

**Aykac v City of New York**

2022 NY Slip Op 33639(U)

October 20, 2022

Supreme Court, New York County

Docket Number: Index No. 805009/2022

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

ILTER AYKAC,

Plaintiff,

- v -

CITY OF NEW YORK, LEON EISIKOWITZ, individually, and
LEON B. EISIKOWITZ, M.D., P.C.,

Defendants.

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INDEX NO. 805009/2022

MOTION DATE 06/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS/X-MOTION AMEND COMPLAINT .

I. INTRODUCTION

This is an action in which the plaintiff, a former New York City Police Department (NYPD) detective, seeks to recover damages for medical malpractice, negligence, gross negligence, negligent hiring, training, and retention of NYPD medical staff, and intentional and negligent infliction of emotional distress (hereafter collectively the tort claims). He also seeks to recover for discrimination in the terms and conditions of his employment on the basis of disability, creation of a hostile work environment on the basis of disability, and retaliation, in violation of the Administrative Code of the City of New York (Admin. Code.) § 8-101, et seq. (hereinafter collectively the discrimination claims). The defendants move pursuant to CPLR 3211(a)(7) to dismiss the entirety of the complaint for failure to state a cause of action. They also seek to dismiss the tort claims on the ground that the plaintiff failed timely to serve a legally sufficient notice of claim upon the New York City Comptroller in accordance with General Municipal Law § 50-e(5). The plaintiff opposes the motion, and cross-moves pursuant to CPLR 3025(b) for leave to serve and file and amended complaint.

The defendants' motion is granted, and the complaint is dismissed. The cross motion is denied.

## II. FACTUAL BACKGROUND

The dispute here arose from a series of encounters at the beginning of the COVID-19 pandemic that the plaintiff had with NYPD District Surgeon Leon Eisikowitz, a defendant in this action, over the plaintiff's medical condition, and whether his contraction of COVID-19 rendered him unable to report to work. The plaintiff alleged that he had a severe case of COVID-19, was hospitalized due to extreme respiratory distress during March and early April 2020, and was given a poor prognosis. He survived, however, and was discharged from the hospital, after which he had an ongoing disagreement with Eisikowitz as to whether he had long-term COVID-19, whether such a condition was recognized by the medical community in the first instance, and whether the plaintiff was fit to return to work.

The plaintiff alleged that Eisikowitz committed medical malpractice and engaged in other tortious behavior, on some unspecified date in April 2020, by insisting that the plaintiff return to work despite suffering from the effects of long-term COVID-19. He further alleged that, on May 14, 2020, Eisikowitz committed additional medical malpractice and engaged in other tortious behavior by again insisting that he return to work based on the plaintiff's condition at the time, disparaging the plaintiff's private physicians, and recommending a pulmonologist to the plaintiff, purportedly in violation of NYPD rules. The plaintiff also asserted that, on some unspecified date in June 2020, Eisikowitz, in order to expedite the plaintiff's return to work, voluntarily advised the plaintiff not to follow up with surgery to treat kidney cysts that had been diagnosed as cancerous by a private physician. He nonetheless also asserted that, although he delayed the surgery for several months, the cancerous tissue successfully was removed, and did not spread beyond his kidneys. In addition, the plaintiff alleged that Eisikowitz subjected him to verbal "abuse" between April 2020 and June 2020, specifically by referring to him as "fat," and

characterizing him as a “malingerer,” and by other statements meant to compel the plaintiff to return to work in spite of his physical condition.

The plaintiff also alleged in his complaint that, sometime in May 2021, Eisikowitz improperly “forced” him to submit to an electroencephalogram (EEG) examination, and committed malpractice and other torts by having him walk around the office during the test. He averred that he was compelled to walk despite his weakened condition and that, as a consequence of walking, he fainted. Additionally, he asserted that, sometime in June 2021, another district surgeon, Dr. Hassett, directed him to return to work despite the continuing physical weakness that was caused by his medical condition.

### III. UNTIMELY AND INSUFFICIENT NOTICE OF CLAIM

Timely service of a legally sufficient notice of claim upon the City Comptroller is a condition precedent to the commencement of an action against the City of New York to recover damages for its tortious conduct (see *Davidson v Bronx Municipal Hosp.*, 64 NY2d 59, 61 [1984]; *McGrue v City of New York*, 195 AD3d 932, 932 [2d Dept 2021]; Admin. Code § 7-201). The failure to satisfy this condition precedent may implicate the subject matter jurisdiction of the court (see *Copeland v Salomon*, 56 NY2d 222, 227 [1982] [the term “lack of subject matter jurisdiction” is “inexactly used to refer to the situation in which the absence of a condition precedent requires dismissal of a particular case notwithstanding that the court has jurisdiction of the subject matter”]; *Lumbermens Mut. Cas. Co. v Port Authority of N.Y. & N.J.*, 137 AD2d 796 [2d Dept 1988] [failure to serve notice of claim upon Port Authority deprives court of subject matter jurisdiction]; cf. *McKenzie v Port Auth. of N.Y. & N.J.*, 201 AD3d 572, 572 [1st Dept 2022] [requirement that action be commenced against Port Authority within one year of accrual of cause of action is a condition precedent, and the failure to commence action within that time period deprives the court of subject matter jurisdiction]). A plaintiff must not only plead in his or her complaint that he or she has served a notice of claim, but must also allege that the notice

was served at least 30 days prior to commencement of the action and that, in that time, the municipal defendants neglected to or refused to adjust or to satisfy the claim (*see Davidson v Bronx Municipal Hosp.*, 64 NY2d at 61-62). General Municipal Law § 50-e(2) requires the written notice to be “sworn to by or on behalf of the claimant,” and it must set forth “the name and post-office address of each claimant, and of his attorney, if any,” “the nature of the claim,” “the time when, the place where and the manner in which the claim arose,” and “the items of damage or injuries claimed to have been sustained so far as then practicable.”

General Municipal Law § 50-e requires that a notice of claim be served within 90 days after a tort claim accrues against a municipality (*see* General Municipal Law § 50-e[1][a]; *Matter of City of New York v County of Nassau*, 146 AD3d 948, 949 [2d Dept 2017]; *Matter of Brownstein v Incorporated Vil. of Hempstead*, 52 AD3d 507 [2d Dept 2008]).

As the Court of Appeals explained it,

“[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate . . . . Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant’s description municipal authorities can locate the place, fix the time and understand the nature of the [claim]”

(*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks and citations omitted]). The “plain purpose” of statutes requiring prelitigation notice to municipalities “is to guard them against imposition by requiring notice of the circumstances . . . upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation” (*Rosenbaum v City of New York*, 8 NY3d 1, 10-11 [2006], quoting *Purdy v City of New York*, 193 NY 521, 523 [1908]).

With respect to claims against municipal employees acting in their official capacity, General Municipal Law § 50-e(1)(b) provides, in pertinent part, that

“[s]ervice of the notice of claim upon an . . . employee of a public corporation shall not be a condition precedent to the commencement of an action or special

proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, *service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person* under this chapter or any other provision of law”

(emphasis added) (see *Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458, 1460 [4th Dept 2013]). General Municipal Law § 50-k(3) provides that the City of New York is obligated to indemnify and hold harmless any City employee for his or her tortious conduct where “the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained.” Inasmuch as Eisikowitz was acting in the course and scope of his employment with the NYPD when examining the plaintiff and reporting his findings to supervisory personnel at the NYPD, the plaintiff was required to serve a timely and proper notice of claim upon the Comptroller in connection with his tort claims against Eisikowitz (see *Wagman v Hooper*, 138 AD3d 826, 827 [2d Dept 2016]), even though he was not obligated to name Eisikowitz as a respondent in the notice of claim (see *Wiggins v City of New York*, 201 AD3d 22, 25 [1st Dept 2021]).

Although, under most circumstances, the plaintiff would have been required to serve his notice of claim upon the Comptroller within 90 days after his tort causes of action had accrued, the Legislature, in accordance with L 2020, ch 23, § 2 (eff Mar. 3, 2020), amended Executive Law § 29-a to authorize the Governor to issue, by executive order, any directive necessary to respond to the state disaster emergency arising from the COVID-19 pandemic, including a declaration that all statutory periods for the service and filing of papers in legal actions and other legal matters were tolled. On March 20, 2020, the Governor, pursuant to that authority, issued Executive Order (EO) 202.8, which provided, in relevant part:

“In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law*

*and rules . . . , or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.”*

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, providing for a final extension of the tolling deadline until November 3, 2020, and reciting that the “toll would no longer be in effect” as of November 4, 2020 (*Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]). By their terms, the EOs applied not only to statutes of limitations, but to deadlines for the service of notices of claim as required by statute (see *Baldi v Rocky Point Union Free Sch. Dist.*, 2022 NY Slip Op 30891[U], 2022 NY Misc LEXIS 1358 [Sup Ct, N.Y. County, Mar. 17, 2022]).

“A toll suspends the running of the applicable period of limitation for a finite time period, and ‘[t]he period of the toll is excluded from the calculation of the [relevant time period]’” (*Brash v Richards*, 195 AD3d at 582, quoting *Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020]). Here, that period was 228 days. “Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension” (*Brash v Richards*, 195 AD3d at 582, quoting *Foy v State of New York*, 71 Misc 3d 605, 608 [Ct Claims 2021]). As the Appellate Division, Second Department, explained in *Brash*, the EOs effectuated a true tolling of the limitation periods applicable to any claim that had accrued prior thereto, and not a mere suspension of the limitations period, as asserted by the moving defendants. In this regard, the Second Department unequivocally asserted that “we conclude that the subject executive orders constitute a toll of such filing deadlines” (*Brash v Richards*, 195 AD3d at 582).

“[A]lthough the seven executive orders issued after Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) did not use the word ‘toll,’ those executive orders all either stated that the Governor ‘hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,’ made in the prior executive orders (Executive Order [A. Cuomo] Nos. 202.14, 202.28, 202.38, 202.48 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48]) or contained nearly identical language to that effect (see Executive

Order [A. Cuomo] Nos. 202.55, 202.55.1, 202.60 [9 NYCRR 8.202.55, 8.202.55.1, 8.202.60]). Since the tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of Executive Law § 29-a(2)(d), *these subsequent executive orders continued the toll that was put in place by Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8)*”

(*id.* at 585 [emphasis added]).

The plaintiff served his notice of claim upon the Comptroller on July 12, 2021. With respect to the allegations that Eisikowitz committed medical malpractice and engaged in other tortious behavior in April 2020 by insisting that the plaintiff return to work despite suffering from the effects of long-term COVID-19, the notice of claim does not identify a specific date. Even if the court were to deem this conduct to have occurred on the last day in April 2020, and taking into account the toll created by the EOs, the 90-day period for serving the Comptroller with a notice of claim in connection with these tort claims expired on February 2, 2021, or 90 days after the expiration of the toll on November 3, 2020. With respect to the separate allegations that Eisikowitz committed medical malpractice and engaged in other tortious behavior on May 14, 2020 by again insisting that he return to work based on his condition at the time, disparaging the plaintiff’s private physicians, and recommending a pulmonologist to the plaintiff, purportedly in violation of NYPD rules, the 90-day period for serving the Comptroller with a notice of claim also expired on February 2, 2021. The February 2, 2021 deadline also applied to the plaintiff’s separate allegations that, on some unspecified date in June 2020, Eisikowitz voluntarily advised the plaintiff not to follow up with surgery to treat kidney cancer that had been diagnosed by a private physician. Moreover, to the extent that the plaintiff asserted in the notice of claim that Eisikowitz subjected him to verbal “abuse” between April 2020 and June 2020, and that this “abuse” was somehow actionable, the same February 2, 2021 deadline is applicable to the claim. The plaintiff’s service of the notice of claim on July 12, 2021 was untimely as to these claims and, since he did not move for leave to extend the deadline for service of the notice of within one year and 90 days after the limitation period applicable to the claims accrued (see

*Pierson v City of New York*, 56 NY2d 950, 954 [1982]), the tort claims arising these three unrelated incidents must be dismissed for failure timely to serve the Comptroller with a notice of claim (see *Smith v Das*, 126 AD3d 462, 463 [1st Dept 2015]).

Nor can the plaintiff claim that he is entitled to an additional toll for the service of the notice of claim in connection with the events of 2020, based on the continuous treatment doctrine, as such a period “does not begin to run until the end of the course of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously *and is related to the same original condition or complaint*” (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; see *Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp.*, 242 AD2d 674, 676 [1st Dept 1997]). Here, even if the court were to assume that the plaintiff was being “treated” by Eisikowitz (see discussion below), the three incidents described in the notice of claim as having occurred in 2020 were separate, distinct events, involving different allegations of wrongdoing and different physical and medical conditions, and were also distinct from the allegations of wrongdoing that described two events that occurred in 2021, for which timeliness is not a bar.

With respect to those 2021 occurrences, although the plaintiff’s July 12, 2021 service of the notice of claim was timely as to his allegations that, sometime in May 2021, Eisikowitz improperly “forced” him to submit to an EEG and committed malpractice and other torts by having him walk around the office during the test, the absence from the notice of claim of a specific date on which Eisikowitz engaged in this behavior renders the notice of claim legally insufficient (see *Korelski v NF Development, LLC*, 2021 NY Misc LEXIS 8315, \*7-8 [Sup Ct, Suffolk County, Sep. 24, 2021]; cf. *Carhart v Village of Hamilton*, 190 AD2d 973, 974 [3d Dept 1993] [claimant need not articulate specific date of accrual of claim where he alleges a continuing wrong, such as stray voltage infiltrating private property]). Similarly, the allegations against the City that were set forth in the notice of claim to the effect that another district

surgeon, Dr. Hassett, directed the plaintiff to return to work sometime in June 2021, were timely interposed in the notice of claim, but were legally insufficient, as they did not identify the specific date on which Dr. Hassett made his or her determination and informed the plaintiff thereof. The court notes that the description of the claims involving the April 2020 and June 2020 occurrences suffers from this defect as well.

The court notes that the plaintiff was not required to serve a notice of claim in connection with his allegations that the defendants violated the New York City Human Rights Law (Admin. Code §§ 8-101, *et seq.*). “Service of a notice of claim is . . . not a condition precedent to commencement of an action based on the [State] Human Rights Law in a jurisdiction where General Municipal Law §§ 50-e and 50-i provide the only notice of claim criteria” (*Margerum v City of Buffalo*, 24 NY3d 721, 730 [2015]), because “[h]uman rights claims are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i” (*id.* at 727; *see Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d at 1460; *Stanley v City of New York*, 71 Misc 3d 171, 182-183 [Sup Ct, N.Y. County 2020] [applying rule to claim against City of New York under New York City Human Rights Law]; *Keles v Yearwood*, 254 F Supp 3d 466, 471-472 [ED NY 2017]). Hence, the lateness or insufficiency of the plaintiff’s notice of claim in connection with the tort claims does not, in and of itself, require dismissal of the discrimination claims.

#### IV. TORT CLAIMS---FAILURE TO STATE A CAUSE OF ACTION

In addition to the untimeliness and/or insufficiency of the notice of claim, the tort claims also fail to state a cause of action.

##### 1. Standards Applicable to Motions Pursuant to CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To

determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; CPLR 3026). “The motion must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

## 2. Medical Malpractice

The plaintiff’s medical malpractice causes of action against the City and Eisikowitz must fail because neither Eisikowitz nor Hassett had a full physician-patient relationship with the plaintiff in the course of meeting with him, examining him, and conducting tests upon him.

There are many instances in which a physician examines a person for the purpose of reporting his or her findings to other parties, including physicians conducting so-called independent medical examinations (IMEs) on behalf of a defendant or an insurer in a personal injury action or action to recover no-fault benefits, physicians conducting eligibility or qualification examinations on behalf of life, health, and workers’ compensation insurers, and physicians conducting examinations to determine the type of work that may safely be undertaken by an applicant for public assistance benefits. A district surgeon employed by the NYPD performs a similar function, in that his or her responsibility is limited to examining NYPD officers to assess their physical and medical fitness for regular or limited duty, and reporting those findings to others, who make the ultimate determinations as to (a) whether the officer must return to work or may remain on medical leave, and (b) whether NYPD line-of-duty

benefits are available to cover the cost of treatment rendered by outside physicians, therapists, and hospitals.

As the Court of Appeals explained in *Bazakos v Lewis* (12 NY3d 631, 635 [2009]),

“the relationship between a doctor performing an IME and the person he is examining may fairly be called a ‘limited physician-patient relationship’--indeed, this language is used in an American Medical Association opinion describing the ethical responsibilities of a doctor performing an IME (AMA Council on Ethical and Judicial Affairs, Code of Medical Ethics, Ops on Patient-Physician Privilege E-10.03).”

The Court quoted, with approval, the analysis of the Michigan Supreme Court, to the effect that the relationship between such a physician and the examinee

“is not the traditional one. It is a limited relationship. It does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions. The IME physician, acting at the behest of a third party, *is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports. The limited relationship that we recognize imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee*”

(*id.*, quoting *Dyer v Trachtman*, 470 Mich 45, 49-50, 679 NW2d 311, 314-315 [2004] [emphasis added]; see also *Lawliss v Quellman*, 38 AD3d 1123, 1124 [3d Dept 2007] [while an IME performed at the request of a third party does not ordinarily give rise to an actionable physician-patient relationship, such a relationship may be implied where the IME physician affirmatively advises the patient]). Thus, a person examined by a physician at the behest of a third party for the purpose of evaluation may not maintain a medical malpractice claim against the physician based on the physician's diagnosis, the extent to which the person's medical history is taken into account, the insufficiency or quality of the examination, the comments made by the physician to the examinee, or the recommendations made to the third party. Such a claim may only be based on actual physical injury caused by the examination or the voluntary assumption by the physician of an obligation to advise the examinee as to the appropriate and proper course of treatment in connection with a medical condition.

The allegations that the plaintiff made in his complaint were that Eisikowitz and Hassett reported to the NYPD that he was fit to return to active duty when he wasn't fully recovered either from COVID-19 or cancer, that Eisikowitz and Hassett ignored his medical history and the records of other physicians, and that Eisikowitz gave him an improper referral to a private physician. He did not allege that these physicians physically harmed him during an examination or that they affirmatively treated him, consulted with him for the purpose of treating him, or made recommendations as to the most appropriate course of treatment. The only allegations vaguely related to such claims are that Eisikowitz compelled the plaintiff to walk around the office during an EEG examination, and that, because he was in no condition to walk, he fainted, and that Eisikowitz told him to forego surgery so that he could return to work as soon as possible.

There is no allegation, however, that the one occurrence of syncope after the EEG examination constituted a compensable injury in and of itself or that it caused other injuries of more than a fleeting nature, a necessary element of a medical malpractice claim (*see Kakoullis v. Jansssen*, 188 AD2d 769, 770 [3d Dept 1992]). Moreover, Eisikowitz's "recommendation" that the plaintiff forego or delay surgery was not made in the context of an attempt to assist the plaintiff in choosing the most appropriate course of action to treat cysts on his kidney, was not based on any promise by Eisikowitz to follow up on the presence of the cysts to assure that they did not become cancerous, and did not constitute "advice" that untreated kidney cancer would not spread. Rather, it was based solely on Eisikowitz's determination that the plaintiff should return to work as soon as possible; there was no reason for the plaintiff to have relied upon Eisikowitz's opinion as of June 2020, when he was clearly in an adversarial relationship with him. As with the EEG incident, since the cancer was successfully treated with surgery, and the plaintiff's short delay in undergoing surgery did not cause or contribute to a spread of the cancer that required additional treatment or surgeries, there was no injury. Hence, even if Eisikowitz could be charged with voluntarily assuming the obligation to advise and treat the plaintiff, the plaintiff sustained no compensable damages as a consequence of relying on such "advice."

Consequently, the medical malpractice claims must be dismissed not only because of the late service and insufficiency of the notice of claim, but for the additional reason that the complaint fails to state a cause of action to recover for medical malpractice.

### 3. Negligence

As the Court of Appeals also explained in *Bazakos*, the conduct of an examining physician in the course of meeting with and examining a person, even in the absence of a true physician-patient relationship, still involves the physician's application of medical knowledge, skill, and training. Where such conduct causes an injury to an examinee in the course of an examination, it thus is not properly prosecuted as a garden-variety common-law negligence action, but sounds in medical malpractice (see *Bazakos v Lewis*, 12 NY3d at 634 [applying 2½-year limitations period to examinee's claim that IME physician injured him in the course of an examination]). Hence, in addition to the plaintiff's failure timely to serve a sufficient notice of claim, the negligence claim here must be dismissed for failure to state a cause of action.

### 4. Gross Negligence

Gross negligence consists of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]; *Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 8 [1st Dept 2011]). Gross negligence thus is "different in kind as well as degree" from ordinary negligence (*Sutton Park Dev. Corp. Trading Co. v. Guerin & Guerin Agency*, 297 AD2d 430, 431 [3d Dept 2002]; *Green v Holmes Protection of N.Y.*, 216 AD2d 178, 178-179 [1st Dept 1995]). The element of culpability is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence (see *Sharick v Marvin*, 1 AD2d 284, 286-287 [3d Dept 1956]). Gross negligence thus can be defined as conduct of an aggravated character that discloses a failure to exercise any diligence whatsoever (see *Civil Service Employees Assn, Inc. v Public Employment Relations Bd.*, 132 AD2d 430, 435 [3d Dept 1987]).

Conclusory allegations of gross negligence, however, are insufficient to state a cause of action or survive a motion to dismiss pursuant to CPLR 3211(a)(7) (see *Mancuso v. Rubin*, 52 AD3d 580, 583 [2d Dept 2008]; *Porter v Forest Hills Care Center, LLC*, 2018 NY Slip Op 33439[U], 2018 WL 6976728 [Sup Ct, Queens County, Nov. 28, 2018]). Where, as here, a plaintiff fails to allege any facts whatsoever describing any type of behavior beyond ordinary negligence, the plaintiff cannot be said to have fulfilled the pleading requirements applicable to claims of gross negligence (see *Mancuso v Rubin*, 52 AD3d at 583; see also *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011]; *Baker v Andover Assoc. Mgt. Corp.*, 2009 NY Slip Op 52788[U], \*26, 30 Misc 3d 1218[A] [Sup Ct, Westchester County, Nov. 3, 2009] [Scheinkman, J.]). Hence, the plaintiff's allegations of gross negligence fail to state a cause of action, and that claim must be dismissed on that ground, as well as because the plaintiff failed timely to serve a proper notice of claim.

#### 5. Negligent Hiring and Retention

"[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention" (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; see *Troy v City of New York*, 160 AD3d 410, 411 [1st Dept 2018]; *Coville v Ryder Truck Rental*, 30 AD3d 744, 745 [3d Dept 2006]). Since the plaintiff alleged that the City is responsible for the alleged tortious conduct of Eisikowitz and Hassett, his cause of action to recover for negligent hiring and retention of those physicians must be dismissed for failure to state a cause of action. In any event, the plaintiff has made no factual allegations to support a claim that the City or the NYPD "knew, or should have known," of the physicians' "propensity for the sort of conduct which caused the injury" (*Kuhfeldt v New York Presbyterian/ Weill Cornell Med. Ctr.*, 205 AD3d 480, 481 [1st Dept 2022], quoting *Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]), a showing that is necessary to sustain a cause of action to recover for negligent hiring (see

*Kuhfeldt v New York Presbyterian/ Weill Cornell Med. Ctr.*, 205 AD3d at 481; see also *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 40 [1st Dept 2001]; *Rodriguez v United Transp. Co.*, 246 AD2d 178, 181 [1st Dept 1998]).

6. Intentional Infliction of Emotional Distress

In order to make out a claim of intentional infliction of emotional distress, a plaintiff must allege 1) that a defendant's conduct was extreme and outrageous, 2) that a defendant intended to cause or disregarded a substantial probability of causing severe emotional stress, 3) a causal connection between the conduct and the injury, and 4) resultant severe emotional distress (see *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]; *Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]; *Troy v City of New York*, 160 AD3d at 411). Here, the plaintiff's primary allegations, in essence, were that the NYPD physicians either misdiagnosed him or failed to appreciate the severity of his claimed illnesses, thus compelling him to return to work at an activity level of which he was not physically capable. This conduct cannot be characterized as extreme or outrageous.

The plaintiff's allegations that Eisikowitz called him a malingerer and disparaged him as "fat" also cannot be characterized as extreme and outrageous, as that physician made those statements in the context of rendering a medical opinion, whether ultimately supportable or not, that the plaintiff's obesity was the reason for his continued problems breathing and undertaking strenuous activity, and that the plaintiff was relying upon his other ailments, including cancer and long-term COVID-19, as pretext for objecting to his return to active duty (see generally *Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999] [alleged disparagement of plaintiff's character does not rise to level of "extreme and outrageous"]; *G.L. v Markowitz*, 2010 NY Slip Op 50968[U], \*5, 27 Misc 3d 1229[A], 2010 NY Misc LEXIS 1412, \*10 [Sup Ct, Kings County, Jun. 3, 2010]). Whether or not Eisikowitz's statements were made in good faith is immaterial to whether his utterance thereof was extreme or outrageous.

### 7. Negligent Infliction of Emotional Distress

With respect to the cause of action to recover for negligent infliction of emotional distress

“[i]t is well-settled that a person ‘to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations’ (*Johnson v State of New York*, 37 NY2d 378, 381 [1975] [citations omitted]). A breach of the duty of care ‘resulting directly in emotional harm is compensable even though no physical injury occurred’ (*Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]) when the mental injury is ‘a direct, rather than a consequential, result of the breach’ (*id.* at 506) and when the claim possesses ‘some guarantee of genuineness’ (*Ferrara v Galluchio*, 5 NY2d 16, 21 [1958])”

(*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008]). The allegations of the complaint fail to state facts sufficient to support such a cause of action (see *Herman v Kveton-Cattani*, 123 AD3d 1093, 1095 [2d Dept 2014] [dismissing negligent infliction claim where plaintiff did not allege that defendant actually rendered or attempted to render any medical care or treatment to the plaintiff]; *Baumann v Hanover Community Bank*, 100 AD3d 814, 816 [2d Dept 2012] [defendant owed plaintiff no legal duty in connection with the conduct that underpinned the negligent infliction claim]). Moreover, a claim to recover for negligent infliction of emotional distress cannot be asserted where, as here, it is essentially duplicative of other tort causes of action (see *C.T. v Valley Stream Union Free Sch. Dist.*, 201 F Supp 3d 307, 327-328 [ED NY 2016]).

### 8. Claims Asserted Against Leon B. Eisikowitz, M.D., P.C.

Only where a physician working for a professional corporation renders medical care to a patient “within the scope of his or her employment” for that corporation may the corporation be held vicariously liable for the negligence of the physician (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]). The complaint fails to state a cause of action against the defendant Leon B. Eisikowitz, M.D., P.C., because all of the tortious and discriminatory acts allegedly committed by Eisikowitz were committed solely in his capacity as a part-time NYPD employee, and not in his capacity as shareholder, officer, or director of the professional corporation through

which he operated his private medical practice. Hence, all causes of action asserted against Leon B. Eisikowitz, M.D., P.C., must be dismissed.

V. DISCRIMINATION CLAIMS

The New York City Human Rights Law (NYC HRL), provides that

“[i]t shall be an unlawful discriminatory practice: . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived . . . disability . . . of any person . . . [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment”

(Admin. Code § 8-107[1][a][3]). It also provides, in relevant part, that

“[i]t shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, . . . [or] (v) requested a reasonable accommodation under this chapter . . . The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, . . . or in a materially adverse change in the terms and conditions of employment, . . . provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity”

(Admin. Code § 8-107[7]). Harassment on the basis of an employer’s membership in a protected class, so as to create a “hostile work environment,” is a form of discrimination (see *Matter of State Div. of Human Rights v Stoute*, 36 AD3d 257, 263 [2d Dept 2006]).

In 2005, the New York City Council amended the NYC HRL to add Admin. Code § 8-130(a) as part of the New York City Civil Rights Restoration Act. That section recites that:

“[t]he provisions of [the NYC HRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights law, including those laws with provisions worded comparably to the provisions of this title, have been so construed.”

In construing claims of sex harassment prosecuted under the NYC HRL, the Appellate Division, First Department, thus rejected the contention that a claimant must establish that any such harassment was “severe or pervasive,” as required under federal and state law. Rather, the Court concluded that “liability is normally determined simply by the existence of unwanted

gender-based conduct” constituting “differential treatment,” and that “questions of ‘severity’ and ‘pervasiveness’ are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability” (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 76 [1st Dept 2009]). “For [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender” (*id.* at 78; see *Suri v Grey Global Group, Inc.*, 164 A.D.3d 108, 114 [1st Dept 2018]).

Moreover, pursuant to Admin. Code § 8-107(13)(b),

“An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:

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“(2) The employer knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee’s or agent’s discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

“(3) The employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”

The Report of the New York City Council Committee on General Welfare explained that this section provided for

“[s]trict liability in employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where employer knew of act and failed to take prompt and effective remedial action or should have known and had not exercised reasonable diligence to prevent. Employer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken”

(1991 NY City Legis Ann, at 187; see generally *Zakrzewska v New School*, 14 NY3d 469 [2010]).

“Despite the popular notion that ‘sex discrimination’ and ‘sexual harassment’ are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no ‘sexual harassment provision’ of the

law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender (Administrative Code § 8-107[1][a])”

(*Williams v New York City Hous. Auth.*, 61 AD3d at 75).

Claims of harassment and creation of a hostile work environment on the basis of disability must be analyzed under the *Williams* framework, in which the Court explained that the appropriate inquiry is addressed to “what a reasonable victim of discrimination would consider ‘petty slights and trivial inconveniences’” (*Estatico v Department of Educ. of City of N.Y.*, 2014 NY Slip Op 33611[U], \*8, 2014 NY Misc LEXIS 6027, \*11 [Sup Ct, N.Y. County, Oct. 30, 2014], quoting *Williams v New York City Hous. Auth.*, 61 AD3d at 79-80)).

The New York City Human Rights Law defines “disability” as “any physical, medical, mental or psychological impairment, or a history or record of such impairment” (Admin Code § 8-102[16][a]; see *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 147 [1st Dept 2009]). Thus, in *Vig*, an actor and musician who claimed that he obtained permission from his employer to undergo knee surgery to treat an injury that he had sustained in the course of acting in a play, stated a cause of action to recover for disability discrimination when he underwent the surgery, but was not permitted to resume his role after he recovered and claimed to be able to perform his role. Here, by way of contrast, the plaintiff asserted that, although he remained unable to perform his job due to an unspecified disability, Eisikowitz and Hassett continued to insist that he return to active duty.

The NYPD’s medical determinations, whether “correct” or not, cannot constitute a basis for the plaintiff’s claim that he was discriminated against on the basis of disability. The plaintiff has not cited, and research has not revealed, any authority for the proposition that a district surgeon’s recommendation, or the NYPD’s determination, that an officer was medically fit to return to active duty could constitute employment discrimination on the basis of disability. In the first instance, it is unclear as to what the nature of the plaintiff’s disability entailed, as he did not specify whether the discrimination that he allegedly suffered was engendered by his difficulties

with long-term COVID, complications in recovering from cancer surgery, or his apparent or perceived obesity. In any event, the defendants had legitimate, nondiscriminatory reasons for their employment actions, and the plaintiff has not asserted facts underpinning his contention that the reason for the employment actions were a pretext for discrimination or that he was treated differently from other employees whose medical conditions were subject to review by NYPD district surgeons (see *Williams v New York City Tr. Auth.*, 171 AD3d 990, 993 [2d Dept 2019]; *Milione v City Univ. of N.Y.*, 153 AD3d 807, 809 [2d Dept 2017]; *Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 139 [1st Dept 2014]). Crucially, the plaintiff did not request a reasonable accommodation to permit him to perform light- or limited-duty work despite his alleged disability, whether that unspecified disability was long-term COVID, recovery from cancer surgery, or obesity (see *Marquart v Department of Educ. of the City of N.Y.*, 2017 NY Slip Op 31363[U] 2017 NY Misc LEXIS 2509 [Sup Ct, N.Y. County, Jun. 27, 2017]). Rather, he insisted that he be permitted to remain on perpetual medical leave, and be paid 100% of his salary, in accordance with NYPD practice.

Hence, to the extent that the plaintiff's disability discrimination claim is premised upon the district surgeons' conclusions that he was medically capable of returning to work, and their recommendations that should return to work, that claim must be dismissed for failure to state a cause of action.

With respect to the plaintiff's contention that he was subjected to a hostile work environment by virtue of Eisikowitz's statements that he was "fat" and a "malingerer," and other unspecified "abuse" intended to compel him to return to work against his will, these clearly do not rise to the level of conduct that altered the terms and conditions of his employment on the basis of disability. At most, they were mere petty slights and trivial inconveniences, and more likely were descriptions of what Eisikowitz believed to be the plaintiff's true reasons for objecting to a resumption of work. Hence, that portion of his disability discrimination claim must be dismissed for failure to state a cause of action.

The plaintiff's cause of action alleging retaliation also must be dismissed for failure to state a cause of action. He asserted that Eisikowitz referred him for psychiatric or psychological evaluation in retaliation for his insistence that he remained totally disabled and unable to work. This conclusory allegation is insufficient to support a claim of retaliation. The court notes that there are cases in which the NYPD properly was subject to suit for retaliatory psychiatric referrals or evaluations meant to derail the career of an officer who was perceived by NYPD brass to be a "problem" (see *Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018] [applicant for appointment as an NYPD officer stated a retaliation cause of action by alleging that psychological hold placed on his application was made in retaliation for his commencement of prior action alleging sexual orientation discrimination when he was an auxiliary officer]). This case, however, does not present such a situation. Rather, based on Eisikowitz's conclusion that the plaintiff met the criteria for designation as a "malingerer," as defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, it was within his scope of responsibility to refer the plaintiff for an evaluation to determine whether his conclusion was, in fact, supportable. Hence, the retaliation claim must be dismissed for failure to state a cause of action.

#### VI. CROSS MOTION FOR LEAVE TO AMEND COMPLAINT

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]; *Daniels v Kromo Lenox Assoc.*, 275 AD2d 608 [1st Dept 2000]; *Bellini v Gesalle Realty Corp.*, 120 AD2d 345 [1st Dept 1986]). Thus, leave to amend should granted unless the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42

AD3d 432 [2d Dept 2007]) or the amendment would prejudice the opposing party (*Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp.*, 103 AD3d 675, 676 [2d Dept 2013]).

The court concludes that the plaintiff's proposed amended complaint does not address the deficiencies described above in connection with the initial complaint, and that all of his proposed further allegations refer to claims that are barred due to his failure timely to serve a legally sufficient notice of claim upon the Comptroller or fail to state a cause of action. Consequently, the proposed amended complaint is palpably insufficient and clearly devoid of merit, and the plaintiff's cross motion must be denied.

VII. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion to dismiss the complaint is granted, the complaint is dismissed insofar as asserted against all of the defendants, and the Clerk shall enter judgment accordingly; and it is further,

ORDERED that the plaintiff's cross motion for leave to serve and file and amended complaint is denied.

This constitutes the Decision and Order of the court.

		<u>10/20/2022</u>			<u>JOHN J. KELLEY, J.S.C.</u>
		DATE			
MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>
	<input type="checkbox"/>		<input type="checkbox"/>	OTHER	<input type="checkbox"/>
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