

Alonso v City of New York
2023 NY Slip Op 35121(U)
December 13, 2023
Supreme Court, Queens County
Docket Number: Index No. 715899/2023
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X
Michael Alonso,

Plaintiff,

Index
Number: 715899/23

Motion
Date: 12/4/23

- against -

The City Of New York, New York City Health and Hospitals Corporation, Helen Ortega, Michael Millnek, Juan Checo, Tanya Moore and Sixto Valentin,
Defendants.

Motion Seq. No.: 1

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The following papers numbered E6-E18 read on this motion by Defendants, New York City Health and Hospitals Corporation and Tanya Moore, for an order to dismiss; and cross motion by Plaintiff for an order granting the filing of a first amended complaint.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-
Memorandum of Law..... E6-12
Notice of Cross-Motion-Affirmation-Exhibits-
Memorandum of Law..... E13-17
Reply..... E18

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, New York City Health and Hospitals Corporation and Tanya Moore, for an order to dismiss is granted. Cross motion by Plaintiff for an order granting the filing of a first amended complaint is denied.

The instant action sounds in claims for hostile work environment. Plaintiff is a former Sergeant assigned to Elmhurst Hospital. Plaintiff alleges that he was subject to a hostile work environment from incidents in March of 2022, and between June 1, 2022 and December 1, 2022. The Court notes that Defendants City of New York, Helen Ortega, Michael Millnek, Juan Checo, Tanya Moore

and Sixto Valentin have not been served with the summons and complaint.

Plaintiff's complaint alleges that he was employed as an NYCHHC Detective, and then Sergeant, from 2010 to December 1, 2022, when he resigned from his position. Plaintiff is a Caucasian Male who suffers from Epilepsy and alleges discrimination based on his gender, race, and medical disability. On or about June 1, 2022, Plaintiff interviewed with Defendant Chief Tanya Moore for the position of Director. The position was awarded to an African-American with less seniority and experience than Plaintiff. On or about June 1, 2022, Plaintiff interviewed with Chief Moore for the position of Lieutenant. The position was awarded to a Hispanic individual in August of 2022 with less experience than Plaintiff. On an undisclosed date, Plaintiff alleges that Chief Moore confiscated Plaintiff's police memo book. On an undisclosed date, Plaintiff alleges that Chief Moore retaliated against him for failing to arrest a handicapped patient who assaulted a nurse. Chief Moore accused Plaintiff of insubordination. In March of 2022, Plaintiff interviewed for the position of Chief. The position was awarded to Chief Moore, an African American Female. On an undisclosed date, Plaintiff was demoted to work a night shift despite his seniority.

Notice of Claim

The branch of the motion to dismiss for failure to comply with the applicable notice of claim requirements with respect to the claim for conversion is granted.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim must set forth "the nature of the claim" "the time when, the place where and the manner in which the claim arose" and "the items of damages or injuries claimed to have been sustained" (General Municipal Law §50-e [2]). "[C]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (Finke v City of Glen Cove, 55 A.D.3d 785 [2d Dept. 2008]).

Plaintiff's claim for conversion is a tort claim and is subject to the notice of claim requirement, as NYCHHC is a municipal corporation (see New York City Health and Hospitals

Corporation Act §4 (1), § 5 (5), § 20 (4) (L 1969, ch 1016, §1). Thus, pursuant to General Municipal Law §50-e, Plaintiff was required to serve a notice of claim within ninety days of the accrual of his claim. Here, Plaintiff's notice of claim is devoid of any mention of his claim for conversion in violation of the notice of claim requirement pursuant to the General Municipal Law. Plaintiff failed to cross-move to file a late notice of claim for the same. Therefore, the motion is granted and the Plaintiff's cause of action for conversion is dismissed as against NYCHHC.

Individually Named Defendant, Chief Tanya Moore

The branch of the motion to dismiss the action as against Chief Moore, to the extent that she was sued in her individual capacity, is granted.

Defendants argue that the claims should be dismissed as against Chief Moore. The New York State Human Rights Law (NYSHRL) permits individual liability for discrimination, "but only if the individual qualifies as an employer or aided and abetted the unlawful discriminatory acts of others" (see Craven v. City of New York, 2023 U.S. Dist. LEXIS 72835 [S.D.N.Y. 2023]). An "employer" under NYSHRL is limited to individuals with "ownership interest," or supervisors who have the authority to hire and fire employees (see id.). By contrast, the NYCHRL provides a "broader basis for direct individual liability" (see id.). However, under the SHRL, the individual must have "actively participated" in the conduct that gave rise to the claims. Here, Plaintiff failed to state a cause of action with regard to Chief Moore, as there is no allegation that she has either a supervisory title or has an "ownership interest." Similarly, there is no allegation, of which can survive a motion pursuant to CPLR 3211(a)(7) that Chief Moore aided or abetted unlawful discriminatory acts of others, as explained supra. Therefore, the complaint is dismissed with respect to any cause of action against Chief Moore.

Hostile Work Environment

The branch of the motion to dismiss the cause of action for Hostile Work Environment under the SHRL is granted.

To assert a claim for hostile work environment under the SHRL, Plaintiff must allege that the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abuse working environment (see

Croci v. Town of Haverstraw, 146 A.D.3d 748 [2d Dept. 2017]; Reaves v. New York City Dept. Of Educ, 2020 N.Y. Misc. LEXIS 3626 [N.Y. Sup. Ct., Queens Cty. 2020]).

The record on this motion establishes that, viewing the evidence in a light most favorable to Plaintiff and crediting as true Plaintiff's factual allegations, the alleged conduct was not sufficiently severe or pervasive so as to raise any issue of fact as to whether Plaintiff's rights under the SHRL were violated (see Harris v Forklift Sys., Inc., 510 U.S. 17 [1993]; Schwapp v Town of Avon, 118 F.3d 106 [2d Cir 1997]; Hernandez v Kaisman, 103 A.D.3d 106 [1st Dept 2012]; Barnum v New York City Transit Auth, 62 A.D.3d 736 [2d Dept 2009]). While Plaintiff notes that he is a white male with Epilepsy, he failed to link any of the alleged discrimination to his membership to a protected class. The incidents described in the complaint do not constitute sufficiently pervasive or severe conduct so as to have created a hostile work environment actionable under the State Human Rights Law (see Golston-Green v. City of New York, 184 A.D.3d 24 [2d Dept. 2020]).

Therefore, the motion is granted and the complaint is dismissed with respect to the cause of action alleging hostile work environment.

Section 349 of NY General Business Law

The branch of the motion to dismiss the cause of action under Section 349 of New York's General Business Law is granted.

Plaintiff alleges that the Defendants engaged in unfair and deceptive business practices under Section 349 of the General Business Law. It appears from the complaint that Plaintiff is alleging that the failure to "award," or promote the Plaintiff, amounted to an unfair and deceptive business practice under Section 349. The Court notes that Plaintiff has not plead a cause of action for failure to promote.

Section 349 applies to "deceptive acts or practices of any business, trade or commerce or in the furnishing of any service" (see NY Gen. Bus. Law §349). It is puzzling to the Court why Plaintiff has alleged violations of a consumer related statute in this matter, as it is clearly inapplicable. Indeed, Section 349 applies to the deceptive trade acts and practices within New York State (see In re Evergreen Mut. Funds Fee Litig., 423 F.Supp.2d 249 [S.D.N.Y. 2006]). Accordingly, even affording Plaintiff the most liberal construction, the complaint fails to state a cause of action under Section 349 of the General Business Law. Therefore, the third cause of action for violations of Section 349 of New York General

Business Law is dismissed.

Conversion

The branch of the motion to dismiss for failure to state a cause of action for conversion is granted.

A claim of conversion is defined as "an intentional act of dominion or control over a chattel which so seriously interferes with the right of another to control to that the actor may justly be required by the other the full value of the chattel" (see Thyroff v. Nationwide Mut. Ins. Co., 8 N.Y.3d 283 [2007]).

The complaint alleges that Chief Moore's conduct amounted to conversion. In reviewing the complaint, it appears that Chief Moore's conduct with this regard involved confiscating Plaintiff's memo book. However, as Defendants point out, a police officer's memo book is not considered their personal property. Thus, the complaint fails to state a cause of action for conversion based on its plain reading (see Gould v. New York City Police Dep't, 89 N.Y.2d 267 [1996]; Burch v. Galgano, 18 Misc. 3d 1105(A) [NY Sup Ct Kings County 2007]). Therefore, the second cause of action for conversion is dismissed.

On or about November 3, 2023, and during the pendency of the instant motion, Plaintiff's counsel cross-moved to amend the complaint to add a cause of action for unjust enrichment. As of the date of this order, none of the Defendants (who have been served with the complaint) have interposed an Answer, and thus, issue has not been joined. Pursuant to CPLR 3025(a), a party may make an amendment to the pleadings 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" (see CPLR 3025(a)). Here, none of the forgoing applies. Accordingly, Plaintiff requires leave of the Court to amend his pleadings pursuant to 3025(b). Pursuant to CPLR 3025(b), "leave shall be freely given" to parties to amend and supplement the pleadings (see CPLR §3025(b)). Leave may be given up to even after trial, provided that the amendment does not prejudice the other party (see Whalen v. Kawasaki Motors Corp., U.S.A., 92 N.Y.2D 288 [1998]). The Court may also deny an application to amend pursuant to CPLR 3025(b) upon a finding that the proposed amendment is palpably insufficient and patently devoid of merit (see Toiny, LLC v. Rahim, 214 A.D.3d 1023 [2d Dept. 2023]). Upon review of the proposed amended complaint, it appears that is the case here.

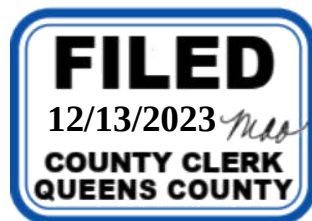
Plaintiff's proposed amended summons and complaint alleges unjust enrichment. The doctrine of unjust enrichment lies as a quasi-contractual claim (see Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]). The proposed amended complaint fails to include any details beyond mere conclusory allegations. It appears that Plaintiff is alleging that because Chief Moore confiscated Plaintiff's memo book, the Defendants were unjustly enriched as a result.

Permitting Plaintiff to amend his complaint to assert it as a cause of action would be an improper use of discretion by this Court. Firstly, the general assertion of an unjust enrichment claim does not fit within the facts and circumstances of this hostile work environment cause of action. There are no facts here that support the quasi-contact claim. Second, to the extent that unjust enrichment can be viewed as a tort claim herein, the Plaintiff's notice of claim does is devoid of any mention of it (see supra). Finally, as the Court noted above, that Plaintiff's memo book is cannot considered his personal property in the first instance, and thus, cannot be the basis for an unjust enrichment claim (see supra). Based on all of the forgoing, the proposed amendment is patently meritless, such that permitting it would result in prejudice to the Defendants.

Accordingly, the motion is granted and the cross-motion is denied.

Serve a copy of this order with notice of entry without undue delay.

Dated: December 13, 2023





KEVIN J. KERRIGAN, J.S.C.