Levine v Suozzi
2010 NY Slip Op 31008(U)
April 12, 2010
Supreme Court, Nassau County
Docket Number: 2655/09
Judge: Ute W. Lally
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SCAN

SHORT FORM ORDER mg, md

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

SAMUEL M. LEVINE,

Plaintiff,

-against-

THOMAS R. SUOZZI,

Defendant.

Motion Sequence #1, #2
Submitted March 18, 2010
XXX

INDEX NO: 26555/09

The following papers were read on this motion to dismiss:

Notice of Motion and Affs..1-3
Notice of Motion and Affs..4-6
Affs in Support and Opposition..7&8
Affs in Reply..9&10
Memoranda of Law..11-13a

Upon the foregoing papers, it is ordered that this motion by defendant, Thomas R. Suozzi, the former Nassau County Executive, for an order pursuant to CPLR 3211(a)(5),(7) dismissing the complaint in this action is granted as provided herein.

This cross-motion by the plaintiff Samuel M. Levine for: (1) an order transferring this case to Queens County; (2) an order pursuant to CPLR 3025 granting him leave to amend his Complaint; and, (3) an order pursuant to CPLR 3101(a)(4) directing the defendant and the former Deputy County Executive Timothy Driscoll to appear for examinations-before-trial is denied.

In this action pursuant to, *inter alia*, 42 U.S.C. § 1983 which was commenced on December 29, 2009, the plaintiff Samuel Levine, a former Nassau County District Court Judge, seeks to recover damages suffered as a result of the defendant's alleged repeated refusals to designate him a Judicial Hearing Officer ("JHO") in the Nassau County Traffic and Parking Violation Agency ("TPVA") from 2000 through 2009. He alleges that the process employed by the defendant in his designation of JHOs at the TPVA violated Article 22 of the Judiciary Law and Part 122 of 22 NYCRR, and that his refusal to designate him a JHO was violative of his civil rights.

On January 11, 2010, the defendant moved to dismiss the Complaint pursuant to CPLR 3211(a)(5), (7). On or about February 11, 2010, Levine moved, *inter alia*, for leave to amend his Complaint and he submitted his proposed Amended Complaint along with his motion. The defendant's pre-Answer motion to dismiss the Complaint extended his time to Answer and accordingly extended Levine's time to amend his Complaint as of right pursuant to CPLR 3025 as well. Therefore, Levine does not require leave of court to amend his Complaint.

The Amended Complaint does not differ significantly from the original Complaint and the defendant, as is his right, has chosen to continue his motion to dismiss pursuant to CPLR 3211 as against the Amended Complaint. (See, *Sage Realty Corp. v Proskauer Rose, LLP*, 251 AD2d 35, citing *Sholom & Zuckerbrot Realty Corp. v Caldwell Banker Commercial Group, Inc.*, 138 Misc2d 799, 801; see also, *Livadiotakis v Tzitzikalakis*, 302 AD2d 369, citing *Baker v Reiss*, 223 AppDiv 842; *D'Addario v McNab*, 73 Misc2d 59, 61; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:65

[* 3]

at 94).

When deciding a motion to dismiss a complaint pursuant to CPLR 3211, the court is required to afford the pleading "a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87, citing CPLR 3026). It must "accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, *supra*, at p. 87-88, citing *Morone v Marone*, 50 NY2d 481, 484; *Rovello v Orfino Realty Co.*, 40 NY2d 633, 634; see also, *Mancuso v Rubin*, 52 AD3d 580).

Via his Amended Complaint, Levine alleges that he was a District Court Judge in Nassau County from January 1, 1997 until December 30, 1997 and that he was in fact President of the District Court's Board of Judges. He alleges that every year thereafter up to and including December 31, 2009, he was qualified to serve as a JHO and that he "was the only retired judge in Nassau County that was discriminated against by the defendant by refusing to contract with [him]." Levine alleges that the defendant "has ignored [his] numerous requests in the past eight years to serve as JHO at the District Court and its TPVA" and that "recent requests were made in 2008 and 2009." He alleges that the defendant has in fact "adopted a policy refusing to contract with [him] to be a JHO at the TPVA." Levine alleges that the defendant engaged in this discriminatory conduct in retaliation against him for exercising his right to free speech by bringing to his and his staff's attention during his tenure as President of the District Court Board of Judges the fact that the defendant was not following New York State's statutory scheme in his designation of JHOs at the TPVB, as well as serious ongoing problems in the District Court.

In his capacity as President of the District Court Board of Judges and in this action he alleges that the defendant lacked statutory or case law authority for designating JHOs to the TPVA. In support thereof, he cites Article 22 of the Judiciary Law as well as the Court of Appeals' decision in *Dolce v Nassau County Traffic and Parking Violations Agency* (7 NY3d 492, 494, 495, 496, citing Nassau County Charter § 2308[2006]) (the "*Dolce* action"). More specifically, Levine maintains that pursuant to Judiciary Law § 850, to become a JHO, a person must have been a judge or justice of a court of record, be on a panel established by the Chief Administrator of the Courts, and be designated by the Chief Administrative Judge. He notes that in the *Dolce* action, the Court of Appeals held "that the TPVA was created to be an adjunct of the Nassau County District Court . . . was intended to be an arm of the District Court . . . [and that] the fines that may be imposed by, and the procedures before, the TPVA hearing officers are set by the Board of Judges of the Nassau County District Court. . . ." He alleges that the former County Executive lacked the authority to designate JHOs for the TPVA and that he is unaware of any actions taken by the State Administrative Judge or the Board of Judges of the District Court of Nassau County to validate his designations. He further alleges that the defendant has engaged in an unlawful employment practice and violated his civil rights in violation of 42 U.S.C. § 1983, including his freedom of speech and "right to recall" as a JHO.

As and for his first cause of action, Levine seeks money damages equivalent to lost salary. As and for his second cause of action, citing *Dolce v Nassau County Traffic and Parking Violations Agency*, *supra*, he seeks declaratory relief that the defendant has violated Article 22 of the Judiciary Law and Part 122 of 22 NYCRR by his designation of

[* 5]

JHOs to the TPVA.

Where, like here, the County is required to indemnify the defendant County employee (see, *Grasso v Schenectady County Public Library*, 30 AD3d 814, citing *Bardi v Warran County Sheriff's Dept.*, 194 AD2d 21, 23-24), the failure to timely serve a notice of claim pursuant to County Law § 52 in an action against the county or one of its employees is fatal unless the action has been brought to vindicate a public interest. (*Picciano v Nassau County Civil Service Com'n.*, 290 AD2d 164; see also, *Mills v Monroe County*, 59 NY2d 307, cert den., 464 U.S. 1018; *Zarate v Nassau County Medical Center*, 9 AD3d 427; *Henneberger v County of Nassau*, 465 F.Supp.2d 176). Levine has clearly brought this action to vindicate the defendant's allegedly improper designation of JHOs in the TPVA; His request for money damages is ancillary. As such, a notice of claim was not required. (*Commission of Village of Pleasantville*, 156 AD2d 521, app dism., 75 NY2d 897; *Torino v Town of Pleasant Valley*, 36 AD2d 963; 62A NYJur 2d Government Tort Liability § 359; Carmody Wait 2d New York Practice § 144:46).

The Nassau County TPVA was established by the enactment of General Municipal Law § 370, *et seq.* It provides "[t]here shall be a department of the Nassau County government known as the Nassau County [TPVA] **which shall operate under the direction and control of the county executive** (emphasis added)." [General Municipal Law § 370(2)]. With certain limitations not relevant here, the Nassau County TPVA "may be authorized to assist the Nassau County district court in the disposition and administration of infractions of traffic and parking laws, ordinances, rules and regulations . . .." [General Municipal Law § 371(2)]. Pursuant to Vehicle and Traffic Law § 1690

[* 6]

entitled "Authority of the Nassau County district court judicial hearing officer," with certain exceptions not relevant here:

> "where the trial of a traffic or parking infraction is authorized or required to be tried before the Nassau county district court, . . . the administrative judge of the county in which the trial court is located may **assign** judicial hearing officers to conduct such a trial. . . . Where such assignment is made, the judicial hearing officer shall entertain the case in the same manner as a court . . . . (emphasis added)"

"In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought. . . ." (*Solnick v Whalen*, 49 NY2d 224, 229; see also, *American Independent Paper Mills Supply Co., Inc. v County of Westchester*, 16 AD3d 443). Where no other method of resolving the claims advanced in a declaratory judgment action exists, the six-year limitation set forth at CPLR 213(1) applies. (*Solnick v Whalen*, *supra*, at p. 230).

Assuming, *arguendo*, that Levin is challenging the County Executive's denial of his requests to serve as a JHO at the TPVA; that it is governed by CPLR 7803(3); and that a four month statute of limitations applies, Levine's claim accrued upon said denials. The defendant has not established that Levine's latest request to serve as a JHO in the TPVA occurred and was denied more than four months before this action was commenced. The defendant has accordingly not demonstrated that the Statute of Limitations requires dismissal of the Complaint.

Nevertheless, assuming, *arguendo*, that the six-year Statute of Limitations applies and that this matter has been timely commenced, Levine's challenge to the procedures

employed by the defendant in his designation of JHOs at the TPVA fails as a matter of law.

Contrary to Levine's interpretation, the procedure for designating JHOs for the TPVA is distinct from the procedure set forth at Article 22 of the Judiciary Law and Part 122 of NYCRR. Again, pursuant to General Municipal Law § 370, the TPVA "operate[s] under the direction and control of the county Executive," who at all pertinent times was the defendant. This delegation of authority included the right to designate the TPVA JHOs, which are then subject to assignment by the Administrative Judge of Nassau County pursuant to Vehicle and Traffic Law § 1690. In fact, both the qualifications of and limitations of Judiciary Law JHOs and the General Municipal Law and Vehicle and Traffic Law JHOs differ. [Compare, Judiciary Law § 850(1) and Vehicle and Traffic Law § 1690(1); and 22 NYCRR 122.10 and Vehicle and Traffic Law § 1690(4)]. Therefore, Levine's claim that the defendant's designation of JHOs at the TPVA violated the State's statutory scheme fails as a matter of law.

The essential elements of a § 1983 cause of action are conduct committed by a person acting under color of State law, which deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States. (*Maio v Kralik*, 70 AD3d; see also, *Parratt v Taylor*, 451 U.S. 527, 534; *Town of Orangetown v Magee*, 88 NY2d 41, 52; *Bower Assoc. v Town of Pleasant Val.*, 304 AD2d 259, 262, *aff'd.*, 2 NY3d 617). Thus, to succeed on his § 1983 claim, Levine must be able "'to establish the deprivation of a protectable property interest by one acting under the authority of law.'" (*Maio v Kralik*, *supra*, quoting *Natalizio v City of Middletown*, 301 AD2d 507).

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v McCollan*, 443 US 137, 145 n. 3). For claims under § 1983, a plaintiff must allege that"(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." (*Snider v Dylag*, 188 F3d 51, 53, citing *Dwares v City of New York*, 985 F2d 94, 98).

Property interests which are protected by due process are not created or defined by the Constitution. They are created and/or defined "by existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Martz v Incorporated Village of Valley Stream*, 22 F3d 26, 29, quoting *Board of Regents v Roth*, 408 U.S. 564, 577). "To establish a property interest in prospective employment, [Levine] must 'demonstrate more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Jones v City School Dist. of New Rochelle*, __ FSupp2d __, 2010 WL 996522 (S.D.N.Y. 2010), p. 8, quoting *Board of Regents v Roth*, *supra*, at p. 577. "Prospective employment does not confer a liberty interest because [Levine] . . . is not entitled to employment with any particular employer." *Jones v City School Dist. of New Rochelle*, *supra*, citing *Burka v New York City Transit Authority*, 680 F.Supp. 590; *Donato v Plainview-Old Bethpage Cent. School Dist.*, 96 F3d 623, 630).

Levine was a New York State employee during his tenure as a District Court Judge. Judiciary Law § 221-h. He has not alleged, let alone established, that he was ever an employee of Nassau County. As an applicant, Levine does not have a protected property or liberty interest in the job. *Board of Regents v Roth*, *supra*; *Jones v City School Dist. of New Rochelle*, *supra*; *Johnson v N.Y. City Police Dept.*, 25 Fed Appx 32, cert. den., 535 US 1018 (2002); *McCall v City of Danbury*, 116 F.Supp2d 316, *aff'd.*, 16 Fed. Appx 77; *Gillum v Nassau Downs Regional Off-Track Betting Corp. of Nassau*, 357 F.Supp2d 564). Having failed to identify a protected property interest, Levine's claim alleging a violation of 42 U.S.C. § 1983 on account of the defendant's failure to designate him a JHO at the TPVA must be dismissed. *Matter of Kapell v Inc. Village of Greenport*, 63 AD3d 940; *Bykofsky v Hess*, 107 AD2d 779, *aff'd.*, 65 NY2d 730, cert den., 474 US 995).

As for Levine's discrimination claim, to establish a *prima facie* case, a plaintiff must show four things: (1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of discrimination. (See, *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305; *McDonnell Douglas Corp. v Green*, 411 US 792, 802). Levine has not alleged that he is a member of a protected class. (See, *Engquist v Or. Dept. of Agric.*, 128 S. Ct. 2146; *Gasparik v Stony Brook University*, 296 Fed Appx 151).

As for Levine's allegation that the defendant's failure to designate him a JHO at the TPVA was in retaliation for his conduct while President of the District Court Board of Judges, i.e., his highlighting problems there and challenging the method by which the

defendant designated JHOs to the TPVA, "[i]n order to establish a claim based upon retaliation under 42 USC § 1983, a plaintiff is required to submit evidence that '(1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a casual connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination.'" *Kline v Town of Guilderland*, 289 AD2d 741, 742-743, quoting *Morris v Lindau*, 196 F.3d 102, 110; see also, *Dillon v Morano*, 497 F3d 247, 251, citing *Cotarelo v Vil. of Sleep Hollow Police Dep't.*, 460 F3d 247, 251). "Adverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." (*Morris v Lindau*, *supra*, at p. 110, citing *Kaluczky v City of White Plains*, 57 F3d 202, 208).

"It is well settled that a public employer cannot discharge or retaliate against employees for the exercise of their First Amendment right to free speech." (*Gilligan v Town of Moreau*, 234 F3d 1261, citing *Ezekwo v New York City Health & Hospitals Corp.*, 940 F.2d 775, 780, cert den., 502 US 1013; *Mt. Healthy City School Dist. Bd. of Educ. v Doyle*, 429 U.S. 274, 283-84). Even expressions made in the workplace which are related to the speaker's job may be entitled to First Amendment protection. (*Garcetti v Ceballos*, 547 U.S. 410, 420-421, citing *Givham v Western Line Consol. School Dist.*, 439 US 410, 414 and *Pickering v Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 395 U.S. 563). However, not all of a public employee's speech is protected. (See, *Garcetti v Ceballos*, *supra*; *Connick v Myers*, 461 U.S. 138, 142; *Pickering v Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, *supra*. First, it must be determined whether the

employee spoke as a citizen on a matter of public concern. (*Garcetti v Ceballos*, *supra*, at p. 418, citing *Pickering v Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, *supra*, at p. 568). If not, the plaintiff does not have a First Amendment cause of action premised upon his potential employer's reaction to his speech. (*Garcetti v Ceballos*, *supra*, at p. 418, citing *Connick v Myers*, *supra*, at p. 147). If the employee spoke as a citizen on a matter of public concern, "the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (*Garcetti v Ceballos*, *supra*, at p. 418, citing *Pickering v Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, *supra*, at p. 568). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." (*Garcetti v Ceballos*, *supra*, at p. 419 citing *Connick v Myers*, *supra*, at p. 147). However, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." (*Garcetti v Ceballos*, *supra*, at p. 421-422). "When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." (*Garcetti v Ceballos*, *supra*, at p. 424). Simply put, such speech is not protected under the First Amendment. (*Garcetti v Ceballos*, *supra*).

It appears that Levine's speech for which he alleges he has been discriminated against was made pursuant to his duties as President of the Board of District Court Judges and it is therefore not protected under the First Amendment.

However, since neither party has addressed this issue, for purposes of this motion, this court will assume, *arguendo*, that Levine's reports regarding the conditions at District Court and the defendant's allegedly improper method of designating JHOs at the TPVA are protected speech.

Levine has not alleged that his experience and qualifications were so superior to the credentials of those persons who were in fact designated by the defendant as JHOs at the TPVA "that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate[s] selected over [him] for the job in question." (*Loris v Moore*, 344 Fed Appx 710, 712, quoting *Byrnie v Town of Cromwell Bd. of Educ.*, 243 F3d 93, 103).

In addition, complaining to one's employer about work conditions is not a protected activity under Title VII. (15 U.S.C. § § 2622, 2655; see also, *Harper v Hunter College*, 162 F3d 1147). While under 42 U.S.C. § 1983, termination for complaining of work conditions can be violative of a plaintiff's First Amendment rights (*Harper v Hunter College*, *supra*, citing *Basbinder v Scott*, 975 F.2d 118, 119-120), Levine was never an employee of the County, therefore he was never terminated. Compare, *Moore v Middletown Enlarged City School Dist.*, 57 AD3d 746; *Cioffi v Averill Park Central School Dist. Board of Ed*, 444 F.3d 158, cert den., 549 US 953 (plaintiffs stated retaliation claims under 42 USC § 1983 where they alleged that their positions were eliminated and the defendants refused to re-hire him in newly created identical positions). To the extent that he alleges an "anti-Levine policy," absent a nexus with an improper government purpose–whether personal or otherwise–a class of one standing alone fails. (See, *Clubside, Inc. v Valentin*, 468 F3d 144, 159). Levine's claim that he had a "right to recall" is similarly unavailing as, again, he was never

employed by the County let alone the TPVA.

Consequently the Complaint fails to state a viable cause of action. The defendant's motion is granted and the complaint is hereby dismissed.

Dated: April 12, 2010

UTE WOLFF LALLY, J.S.C.

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