

Swinburne v City of New York

2025 NY Slip Op 31064(U)

March 28, 2025

Supreme Court, New York County

Docket Number: Index No. 153793/2024

Judge: Jeanine R. Johnson

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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. JEANINE R. JOHNSON PART 52M

Justice

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JASON SWINBURNE,

Plaintiff,

- v -

CITY OF NEW YORK, LAURA MULLE

Defendant.

-----X

INDEX NO. 153793/2024

MOTION DATE 08/13/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10

were read on this motion to/for DISMISS.

Upon the foregoing documents and oral argument heard on December 18, 2024, Defendant's - the City of New York and Laura Mulle (hereinafter "The City"), motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7) is denied.

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of the Plaintiff's claim. *Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248, 248 (1st Dept 1995). "To qualify as 'documentary' evidence, a paper's content must be essentially undeniable and... will itself support the ground on which a motion to dismiss is based." *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 (1st Dept 2014).

On a motion to dismiss, pursuant to CPLR § 3211(a)(7), "the pleading is to be afforded a liberal construction." *Leon v Martinez*, 84 NY2d 83, 87 (1994). Courts do not consider "whether a Plaintiff can ultimately establish its allegations... in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). This Court is required to "determine only whether the facts alleged fit within any cognizable legal theory." *Bernberg v Health Mgmt. Sys.*,

303 AD2d 348, *3 (2d Dept 2003). However, allegations comprising bare legal conclusions are not entitled to the same consideration. *See Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 (2017) quoting *Simkin v Blank*, 19 NY3d 46 (2012).

DISCUSSION

Retaliation

"Under [NYCHRL], it is unlawful to retaliate against an employee for opposing discriminatory practices." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312 (2004). To maintain a claim for retaliation under NYCHRL, a plaintiff must show: (1) they engaged in protected activity by opposing conduct prohibited thereunder, (2) the defendant was aware of the plaintiff's participation in the activity, (3) the plaintiff suffered an adverse employment action based upon the activity, and (4) a causal connection existed between the protected activity and the adverse action. *Id.*

In his complaint, Plaintiff alleges he engaged in a "protected activity when he applied for a reasonable accommodation to not take the COVID-19 due to his health status and disability". (NYSCEF Doc. 1 pgs. 8) He alleges that the "request for [an] accommodation was well known throughout the Police Action Litigation Section" when he was transferred from the NYPD Legal Bureau. (*Id.*) He alleges further that because of the transfer, he suffered a "demotion to regular patrol [which] resulted in pain to his neck and back, denial of overtime [and a reduction in] earning \$15,000 to 25,000 less a year, repeated harassment including poor performance evaluations and no longer being able to use his legal skills at work". (NYSCEF Doc. 1 pgs. 14-18).

The City contends that Plaintiff's claim must be dismissed because "there is simply no causal connection between his request for a reasonable accommodation and the alleged adverse

actions.” (NYSCEF Doc. 3 pg. 11). The City argues specifically that Plaintiff did not “provide specific dates or supporting details indicating that such actions were in response to his request... and more than three years elapsed between the reasonable accommodation request and the alleged adverse actions.” (NYSCEF Doc. 3 pgs. 11-12).

This Court finds that Plaintiff’s alleged request for a medical accommodation and exemption from the vaccine mandate because of his disability was a protected activity of which The City was aware. This Court also finds Plaintiff’s representation that – following his accommodation request, he was transferred from the NYPD Legal Bureau under false pretenses and received diminished pay – sufficiently alleges an adverse action and casual connection thereto. Furthermore, this Court is required to accept Plaintiff’s allegations as true and as a result, he sufficiently pled a cognizable claim for retaliation. *Shui Kam Chan v Louis*, 303 AD2d 151, *3 (1st Dept 2003) (When considering a “motion to dismiss a complaint, [pursuant to CPLR § 3211(a)(7)] an appellate court must accept all of the factual allegations in the complaint as true and draw all inferences favorably to a plaintiff”).

Strict Liability

NYC Administrative Code § 8-107(13)(b) holds employers liable for the unlawful discriminatory conduct of their employees “where: (1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or (3) the employer should have known

of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”

In his complaint, Plaintiff alleges that Defendant-Mulle was “the civilian in charge of his unit” at the NYPD Legal Bureau who indicated the agency had “not been using [him] to his full potential and “insinuated” she “would like Plaintiff to be assigned more legal work”. (NYSCEF Doc. 1 pg. 7) Plaintiff alleges, *inter alia*, that upon his return to her supervision, after his disability accommodation request and appeal were denied, she pushed him out of the unit by starting rumors about him, not assigning him cases, and finally having him transferred under the false pretense that the unit was to be civilianized. (NYSCEF Doc. 1 pgs. 7-13).

The City argues Plaintiff’s strict liability claim fails because Plaintiff failed to show that Defendant-Mulle was aware of his protected activity. (NYSCEF Doc. 3 pg. 13). This Court finds that Plaintiff clearly satisfied the pleading standard because Defendant-Mulle was the supervisor in his unit, his request was well known throughout the unit, and he alleges that he had direct conversations with her regarding same. *Russell v New York Univ.*, 42 NY3d 377, 389 (2024) (NYCHRL “provides liability for individual employees for discrimination when those employees have some supervisory role over the victim.”).

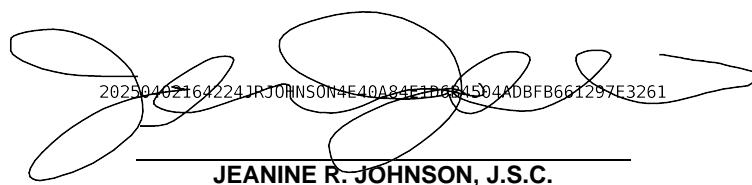
Accordingly, it is hereby,

ORDERED that Defendants - The City of New York and Laura Mulle’s motion to dismiss is denied in its entirety; it is further

ORDERED that Defendants - The City of New York’s application as to attorney’s fees is denied; and it is further

ORDERED that any relief not specifically addressed herein is denied.

This constitutes the Decision and Order of the Court.


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JEANINE R. JOHNSON, J.S.C.

3/28/2025
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>			