

**Brazill v Elmont Union Free School Dist.**

2010 NY Slip Op 32383(U)

August 25, 2010

Supreme Court, Nassau County

Docket Number: 012272/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

TRIAL/IAS PART 20

**Justice.**

X

KEVIN BRAZILL,

Plaintiff,

Index No.: 012272/09

Motion Sequence...01

- against-

Motion Date...06/15/10

ELMONT UNION FREE SCHOOL DISTRICT,

Defendant.

X

Papers Submitted:

Notice of Motion .....X

Memorandum of Law in Support.....X

Affidavit in Opposition.....X

Reply Affirmation.....X

Reply Memorandum of Law in Support.....X

The Plaintiff seeks compensation for the Defendant's alleged wrongful termination of his employment on June 4, 2008. The Defendant, a public corporation as defined in the General Construction Law, moves to dismiss the Plaintiff's complaint based on the purported insufficiency of the Plaintiff's Notice of Claim and the Plaintiff's failure to state a claim on the four causes of action alleged in his complaint.

## **Factual Background**

The Plaintiff was employed by the Defendant between June of 2007 and June of 2008. The Plaintiff's period of employment was pursuant to a collective bargaining agreement entitled, "Board of Education Elmont Union Free School District and Custodian Association of Elmont". The Plaintiff claims in his complaint that during his employment, he was "required/ordered to perform multiple assignments involving the removal of asbestos while school was in session and without the Plaintiff's knowledge, consent, proper training, safety equipment, and without first properly abating said asbestos". *See* Plaintiff's Complaint, ¶ 8, attached to Defendant's Affirmation in Support as Exhibit "A". The Plaintiff's complaint alleges that the Defendant knowingly subjected the Plaintiff, other employees and students to the risk of harm. *Id.* at ¶ 9. The Plaintiff further claimed that he timely notified the Defendant of the condition in order for the Defendant to properly address the situation. *Id.* at ¶ 10. Upon the Defendant's failure to address the problem, the Plaintiff claims that he called the Department of Labor, or other "proper authorities", to report the Defendant's "abusive and dangerous practice" and that thereafter, the Plaintiff was wrongfully terminated on June 4, 2008. *Id.* at ¶ 11. The Plaintiff claims that he, as well as other employees and students, may have been exposed to asbestos between June, 2007 and May, 2008 at certain premises within the Elmont Union Free School District.

The Plaintiff pleads the following causes of action in his complaint: (1) whistleblower; (2) wrongful termination; (3) breach of contract; and (4) violation of civil

rights.

Prior to the commencement of this action, on or about August 1, 2008, the Plaintiff, by and through his attorney, filed and timely served a Notice of Claim. *See* Notice of Claim, dated August 1, 2008, attached to the Defendant's Affirmation in Support as Exhibit "B". The Notice of Claim placed the Defendant on notice that the Plaintiff intended to commence an action for wrongful termination and for damages suffered due to his alleged exposure to asbestos. The Plaintiff's counsel stated in the Notice of Claim that the Plaintiff was forced to be exposed to asbestos despite his objections. Notably, the Notice of Claim states that the Plaintiff was wrongfully terminated "when he refused to repair plumbing that was covered with asbestos and that no steps were taken by the Defendant to safeguard the health of the Plaintiff, other employees or the students. The Notice of Claim further states the following:

"Mr. Brazil will be seeking \$1,000,000.00 in compensatory damages for his loss of future earnings and personal injuries and \$2,000,000.00 in punitive damages, for the school district's abhorrent and illegal behavior, for which the school district was fined by the Department of Labor (Exhibit B)."

*See* Notice of Claim. Inexplicably, neither the Plaintiff nor the Defendant attached the document purportedly labeled as Exhibit "B" referenced in the Plaintiff's Notice of Claim. However, attached as Exhibit "I" to the Plaintiff's Affirmation in Opposition is a letter dated May 28, 2008, from the New York State Department of Labor addressed to Robert Geras, regarding a civil penalty that was imposed on the Defendant after an asbestos

related investigation. The letter dated May 28, 2008 establishes that the investigation was prompted by the Plaintiff's complaints. See letter dated May 28, 2008 from NYS Dept. of Labor attached to the Plaintiff's Affirmation in Opposition as Exhibit "I", page 2, "Inspector's Observations".

The Defendant now moves to dismiss the Plaintiff's first, third and fourth causes of action (whistleblower, breach of contract and civil rights, respectively) for his failure to reference these claims in the Notice of Claim. The Defendant also moves to dismiss the Plaintiff's wrongful termination, breach of contract and civil rights causes of action pursuant to the election of remedies provision contained within Labor Law § 740 (7). The Defendant argues that the Plaintiff's wrongful termination claim must also be dismissed based upon there being no cognizable cause of action in New York for the wrongful discharge of an "at-will" employee.

#### **Standard of Review**

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), the court must determine whether, from the four corners of the pleading, "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law". *Salvatore v. Kumar*, 45 A.D.3d 560 (2nd Dept. 2007), *lv to app den.* 10 N.Y.3d 703 (2008), quoting *Morad v. Morad*, 27 A.D.3d 626, 627 (2nd Dept. 2006). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable

inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, “[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’ ”. *Garber v. Board of Trustees of State Univ. of N.Y.*, 38 A.D.3d 833, 834 (2nd Dept. 2007), quoting *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999).

In assessing a motion under CPLR § 3211(a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. Where, as here, extrinsic evidence is used, the standard of review on a CPLR § 3211 (a) (7) motion is whether plaintiffs have a cause of action, not whether they have stated one. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 (1977).

## LEGAL ANALYSIS

### *I. Notice of Claim*

#### *A. Sufficiency of Notice of Claim as to Plaintiff’s Whistleblower Claim*

In determining whether there has been compliance with the requirements of General Municipal Law § 50-e (2), courts should focus on whether the notice of claim included information sufficient to enable the municipal defendant to investigate the claim and whether, based on the claimant’s description, municipal authorities could locate the place, fix the time, and understand the nature of the accident. *Brown v. City of New York*, 95 N.Y.2d 389, 393 (2000); *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 (1981). Furthermore,

General Municipal Law § 50-e (6) provides that a “mistake, omission, irregularity or defect” in the notice of claim may be “corrected, supplied or disregarded” in the court's discretion, provided that two conditions are met. First, the mistake, omission, irregularity, or defect must have been made in good faith, and second, it must appear that the public corporation was not prejudiced thereby. *D'Alessandro v. New York City Tr. Auth.*, 83 N.Y.2d 891, 893 (1994); *Palmieri v. New York City Tr. Auth.*, 288 A.D.2d 361, 362 (2nd Dept. 2001); *Cyprien v. New York City Tr. Auth.*, 243 A.D.2d 673, 674 (2nd Dept. 1997).

In passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself. In making the determination of prejudice, the court may look to evidence adduced at a hearing held pursuant to General Municipal Law § 50-h, and to such other evidence as is properly before the court. *D'Alessandro, supra*, 83 N.Y.2d at 893. Whether the notice of claim substantially complies with the requirements of the statute depends on the circumstances of each case. *Schwartz v. City of New York*, 250 N.Y. 332, 335 (1929).

Here, the Plaintiff stated in his Notice of Claim that he was wrongfully terminated based upon his refusal to perform tasks that involved unlicensed asbestos removal. In the Notice of Claim, the Plaintiff references a letter by the New York State Department of Labor which indicates that the Plaintiff was the complainant regarding the alleged unlicensed asbestos removal that was occurring at the Defendant's premises. *See* letter dated May 28, 2008 from NYS Dept. of Labor attached to Plaintiff's Affirmation in

Opposition as Exhibit “I”. The letter also establishes that after the New York State Department of Labor conducted an investigation into the complaints, the Defendant was fined a civil penalty. *Id.* These facts, taken together with the essential facts in the Notice of Claim, were sufficient to allow the Defendant to investigate the facts and circumstances surrounding the Plaintiff’s claim pursuant to New York’s Whistleblower statute. Further, the Defendant conducted an examination pursuant to General Municipal Law § 50-h of the Plaintiff on December 12, 2008 and January 27, 2009. Any defects in the Notice of Claim with respect to the Plaintiff’s whistleblower claim could have been cured at the Plaintiff’s 50 (h) examination. While the Plaintiff did not specifically reference the “whistleblower” claim, the Defendant had notice of the essential facts constituting the Plaintiff’s claim.

Additionally, the Defendant fails to establish what prejudice, if any, it suffered as a result of the purported defect in the Plaintiff’s Notice of Claim. It appearing that the mistake, omission, irregularity, or defect was made in good faith and that the Defendant was not prejudiced thereby, this Court finds that the Plaintiff’s claim pursuant to New York’s whistleblower statute should not be dismissed on these grounds.

B. Sufficiency of Notice of Claim as to Plaintiff’s Remaining Causes of Action

At the outset, the Plaintiff’s cause of action for wrongful termination was clearly set forth in his Notice of Claim, and, as such, will not be dismissed on these grounds. The Plaintiff’s breach of contract claim, however, must fail due to the Plaintiff’s failure to refer to the breach of contract claim in his Notice of Claim. “The addition of such causes of

action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims". *DeMorcy v. City of New York*, 137 A.D.2d 650, 651 (2nd Dept. 1988); *Rice v. New York City Hous. Auth.*, 149 A.D.2d 495 (2nd Dept. 1989). Under New York law, any cause of action or theory of liability not directly or indirectly mentioned in a notice of claim against a municipality may not be included in a subsequent lawsuit. *Colena v. City of New York*, 68 A.D.2d 898 (2nd Dept. 1979).

The Plaintiff's argument that he is under no obligation to specifically set forth his causes of action and is only required to state the nature of his claim does not save the breach of contract claim. As noted by the Defendant, the Notice of Claim makes no mention of an existing contract or collective bargaining agreement between the Plaintiff and the Defendant that was breached. The breach of contract claim was not referenced either directly or indirectly in the Notice of Claim and it cannot be inferred from the Plaintiff's theory based upon wrongful termination. Further, the fact that the breach of contract claim arose out of the same incident is not pivotal; rather, the nature of the claim and the theory of liability are determinative. *Murphy v. County of Nassau*, 84 A.D.2d 577 (2nd Dept. 1981). Therefore, that branch of the Defendant's motion which seeks to dismiss the third cause of action of the Plaintiff's complaint which was not specified in the original Notice of Claim is hereby

**GRANTED.**<sup>1</sup>

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<sup>1</sup> The Court notes that the Plaintiff's breach of contract claim based upon the collective bargaining agreement would have been dismissed notwithstanding his failure to reference this cause of action in the Notice of Claim. Pursuant to Labor Law § 740 (7) "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies

Although not a model of clarity, the Plaintiff attempted to plead in his complaint a fourth cause of action entitled “Violation of Civil Rights”. The sole substantive paragraph setting forth this cause of action states, “The Defendant violated the Civil Rights of the Plaintiff pursuant to the New York State Constitution and its laws, including but not limited to New York State Human Rights Laws and New York Labor Law.” See Plaintiff’s Complaint, ¶ 29, attached to Defendant’s Notice of Motion as Exhibit “A”. To the extent that the Plaintiff sought to plead a cause of action pursuant to New York Executive Law § 296, the failure to refer to any civil rights violations in his Notice of Claim is fatal to this claim. *Mills v. County of Monroe*, 59 N.Y.2d 307, (1983) cert. denied 464 U.S. 1018 (1983). Although the United States Supreme Court has recently interdicted application of such state requirements to Federal civil rights actions brought under 42 U.S.C. § 1983, this holding was based on preemption under the Supremacy Clause (see, *Felder v. Casey*, 487 U.S. 131, 134 [1988]), and thus, overrules *Mills v. County of Monroe*, supra, only with regard to Federal claims. Accordingly, the branch of the Defendant’s motion which seeks to dismiss the Plaintiff’s “civil rights” claim, which was not referenced directly or indirectly in the Plaintiff’s Notice of Claim, is **GRANTED**.

In light of the foregoing, the Court will now address the sufficiency of the Plaintiff’s complaint with respect to his Whistleblower claim (first cause of action) and wrongful termination claim (second cause of action).

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available under any other contract [or] collective bargaining agreement”.

## II. Wrongful Termination

The Defendant argues that the Plaintiff, as an at-will employee of the Defendant, cannot sustain a cause of action for wrongful termination because the Defendant may freely terminate an employee at any time, for any reason. *See* Defendant's Memorandum of Law in Support of its Motion to Dismiss at page 10. It is not disputed that the collective bargaining agreement governed the terms of the Plaintiff's employment while he was employed by the Defendant. Although the Plaintiff's employment was governed by a collective bargaining agreement, the Plaintiff does not specifically refute the Defendant's allegation that he was an employee "at-will". The Plaintiff has not alleged any facts to suggest the "existence of a limitation by expressed agreement". *Weiner v McGraw-Hill Inc.*, 57 N.Y.2d 458 (1982). Indeed, from a review of the collective bargaining agreement, it appears that there is no express condition limiting the employer's power to discharge "at-will" employees (i.e. that the employee shall only be discharged for cause). Therefore, this Court finds that the Plaintiff was an employee "at-will", subject to discharge at any time. New York courts have consistently declined to recognize a separate and distinct cause of action in tort for wrongful discharge of an "at-will" employee. *Leibowitz v. Bank Leumi Trust Co. of New York*, 152 A.D.2d 169 (2nd Dept. 1989).

Accordingly, the Plaintiff's second cause of action for wrongful termination is **DISMISSED**.

### III. Labor Law § 740

To maintain an action under the Whistleblower Law, an employee must allege that an employer took retaliatory action against the employee because: (1) the employee threatened to disclose that his employer violated a law, rule or regulation and the alleged violation creates and presents a substantial and specific danger to the public health or safety, (2) the employee provided information to an investigating public body regarding such an allegation, or (3) the employee objected to participating in the alleged violation. New York Labor Law § 740(2); *See also Hogan v. 50 Sutton Place South Owners, Inc.*, 919 F.Supp. 738 (S.D.N.Y. 1996).

To sustain a cause of action to recover damages under Labor Law § 740, an employee must, inter alia, plead and prove that the employer engaged in an activity, policy, or practice that constituted an actual violation of law, rule, or regulation. *Bordell v. General Elec. Co.*, 88 N.Y.2d 869, 871 (1996); *Khan v. State University of New York Health Science*, 288 A.D.2d 350 (2nd Dept. 2001).

The Plaintiff's complaint unequivocally states that while an employee of the Defendant, he reported activity to his superiors that posed a danger to the health and safety of employees and students in the School District. *See* Plaintiff's Complaint, ¶¶ 8-11. The complaint further alleges that the Plaintiff called the Department of Labor to report the alleged illegal activity and that thereafter, he was wrongfully terminated. *Id.* The conduct complained of by the Plaintiff was in fact "an activity, policy, or practice that constituted an

actual violation of law, rule, or regulation” as evidenced by the letter dated May 28, 2008 from the Department of Labor. Specifically, the letter establishes that an investigation into the Plaintiff’s complaints revealed violations of Article 30 of the New York State Labor Law and/or Code Rule 56. *See* letter dated May 28, 2008 from NYS Dept. of Labor attached to Plaintiff’s Affirmation in Opposition as Exhibit “I”.

Examining the Plaintiff’s complaint in the light most favorable to him, this Court declines to dismiss the complaint with respect to the Plaintiff’s whistleblower claim at this early stage of the litigation. The Plaintiff’s claim, pursuant to New York’s whistleblower statute, was sufficiently pled for purposes of stating a claim upon which relief can be granted.

Accordingly, it is hereby

**ORDERED**, that the Defendant’s motion to dismiss the Plaintiff’s second, third and fourth causes of action is hereby **GRANTED**; and it is further


**ORDERED**, that the branch of the Defendant’s motion seeking to dismiss the Plaintiff’s first cause of action, pursuant to Labor Law § 740, is **DENIED**; and it is further

**ORDERED**, that the parties are directed to appear for a Preliminary Conference on **September 22, 2010 at 9:30 AM** at 100 Supreme Court Drive, Mineola, New York.

The Plaintiff’s remaining contentions are without merit.

This constitutes the decision and order of the Court.

Dated: Mineola, New York  
August 25, 2010

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
AUG 30 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE