

Benoit v City of New York

2024 NY Slip Op 31724(U)

May 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 527268/2023

Judge: Gina Abadi

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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 10th day of May, 2024.

P R E S E N T:

HON. GINA ABADI,
J.S.C.

KEVIN BENOIT,

Plaintiff,

-against-

Index No.: 527268/2023

Motion Seq: 2-3

THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT
OF EDUCATION, THE NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL
HYGIENE, NEW DAWN CHARTER HIGH SCHOOL,
SARA ASMUSSEN, AND "JOHN DOES" 1-10,

DECISION AND ORDER

Defendants.

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

Papers

NYSCEF Numbered

Notice of Motion/Cross Motion/Order to Show Cause and
Affidavits (Affirmations) Annexed
Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Other

16 - 19; 20 - 24
26 - 27; 28 - 29
31; 32

Upon the foregoing cited papers and after oral argument, defendants New Dawn Charter High School (New Dawn) and its Executive Director Sara Asmussen (collectively with New Dawn, the New Dawn defendants), jointly move, pre-answer, for an order, pursuant to CPLR § 3211 (a), dismissing the verified complaint, dated September 20, 2023 (Complaint), of plaintiff Kevin Benoit (plaintiff), insofar as asserted against them.

Concurrently, defendants City of New York, Board of Education of the City School District of the City of New York (also known as and being sued herein as the New York City Department of Education), and New York City Department of Health and Mental Hygiene (collectively, the City defendants), jointly move, likewise pre-answer, for an order, pursuant to CPLR § 3211 (a), dismissing the Complaint insofar as asserted against them.

Background

Plaintiff, an African-American male allegedly suffering from chronic eosinophilic leukemia, was employed by (and worked at) New Dawn, a charter school,¹ as a manager, for approximately three years “from about September 2018 through September 29, 2021.” Complaint, ¶¶ 1, 5, 13-14. Plaintiff’s employment with New Dawn was governed by its annual offers of employment. In the summer 2021, plaintiff accepted New Dawn’s latest offer of employment for a one-year term from September 1, 2021 through August 31, 2022 (the “employment offer”). NYSCEF Doc No. 19. As relevant to this case, the employment offer expressly provided that plaintiff’s employment with New Dawn was “at-will which mean[t] that the employment may be terminated by either party, with or without cause at any time by giving [the other party] thirty days prior notice.” NYSCEF Doc No. 19, page 2.

On September 15, 2021, the Commissioner of the Department of Mental Health and Hygiene issued – and on September 17, 2021, the Board of Health ratified and continued – an Order requiring proof of COVID-19 vaccination by September 27, 2021 (the “vaccine

¹ Located in Downtown Brooklyn, New Dawn is “an educational institution that provides over-aged and under-credited students from ages fifteen . . . through twenty-one . . . the opportunity to return to school and obtain a high school diploma.” Complaint, ¶ 5.

mandate”).² The vaccine mandate applied to the charter-school staff and other individuals who worked in-person in a charter-school setting. Plaintiff, as one of the charter-school staff members at New Dawn, fit within the scope of the vaccine mandate.

The vaccine mandate provided (in ¶ 6 thereof) that “[n]othing [there]in . . . shall be construed to prohibit any reasonable accommodations otherwise required by law.” According to plaintiff, however, the vaccine mandate, as implemented at New Dawn, was an “all or nothing” proposition for the African-Americans with pre-existing health conditions: they were either to get vaccinated or they would be fired by New Dawn. Complaint, ¶ 27.

On September 15, 2021, New Dawn notified plaintiff and its other employees that “everyone ha[d] to get vaccinated by the following week.” Complaint, ¶ 24. Plaintiff’s attempts at New Dawn to obtain a medical exemption from the vaccine mandate were unsuccessful. According to plaintiff, New Dawn did “not want to grant him a medical accommodation,” even though it concurrently “granted an accommodation to [one or more] white employee[s]” to perform “the identical work remotely.” Complaint, ¶¶ 20-22, 25, 30, and 33. New Dawn allegedly “informed Plaintiff that the school site [did] not offer medical accommodations to people like him.” Complaint, ¶ 32. Thereafter, plaintiff “engaged in

² See “Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others,” dated September 15, 2021 (available at <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-2.pdf>) (last accessed May 10, 2024). The Court is permitted to take judicial notice of the vaccine mandate and its subsequent repeal. See *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 (2d Dept 2009) (“material derived from official government websites may be the subject of judicial notice”).

weekly testing until [New Dawn allegedly] told him he either had to get vaccinated or [he would] be terminated.” Complaint, ¶ 27. Plaintiff declined the vaccine. On September 29, 2021, New Dawn terminated plaintiff’s employment. Complaint, ¶¶ 1, 14.³

After his termination from New Dawn, plaintiff was quiescent for approximately 1-½ years until February 2023 when Commissioner of the Department of Mental Health and Hygiene repealed the vaccine mandate by order, dated February 9, 2023.⁴ On February 14, 2023, plaintiff served his notice of claim for wrongful termination and other torts on each of NYC Department of Education, Department of Education’s Office of the General Counsel, New Dawn’s principal Donna Lobato, and NYC Chancellor’s Office. Complaint, ¶ 10; NYSCEF Doc No. 23. Plaintiff’s notice of claim alleged that the events giving rise to his claims all occurred on February 7, 2023. NYSCEF Doc No. 23, pages 1-2. Thus, plaintiff took the position, by way of his notice of claim, that his claims accrued on (or shortly before) the repeal of the vaccine mandate on February 9, 2023, rather than on the date of his termination from New Dawn on September 29, 2021.

For the next seven months, plaintiff likewise remained quiescent until September 2023 when he again looked to the State and City law for relief. On September 20, 2023, plaintiff commenced this wrongful-termination action, alleging a total of nine claims under

³ The reference in ¶ 84 of the Complaint to plaintiff’s termination date of “September 18, 2022” is a typographical error.

⁴ See “Order of the Board of Health Amending COVID-19 Vaccination Requirements for Department of Education Employees, Contractors, Visitors, and Others,” dated February 9, 2023 (available at <https://www.nyc.gov/assets/doh/downloads/pdf/notice/2023/boh-order-amend-covid-vaccine-req-doe-employees.pdf>) (last accessed May 10, 2024).

the New York State Human Rights Law (Executive Law § 296, et seq.), the New York City Human Rights Law (Administrative Code § 8-107, et seq.), the Constitution of the State of New York, and the common-law theories of intentional infliction of emotional distress and wrongful termination. Plaintiff seeks compensatory and punitive damages. He also seeks a declaratory judgment, even though the vaccine mandate has since been repealed. While plaintiff's claims against the New Dawn defendants rest (for the most part) on their alleged wrongful termination of his employment and their alleged failure to accommodate, his blanket assertion (in Complaint, ¶ 89) that his "unexpected termination was nothing more than a pretext to deny [him] his medical rights in [New Dawn's] Marxist and unethical organization" falls outside the pale of reason.

As noted, both groups of defendants have each moved, pre-answer, for dismissal of plaintiff's claims insofar as asserted against them. The Court heard oral argument on March 27, 2024 and reserved decision.

Discussion

New Dawn Defendants

The New Dawn defendants' contentions for dismissal of this action as against them, in whole or in part (as summarized in ¶¶ 4-5 of their counsel's opening affirmation at NYSCEF Doc No. 17), are three-fold. First, plaintiff failed to serve them with a notice of claim as a condition precedent for the commencement and prosecution of this action as a general matter. Second, plaintiff's claim for intentional infliction of emotional distress is

inadequately plead. Third and finally, plaintiff's claim for breach of contract is deficient as a matter of law because he was an at-will employee.

The New Dawn defendants' initial contention – that plaintiff's failure to serve them with a notice of claim has precluded him from initiating and prosecuting this action – is incorrect as a matter of law. On April 24, 2024, the Second Judicial Department held, as a matter of first impression, that the “notice of claim requirements of Education Law § 3813 (2) and General Municipal Law § 50-e . . . do not require service of a notice of claim prior to commencement of a tort action against a charter school.” *A.P. v John W. Lavelle Preparatory Charter Sch.*, ___ AD3d ___, 2024 NY Slip Op 02205, *1 (2d Dept 2024).

The New Dawn defendants' next contention – that plaintiff has failed to state a claim for intentional infliction of emotional distress – has some merit. “In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleadings are afforded a liberal construction, the facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference.” *Mackey v Lawrence Union Free School Dist.*, 225 AD3d 683, 685 (2d Dept 2024). “At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *Simkin v Blank*, 19 NY3d 46, 52 (2012) (internal quotation marks omitted). With respect to the sixth cause of action, which seeks to recover damages for intentional infliction of emotional distress, the conduct alleged in the Complaint was not extreme and outrageous. *See e.g. Mackey*,

225 AD3d at 685; *Reilly v Garden City Union Free School Dist.*, 89 AD3d 1075, 1076 (2d Dept 2011), *lv denied* 18 NY3d 809 (2012).

The New Dawn defendants' final contention – that plaintiff's claim for breach of contract is deficient as a matter of law because he was an at-will employee – is likewise meritorious. "When there is an at-will employment relationship, the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable." *Minovici v Belkin BV*, 109 AD3d 520, 523 (2d Dept 2013). With respect to the eighth cause of action, which seeks to recover damages for breach of contract, the Complaint fails to state a claim because plaintiff, as "an at-will employee[,] . . . may not maintain a breach of contract cause of action based on an alleged wrongful termination of employment." *Webb v Greater NY Auto. Dealers Assn., Inc.*, 123 AD3d 1111, 1112 (2d Dept 2014).⁵

The New Dawn defendants' additional contentions (raised for the first time in their counsel's reply affirmation at NYSCEF Doc No. 32) cannot be considered. *See Deutsche Bank Natl. Tr. Co. v Ezagui*, 221 AD3d 964, 967 (2d Dept 2023); *DeMarzo v Cuba Hill Elementary School*, 220 AD3d 917, 920 (2d Dept 2023).

⁵ Plaintiff's contention that the New Dawn defendants' motion "lacks any probative value" because an affidavit from someone with knowledge was not submitted is (in the words of a sister court who was presented with a similar contention) "blatantly inaccurate." *Bisogno v Borsa*, 31 Misc 3d 1203(A), 2011 NY Slip Op 50482(U), *5 n 2 (Sup Ct, Richmond County 2011), *affd* 101 AD3d 780 (2d Dept 2012). On a motion to dismiss, parties are not required to provide affidavits unless the motion to dismiss is converted into a summary judgment motion (which is not the instance here). *See Sokol v Leader*, 74 AD3d 1180, 1181 (2d Dept 2010). Contrary to plaintiff's further contention, the New Dawn defendants' failure to submit word-count certifications with their papers, pursuant to 22 NYCRR 202.8 b (a)-(c), is a mere "technical defect" which the Court, in its discretion, has disregarded. *See Taveras v Incorporated Vil. of Freeport*, 225 AD3d 822, 823 (2d Dept 2024).

The City Defendants

The City defendants have demonstrated, prima facie, that they are not proper parties to this action because not one of them was plaintiff's employer. As noted, plaintiff was employed by New Dawn, a charter school which, by statute, is "independent and autonomous" from the City defendants. See Education Law § 2853 (1) (c). Further, plaintiff, being an employee of New Dawn, was not concurrently an employee of the Department of Education or of any other City defendants. See Education Law § 2854 (3) (a). The separation between New Dawn as a charter school (on the one hand) and the Department of Education with the other City defendants (on the other hand) is reinforced by Education Law § 2853 (1) (g), which provides that "[n]either the local school district, the charter entity nor the state shall be liable for the debts or financial obligations of a charter school. . . ." To the extent that plaintiff seeks to challenge the general validity of the vaccine mandate,⁶ its validity has been repeatedly upheld by the appellate courts, as more fully set forth in the margin.⁷

⁶ According to plaintiff, "[t]he [City] [d]efendants knew [that] the [COVID-19] vaccine had adverse effects and lied to the public in August of 2021 stating the vaccine was safe," and that, more generally, "[t]here is a history of the government using African American men as guinea pigs for vaccines." Complaint, ¶¶ 36 and 66.

⁷ See e.g. *We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 294 (2d Cir 2021), 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); *Marciano v De Blasio*, 589 F Supp 3d 423, 431-433 (SD NY 2022), appeal dismissed as moot 2023 WL 3477119 (2d Cir 2023), cert denied ___ US ___, 144 S Ct 286 (2023); *Commeys v Adams*, 2022 WL 3286548, *4 (SD NY 2022), appeal dismissed (2d Cir 2022); *Garland v New York City Fire Dept.*, 574 F Supp 3d 120, 129 (ED NY 2021); *O'Reilly v Board of Educ. of City School Dist. of City of NY*, 2022 WL 180957, *3 (Sup Ct, NY County 2022). 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). See further *Matter of Ferrelli*, ___ AD3d ___, 2024 NY Slip Op 02012 (1st Dept 2024); *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), *lv appeal denied, appeal dismissed* 2024 NY Slip Op 64321 (Ct App 2024).

In opposition, plaintiff has failed to rebut the City defendants' prima facie showing for the reasons (among others) which the Court in the prior decisions involving the same plaintiff's side counsel addressed and rejected. *See Chun v City of NY*, 2024 NY Slip Op 30962(U) (Sup Ct, Kings County 2024); *Currid v City of NY*, 2024 NY Slip Op 30222(U) (Sup Ct, Kings County 2024).

The Court has considered the parties' remaining contentions and found them either academic or without merit in light of its determination.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 2, the New Dawn defendants' pre-answer motion to dismiss, pursuant to CPLR § 3211 (a), is *granted to the extent* that plaintiff's sixth and eighth causes of action (intentional infliction of emotional distress and breach of contract/wrongful termination, respectively) are dismissed as against them, and *the remainder of their motion is denied*; and it is further

ORDERED that in Seq. No. 3, the City defendants' pre-answer motion to dismiss, pursuant to CPLR § 3211 (a), is granted, and the Complaint is *dismissed in its entirety as against the City defendants* without costs or disbursements and the matter shall be overridden to a non-City part; and it is further

ORDERED that, pursuant to CPLR § 3211 (f), the New Dawn defendants shall answer the extant portions of the Complaint within ten days after electronic service of this

Decision and Order with notice of entry of plaintiff's counsel on the other parties' respective counsel; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order on the other parties' respective counsel, and to electronically serve an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision and Order of this Court.

ENTER,



HON. GINA ABADI
J. S. C.

HON. GINA ABADI
J.S.C.

2024 MAY 13 A 9:27
KINGS COUNTY CLERK
FILED