

**Feehan v Consolidated Edison Co. of N.Y., Inc.**

2023 NY Slip Op 30571(U)

February 23, 2023

Supreme Court, New York County

Docket Number: Index No. 154755/2022

Judge: Lori S. Sattler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LORI S. SATTLER PART 02TR**

*Justice*

-----X

ANDREW FEEHAN

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC.,

Defendant.

-----X

INDEX NO. 154755/2022

MOTION DATE 12/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25

were read on this motion to/for DISMISS.

In this tort action, Defendant Consolidated Edison Company of New York Inc. (“Defendant”) moves to dismiss the Amended Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff Andrew Feehan (“Plaintiff”) opposes the motion and cross-moves for an order granting leave to file and serve a Second Amended Complaint. Defendant opposes the cross-motion.

Plaintiff commenced this action by Summons and Complaint dated June 3, 2019. Thereafter, Plaintiff filed an Amended Complaint dated September 28, 2022 (NYSCEF Doc. No. 5). In that Amended Complaint, Plaintiff contends he was a construction manager employed by Defendant and was informed in Spring 2018 that he was the subject of a racial discrimination claim. He purportedly was accused of presiding over two discriminatory performance reviews, discriminatory scrutiny of an employee’s required paperwork submissions, giving preferential treatment to white employees, engaging in a discriminatory practice of allocating overtime, and giving an unfair warning to one specific employee, Mr. Accely (“Accely”) (Amended Complaint

at 2-3). On June 5, 2019, Plaintiff attended a meeting with Theresa Kong, a general manager, and Robert Boyle, a Vice President of Defendant, and was informed that Defendant's Office of Diversity and Inclusion ("ODI") had found him to be in violation of the company's EEO policy and that as a result he was being demoted from construction manager to project manager, suspended for five days, and transferred to Staten Island from the Bronx. He was also issued a final warning (Amended Complaint at 3). Plaintiff claims that during the course of federal litigation commenced by Accely, the findings in the ODI report claiming he had violated Defendant's EEO policy were "demonstrated to be false, dismissive of exculpatory evidence, [and] contradicted by ConEd's own representations of fact made in Federal Court" (Amended Complaint at 5).

Defendant contends that Plaintiff fails to satisfy the elements required to state a claim for prima facie tort. Specifically, it contends that Plaintiff has not established that there was an intentional infliction of harm resulting in special damages without any excuse or justification. Defendant further maintains that, even if it had knowledge of the falsities of the ODI report when it made the decision to demote Plaintiff, which it does not concede, Plaintiff did not meet the other requirements to state a cause of action, namely that Defendant's sole motivation was to injure Plaintiff and that it acted without excuse or other justification. Additionally, it asserts that Plaintiff does not allege his actual losses with sufficient particularity.

Plaintiff appears to concede that the Amended Complaint was insufficient by way of filing a cross-motion seeking leave to file a Second Amended Complaint. Defendant contends that the proposed Second Amended Complaint is still insufficient as it pleads conclusory allegations, while Plaintiff maintains that it sufficiently states a cause of action for prima facie tort, along with the Amended Complaint. Plaintiff contends that the Amended Complaint

“clearly states facts from which intent and disinterested malice may are [sic] clearly alleged, primarily Defendant’s knowledge of the falsity of the allegations that were used by Defendant as a basis to demote Plaintiff” (NYSCEF Doc. No. 17 at 1). Plaintiff further contends that, if Defendant’s motion is granted, he should be permitted to file the proposed Second Amended Complaint “which addresses each of the issues raised by Defendant even more forcefully than the Amended Complaint” (*id.* at 1-2). According to Plaintiff, the proposed Second Amended Complaint moves from implicit allegations of intent to a “clear assertion that malevolence was the sole motivating factor for Defendant” and sets forth his “best current estimate” for lost wages and benefits (*id.* at 6, 8).

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), “the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). “Factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions . . . are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

Defendant’s motion to dismiss Plaintiff’s Amended Complaint is granted. “The requisite elements of a cause of action for prima facie tort are (1) intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful” (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). An action for prima facie tort will not stand where the pleadings do not allege that Defendant’s sole motivation was “disinterested malevolence” (*Burns Jackson Miller Summit & Spitzer v*

*Linder*, 59 NY2d 314, 333 [1983] [“Here the prima facie tort causes of action cannot stand because, although they allege intentional and malicious action, they do not allege that defendants’ sole motivation was ‘disinterested malevolence’”]).

In the Amended Complaint, Plaintiff does not sufficiently plead the elements for the cause of action for prima facie tort. Plaintiff specifically contends that “[b]y demoting and disciplining Plaintiff on June 5, 2019, based on an investigative report ConEd knew contained numerous factual errors and faulty evidentiary conclusions, and that ignored exculpatory evidence, Defendant deprived Plaintiff of pay, benefits, inflicted reputational loss, and inflicted emotional distress on him without excuse or justification” (Amended Complaint at 5). These statements, which at best consist of bare legal conclusions, do not support the cause of action or meet the elements required for a finding of prima facie tort. Nowhere in the Amended Complaint does Plaintiff assert that Defendant acted with the sole motivation of malevolence. Accordingly, the Amended Complaint must be dismissed.

Plaintiff seeks to interpose a Second Amended Complaint which he contends is not insufficient as a matter of law. He asserts that this complaint does not contain conclusory boilerplate allegations and that the Court when assessing the validity of a claim may consider not only the complaint, but the documents annexed thereto that are integral to the claim. Plaintiff contends that the Second Amended Complaint “is replete with specific allegations of falsity in the ODI report, that ConEd moved forward with knowledge of that falsity, and a concomitant intent on the part of ConEd to harm plaintiff” (NYSCEF Doc. No. 21).

Discretionary leave to amend pleadings under CPLR 3025(b) should be freely given unless doing so would result in surprise or prejudice to the nonmoving party (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Leave to amend a complaint will be

denied when the proposed pleading fails to state a cause of action, is palpably insufficient as a matter of law, or is devoid of merit (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011], quoting *MBIA Ins. Corp v Greystone & Co., Inc*, 74 AD3d 499, 500 [1st Dept 2010]). The party seeking leave to amend need not establish the merit of proposed allegations (*Perrotti* at 498).

Plaintiff's motion to serve a Second Amended Complaint is denied. Although leave to amend is freely given, in this instance, the proposed pleading, even after a review of the documents annexed thereto, fails to state a cause of action for prima facie tort. The proposed pleading states that Defendant "with no intent other than malevolence toward [Plaintiff], intentionally deprived Plaintiff of pay, benefits, inflicted reputational loss, and intentional emotion to distress. . . without justification, and with the sole intent of harming Plaintiff." These conclusory statements alone cannot satisfy the elements for a prima facie tort.

Plaintiff claims that the record in the federal litigation commenced by Accely shows that the facts Defendant relied upon to make its decision to demote Plaintiff "were demonstrated to be false, dismissive of exculpatory evidence, contradicted by ConEd's own witnesses, and contradicted by ConEd's own representations of fact made in in Court" and that Defendant had knowledge of the deficiency in the ODI report when it was issued (NYSCEF Doc. No. 21 at 5). These blanket statements demonstrate that Plaintiff has not alleged facts showing that Defendant "acted with 'disinterested malevolence' or intent to inflict harm on him" (*Sullivan v MERS, Inc.* 139 AD3d 419, 420 [1st Dept 2016]).

Accordingly, it is hereby,

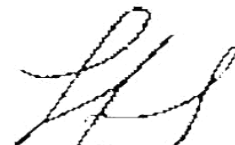
ORDERED that Defendant's motion to dismiss the Amended Complaint is granted, and it is further

ORDERED that Plaintiff's cross-motion to file a Second Amended Complaint is denied.

This constitutes the Decision and Order of the Court.

2/23/2023

DATE



\_\_\_\_\_  
LORI S. SATTLER, 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