

Scott v New York City Dept. of Corr.
2022 NY Slip Op 30952(U)
March 23, 2022
Supreme Court, New York County
Docket Number: Index No. 158279/2019
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

-----X

SHANEEN SCOTT,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF CORRECTION, CITY
OF NEW YORK, CYNTHIA BRANN, ANGEL VILLALONA,
KEITH POWERS, ALICKA AMPRY-SAMUEL, DONOVAN
RICHARDS JR., CARLINA RIVERA

Defendants.

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INDEX NO. 158279/2019

MOTION DATE 4/30/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 73

were read on this motion for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78

were read on this motion for DISMISSAL.

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

FACTUAL BACKGROUND

On December 19, 2016, plaintiff Shaneen Scott was hired by the New York City Department of Correction (“DOC”) as a Probationary Correction Officer¹ (NYSCEF Doc. No. 2 [Complaint at ¶4]). Plaintiff was assigned to work on Rikers Island in the Robert N. Davoren Complex (“RNDC”) which housed juvenile inmates (*Id.* at ¶¶10, 19).

Beginning in October 2018, defendant the City of New York (the “City”) transferred juvenile inmates to the Horizon Juvenile Center (*Id.* at ¶11). DOC requested that plaintiff and other

¹ According to plaintiff, her probationary term ended on December 19, 2018 (*Id.* at ¶5).

officers from RNDC voluntarily agree to transfer to the Horizon Juvenile Center (Id. at ¶12). Plaintiff's union commenced a lawsuit relating to these transfers (Id. at ¶13). Based on advice from her union, plaintiff declined to volunteer for this transfer (Id.). After the lawsuit was resolved, plaintiff's union advised her and other members to complete the paperwork to transfer to Horizon Juvenile Center on or before December 29, 2019, or face discipline (Id. at ¶¶16-17). Plaintiff represents that she completed the necessary paperwork on December 13, 2018 (Id. at ¶18).

DOC terminated plaintiff's employment on January 7, 2019 (Id. at ¶19). Plaintiff maintains that she was not given an explanation for her termination or afforded the hearing she believes she was entitled to as a DOC employee (Id. at ¶20). After plaintiff applied for unemployment benefits, DOC sent the Department of Labor a letter stating that plaintiff

was terminated for insubordination for failure to follow a direct, lawful order. The claimant was ordered to complete the pre-justice forms necessary for reassignment to another facility. The claimant failed to complete the form and return within the allocated timeframe ... Therefore, the claimant was terminated for insubordination.

(NYSCEF Doc. No. 17).

Plaintiff commenced the instant action on August 23, 2019, asserting that defendants violated Civil Service Law §80 by terminating her employment based on a pretext as part of its efforts to lower uniform staff numbers and also violated Article I, Section 11 of the New York State Constitution, Executive Law §296 (the New York State Human Rights Law or "NYSHRL"), and New York City Administrative Code §8-107 (the New York City Human Rights Law or "NYCHRL") by terminating her employment based on her race and gender.

The parties subsequently stipulated to extend the City's time to answer to January 3, 2020 (NYSCEF Doc. No. 14). On December 31, 2020, plaintiff filed the instant motion for a default judgment (mot. seq. 001). On January 13, 2021, defendants submitted opposition and cross-moved

to dismiss this action² (mot. seq. 002). Motion sequences 001 and 002 are hereby consolidated for disposition.

DISCUSSION

Plaintiff's motion for a default judgment is denied. Pursuant to CPLR §3215(f), "[a] plaintiff moving for a default judgment based upon a defendant's failure to appear must submit proof of service of the summons and complaint and proof of the facts constituting the claim" (PV Holding Corp. v AB Quality Health Supply Corp., 189 AD3d 645, 646 [1st Dept 2020]) but plaintiff has not submitted proof of service of the initiating papers; the document denominated as an affidavit of service is a blurry scan of the summons (NYSCEF Doc. No. 13), mandating the denial of plaintiff's motion (See e.g., Lewis v Solny, 172 AD3d 1352, 1354 [2d Dept 2019]; DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co., 128 AD3d 760, 761 [2d Dept 2015]).

Even leaving this aside, defendants have met their burden in opposition to demonstrate "a reasonable excuse for the default and a meritorious defense" (Johnson–Roberts v Ira Judelson Bail Bonds, 140 AD3d 509, 509 [1st Dept 2016] [internal citations omitted]). "What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court" (Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 AD3d 510, 510 [1st Dept. 2010]). In this case, "defendants have demonstrated a reasonable excuse for their default based on their [various] difficulties resulting from the COVID-19 pandemic" as well as the departure of the attorney handling this matter (See H Smith Lender, LLC v 232 Smith St. LLC, 2021 NY Slip Op. 31673[U], 8-9 [Sup Ct, Kings County 2021]). The Court further notes that, after considering the tolling period of nearly seven months put in place by Executive Order 202.8, defendants' delay in

² Plaintiff notes that defendants did not timely respond to her motion for a default judgment. To the extent defendants' cross-motion and opposition was filed six days after plaintiff's motion rather than the seven days required under CPLR §2214(b), there is no evidence this de minimis delay prejudiced plaintiff and it is therefore excused (CPLR §§2004, 2214[c]).

answering was approximately six months. Defendants have also demonstrated a meritorious defense as they have established that the complaint is insufficient as a matter of law, as discussed in greater detail below. In short, “given the questions of fact as to merit, the brief delay, the lack of intention on [defendants’] part to default, the failure of plaintiff to demonstrate any prejudice attributable to the delay and the policy preference in favor of resolving disputes on the merits” it would be inappropriate to grant plaintiff’s motion for a default judgment (New Media Holding Co. LLC v Kagalovsky, 97 AD3d 463, 466 [1st Dept 2012] citing Cerrone v Fasulo, 245 AD2d 793, 794 [1997]).

The Court now turns to defendants’ motion to dismiss. As a threshold matter, the Court rejects plaintiff’s argument that, at this juncture, defendants may only move for permission to file a late answer under CPLR §3012(d) rather than make the instant motion to dismiss. This proposition is not supported by case law and ignores the fact that CPLR §3211(e) permits a motion to dismiss pursuant to CPLR §3211(a)(7) to be made at any time, including prior to service of a responsive pleading (See e.g., Goldberg v Torim, 181 AD3d 443, 444 [1st Dept 2020]).

“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 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, NY County 2021]).

Plaintiff’s claims against the City of New York must also be dismissed. Plaintiff’s CSL §80 claim is improperly brought in this plenary action rather than in an Article 78 proceeding (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]). To the extent plaintiff asserts, in opposition, that the allegations at issue here do not present a claim under CSL §80 “in the classic sense” and therefore do not need to be brought in an Article 78 proceeding, this novel argument has no foundation in statute or case law and is not credited by this Court. In any event, even if the Court exercised its authority under CPLR §103(c) to convert this claim to an Article 78 proceeding (See Tyk v Brooklyn Community Bd. 12, City of New York, 61 Misc 3d 1217(A) [Sup Ct, Kings County 2016], affd sub nom. Tyk v Brooklyn Community Bd. 12, 166 AD3d 708 [2d Dept 2018]), it would be dismissed as untimely.

Under CPLR §217, “a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact” (CPLR §217[1]). Here, plaintiff’s termination on January 7, 2019 was the date of the “final determination,” for purposes of CPLR §217. As a result, plaintiff’s commencement of this action on August 23, 2019 was beyond the four-month

statute of limitations. Accordingly, plaintiff's CSL §80 claim is dismissed as time-barred (See Lipton v New York City Bd. of Educ., 284 AD2d 140, 141 [1st Dept 2001]).

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 New York State Constitution's equal protection clause "was not intended to create a duty without enabling legislation" (Brown v State, 89 NY2d 172, 190-91 [1996]). Therefore, the proper method to assert an equal protection claim is through the NYSHRL and NYCHRL, which plaintiff has done.

Plaintiff's complaint fails, however, to state a claim under either the NYSHRL or NYCHRL. To do so, plaintiff must allege "that she is a member of a protected class, that she was qualified for her position, that she 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]).

Plaintiff alleges that she is a member of a protected class and that she was terminated as a correction officer but

fails to ... allege that defendants' actions occurred under circumstances that give rise to an inference of discrimination. She 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"]).

Finally, plaintiff's counsel represented – in opposition to the City's motion to dismiss – that plaintiff would withdraw the complaint as against the individuals named as defendants therein, i.e., Cynthia Brann, Angel Villalona, Keith Powers, Alicka Ampry-Samuel, Donovan J. Richards, Jr., and Carlina Rivera (See NYSCEF Doc. No. 9 [Plaintiff's Memo. of Law at p. 5, n. 1]). Since plaintiff's counsel has not yet done so, the Court grants the City's motion as to these defendants for the same reasons set forth above.

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 as to all defendants with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

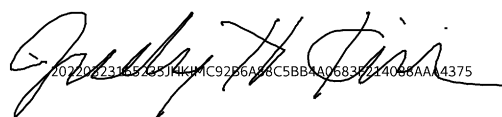
ORDERED that defendant the City of New York shall, within ten days of the date of this decision and order, serve copy of this decision and order, with notice of entry, on all parties.

ORDERED that within thirty days from the date of this decision order, defendant the City of New York shall serve a copy of this decision and 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).

This constitutes the decision and order of the Court.



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3/23/2022

DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE