

**Dolce-Richard v New York City Health & Hosps.
Corp.**

2015 NY Slip Op 32706(U)

November 5, 2015

Supreme Court, Queens County

Docket Number: 705255/14

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Kettly Dolce-Richard,

Index
Number: 705255/14

Plaintiff,

- against -

Motion
Date: 10/20/15

New York City Health and Hospitals
Corporation,

Motion
Cal. Number: 71

Defendant.
-----X

Motion Seq. No.: 4

FILED
NOV 10 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 10 read on this motion by defendant for an order converting the declaratory judgment action to an Article 78 proceeding, and to dismiss; and cross-motion by plaintiff to amend the complaint and to compel discovery.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-3
Memorandum of Law.....	4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Memorandum of Law.....	9
Reply Memorandum of Law.....	10

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

That branch of the motion by defendant New York City Health and Hospitals Corporation (HHC) for an order converting this declaratory judgment action to an Article 78 proceeding, pursuant to CPLR 103(c), is granted. That branch of the motion to dismiss the complaint upon the ground of statute of limitations, pursuant to CPLR 3211(a)(5), and for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted solely to the extent that plaintiff's first and second causes of action for declaratory judgment and injunctive relief are dismissed. The remaining branch of the motion for dismissal of plaintiff's third cause of action for reimbursement of unpaid wages and costs pursuant to Labor Law §198, and attorney's fees and liquidated damages, for failure to

state a cause of action, is granted solely to the extent that plaintiff's third cause of action is dismissed without prejudice to commencement of a separate plenary action under a new Index Number.

Cross-motion by plaintiff to amend the complaint and to compel the production of documents is denied.

Plaintiff was hired by HHC as a nurse at its Queens Health Network facility on an unspecified date in 2011 and was thereafter terminated on July 28, 2011 for failing to disclose prior employment by HHC on her employment application and her background investigation form. Plaintiff thereafter commenced the present action for declaratory judgment and injunctive relief, and for the recovery of unpaid wages, attorney's fees and costs, pursuant to Labor Law §198, on July 29, 2014.

Plaintiff alleges in her complaint that she had disclosed her prior employment and thus was erroneously terminated. Plaintiff also alleges that it was not until she applied for a position again with HHC at its Metropolitan Hospital facility on an unspecified date in 2013, and was not offered a position, that she learned that HHC had placed a misconduct code next to her name and for that reason, she was turned down for a position at Metropolitan Hospital.

Plaintiff seeks, as a first cause of action, a declaration that she was improperly terminated by HHC, as a second cause of action, an injunction to remove the misconduct code, and as a third cause of action, reimbursement of unpaid wages and costs pursuant to Labor Law §198, and attorney's fees and liquidated damages.

HHC contends that the action for declaratory judgment and injunctive relief should be converted to an Article 78 proceeding and dismissed as untimely. It also contends that the third cause of action must be dismissed for failure to state a cause of action in that no factual allegations are set forth in the complaint to support the third cause of action.

Plaintiff cross-moves to amend the complaint to allege that plaintiff failed to pay her approximately 100 hours of vacation and holiday time owed to her by Woodhull Hospital while she was working there, that those benefits were never transferred to Queens Health Network after she began working at Queens Health Network and that she is also owed two weeks pay by Woodhull Hospital.

Plaintiff's challenge to her termination by HHC should have been brought as a special proceeding under CPLR Article 78 in the nature of mandamus to review and mandamus to compel, since it is a

challenge to an agency's determination (see Ricketts v New York City Health and Hosp. Corp., 88 AD 3d 593 [1st Dept 2011]). Therefore, the instant action for declaratory and injunctive relief is, in reality, a proceeding under Article 78 and is, accordingly, hereby converted to a special proceeding under CPLR Article 78 (see EMP of Cadillac LLC v Assessor of Spring Valley, 15 AD 3d 336 [2nd Dept 2005]).

Plaintiff's counsel's argument that plaintiff improperly assigned a code of misconduct as the reason for plaintiff's termination and that plaintiff properly sought the removal of the "erroneous" misconduct code placed with her name in HHC's records by way of injunctive relief and that none of the grounds set forth in CPLR 7803 are being alleged or are applicable is disingenuous and without merit.

By seeking an order declaring that HHC was in error in terminating her for failing to disclose her prior employment history with HHC on her employment application and background check form and seeking an attendant injunctive order expunging her record of misconduct in connection with her failure to disclose her prior employment with HHC, plaintiff is clearly requesting Article 78 relief in the nature of mandamus to review and to compel.

Plaintiff was required to commence an Article 78 proceeding against HHC within four months of her termination on July 28, 2011, or, no later than November 28, 2011 (see CPLR 217). Plaintiff did not seek to challenge her termination until two years and eight months past the expiration of the statute of limitations. Her counsel's attempt to evade the consequences of plaintiff's untimeliness by commencing a declaratory judgment action, seeking a declaration that plaintiff's termination was improper, is without avail. Likewise of no avail and without merit is counsel's argument that HHC erroneously assigned the code for misconduct as the reason for plaintiff's termination and that such "error" is most akin to a defamation cause of action which carries a one-year statute of limitations and, therefore, her declaratory judgment action seeking injunctive relief, commenced within a year of plaintiff's "discovery" in September 2013 that the misconduct code was placed next to her name was both proper and timely. As stated, plaintiff was terminated for misconduct in failing to disclose her prior employment with HHC at another facility when she applied for a nursing position at the Queens Health Network facility. Plaintiff's challenge to the notation of misconduct as the basis for her termination is part and parcel of her challenge to HHC's determination to terminate her. Plaintiff did not seek to challenge that determination until three years after her termination, after the statute of limitations had expired for her to commence an

Article 78 proceeding.

Accordingly, this action for a declaratory judgment and injunctive relief is converted to a special proceeding under CPLR Article 78, the summons and complaint are deemed to be a notice of petition and petition and the petition is dismissed as untimely.

With respect to that branch of the motion to dismiss the third cause of action for damages for non-payment of wages, vacation time and holiday time for failure to state a cause of action, the third cause of action is dismissed without prejudice and with leave of plaintiff to commence a separate plenary action for said relief under a new Index Number.

Accordingly, the cross-motion for leave to amend the complaint to allege more specific facts comprising the third cause of action and to compel discovery is denied as moot.

Defendant may enter judgment accordingly.

Dated: November 5, 2015



KEVIN J. KERRIGAN, J.S.C.

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NOV 10 2015
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QUEENS COUNTY