

**Callahan v City of New York**

2023 NY Slip Op 32637(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 160680/2022

Judge: J. Machelle Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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JASON CALLAHAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT LIEUTENANT NOE CAMPOS

Defendants.

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INDEX NO. 160680/2022

MOTION DATE 03/08/2023, 04/03/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 13, 14, 19, 20, 25, 27, 28

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 23, 24, 26, 28

were read on this motion to/for DISMISS

In the underlying action, plaintiff Jason Callahan, a former police officer with the New York City Police Department ("NYPD"), alleges, inter alia, claims of race discrimination, retaliation, hostile work environment, and constructive discharge as against defendants The City of New York and the NYPD (collectively, the "City Defendants"), and former Lieutenant Noe Campos ("Lt. Campos").

Now pending before the court are two motions: Motion #001 in which the City Defendants seek an order and judgment pursuant to Rule 3211 of the New York Civil Practice Law and Rules ("CPLR"), granting the City Defendants' motion to dismiss the Complaint with prejudice; entering judgment for City Defendants; and granting City Defendants costs, fees, and disbursements.

In Motion #002, Lt. Campos seeks an order and judgment, pursuant to Rule 3211 of the CPLR, dismissing the Complaint with prejudice; entering judgment for Lt. Campos; and granting Lt. Campos costs, fees, and disbursements.

The briefing schedules in both motion sequences were adjourned on consent of all parties. For Motion Sequence #001, the deadline for plaintiff to submit opposition papers was initially adjourned to May 19, 2023 (NYSCEF Docs. 13, 14), and then adjourned to June 9, 2023 (NYSCEF Doc. 19). For Motion Sequence #002, the deadline for plaintiff to submit opposition papers was adjourned to June 5, 2023 (NYSCEF Doc. 18).

It is undisputed that plaintiff did not file opposition papers on time, or contact any defendant to seek an extension. Instead, on June 13, 2023, plaintiff filed opposition papers that addressed both motions (NYSCEF Doc. 23)<sup>1</sup> and also filed an Amended Complaint. Plaintiff also filed letters to the court (NYSCEF Docs. 21, 27, 28) contending that the pending motions with respect to the original Complaint should be denied as moot because the operative document is now the Amended Complaint. Plaintiff further stated that the late filing of opposition papers was due to “clerical oversight and office technological issues.”

Letters to the court were also filed by the City Defendants (NYSCEF Doc. 25) and by Lt. Campos (NYSCEF Doc. 26), in which defendants argue that their motions should be granted, as no timely opposition was filed and plaintiff never obtained consent from the defendants, or leave from the court, to file late opposition papers. Each defendant also argues that should the court find that the Amended Complaint is the operative document, then defendants require an additional 45 days to file motions to dismiss the Amended Complaint.

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<sup>1</sup> Plaintiff erroneously filed the Opposition Papers under Motion Sequence #002 only (NYSCEF Doc. 23), but the substance of the papers also includes arguments regarding Motion Sequence #001.

### Late Opposition Papers

As noted above, these motions sequences were adjourned, more than once, on consent of all parties, to allow plaintiff additional time to file opposition papers. Despite such professional courtesies, plaintiff still failed to file opposition papers in a timely manner. Moreover, plaintiff failed to contact opposing counsel or seek permission from the court, to request a further extension. Instead, plaintiff filed an Amended Complaint.

Nevertheless, the Appellate Division, First Department has repeatedly held “[t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible [...] in furtherance of justice to the end that the parties may have their day in court to litigate the issues” (38 Holding Corp. v. New York, 179 A.D.2d 486 [App. Div. 1st Dept. 1992]); *see also* Gluck v. McDonough, 139 A.D.3d 628 (2016) (referencing that “strong public policy favors resolving cases on the merits”) and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (2010) (“Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits”).

Given this, the court will consider the substantive content of plaintiff’s opposition papers in the context of these motions.

### Amended Complaint

With respect to the Amended Complaint, “plaintiff had the right to amend its complaint during the pendency of defendants’ motion to dismiss [and it] is well settled that an amended complaint supersedes the original complaint, thus rendering without legal effect the defective earlier pleading (Nimkoff Rosenfeld & Schechter, LLP v O’Flaherty, 71 AD3d 533 [1st Dept

2010]). *See also* Roam Capital, Inc. v Asia Alternatives Mgt. LLC, 194 AD3d 585 (1st Dept 2021):

A party may amend his pleading once without leave of court at any time before the period for responding to it expires [...]. Since a motion to dismiss extends the defendant's time to answer the complaint until ten days after service of notice of entry of the order deciding the motion, and since the court had not yet even decided defendant's CPLR 3211 motion at the time plaintiff moved to amend its complaint, plaintiff did not need to move pursuant to CPLR 3025(b); instead, it could have amended as of right pursuant to CPLR 3025(a) [internal citations removed];

Gowen v Helly Nahmad Gallery, Inc., 60 Misc 3d 963, 979 (Sup Ct 2018), *affd*, 169 AD3d 580 (1st Dept 2019):

CPLR 3025(a), however, provides that “a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” CPLR 3025(a) has been interpreted to include the time to amend the complaint as of right where a defendant has made a CPLR 211 motion to dismiss “since the defendant's motion to answer the complaint, also extended the plaintiff's time to amend the complaint” [internal citations removed].

Here, it is undisputed that defendants had filed their respective motions to dismiss prior to the filing of their Answer in this case. Given this, the court finds that plaintiff had the right, pursuant to CPLR 3025(a), to amend his original Complaint. Accordingly, the Amended Complaint filed by plaintiff on June 13, 2023 is now the operative document in this case.

#### Motions #001 and #002

Given that the motions filed by the defendants were based on the original Complaint, which is now without legal effect, the court denies these motions as moot.

Conclusion

It is hereby:


**ORDERED** that Motion Sequence #001 filed by the City Defendants is **DENIED** as moot;

and it is further

**ORDERED** that Motion Sequence #002 filed by Lt. Campos is **DENIED** as moot; and it

is further

**ORDERED** that defendants are each given leave of court to file, at their election, motions to dismiss the Amended Complaint.

|                       |   |  |
|-----------------------|---|--|
| 7/28/2023<br>DATE     |   | <br>J. MACHELLE SWEETING, J.S.C. |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION  |
|                       | <input type="checkbox"/> GRANTED                    | <input type="checkbox"/> GRANTED IN PART   |
|                       | <input checked="" type="checkbox"/> DENIED          | <input type="checkbox"/> OTHER   |
| APPLICATION:          | <input type="checkbox"/> SETTLE ORDER               | <input type="checkbox"/> SUBMIT ORDER  |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT   |
|                       |   | <input type="checkbox"/> REFERENCE   |