France v New York City Hous. Auth.

2014 NY Slip Op 30374(U)

February 10, 2014

Supreme Court, New York County

Docket Number: 154650/12

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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CHRISTOPHER A. FRANCE,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and NEW YORK CITY DEPARTMENT OF INVESTIGATIONS,

Defendants.

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DECISION/ORDER
Index No.: 154650/12
Seq. No.: 002

PRESENT:
Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2 (Exs 1-3)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3-4.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....5-6.....
STIPULATIONS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

In this action for age and racial discrimination, plaintiff Christopher France moves, pursuant to CPLR 2221, for an Order granting reargument of a prior motion by defendant The New York City Department of Investigations ("DOI") seeking dismissal of the complaint pursuant to CPLR 3211(a)(7) on the ground that the complaint failed to state a cause of action against it. Defendants The New York City Housing Authority ("NYCHA") and DOI oppose the motion.

Upon oral argument, a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and Procedural Background:

Plaintiff alleges that he has been employed by the Office of the Inspector General for NYCHA since July 17, 1989 and that his title is Chief Investigator.[1] He claims that, on May 4, 2010, he met with his Supervisor, Inspector General Kelvin Jeremiah, and others, to discuss his written comments and response to a 2009 Performance Evaluation. When plaintiff was asked whether he believed that he should have been granted a promotion to Assistant Inspector General, he answered in the affirmative and said he should have been promoted instead of John Graham Forbes. When promoted, Mr. Forbes was under the age of forty and had been employed by defendant since February, 2005. Plaintiff alleges that Mr. Jeremiah responded "At your age, there is no way that I am going to promote and groom you for management over a younger investigator." Additionally, plaintiff claims that, in response to his question "so I am being discriminated against because of my age?" Mr. Jeremiah responded "I know you and your racial discrimination views."

Plaintiff, acting *pro se*, subsequently filed a charge of discrimination with the Equal Employment Opportunities Commission. He then commenced a federal lawsuit on September 13, 2011, in the U.S. District Court for the Southern District of New York, similarly asserting, inter alia, claims of discrimination and retaliation under the Age Discrimination and Employment Act, 29 U.S.C. § 621, et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The federal action was dismissed as untimely and the federal court dismissed plaintiff's state and local law discrimination claims without prejudice. Plaintiff then commenced the instant suit on July 18,

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[1]Plaintiff alleges in his complaint that he was employed by DOI and NYCHA. However, in his motion for reargument, he alleges only that NYCHA failed to promote him.

2012, alleging age and racial discrimination under state and local laws. NYCHA filed an answer denying all substantive allegations of wrongdoing and DOI moved to dismiss pursuant to CPLR 3211(a)(7), asserting that plaintiff failed to state a cause of action against it. NYCHA did not submit any papers in connection with DOI's motion to dismiss.

By Order dated March 21, 2013, this Court granted DOI's motion to dismiss the complaint as against it, finding, inter alia, that the complaint failed to allege how or why DOI was a proper party to the action or how DOI and the NYCHA were related. In so holding, this Court stated, inter alia, that:

> Moreover, even if the issue of the legitimacy of having either or both defendants involved in the suit was non-existent, the complaint does not establish any cognizable theory, but merely advances bare conclusions and allegations. Indeed, plaintiff's entire case seems premised upon two statements allegedly made by his superior, one relating to plaintiff's opinions regarding racial discrimination and one relating to his age.

Plaintiff thereafter brought the instant motion to reargue DOI's motion to dismiss and DOI and NYCHA opposed the motion.

Positions of the Parties:

In support of his motion for reargument, plaintiff argues that this Court erred by dismissing the complaint "in its entirety" on the ground that it fails to allege a claim upon which relief can be granted. Plaintiff claims that he has stated a claim of age discrimination by quoting a statement by his supervisor, Mr. Forbes, evincing discriminatory intent. He also asserts that NYCHA discriminated against him because he had 20 years of experience and it promoted someone with only 5 years of experience.

Plaintiff specifically states in his motion that he does not seek to reargue those portions of this Court's Order determining that the DOI is not a proper party to this action and dismissing his second cause of action against DOI, which claimed retaliation based on his views about racial discrimination.

DOI argues in its opposition to plaintiff's motion that plaintiff has failed to establish that this court overlooked or misapprehended the law or facts in rendering its decision. It asserts that plaintiff failed to allege any basis upon which a claim against it can be viable. Further, DOI relies on plaintiff's concession that he does not seek reargument of that portion of the decision holding that it was not a proper party to this action.

In its opposition to plaintiff's motion, NYCHA reiterates DOI's argument that this Court did not misapprehend the law or the facts in rendering its decision. Counsel for NYCHA asserts that, at oral argument of the instant motion, plaintiff's counsel "abandoned [this motion] and instead, after stipulating to DOI's dismissal, sought to vacate the Decision for the stated reason of preemptively precluding NYCHA from relying on it."[2]

In his reply to NYCHA's opposition, plaintiff asserts that this court erred in holding that the entire complaint should be dismissed. In support of this argument, plaintiff notes that counsel for NYCHA "had indicated its intent to plaintiff's counsel to rely on [this Court's] decision [granting

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[2]Despite NYCHA's implication that plaintiff's counsel withdrew the instant motion, it is evident that he did not do so given that this court proceeded to render a decision on the same. This Court also notes that, although the instant motion was to be argued on September 17, 2013, it granted NYCHA, which did not move to dismiss, leave on that date to submit papers in opposition to plaintiff's motion by October 25, 2013 and rescheduled oral argument for November 19, 2013. Further, the note of issue has been filed and NYCHA successfully moved for leave to file a late motion for summary judgment within 90 days after the instant motion is decided.

DOI's motion to dismiss] as grounds to seek summary judgment in its favor."

In his reply to the DOI's opposition, plaintiff asserts that the complaint sufficiently sets forth his claim of age discrimination.

Conclusions of Law:

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *William P.Pahl Equip. Corp. v. Kassis, supra* at 27; *Amato v. Lord & Taylor, Inc.*,10 A.D.3d 374 (2d Dept. 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed) succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

Here, plaintiff has failed to proffer arguments sufficient to warrant reargument and the vacating of its Order dated March 21, 2013.

Initially, this Court did not overlook or misapprehend the law or facts in deciding DOI's motion to dismiss. This Court determined that DOI was entitled to dismissal of the complaint due to plaintiff's deficient allegations. Specifically, this Court held that plaintiff failed to establish, inter

alia, that DOI was a proper party in this action. This Court noted that plaintiff sued DOI and not the City of New York and that it is well settled that DOI is an agency within the City of New York, which is a public corporation. See *Rosenbaum v. City of New York*, 8 N.Y.3d 1 (2006). It further held that, pursuant to New York City Charter § 396 "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law." Thus, this Court had a solid legal and factual basis upon which to find that DOI was not a proper party. *See Siino v. Department of Educ. of the City of New York*, 44 A.D.3d 568 (1st Dept. 2007).

In any event, as noted above, plaintiff specifically states in his motion papers that he does not seek to reargue those portions of this Court's Order determining that the DOI is not a proper party to this action and dismissing his second cause of action against DOI, which claimed retaliation based on his views about racial discrimination.

Plaintiff's contention that this Court should grant reargument because it erred in holding that "the complaint does not establish any cognizable theory, but merely advances bare conclusions and allegations", is without merit. Contrary to plaintiff's contention, this language did not result in the dismissal of the complaint "in its entirety." DOI was the sole defendant to move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Since NYCHA did not move to dismiss the complaint, or even submit any papers in connection with DOI's motion to dismiss, it cannot be "afforded the benefit of a motion [to dismiss] for which [it] offered no support." *See Bethview Amusement Corp. v Lorber*, 35 AD2d 971 (2d Dept 1970), *app dismissed* 28 NY2d 652 (1971). Tellingly, NYCHA does not even assert that the complaint was dismissed in its entirety. Indeed, the decretal paragraphs of this Court's Order state that "DOI's motion to dismiss

the complaint for failure to state a cause of action is granted" and that DOI "is not a proper party to this matter." These decretal paragraphs, which are silent as to NYCHA, set forth the determination of this Court in "such detail as [this Court] deem[ed] proper" to apprise the parties that the complaint was dismissed solely as against DOI. CPLR 2219(a).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for reargument is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: February 10, 2014
FEB 10 2014

ENTER:

Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT