

Cadely v City of New York

2011 NY Slip Op 30707(U)

March 24, 2011

Sup Ct, NY County

Docket Number: 105558/08

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 105558/2008

CADELY, DUNEL

VS.

DEPARTMENT OF TRANSPORTATION

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 105558/08

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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 attached decision.

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

FILED

MAR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/24/11

PJK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X
DUNEL CADELY,

Plaintiff,

Index No. 105558/08

-against-

DECISION/ORDER

THE CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION,

FILED

Defendant.

MAR 25 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

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.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover back wages allegedly owed to him by The New York City Department of Transportation ("DOT"). DOT now moves for summary judgment dismissing plaintiff's Complaint on the grounds of res judicata and that plaintiff was no longer in "service" during the time for which he seeks back wages. For the reasons set forth below, the DOT's motion is granted solely to the extent of dismissing any claim for back wages beyond the date of August 4, 2005.

The relevant facts are as follows. Plaintiff is a former Highway Repairer employed by the DOT. Plaintiff was selected for layoff from the position of Highway Repairer in May 2003. On

October 18, 2004, plaintiff commenced an action in the United States District Court for the Southern District of New York against the DOT alleging race discrimination in connection with the May 2003 layoff. On or about August 4, 2007, that action was discontinued due to a settlement stipulation between plaintiff and the DOT, with the DOT agreeing to pay plaintiff the sum of \$240,000.00 which encompassed back wages for the period from May 17, 2003 to August 4, 2005. In consideration of the payment of the settlement amount, plaintiff executed a General Release releasing and discharging the DOT from any and all claims which were or could have been alleged by him from the beginning of the world through and including the date of August 4, 2007. The General Release carved out an exception, however, providing that “[n]othing herein contained shall be deemed to waive any rights or entitlements to which [plaintiff] might be entitled for a Back Wage Claim as defined in Paragraph 1(b) of the Stipulation and Order of Settlement of Discontinuance executed by the parties simultaneously herewith.” Paragraph 1(b) of the Stipulation and Order provides the following:

Notwithstanding the general nature of this Release, the parties agree that this Release shall not affect nor waive any claims of plaintiff, DUNEL CADELY, to any monies to which he might otherwise be entitled as a Back Wage Claim pursuant to an agreement reached between Local 376 and the NEW YORK CITY DEPARTMENT OF TRANSPORTATION pursuant to which Highway Repairers employed by the NEW YORK CITY DEPARTMENT OF TRANSPORTATION were to receive retroactive monies based upon the new hourly rate of pay for Highway Repairers from July 1, 2002. Nothing herein contained shall be deemed an admission by the DEPARTMENT OF TRANSPORTATION that plaintiff, DUNEL CADELY, is entitled to any monies or any additional monies arising out of said agreement, but the execution of this Release shall not, in any way, limit DUNEL CADELY’s entitlement thereunder.

On April 12, 2007, plaintiff’s former labor union and the City of New York entered into a

final Consent Determination. The Consent Determination provided that certain employees of the City of New York serving in the title of Highway Repairer could receive a retroactive pay increase. Specifically, the Consent Determination stated that

- i) The foregoing basic rates of wages and supplemental benefits are due and payable to each and every employee of the City of New York, et al., serving in the above-referenced titles [Highway Repairers] beginning as of the effective date of the complaint filed herein [July 1, 2002], and shall be applicable to all employees of the City of New York, et al., serving in the above-referenced titles [Highway Repairers] who are represented by the Complainant.

Pursuant to this agreement, plaintiff was paid the sum of \$13,458.46 representing a retroactive pay increase for the period July 1, 2002 through June 30, 2003.

Subsequently, on June 4, 2008, plaintiff requested that his former labor union bring a grievance on his behalf for additional back wages to which plaintiff alleged he was entitled for work as a Highway Repairer after June 30, 2003. On June 6, 2008, counsel for plaintiff's former labor union responded to plaintiff's request by declining to file a grievance on his behalf, stating that plaintiff was not entitled to any additional back wages for time beyond his last date of service as a Highway Repairer, which, according to plaintiff's former labor union, was May 17, 2003. Plaintiff then brought the instant action against the DOT, alleging that the DOT owes him monies pursuant to the retroactive pay raise stemming from the April 12, 2007 Consent Determination, for the period of time from July 1, 2003 until June 19, 2007.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any

