SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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BRIAN COLELLA,

Plaintiff,

- v -

CITY OF NEW YORK, ATTN CORPORATION COUNSEL,

Defendant.

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INDEX NO. 156846/2019

MOTION DATE 01/29/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

In this action, *pro se* plaintiff Brian Colella, an employee of the New York City Fire Department ("FDNY"), alleges that agents of defendant City of New York ("defendant/City") intentionally discriminated and retaliated against him in violation of the exercise of his rights ultimately leading to the loss of his employment. Defendant seeks an order pursuant to CPLR §3211 (a)(7) dismissing the complaint for failure to state a claim.

DISCUSSION

Under CPLR §3211 (a) (7), a party may move for dismissal of one or more causes of action on the ground that the pleading fails to state a cause of action. On such a motion, the court is concerned with whether the plaintiff has a cause of action and not whether he has properly stated one. (*Rovello v. Orofino Realty Co*., 40 N.Y.2d 633,636 [1976]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d 60, 65, 248 N.Y.S.2d 121 [1st Dept 1964]. "[W]e

look to the substance [of the pleading] rather than to the form" (*id*.). The court will liberally construe the pleadings in plaintiff's favor, accept the facts as true, and determine whether the facts alleged fit within any cognizable theory. (*Cron v. Hargro Fabrics*, 9l N.Y.2d 362, 366 [1998]).

Here, the complaint appears to allege that plaintiff was formerly employed by FDNY and was discriminated against for "exercising his protected rights & these illegal actions led to claimant's loss of employment". (NYSCEF Doc. No. 6). Construing the complaint liberally, presuming its factual allegations to be true, and according the complaint the benefit of every possible favorable inference (see *511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 151-152, 773 NE2d 496, 746 NYS2d 131 [2002]), plaintiff has not adequately pled a cause of action for discrimination or retaliation. As defendant correctly notes, the complaint does not allege the violation of a specific statute or agreement, nor does the complaint allege any facts upon which the court could construe whether plaintiff can assert a valid cause of action for discrimination. Rather, the complaint simply concludes that pursuant to a "tacit agreement" the City has agreed to award claimant compensation due in the amount of $1,229,542.00. (NYSCEF Doc. No. 6).

Generally, while courts may afford a *pro se* litigant some leeway, he acquires no greater right than any other litigant and it has been recognized that "courts are not obliged to indulge the excesses of a *pro se* litigant at the expense of decorum, judicial economy and fairness to opposing parties." (see *Couri v Siebert*, 48 AD3d 370, 371 [1st Dept. 2008] [*pro se* plaintiff "engaged in frivolous, defamatory and prejudicial conduct that includes multiple actions ... and voluminous and unnecessary motion practice"]). Proceeding *pro se* is not a license to pursue frivolous litigation.

Defendant has established that plaintiff has failed to allege a cause of action upon which relief can be granted. Indeed, in opposing defendant's motion plaintiff has failed to identify any facts sufficient to allege a cause of action, including, a claim for discrimination or retaliation. Plaintiff's opposition alludes to a grievance he filed for unpaid overtime and he states that "[m]y supervisors even went so far as to violate established hiring procedures by hiring an unqualified, differently titled person from outside of the fdny[sic], ... This person went on to create and bring forth numerous false charges against me that lead up to my wrongful termination." (NYSCEF Doc. No. 14, ¶ 5).

Affording plaintiff some leeway and recognizing that on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiff's statements can sustain a cause of action, not whether the plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306, 626 N.Y.S.2d 803 [1st Dept 1995], plaintiff has simply failed to allege a cause of action. Neither the complaint nor plaintiff's opposition allege any facts sufficient to identify that he is in a protected class, that he was qualified to hold his position, or that he engaged in any protected activity. As such, plaintiff's allegations cannot be implied to fit within any cognizable legal theory.

While plaintiff alleges that he suffered "loss of employment," he fails to state what job or employment opportunity he lost, and he alleges in his complaint that he *is* employed by FDNY. (NYSCEF Doc. No. 6, ¶ 2, emphasis added). In opposing defendant's motion plaintiff states that he was "wrongfully terminated" and "then reinstated nearly four (4) years after my termination." (NYSCEF Doc. No. 14, ¶ 6). Plaintiff implies that he was required to retain an attorney to pursue grievances through arbitration and that he is seeking to recover those costs, however, neither the allegations in the complaint nor the statements presented in opposition can sustain a

cause of action for discrimination. Nor does plaintiff allege a claim for retaliation; he merely states in conclusory fashion that defendant retaliated against him for "exercising his protected rights". Accordingly, based upon careful review of the record, it is hereby

ORDERED that the motion of defendant City of New York, to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this Court.

6/25/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE