SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

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MICHAEL DELLEGRAZIE,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF SANITATION, THE CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, THE CITY OF NEW YORK CIVIL SERVICE COMMISSION, NORMAN L. MARON, INDIVIDUALLY AND AS AN AIDER AND ABETTOR,

Defendants.

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INDEX NO. 153116/2019

MOTION DATE 8/25/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number were read on this motion to dismiss: (002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51.

Plaintiff Michael Dellegrazie commenced this action against Defendants City of New York (the "City"), City of New York Department of Sanitation ("DSNY"), City of New York Department of Citywide Administrative Services ("DCAS"), City of New York Civil Service Commission ("CSC"), and Dr. Normal L. Maron to recover damages stemming from Defendants' alleged role(s) in denying Plaintiff a civil service position as a DSNY Sanitation Worker. Defendants move, pursuant to CPLR 3211(a)(2), (5), and (7), to dismiss the Complaint, arguing: (1) that collateral estoppel and res judicata bar Plaintiff's claims because they were, or should have been, raised in a prior Article 78 proceeding which Justice Edmead decided in Plaintiff's favor (*NY County Index No. 101541/2017*; *NYSCEF 28/Article 78 Petition*; *NYSCEF 31/Article 78 Decision*]); (2) that the claims relating to Plaintiff's ongoing application with DSNY are not ripe for judicial review;[1] and (3) failure to state a claim. Plaintiff opposes. For the reasons below, Defendants' motion is granted to the extent discussed below.

BACKGROUND[2]

In October 2014, Plaintiff, seeking civil service employment as a Sanitation Worker with DSNY, participated in open competitive civil service Exam 5001 administered by DCAS (*NYSCEF 47/Pl Affirm in Opp* ["Pl Opp"] p 1, citing *NYSCEF 34/Amended Verified Complaint* ["Complaint"] ¶ 17). Plaintiff was qualified to sit for Exam 5001 based on several qualifications: reaching age 21, a four-year high school diploma or its equivalent, drug and alcohol screening, a medical examination, residency, New York State Class A or B Commercial Driver License,

[1] As discussed below, Defendants, in reply, also added a mootness argument.

[2] As it must on a motion to dismiss, this Court presumes the Complaint's allegations to be true, affording them the benefit of every favorable inference.

English language proficiency, proof of identity, and disclosure of license and/or driving issues (*Complaint* ¶¶ 19-20). Exam 5001 also stated that

> "[m]edical guidelines have been established for the position of Sanitation Worker. You will be examined to determine whether you can perform the essential functions of the position of Sanitation Worker. Where appropriate, a reasonable accommodation will be provided for a person with a disability to enable him or her to take the examination, and/or to perform the essential functions of the job" (*Complaint* ¶ 21).

After taking Exam 5001, Plaintiff was assigned number 538 on the Sanitation Worker list (*Complaint* ¶ 22). DCAS delegated administration of certain aspects of the civil service process to DSNY, including disqualification based on medical reasons (*Complaint* ¶ 23). After successful physical exams in November 2015 and April 2016, Plaintiff disclosed to DSNY that he had previously been diagnosed with sleep apnea, which he used a CPAP medical device to treat (*Complaint* ¶¶ 25-26).

In response to a DSNY request, on June 22, 2016, Plaintiff's physician Dr. Brian Mignola confirmed Plaintiff's diagnosis and treatment, and reported, in relevant part, that "[Plaintiff] has been diagnosed with sleep apnea and is undergoing the necessary treatment including the use of a CPAP machine. [Plaintiff] does not experience daytime drowziness [sic] and is clear to operate machinary [sic] and fulfill duties" (*Complaint* ¶¶ 27-28). According to the City, contemporaneous notes demonstrate that on June 23, 2016, DSNY medical staff contacted Plaintiff and "left [a] message in reference to additional documentation needed. [Plaintiff] [n]eeds compliance with CPAP machine and needs latest sleep study" (*NYSCEF 29* p 47).

On August 19, 2016, DSNY sent Plaintiff a notice informing Plaintiff that DSNY proposed finding Plaintiff medically unqualified for the Sanitation Worker position because there was "no confirmation on compliance with CPAP" (*Complaint* ¶ 30). The Notice of Proposed Medical Disqualification provided Plaintiff with 30 days to request that DSNY release Plaintiff's medical records to his physician and an additional 60 days following receipt to submit a report and supporting documentation to challenge the disqualification (*Complaint* ¶ 32).

On September 9, 2016, Plaintiff challenged the proposed disqualification and provided a medical authorization (*Complaint* ¶ 34). Plaintiff attempted to use his CPAP machine to generate CPAP records to be used in a medical report (*Complaint* ¶35). On December 19, 2016, Plaintiff requested and received an extension to January 30, 2017 (*Complaint* ¶ 36). Plaintiff, unable to schedule a medical appointment by that date, requested another extension; however, on January 31, 2017, DSNY sent Plaintiff a notice denying Plaintiff's extension request and disqualifying Plaintiff from the Sanitation Worker position on medical grounds, specifically that "[m]edical documents supplied did not alter criteria for disqualification" (*Complaint* ¶¶ 37-39). Plaintiff appealed his disqualification to the Civil Service Commission (CSC) (*Complaint* ¶ 40).

The record before the CSC included an April 24, 2017 letter from Plaintiff's pulmonologist Dr. Thomas Kilkenny, who had treated Plaintiff since 2015 (*Complaint* ¶ 41). Dr. Kilkenny, who had diagnosed Plaintiff with obstructive sleep apnea, stated that Plaintiff was

> ...benefitting from complete resolution of his symptoms as the disease has completely resolved with therapy. [Plaintiff] is very compliant with the therapy. Given the fact that his disease is completely treated, ... [a]s long as the patient continues to remain compliant with the CPAP he does not demonstrate signs of daytime somnolence and is able to operate complex machinery without difficulty. Further testing, to further evaluate this patient's response to therapy, is not needed (*Complaint* ¶¶ 41-42).

The CSC record also included an April 4, 2017 letter by Dr. Maron, who never treated or examined Plaintiff (*Complaint* ¶ 43). Dr. Maron cited an unidentified Federal Motor Carrier Safety Administration which provided that "while FMCSA regulations do not specifically address sleep apnea, they do prescribe that a person with a medical history or clinical diagnosis of any condition likely to interfere with their ability to drive safely cannot be medically qualified to [sic] a commercial motor vehicle (CMV) in interstate commerce" (*Complaint* ¶ 45). Based on Plaintiff's sleep apnea diagnosis and CPAP machine use, Dr. Maron determined that Plaintiff failed to meet the standards to qualify as a Sanitation Worker (*Complaint* ¶¶ 46-49). On June 29, 2017, CSC affirmed Plaintiff's disqualification (*Complaint* ¶ 50).

Plaintiff subsequently filed the Article 78 Petition. On September 5, 2018, Justice Edmead found in Plaintiff's favor that CSC's determination was irrational considering Dr. Kilkenny's certification that Plaintiff's sleep apnea had been completely resolved with therapy, and that no further testing was needed (*Article 78 Decision* p 4, *et seq.*). "In so doing," Justice Edmead determined, "the [CSC] directly contravened the legislative prohibition of denying employment to a person solely on the basis that he or she has a disease" (*id.* at pp 5-6). Justice Edmead granted the Article 78 Petition, annulled the CC's determination, and ordered Plaintiff's reinstatement to the civil service list for the Sanitation Worker position (*id.*).[3]

On February 16, 2019, DSNY scheduled Plaintiff to begin pre-employment processing (*Complaint* ¶¶ 58-60). DSNY subsequently questioned Plaintiff's 13-pound weight gain since his first application (*Complaint* ¶¶ 66-69). Dr. Mignola certified that the weight gain had not affected Plaintiff's health or unrestricted ability to work as a Sanitation Worker (*Complaint* ¶ 70). On July 10, 2019, Dr. Maron rejected Dr. Mignola's certification and requested the underlying documentation relied upon by Dr. Mignola, including a 2017 sleep study (*Complaint* ¶ 71).

Plaintiff subsequently filed an Amended Complaint alleging: (1) disability discrimination under the New York City Human Rights Law (NYCHRL); (2) failure to provide reasonable accommodation under the NYCHRL; (3) aiding and abetting discriminatory action by Dr. Maron; (4) retaliation by DSNY and Dr. Maron; (5) discrimination violating Rehabilitation Act

[3] The Article 78 Decision dismissed claims against DSNY as time-barred and against the City of New York and DCAS for failing to raise any claims against those parties (p 6).

of 1973, (29 USC § 701, *et seq.*), by the City, DCAS, DSNY, and the CSC; (6) failure to provide reasonable accommodation violating the Rehabilitation Act against the City, DCAS, DSNY, and the CSC; and (7) retaliation violating the Rehabilitation Act against DSNY (*Complaint* ¶¶ 51-93). The Amended Complaint seeks declaratory judgment, costs and expenses including attorneys' fees, compensatory damages including for the Article 78 action, and punitive damages (*Complaint* p 21).

Defendants move to dismiss, initially arguing: (1) that Plaintiff's claims are barred by res judicata and estoppel because all claims relate to Plaintiff's initial 2017 disqualification from employment as a Sanitation Worker and therefore were (or could have been) raised and adjudicated in the Article 78 action; (2) that Plaintiff has failed to state a cause of action against Dr. Maron for aiding and abetting; (3) that Plaintiff's claims regarding the current application process are not ripe for judicial review; (4) that Plaintiff has failed to state a cause of action for disability discrimination under the NYCHRL and Rehabilitation Act; and (5) that Plaintiff has failed to state a cause of action for retaliation under the NYCHRL and Rehabilitation Act pertaining to the ongoing DSNY application. Plaintiff opposes, arguing: (1) that the claims are not barred by res judicata because Plaintiff was barred from seeking compensatory damages in the Article 78 proceeding; and, in sum and substance, (2) that all claims have merit. Defendants, in their reply, note that during the briefing process, Plaintiff's DSNY application was approved, thus mooting any claims relating to his second application, including discrimination and retaliation claims.

DISCUSSION

I. Res Judicata/Collateral Estoppel

A. Res judicata

"Pursuant to CPLR 3211 (a) (5), a party may move to dismiss a cause of action based on the doctrine of res judicata" (*Williams v City of Yonkers*, 160 AD3d 1017, 1018 [2d Dept 2018]). "Res judicata is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 141 AD3d 464, 466 [1st Dept 2016]). "The proper inquiry for res judicata purposes is when [a party] could have raised a cause of action, not when it had enough evidence to prove the claim at trial" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476 [1st Dept 2011] [dismissing fraud claims where facts were available years prior which would have permitted a "reasonable inference of the alleged conduct," and permitting claims for breach of the covenant of good faith and fair dealing and fraudulent conveyance where alleged conduct occurred after the commencement of the prior action]; *see also Paramount*, 141 AD3d at 466 ["...a final judgment on the merits...is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit *or which might have been litigated therein*"] [emphasis added]).

"Under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"

(*Paramount*, 141 AD3d at 467). "[A] claim will be barred by the prior adjudication of the same claim arising out of the same factual grouping' even if the claims involve materially different elements of proof, and even if the claims would call for different measures of liability or different kinds of relief" (*Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005]). Conversely, "res judicata is inapplicable where [a] plaintiff [is] unable to … seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action … to seek that remedy or form of relief" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], citing Restatement 2d of Judgments § 26 [1]).

CPLR 7806 provides, in relevant part, that in Article 78 proceedings, "[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity." "Whether damages are incidental to the primary relief sought depends upon the facts of the case" (*Pauk v Bd. of Trustees*, 68 NY2d 702, 705 [1986]). Generally, claims for loss of salary are considered "incidental to the primary relief sought" in Article 78 petitions (*id.* at 704 [loss of salary claim, including back pay, incidental to article 78 action seeking rescission of termination letter and declaration of tenure status]).

However, compensatory damages, including those awarded for civil rights violations, are generally not "incidental" to Article 78 actions, and are thus not barred by res judicata (*see Matter of Brown v Bd. of Educ. of Mahopac Cent. Sch. Dist.*, 129 AD3d 1067, 1071-1072 [2d Dept 2015] [affirming reinstatement to position, including tenure and back pay, but holding that Supreme Court "erred in awarding the petitioner compensatory damages since, under the circumstances of this case, such damages are not incidental to the primary relief sought"]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 348 [1999] ["plaintiff's 42 USC § 1983 civil rights claims do not seek the restoration of any economic benefits derivable from his status as a member of the Blauvelt Fire Department. Rather, his prayer for relief seeks one million dollars in damages plus attorneys' fees for embarrassment, loss of reputation and mental anguish"]).

Here, Plaintiff seeks compensatory damages for "the costs associated with bringing an Article 78 Petition." Those claims, as well as any claims for lost salary and/or backpay and claims for attorneys' fees incurred in the Article 78 Action, are barred by res judicata. However, Plaintiff's Amended Complaint also seeks "compensatory damages for mental, emotional, and physical injury, distress, pain and suffering, and injury to reputation" (*Complaint* p 21, ¶ F), refuting Defendants' argument in reply that Plaintiff's opposition was the first mention of such claims (*NYSCEF 51* p 2). Those compensatory claims, to the extent that they relate to Plaintiff's non-Article 78 claims and prayers for relief, are not barred by res judicata. Indeed, Defendants essentially concede this, stating that "…the only claim [P]laintiff may conceivably proceed on for compensatory damages is a claim premised on DSNY's failure to provide an individualized assessment under the [NY]CHRL during plaintiff's first pre-employment application" (*NYSCEF 51* p 12). Accordingly, this branch of Defendants' motion is granted solely to the extent that any claims for lost salary and/or backpay and for costs and fees associated with prosecuting the Article 78 Action are dismissed.

B. Collateral estoppel

"Collateral estoppel, or issue preclusion, 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 …, whether or not the tribunals or causes of action are the same" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*id.*). "The burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding" (*id.*).

Here, Defendants correctly argue that Plaintiff raised NYCHRL claims in the Article 78 proceedings (*Article 78 Petition* pp 124-128). As Defendants argue in reply, Plaintiffs fail to oppose the branch of Defendants' motion arguing that collateral estoppel precludes Plaintiff's plenary discrimination claims (*see Weldon v Rivera*, 301 AD2d 934, 935 [3d Dept 2003] [failure to address an argument, "other than a scant reference," is a concession of that argument]).

Nevertheless, collateral estoppel does not apply here because the determinative issue was not "decided against" Plaintiff in the Article 78 Action; to the contrary, Justice Edmead found that Plaintiff *had* been discriminated against, albeit on grounds other than those claimed here (*Parker*, 93 NY2d at 349; *cf Corvetti v Town of Lake Pleasant*, 146 AD3d 1118, 1121 [3d Dept 2017] [holding that collateral estoppel barred subsequent complaints alleging 42 USC § 1983 civil rights violations where a prior Article 78 decision dismissing the petition "addressed and decided" similar issues, even though the decision "did not expressly address the merits of the constitutional claims asserted therein," because "[the Article 78 court] was well aware of plaintiff's arguments on this point and, in granting the named respondents' motion for summary judgment…, necessarily determined that the underlying constitutional claims were lacking in merit."]; *Matter of Khan v NY City Health & Hosps. Corp.*, 144 AD3d 600, 602 [1st Dept 2016] [affirming dismissal of plenary action alleging discrimination and retaliation claims based on wrongful termination where a prior article 78 decision decided the "core issue" of wrongful termination and found that petitioner was lawfully terminated, not the victim of discrimination or retaliation]; *see also Bowne Mgt. Sys., Inc. v City of NY*, 32 Misc 3d 1215[A], 1215A, 2011 NY Slip Op 51327[U], *4 [Sup Ct, NY County 2011, Fried, J.] [holding that defendant did not establish that collateral estoppel barred breach of contract claims in a subsequent plenary proceeding where a prior Article 78 decision explicitly severed the breach claims from the Article 78 proceeding and dismissed them without prejudice]). Accordingly, the claims are not barred by collateral estoppel.

II. Mootness/ripeness

At the time Defendants filed this motion, they argued that Plaintiff's claims pertaining to the current, post-Article 78 Decision application process were not yet ripe for judicial review because they remained ongoing. That argument was mooted during this motion's briefing process when, on October 11, 2019, DSNY notified Plaintiff that his pre-employment status was

updated from "pending" to "accepted" after review of Plaintiff's September 6, 2019 sleep apnea report, and that he would be contacted during the next hiring cycle (*NYSCEF 50*). The DSNY letter also stated that if Plaintiff is "not called during the 2019 calendar year," he would "likely … have to undergo testing again with the Medical Division" (*id.*). That said, interpreting the Amended Complaint liberally, Plaintiff sought not only reinstatement to the civil service list and consideration for the Sanitation Worker position—that request would, of course, be moot—but also compensatory damages for "mental, emotional, and physical injury, distress, pain and suffering, and injury to reputation" stemming from any retaliation or delays (*Complaint* p 21 ¶ F; *cf Pastore v Sabol*, 230 AD2d 835, 836 [2d Dept 1996] [holding that motion court should have dismissed action as academic where plaintiffs were found eligible to receive Medicaid retroactive to the date of their applications]). Those claims are not moot, and are ripe for determination, and thus the branch of Defendants' motion seeking their dismissal is denied.

III. Failure to state a claim

A. Aiding and abetting cause of action against Dr. Maron

Defendants argue that Plaintiff fails to a state cause of action against Dr. Maron for aiding and abetting discrimination because Plaintiff impermissibly argues that Dr. Maron aided and abetted his own allegedly discriminatory conduct. Defendants are correct that "an individual cannot aid and abet his own alleged discriminatory conduct" (*Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 913 NYS2d 296 [2d Dept 2010] [supervisor whose conduct gave rise to plaintiff's sexual discrimination claim cannot be held liable under Executive Law § 296 (6) for aiding and abetting his own violation of the Human Rights Law]). As argued by Defendants in reply, this action is distinguishable from the cases cited by Plaintiff in opposition because this action's discrimination claims, as they relate to Maron's employer DSNY, stem entirely from Dr. Maron's alleged conduct. Accordingly, the branch of Defendants' motion seeking to dismiss the third cause of action for aiding and abetting against Dr. Maron is granted.

B. Failure to accommodate

To establish a prima facie claim for failure to reasonably accommodate under the Rehabilitation Act, a plaintiff must show that: (1) plaintiff is a person with a disability under the meaning of the Rehabilitation Act; (2) an employer covered by the Rehabilitation Act had notice of his disability; (3) with reasonable accommodations, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations (*Dooley v JetBlue Airways Corp.*, 636 Fed. App'x 16 [2d Cir 2015]).

"To establish a *prima facie* failure to accommodate claim under the…NYCHRL, a plaintiff must demonstrate that (1) she has a 'disability' within the meaning of the statutes, (2) the employer had notice of the disability, (3) she was otherwise qualified to perform the essential functions of her job with reasonable accommodation, and (4) the employer refused to make a reasonable accommodation" (*Romanello v Shiseido Cosmetics Am. Ltd.*, No. 00-CV-7201, 2002 US Dist LEXIS 18538, at *23-24 [SDNY Sept. 30, 2002] [observing that, except for the broader definition of "disability" under the NYSEL and NYCHRL, the same standards used to evaluate

claims under the Americans with Disabilities Act also apply to cases involving the NYSEL and NYCHRL]).

As Defendants argue in reply, analysis under either the Rehabilitation Act or NYCHRL requires a disability, which Plaintiff does not allege. Further, as Defendants also argue in reply, to the extent that Plaintiff's argument is premised upon perceived disability, Plaintiff's "reasonable accommodation" argument is that Defendants "refused to provide additional time…to submit [medical documentation in support of his appeal]," which is not an accommodation related to the "essential functions" of the job (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 146 [1st Dept 2006] ["…in order for the plaintiff to be protected under the NYHRL as a disabled employee, she was required to establish at least that she was capable of performing the essential functions of her job with reasonable accommodation."]). Accordingly, the branch of Defendants' motion seeking to dismiss Plaintiff's second cause of action for failure to provide a reasonable accommodation under the NYCHRL and sixth cause of action for failure to provide a reasonable accommodation under the Rehabilitation Act is granted.

C. Disparate treatment

Defendants argue that Plaintiff fails to state a cause of action for disability discrimination under the Rehabilitation Act because DSNY and Dr. Maron's requests for a sleep study and underlying medical records are not an adverse employment action or material change to the conditions of Plaintiff's employment. In opposition, Plaintiff relies on Justice Edmead's determination reinstating him to the civil service list.

To prove discrimination under the ADA, and therefore under the Rehabilitation Act and NYCHRL, a plaintiff must prove that: (1) the defendant is covered by the ADA; (2) plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA; (3) plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of his disability or perceived disability (*Kinneary v City of NY*, 601 F3d 151, 155-156 [2d Cir 2010]; *Santiago v Dept. of Educ. of the City of NY*, 2014 NY Slip Op 30624[U], *3 [Sup Ct, NY County 2014] ["Discrimination claims brought pursuant to the State and City Human Rights Laws are reviewed under" the same burden-shifting framework], citing *McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]).

"Adverse employment actions include discharge, *refusal to hire*, refusal to promote, demotion, reduction in pay, and reprimand," as well as "lesser actions" (*Phillips v Bowen*, 278 F3d 103, 109 [2d Cir 2002] [emphasis added]). Here, Justice Edmead found that "in the face of the certifications by petitioner's pulmonologist, the Commission based the Determination on DSNY's general discussion of untreated sleep apnea. In so doing, the Commission directly contravened the legislative prohibition of denying employment to a person solely on the basis that he or she has a disease" (*Article 78 Decision* pp 5-6). This is enough to, at minimum, suggest an adverse employment action on the basis of Plaintiff's perceived disability. Accordingly, the branch of Defendants' motion seeking to dismiss the discrimination/disparate treatment claims is denied.

D. Retaliation under the NYCHRL and Rehabilitation Act

Defendants argue that Dr. Maron's requests for additional medical documentation on behalf of DSNY were justified and not materially adverse. In opposition, Plaintiff clarifies that the retaliation allegations are actually broader, and that Plaintiff, among other things, also alleges that as "a result of Plaintiff's successful Article 78, Dr. Maron and DSNY retaliated against Plaintiff by quizzing him as to why he prevailed in his petition and telling him that the doctors wanted to know because they considered it a missing piece of material information" (*NYSCEF 47* pp 24-25).

"Because discrimination is rarely so open as to provide direct proof, a plaintiff is required only to prove four circumstantial elements to make out a prima facie Rehabilitation Act discrimination claim: (1) plaintiff's employer is subject to the Rehabilitation Act; (2) plaintiff was disabled within the meaning of the Rehabilitation Act; (3) plaintiff was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of her disability (*Quadir v NY State DOL*, 39 F Supp 3d 528, 540 [SDNY 2014]). Similarly, "to make out an unlawful retaliation claim under the NYCHRL, a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct" (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 [2d Dept 2013]).

Here, Defendants' argument challenges whether the actions alleged by Plaintiff would "deter a reasonable person from making or supporting a charge of discrimination" (*NYSCEF 40* pp 25-26, citing *Mazzeo v Mnuchin*, 2017 US Dist LEXIS 101299, at *23, n 6 [SDNY June 28, 2017, No. 16 CV 2747 (VB)]). To the extent that Defendants cite this and the Article 78 Action as proof that Plaintiff was not deterred from making charges of discrimination, *Mazzeo* is distinguishable because it cited the plaintiff's further internal, administrative complaints, not subsequent litigation (*id.*). Defendants suggest that by continuing this action, Plaintiff "is clearly not deterred by the inquiry" (*NYSCEF 51* p 10). This theory would end each claim when it begins: that is, anyone seeking to vindicate statutory rights in court would, simply by filing, prove that they were not deterred from making a complaint, a result which this Court cannot permit. Most importantly, the severity of the action is better left for a fact-finder to determine. Accordingly, this branch of Defendants' motion is also denied.

CONCLUSION

For the reasons above, it is

ORDERED that Defendants' motion is **GRANTED SOLELY TO THE EXTENT THAT** the following claims in Plaintiff's amended verified complaint are dismissed: (1) any claims for costs and fees associated with the Article 78 action and back wages are dismissed; (2) the third claim for aiding and abetting against Dr. Maron; and (3) the second and sixth causes of

action for failure to provide a reasonable accommodation under the NYCHRL and Rehabilitation Act; and it is further

ORDERED that all other branches of Defendants' motion are denied; and it is further

ORDERED that Plaintiff shall, within 30 days, e-file and serve a copy of this order with notice of entry upon Defendants; and it is further

ORDERED that within 60 days, the parties shall confer in good faith to resolve any remaining discovery and submit a discovery stipulation to be so-ordered; and it is further

ORDERED that if the parties are unable to agree on all outstanding discovery issues, they may email the Court (dsolomki@nycourts.gov) to request a discovery conference.

This constitutes the decision and order of the Court.

11/23/20
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

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