Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J Kerrigan Justice

IA Part 10

John D'Amore, Plaintiff,

- against -

The City of New York, Defendant.

Index Number 723114 2020

Motion Date September 13, 2021

Motion Seq. No. 2

The following numbered papers read on this motion by defendant The City of New York (defendant), dismissing the complaint pursuant to CPLR § 3211(a)(5) and (a)(7).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 24-33, 38
Answering Affidavits - Exhibits	EF 35-37
Reply Affidavits	EF 39-40

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for defendant's alleged violation of New York State Human Rights Law, Executive Law § 290, and New York City Human Rights Law, Administrative Code of the City of New York § 8-101. Plaintiff John D'Amore (plaintiff), has alleged that he was a former employee of non-party the New York City Department of Correction (DOC), and that he was terminated from his employment because he raised concerns regarding a transfer from one facility to another that he was told was based on his gender.

Defendant has now moved to dismiss plaintiff's complaint pursuant to CPLR § 3211 (a)(5) and (a)(7). The court will first address the branch of defendant's motion brought pursuant to CPLR § 3211 (a)(5). Defendant has argued that the complaint should be dismissed as untimely and based upon the doctrine of collateral estoppel as a result of the

dismissal of plaintiff's claims in federal court. CPLR § 3211 (a)(5) provides that a party may also move to dismiss "one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... collateral estoppel ... res judicata [or] statute of limitations..."

In support of this branch of its motion, defendant has argued that plaintiff's claims that have been brought for defendant's alleged violation of New York City Human Rights Law and New York State Human Rights Law are untimely since plaintiff filed the instant action over a year after the applicable statute of limitations expired. Defendant has argued that when plaintiff's non-federal claims were dismissed in federal court in an order entered on June 25, 2019, from the United States District Court, Eastern District of New York, plaintiff was afforded six months in which to bring another action in State court from that date, that plaintiff did not appeal the federal court's dismissal of his state law claims, and that plaintiff's time to file the instant action then elapsed on December 25, 2019.

"'On a motion to dismiss a cause of action pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired'" (*Deutsche Bank Natl. Tr. Co. v Blank*, 189 AD3d 1678 [2d Dept 2020], quoting *HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2d Dept 2019]; *see Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]; *Island ADC, Inc. v Baldassano Architectural Grp., P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). "'If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period'" (*Deutsche Bank Natl. Tr. Co. v Blank*, 189 AD3d at 1678, quoting *HSBC Bank USA, N.A. v Gold*, 171 AD3d at 1030; *see Geotech Enterprises, Inc. v 181 Edgewater, LLC*, 137 AD3d 1213, 1214 [2d Dept 2016]; *J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652, 653 [2d Dept 2014]; *Jalayer v Stigliano*, 94 AD3d 702, 703 [2d Dept 2012]).

The record contains, among other things, copies of the pleadings, a copy of plaintiff's complaint filed in federal court dated March 29, 2017, a copy of a decision dated June 21, 2019, and entered on June 25, 2019, from the United States District Court, Eastern District of New York, a copy of plaintiff's notice of appeal dated July 19, 2019, to the United States Court of Appeals for the Second Circuit, a copy of plaintiff's brief filed in federal court dated October 30, 2019, and a copy of a decision dated June 4, 2020, from the United States Court of Appeals for the Second Circuit.

The instant action was commenced on December 1, 2020. In the complaint, plaintiff has alleged that DOC hired him on April 11, 2016, and appointed plaintiff to the position of

Investigator with DOC's Investigation Division. Plaintiff has further alleged that after he objected to a change in his assigned location, a change that was made on the basis of his gender, he was given the option to either resign or be terminated, and that his employment was subsequently terminated on April 28, 2016.

Claims brought pursuant to both the New York State Human Rights Law and the New York City Human Rights Law are subject to a three-year statute of limitations (CPLR § 214[2]; *see Goldin v Engineers Country Club*, 54 AD3d 658, 659 [2d Dept 2008]; *Alaimo v New York City Dept. of Sanitation*, 203 AD2d 501, 501 [2d Dept 1994]; *Jones v State*, 149 AD2d 470, 471 [2d Dept 1989]; *see also Hagan v City of New York*, 39 F Supp 3d 481, 496 n10 [SDNY 2014]). CPLR § 205 (a), entitled "Termination of action," provides the following:

> "New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

In an order dated June 21, 2019, and entered on June 25, 2019, the United States District Court, Eastern District of New York declined to exercise supplemental jurisdiction over plaintiff's state claims and dismissed them without prejudice. A review of plaintiff's appeal of the District Court's June 25, 2019, order has demonstrated that plaintiff only appealed the dismissal of his federal claims and did not address his appeal to District Court's decision to decline to exercise supplemental jurisdiction and the dismissal of his state law claims. Thus, plaintiff abandoned the issue of District Court's dismissal of his state law claims.

As such, plaintiff's state law claims were terminated by the dismissal order of the District Court entered on June 25, 2019, and the period in which plaintiff was required to bring the instant action began to run upon the entry of that order. Given the provisions of

CPLR § 205 (a), plaintiff's time to commence the instant action ran on December 25, 2019. As such, defendant has satisfied its burden on this branch of its motion by demonstrating that plaintiff's instant action is untimely. In opposition, plaintiff has failed to demonstrate that the statute of limitations was tolled or otherwise inapplicable.

Moreover, even "[w]here a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims" (*Milione v City Univ. of New York*, 153 AD3d 807, 808-09 [2d Dept 2017]; *see Afrat v Kimber Mfg., Inc*., 179 AD3d 880, 881 [2d Dept 2020] *see also Emmons v Broome County*, 180 AD3d 1213, 1217 [3d Dept 2020]). The doctrine of "[c]ollateral estoppel means ... that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (*Matter of McGrath v Gold*, 36 NY2d 406 [1975]; *see Jimenez v Shippy Realty Corp*., 213 AD2d 377, 377-378 [2d Dept 1995]). .

A careful review of plaintiff's causes of action alleging retaliation in the instant action, while taking into consideration plaintiff's claims brought in federal court and District Court's prior determination to grant summary judgment dismissing the action on the basis that "no reasonable jury could find that [p]laintiff ... engaged in protected activity ... and that the employer was aware of that activity..." has demonstrated that the doctrine of collateral estoppel applies in this matter to bar plaintiff's claims under New York State Human Rights Law and the New York City Human Rights Law (*see Jamal v Caroline Garden Tenants Corp*., 173 AD3d 843, 844 [2d Dept 2019]).

District Court's factual determinations resolving the first two essential elements of plaintiff's retaliation claims (Executive Law § 296 [7]; Administrative Code of the City of New York § 8–107 [7]; *see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-13 [2004]; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 920 [2d Dept 2015]), have a preclusive effect on plaintiff's ability to assert and advance such claims in the instant action given his prior full and fair opportunity to litigate those identical issues before and given the prior judgment on the merits (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]; *Jamal v Caroline Garden Tenants Corp*., 173 AD3d at 844).

Since "'[t]he doctrine of collateral estoppel ... 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 actions are the same"' (*Jamal v Caroline Garden Tenants Corp*., 173 AD3d at 844, quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see Matter of McGrath v Gold*, 36 NY2d 406 [1975]; *Jimenez v Shippy Realty Corp*., 213 AD2d , 377-378 [2d Dept 1995]), defendant has

sufficiently demonstrated that plaintiff's instant action for retaliation is barred by the doctrine of collateral estoppel. In opposition, plaintiff has failed to sufficiently demonstrate an "'absence of a full and fair opportunity to litigate the issue in the prior action'" (*Jamal v Caroline Garden Tenants Corp.*, 173 AD3d at 844, quoting *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]; *see also Emmons v Broome County*, 180 AD3d at 1217).

Given the above determinations, the court need not reach the remaining branch of defendant's motion.

Accordingly, defendant's motion is granted and the complaint is, hereby, dismissed.

Dated: January 5, 2022

FILED
1/10/2022
COUNTY CLERK
QUEENS COUNTY

Kevin J. Kerrigan, J.S.C.