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

PRESENT: MANUEL J. MENDEZ *JUSTICE* **PART** 13

KEVIN KARAHUTA,
Plaintiff,
-against-

THE WATERFRONT COMMISSION OF NEW YORK HARBOR and DISCOVERY INSTITUTE FOR ADDICTIVE DISORDERS,
Defendants.

INDEX NO. 154540/2016
MOTION DATE 10-04-2017
MOTION SEQ. NO 004
MOTION CAL. NO

The following papers, numbered 1 to 12 were read on this motion and cross-motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 7, 8, 9 - 10
Replying Affidavits	11, 12

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered, that plaintiff's motion pursuant to CPLR §3212[e] for summary judgment on the first and fourth causes of action in the complaint against defendant, Waterfront Commission of New York Harbor, is denied. Defendant, Waterfront Commission of New York Harbor's cross-motion, pursuant to CPLR §3212[e], for summary judgment dismissing with prejudice all of the claims asserted against it by plaintiff in this lawsuit, is granted.

Plaintiff was temporarily registered to work as a longshoreman starting October 25, 2006. Six months later in 2007 plaintiff had a permanent registration to work as a deep sea longshoreman. Plaintiff commenced this action for damages and declaratory and injunctive relief to recover against the defendant, Waterfront Commission of New York Harbor (hereinafter referred to as "WFC"), in connection with its denial, cancellation and revocation of Plaintiff's registration and the right to work at the New York Harbor as a longshoreman; and to recover against the defendant Discover Institute for Addictive Disorders, Inc. (hereinafter referred to as "DIADI"), a New Jersey Corporation that operates an alcohol and substance abuse program - for the release of plaintiff's confidential records and health information. Plaintiff alleges that DIADI unlawfully and improperly disclosed to WFC records of his participation in an outpatient drug rehabilitation program in 2015 (See Amended Complaint - Mot. Exh. 2).

The Amended Complaint asserts four causes of action against WFC: (1) for a declaratory judgment that WFC's actions in denying, cancelling, and/or revoking plaintiff's permanent registration was unlawful and in violation of Article XI Sections 2 and 3 of the Waterfront Commission Act (N.Y. Unconsolidated Laws 9846 and 9847), void and without legal effect, and that plaintiff's permanent registration remains valid effective and in force; (2) for negligence and/or recklessness per se in denying cancelling and/or revoking plaintiff's permanent registration; (3) WFC breached contractual obligations to plaintiff by failing to follow required procedures for denial cancellation and/or revocation of his license; and (4) for a judgment directing WFC to immediately restore plaintiff's permanent registration and permit him to return to work as a longshoreman at New York Harbor (Mot. Exh. 2).

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

Plaintiff's motion, pursuant to CPLR §3212 [e], seeks partial summary judgment on the first and fourth causes of action in the complaint against defendant WFC.

WFC's cross-motion, pursuant to CPLR §3212[e], seeks summary judgment dismissing with prejudice all of the claims asserted against it by plaintiff in this lawsuit.

In order to prevail on a motion for summary judgment, pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). A conclusory affidavit without specific factual basis does not meet the prima facie burden of a proponent of a motion for summary judgment. Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (JMD Holding Corp. v. Congress Financial Corp., 4 N.Y. 3d 373, 828 N.E. 2d 604, 795 N.Y.S. 2d 502 [2005] and In re New York City Asbestos Litigation, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

The Waterfront Commission Act §9907, titled "Regularization of Longshoremen's Employment," grants the WFC...

> "The power to remove from the longshoremen's register any person ...who shall have failed to have worked as a longshoreman in the Port of New York district for a minimum number of days during a period of time as shall have been established by the commission (WFC)..." (McKinney's Unconsolidated Laws Annotated §9907)

The Waterfront Commission of New York Harbor Rules and Regulations Section 8.1, titled "Removal from register for failure to work or be available for work," states in relevant part...

> "(a) To qualify for retention...a person included in such register must work as a longshoreman or as a checker, or make himself available for work...a minimum of 90 days in each half-calendar year, distributed at least 15 days to each month during at least five of the six months in each half-calendar year..."

The Waterfront Commission Act §9837, titled "Reinstatement After Removal From Register," permits the immediate reinstatement of a longshoreman's registration...

> "...Upon proper showing that the registrants failure to work or apply for work the minimum number of days above described was caused by the fact that the registrant was engaged in the military service of the United States or was incapacitated by ill health, physical injury, or *other good cause.*" (Emphasis added) (McKinney's Unconsolidated Laws Annotated §9837)

Plaintiff made four applications for retention of his permanent registration. The first round application covered the six month period of July 1, 2013 through December 31, 2013 (Round 5J). Plaintiff came up short of the fifteen days required each month, in November of 2013 by two days and December of 2013 by one day. On February 28, 2014 plaintiff submitted a "Request for Retention on the Longshoremen's Register" form giving as an excuse child visitation and miscounting the number of days he needed to work (Cross-Mot. Exh. A).

The second round application covered the six month period of January 1, 2014 through June 1, 2014 (Round 5K). Plaintiff came up short of the fifteen days required each month, in February of 2014 by seven days, but was given work credit for five of them,

leaving two days unaccounted for. In June of 2014 plaintiff came up short of the fifteen days by one day. On September 12, 2014 plaintiff submitted a "Request for Retention on the Longshoremen's Register" claiming bad weather (snow and ice) prevented him from working on January 3, February 3, February 5, and February 13-14, still leaving two days unaccounted for (Cross-Mot. Exh. B).

The third round application covered the six month period of July 1, 2014 through December 1, 2014 (Round 5L). Plaintiff came up short of the fifteen days required each month, in September of 2014 by one day and December of 2013 by one day. On February 26, 2015 plaintiff submitted a "Request for Retention on the Longshoremen's Register" claiming he miscalculated days and was one day short each month and that he had additional parenting time with his son in September and December (Cross-Mot. Exh. C).

The fourth round application covered the six month period of January 1, 2015 through June 1, 2015 (Round 5M). Plaintiff came up short of the fifteen days required each month in January of 2015 by three days but was given work credits. He came up short of the fifteen days required each month in February of 2015 by two days, May of 2015 by two days, and June of 2015 by all fifteen days. On September 10, 2015 plaintiff submitted a "Request for Retention on the Longshoremen's Register" claiming he missed four days work due to snow on February 2-3, February 10, and February 17. Plaintiff also referred to a May 19, 2015 accident where he allegedly fell asleep and crashed a "hustler" truck into a cargo container, and left the scene without reporting it. Plaintiff was sent to DIADI for counseling and drug testing. On the September 10, 2015 retention form plaintiff stated, "I did not work in June due to a suspension for not reporting an accident I was involved in. I submitted a grievance that was denied and I am currently in an outpatient program that I must complete before I can return to work" (Cross-Mot. Exh. D).

Plaintiff's conclusory affidavit which states in a footnote, "Due to personal child care obligations, and related matters I missed satisfying the WFC minimum work requirements during certain months in 2014 and 2015. I timely filed Requests for Rentention which I understood were granted permitting me to continue working on the waterfront" (Kerahuta Aff., pg. 1), does not establish entitlement to summary judgment. Plaintiff has not shown that he should only have been subject to a hearing on the fourth round retention application (5M).

Plaintiff's argument in opposition to the cross-motion, that the first three rounds of applications for retention (5J, 5K,5L) had been previously approved by WFC, because procedure changed after 2013, and that by being allowed to continue to work during the three other rounds (5J,5K,5L) he was granted retention, are unsubstantiated and fail to raise an issue of fact. Plaintiff did not provide copies of the alleged 2013 amendment to the rules or other proof that a determination had been rendered on the first three applications for retention. He provides no proof for the argument that the WFC reversed its position on the three rounds of applications for retention (5J,5K,5L) after receipt of records from DIADI. Plaintiff was made aware prior to, and on November 24, 2015, that the requests for retention would: (1) cover periods from July of 2013 through June of 2015, (2) include all four of his retention requests (5J,5K, 5L, 5M), and (3) that he had been allowed to work while the investigations were pending (Cross-Mot. Exhs. K and N).

The Waterfront Commission Act §9847, titled "Institution of proceedings; notice and hearing," states that the WFC...

> "...May institute proceedings to revoke, cancel or suspend any license or registration after a hearing at which the licensee or registrant and any person making such complaint shall be given an opportunity to be heard...Such hearings shall be held in such manner and upon such notice as may be prescribed by the rules of the commission, but such notice shall be of not less than ten days and shall state the nature of the complaint." (McKinney's Unconsolidated Laws Annotated §9847)

Judicial deference is given to reasonable interpretation of statues and regulations by the agency that is responsible for administering them. Deference is given because of the specialized knowledge and understanding of practices with the inferences to be drawn therefrom by the agency (See Cambio v. Goldstock, 28 Misc. 3d 888, 908 N.Y.S. 2d 333 citing to Roberts v. Tishman Speyer Properties, L.P. ,13 N.Y. 3d 270, 918 N.E. 2d 900, 890 N.Y.S. 2d 388 [2009] and Chin v. New York City Bd. of Standards and Appeals, 97 A.D. 3d 485, 948 N.Y.S. 2d 300 [1st Dept., 2012]). WFC is afforded judicial deference on its interpretation of the Waterfront Commission Act, §9847.

Plaintiff's due process rights were not violated. Plaintiff was given an opportunity to be heard on December 11, 2015 when he appeared at WFC offices with his attorney and gave testimony on the record (Cross-Mot. Exh. K). WFC gave plaintiff prior written notice by e-mail advising him to bring records including those from DIADI, that were pertinent to all four of his requests for retention (5J,5K, 5L, 5M), but he failed to do so (Cross-Mot. Exhs. K and N). On December 11, 2015 plaintiff stated reasons for retaining his permanent registration on the record but provided little or no evidence in support of his claims. Plaintiff testified on the fourth round application (5M) as to his treatment, but did not provide records sought for the related rehabilitation and treatment at DIADI (Cross-Mot. Exh. K). Plaintiff was also given the opportunity to provide records in support of his claims after the hearing but he failed to do so (Cross-Mot. Exh. K, pg. 159 WC0294, lines 2-13). On January 11, 2016, WFC forwarded a release to DIADI and on the same day obtained the records (Cross-Mot. Exh. P).

Plaintiff signed authorizations permitting the release of his DIADI records for use by WFC at his request for retention. On July 21, 2015 plaintiff signed an "Authority to Release Medical and/or Hospital Records," on the bottom of plaintiff's "Request for Retention on the Longshoremen's Register" form, on his fourth round application (5M) (Cross-Mot. Exh. D). On July 9, 2015 plaintiff signed a "Records Release Authorization" for DIADI permitting the release by DIADI to his unnamed "employer" of information on his treatment (Olitt Aff. for DIADI in Response to Mot., Exh. A). On November 25, 2015 plaintiff signed another "Records Release Authorization" for DIADI, authorizing release of information on his treatment to his employer, for the first time identifying "Local ILA" (Olitt for DIADI Aff. In Response to Mot., Exh. B). WFC's actions in using plaintiff's own authorizations were not illegal. DIADI was authorized to release plaintiff's rehabilitation facility records to WFC.

Disclosure of confidential treatment records is appropriate if it occurs in connection with an administrative proceeding in which the plaintiff testified as to the content of the confidential communication, resulting in waiver (See Matter of Simmons Mach. Tool Corp. v. St. Peter's Health Care Servs., 90 A.D. 3d 1224, 934 N.Y.S. 2d 578 [3rd Dept., 2011]). It was proper for WFC to use the authorizations after plaintiff waived privilege by testifying and offering to provide records from DIADI but failed to do so.

Plaintiff had notice through the WFC website of the date and time of the February 2, 2016 meeting and could have been present (Cross-Mot. Exh. R). He failed to raise an issue of fact or show that the February 2, 2016 WFC meeting, open to the public, was a hearing or administrative proceeding. The WFC "Order" which only references consideration of the record, found that plaintiff did not show "good cause" for retention of his registration (Cross-Mot. Exh. Q). The testimony relied on in the February 2, 2016 "Order" was provided by plaintiff on December 11, 2015, in statements made on his applications for retention, his work history records and the records obtained by WFC from DIADI, the contents of which plaintiff had already divulged in his testimony (Cross-Mot. Exh. Q).

The February 2, 2016 WFC "Order" identified each of the four rounds and stated specific reasons for finding that plaintiff had not provided good cause for retention for each of them(Cross-Mot. Exh. Q). Plaintiff's permanent registration was not reinstated under the first round (5J) and third round (5L), because miscalculation was not deemed "good cause." The second round application (5K) was rejected because only two of the days missed by plaintiff in February of 2014 were attributed to snow, and his work record showed plaintiff was unavailable on multiple other occasions. The fourth round application (5M) was rejected because plaintiff had unexcused absences in February of 2015, and had willfully

made himself unavailable. It was also determined that the DIADI records provided on January 11, 2016 showed plaintiff had offered fraudulent, deceitful, or misrepresentative testimony at his December 15, 2015 interview by stating that he last used marijuana "years ago" and not during the last four years. The DIADI records showed that plaintiff admitted he used 1-2 joints of marijuana daily and last used it on May 20, 2015, the day after the accident (Cross-Mot. Exh. Q).

An administrative determination will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. The determination of arbitrary and capricious is derived from justification of the administrative action and reliance on facts (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). "Once it has been determined that an agency's conclusion has a sound basis in reason...judicial function is at an end...and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (Partnership 92 LP v. State Div. of Housing and Community Renewal, 46 A.D.3 d 425, 849 N.Y.S. 2d 43 [1st Dept., 2007] affd. 11 N.Y. 3d 859, 901 N.E. 2d 740, 873 N.Y.S. 2d 247[2008]).

WFC is entitled to summary judgment dismissing plaintiff's claims against it. The finding of no good cause and rejection of plaintiff's first three applications for retention of permanent registration (5J,5K, 5L) did not rely on the records from DIADI, were rational and proper with a sound basis in reason. The use of plaintiff's records from the authorization for DIADI were lawful and provided a further reason to deny plaintiff's fourth application for retention of his permanent registration.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212[e], for summary judgment on the first and fourth causes of action in the complaint against defendant, Waterfront Commission of New York Harbor, is denied, and it is further,

ORDERED that Defendant, Waterfront Commission of New York Harbor's cross-motion, pursuant to CPLR §3212[e], for summary judgment dismissing with prejudice all of the claims asserted against it by plaintiff in this lawsuit, is granted, and it is further,

ORDERED that plaintiff's causes of action asserted against the Waterfront Commission of New York Harbor are severed and dismissed from this action with prejudice, and it is further,

ORDERED that this action is continued as to the remaining defendant and it is further,

ORDERED that within twenty (20) days of the date of entry of this Order the Waterfront Commission of New York Harbor shall serve a copy of this Order with Notice of Entry pursuant to e-filing protocol, on the plaintiff, the County Clerk (Room 141B) and upon the Trial Support Clerk located in the General Clerk's Office (Room 119) who are directed to mark their records accordingly, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER: MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: October 25, 2017

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE