Chun v City of New York
2024 NY Slip Op 30962(U)
March 4, 2024
Supreme Court, Kings County
Docket Number: Index No. 516824/2023
Judge: Gina Abadi

At an IAS Term, City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 4th day of March 2024.

P R E S E N T:
HON. GINA ABADI,
J.S.C.

TERRY CHUN,

Plaintiff,

-against-

THE CITY OF NEW YORK, ERIC EICHENHOLTZ, AND "JOHN DOES" 1-10,

Defendants.

Index No.: 516824/2023
Motion Seq: 4 & 5

DECISION, ORDER AND JUDGMENT

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

Papers	NYSCEF Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	52 – 57, 61 – 74
Opposing Affidavits (Affirmations).....	59 – 60, 75
Reply Affidavits (Affirmations).....	78, 76 – 77
Other.....	

Upon the foregoing cited papers and after oral argument, defendant City of New York (the City), together with defendant Eric Eichenholtz, Chief Assistant Corporation Counsel for Employment Policy and Litigation within the New York City Office of the Corporation Counsel (collectively with the City, defendants), jointly move, pre-answer, for an order, pursuant to CPLR §§ 3211 (a) (7), dismissing the entirety of the amended complaint, dated November 28, 2023 (Amended Complaint or AC). Plaintiff Terry Chun (plaintiff) cross-moves for an order, pursuant to CPLR § 3212 (b), for partial summary

judgment on the issue of liability on his third cause of action for declaratory judgment. As a general matter, no summary judgment may be sought before issue has been joined by service of an answer, denial of plaintiff's cross motion is mandatory without further analysis. *See* CPLR § 3212 (a); *City of Rochester v Chiarella*, 65 NY2d 92, 101 (1985); *Maurizaca v CW Highridge Plaza, LLC*, 222 AD3d 964, 965 (2d Dept 2023). This leaves for the Court's consideration defendants' pre-answer motion to dismiss.

Chronology of Events

Plaintiff, a self-described "loyal God-fearing Christian public servant," worked for the City's Department of Sanitation (DSNY) as a computer-systems manager from July 28, 2016 through February 11, 2022. AC, Introduction, ¶¶ 1, 11. The tail end of plaintiff's employment with DSNY overlapped with the inception of the COVID-19 pandemic.

On October 20, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene issued an order requiring City employees, including those at DSNY, to receive COVID-19 vaccinations on or before October 29, 2021 (the "vaccine mandate"). NYSCEF Doc No. 19. The vaccine mandate further provided (in § 3 thereof) that "[a]ny City employee who has not provided . . . proof [of vaccination] must be excluded from the premises at which they work beginning on November 1, 2021." The vaccine mandate (in § 8 thereof) permitted employees to apply for a reasonable accommodation to be exempt from vaccination.

On October 27, 2021, plaintiff applied to DSNY for a religious-based accommodation (*i.e.*, an exemption) from the vaccine mandate. AC, ¶ 18; NYSCEF Doc

No. 21.[1] In his initial request (at page 2 of NYSCEF Doc No. 21), he explained that he considered "vaccines as attempts to undermine [his] faith and defy God's moral commandments." Specifically, he stated that "vaccines have been documented to use fetal cell lines in their development or testing that are derived from fetal tissue taken from abortion procedures." *Id.* (internal citations omitted). He did not request or suggest any specific accommodation for his religious conflict with the COVID-19 vaccine but asked for a blanket exemption from the vaccine mandate.

On November 18, 2021, DSNY denied plaintiff's initial request on the grounds that he had "not sufficiently demonstrated to DSNY that there [was] a basis for granting [him] an exemption." AC, ¶ 26; NYSCEF Doc No. 23. Nonetheless, DSNY afforded him time to appeal its initial denial. NYSCEF Doc No. 23.

On November 23, 2021, plaintiff timely submitted to DSNY his "Appeal Request for Religious Accommodation." NYSCEF Doc No. 26. On January 19, 2022, DSNY denied his subsequent request, with a directive that plaintiff shall "submit proof of [his] COVID-19 vaccination by no later than . . . January 24, 2022," and that if he failed to do so, "[he would] be placed in [the] Leave Without Pay status until [he] provide[d] proof of [his] COVID-19 vaccination." NYSCEF Doc No. 27.

Plaintiff refused to be vaccinated. On February 11, 2022, his employment with DSNY was terminated. AC, ¶ 77.

[1] Although the Amended Complaint frequently uses the term "accommodation," what plaintiff requested was, in fact, a vaccine-mandate exemption that, if granted, would have allowed him to continue working for DSNY while remaining unvaccinated.

On February 6, 2023, with over 96% of New York City employees fully vaccinated against COVID-19, Mayor Eric Adams announced the City's decision to rescind the vaccine mandate for City workers. On February 9, 2023, the City's board of health ratified the amendment. As of February 10, 2023, the COVID-19 vaccine has become optional for current and prospective City employees.

On June 8, 2023, plaintiff commenced this employment-discrimination action seeking damages for (among other things) intentional infliction of emotional distress. Verified Complaint, Fifth Cause of Action, ¶¶ 60-63; NYSCEF Doc No. 1. Thereafter, the City moved, pre-answer, to dismiss the initial complaint, whereas plaintiff moved for (among other relief) leave to serve a proposed amended complaint which (as relevant herein) added a cause of action for the alleged violation of the Equal Protection Clause of the Constitution of the State of New York. Proposed Amended Complaint, Ninth Cause of Action, ¶¶ 83-94; NYSCEF Doc No. 36. By short-form order, dated November 1, 2023, the Court (in relevant part) granted the City's initial motion to the extent of dismissing plaintiff's cause of action for intentional infliction of emotional distress (as well as dismissing DSNY as codefendant), and further granted plaintiff leave to serve the proposed amended complaint in the form annexed to his cross motion, with the exception of the concurrently dismissed emotional distress claim (the "November 2023 Order") NYSCEF Doc No. 46.[2]

[2] Plaintiff has appealed the November 2023 Order to the Second Judicial Department (Docket No. 2023-11799). The stated issue on appeal is whether "the lower court properly dismiss[ed] the NYC Human Rights claims against the Department of Sanitation" (Docket No. 2023-11799, Doc No. 1). *Compare* NYC Charter § 396 ("All actions and proceedings for the recovery of penalties for the violation of any law shall (footnote continued)

On November 28, 2023, plaintiff filed the Amended Complaint which (as noted) is the subject of defendants' instant motion to dismiss. NYSCEF Doc Nos. 49 and 57. As defendants correctly point out, the Amended Complaint fails to comply with the November 2023 Order in two key respects; *first*, it includes the previously dismissed emotional distress claim (Amended Complaint, Fifth Cause of Action, ¶¶ 66-69); and, *second*, it pleads an additional but previously undisclosed cause of action for "Disparate Treatment and Disparate Impact Under NYCHRL." *Id.*, Tenth Cause of Action, ¶¶ 95-101. Plaintiff's failure to disclose and plead the "Disparate Treatment and Disparate Impact" cause of action in his proposed amended complaint must be stricken from the Amended Complaint. *See Ias Bicor Corp. v Mezrahi*, 22 AD2d 898, 899 (2d Dept 1964); *Beverly Milk Yonkers Co. v Conrad*, 5 AD2d 682, 683 (2d Dept 1957); *Azrak v Carter Enters., LLC*, 2021 NY Slip Op 32413(U), *11 (Sup Ct, Kings County 2021); *Reiner v Kane*, 25 Misc 2d 477, 480 (Sup Ct, NY County 1960). Thus, the remainder of this Decision, Order, and Judgment addresses the viability of plaintiff's causes of action sounding in: (1) religious discrimination under the New York State Human Rights Law (Executive Law § 296, et seq.) (State HRL) and the New York City Human Rights Law (Administrative Code § 8-107, et seq.) (City HRL) (First Cause of Action); (2) failure to engage in cooperative dialogue under the City HRL (Second Cause of Action); (3) declaratory judgment (Third Cause of Action); (4) violation of the Free Exercise and the Equal Protection Clauses of the Constitution of the State of New York (State Constitution) (Fourth and Ninth Causes

be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.").

of Action, respectively); (5) aiding, abetting, compelling, and coercing under the City HRL (Sixth Cause of Action); (6) breach of contract/wrongful termination (Seventh Cause of Action); and (7) attorney's fees (Eighth Cause of Action).

Standard of Review

In considering a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83, 88 (1994). "However, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration, nor to that arguendo advantage." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999) (internal quotation marks omitted). Likewise, "factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration." *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006), *affd* 9 NY3d 836 (2007).

Discussion

Religious Discrimination (First Cause of Action)

The State and City HRLs "prohibit employment discrimination on the basis of religion." *Reichman v City of NY*, 179 AD3d 1115, 1116 (2d Dept 2020). "To state a *prima facie* claim of religious discrimination under a failure to accommodate theory, [plaintiff] must demonstrate that: (1) [he or] she has a bona fide religious belief that

conflicted with an employment requirement; (2) [he or] she informed [his/her employer] about [his or] her beliefs; and (3) [he or] she was disciplined for failing to comply with the requirement." *Moore v Montefiore Med. Ctr.*, 2023 WL 7280476, *5 (SD NY 2023); *see also Price v Cushman & Wakefield, Inc.*, 829 F Supp 2d 201, 222 (SD NY 2011).

Plaintiff's failure to accommodate theory lacks merit at both the *micro* and the *macro* levels. At the *micro* level, plaintiff has failed to plead that DSNY could accommodate him without suffering an undue hardship. *See Beickert v New York City Dept of Educ.*, 2023 WL 6214236, *4 (ED NY 2023). In that regard, plaintiff has failed to plead that his requested accommodation in the form of weekly testing and/or remote work did not constitute an undue hardship to DSNY; in particular, that he, as a computer-systems manager, did not have (nor was required to have) under the terms of his employment with DSNY any face-to-face contact with its personnel at any time in the course of his workday.[3] Plaintiff's broadside attack against the City (in ¶ 42 of the Amended Complaint) that "[its] policy and practice [was] to deny all requests for religious accommodations to its vaccine policies pertaining to Covid-19, regardless of whether reasonable accommodations [were] available that would resolve the religious conflict without imposing an undue burden on the City," misses the crucial point of the inquiry; namely, whether granting *plaintiff* an accommodation would have imposed an undue hardship on DSNY in light of *his* work duties at the time.

[3] *Compare Gayles v Roswell Park Cancer Inst. Corp.*, 2023 WL 6304020, *2 (WD NY 2023) (where a plaintiff alleged that "[a]lmost all" of her "essential duties" were administrative and could have been performed remotely); *McDaniel v University of Rochester*, 2023 WL 6118270, *1 (WD NY 2023) (where a plaintiff worked as a stockkeeper with "no direct patient contact").

Equally important, DSNY's exercise of its administrative discretion in denying him accommodation was further influenced by the then-prevailing undercurrent that the City's vaccine mandate was a condition of employment for both healthcare and non-healthcare workers, as more fully set forth in the margin.[4] Viewed at this *macro* level, granting plaintiff (or any other City worker, for that matter) an accommodation (*i.e.*, an exemption from the vaccine mandate) would have constituted, in many circumstances at the time, "an undue hardship as a matter of law." *Marte v Montefiore Med. Ctr.*, 2022 WL 7059182, *5 (SD NY 2022).

Separately from the foregoing, plaintiff also appears to press a disparate treatment theory of liability as an alternative/additional ground for his religious discrimination claim. In that regard, he alleges (in ¶ 23 of the Amended Complaint) that "many other workers were routinely allowed to work wearing masks and/or taking weekly tests," whereas "[those] options were never offered to [him]." It is true that "[a] showing that the employer treated a similarly situated employee differently is a common and especially effective

[4] *See e.g. We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 294 (2d Cir 2021) (vaccination against COVID-19 was a proper condition of employment for healthcare workers), *clarified* 17 F4th 368 (2d Cir 2021), *stay pending appeal denied* ___ US ___, 142 S Ct 734 (2021); *Broecker v New York Dept of Educ.*, 585 F Supp 3d 299, 314-315 (ED NY 2022) (DOE's vaccine mandate was a valid condition of employment for DOE employees); *Marciano v De Blasio*, 589 F Supp 3d 423, 431-433 (SD NY 2022) (concluding that the New York City Board of Health and the Commissioner for the New York City Department of Health and Mental Hygiene have authority to require COVID-19 vaccination for New York City employees and contractors), *appeal dismissed as moot* 2023 WL 3477119 (2d Cir 2023), *cert denied* ___ US ___, 144 S Ct 286 (2023); *Commey v Adams*, 2022 WL 3286548, *4 (SD NY 2022) (vaccination was a condition of employment for a building porter), *appeal dismissed* (2d Cir 2022); *Garland v New York City Fire Dept.*, 574 F Supp 3d 120, 129 (ED NY 2021) (COVID-19 vaccination was a valid condition of employment under the Health Commissioner's Order and applicable to the City employees); *O'Reilly v Board of Educ. of City School Dist. of City of NY*, 2022 WL 180957, *3 (Sup Ct, NY County 2022) (the DOE's vaccine mandate was a valid condition of employment for DOE employees). *See generally Garland v City of NY*, 665 F Supp 3d 295, 308 n 8 (ED NY 2023) (collecting authorities), *affd* 2024 WL 445001 (2d Cir 2024).

method of establishing a prima facie case of discrimination." *McGuinness v Lincoln Hall*, 263 F3d 49, 53 (2d Cir 2001) (internal quotation marks omitted). Here, however, plaintiff has failed to allege any facts to show that he was treated differently because of his religion, which failure is fatal to his religious discrimination claim. *See St. Hillaire v Montefiore Med. Ctr.*, 2024 WL 167337, *4 (SD NY 2024).

Cooperative Dialogue (Second Cause of Action)

The City HRL makes it an "unlawful discriminatory practice for an employer . . . to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation," including a religious accommodation. *See* Administrative Code § 8-107 (28) (a) (1). Plaintiff has not alleged facts, beyond bare legal conclusions, that the City's process for resolving requests for accommodations to the vaccine mandate generally, and plaintiff's request in particular, fell short of the requirements of the City HRL regarding cooperative dialogue. The City's process was repeatedly found to be rational by the Appellate Division, First Department, and plaintiff has not alleged facts showing, under his particular circumstances, that the City HRL required "a more robust or individualized dialogue than the process he received." *Matter of Marsteller v City of NY*, 217 AD3d 543, 545 (1st Dept 2023), *lv rearg & lv appeal denied* 2023 NY Slip Op 72547(U) (1st Dept 2023).[5]

[5] *See also Matter of Lynch v Board of Educ. of City School Dist. of City of NY*, 221 AD3d 456 (1st Dept 2023); *Matter of Lebowitz v Board of Educ. of City School Dist. of City of NY*, 220 AD3d 537 (1st Dept 2023), *lv rearg & lv appeal denied* 2024 NY Slip Op 60773(U) (1st Dept 2024); *Matter of Hogue v Board of Educ. of City School Dist. of City of NY*, 220 AD3d 416, 417 (1st Dept 2023), *lv rearg & lv appeal denied* 2024 NY Slip Op 60411(U) (1st Dept 2024).

While plaintiff alleges in conclusory fashion (in ¶ 28) that "[a]t no point did any member of the Defendants ever speak to Plaintiff about a reasonable accommodation" and that "[a]t no point did any of the Defendants engage the Plaintiff in a cooperative dialogue," he simultaneously alleges (in ¶ 26) that he did, in fact, apply for a religious accommodation, which was denied on November 18, 2021, and the record further reflects that he filed an appeal of DSNY's denial on November 23, 2021, which was administratively affirmed on January 19, 2022. NYSCEF Doc Nos. 26-27. As such, plaintiff has failed to state a cognizable claim based on the cooperative dialogue provisions of the City HRL. *See Currid v City of NY*, 2024 NY Slip Op 30222(U),*6 (Sup Ct, Kings County 2024).

Declaratory Judgment (Third Cause of Action)

"[A]n action for a declaratory judgment must be supported by the existence of a justiciable controversy (*see* CPLR 3001)." *Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1022, 1024 (2d Dept 2018) (internal citations omitted). "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration." *Staver Co., Inc. v Skrobisch*, 144 AD2d 449, 450 (2d Dept 1988), *appeal dismissed* 74 NY2d 791 (1989).

Here, contrary to plaintiff's contention, defendants have demonstrated that the Amended Complaint does not present a justiciable controversy sufficient to invoke the Court's power to render a declaratory judgment. *See Krawczyk v Incorporated Vil. of Lindenhurst*, 216 AD3d 929, 931 (2d Dept 2023).

Free Exercise and Equal Protection Clauses (Fourth and Ninth Causes of Action, Respectively)

A cause of action for a violation of the State Constitution arises only where it is necessary to ensure the full realization of the claimant's constitutional rights. *See Brown v State of NY*, 89 NY2d 172, 186 (1996); *Martinez v City of Schenectady*, 97 NY2d 78, 83-84 (2001). Here, invocation of a constitutional tort cause of action is unnecessary as plaintiff had alternative avenues of redress available, including a private right of action under the State and City HRLs. Thus, recognition of a separate state constitutional claim is neither necessary nor appropriate to ensure the full realization of a person's religious rights because the alleged wrongs are redressable under an alternative remedy. *See Lyles v State*, 2 AD3d 694, 695 (2d Dept 2003), *affd* 3 NY3d 396 (2003).

Aiding and Abetting Liability (Sixth Cause of Action)

To assert a claim for aiding and abetting, plaintiff must allege: (1) the existence of an underlying tort; (2) the defendant's actual knowledge of the underlying tort; and (3) the defendant's provision of substantial assistance in the commission of the underlying tort. *See Markowits v Friedman*, 144 AD3d 993, 996 (2d Dept 2016). Because plaintiff has not stated a cognizable underlying tort, there can be no aiding and abetting liability. *See Li v Shih*, 207 AD3d 444, 448 (2d Dept 2022).

Breach of Contract/Wrongful Termination (Seventh Cause of Action)

Plaintiff's breach of contract/wrongful termination claim fails as a matter of law, there being no cognizable cause of action for religious discrimination and/or failure to accommodate. *See Larson v Albany Med. Ctr.*, 252 AD2d 936, 938 (3d Dept 1998) ("no private cause of action sounding in wrongful discharge can be implied").

Attorney's Fees (Eighth Cause of Action)

Although a prevailing plaintiff may be awarded attorneys' fees under the State and City HRLs (*see* Executive Law § 297 [10]; Administrative Code § 8-502 [g]), a claim for attorney's fees may not be maintained as a separate cause of action. *See La Porta v Alacra, Inc.*, 142 AD3d 851, 853 (1st Dept 2016). Because none of the underlying causes of action are viable, plaintiff is not a prevailing party warranting the award of attorney's fees.

Lastly, because the Court is dismissing the Amended Complaint in its entirety, plaintiff is not entitled to damages of any kind, including punitive damages which he is seeking in the second "Wherefore" clause. *See Niles v New York City Human Resources Admin.*, 2024 WL 496346, *10 (ED NY 2024). The Court has considered plaintiff's remaining contentions and found them either unavailing or moot in light of its determination.

Conclusion

Accordingly, it is

ORDERED that defendants' pre-answer motion for an order, pursuant to CPLR § 3211 (a) (7), dismissing the Amended Complaint is *granted*, and the Amended Complaint is *dismissed in its entirety as against all defendants* without costs or disbursements; and it is further

ORDERED that plaintiff's cross motion for an order, pursuant to CPLR § 3212 (b), for partial summary judgment on the issue of liability on the third cause of action for declaratory judgment is *denied*; and it is further

ORDERED that the Corporation Counsel is directed to electronically serve a copy of this Decision, Order, and Judgment on plaintiff's counsel and to electronically serve an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the Preliminary Conference which is currently scheduled for March 18, 2024, at 9:30 a.m. in CDPC7 is canceled.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

ENTER,

HON. GINA ABADI
J. S. C.

HON. GINA ABADI
J.S.C.

KINGS COUNTY CLERK
FILED
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