

**Aponte v Town of Islip**

2023 NY Slip Op 33820(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 151329/2023

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP**

*Justice*

-----X

NICHOLAS APONTE,

Plaintiff,

- v -

TOWN OF ISLIP, STATE OF NEW YORK, CITY OF NEW YORK, CRAIG CAIN,

Defendants.

-----X

INDEX NO. 151329/2023

MOTION DATE 10/10/2023

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 8, 34, 35, 36, 37, 38, 41

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 30, 31, 32, 40

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 33, 39, 42

were read on this motion to DISMISS.

Upon the foregoing documents, defendants' motions to dismiss this action (mot. seq. 001, 002, and 003) are consolidated for disposition and granted for the reasons set forth below.

Plaintiff's complaint alleges as follows:

Plaintiff was hired by the defendant Town of Islip as a Park Ranger in March 2019 (NYSCEF Doc. No. 1 [Compl. at ¶14]). In June 2019, plaintiff was informed that "he was to begin the process" to be hired as a State Trooper by defendant State of New York (*Id.* at ¶20). As part of this process, plaintiff met with Investigator Scott Kuntz in late November 2019 (*Id.* at ¶24). During this interview, plaintiff gave Kuntz his phone and Kuntz began reviewing plaintiff's text messages

and photos (Id. at ¶¶25-26). In doing so, Kuntz saw a text message from plaintiff to plaintiff's wife "advising his wife not to smoke too much marijuana when she was with her mother" (Id. at ¶27).

When Kuntz questioned plaintiff about this message, plaintiff explained that he and his wife are caretakers for his mother-in-law who is disabled in that she has sleep apnea, depression, and anxiety, and has a medical marijuana prescription for the treatment of same (Id. at ¶¶28-30). Plaintiff informed Kuntz that he did not use marijuana (Id. at ¶35). Kuntz told plaintiff that, based on this text message, he could not work as a State Trooper (Id. at ¶37).

After plaintiff returned to work, he was called to a meeting with several union officials and representatives of the Town of Islip who informed him that a New York State employee had contacted them and informed them about his text message regarding his wife's marijuana use (Id. at ¶¶53-54). Plaintiff was then told that if he did not resign as a Park Ranger he would be terminated (Id. at ¶55). As a result, plaintiff resigned on December 17, 2019 (Id. at ¶60).

Plaintiff subsequently reopened a prior application to work as a New York City Police Department ("NYPD") police officer and, after passing a preliminary physical fitness test and assessment, had an in-person interview on February 14, 2022 (Id. at ¶81). During this interview, the interviewer called the Town of Islip's Public Safety Enforcement Department and spoke to defendant Craig Cain (Id. at ¶¶77-83). Cain stated that plaintiff was terminated as an Islip Park Ranger for drug use and that Cain did not recommend plaintiff for employment with the NYPD (Id. at ¶84). Plaintiff alleges that Cain knew that these statements were false at the time he made them (Id. at ¶86). As a result of this call, plaintiff was not hired by the NYPD (Id. at ¶90).

Plaintiff's complaint asserts claims pursuant to New York State Executive Law §296 (also known as the "New York State Human Rights Law" or "NYSHRL") for caretaker discrimination and disability discrimination against all defendants as well as claims against the City of New York

pursuant to Administrative Code §8-107 (the “New York City Human Rights Law” or “NYSHRL”) for caretaker discrimination and disability discrimination. Finally, plaintiff asserts a claim of defamation against Craig Cain, individually<sup>1</sup>.

Defendants now move, pursuant to CPLR §3211, to dismiss the complaint in its entirety. Specifically, the Town of Islip (the “Town”) argues that this action is barred by the statute of limitations set out by Town Law §67(2) and by plaintiff’s failure to timely file a Notice of Claim as required by Town Law §67(1) and, furthermore, that no claims for caretaker discrimination and disability discrimination are contemplated by the New York State Human Rights Law. In support of its motion, the Town submits an affidavit from Anthony Prudenti, Commissioner of the Public Safety Enforcement Department for the Town of Islip, attesting that:

Approximately around the end of November 2019, I was contacted by a Technical Lieutenant from the State Police, Lt. Rodger F. Kirsopp, who called me wanting to discuss a State Trooper Candidate, Nicholas Aponte

...

Lieutenant Kirsopp provided that Mr. Aponte brought in a brand new cellphone to his interview and that there were no messages or accounts to go through. However, Lt. Kirsopp stated that the State Troopers office was able to get onto Mr. Aponte’s iCloud and found many disturbing text messages. Most concerning being the fact that as recently as October 2019, Mr. Aponte was involved in the sale and consumption of Marihuana.

...

On December 13, 2019, I received a letter from Steven G. James, Deputy Superintendent of Employee Relations for the State Police, dated December 6, 2019, that was sent to the Town, however such letter included only that Aponte was involved in the sale and consumption of Marihuana...

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<sup>1</sup> The complaint originally included claims for retaliation under the NYSHRL and NYCHRL against the Town, City, and State, and caretaker discrimination and disability discrimination claims under the NYCHRL against the State and Town. These claims were withdrawn by plaintiff in his opposition to the instant motion and this was confirmed at oral argument.

More than two (2) years after Mr. Aponte's resignation from his employment, my Department received a reference call from the New York Police Department inquiring about Mr. Aponte's previous employment with the Town.

I assigned Lieutenant Craig Cain, as one of the Town's superior Park Rangers who had experience working with Mr. Aponte, to take the call. Lieutenant Cain was engaged in this reference call at my direction and was acting within the scope of his public Town employment and in the discharge of his duties as a Park Ranger III.

(NYSCEF Doc. No. 13 [Prudenti Aff. at ¶¶6, 10, 12, 21-22]).

The Town also submits an affidavit by Craig Cain, Lieutenant of the Public Safety Enforcement Department, attesting that:

In or around February of 2022, while working in my capacity as a Park Ranger III in the Public Safety Enforcement Department, I received a phone call during work hours on my work phone from an NYPD investigator asking questions about a former employee, Nicholas Aponte.

...

The NYPD investigator asked why Mr. Aponte no longer worked for the Town and ceased employment with the Town following Town's receipt of a notice from the State Police Department regarding an inspection that revealed Mr. Aponte's sale and consumption of an illegal substance during the course of his employment with Town. I further explained that Nicholas Aponte resigned in 2019 after being confronted about these allegations.

When the NYPD investigator asked if I recommend Mr. Aponte to the NYPD, I told him that I did not. I then told the investigator that if he had follow-up questions related to the allegations that arose out of State's inspection, that he would need to contact the State Police Department

(NYSCEF Doc. No. 14 [Cain Aff. at ¶¶9, 11-12]).

Defendants the State of New York (the "State") and City of New York (the "City") also move to dismiss this action arguing, principally, that claims for caretaker discrimination and disability discrimination are not contemplated by the NYSHRL. The City argues that the complaint fails to state a claim under the NYCHRL because it does not contain factual allegations supporting

plaintiff's claim that he was discriminated against based on his association with his disabled mother-in-law.

Plaintiff opposes the motion, asserting that his claims are timely, that no notice of claim requirements applies, and that his claims for discrimination based on association with individuals belonging to protected classes under the NYSHRL are viable. Finally, he argues that his complaint states a claim under the NYCHRL given the generous standard for review on a motion to dismiss such claims.

Plaintiff also cross-moves to amend the complaint, submitting a proposed amended complaint asserting that Kuntz "allegedly" discovered a text message from plaintiff to his wife concerning her marijuana use, and adding allegations about a letter sent by State employee Arthur Abbate to Islip Deputy Commissioner Prudenti, disputing the factual allegations in the affidavits of Prudenti and Cain, and adding further details to his defamation claim against Cain (See NYSCEF Doc. No. 36 [Proposed Am. Compl. at ¶¶27, 53-56, 95-105, 107-117, 177-182]).

### DISCUSSION

The Town's motion is granted in its entirety. As a preliminary matter, the Court notes that the affidavits submitted by the Town have no probative value on this motion (See e.g., Art and Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436, 438 [1st Dept 2014]). Ultimately, however, the Town has established that the claims against the Town and Cain are barred by plaintiff's failure to commence this action prior to the expiration of the statute of limitations set forth in Town Law §67(2).

Town Law §67(2) provides that "[e]very action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law" while General Municipal Law §50-i(1)(c) provides that "[n]o action shall be prosecuted ... unless ... the action or special

proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. The one-year-and-ninety-day statute of limitations set forth in Town Law §67(2) applies to NYSHRL claims brought against the Town (See Scopelliti v Town of New Castle, 210 AD2d 308, 309 [2d Dept 1994]). As the statute of limitations began to run upon plaintiff's resignation on June 30, 2019, it expired (after accounting for the tolling period created by Executive Order 202.8) on November 1, 2021, well before the commencement of this action on February 9, 2023.

Plaintiff's failure to timely file a notice of claim also provides separate and independent grounds to dismiss this action as against the Town and Cain. Town Law § 67(1) requires that any claim against the Town "for damages for wrong or injury to person or property... shall be made and served in compliance with section fifty-e of the general municipal law," i.e., within ninety days after the claim arises. As Town Law §67 applies to employment discrimination actions (See Picciano v. Nassau Cnty. Civil Serv. Comm'n, 290 AD2d 164, 170 [2d Dept 2001]; Town of Brookhaven v. N.Y. State Div. of Human Rights, 282 AD2d 685, 685-86 [2d Dept 2001]), plaintiff's failure to timely file a notice of claim on the Town, as required under General Municipal Law §50-e, warrants dismissal of the complaint. Plaintiff's reliance on Palmer v City of New York, 215 AD2d 336 (1st Dept 1995) to support a contrary conclusion is misplaced. Palmer addressed the applicability of GML§50-i to NYSHRL claims and is irrelevant to the circumstances here, where the Town has, by statute, applied GML §50-i's notice of claim requirements to such claims (See e.g., Fair v City of Mount Vernon, 210 AD3d 868, 869 [2d Dept 2022]).

Plaintiff's failure to serve a notice of claim also mandates the dismissal of his claims against Cain. "[S]ervice of a notice of claim upon the county or public corporation is ... required in a suit against its employee if the former has a statutory obligation to indemnify (See Grieco v

Fugaro, 61 AD2d 903, 904 [1st Dept 1978]; see also Stewart v Westchester Inst. for Human Dev., 136 AD3d 1014, 1017-18 [2d Dept 2016]). Here, Islip Town Code §24-3 provides that

... the Town shall provide for the defense of the employee, agency employee or appointed volunteer in the civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting or in good faith purporting to act within the scope of his public employment or duties.

As the statements Cain allegedly made in response to questions about a former colleague by another law enforcement officer interviewing that former colleague (in effect, serving as a professional reference on behalf of the Public Safety Enforcement Department, albeit a negative one) fall within the scope of his professional duties (See e.g., Pezhman v City of New York, 29 AD3d 164, 168 [1st Dept 2006] [trial court properly concluded that allegations that school principal sent letters to superintendents stating, inter alia, that plaintiff used drugs during school hours, exhibited poor professional judgment, and failed to appear for work, were within scope of principal's employment]), the Town would be required, under Town Code §24-3, to indemnify Cain for any recovery against him in this action. Accordingly, this action is dismissed as against the Town and Cain based on plaintiff's failure to serve a notice of claim.

*New York State Human Rights Law*

Even ignoring the foregoing, plaintiff's NYSHRL claims must be dismissed against the Town as well as the City and State because no such claims lie under Executive Law §296.

Executive Law §296(1)(a) prohibits discrimination in employment "because of an individual's age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence." However, "caring for an ailing family member is not a protected activity under the [New York State] Human

Rights Law” (Floriano-Keetch v. New York State Div. of Human Rights, 175 AD3d 960, 961 [4th Dept 2019]). The Court declines plaintiff’s request to extend, by judicial fiat, the protections of the statute beyond its plain terms. The New York State Legislature is the proper avenue to seek an expansion<sup>2</sup>.

Neither can plaintiff assert a claim under the NYSHRL for discrimination based on a his association with a disabled person—“the plain language of the New York State Human Rights Law clearly indicates that it only prohibits discrimination against individuals who are themselves disabled” (Bartman v Shenker, 5 Misc 3d 856, 859-60 [Sup Ct, NY County 2004] [internal citations and quotations omitted]; see also Sedhom v SUNY Downstate Medical Center, 2018 NY Slip Op 33210(U) [Sup Ct, NY County 2018]). Although, as plaintiff notes, the Appellate Division, Second Department has concluded that the NYSHRL applies to certain plaintiff’s “who are the victims of discriminatory animus towards third persons with whom the individuals associate” (Chiara v Town of New Castle, 126 AD3d 111, 121 [2d Dept 2015]; see also Macchio v Michaels Elect. Supply Corp., 149 AD3d 716, 717-18 [2d Dept 2017]), these decisions do not apply here.

In Chiara and Macchio, the Second Department concluded that allegations that “the Town [of New Castle] and others subjected [plaintiff] to employment discrimination because his wife is Jewish” stated a claim under the NYSHRL (Chiara v Town of New Castle, 126 AD3d 111, 121 [2d Dept 2015]) as did allegations that “throughout his employment ... [plaintiff] was subjected to discriminatory epithets directed at his Italian–American ancestry, his association with African–Americans, and his affinity for African–American culture” (Macchio v Michaels Elect. Supply Corp., 149 AD3d 716, 717-18 [2d Dept 2017]). Both of these decisions, however, were premised

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<sup>2</sup> The Court notes that legislation seeking to amend the NYSHRL to add caregivers as a protected class has passed the New York State Senate and been delivered to the Assembly for consideration (See NY State Senate Bill 2023-S5465, available at <https://www.nysenate.gov/legislation/bills/2023/S5465> [last accessed October 26, 2023]).

on the principle that since NYSHRL claims are “analytically identical to claims brought under Title VII” and federal courts have construed Title VII to protect individuals “who are the victims of discriminatory animus towards third persons with whom the individuals associate” the courts of this State must follow suit (Chiara v Town of New Castle, 126 AD3d 111, 120-122 [2d Dept 2015] [internal citations omitted]). However, while Title VII addresses discrimination by race and religion, which were at issue in Chiara and Macchio, Title VII does not encompass claims for disability discrimination at issue here (See 42 USC §2000e-2). This distinction is dispositive, bringing this action outside the reasoning of Chiara and progeny (See Arazi v Cohen Brothers Realty Corp., No. 20-cv-8837 (GHW), 2022 WL 912940, \*8 n. 7 [SDNY 2022]). Accordingly, plaintiff’s NYSHRL claims are dismissed in their entirety, and the Court turns to the City’s motion to dismiss plaintiff’s remaining claims under the NYCHRL.

*New York City Human Rights Law*

“Unlike the NYSHRL and Title VII, the NYCHRL specifically prohibits employment discrimination against individuals by virtue of their association with actual or perceived members of a protected class” (Lapko v Grand Mkt. Intern. Corp., 2020 NY Slip Op 32711[U], 7-8 [Sup Ct, Kings County 2020] citing Administrative Code § 8-107[20]).

The City moves to dismiss these claims pursuant to CPLR §3211(a)(7). “When reviewing a defendant’s motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. The ultimate question is whether, accepting the allegations and affording these inferences, plaintiff can succeed upon any reasonable view of the facts stated” (Doe v Bloomberg, L.P., 36 NY3d 450, 454 [2021] [internal citations and quotations omitted]).

In this case, the complaint lacks any allegations to indicate that plaintiff was forced to resign by the Town and denied employment with the State and City because of his association with his mother-in-law or his purported caregiver status. Rather, his complaint, on its face, identifies that the decisions by these defendants was based on their understanding that he condoned marijuana use and potentially used such drugs himself and no facts in the record suggest that this rationale was pretextual. The fact that plaintiff disputes that he used drugs is irrelevant to this analysis. Accordingly, the City's motion is granted and plaintiff's NYCHRL claims are also dismissed.

In light of the foregoing, plaintiff's cross-motion to amend his complaint denied as futile, as the proposed Amended Complaint does not address the deficiencies set out above.

Accordingly, it is

**ORDERED** that plaintiff's motion to amend the complaint is denied; and it is further

**ORDERED** that Town of Islip and Craig Cain's motion to dismiss is granted and this action is hereby dismissed as against them; and it is further

**ORDERED** that the City of New York's motion to dismiss is granted and this action is hereby dismissed as against it; and it is further

**ORDERED** that the State of New York's motion to dismiss this action are granted, and this action is hereby dismissed as against it; and it is further

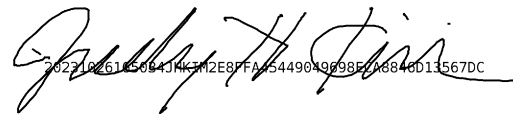
**ORDERED** that, in light of the foregoing, this action is dismissed in its entirety; and it is further

**ORDERED** that counsel for the City of New York shall, within ten days from the date of this decision and order, serve a copy of this decision and order, with notice of entry, on plaintiff, as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General

Clerk’s Office (60 Centre St., Room 119), who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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10/26/2023

DATE

HON. JUDY H. KIM, 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