

Gray v City of New York
2007 NY Slip Op 34198(U)
December 21, 2007
Supreme Court, New York County
Docket Number: 0116607/2004
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINIGAN
Justice

PART 52

GRAY
- v -
CITY of NY, et al.

INDEX NO. 116607/07
MOTION DATE 7/5/07
MOTION SEQ. NO. 006
MOTION CAL. NO. 6

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS REFERRED TO JUSTICE
THE FOLLOWING REASON(S) ARE GIVEN.

FILED
DEC 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/21/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

SIMPSON GRAY,

Plaintiff,

against

Index Number 116607/2004
Mot. Seq. No. 006

CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF EDUCATION, MICHAEL
BLOOMBERG, Mayor of the City of New York, JOEL
KLEIN, Chancellor of the New York City Public Schools,
DENISE J. HALLET, THERESA EUROPE, in their
individual capacities as well as their capacity as
employees of the City of New York and the New York
City Department of Education,
Defendants.

DECISION AND ORDER

-----X

For the Plaintiff:
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For the Defendants:
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Corporation Counsel of City of New York
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DEC 28 2007
NEW YORK
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Papers considered in review of this motion to renew and reargue:

Papers	Numbered
Notice of Motion.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Reply Affidavit.....	<u>3</u>

PAUL GEORGE FEINMAN, J.:

Plaintiff, who is self-represented, seeks leave to renew and reargue the decision and order of May 15, 2007 which denied his motion to amend his complaint to add three individual defendants, and to "replead" a claim of retaliation.

CPLR 2221 governs motions affecting prior orders. A motion to reargue is based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the

prior motion, and is to be made within 30 days after service of a copy of the decision and order with notice of entry (CPLR 2221 [d] [2], [3]). The granting of a motion to reargue is discretionary (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to renew is based on new facts not previously set forth in the motion papers and which would change the determination or demonstrate that a change in the law would change the prior determination, and should include “reasonable justification” as to why the facts were not previously included in the motion (CPLR 2221 [c] [2], [3]; *see, Castillo v Zimmerly*, 260 AD2d 243 [1st Dept. 1999]).

The court’s decision and order of April 17, 2006, granted the municipal defendants’ motion to dismiss a majority of the complaint’s causes of action, because of failure to properly provide statutory notice. The original complaint alleged breach of a settlement agreement, misrepresentation, discrimination because of race, age, religious beliefs, and/or gender in violation of Article I, Section 11 of the New York State Constitution, the New York State Human Rights Law § 296 (1) (a), and the New York City Administrative Code § 8-107 (1) (a), retaliation in violation of the Human Rights Law § 296 (1) (e), and violation of plaintiff’s Fourteenth Amendment due process rights, pursuant to 42 USC § 1983. Remaining after the April 17, 2006 decision and order were the claims of breach of the settlement as against the City and the Department of Education, and the claim of violation of due process rights by the City, the Department, and the individual defendants in their official capacities, pursuant to 42 USC § 1983.¹

Plaintiff then moved to amend his complaint, the decision of which is the subject of the

¹The latter cause of action states in part:

“Defendants’ failure to abide by the terms of the Stipulation of Settlement and wrongfully denying Plaintiff access to the statutorily required hearing process effectively denied Plaintiff due process of law when he was removed from his teaching position as a classroom teacher without any notice, hearing or opportunity to be heard.” (Verified Compl. ¶ 181).

instant motion. On May 15, 2007, the court denied the motion to amend the complaint to add claims of retaliation because plaintiff had not filed a notice of claim upon the Department of Education pursuant to NY Education Law § 3813 and General Municipal Law § 50-e. This decision was entered on May 21, 2007. Plaintiff filed his motion seeking to renew and reargue on July 5, 2007. Although he filed his motion more than 30 days after the date of entry of the order, the City has not offered an affidavit of service showing that he was served with notice of entry and that this motion is untimely. Therefore, plaintiff's motion to reargue is deemed timely.

The court grants plaintiff's motion to reargue and upon reargument, the court adheres to its previous determination denying the motion to amend, although on different grounds.

By decision and order dated April 17, 2006, this court granted defendants' motion to dismiss as to the second through twenty-fourth causes of action. The court directed defendants to answer the 1st and 25th causes of action. The court dismissed the action in its entirety as against the individual defendants Theresa Europe, Denise J. Hallet and the Mayor and Chancellor as individuals.

The instant motion seeks to add three individual defendants. However, notwithstanding the liberal pleading standards, an amendment can be denied when to allow it would be palpably without merit. There is no basis for individual liability here even assuming the truth of the allegations made. As to the municipal defendants, the motion seeks to amend his complaint to add a claim of retaliation as part of his 42 USC § 1983 claim. Contrary to the defendants' argument, no notice of claim to the municipal defendants is required when a plaintiff seeks to add a retaliation claim as part of a Federal claim brought under 42 USC § 1983. "State notice of claim requirements cannot defeat a substantive Federal right" (*Summers v County of Monroe*, 147 AD2d 949, 950 [4th Dept. 1989, citing *Felder v Casey*, 487 US 131 [1988]]). Here, plaintiff's

allegations of retaliation grow out of the same transactions and occurrences set forth in the original complaint. The dismissal of the State-law causes of action has not vitiated the related allegations of the original complaint (see *Pendleton v City of New York*, ___ AD3d ___, 984 NYS2d 648 [2d Dept. 2007]). Nor would dismissal of State-law causes of action based on failure to file a notice of claim pursuant to Gen. Mun. Law § 50-e bar their applicability to a Federal civil rights claims pursuant to 42 USC § 1983 (*Pendleton*, 984 NYS2d at 653).

A plaintiff can establish a claim based upon retaliation under 42 USC § 1983 by providing evidence that his or her speech was constitutionally protected, that he or she suffered an adverse employment decision, and that there exists a causal connection between the speech and the adverse employment determination, so that it can be said that the speech was a motivating factor in the determination (*Kline v Town of Guilderland*, 289 AD2d 741, 742-743 [4th Dept. 2001]). Plaintiff has set forth sufficient allegations to sustain a claim of breach of the settlement agreement. However, his proposed amended complaint does not sufficiently allege that the actions taken by the municipal defendants since the breach, including not allowing him to return to his former assignment, assigning him to a different office, giving him “go-fer” work, and assigning him to sit in a corner near broken office machinery, files, and garbage, is in retaliation for his lawsuit, rather than the outgrowth of the breach of the settlement agreement. His other allegations of retaliatory conduct are generalized and without specificity. For instance, he claims that defamatory comments have been made about him, but provides absolutely no details as to the actor, date, and to whom the comment was made.

Although CPLR 3025(b) provides that a party may amend or supplement a pleading, amendment lies with the discretion of the court. Here, the court cannot grant plaintiff's motion because of the paucity of allegations to establish a claim.

Accordingly, it is

ORDERED that the motion to reargue granted and upon reargument the court adheres to its decision denying the motion to amend the complaint for the reasons stated in this decision.

This constitutes the decision and order of the court.

Dated: December 21, 2007



J.S.C.

HON. PAUL C. HEENAN

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