

Elco v Aguiar
2023 NY Slip Op 35263(U)
May 2, 2023
Supreme Court, Suffolk County
Docket Number: Index No. 614414/2020
Judge: Vincent J. Martorana
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Short Form Order

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

MELISSA BREITENBACH ELCO,

Plaintiff,

- against-

YVETTE AGUIAR INDIVIDUALLY AND AS
POLICE COMMISSIONER AND SUPERVISOR
OF THE TOWN OF RIVERHEAD, THE TOWN
OF RIVERHEAD, DAVID HEGERMILLER
INDIVIDUALLY, AND AS CHIEF OF POLICE
OF THE TOWN OF RIVERHEAD, THE
RIVERHEAD POLICE DEPARTMENT,
RICHARD FREEBORN,

Defendants.

ORIG. RETURN DATE: 03/31/22

ADJOURNED DATE: 02/23/23

MOTION SEQ. NO.: 005 - MG

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Upon efiled documents numbered 106- 117; it is

ORDERED that Richard Freeborn's motion seeking reargument of his prior motion is granted with respect to dismissal pursuant to CPLR §3211. Upon reargument, dismissal of the remaining cause of action against Richard Freeborn is granted. Freeborn's request for a stay pending an appeal is denied.

Plaintiff's complaint seeks compensatory and punitive damages as a result of alleged workplace discrimination. Claims are alleged under state and federal law. Upon motion of several defendants seeking dismissal pursuant to CPLR §3211 and the resulting order of the Honorable William G. Ford dated April 26, 2021, Plaintiff's claims as against Yvette Aguiar, individually and as Police Commissioner and Town Supervisor were dismissed, as were claims against the Town of Riverhead and The Riverhead Police Department. Claims against David Hegermiller as Riverhead Chief of Police were dismissed but the claims against him individually remain. Plaintiff also alleges negligent and intentional infliction of emotional distress. Such claims as against the "Town defendants" were also dismissed by the April 26, 2021 order. Therefore the only remaining defendants are David Hegermiller in his individual capacity and Richard Freeborn ("Freeborn"). By prior order of this court dated January 18, 2022, Defendant Richard Freeborn's motion seeking

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dismissal of Plaintiff's claims against him was granted in part, to the extent that Plaintiff's second, third, fourth, fifth and sixth causes of action as alleged against Freeborn were dismissed pursuant to CPLR §3211(a)(7). The portion of Freeborn's motion seeking summary judgment and the portion of his motion seeking dismissal of Plaintiff's first cause of action were denied. Freeborn now seeks leave to reargue his prior motion and an order granting "dismissal of the complaint against Richard Freeborn pursuant to CPLR § 3211 or CPLR § 3212," along with a stay of the action pending the determination of the appeal.

As summarized in this court's prior order, the alleged facts underlying Plaintiff's claim are that she is a Riverhead Town Police Dispatcher and that the father of her eldest child is Defendant Richard Freeborn who is a Riverhead Police Officer. The romantic relationship between Plaintiff and Freeborn ended in December 2009. Plaintiff alleges that Freeborn harassed her and sent harassing texts, spread rumors about her sexual relationships, showed private photographs of her to male coworkers, complicated child visitation and stalked her beginning in 2010 and that Freeborn also harassed her ex-husband. Plaintiff states that she advised her supervisors about these behaviors but they refused to intervene. She describes many incidents, most of them related to child visitation issues which sometimes resulted in Domestic Incident Reports being filed; however some incidents involved more general subject matter. Plaintiff claims that numerous times she attempted to make domestic incident complaints against Freeborn but was turned down by various Riverhead Police Department Lieutenants and other senior officers. She asserts that further action should have been taken against Freeborn but that the Police Department covered up for Freeborn. Plaintiff claims that Defendants restricted her role in the workplace and denied her overtime and advancement, along with other alleged administrative retaliation for her complaints. She further states that she was questioned by superior officers about her personal life and custody issues.

Freeborn countered in his prior motion that the parties had engaged in extensive litigation in New York State Family Court, Suffolk County, regarding custody of their daughter and that the vast majority of allegations in the complaint pertain to a domestic dispute unrelated to their status as co-workers and that such claims fail to provide a basis for a claim under state or federal law.

This court's prior order dated January 18, 2022, which is the subject of the within motion, held, in part:

A claim under NYS Human Rights Law, Executive Law §296 requires the following elements: "(1) [the claimant] is a member of a protected class; (2) [the claimant] was qualified to hold the position; (3) [the claimant] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305, 786 N.Y.S.2d 382 [2004]; *Bilitch v. New York City Health & Hosps. Corp.*, 194 AD3d 999, 148 NYS3d 238, 243 [2d Dept. 2021]). On this record, giving the pleading every possible favorable inference (*Chanko v. Am. Broad. Companies Inc.*, *supra*) and in consideration of Justice Ford's prior findings, the Court finds that Plaintiff has met the bare pleading requirements of a cognizable claim under Human Rights Law as against Freeborn as an aider or abettor (Executive Law §296(6); *Ananiadis v. Mediterranean Gyros Prod., Inc.*, 151 AD3d 915, 917, 54 NYS3d 155 [2d Dept. 2017]; *McIlwain v. Korbean Int'l Inv. Corp.*, 896 FSupp 1373, 1382–83 [SDNY 1995]; *Pellegrini v. Sovereign Hotels, Inc.*, 740 FSupp2d 344, 355–57 [NDNY 2010]). The portion of

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Freeborn's motion seeking dismissal of Plaintiff's first cause of action as against him is denied.

Freeborn now seeks an order granting reargument and dismissal, contending that this court erred in denying the prior motion because (1) the claims against him involve workplace conduct and he is being indemnified by the Riverhead Police Department, therefore the claims are subject to the notice of claim requirement pursuant to Town Law §67 (which was not met), (2) "the Second Department has rejected liability of co-employees under an aider or abettor theory who have no decision-making authority and who were alleged direct participants in the purported misconduct," (3) the conduct alleged does not give rise to a claim under New York State Human Rights Law and (4) the claims that predate July 7, 2019 are time barred as they occurred more than one year and ninety days prior to the commencement of the action.

A motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining a prior motion, and may not be used to advance arguments different than those presented on such prior motion (CPLR 2221 [d] [2]; *see Grimm v Bailey*, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]; *Haque v Daddazio*, 84 AD3d 940, 922 NYS2d 548 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). Reargument may be granted upon a showing that the court overlooked or misapprehended the facts or the law "or for some other reason mistakenly arrived at its earlier decision" (*Carrillo v PM Realty Group*, 16 AD3d 611, 611, 793 NYS2d 69 [2d Dept 2005]; *see e.g. Grimm v Bailey*, 105 AD3d 703, 963 NYS2d 277; *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]). It is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594, 691 NYS2d 75 [2d Dept 1999]; *see e.g. Sheldrake Riv. Realty, LLC v Village of Mamaroneck*, 106 AD3d 1075, 966 NYS2d 188 [2d Dept 2013]; *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 895 NYS2d 860 [2d Dept 2010]).

Plaintiff's First Cause of Action asserts that Freeborn and others subjected her to discrimination under New York Human Rights Law, Exec Law §296(h). She asserts that, "Defendants improperly discriminated against Plaintiff based upon gender, familial status, and social class in the terms and conditions of her employment creating a hostile work environment for the above-mentioned reasons in violation of the NYSHRL Exec Law §296."

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 52, 49 NE3d 1171, 1175 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 774 N.E.2d 1190 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Bare legal conclusions; however, are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (*Chanko, supra*; *Leon supra*). "If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010]).

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(quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]). "Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR§ 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action" (*Sokol, supra; Porat, supra*). The analysis goes to whether or not a colorable cause of action exists, not whether or not such claim is ultimately likely to prevail on the merits. Although the Court may consider evidentiary material in support of a motion to dismiss on this basis, consideration of whether or not Plaintiff might survive a summary judgment motion is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 768–69, 97 NYS3d 203, 205–06 [2d Dept. 2019]). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe, supra; McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190, 192 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 372 NE2d 17 [1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

This court's January 18, 2022 order was reliant upon the determination by Justice Ford in his April 26, 2021 order that the claims against Hegermiller individually would stand, as the allegations were sufficient to establish Hegermiller as a supervisor and sufficient to state a claim against him as an aider or abettor under NYSHRL. Justice Ford dismissed the claims against the Town Defendants partly based upon failure to comply with the notice of claim condition precedent and statute of limitations; however his order stated that the claims against Defendants in their individual capacity merited different treatment. Implicit in this was a determination that the notice of claim requirement did not apply to the claims against persons in their individual capacity. This court considered such determination to be law of the case pursuant to Justice Ford's order.

Freeborn, in his prior motion argued that Plaintiff "failed to allege a claim under the NYSHRL, as she has not alleged any of the required elements (2) through (4) above. The complaint fails to allege that plaintiff was qualified for the position and that her performance was satisfactory. Nor does the complaint adequately allege adverse employment actions. Finally, she failed to allege that any purported adverse actions occurred under circumstances giving rise to an inference of discrimination." Freeborn did not make any specific argument as to why the claim against him should be dismissed, when Justice Ford had already determined that similar claims against Hegermiller should stand. There was no argument advanced that they were not similarly situated, yet Freeborn now asserts that this court overlooked their differences.

Freeborn also previously argued that a notice of claim must name specific individuals against whom claims will be asserted. The relevance of this was unclear because no notice of claim was filed and it appeared that Justice Ford had determined that no notice of claim was required for the claims against the individuals. Although it should be noted that, if a notice of claim had been filed with the Town, it is not required that individual employees be named in order to impose liability against them (*Blake v. City of New York*, 148 AD3d 1101, 1106, 51 NYS3d 540, 545 [2d Dept. 2017]; *Wiggins v. City of New York*, 201 AD3d 22, 25, 159 NYS3d 392, 394 [1st Dept. 2021]).

Freeborn now argues for the first time that a notice of claim was required because he is being indemnified by the Town. Freeborn argues that Plaintiff's claims "concerned violations under the NYSHRL for Officer Freeborn's workplace conduct in the scope of his employment and thus, were subject to the notice of claim requirement, particularly because he is being indemnified by the

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Town.” He further argues that Plaintiff did not even allege that Freeborn was not acting within the scope of his employment, rendering the Town the real party in interest. He also claims that Justice Ford’s order was in error when it did not make such a finding with respect to Hegermiller; however, this issue is not before this court, nor may it be brought before this court at this juncture.

With some exceptions, a notice of claim is generally required as condition precedent to suit against a municipality or a party that is indemnified by such municipality (see *Santiago v. Santana*, 8 AD3d 650, 779 NYS2d 554 [2d Dept. 2004]; *Coleman v. Westchester St. Transportation Co.*, 57 NY2d 734, 454 NYS2d 978 [1982]; *Smith v. Pierce*, 181 AD3d 849, 119 NYS3d 867 [2d Dept. 2020]). “[C]ompliance with the notice of claim requirements set forth in Town Law § 67 and General Municipal Law § 50-e is a condition precedent to the pursuit of an employment discrimination claim against a town” under Executive Law § 296 (*Town of Brookhaven v. New York State Div. of Hum. Rts.*, 282 AD2d 685, 685–86, 723 NYS2d 410 [2d Dept. 2001]). Where individual defendants are named in their individual capacities but the claims alleged arise from their employment, the notice of claim requirement applies (*Kassapian v. City of New York*, 155 AD3d 851, 854, 65 NYS3d 562, 566 [2d Dept. 2017]). Furthermore, timely filing of a notice of claim is condition precedent for a civil action asserting claims against individuals employed by a municipality for workplace related discrimination under Executive Law § 296 (*Fair v. City of Mount Vernon*, 2022 WL 16954592 [2d Dept. 2022]; *Mirro v. City of New York*, 159 AD3d 964, 966–67, 74 NYS3d 356, 359–60 [2d Dept. 2018]). General Municipal Law §50-i requires that a complaint allege that thirty days have elapsed since service of a notice of claim (*Alex-Mitchell: El v. State*, 2 AD3d 549, 768 NYS2d 384 [2d Dept. 2003]). Plaintiff has failed to meet this requirement.

Additionally, Freeborn now asserts that he was a co-employee without decision-making power who may not be held liable under NYSHRL. Contrary to Freeborn’s assertions, a co-employee can be held liable for aiding and abetting under NYSHRL and such a claim is not precluded by the Second Department’s decision in *Trovato v. Air Express Intl.* (see *Murphy v. ERA United Realty*, 251 AD2d 469, 472–73, 674 NYS2d 415, 417–18 [2d Dept. 1998] (“[T]he broad language in *Trovato v. Air Express Intl.*, 238 A.D.2d 333, 655 NYS2d 656, should not be read to rule out a cause of action pursuant to Executive Law § 296(6) against a coemployee who is alleged to have actively aided and abetted the employer in acts prohibited under Executive Law article 15.”)). Furthermore, “The decision of the Court of Appeals in *Patrowich v. Chemical Bank* [63 NY2d 541, 542], which did not discuss liability pursuant to Executive Law § 296(6) for aiding and abetting a discriminatory practice, does not warrant a different conclusion” (*Murphy v. ERA United Realty*, *supra*). Although coworkers are not employers, and are therefore not liable under Executive Law §296(1)(a), they may be held personally liable under Executive Law§296(6)for aiding and abetting an employer’s discriminatory actions in the workplace (*Mitchell v. TAM Equities, Inc.*, 27 AD3d 703, 706, 812 NYS2d 611, 614 [2d Dept. 2006]).

Freeborn also argues that a party may not be held liable under an aiding or abetting theory when he is himself the perpetrator of the alleged discriminatory acts. However, Freeborn does not provide any direct discussion as to how such premise relates to the claims here at issue.

In opposition, Plaintiff states that a notice of claim was filed on March 1, 2021, five months after suit was filed. Plaintiff asserts that *res judicata* applies to the sufficiency of the discrimination claims, pursuant to the April 26, 2021 order of Justice Ford, and argues that Justice Ford previously ruled that Defendants can be held liable in their individual capacity.

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It must be noted that much of the argument asserted by Freeborn was not asserted in his prior motion and that this court predicated its prior decision based upon the findings of Justice Ford in his earlier order. Upon reconsideration, this court determines that it is appropriate to consider the claims against Freeborn independently; therefore, reargument is granted with respect to his motion to dismiss.

General Municipal Law § 50-i (1)(b) requires a plaintiff to plead in the complaint that: (1) the plaintiff has served the notice of claim; (2) at least thirty days have elapsed since the notice was filed (and before the complaint was filed); and (3) in that time the defendant has neglected to or refused to adjust or to satisfy the claim. As plaintiff's complaint fails to set forth an allegation in compliance with GML § 50-i, it fails to state a cause of action. Accordingly, Plaintiff's complaint is dismissed as to the remaining claim against Freeborn (*see Perkins v City of New York*, 26 AD3d 483, 485, 810 NYS2d 218, 220 [2d Dept 2006]; *Davidson v Bronx Municipal Hosp.*, 64 NY2d 59, 62, 484 NYS2d 533 [1984]; *Smith v Scott*, 294 AD2d 11, 22, 740 NYS2d 425 [2d Dept 2002]).

Based upon the foregoing, reargument of Freeborn's motion to dismiss is granted. Upon reargument, dismissal is granted based upon Plaintiff's failure to timely file a notice of claim and failure to comply with the pleading requirements of General Municipal Law §50-i. Freeborn's motion is denied in all other respects.

Dated: May 2, 2023
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION