Dingle v New York City Hous. Auth.

2011 NY Slip Op 32481(U)

September 12, 2011

Supreme Court, New York County

Docket Number: 0114870/10

Judge: Joan M. Kenney

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SCANNED ON 9/20/2011

[* 1]

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

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 114870/2010

DINGLE, ANTHONY

vs.

NYC HOUSING AUTHORITY

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 114870/10

MOTION DATE 6/17/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + Memo of Law	1-6
Answering Affidavits — Exhibits X Motion + Memo of Law	7-14
Replying Affidavits Supp Aff in Support + Exhibits	15-20
	21

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 20 2011

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/12/11

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8
--------------------------------------x
ANTHONY DINGLE,
Plaintiff,

Decision & Order
Index No.: 114870/10

-against-

NEW YORK CITY HOUSING AUTHORITY and
DEMETRICE GADSON,
Defendants.
--------------------------------------x

JOAN M. KENNEY, J.:

FILED
SEP 20 2011
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of these motions:

Papers	**Numbered**
Notice of Motion and Aff.	1-2
Exhibits	3-5
Memorandum of Law	6
Notice of Cross Motion & Aff.	7-8
Exhibits	9-13
Memorandum of Law	14
Supp. Aff. in Support & Exhibits	15-20
Reply Memorandum of Law	21

Defendants, New York City Housing Authority (NYCHA) and Demetrice Gadson (Gadson) move, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the complaint.

Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to amend the complaint.

FACTUAL & PROCEDURAL BACKGROUND and ARGUMENTS

According to NYCHA employment records, plaintiff started his employment with NYCHA in July, 1990, as a maintenance worker, was provisionally appointed to the title of Resident Buildings Superintendent (Superintendent) in August of 2000, and was assigned to East River Houses, a NYCHA development located in Manhattan. Motion, Ex. A. In February of 2004, plaintiff was transferred to

Audubon Houses, another NYCHA development in Manhattan. *Id.* Plaintiff obtained a permanent civil service appointment to the title of superintendent in July, 2004. *Id.*

In November, 2004, plaintiff began reporting to Gadson, a Deputy Director in NYCHA's Manhattan Management Department. Complaint, ¶ 10. In early 2007, plaintiff was transferred to NYCHA's Polo Grounds Towers and continued to report to Gadson. Complaint, ¶ 11. Effective June 28, 2010, plaintiff commenced a workers' compensation leave of absence, returning to work on September 23, 2010, at which time he was assigned to King Towers, another NYCHA development in Manhattan. Motion, Ex. A. Gadson stopped supervising plaintiff at the end of June, 2010.

In January of 2010, plaintiff commenced an action against the City of New York (City), NYCHA and Gadson in the United States District Court for the Southern District of New York, alleging that City, NYCHA and Gadson retaliated against him for his complaints of alleged matters of public concern, such as his workload, development staffing and Gadson's supervision, as well as acts of corruption on the part of Gadson, complaining that he was deprived of his fundamental liberty rights without due process of law. In his federal complaint, plaintiff also asserted causes of action for defamation and violation of rights pursuant to Labor Law §§ 740 and 741, and New York Civil Service Law (CSL) § 75-b.

On June 16, 2010, plaintiff served a notice of claim on NYCHA

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and Gadson. Motion, Ex. B. In his notice of claim, plaintiff alleges injuries resulting from the following:

> "The allegations herein are in the nature of a continuing violation of defamation and retaliation committed by the NEW YORK CITY HOUSING AUTHORITY its agents, servants, and/or employees, including, but not limited to, DEMETRICE GADSON which began on June 2007 and with the most recent publication being on the 21st day of April, 2010 in an email published to NEW YORK HOUSING AUTHORITY supervisory personnel.
> Upon information and belief, THE NEW YORK CITY HOUSING AUTHORITY its agents, servants, and/or employees, including, but not limited to, DEMETRICE GADSON made statements that were maliciously, negligently and/or with the knowledge that said statements were false or with reckless disregard for the truth. The THE NEW YORK CITY HOUSING AUTHORITY its agents, servants, and/or employees, including, but not limited to, DEMETRICE GADSON have consistently attacked claimant ANTHONY DINGLE'S character in continually publishing and re-publishing false statements concerning claimant, ANTHONY DINGLE'S performance and character during his tenure while employed by the THE NEW YORK CITY HOUSING AUTHORITY in the form of numerous Counseling Memoranda alleging 'incompetence' and/or 'misconduct' during the years of claimant's tenure from 2007 to the present. THE NEW YORK CITY HOUSING AUTHORITY its agents, servants, and/or employees, including, but not limited to, DEMETRICE GADSON have also taken retaliatory disciplinary action against him in the form of ultimately charging him with two (2) days accrued annual leave in February 2010."

In addition to the two days of annual leave that was charged against him, plaintiff alleges physical and emotional injuries resulting from the above-quoted actions.

On July 28, 2010, the federal court dismissed all of plaintiff's claims except for his First Amendment retaliation claim asserted against Gadson in her individual capacity. *Dingle v City of New York*, 728 F Supp 2d 330 (SD NY 2010).

The instant action was commenced on November 15, 2010.

Plaintiff alleges two causes of action in his complaint: (1) violation of New York Civil Code § 75 (b); and (2) libel per se asserted as against Gadson only. It is noted that plaintiff is still employed by NYCHA as a superintendent.

In the complaint, plaintiff alleges various incidents that he claims constituted retaliation and harassment for his complaints about Gadson's actions, which he characterizes as illegal with respect to managing NYCHA housing facilities. The complaint also lists various memoranda that Gadson sent to plaintiff regarding his job performance, and indicates the following specific statements made about plaintiff to others:

> "¶ 58. On or about October 22, 2009, upon Mr. Dingle's return to work, Mr. Dingle was told by a colleague, Ms. Latesha Harley, that Ms. Gadson had stated to her the previous day 'I did not know that I made men throw up,' and then laughed hysterically about the matter.
>
> * * *
>
> ¶ 60. On or about November 20, 2009, Gadson issued Mr. Dingle another formal Counseling Memorandum, falsely accusing him of using profanity, aggressive behavior, and charging towards her in a threatening manner, in a meeting the day before. The allegations in this complaint were utter fabrications. This memorandum was distributed to numerous NYCHA supervisory personnel.
>
> * * *
>
> ¶ 64. On or about April 21, 2010, in a further act of retaliation, Defendant Gadson sent a defamatory email to Mr. Dingle, with a 'cc' to all Housing Authority supervisory personnel, stating in bold, large font type that Mr. Dingle was 'incompeten[t],' that he 'failed to perform [his] duties,' and that he needed to 're-evaluate [his] responsibilities as a superintendent."

Defendants maintain that any cause of action asserted by plaintiff for alleged violations of CSL § 75-b or for libel per se

accruing prior to March 18, 2010, must be dismissed for lack of a timely served notice of claim. Defendants also claim that any alleged violation of CSL § 75-b accruing on or after March 18, 2010, must also be dismissed, because no such cause of action may be asserted against an individual, because no such cause of action was set forth in plaintiff's notice of claim, and because plaintiff failed to allege that he provided the appointing authority the information regarding Gadson's alleged violations of laws, rules and regulations. Lastly, defendants argue that plaintiff's libel per se claim asserted as against Gadson must be dismissed because plaintiff both failed to plead the alleged defamatory language with the requisite particularity and because plaintiff failed to allege such a cause of action in his notice of claim.

In opposition to the instant motion, and in support of his cross motion, plaintiff argues that NYCHA's pre-March 18, 2010 actions are still actionable pursuant to the continuing violation doctrine and that his notice of claim adequately identifies the conduct giving rise to his CSL § 75-b cause of action. In addition, plaintiff states that the notice of claim requirement is inapplicable to libel per se causes of action. Lastly, plaintiff maintains that, even if his causes of action are deemed to be improperly pled, he should be afforded the opportunity to amend the complaint.

In reply, defendants assert that plaintiff's arguments

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regarding the continuing violation doctrine must fail because he has failed to allege any ongoing policy or practice of discrimination to support that theory. Further, defendants state that the allegations of libel per se asserted as against Gadson are required to appear in a notice of claim because the acts alleged to have been committed by Gadson were all committed within the scope of her employment as a public official. Lastly, defendants oppose plaintiff's cross motion on the ground that any amendment would be futile, since no valid claim can be asserted.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
>
> * * *
>
> (7) the pleading fails to state a cause of action ... ."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

> "the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88)."

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To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

That branch of defendants' motion seeking to dismiss plaintiff's first cause of action alleging violations of CSL § 75-b, is granted.

In his opposition, plaintiff withdraws his cause of action based on a violation of CSL § 75-b asserted as against Gadson.

Plaintiff asserts that his claims are not time-barred under the continuing violation doctrine. Under this doctrine, which has been held to apply to harassment claims, "a continuing violation would exist if there had been a continuing policy that 'limited opportunities for ... participations in the work force, including policies related to 'hiring, assignment, transfer, promotion and discharge' [internal quotation marks and citation omitted]." *Williams v New York City Housing Authority*, 61 AD3d 62, 72 (1st Dept 2009). However, under the facts alleged by plaintiff, this doctrine is inapplicable to the case at bar.

In the first place, plaintiff has failed to allege a

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continuing policy on the part of NYCHA designed to harass him and create a hostile work environment. In the second place, the retaliatory acts complained of consist of employee work and job evaluations, and such memoranda are

> "not an employer action sufficiently adverse to support a retaliation claim, or one for constructive discharge. The memorand[a], although critical of plaintiff, did not threaten plaintiff with termination, and did not render plaintiff's employment so difficult or unpleasant that a reasonable person in [his] position would have felt compelled to resign [internal citations omitted]."

Nichols v Memorial Sloan-Kettering Cancer Center, 36 AD3d 426, 426 (1st Dept 2007).

And in the third place, plaintiff has provided not a shred of evidence of adverse employment action, since he remains an employee of NYCHA in the same position that he has held, he has not alleged that he was denied any promotion based on the memoranda or his "whistle blowing," nor has he alleged any details of new discrete acts to establish a continuing violation claim. *Donas v City of New York,* 62 AD3d 504 (1st Dept 2009).

Therefore, based on the foregoing, the court concludes that the continuing violation doctrine is inapplicable, rendering all acts complained of that occurred prior to March 18, 2010 time-barred, since plaintiff was required to file a notice of claim asserting such actions within 90 days of their occurrence. *O'Connor v Huntington U.F.S.D.,* 2011 NY Slip Op 6222, 2011 WL 3505767, 2011 NY App DIV LEXIS 6100 (2d Dept 2011).

In addition, the notice of claim failed to allege any CSL § 75-b claim, and "[c]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed." *Mazzilli v City of New York*, 154 AD2d 355, 357 (2d Dept 1989); *Kraja v New York City Transit Authority*, 57 AD3d 854 (2d Dept 2008).

Even if the court were to agree with plaintiff that the notice of claim, although not citing to CSL § 75-b, provided all of the underlying facts for such a claim so as to provide NYCHA with sufficient notice, plaintiff has failed to allege requisite elements of such cause of action, either in the notice of claim or the complaint.

> "In pertinent part, Civil Service Law § 75-b (2) (b) requires that prior to disclosing information to a governmental body, a public employee 'shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action."

Brohman v New York Convention Center Operating Corp., 293 AD2d 299, 299 (1st Dept 2002); *Hastie v State University of New York (SUNY) College of Agriculture & Technology at Morrisville*, 74 AD3d 1547 (3d Dept 2010).

Neither the complaint nor the notice of claim alleges that plaintiff reported Gadson's alleged misconduct to NYCHA's appointing authority.

In his opposition, plaintiff points out that the complaint

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states, in paragraph 31, that he filed a complaint against Gadson's alleged corrupt activities with the Housing Authority's Inspector General's Office (OIG). In support of his contention that this constitutes sufficient notification to NYCHA's appointing authority, plaintiff has provided a printout from the NYCHA website indicating that the OIG is supervised by the New York City Department of Investigation and is responsible for the investigation of any corrupt or criminal activity, and that persons doing business with NYCHA are encouraged to report information to that body. Opp., Ex. A. In addition, plaintiff has provided an unauthenticated document, headed "New York City Housing Authority Office of the Inspector General," which reminds all NYCHA employees to report corrupt or criminal activity to that office. Opp., Ex. B. This document further states that all whistle blowers will be protected from adverse action. Plaintiff contends that this notification constitutes a good faith effort to notify NYCHA's appointing authority.

Defendants assert that OIG is part of, and is supervised by, the Department of Investigation (Mayoral Executive Order Nos. 16 and 78), and is not an internal part of NYCHA; therefore, according to defendants, whereas OIG would constitute the governmental agency to whom such activities as those alleged by plaintiff to have been perpetrated by Gadson should be reported, the employee, to maintain a CSL § 75-b claim must still provide the information to NYCHA's

appointing authority, which is a three-member board. Mayoral Executive Order No. 105. Therefore, defendants assert that plaintiff has not met the prerequisite to maintain this action.

However, regardless of these arguments, as previously discussed, plaintiff has failed to evidence any adverse action, which is required pursuant to CSL § 75-b (2) (a), and so, for this reason, this cause of action must be dismissed.

It is also noted that, in the federal action, the federal court dismissed plaintiff's state claims based on a violation of CSL § 75-b for his failure to comply with the New York notice of claim requirements.

Based on the foregoing, that branch of defendants' motion seeking to dismiss plaintiff's first cause of action is granted.

That branch of defendants' motion seeking to dismiss plaintiff's cause of action asserted as against Gadson for libel per se is also granted.

> "[T]he complaint fail[s] to comply with CPLR 3016 (a), which requires that a complaint sounding in defamation 'set forth "the particular words complained of."' Compliance with CPLR 3016 (a) is strictly enforced. Accordingly, that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action should [be] granted [internal citations omitted]."

Horbul v Mercury Insurance Group, 64 AD3d 682, 682 (2d Dept 2009)

In addition, the publications alleged to have been defamatory were memoranda concerning plaintiff's employment evaluation by his supervisor, and "a subjective characterization of the plaintiff's

behavior and an evaluation of [his] job performance[] constituted a nonactionable expression of opinion." *Farrow v O'Connor, Redd, Gollihue & Sklarin, LLP,* 51 AD3d 626, 627 (2d Dept 2008); *DG & A Management Services, LLC v Securities Industry Association Compliance and Legal Division,* 52 AD3d 922 (3d Dept 2008).

Moreover, whereas no notice of claim is required to sue a public employee in his or her individual capacity, in situations such as the one at bar, in which Gadson is being sued for statements made within the scope of her employment (employment memoranda concerning plaintiff's job performance), NYCHA is obligated to indemnify her, pursuant to Public Housing Law § 402-a (3), and, as such, NYCHA is the real party in interest, requiring the filing of a notice of claim. *Ruggiero v Phillips,* 292 AD2d 41 (4th Dept 2002). Since plaintiff's notice of claim did not assert a theory of libel per se, he may not now assert such a cause of action. *O'Connor v Huntington U.F.S.D.,* 2011 NY Slip Op 06222, 2011 WL 3505767, 2011 NY App DIV LEXIS 6100, *supra* (a party may not add a new theory of liability that was not included in the notice of claim).

Based on the foregoing, that portion of defendants' motion seeking to dismiss plaintiff's second cause of action for libel per se asserted as against Gadson is granted.

Plaintiff's cross motion for leave to amend is denied.

CPLR 3025 (b) provides that

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> "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.* (83 AD3d 1040, 1040-1041 [2d Dept 2011]):

> "Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

In this instance, not only has plaintiff failed to establish that any amendment to the pleadings would correct the lack of merit discussed above, but the motion itself is procedurally defective in that it fails to include the proposed amendment for the court to scrutinize. Hence, plaintiff's cross motion is denied. Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for leave to amend is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 9/12/11

FILED

SEP 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Joan M. Kenney, J.S.C.