

Pesantez v City of New York

2023 NY Slip Op 32249(U)

July 7, 2023

Supreme Court, New York County

Docket Number: Index No. 154734/2022

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NICHOLAS W. MOYNE PART 52

Justice

-----X

BENITO PESANTEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, RUSSEL MILLER, JAMES
HENRY, NICOLAS VICCARI

Defendant.

-----X

INDEX NO. 154734/2022
MOTION DATE 11/18/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

The defendants move, pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), to dismiss the complaint. Plaintiff cross-moves, pursuant to CPLR § 3025(b), for leave to file an amended complaint. The defendants oppose the cross-motion, contending that their motion would still be applicable to the proposed amended complaint and the complaint or amended complaint should be dismissed.

The plaintiff in this case, a police officer injured in the line of duty, is seeking damages for alleged disability discrimination, retaliation, and hostile work environment pursuant to the New York City Human Rights Law (“City HRL”) (New York City Administrative Code §§ 8-107 *et seq* and 8-502[a]); negligent failure to train, supervise, or discipline; medical malpractice against Dr. James Henry (“Henry”); negligence and gross negligence against Dr. Henry; and to hold the City of New York (“City”) liable for the alleged negligent or intentional acts of its employees under the theory of respondeat superior.

Plaintiff's Motion For Leave To Amend Complaint

As an initial matter plaintiff's cross-motion seeking to amend the complaint is granted. Pursuant to CPLR § 3025(b), "[l]eave shall be freely given upon such terms as may be just." Accordingly, the defendants' motion to dismiss is analyzed with regard to the Corrected Proposed Amended Complaint (Verified Amended Complaint, NYSCEF Doc. No. 13).

Factual Background

The plaintiff is a Police Officer employed by the New York City Police Department ("NYPD"). In February 2021, the plaintiff was injured in the line of duty while trying to apprehend an emotionally disturbed person. As a result of this incident, the plaintiff complained of numbing in his hand and pain in his shoulder. Plaintiff's MRIs and X-rays revealed a sprained shoulder and herniated discs in his neck. Plaintiff underwent shoulder surgery on May 14, 2021. Plaintiff was required to check into the NYPD's Medical Division on a monthly basis for evaluation of his injuries. The individual defendants in this case are doctors employed by the NYPD to examine NYPD officers in order to assess their physical and medical fitness for duty. Plaintiff contends that the defendants disparaged his private physician, and regularly accused plaintiff of being a malingerer and faking his injuries. Additionally, plaintiff contends that defendant Dr. Henry viewed plaintiff's operation report, told the plaintiff that the shoulder surgery was just a "clean-up" job, and advised the plaintiff to wear a sling. Plaintiff further states that he relied on Dr. Henry's advice and wore a sling. However, upon next seeing his treating physician, plaintiff was told that wearing the sling had impeded his recovery. Plaintiff contends that wearing the sling stunted his recovery and has resulted in plaintiff's injuries becoming permanent.

Analysis

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. We 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]). “In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards” (*Vig v NY Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). “Conclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss” (*Matter of In re Kenneth Cole Productions, Inc.*, 27 NY3d 268, 278 [2016]).

Medical malpractice against Dr. Henry

The plaintiff contends that the medical malpractice cause of action against Dr. Henry is against him in his individual capacity not as an employee of the NYPD. However, the verified amended complaint states that “Defendant HENRY is a doctor who is employed by the New York City Police Department and is an employee of the Defendant CITY OF NEW YORK” (Verified Amended Complaint ¶ 11). The verified amended complaint, which added paragraphs thirteen to forty-four, and consists of plaintiff’s subjective beliefs and legal conclusions, are bereft of factual allegations that would indicate that Dr. Henry saw the plaintiff for any purpose other than as an employee of the City. In fact, the Verified Amended Complaint specifically states that “[a]t all times herein Defendant Henry was acting within the scope of his employment with the Defendant City” (*Id.* at ¶ 38). As such, Dr. Henry and the plaintiff did not have a traditional doctor-patient relationship which is typically a prerequisite for an action for medical malpractice. Dr. Henry performed a function similar to a doctor conducting an independent

medical examination (“IME”) 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” (*Aykac v City of New York*, 2022 NY Slip Op 33639[U], 10-11 [N.Y. Sup Ct, New York County 2022]). This is not a traditional doctor patient relationship, 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” (*Bazakos v Lewis*, 12 NY3d 631, 635 [2009]). “The physician-patient relationship does not exist if the physician is retained solely to examine an employee on behalf of an employer” ” (*Lee v City of New York*, 162 AD2d 34, 36 [2d Dept 1990] [citation omitted], *lv denied* 78 NY2d 863 [1991]). Therefore, much of the alleged conduct attributed to Dr. Henry does not constitute medical malpractice because there was no physician-patient relationship.

“An exception applies, however, when the physician affirmatively treats or affirmatively advises the employee as to treatment and the treatment actually causes further injury. Thus, a cause of action for malpractice may result even where the physician-patient relationship rests upon an ‘implied’ contract” (*Lee v City of New York*, 162 AD2d 34, 36 [2d Dept 1990] [citation omitted], *lv denied* 78 NY2d 863 [1991]; *see also Rojas v McDonald*, 267 AD2d 130, 131 [1st Dept 1999]). Therefore, to the extent that a claim for medical malpractice exists, it is limited to the allegation that Dr. Henry advised plaintiff to wear a sling, that plaintiff wore the sling, and

that this impaired his recovery. However, for the reasons discussed below, the medical malpractice claim must be dismissed for failure to file a Notice of Claim.

Failure to file a Notice of Claim

Plaintiff's tort claims must be dismissed due to the plaintiff's failure to file a Notice of Claim. Pursuant to General Municipal Law ("GML") § 50-e(1)(a), "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, ... or any officer, appointee or employee thereof, the notice of claim shall comply with and be served ... within ninety days after the claim arises."

Here, the defendants have provided prima facie evidence that no Notice of Claim was filed by submitting the affidavit of George Mcook – who states that he searched the records of the office of the Comptroller and that no Notice of Claim for the plaintiff was found. Plaintiff has failed to present any evidence to rebut the defendants' prima facie showing that no Notice of Claim was filed. As previously established, although plaintiff contends that the medical malpractice claim is asserted against Dr. Henry in his individual capacity, not as a City employee, this is belied by plaintiff's factual allegation that "[a]t all times herein Defendant Henry was acting within the scope of his employment with the Defendant City" (Verified Amended Complaint at ¶ 38). As plaintiff failed to comply with the statutory prerequisite, the tort claims, including medical malpractice, are dismissed.¹

¹ Plaintiff's gross negligence claim is also dismissed for failure to state a claim. "[G]ross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823-24 [1993] [Citation omitted]). The Amended Verified Complaint herein lacks any factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing, and is therefore insufficient to state a cause of action alleging gross negligence (*see Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008]).

Likewise, the respondeat superior claims against the City are dismissed for failure to file a Notice of Claim. The respondeat superior claims against the individual defendants are also dismissed as they were employed by the City (*see* Verified Amended Complaint ¶¶ 10, 11, 12), and there is no indication that they had control of the allegedly actively negligent physician's 'course of treatment' of the plaintiff. Therefore, there is no vicarious liability based on respondeat superior against them (*see Sanders v Guida*, 213 AD3d 712, 715 [2d Dept 2023]). Additionally, as the underlying tort claims are dismissed, the respondeat superior claims must be dismissed as well.

Disability discrimination – hostile work environment under the City Human Rights Law

Plaintiff has not sufficiently plead all of his hostile work environment claims under the New York City Human Rights Law ("NYCHRL") (NYC Admin. Code § 8-101, et. seq.). "Under the NYCHRL, a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated 'less well than other employees' because of the relevant characteristic. The conduct alleged must, however, exceed what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1003 [2d Dept 2021] [citations omitted]).

Here, much of the conduct the plaintiff complains about does not even rise to the level of petty slights and trivial inconveniences. In particular, plaintiff complains of the individual defendants stating that plaintiff is a malingerer who is faking his injuries. However, these statements are merely expressions of the doctors' medical determination. "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" (*Aykac v City of New York*, 2022 N.Y. Slip Op. 33639[U], 19 [NY Sup Ct, New York County 2022]). Furthermore, Dr. Miller informing

plaintiff that he had only been approved for an MRI of his shoulder and not his back is insufficient. This would not constitute harassment as the plaintiff was allowed to amend his initial report, and he received the appropriate authorization which allowed plaintiff to avoid paying for the back MRI out of pocket (*see* Verified Amended Complaint ¶¶ 62 – 64). This does not constitute harassment as plaintiff was provided with the remedy he sought. Accordingly, these are not actionable as harassment.

However, the same cannot be said for plaintiff's allegations that the defendant doctors have threatened to survey plaintiff off the job if he doesn't return to work, despite it being work that plaintiff is allegedly unable to physically perform (*see* Verified Amended Complaint ¶¶ 106, 112). Repeated threats to fire an employee based on a protected characteristic may be sufficient to state a hostile work environment claim (*see e.g. Leopold v Baccarat, Inc.*, 174 F3d 261, 268 [2d Cir 1999]).

Failure to provide reasonable accommodation/engage in cooperative dialogue

Pursuant to NYC Admin. Code § 8-107(28)(a)(2), “[i]t shall be an unlawful discriminatory practice for an employer, labor organization or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation ... Related to a disability.” The term “cooperative dialogue” means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a

requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.

The plaintiff has sufficiently plead that he requested an accommodation and that the defendants neither provided him with an accommodation or engaged in the required cooperative dialogue (see Verified Amended Complaint ¶¶ 88, 94, 95, 97, 107, 134, 135, 140, 173, 174, 181, 210).

Conclusion

For the reasons set forth hereinabove, it is hereby

ORDERED that the plaintiff's cross-motion to amend the complaint is granted; and it is further

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that the claims sounding in tort, including medical malpractice, negligence, gross negligence, and respondeat superior are dismissed; and it is further

ORDERED that the defendants' motion to dismiss the hostile work environment claim is granted to the extent that such claim is limited as set forth above and is otherwise denied; and it is further

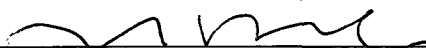
ORDERED that the defendants' motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the verified amended complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

7/7/2023

DATE


NICHOLAS W. MOYNE, 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