believe that the City defendants retaliated against Ruotolo for writing the Report. The City also argued that Ruotolo was time-barred from recovering for any alleged retaliation which occurred before July 8, 2000. On February 3, 2006, Judge Stein dismissed the claims that were violative of the statute of limitations, but otherwise denied the summary judgment motion.

Before the action could proceed to trial, the United States Supreme Court issued its decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, the Supreme Court held that the First Amendment does not “protect[] a government employee from discipline based on speech made pursuant to the employee’s official duties.” 547 U.S. at 413.

Thereafter, the City defendants renewed their motion for summary judgment dismissing Ruotolo’s complaint on the grounds that the Report arose from Ruotolo’s official duties as a police officer, and thus was not protected by the First Amendment. In opposition, M&N argued that the amended complaint should in fairness be read to include Ruotolo’s conversation with the PBA attorney, which M&N contended were not pursuant to Ruotolo’s official job duties.

On July 19, 2006, Judge Stein granted the City defendants’ motion for summary judgment, holding that Ruotolo prepared the Report pursuant to his official job duties and therefore had no First Amendment claim with respect to the Report. *Ruotolo v. City of*

New York, 2006 U.S. Dist. LEXIS 49903, *10-11 (S.D.N.Y. July 19, 2006).¹ Because Ruotolo had not pled any claim based upon the conversation with the PBA attorney in either the initial or amended complaints, Judge Stein based his dismissal of the civil rights action solely on claims arising from the Report itself. However, Judge Stein noted that even if he had considered Ruotolo's discussion with the PBA attorney, Ruotolo's First Amendment claim would fail because that discussion was held pursuant to Ruotolo's official job duties, which included "answering questions about safety issues at the precinct." *Ruotolo v. City of New York*, 2006 U.S. Dist. LEXIS 49903, *12-13 (S.D.N.Y. July 19, 2006).²

Thereafter, M&N moved to vacate the dismissal of the civil rights action and to again amend the complaint to add specific allegations relating to Ruotolo's conversation with the PBA attorney. Judge Stein denied the motion on August 15, 2006. *See Ruotolo v. City of New York*, 2006 U.S. Dist. LEXIS 57346 (S.D.N.Y. August 15, 2006). The United States Court of Appeals for the Second Circuit affirmed Judge Stein's decision on February 6, 2008. *See Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2008).

M&N ceased representing Ruotolo in 2006. M&N did not represent Ruotolo on his appeal to the Second Circuit.

¹ Judge Stein also held that because Ruotolo's Due Process claims related solely to the alleged violation of his First Amendment right of free speech, the Due Process claims would likewise be dismissed.

² The official job description for the Command Safety Officer states that he or she is responsible for "act[ing] as a liaison for command and safety issues."

Ruotolo commenced this action in July 2008, alleging that defendants committed legal malpractice by failing to amend the complaint in the civil rights action a second time before dismissal, to include Ruotolo's claims for violation of his constitutional property rights, and by failing to "specify facts establishing the requisite retaliation and retaliatory motive of [the City defendants]." Ruotolo also alleges that defendants failed to plead violations of whistleblower statutes and labor codes, including the Clean Air Act of 1972, the Surface Transportation Act of 1982, the Sarbanes Oxley Act of 2002, OSHA regulations, and the False Claims Act of 1986. Finally, Ruotolo alleges that Mussman accepted a position as a New York City administrative judge while she represented him, in breach of defendants' duty of loyalty to Ruotolo.

Defendants now move for summary judgment dismissing the complaint, arguing that the malpractice allegations fail as a matter of law because Ruotolo would not have prevailed in the underlying suit notwithstanding defendants' alleged negligence. Specifically, defendants argue that Ruotolo's conversation with the PBA attorneys was not protected speech because it was pursuant to Ruotolo's official job duties and did not relate to a matter of public concern.

Defendants further contend that any potential First Amendment claim for retaliation based on Ruotolo's conversation with the PBA attorney was barred by the statute of limitations, and that Ruotolo would have been unable to show that the retaliation resulted from the conversation.

Defendants also argue that Ruotolo's claimed Due Process claim would have failed because Ruotolo did not have a protected property interest in a post-retirement pistol permit, and because Ruotolo had adequate remedies under state law to remedy the alleged deprivation of his gun license. Defendants maintain that they did in fact plead state whistleblower claims. Moreover, defendants argue that Ruotolo does not allege any factual or legal bases for arguing that he had a viable claim under the Clean Air Act of 1972, the Surface Transportation Act of 1982, the Sarbanes Oxley Act of 2002, OSHA regulations, or the False Claims Act of 1986. Lastly, defendants argue that Ruotolo may not maintain a legal malpractice claim based solely on Mussman's purported conflict of interest.

In opposition, Ruotolo argues that his conversation with the PBA attorney was not pursuant to his official job duties and that the speech was concerning a matter public health and safety, thus his communication was protected by the First Amendment and should have been pled in the civil rights action. Ruotolo maintains that it would have been futile to pursue the state law remedies for his Due Process claim, and that defendants never advised him to pursue these remedies. Ruotolo further contends that the First Amendment claims based on the PBA conversation were not time-barred because these allegations related back to the original claims.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

To prevail in a legal malpractice action, a plaintiff must demonstrate that he or she would have succeeded on the merits of the underlying action “but for” the attorney’s negligence. *Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 218-19 (1st Dept. 2007). A defendant is entitled to summary judgment where the defendant shows that the plaintiff would not have prevailed in the underlying action notwithstanding the alleged malpractice. *See Snolis v. Clare*, 81 A.D.3d 923, 925-26 (2d Dept. 2011).

Here, defendants have made a *prima facie* showing that Ruotolo would not have prevailed on his First Amendment claim even if defendants had amended the complaint to include Ruotolo’s conversations with the PBA attorney in April, 2000. The First Amendment does not protect public employees from adverse employment decisions based on communications they make pursuant to their official duties, *see Weintraub v. Bd. of Educ.*, 593 F.3d 196, 200-01 (2d Cir. 2010), and defendants have submitted sufficient

evidence to show that Ruotolo's conversation with the PBA attorney was made pursuant to his official duties.

Ruotolo testified that the PBA attorney asked him about the Report, which Ruotolo wrote in his official capacity. This meeting occurred while Ruotolo was on duty and while his supervisor was present. Further, the communication fit within Ruotolo's job description, which states that he was responsible for "act[ing] as a liaison for command on safety and health issues."³ Thus, Ruotolo would not have had a viable First Amendment claim based upon his discussion with the PBA attorney. See *Platt v. The Inc. Vill. Of Southampton*, 391 Fed. Appx. 62, 64 (2d Cir. 2010) ("We cannot say that a police officer speaking to a public official about his concerns over public safety issues is speaking in his capacity as a citizen, as opposed to his capacity as a police officer.").

In his July 19, 2006 decision, Judge Stein addressed, albeit in dicta, Ruotolo's claim that his conversation with the PBA attorney about the Report was protected by the First Amendment. While Judge Stein did not consider the conversation between the PBA

³ Ruotolo argues that he was acting as a private citizen when he spoke to the PBA because the communication was in violation of NYPD Patrol Guide 212-76, which states that officers may not release information to other New York City agencies concerning employees of those agencies if the City may become a party to an action. Even assuming Ruotolo's conversation with the PBA violated this rule, failing to comply with this regulation does not transform Ruotolo's speech to that of a private citizen for purposes of the First Amendment. See *Anemone v. Metropolitan Transp. Auth.*, 629 F.3d 97, 116 (2d Cir. 2011) ("When a government employee concededly engages in speech pursuant to his official duties, the fact that he persists in such speech after a supervisor has told him to stop does not, without more, transform his speech into protected speech made as a private citizen.").

attorney and Ruotolo in reaching his decision because it had not, at that time, been pled, Judge Stein's observation that this conversation with the PBA's attorney was a part of Ruotolo's official duties comports with my holding here. *See Ruotolo*, 2006 U.S. Dist. LEXIS 49903 at *12-13.

Defendants have also shown that Ruotolo would not have succeeded on a Due Process claim based on the City defendants' deprivation of Ruotolo's firearms. Where a government agency randomly and arbitrarily deprives a citizen of a protected property interest, due process is satisfied if the state provides an adequate post-deprivation remedy. *Hellenic Am. Neighborhood Action Comm. v. New York City*, 101 F.3d 877, 880 (2d Cir. 1996). Here, Ruotolo had the option of challenging the City defendants' determination through an Article 78 proceeding, which federal courts have repeatedly recognized as a meaningful post-deprivation remedy that satisfies procedural due process. *See Hellenic*, 101 F.3d at 881. Accordingly, Ruotolo's alleged Due Process claim would have failed as a matter of law.⁴

Ruotolo also claims that M&N failed to assert various whistleblower and labor law claims in the civil rights action. First, M&N did include whistleblower claims in the civil rights action, which claims Judge Stein dismissed on August 25, 2004. Further, Ruotolo

⁴ Ruotolo contends in opposition to the summary judgment motion that defendants were negligent in failing to advise him to pursue an Article 78 proceeding. However, Ruotolo did not plead this allegation in his complaint, thus the Court will not consider it in opposition to this summary judgment motion.

fails to allege any factual or legal basis to suggest he would have a viable claim as to the Clean Air Act of 1972, the Surface Transportation Act of 1982, the Sarbanes Oxley Act of 2002, OSHA regulations, or the False Claims Act of 1986. Thus, M&N is entitled to summary judgment dismissing any legal malpractice claims based upon defendants failure to plead violations of these statutes.

Lastly, the Court dismisses Ruotolo's claim that defendants breached their duty of loyalty when Mussman became an administrative judge with the City. In support of this summary judgment motion, Mussman affirms that she became an administrative law judge with the New York City Housing Authority (not the City of New York) in 2008, long after she ceased representing Ruotolo. Ruotolo submits nothing except his own conjecture to dispute Mussman's affirmation that she did not work for the City of New York while she represented him.⁵

In accordance with the foregoing, it is

⁵ In any event, a conflict of interest is insufficient on its own to support a malpractice cause of action. *See Sumo Container Sta. v. Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 A.D.2d 169, 170-71 (1st Dept. 2000).

ORDERED that the motion by defendants Mussman & Northey, Bonnie Mussman and Rebecca Northey for summary judgment dismissing the complaint of plaintiff Angelo Ruotolo is granted; and is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court

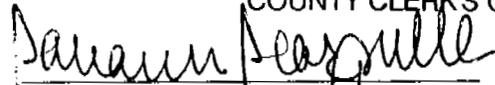
Dated: New York, New York
April 3, 2012

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