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

PRESENT: CYNTHIA S. KERN PART 52

Index Number : 115361/2006

COLON, HIPOLITO

VS

BOARD OF EDUCATION

Sequence Number : 013

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 013

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: [X] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

FILED
MAR 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/18/10

CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: [X] 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 52

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In the Matter of HIPOLITO COLON,

Plaintiff,

Index No. 115361/06

-against-

DECISION/ORDER

NEW YORK CITY BOARD OF EDUCATION,
JOEL KLEIN, Chancellor, PS 120 Principal
LIZA CARABALLO,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced this action seeking certain disciplinary hearings in connection with his reassignment and suspension from his employment as a teacher by defendants. Plaintiff now moves to compel certain discovery. Defendants cross-move for summary judgment on the grounds that plaintiff's claims are moot, are barred by the doctrines of collateral estoppel or res judicata and that plaintiff fails to state a cause of action. For the reasons set forth below, defendants' cross-motion is granted and plaintiff's motion for discovery is thus denied as moot.

The relevant facts are as follows. On January 10, 2006, plaintiff was reassigned from

P.S.120, where he had been teaching, to a "rubber room" or reassignment center. Plaintiff alleges that in June 2006, the Department of Education ("DOE") tried to serve him with disciplinary charges but that he did not receive them. However, he learned of such charges in August 2006, upon receiving a letter saying he had waived his right to a hearing by failing to respond to the original letter. Plaintiff pursued his right to a hearing, which was held before an arbitrator from January to August 2008. During this hearing, plaintiff was represented by counsel, presented evidence and offered testimony. On October 21, 2008, the arbitrator, Howard C. Edelman, Esq., issued a decision in which plaintiff was found guilty of some charges and not guilty of others. The arbitrator determined that a penalty of three months suspension without pay was appropriate.

On or about November 10, 2008, plaintiff commenced a special proceeding pursuant to CPLR Article 75, challenging the arbitration decision and seeking to vacate the award. On April 13, 2009, the Honorable Marylin G. Diamond dismissed the proceeding, holding that there was no basis for disturbing the arbitrator's decision. Judge Diamond specifically held that the arbitrator's conclusion that the disciplinary actions taken against plaintiff were not retaliatory was "rational and well supported by the record."

Plaintiff commenced the instant action on or about October 13, 2006. In the present action, he demands a disciplinary hearing, alleges that the DOE's Panel for Educational Policy ("PEP") is "illegal," alleges that his union had not represented him in good faith and alleges that defendant Liza Caraballo, principal of the school at which plaintiff worked, had acted in retaliation for plaintiff taking "whistleblower" actions against her.

Defendants are entitled to summary judgment dismissing plaintiff's claim seeking a

disciplinary hearing as that claim is moot. The disciplinary hearing which plaintiff seeks has already been held.

Defendants are also entitled to summary judgment dismissing plaintiff's claim alleging retaliation as that claim is barred by the doctrines of collateral estoppel and res judicata. "The doctrine of collateral estoppel...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." *Ryan v. New York Tel. Co.*, 62 N.Y. 2d 494, 500 (1984). For collateral estoppel to apply, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." *Allied Chem. v. Niagara Mohawk*, 72 N.Y. 2d 271, 276 (1988). "The doctrines of res judicata and collateral estoppel are applicable to arbitration awards." *Waverly Mews Corp. v Waverly Stores Assocs.*, 294 A.D.2d 130, 132 (1st Dept 2002). In the instant case, plaintiff had a full and fair opportunity to litigate his claim of retaliation and the arbitrator made a specific finding that respondents had not engaged in retaliatory behavior. Moreover, a court then found that the arbitrator's finding with regard to plaintiff' retaliation claim was rational and "well supported by the record." Based on the foregoing, plaintiff's retaliation claim is clearly barred by the doctrines of collateral estoppel and res judicata.

Defendants are also entitled to dismissal of plaintiff's claim that the PEP is an "illegal entity" and that it violated the Open Meetings Law based on an Executive Session of the PEP on September 19, 2006 as plaintiff fails to state a cause of action. The PEP is created by statute. *See Education Law* 2590-(b)(1). Pursuant to NY Education Law 2590-b, the PEP is to consist

of thirteen members, with eight appointed by the mayor and one appointed by the borough president. The PEP is properly constituted pursuant to that statute and, as such, plaintiff fails to make out a claim that it is "illegal." Moreover, a four-month statute of limitations applies to claims based on the Open Meetings Law ("OML"). *See* CPLR 217; *Smith v City Univ. of New York*, 92 N.Y.2d 707, 716 (1999). Because plaintiff brought his claim in October 2008, more than 2 years after the meeting which he alleges violated the OML, this claim is time-barred.

Defendants are also entitled to dismissal of plaintiff's claim that the DOE violated the collective bargaining agreement with the teachers' union, the United Federation of Teachers ("UFT") or NYSUT, an umbrella union organization. To the extent that plaintiff's claim is against the UFT and/or NYSUT, it must be dismissed as neither is a party to this action. To the extent this claim is brought against the DOE, plaintiff failed to exhaust his contractual remedies, as required, before commencing this action. The UFT contract with the DOE provides for grievance procedures, which must be followed before commencing a lawsuit. Plaintiff does not allege that he followed these. Therefore he did not exhaust his contractual remedies as required. *See Cantres v Board of Education*, 145 A.D.2d 359, 360 (1st Dept 1998) (citations omitted). This claim must therefore be dismissed. *See id.*

Plaintiff raises claims for false imprisonment, malicious prosecution, defamation, hostile work environment and negligent infliction of emotional distress for the first time in his opposition to defendants' cross-motion for summary judgment. Although it is improper to raise these claims for the first time in opposition papers, the court will briefly address the substance of each claim.

Defendants are entitled to summary judgment dismissing plaintiff's claim for false

imprisonment because plaintiff fails to state a cause of action. To make out a claim for false imprisonment, plaintiff must establish that "the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, and that the confinement was not otherwise privileged." *Martinez v City of Schenectady*, 97 N.Y.2d 78, 85 (2001). Plaintiff alleges that his reassignment to the so-called "rubber room" constituted a confinement within the meaning of the definition of false imprisonment. He is mistaken. He was no more "confined" to the rubber room than any employee is "confined" to their place of employment.

Plaintiff also fails to state a cause of action for malicious prosecution. An element of a malicious prosecution claim is that a criminal proceeding was commenced. *See id.* at 84. As no criminal proceeding has been brought against plaintiff, he cannot state a claim for malicious prosecution.

Plaintiff cannot state a cause of action for defamation either. The elements of defamation are a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 A.D.2d 34, 37-38 (1st Dept 1999). In order to state a cause of action for libel, "the particular words complained of" must be "set forth in the complaint." *Id.* The words plaintiff alleges are defamatory were spoken by Joel Klein as follows:

> We did not vote to terminate you. We did vote to terminate a teacher in executive Session... in fact, we voted to terminate two teachers. It's perfectly consistent with the law. Many teachers have been charged with sexual activities and some are charged with corporal punishment... I have no interest in removing people who are qualified to teach, I can assure you, because I don't get any return... and in fact, I have complained publicly about how long this process drags out. But our first concern will always be , and as a former lawyer and somebody who clerked

> on the United States Supreme Court I will tell you, there is no violation of due process whatsoever...

Plaintiff alleges that this statement meant that Chancellor Klein told people that plaintiff was charged with misconduct. However, that is not what Chancellor Klein said. In fact, Chancellor Klein does not speak about plaintiff directly other than to say that he was not terminated at this particular meeting and that the process of termination afforded the affected teachers due process. Based on these facts, there was no defamatory statement.

Plaintiff also fails to state a cause of action for negligent infliction of emotional distress. He states he suffered such emotional distress by virtue of his reassignment to the "rubber room." However, this reassignment is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" as required to make out a claim for negligent infliction of emotional distress. *Hernandez v Central Parking Sys. Of New York, Inc.*, 63 A.D.3d 411 (1st Dept 2009) (citation omitted).

Nor does Plaintiff state a cause of action for a hostile work environment. "A [] hostile work environment exists 'when the workplace is permeated with discrimination intimidation, ridicule, and insult [based on a protected category] that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 (2004) (citation omitted). Plaintiff does not allege that he was subject to ridicule, harassment, intimidation or insults based on his being a member of a protected category. Therefore, he fails to make out a claim for hostile work environment.

Accordingly, defendants' cross-motion is granted and plaintiff's complaint is dismissed in its entirety. Since his complaint has been dismissed, plaintiff's motion for discovery is denied as moot. This constitutes the decision and order of the court.

Dated: 3/18/10

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.