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| <b>Arty v New York City Health &amp; Hosps. Corp.</b>  |
| 2015 NY Slip Op 30609(U)   |
| April 15, 2015   |
| Supreme Court, New York County   |
| Docket Number: 162089/14   |
| Judge: Donna M. Mills  |
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK

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 PIERRE ARTY,

INDEX NO.  
 162089/14

Plaintiff,

- against -

NEW YORK CITY HEALTH and HOSPITALS  
 CORP., ALAN AVILES and JORGE PETITE,

DECISION/ORDER

Defendants.  
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DONNA M. MILLS, J:

In this employment discrimination and defamation case, defendants New York City Health and Hospitals Corp., Alan Aviles and Jorge Petite (collectively "defendants"), move for an order dismissing the plaintiff, Pierre Arty's claim for defamation on the grounds that the cause of action is barred by the statute of limitations and on grounds of an absolute or qualified privilege. Defendants also seek dismissal of plaintiff's race discrimination claim arguing that it is barred by collateral estoppel.

BACKGROUND

This case arises from plaintiff Dr. Pierre Arty's employment as the senior administrator in charge of the Behavior Health Division ("BHD") at Kings County Hospital Center ("KCHC"), which is operated by the New York City Health and Hospitals Corporation ("HHC"). Plaintiff brings claims against defendants HHC, HHC Chief Executive Alan Aviles ("Aviles"), and HHC consultant Dr. Jorge Petit ("Petit").

On June 19, 2008, a patient named Esmin Green died after lying on the floor of the KCHC waiting room for an extended period of time. Video surveillance footage shoed that Ms. Green had been the victim of gross neglect by KCFC staff prior to her death—she had lain face-down on the floor in the sight line of seven nurses, psychiatrists, and security guards, none of whom had attempted to help her, for over an hour. Plaintiff was terminated

the following day of Ms. Green's death.

Plaintiff alleges that HHC and Dr. Petit discriminated against him on the basis of race in violation of the New York County Human Rights Law (NYCHRL"), N.Y. Admin. Code § 8-107. In addition, Plaintiff alleges that he was unlawfully defamed by defendants HHC and Aviles following his termination.

Defendants contend that the factual allegations set forth in this action are, for all practical purposes, identical to the allegations made by plaintiff against the identical defendants in a prior litigation that was commenced in 2009, *Arty v New York City Health and Hospitals Corporation, Alan Aviles and Jorge Petit*, 09 Civ. 0598f2 (AJN). Defendants further argue that the only substantive difference is that in his federal action, plaintiff asserted not only his common law defamation claim and race discrimination claim under the NYCHRL, but also race discrimination claims under Title VII and the New York State Human Rights Law ("NYSHRL")

After the close of discovery in the federal action, defendants moved for summary judgment and in a Memorandum and Order dated December 3, 2013, the District Court granted summary judgment (a) dismissing plaintiff's race discrimination claims under Title VII, the NYSHRL and the NYCHRL, and (b) declined to exercise supplemental jurisdiction over the defamation claim. Judgment was entered the next day, December 4, 2013, and the federal *Arty* case was closed.

On or about January 10, 2014, plaintiff moved for reconsideration and sought an order amending the December 3, 2013 Order, by either (a) declining supplementary jurisdiction over plaintiff's race discrimination claim under the NYCHRL, or (b) denying summary judgment with respect to plaintiff's NYCHRL discrimination claim and retain supplemental jurisdiction of it and plaintiff's defamation claim.

Plaintiff's motion for reconsideration was successful and by Order dated August 8,

2014, the District Court granted reconsideration of the dismissal of plaintiff's NYCHRL claim with prejudice and amended the December 4, 2013 Order to dismiss the NYCHRL claim without prejudice, on jurisdictional grounds only.

On December 8, 2014, plaintiff commenced this action by filing the summons and complaint in New York State Supreme Court, New York County.

Defendants argue that plaintiff's race discrimination claim must be dismissed upon the grounds of collateral estoppel, due to the fact that the plaintiff has previously brought this same claim against them in federal court. Defendants also seek dismissal of the defamation cause of action arguing that plaintiff's defamation claim is time barred because (a) such claims are subject to a one-year statute of limitation and (b) plaintiff failed to commence this action and effect service of process within six months after his defamation claim was dismissed without prejudice by the United States District Court.

#### APPLICABLE LAW AND DISCUSSION

The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel effect will be given only to matters actually litigated and determined in a prior action or proceeding (see *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). It must be shown that the identical issue was decided in the prior action or proceeding, is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest it (*id* at 455). Here, it is clear that defendants have not met their burden of demonstrating the elements of

collateral estoppel. Although the race discrimination claim in violation of the New York City Human Rights law raised in this proceeding is similar to the one raised in the Federal Court proceeding, it was dismissed without prejudice by Judge Nathan. The cases cited by defendants for their proposition all deal with matters where there was a decision on the merits, and therefore are not applicable to this instant matter. As such, the race discrimination claim in violation of the New York City Human Rights Law was not necessarily decided in the first proceeding and plaintiff did not have a full and fair opportunity to litigate.

Defendants next contend that the six months given a plaintiff by CPLR 205(a) to commence a new action following the termination of a prior action should run from December 4, 2013, the date on which judgment was entered dismissing Dr. Arty's NYCHRL discrimination claim with prejudice, and his State law defamation claim without prejudice on jurisdictional grounds. Defendants base this argument on the assumption that Dr. Arty's Motion for Reconsideration was a discretionary motion.

CPLR 205(a) provides that when an action is dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits, the plaintiff may bring a new action within six months of the dismissal, even though the action would otherwise be barred by the statute of limitations.

The function of a CPLR 205(a) extension is to ameliorate the potentially harsh effect of the statute of limitations in cases in which the defendant has been given timely notice of a claim previously brought by a party, but not fully litigated for reasons not enumerated and excluded in the statute. As a remedial statute, its broad and

liberal purpose is not to be diminished by a narrow construction. *George v. Mt. Sinai Hospital*, 47 N.Y.2d 170, 417 N.Y.S.2d 231, 390 N.E.2d 1156 (1979).

A motion for reconsideration in federal court is akin to a motion to reargue under the CPLR in a New York State court, and is addressed to the discretion of the court. In *Cohoes Hous. Auth. v Ippolito-Lutz, Inc.* (49 NY2d 961, *affg* 65 AD2d 666), the Court of Appeals rejected the argument that a party could forestall the commencement of the statutory six-month period merely by continuing to pursue discretionary appellate review. It is not the purpose of CPLR 205 (a) to permit a party to continually extend the statutory period by seeking additional discretionary appellate review. By contrast, where an appeal is taken as a matter of right, or where discretionary appellate review is granted on the merits, the six-month period does not commence since termination of the prior action has not yet occurred (see, 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 205.07). Contrary to the assertions made by plaintiff, he has failed to cite any authority precluding its application. Therefore this Court finds that the motion for reconsideration was a discretionary motion which did not toll the CPLR 205(a), six month time limit to commence a new action, and as such, the clock started to run from the date on which judgment was entered December 4, 2013, not from August 8, 2014 which was the date of the Order granting plaintiff's motion for reconsideration.

Since this action was not commenced until December 8, 2014, almost six months after the 205(a) extension expired, plaintiff's cause of action for defamation shall be dismissed.

Accordingly it is

ORDERED that the motion to dismiss is granted to the limited extent that the

fourth cause of action for defamation against the Health and Hospitals Corp. and Alan Aviles is dismissed; and it is further

ORDERED that the action against defendant Alan Aviles is dismissed as against said defendant, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

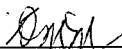
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on June 5, 2015, at 10:00 AM.

Dated: 4/15/15

So Ordered



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Donna M. Mills, J.S.C.  
**DONNA M. MILLS, J.S.C.**