Tipaldo v Lynn
2006 NY Slip Op 30746(U)
July 26, 2006
Supreme Court, New York County
Docket Number: 106057/97
Judge: J. Shafer
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PART _____

Index Number : 106057/1997
TIPALDO, JOHN
VS
LYNN, CHRISTOPHER
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion decided pursuant to attached Decision

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

FILED
JUL 31 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/26/06

HON. MARILYN SHAFFER, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 62

----------X

JOHN TIPALDO,

Plaintiff,

Index No. 106057/97

-against-

CHRISTOPHER LYNN, in his Capacity as the Commissioner of the Department of Transportation for the City of New York, Richard Malchow, in his Capacity as First Deputy Commissioner of the Department of Transportation for the City of New York, and the City of New York,

Defendants.

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Shafer, J. :

Christopher Lynn (Lynn) in his Capacity as the Commissioner of the Department of Transportation (DOT) for the City of New York, Richard Malchow (Malchow), in his capacity as First Deputy Commissioner of the DOT and the City of New York (City) (Defendants) move pursuant to CPLR 3212, for summary judgment dismissing this action in its entirety which seeks relief under Civil Service Law § 75-b (2) (Whistleblower Statute), the sole cause of action in the complaint. Defendants alternatively seek the dismissal of all claims for damages. Plaintiff, John Tipaldo (Tipaldo), opposes the motion and cross moves for partial summary judgment.

Plaintiff is an employee of the DOT. He alleges that he was demoted by defendants Lynn, and Malchow, solely because he reported to the New York City Department of Investigation (DOI) that Lynn had violated City rules and regulations (Rules) regarding the procurement of DOT "Don't Honk" signs. Both defendants are named in their official capacity and thus, the sole defendant is the City.

The following facts are not in material dispute: the DOT signs were purchased during the early part of the week beginning Monday, November 4, 1996, and were installed during the following weekend, which was Veteran's Day. Plaintiff alleges that he learned of the allegedly illegal purchase of "Don't Honk" signs on or about Wednesday, November 6, 1996 (Complaint, ¶ 12). That day or the next, other DOT employees questioned Commissioner Lynn's disregard of Rules and on Friday, November 8, bids were solicited from several private vendors (Complaint, ¶¶ 13, 14). Tipaldo secured documents supporting this effort to conceal the Rules violation on November 16, 1996 (Tipaldo Affidavit dated November 24, 2004, in Support of Cross Motion). Plaintiff first reported the bidding problems to DOI's Inspector General for DOT on Monday, November 18, 1996. Plaintiff never reported the irregularities to Lynn or Malchow. Four months later, in February 1997, Tipaldo was demoted.

Plaintiff testified at a hearing pursuant to General Municipal Law § 50-h that he never confronted Lynn or Malchow with the bidding irregularities. While plaintiff discussed his intention to report the "Don't Honk" signs matter with a friend, John Martin, and with his immediate supervisor, DOT Assistant Commissioner Kathie Keegan, it appears that this discussion took place on or around November 16 or 17th - only a day or two before Tipaldo reported the matter to the DOI (Plaintiff's Dep at 15-16, 28-29, annexed to the Affirmation of Alan M. Schlesinger, dated September 24, 2004, as Exs C and D). In fact, his supervisor's affidavit, submitted in opposition of the motion to dismiss, reveals that Tipaldo merely stated his intentions of reporting this matter to DOI to Keegan as a confidante, and

that "at no time did [she] advise Lynn, Malchow or any of [her] superiors of Mr. Tipaldo's intentions" (Affidavit of Kathie Keegan, dated November 24, 2004).

Tipaldo's sole claim is an alleged violation of the Whistleblower Statute (see *Tipaldo v Lynn*, 284 AD2d 142 [1st Dept 2001]), *later proceeding*, 8 AD3d 36 [1st Dept 2004]). The Whistleblower Statute, prohibits the removal or any other disciplinary action against a civil service employee except for incompetency or misconduct. This action was brought against the City and against Lynn and Malchow in their official capacities.

In July 1999, defendants issued an Offer of Compromise, pursuant to CPLR 3221, which was rejected by plaintiff.

By Order dated January 9, 2006, defendants' motion for summary judgment was marked off the calendar. By order dated March 21, 2006 the Court restored the defendants' motion and plaintiff's cross motion for partial summary judgment.

The defendants seek to dismiss the complaint on the basis that plaintiff failed to communicate information regarding Lynn's allegedly improper actions to defendants prior to disclosing the information to a governmental body, thus precluding reliance upon the Whistleblower Statute. The court agrees.

Civil Service Law § 75-b (2) provides, in pertinent part, that :

> (a) 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: ... (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, or an agent of such 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.

(b) Prior to disclosing information pursuant to paragraph (a) of this subdivision, an employee shall have *made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety*. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision.

[Emphasis added].

To be a protected activity, the employee must first report the alleged illegality to the "appointing authority," which is defined as the "officer, commission or body having the power of appointment to subordinate positions" (Civil Service Law § 2 [9]) or his or her "designee." Here, that would be Lynn or Malchow. Plaintiff admittedly had no communications with Lynn or Malchow regarding the improprieties, and thus, gave them no opportunity to investigate and correct this action. Plaintiff argues that his communications with DOT's Assistant Commissioner, Kathie Keegan (Keegan) , satisfied the internal notice requirement.

Assuming that the DOT's Assistant Commissioner can be considered defendant's designee, this argument is rejected by plaintiff's own documents which reveal that the purpose for the conversation with Keegan was not to provide the DOT with "a reasonable time to take appropriate action," as required by the Whistleblower Statute, but rather, she

was used as a confidante. A communication such as this, not made for the purpose of putting an end to the alleged improprieties, is insufficient notice to the DOT, and thus, precludes reliance on the whistleblower protection of the Civil Service Law (*Brohman v New York Convention Center Operating Corporation*, 293 AD2d 299 [1st Dept 2002]).

Moreover, even if Keegan is considered an appropriate designee, at best, plaintiff reported his concerns to the DOI a day or two after he communicated them to Keegan. As a matter of law, this short time period has been held to be an insufficient amount of time "to investigate and correct the problems brought" to an agency's attention, which opportunity is a precondition to his statutory cause of action (*Garrity v University of Albany*, 301 AD2d 1015 [3d Dept 2003], where a whistleblower reported his concerns about irregularities to the external authorities the next day after he reported them to his superiors).

Plaintiff's argument that defendants should be estopped from arguing that plaintiff is not within the class of persons protected by the Statute fails as the internal reporting requirement is not an affirmative defense raised by defendants, but rather, is a burden to be met by plaintiff as a condition of bringing this action (*id*). Furthermore, estoppel is usually not available against the government (*New York S Med'ical Transporters Assn v Perales*, 77 NY2d 126, 130-31 [1990]), particularly, as in a situation such as this, when the proponent using the doctrine to amend the statute (*id.)*.

Plaintiff's asks the court for "justice" in interpreting the Whistleblower Statute, relying on a December 2005 letter to City workers, reminding them of the rules concerning

Christmas gifts and generally commending them for reporting corruption (December 2005 Letter). However, the December 2005 Letter post-dates the events at issue by nine years, and specifically, does not help plaintiff establish his strict burden under the Whistleblower Statute *(see*, Ex. C to Supplemental Affirmation of Lewis Rosenberg). Moreover, as was specifically noted by the Appellate Division on the appeal of this matter, in an effort to settle this matter in good faith, the City offered, among other things, to reinstate plaintiff to a position comparable to his position as DOT Assistant Commissioner, to pay him any back salary owed to him, and to restore the lost benefits to which he was entitled. Plaintiff immediately rejected this Offer of Compromise without explanation.

Thus, that portion of the cross motion whereby plaintiff seeks summary judgment is denied.

For the foregoing reasons, it is

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed; and it is further

Index No.:_____

ORDERED that plaintiff's cross motion for partial summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment for defendants accordingly.

Dated:

7/26/06

ENTER:

J.S.C.

HON. MARILYN SHAFFER, JSC

FILED

JUL 31 2006

COUNTY CLERK'S OFFICE
NEW YORK