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

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HARRY DONAS,

Plaintiff,

Index Number 100977/2006
Mot. Seq. Nos. 001, 002

against

CITY OF NEW YORK and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

DECISION AND ORDER

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For the Plaintiff:
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For the Defendant:
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Papers considered in review of these motions to dismiss and amend complaint:

	Papers	Numbered
Seq. 001	Notice of Motion, Affirmation, and Memo of Law	1, 2
	Attorney's Affirmation and Memo of Law in Opp.	3, 4
	Reply Memo of Law.....	5
Seq. 002	Notice of Motion, Affirmatiaon.....	1
	Affirmation in Opposition and Memo of Law.....	2, 3

PAUL G. FEINMAN, J.:

The motions bearing sequence numbers 001 and 002 are consolidated for purposes of joint decision.

In motion sequence number 001, defendants move to dismiss the complaint based on plaintiff's failure to timely file a notice of claim, the running of the statute of limitations, and his failure to state a cause of action (Gen. Mun. L. § 50-e [1]; CPLR 3211 [a] [5], [7]). In motion sequence number 002, plaintiff moves to file and serve an amended complaint pursuant to CPLR 3025(b). For the reasons which follow, the motion to dismiss is granted and the motion to amend the complaint is denied.

Factual Allegations

Plaintiff has been employed since 1987 as an Assistant Chemical Engineer with the New York City Department of Environmental Protection (DEP) and his duties mostly entailed inspection of waterworks components (Not. of Mot. Ex. A, Ver. Compl. [herinafter Ver. Compl.] ¶ 6). On January 26, 2005, he filed a notice of claim against the City of New York (Not. of Mot. Ex. B). The notice claimed that on November 9, 2001, he discovered corruption in his agency, and reported the specific information to his superior, Michael Krysko, who refused to investigate. Three months after plaintiff reported the wrongdoing, his supervisor was changed and he was pulled from his inspection duties, and was later denied a promotion even though he had passed his professional engineer's license. He filed a grievance through his union, and a hearing was held on July 23, 2004 with the Office of Labor Relations of DEP; a decision "which avoided the issues," was rendered against him on October 29, 2004. Plaintiff claimed damages to his professional reputation causing monetary loss and promotional opportunities.

Plaintiff subsequently commenced an action against the City of New York and the DEP by filing his summons and verified complaint on April 11, 2006. The complaint describes in more detail his discovery and reporting of wrongdoing in November 2001, the subsequent transfer to another supervisor in February 2002 and change in duties very shortly thereafter despite having received four consecutive years of "outstanding" ratings for his work, and that beginning in June 2002 Krysko "actively sought to transfer" him to units not concerned with waterworks inspection (Ver. Compl. ¶¶ 7-13). He describes learning in September 2003 that he would never be promoted as long as Krysko was around, and contends that as his union grievance was found against him in about October 29, 2004, he has exhausted all administrative

remedies (Ver. Compl. ¶¶ 15, 16). He also describes providing information to the New York City Department of Investigation (DOI) beginning in December 2003 (Ver. Compl. ¶ 18). He alleges that the DEP has known for many years of other unethical acts by Krysko but has done nothing and in fact has promoted him (Ver. Compl. ¶¶ 20-22). The complaint sets forth two causes of action: that plaintiff has been damaged monetarily by not receiving the salary to which he was entitled, and that his professional standing and reputation have been damaged.

In motion sequence number 001, defendants move to dismiss on several bases. They argue that none of the plaintiff's claims were timely noticed, as the last event described in his verified complaint was the comment made in September 2003, which meant he should have filed a notice of claim no later than December 2003, rather than on January 26, 2005. They argue that the action was also untimely commenced, as the whistleblower statute (Civil Serv. L. § 75-b) has a one-year statute of limitations, and the latest alleged act of retaliation occurred in September 2003. They further argue that plaintiff, a member of a union, was required to grieve his claims and assert them before an arbitrator rather than pursue a plenary action. Defendants also seek costs, fees, and disbursements.

Plaintiff opposes. He argues that the grievance process contained in the collective bargaining agreement does not pertain to adverse employment actions such as denial of promotion, transfer of supervision, or elimination of job assignments unrelated to a disciplinary action (Donas Aff. 5, 6). Plaintiff contends that the grievance that he pursued was filed prior to the commencement of the adverse employment actions, and did not address his complaints of

corruption or the subsequent adverse actions (Pl. Memo of Law in Opp. 2).[1] Procedurally unrelated to the grievance, plaintiff approached the DOI in December 2003, after which DEP employees "badmouthed" him (Ver. Compl. ¶ 19). He had further meetings with DOI officials in February and April of 2004, and early in 2005 (Donas Aff. 10-13). In 2004 and 2005, he requested whistleblower status (Donas Aff. 15). Plaintiff claims he last complained about corruption and health and safety issues "in July 2005," and thus timely filed his civil action within one year of July 2005 (Pl. Memo of Law in Opp. 4). Plaintiff argues that the adverse personnel actions commenced in December 2003 because of his reporting activities, are ongoing in nature and include continuing denial of promotions and title changes and loss of salary, elimination of duties, isolation, and false claims against him by supervisors (Donas Aff, 16, 17). He argues that he is bringing a claim pursuant to the New York City False Claims Act (NY Admin Code §§ 7-801 *et seq.*), and Civil Service Law § 75-b, a "whistleblower statute" which protects public employees from retaliation by their employers. He argues that if he has failed to state a viable cause of action under the False Claims Act or Whistleblower Act, he can seek recovery under the State Constitution for violation of his right to protected speech and that his State constitutional rights and remedies are not waived by invoking the Whistleblower Act. He also argues that his claim for damage to his professional reputation is distinct from the claim under the Whistleblower Act and not foreclosed under it.

In motion sequence number 002, plaintiff moves to amend his complaint to add further

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[1]Plaintiff's grievance concerned out of title job assignments (Meenan Aff. in Opp., Donas Aff. ¶ 3; Ex. 3). The Step III determination dated October 29, 2004, found that he had not been assigned to perform duties substantially different from those of his title; the option of the Union's proceeding to arbitration, set forth in the determination, was not pursued.

facts and claims concerning his meeting with a DOI official in early 2005, after which "adverse employment actions" occurred against him (Pl. Not.of Mot. Ex. 1, Proposed Amended Compl. ¶ 35), and led to his decision to file his notice of claim at the end of January 2005. Defendants oppose allowing amendment, arguing that it does not rectify the issues raised in their arguments set forth above for why the action should be dismissed.

The Relevant Statutes[2]

When an individual seeks to litigate a claim sounding in tort against a public corporation, he or she is required pursuant to General Municipal Law § 50-e to serve a notice of claim on the entity within 90 days after the claim arises (Gen. Mun. L. §50-e [1] [a]). The court may, in its discretion and upon application by the plaintiff, extend the time to serve a notice of claim when it finds sufficient reason for the delay in service (Gen. Mun. L. §§ 50-e [5]). This exercise of discretion is circumscribed by the clear legal mandate that filing a notice of claim must be accomplished within the statute of limitations period, i.e., not more than one year and 90 days after the cause of action accrued, unless the statute of limitations was tolled (Gen. Mun. L. §§ 50-e [5]; 50-i; *Pierson v City of New York*, 56 NY2d 951, 954 [1982]). "This Court has consistently treated the year-and-90-day provision contained in section 50-i as a statute of limitations" (*Campbell v City of New York*, 4 NY3d 200, 203 [2005]).

The purpose of a notice of claim is to provide a municipal authority an opportunity to investigate the claim (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [1st Dept. 2007]).

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[2]Although New York State's Whistleblower Statute (Labor L. § 740), is discussed by the parties in their motion papers, it is concededly not applicable here, as it concerns private sector employees.

The notice must set forth the time, the place, and the manner in which the claims arose (*O'Brien v Syracuse*, 54 NY2d 353, 358 [1981]). "The test of the notice's sufficiency is whether it includes information sufficient to enable the city to investigate the claim." (*O'Brien*, at 358, citations omitted).

As long as there is no apparent prejudice to the other party, at "any time after the service of a notice of claim and at any state of an action," mistakes, omissions, or defects made in good faith in the notice of claim, may be "corrected, supplied, or disregarded" in the discretion of the court, provided that there is no apparent prejudice to the other party (Gen.Mun. L. § 50-e [6]). Thus, it is not required that a claimant state a "precise" cause of action, given the short 90-day statute of limitations (*Goodwin v New York City Hous. Auth.*., 42 AD3d 63, 68 [1st Dept. 2007]).

Civil Service Law § 75-b forbids retaliatory or personnel action concerning compensation, promotion, transfer, or evaluation of performance, by public employers against their employees who disclose to a governmental body information regarding violations of regulations that would present a specific danger to public health or safety (Civ. Serv. L. § 75-b [1] [d]; [2] [a]). The statute distinguishes employees who are subject to a collective bargaining agreement and who must pursue their grievance through arbitration, a hearing, or binding arbitration, from those not subject to collective bargaining agreements who may commence an action in a court of competent jurisdiction (Civ. Serv. L. § 75-b [a-b; c]).

The New York City False Claims Act (NYC Admin. Code § 7-805), allows any New York City employee who believes that he or she has been the subject of a retaliatory action, as defined by Civil Service Law section 75-b, "because of lawful acts of such employee in furtherance of a civil enforcement action brought under this section, including the investigation,

initiation, testimony, or assistance in connection with, a civil enforcement action commenced or to be commenced under this section," to seek "all relief necessary to make the employee whole." (NYC Admin Code § 7-805 [a] [2], [3]).

Legal Analysis

In assessing a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction" and the test is "whether the proponent of the pleading has a cause, not whether he has stated one." (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994] [citations omitted]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). When determining a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the court will examine whether the facts stated are sufficient to support any cognizable legal theory (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]). In opposing a motion to dismiss, a plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636, [1976]). Submissions of a party in opposition to a motion to dismiss are to be "'given their most favorable intendment.'" (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998] [citation omitted]). Allegations consisting of bare legal conclusions are not entitled to such consideration (*Franklin v Winard*, 199 AD2d 220, 220 [1st Dept. 1993]). In order for a defendant to prevail in a motion to dismiss, he or she must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [3d ed.]).

The one-year statute of limitations to bring an action under Civil Service Law § 75-b begins to accrue at the time that "the alleged retaliatory persnnel action was taken" (Civ. Serv. L.

§ 75-b [3] [c]). As set forth both in the notice of claim and the complaint, as well as the proposed amended complaint, the last *specific* action against plaintiff occurred in September 2003 when he learned that he would never be promoted as long as his superior was there. He also alleges that there have been continuing acts against him up to the present.

To successfully plead a claim of continuing violation, plaintiff must show a series of "'related acts, one or more of which falls within the limitations period'" (*Drayton v Veterans Admin.*, 654 F. Supp. 558, 567 [SDNY 1987] [citation omitted]). He must allege a "present and ongoing violation" and may not characterize a completed act of discrimination as a continuing violation so as to evade the statute of limitations (*Drayton*, at 567). The facts of being discharged, transferred, or discontinued from a particular assignment are "not acts of a 'continuing' nature." (*Bradley v Consolidated Ed. Co.*, 657 F. Supp. 197, 204 [S.D.N.Y. 1987] [citation omitted]). Actions including failure to promote and denial of transfer, as well as termination and refusal to hire, are "discrete acts" and "each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" (*National R.R. Passenger Corp. v Morgan*, 536 U.S. 101, 114 [2002] [claim filed under the EEOC]). Moreover, the "[p]resent effects of past discrimination do not toll the statute of limitations." (*LaBeach v Nestle Co.*, 658 F. Supp. 676, 686 [SDNY 1987]; *see, Matter of Davison v White*, 140 AD2d 699 [2d Dept. 1988] [petitioners failed to establish that reappointment of another individual was an act of unlawful discrimination against them]).

Here, although plaintiff filed a notice of claim and complaint that allege adverse actions against him because of his reporting of corruption and bad acts within the agency, he fails to demonstrate that any of the adverse actions were made within 90 days prior to the filing of the

notice of claim in January 2005 or that they were in fact continuing violations, rather than discrete events with ongoing effects. That he met more than once with officials from the DOI, by itself, does not establish that he also suffered new acts of retaliation following each meeting. Nor does the fact that he met with DOI officials mean that a civil enforcement action was being commenced, and that he could claim damages and seek remedies under New York City's False Claims Act.[3]

Plaintiff's proposed amended complaint states in general that there has been ongoing retaliation, and in particular that he was wrongfully accused of abusing overtime (Pl. Not. of Mot. Ex. 1, Prop. Amend. Compl. ¶ 39). However, this allegation is not sufficient to establish that this bad act occurred within the period of the statute of limitations. He has not alleged when this statement was made, or who made it and who heard it, and he does not set forth the actual words used (*see,* Gen. Mun. L. § 50-e [1] [requiring time, place, and manner in which claim arose]; *see also,* CPLR 3016 [a] [requiring the recitation of the actual defamatory words at issue]). Given that defendants' motion to dismiss the complaint is based in part on the generalized unspecific nature of plaintiff's allegations concerning more recent retaliatory acts, plaintiff was obligated to include in his proposed amended complaint, the extrinsic facts surrounding the making of the statement so as to establish that it fell within the statute of limitations and that it was false (*Danko v F.W. Woolworth Co.*, 29 AD2d 855, 855 [1st Dept. 1968]).

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[3]The False Claims Act, Admininstrative Code § 7-805, was only enacted in May 2005, and made effective on August 17, 2005, and thus plaintiff's actions in 2004 and early 2005 could not fall under the protection of this regulation.

Conclusory statements that retaliatory acts are continuing are insufficient to establish a continuing violation claim (*Drayton v Veterans Admin.*, 654 F. Supp. at 567; *Frumkin v International Business Mach. Corp.*, 801 F. Supp. 1029, 1035 [1992]). Plaintiff alleges subsequent and ongoing continuations of the past acts in generalized terms and without dates, situational details, or persons involved, and does not describe any of these more recent adverse acts, even in his proposed amended complaint. Therefore, it must be understood that his post-December 2003 employment situation is reflective of the adverse personnel actions, explicitly set forth in the notice of claim and complaint, that were taken against him in the period 2001-2003. This is true also for the claim of damage to his reputation, for which no specific details have been set forth in any of plaintiff's pleadings.

There is no merit to plaintiff's argument that his claims can also be brought as violations of the State Constitution. Although in *Brown v State of New York*, a civil damage remedy was recognized for a violation of a State constitutional provision, it is only applicable in circumstances where the alleged violation does not fit within the definition of any common-law tort remedy (89 NY2d 172, 188, *et seq.* [1996] [implying a damage remedy was consistent with the purposes of the Constitutional clauses that had allegedly been violated, where neither injunctive or declaratory relief was available]). Where there exist alternative statutory or common-law remedies, it has been held improper to find a State constitutional claim (*see, e.g., Lyles v State*, 2 AD3d 694 [2d Dept. 2003], *aff'd* 3 NY3d 396 [2004] [alleged wrongs could have been redressed by timely interposed common-law tort claims including assault and battery, and false imprisonment, and thus State constitutional claims were properly dismissed]). Moreover, where a complaint asserts claims based on the State Constitution, there must be a prior notice of

claim (*423 So. Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 427-428, n. 5 [1986], *cert denied*, 481 U.S. 1008 [1987] [claims brought under State Constitution must first have been filed in a notice of claim to the municipality and are subject to the one-year-and-ninety-day limitations period]; *Bidnick v Johnson*, 253 AD2d 779, 780 [1998] [same]).

Plaintiff argues that his claim for damage to his professional reputation is distinct from the Whistleblower claim, citing *Kraus v Brandstetter*, 185 AD2d 302 (2d Dept. 1992} (holding that the causes of action sounding in tort, namely defamation, were separate and distinct from the claim to recover damages for retaliatory termination of employment). If his claim of damage to his reputation is based on the "badmouthing" that allegedly occurred, and the accusation that he abused overtime, then he has not, as stated above, set forth sufficient details of time, place, speaker, and the actual words used, to adequately allege a claim of defamation. If his claim is based on other acts, then nothing has been alleged to support such a claim.

When determining whether to allow an amended pleading, the standard pursuant to CPLR 3025(b), is to freely give leave to amend, absent prejudice or surprise resulting from the delay. However, a motion will not be granted where the proposed amendment fails to state a cause of action or is palpably insufficient as a matter of law (*see, Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept. 2001]). Here, the contents of the proposed amended complaint make it apparent that plaintiff cannot sufficiently establish his claims and that they are barred by the statute of limitations.

Accordingly, for the above-stated reasons, the motion to dismiss the complaint is granted and the motion to amend the complaint is denied. It is

ORDERED that the defendants' motion to dismiss (Mot. Seq. No. 001) is granted and the

Clerk of the Court shall enter judgment dismissing the complaint in its entirety, together with costs and disbursements to defendant as taxed by the Clerk of the Court; and

it is further

ORDERED that the plaintiff's motion to amend (Mot. Seq. No. 002) is denied.

This constitutes the decision and order of the court.

Dated: Jan. 21, 2008
New York, New York

J.S.C.

HON. PAUL G. FEINMAN