

Yan Ping Xu v City of New York

2009 NY Slip Op 32343(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 103544/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 5

Justica

Index Number : 103544/2009

XU, YAN PING

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2, 3, 4,

5, 6, 7, 8

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

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

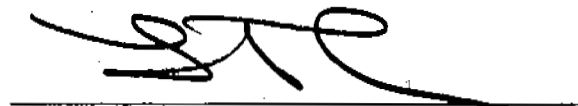
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

OCT 14 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/9/08



HON. EILEEN A. RAKOWER

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 5

-----X

YAN PING XU,

Plaintiff,

- against -

THE CITY OF NEW YORK s/h/a THE NEW YORK
CITY DEPARTMENT OF HEALTH AND MENTAL
HYGIENE,

Defendants.

EILEEN A. RAKOWER, J.S.C.

Index No.
103544/09

DECISION
and ORDER

Mot. Seq.
001

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff, *pro se*, brings this action to recover for the allegedly retaliatory termination of Plaintiff by defendants in March of 2008, which Plaintiff alleges was in violation of New York Civil Service Law §75-b. Plaintiff alleges that she was employed as a City Research Scientist with the New York City Department of Health and Mental Hygiene's ("DOHMH") Division of Disease Control, Bureau of Immunization, from June 4, 2007 until her termination on March 13, 2008. Plaintiff states that, in that capacity, her primary duties entailed analyzing and maintaining computer databases.

Plaintiff alleges that, in the course of her employment, she discovered discrepancies in the data being processed which had potential public health ramifications. Specifically, the databases at issue listed enrolled and active provider sites for the federally funded Vaccines for Children Program, which provides vaccines through enrolled providers at no cost to children who are uninsured, or whose medical insurance does not cover their vaccinations. Plaintiff alleges that Angel Lapaz, her Unit Chief, asked her to use 2006 data for enrolled and active provider sites for the VFC program's 2007 Management Survey. She claims that, on February 29, 2008, she reported this to Dennis King, her supervisor, and that King nevertheless submitted the incorrect data to the Federal Center for Disease Control. Plaintiff claims that she was terminated on March 13, 2008, in retaliation for speaking out about DOHMH's use of outdated and inaccurate data. She further alleges that, on March 14, 2008, she

received a negative performance evaluation, also in retaliation. Plaintiff “had received positive written emails and many verbal compliments” up until that time, and was never informed that her job performance was problematic in any respect.

Xu commenced an Article 78 proceeding on July 14, 2008, wherein she sought removal of her unsatisfactory performance evaluation and reinstatement to her position with back pay, money damages, and costs in relation to the events surrounding her March 13, 2008 termination (*see Xu v. New York City Dept. of Health*, 2009 NY Slip Op 50147U (Sup. Ct., New York Cty. 2009) (“*Xu I*”). In that matter, Plaintiff made the same allegations she makes in this action - *i.e.*, that she was terminated and given an unsatisfactory performance evaluation in retaliation for reporting DOHMH’s allegedly improper use of outdated data in its 2007 survey of enrolled participants in the VFC program, in violation of Civil Service Law §75-b.

The Hon. Paul G. Feinman, by decision dated January 23, 2009, dismissed the Article 78 petition and denied Xu’s cross-motion to file a late notice of claim. First, Justice Feinman held that Xu did “not make out a claim as a whistle blower protected under Civil Service Law §75” (*Xu I* at *4). Justice Feinman also rejected Xu’s allegation that her termination was procedurally improper, holding that “it is apparent that whether she was a probationary or a permanent employee, she failed to follow the proper procedure in challenging her termination” (*id.*). Justice Feinman also held that, in addition to the above grounds for dismissal, Xu’s claim of retaliatory firing would be barred by her failure to timely file a notice of claim (*id.* at *5) (citations omitted). Finally, Justice Feinman declined to convert Xu’s attempted cross-motion for leave to file a late notice of claim into a special proceeding, since Xu “has made no excuse for her failure to file a timely notice, other than ignorance, although it has been repeatedly held that ignorance of the 90-day requirement for filing a Notice of Claim is not considered a ‘reasonable excuse’ under the dictates of General Municipal Law § 50-3(5)” (*id.*).

Plaintiff commenced this action on March 13, 2009. Defendants now move to dismiss the matter pursuant to CPLR §§3211(a)(5) and 3211(a)(7). Defendants assert that Plaintiff’s claims herein are barred under the doctrine of collateral estoppel, relying on Justice Feinman’s decision in *Xu I*. Defendants also claim that Plaintiff fails to state a cause of action for which relief can be granted. Attached to Defendants’ notice of motion are copies of the *Xu I* decision and Xu’s notice of appeal of Justice Feinman’s decision. Defendants also submit a memorandum of law in support.

Plaintiff cross-moves for leave to amend her complaint, and annexes a proposed second amended complaint hereto. The proposed second amended complaint seeks to interpose an additional claim under §7-805 of the New York City False Claims Act. In addition, Plaintiff appears to contend that her union agreement does not comply with the New York City Collective Bargaining Law.

In response, Defendants submit an affirmation in opposition to Petitioner's cross-motion, arguing that Defendants are entitled to dismissal of the presently operative complaint, and that leave to amend Plaintiff's pleadings should be denied because the proposed amendments are futile.

Plaintiff files a memorandum of law in opposition to Defendants' motion to dismiss, as well as a "further memorandum of law in opposition."¹ These documents contain as exhibits Plaintiff's prior Article 78 petition, Plaintiff's performance evaluation, e-mails, and other documents related to her employment with DOHMH and her subsequent termination.

Defendants respond with a reply affirmation and memorandum of law. Annexed to the affirmation is, *inter alia*, a copy of Plaintiff's current complaint.

Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500; *see also, Burgos v Hopkins, supra*, 14 F3d, at 792). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co., supra*, at 500-501). '[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to

¹The court notes that neither of these submissions were timely, and that Plaintiff was not granted leave or otherwise permitted to file a "further memorandum" of law.

establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (*id.*, at 501).

(*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

Here, the court finds that Plaintiff's claims of retaliatory firing are clearly barred by Justice Feinman's decision in *Xu I*. The issues raised therein are plainly identical to the ones raised in the instant plenary action, and Plaintiff is unable to demonstrate that she lacked a full and fair opportunity to litigate the matter of her allegedly retaliatory termination and negative performance review. Moreover, Justice Feinman also held that Plaintiff's claims were precluded by Plaintiff's failure to timely file a notice of claim, and denied Plaintiff's motion for leave to file a late notice of claim.

In addition, the court denies Plaintiff's cross-motion for leave to amend her complaint, as Plaintiff's proposed amendments are futile (*see Crucen v. Leary*, 2008 NY Slip Op 2008 NY Slip Op 8278, *2 [1st Dept. 2008]) (citation omitted). With respect to Plaintiff's claim under the New York City False Claims Act, Justice Feinman has already ruled that the actions complained of herein did not constitute retaliatory action, and thus Plaintiff is collaterally estopped from relitigating the issue. Moreover, the False Claims Act is inapplicable to the present dispute. §7-805 of the Act reads, in pertinent part,

Any officer or employee of the city or state of New York who believes that he or she has been the subject of a retaliatory action, as defined by section seventy-five-b of the civil service law... 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, shall be entitled to all relief necessary to make the employee whole.

The False Claims Act empowers the Corporation Counsel of the City of New York to initiate civil enforcement proceedings against "parties who file fraudulent claims for payment of city funds" (New York City False Claims Act at Preamble; *id.* at §§7-803

[* 6]
& 7-804). Finally, Plaintiff's allegation that her union agreement does not comply with the New York City Collective Bargaining Law fails to state a claim for which relief may be granted as against Defendants.

Wherefore it is hereby

ORDERED that Plaintiff's cross-motion to amend the complaint is denied; and it is further

ORDERED that Defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 9, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK