

**Miller v City of New York**

2011 NY Slip Op 30635(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 112216/09

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Miller, Adam

INDEX NO. 112216109

MOTION DATE 3/23/10

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

Cites

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the amended memorandum decision and order.

W.B. -- Preliminary Conference is scheduled for 5/2/11 at 11 A.M.

**FILED**

MAR 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/16/11

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

----- X

ADAM MILLER,

Plaintiff,

Index No. 112216/09

-against-

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, JOEL KLEIN, as Chancellor of the NEW YORK CITY DEPARTMENT OF EDUCATION, OLGA LIVANIS, Principal of NEST+M School of the NEW YORK CITY DEPARTMENT OF EDUCATION, MICHAEL KONDOS, Investigator for the OFFICE OF SPECIAL INVESTIGATION of the NEW YORK CITY DEPARTMENT OF EDUCATION, and LISA HYMAN, Human Resources Partner for the DIVISION OF HUMAN RESOURCES of the NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

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Jane S. Solomon, J.:

Plaintiff pro se Adam Miller (Miller) sues the City of New York, the New York City Department of Education (DOE), and others associated with the DOE, in connection with the job he held as a high school English teacher at a school called New Explorations into Science Technology & Math (NEST+M). The City moves to dismiss the amended complaint "on the grounds that (1) the Court lacks personal jurisdiction over certain defendants; (2) the Amended Complaint fails to state a cause of action for defamation; (3) plaintiff failed to file a notice of claim on the basis of a prima facie tort, tortious interference, defamation and libel, and intentional and negligent infliction of emotional

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distress; (4) the Amended Complaint is in part time-barred; (5) the City of New York is not a proper party to this action; and (6) the Amended Complaint fails to state a cause of action for age discrimination and prima facie tort, . . . ”.

The City's motion does not include a copy of the Amended Complaint as an exhibit; the Court obtained a copy from the Clerk's file. The amended complaint has seven causes of action: prima facie tort, breach of contract, tortious interference, conspiracy, defamation, intentional and negligent infliction of emotional distress, and age discrimination.

The claims arise from DOE's efforts to terminate Miller's employment as a teacher. In 2009, Miller commenced an Article 78 proceeding to challenge his termination. Miller prevailed in the Article 78 proceeding, and the DOE was ordered to reinstate his employment (see, *Miller v DOE*, 2010 N.Y. Lexis 2348 (N.Y. County Supreme Ct, May 11, 2010, New York County index number 117204/08)). At a conference in Part 55 in November 2010, Miller and the DOE settled his claim for back pay (without prejudice to his claims in this action), and he was to resume teaching as a DOE employee.

The facts regarding his 2008 termination are set forth in two decisions in the Article 78 proceeding, dated August 11, 2009 and May 11, 2010 (together, the Article 78 Decisions). Briefly stated, Miller received poor performance ratings from the

NEST+M principal, defendant Olga Livanis (Livanis). Livanis induced him to offer his resignation in return for an upgrade of his rating for the 2007-2008 school year from "Unsatisfactory" to "Satisfactory", which would allow him to transfer to another DOE school and continue teaching. According to Miller, he submitted a resignation from NEST+M for the 2008-2009 school year, but Livanis rejected it, writing to him that he needed to resign from the DOE without limitation. Miller subsequently learned that Livanis had consulted with a DOE employee, defendant Linda Hyman (Hyman), who advised Livanis to reject the resignation.

Miller refused to change the terms of his resignation. Livanis, however, continued to process the resignation without telling him. She also gave him an "Unsatisfactory" rating and secretly filed a disciplinary charge against him. Miller learned that Livanis processed his resignation when he reported for work on August 26, 2008. He then wrote a letter to Livanis purporting to withdraw the resignation. Livanis told Miller that she had to consult with someone about the withdrawal letter before responding; she did not say who, but Miller believes she consulted with defendant Michael Kondos (Kondos), an investigator for the DOE Office of Special Investigation. Livanis and the DOE did not respond to the withdrawal letter, and Miller was terminated from DOE employment effective August 28, 2008.

[\* 5]  
On November 25, 2008, Miller filed a notice of claim (Notice of Motion, Ex. 2). The notice of claim is based upon the refusal by DOE and Livanis to accept the withdrawal of his resignation. In addition to seeking reinstatement and back pay, he claimed damages for harm to his professional reputation and "ongoing emotional pain and suffering" (*id.*, paragraph 5).

This action was commenced by filing on August 26, 2009. It would appear that Miller made a motion requesting that his time to file and serve a supplemental summons and complaint be extended, which motion was granted by order of Justice Schoenfeld of this court (Order, Notice of Motion, Ex. 3). The order permitted Miller until April 20, 2010 to file the supplemental summons with the clerk, to serve the original and amended summons and complaint on defendants, and to file an affidavit of service of same. Later, the action was transferred to join the Article 78 proceeding already before me.

In support of defendants' claim that Miller has not obtained personal jurisdiction over the individual defendants, they submit Livanis's affidavit, in which she admits that she received a copy of the original complaint from a school secretary in December 2009, and she received a copy of the supplemental summons and the original complaint in the mail on or about April 20, 2010. She denies receiving the amended complaint.

In opposition, Miller submits an affidavit of service, dated April 12, 2010, showing that a supplementary summons, summons, order and verified complaint were delivered to a person of suitable age and discretion named "Cecilia" at Livanis's actual place of business, the NEST+M main office, and the papers were mailed to Livanis at NEST+M the same day. Another affidavit of service states that an amended verified complaint was delivered to a person of suitable age and discretion named Lisa Wigfal at the NEST+M main office and mailed to Livanis the same day. Miller avers that the affidavits of service were filed with the Clerk. Miller also provides United States Post Office certificates showing letters were mailed to defendants Kondos and Hyman.

#### DISCUSSION

Miller concedes that the City is not a proper party to this action, and that his complaint does not state a cause of action for unlawful age discrimination.

That part of defendants' motion to dismiss the complaint as against the individual defendants for lack of personal jurisdiction is granted with respect to Kondos and Hyman, because there is no proof of service upon them apart from the certificates of mailing. CPLR 308 describes the manner in which a summons and complaint must be served on an individual for

\* 7]

the court to obtain personal jurisdiction, and simply mailing the summons and complaint is not sufficient. However, Miller substantially complied with Justice Schoenfeld's order with respect to Livanis. She admits having received copies of the original and amended complaints, and receiving the supplemental summons, all before the time frame in Justice Schoenfeld's order had expired. The affidavit of service states that the supplemental summons, the amended complaint and the original complaint were delivered to Livanis's actual place of business as well, which she does not deny.<sup>1</sup> While there is a factual dispute as to whether the envelope sent to Livanis also included the amended complaint, the papers she admits receiving are sufficient to put her on notice that she was being hailed into court and of the nature of his claim against her.

Turning to the substance of Miller's claims, defendants correctly argue that the amended complaint does not state a cause of action for defamation. The amended complaint does not set forth with particularity the offending statement, or the time, place and manner of such statement (see, CPLR 3016[a], and *Dillon v City of New York*, 261 AD2d 34 [1<sup>st</sup> Dept 1999]). To the extent that statements by Livanis are specified, they are not defamatory, rather they are reflections of her opinion as a

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<sup>1</sup> Livanis also does not deny that the people to whom papers were delivered, as identified in the affidavits of service, were people of suitable age and discretion who worked in her office.

school principal that Miller was not a satisfactory teacher. Accordingly, the defamation and libel claims are dismissed.

Miller also fails to state a claim for negligent or intentional infliction of emotional distress. The alleged conduct complained of may be described as boorish, underhanded and dishonest, but it does not rise to the level of extreme and outrageous conduct necessary to support this cause of action (see, *Howell v New York Post Co. Inc.*, 81 NY2d 115 [1993]). This claim also is dismissed.

Miller's fourth cause of action, for conspiracy, alleges conspiracies between Livanis and Kondos, and between Livanis and Hyman. Livanis and Kondos allegedly conspired to place Miller on the DOE's ineligible list to prevent him from finding employment as a teacher, and to deprive him of his teaching position by "speciously" accepting his letter of resignation and refusing to accept his recision of the resignation. Livanis and Hyman allegedly conspired to fabricate a basis for giving Miller an "Unsatisfactory" rating.

There is no independent cause of action for civil conspiracy in New York (*Ferguson v Meridian Dist. Services, Inc.*, 155 AD2d 642 [2d Dept 1989]), although a conspiracy may provide a basis for tort liability where a defendant engaged in a common scheme to injure the plaintiff with a codefendant against whom there is an independent tort claim (*id.*, and see, *Small v*

*Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). The conspiracy cause of action in this case is offered as a basis for holding Kondos and Hyman liable. The complaint is dismissed as against these defendants for lack of personal jurisdiction (*supra*); this cause of action would be dismissed in any event, because the alleged participation by Kondos and Hyman is too peripheral and speculative for conspiracy liability to attach.

Defendants' motion does not address Miller's claim against Livanis for tortious interference with contractual rights.<sup>2</sup> "The elements of a tortious interference with contract claim are well settled -the existence of a valid contract, the tortfeasor's knowledge of the contract, and intentional interference with it, the resulting breach and damages" (*Hoag v Chancellor, Inc.*, 246 AD2d 224 [1<sup>st</sup> Dept 1998]). Miller has alleged facts sufficient to preserve this claim. Livanis is said to have intentionally sought to deprive Miller of his employment by misleading him, and by manipulating the procedures for evaluating employees and processing resignations. That she was aware that Miller was employed subject to the terms of a collective bargaining agreement between his union and the DOE may be inferred. A breach and resulting damages may be inferred from

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<sup>2</sup> Defendants' only opposition to the tortious interference claim is that it was not mentioned in the notice of claim served on City; Livanis does not enjoy the benefit of this defense in her individual capacity (see, General Municipal Law § 50-e).

the termination of Miller's employment and his subsequent reinstatement as the result of the Article 78 proceeding. Accordingly, the motion is denied with respect to the tortious interference with contract claim against Livanis. To the extent that the prima facie tort claim against Livanis states a cause of action, it duplicates the tortious interference claim and is dismissed. Accordingly, it hereby is

ORDERED that the motion to dismiss is granted as to all defendants except Livanis, against whom all claims are dismissed except for the tortious interference claim; and it further is

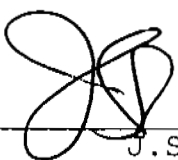
ORDERED that the Clerk shall sever and dismiss the complaint as against defendants City of New York, New York City Department of Education, Joel Klein, Michael Kondos and Lisa Hyman; and it further is

ORDERED that Livanis shall serve and file an answer within twenty days of service of a copy hereof with notice of entry; and it further is

ORDERED that Miller and Livanis, or their counsel, shall appear in Part 55, 60 Centre Street, Room 130, New York, NY, for a preliminary conference on May 2, 2011 at 11 AM.

Dated: March 16, 2011

ENTER:

  
\_\_\_\_\_  
J.S.C.

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