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

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART 52

Index Number : 114975/2009
RYAN, PATRICK
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 114975/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
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 is decided in accordance with the annexed decision

FILED
JUN 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/28/10

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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PATRICK RYAN,

Plaintiff,

Index No. 114975/09

-against-

DECISION/ORDER

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION and JOHN W. McCABE,

Defendants.

----------x

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
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff Patrick Ryan commenced this action seeking damages for intentional infliction of emotional distress, defamation and violation of a Collective Bargaining Agreement against defendants City of New York (the "City), the Board of Education of the City School District of the City of New York (the "BOE" also known as the "New York City Department of Education") and John McCabe, an employee of the BOE ("McCabe")(collectively "defendants"). Defendants move for dismissal of the complaint in its entirety. Plaintiff cross-moves for permission to amend the complaint and for an extension of time to file the notice of claim.

Defendants' motions are granted and plaintiff's cross-motion is denied for the reasons set forth below.

As a matter of background, under the BOE's "Indirect System of Custodial Care", the BOE hires custodian engineers who are each responsible for cleaning and properly maintaining an individual school. The BOE pays each custodian engineer an allotment for his or her school. The custodian engineer, in turn, is responsible for hiring his or her own custodial assistant and paying that assistant from the funds provided in the allotment. Thus, the custodian engineer is the custodial assistant's employee of record. Custodian engineers and custodial assistants are represented by unions, respectively Local 891, International Union of Operating Engineers AFL-CIO ("Local 891") and Local 32BJ of the Service Employees International Union, AFL-CIO ("Local 32BJ"). The Collective Bargaining Agreement ("CBA") between Local 891 and Local 32BJ sets the terms and conditions of employment, grievance procedures and methods of calculating pay for custodial workers.

The relevant facts are as follows. Plaintiff has been employed as a custodial assistant at John Bowne High School for approximately eleven years. John Bowne High School is a school under the jurisdiction of the BOE. On or about November 2005, McCabe became the custodian engineer at John Bowne High School, and as such, plaintiff's supervisor and employer. In the time that McCabe has employed Ryan, McCabe has written several memoranda to file mainly addressing deficiencies in Ryan's job performance and conduct. These letters form the basis upon which plaintiff brings his claims. The memoranda raised in plaintiff's complaint were written in a period of time commencing September 6, 2006 and ending August 20, 2009 and covered the following topics: insubordination and abuse of property (September 6, 2006),

improperly being absent (April 3, 2007), dereliction of duty (May 30, 2007), insubordination (October 17, 2007), termination of employment for failure to follow directions and disrespectful behavior (October 20, 2007, plaintiff was later reinstated), failing to follow proper cleaning procedure (February 26, 2008), abuse of sick leave (February 26, 2008), reduction of scheduled work hours (September 2, 2008), termination of employment due to a reduction to the custodial allotment (December 17, 2008, plaintiff was later reinstated), improper cleaning and sweeping of rooms (March 20, 2009), and reduction of work hours due to reduction in custodial allotment (August 20, 2009).

Plaintiff claims that by writing these letters, McCabe (and vicariously the City and the BOE) engaged in intentional infliction of emotional distress and defamation. Plaintiff further alleges that McCabe's attempts to terminate the plaintiff and reduce his work hours violated the CBA between Local 891 and Local 32BJ.

As a preliminary matter, plaintiff's claims against the City are dismissed as plaintiff fails to state a cause of action against the City. "The Board of Education is not a department of the city of New York." *Ragsdale v. Bd. of Educ.*, 282 N.Y. 323 (1940). This fact remains true even after the 2002 amendments to the Education Law which provided for "greater mayoral control, significantly limit[ing] the power of the Board of Education." *Perez v. City of New York.*, 41 A.D.3d 378, 379 (1st Dep't 2007). "The legislative changes do not abrogate the statutory scheme for bringing lawsuits arising out of torts allegedly committed by the [Board of Education] and its employees, and the City cannot be held liable for those alleged torts." *Id.* In the instant case, plaintiff's claims are based entirely upon actions allegedly committed by McCabe in his capacity as a BOE employee. As the BOE is not a department of the City and

McCabe is not an employee of the City, the City cannot be held liable for those claims. Therefore, plaintiff's complaint as against the City is dismissed.

The court now turns to McCabe and the BOE's motions requesting that the court dismiss plaintiff's complaint for failure to file a timely notice of claim. According to Education Law § 3813(2), no action founded upon tort may be brought against a board of education or its employee unless a notice of claim was filed in compliance with General Municipal Law ("G.M.L.") § 50-e. G.M.L. § 50-e, in turn provides that the notice of claim must be served "within ninety days after the date the claim arises." N.Y. GEN. MUN. LAW § 50-e (2010). Further, under New York law, when plaintiff fails to file a notice of claim, as required by a provision (such as G.M.L. § 50-e), the underlying complaint must be dismissed. *See Davidson v. Bronx Mun. Hosp.*, 64 N.Y.2d 59 (1984). Moreover, if an untimely notice of claim is filed without seeking leave of court, it is a nullity thereby requiring dismissal of the underlying complaint. *See Wollins v. New York City Bd. of Educ.*, 8.A.D.3d 30, 31 (1st Dep't 2004).

In the instant case, plaintiff's complaint must be dismissed against both McCabe and the BOE. First, plaintiff failed to serve McCabe with a notice of claim. As the alleged tortious acts were committed within the scope of McCabe's employment as a BOE employee, plaintiff was required to serve him with a notice of claim. As held by the Court of Appeals in *Davidson*, where, as here, the plaintiff fails to serve a notice of claim at all, the complaint must be dismissed. Second, plaintiff served the BOE with an untimely notice of claim on or about November 10, 2008, over two years after the accrual of the cause of action, without seeking permission from this court. As held by the First Department in *Wollins*, plaintiff's untimely notice of claim served on the BOE without seeking leave of this court is a nullity, requiring

dismissal of the underlying complaint against the BOE. Accordingly, plaintiff's complaint is dismissed as against both McCabe and the BOE.

Plaintiff's claims against all of the defendants are also dismissed for failure to state a cause of action. First, plaintiff has failed to state a cause of action for intentional infliction of emotional distress. A claim for intentional infliction of emotional distress requires allegations of conduct "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 society." *Brasseur v. Speranza*, 21 A.D. 3d 297, 298 (1st Dep't 2005)(citing *Murphy v. Amer. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983). Here, plaintiff has failed to plead a single factual allegation that satisfies the standard set forth above. Accordingly, plaintiff's claim for intentional infliction of emotional distress is dismissed.

Second, plaintiff has also failed to state a cause of action for defamation. To establish a cause of action sounding in defamation, plaintiff must plead "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, 38 (1st Dep't 1999). Further, C.P.L.R. §3016(a) requires that the complaint set forth the particular words complained of. The failure to plead the exact language complained of mandates dismissal of the claim. See *Kelly v. CBS, Inc.* 59 A.D.2d 686 (1st Dep't 1977); *Monsanto v. Elec. Data Sys. Corp.*, 141 A.D.2d 514, 516 (2d Dep't 1998). Additionally, "statements made by an employer/supervisor reviewing or evaluating the performance of an employee" are privileged. *Kasachkoff v. City of New York*, 107 A.D.2d 130, 134 (1st Dep't 1985).

Here, plaintiff has failed to set forth with specificity the particular words complained of. Apart from a general allegation that the memoranda referenced above were defamatory in nature, the complaint is devoid of any specificity at all with regard to this claim. Moreover, the memoranda referenced in the complaint are privileged, as they are all written in the context of McCabe, as a supervisor, reviewing the performance of Ryan, as his employee. Thus, the claim must be dismissed.

Finally, plaintiff has failed to state a cause of action for violation of the CBA. "It is well established that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court." *Cantres v. Bd. of Educ.*, 145 A.D.2d 359, 360 (1st Dep't 1988). In fact, plaintiff must exhaust the remedies available under the CBA before commencing an action in court. *See id.* Here, since the plaintiff has failed to demonstrate that he exhausted the remedies available to him under the controlling CBA, plaintiff cannot commence an action in this court. Accordingly, plaintiff's claim is dismissed.

Plaintiff's cross-motion to extend the time to file a late notice of claim is denied. Education Law § 3813(2-b) prohibits the commencement of an action against the BOE or its employees more than one year after the cause of action arose. Here, with the exception of three incidents which occurred after October 23, 2008, most of the claims are time barred as they are based upon incidents that occurred more than one year before the commencement of the instant action. Moreover, as previously discussed, the remaining claims that are not time barred do not state a valid cause of action.

Plaintiff's cross-motion to amend the complaint is also denied. "Although leave to amend a pleading should be 'freely' granted, the motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." *Nab-Tern Constructors v. City of New York*, 123 A.D.2d 571, 572 (1st Dep't 1986). Here, the only additional evidence offered by plaintiff is an additional memorandum to file drafted by McCabe addressing plaintiff's unprofessional behavior. The addition of this memorandum does not cure plaintiff's failure to state a valid cause of action. Therefore, plaintiff's cross-motion is denied.

Accordingly, the City's motion to dismiss the complaint is granted, the BOE's motion to dismiss the complaint is granted, McCabe's motion to dismiss the complaint is granted and plaintiff's cross-motion is denied. This constitutes the decision and order of the court.

Dated: 5/28/10 Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.