

<b>Akande v New York City Dept. of Corr.</b>
2022 NY Slip Op 30651(U)
March 3, 2022
Supreme Court, New York County
Docket Number: Index No. 154724/2020
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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JONATHAN AKANDE,

Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF CORRECTION,
CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 154724/2020

MOTION DATE 12/07/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53

were read on this motion for JUDGMENT - DEFAULT.

Upon the foregoing documents, plaintiff's motion for a default judgment is denied and defendants' cross-motion to dismiss this action is granted.

Plaintiff's Amended Complaint makes the following factual allegations: Plaintiff was hired as a probationary corrections officer by defendant the New York City Department of Corrections ("DOC") on or about January 1, 2018 (NYSCEF Doc. No. 8 [Amended Complaint at ¶7]). On September 19, 2019, DOC provided plaintiff with an agreement to extend his probationary employment (Id. at ¶43; see also NYSCEF Doc. No 38 [Probation Extension Agreement]). According to plaintiff this extension agreement was defective because it was not signed by the Commanding Officer of MDC and the Deputy Commissioner of Human Resource for DOC, as mandated by Directive 2219RA, and failed to inform plaintiff of the reasons for the extension of his probation (Id. at ¶44-48). Plaintiff asserts that, as a result of DOC's failure to properly extend his probationary period, he became an employee of DOC. The point at which plaintiff believes this change occurred is not specified, however.

On April 10, 2020, plaintiff was involved in transporting inmate Rafael Ramos to the DOC medical facility at Hart Island (Id. at ¶10). While plaintiff stood guard at the cell in which Ramos was being held, Ramos grew distressed and turned away from plaintiff, holding a plastic object (Id. at ¶¶11, 13-15). Plaintiff did not enter Ramos's cell at that time – he claims that he had no authority to do so – and instead found another officer, who he asked to “notify the area supervisor” that Ramos might harm himself (Id. at ¶¶16, 18). After plaintiff was unable to motivate this officer to “act more quickly” plaintiff approached the Mental Health Clinician on duty, who also dismissed his concerns (Id. at ¶¶20-21). Plaintiff then returned to Ramos's cell (Id. at ¶22). At some point after plaintiff's return, Ramos, still in the cell, gouged out his eye with a plastic spoon (Id. at ¶23). Officers arrived after this occurred (Id. at ¶24). Plaintiff subsequently submitted an “Incident Report,” describing the foregoing events to multiple parties, i.e., his supervisors, the City's oversight agency for DOC (the New York City Department of Investigations, i.e., the “Inspector General”), and the “Federal Nunez Monitor” (Id. at ¶¶25-26).

Approximately twelve days after plaintiff filed the Incident Report, DOC suspended him indefinitely and without pay (Id. at ¶27). Then, on July 1, 2020, DOC terminated plaintiff's employment (Id. at ¶¶8, 30). Plaintiff contends that his suspension and termination were carried out without the Civil Service protections he was entitled to as a DOC employee and that his procedurally improper and unwarranted suspension and dismissal were the result of racial animus against him as an African American and were reprisal for his filing of the Incident Report (Id. at ¶64).

The Amended Complaint alleges that DOC's termination of plaintiff's employment as a corrections officer violated: (i) Article I, Section 11 of the New York State Constitution; (ii) Executive Law §296, also known as the New York State Human Rights Laws (“NYSHRL”); (iii)

New York City Administrative Code §8-107, also known as the New York City Human Rights Law (“NYCHRL”); and (iv) Civil Service Law (“CSL”) sections 75-b and 80.

On June 26, 2020, plaintiff electronically filed the Summons and Complaint in this action with the New York State Court’s Electronic Filing system (“NYSCEF”) (See NYSCEF Doc. No. 2) but did not serve same on defendants. Rather, on July 28, 2020, plaintiff served an Amended Summons Complaint on defendants via email (NYSCEF Doc. No. 9 [Proof of Service]) and attempted to e-file it with the Court (See NYSCEF Doc. No. 3). The Court’s records reflect, however, that the Amended Complaint was returned for correction (Id.) and was not re-filed on NYSCEF until June 7, 2021, when it was included as an exhibit to plaintiff’s motion for a default judgment. Defendants did not interpose an Answer to the Amended Complaint. As a result, plaintiff now moves, pursuant to CPLR §3215, for a default judgment and inquest. Defendant opposes and cross-moves to dismiss the Amended Complaint as facially insufficient.

### DISCUSSION

The Court first addresses plaintiff’s motion for a default judgment. To succeed on his motion, plaintiff must establish (1) valid service of the Amended Summons and Complaint, (2) the facts constituting the claim and (3) defendants’ default (CPLR §3215[f]; see also First Fed. Sav. & Loan Assn. of Charleston v Tezzi, 164 AD3d 758, 759 [2d Dept 2018]). Plaintiff has not satisfied his burden here. While the Summons and Complaint were filed with the Court, they were never served on defendants and are therefore a nullity (See CPLR §306-b). The Amended Summons and Complaint, upon which plaintiff now seeks a default judgment, was never filed with the Court and therefore does not provide grounds for a default judgment. In light of the foregoing, plaintiff’s motion is denied.

The Court notes that plaintiff's failure to timely serve the Amended Summons and Complaint provides grounds for dismissal of this action, upon defendants' motion (CPLR §306-b). However, since defendants have not moved to dismiss on this ground but elected instead to cross-move to dismiss the Amended Complaint pursuant to CPLR §3211(a)(7) – which motion has been fully briefed – in the interest of judicial economy the Court deems the Amended Complaint filed as of June 7, 2021 (the date it was filed as an exhibit to plaintiff's default judgment motion) and turns to the merits of defendants' cross-motion.

“On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction ... [and the Court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [internal citations and quotations omitted]). “In assessing a motion under CPLR §3211(a)(7) the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Id. [internal citations and quotations omitted]).

That branch of defendants' motion which seeks to dismiss this action as to the DOC is granted. Pursuant to Chapter 17, Section 396 of the New York City Charter, “[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law” (NY City Charter, Ch 17, §396). There is no exception at law which removes DOC from this rule. Accordingly, DOC is not a proper party to this action and the Amended Complaint is hereby dismissed as against it (See e.g. Dimaggio-Campos v Brann, 2021 N.Y. Slip Op. 31868[U] [Sup Ct, New York County 2021]).

The Amended Complaint also fails to state a claim against defendant the City of New York (the “City”) under Article I, Section 11 of the New York State Constitution; the NYSHRL, the NYCHRL or Civil Service Law §80.

Plaintiff’s claim under the equal protection clause of the New York State Constitution (NY Const., Art I, §11) is “barred by plaintiff’s failure to serve a notice of claim as required by General Municipal Law § 50-F’ (423 S. Salina St., Inc. v City of Syracuse, 68 NY2d 474, 479-480 [1986]; see also E. End Resources, LLC v Town of Southold Planning Bd., 135 AD3d 899, 902 [2d Dept 2016] [plaintiff’s failure to serve a timely notice of claim upon defendant mandated dismissal of claim alleging violation of plaintiff’s right to equal protection under New York State Constitution]). The cases plaintiff offers in opposition, Blackmon v City of Syracuse, 185 AD3d 1505, 1507 [4th Dept 2020] and Khrapunskiy v. Doar, 12 NY3d 478 [2009]) do not support a contrary conclusion. In any event, the proper method to assert an equal protection claim is through the New York State Human Rights Law and New York City Human Rights Law (See Brown v State, 89 NY2d 172, 190-91 [1996] [Equal Protection Clause in Article 1, Section 11 of New York State Constitution “was not intended to create a duty without enabling legislation”]), which plaintiff has done.

Under either the New York State or New York City Human Rights Laws, however plaintiff’s Amended Complaint fails to state a claim. To state a claim under either of these statutes, plaintiff must allege “that [he] is a member of a protected class, that [he] was qualified for [his] position, that [he] suffered an adverse employment action, and that the adverse action was due to circumstances that could be deemed discriminatory” (Thomas v Mintz, 60 Misc 3d 1218(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted], aff’d as mod., 182 AD3d 490 [1st

Dept 2020)). Here, plaintiff alleges that he is a member of a protected class and that he was terminated as a corrections officer but otherwise

fails to ... allege that defendants' actions occurred under circumstances that give rise to an inference of discrimination. [He] does not allege facts that would establish that similarly situated persons who ... [were] not of African American descent were treated more favorably than plaintiff was. Instead, the complaint merely asserts the legal conclusion that defendants' adverse employment actions and plaintiff's termination were due to race

(Thomas v Mintz, 182 AD3d 490, 490-91 [1st Dept 2020]; see also Askin v Dept. of Educ. of City of New York, 110 AD3d 621, 622 [1st Dept 2013] [plaintiff's claim of age-related bias insufficient without "concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or less well under the City HRL"]).

Plaintiff's claim under CSL §80 is improperly brought here as a plenary action; it should instead be brought as an Article 78 proceeding and must be dismissed for this reason (See Hand v New York City Dept. of Correction, 2020 NY Slip Op. 33822[U], 2 [Sup Ct, NY County 2020] citing Wilson v Madison-Oneida Bd. of Co-op. Educ. Services, 268 AD2d 625, 626 [3d Dept 2000]). Even were this not the case, plaintiff fails to state a claim under that statute. CSL §80 provides that:

Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs...

(Civil Service Law §80[1]). CSL §80 only applies "when an existing position is being abolished (Matter of Zigarelli v New York State Police, 126 AD2d 822, 824 [3d Dept 1987]) but although plaintiff alleges that "the Department of Correction is in the process of reducing its uniform staff ... because of the mass reduction in the Department's inmate population" (NYSCEF Doc. No. 8

[Amended Complaint at ¶55]), he nowhere alleges that his former position is being abolished as part of this reduction. CSL §80 is, therefore, not implicated by the allegations in his complaint.

Finally, plaintiff's claim under CSL §75-b must be dismissed. "[C]laims under Civil Service Law §75-b are committed to the exclusive jurisdiction of the Court of Claims" pursuant to the New York State Constitution, Article VI, section 9 and Court of Claims Act §9(13) (Ajoku v New York State Off. of Temporary and Disability Assistance, 198 AD3d 437 [1st Dept 2021] [internal citations omitted]). Accordingly, the Court severs this claim and dismisses same without prejudice to its assertion in an action before the Court of Claims (See Concourse Nursing Home v Chasin, 259 AD2d 302, 302-03 [1st Dept 1999] [Supreme Court properly dismissed action, sua sponte, for lack of subject matter jurisdiction where "plaintiff's only remaining causes of action could "only be entertained in the Court of Claims"]]).

In light of the foregoing, it is

**ORDERED** that plaintiff's motion for a default judgment is **DENIED**; and it is further

**ORDERED** that defendants' motion to dismiss this action is **GRANTED** and the complaint is hereby dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that within thirty days from entry of this order, defendant the City of New York shall serve a copy of this order with notice of entry upon the New York County Supreme Court's General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Court (60 Centre Street, Room 141B), who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that defendant the City of New York shall, within thirty days of receipt of this order, e-file and serve upon all parties a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

*Judy H. Kim*  
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3/3/2022  
DATE

JUDY H. KIM, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE