Sibner v City Univ. of N.Y.
2016 NY Slip Op 30159(U)
January 22, 2016
Supreme Court, New York County
Docket Number: 160783/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - Part 42

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DR. ROBERT SIBNER,

Plaintiffs,

-against-

Index No. 160783/2014

THE CITY UNIVERSITY OF NEW YORK and BROOKLYN COLLEGE OF THE CITY OF NEW YORK,

Defendants.

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NANCY M. BANNON, J.

I. Introduction

In this action to recover damages for employment discrimination and retaliation based on disability, the defendants move, pre-answer, to dismiss the amended complaint on the grounds that documentary evidence provides a complete defense (CPLR 3211[a][1]), the court lacks subject matter jurisdiction (CPLR 3211[a][2]), the plaintiff's claims are barred by the applicable statute of limitations (CPLR 3211[a][5]), and the complaint fails to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes only the dismissal of his sixth, seventh, and eighth causes of action alleging violations of the New York State Human Rights Law (Executive Law § 290 et seq.). The motion is granted and the complaint is dismissed.

II. Background

Following a car accident in the fall of 2007, the plaintiff, a mathematics professor at Brooklyn College, applied for and was granted temporary disability leave due to the injuries he sustained from the accident. Over the course of the period from January 2008 through January 2009, the plaintiff exhausted all his accumulated sick leave and, after January 2009, continued on disability leave without pay, but received disability insurance payments through the defendants' disability insurance program through January 2010. When the plaintiff's disability insurance payments ceased in February 2010, he continued on disability leave without pay until he returned to work on April 5, 2010. The plaintiff alleges that, upon returning to work, the defendants did not schedule him to teach until the fall 2010 semester. After the 2010 Early Retirement Incentive Program ("ERI Program") came into effect in June 2010, the plaintiff

requested that he be deemed eligible for the program. In August 2010 and again on December 20, 2010, the plaintiff was informed that he was not eligible to participate in the ERI Program because the amount of time the plaintiff was on leave without pay after February 1, 2010 exceeded the 12 week limit and, thus, he did not fulfill the "Active Service" requirement for the program.

On April 20, 2011, the plaintiff filed a Charge of Discrimination against the defendants with the Equal Employment Opportunity Commission ("EEOC"). On May 16, 2014, the EEOC issued a determination of Reasonable Cause to believe that the defendants discriminated against him on the basis of his disability and referred the matter to the United States Department of Justice ("DOJ"). On August 4, 2014, the DOJ issued a "Notice of Right to Sue within 90 Days," wherein the DOJ notified the plaintiff that it determined not to file suit on his behalf.

On October 30, 2014, the plaintiff commenced this action asserting eight causes of action for injunctive relief and monetary damages for violations of, inter alia, the American Disabilities Act ("ADA") (42 USC §§ 12101 et seq. and 8 USC § 1343[4]), Section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 USC § 701 et seq.), and New York State Executive Law § 290 et seq. ("Human Rights Law"), based on the defendants' denial of his request to be deemed eligible for the ERI Program. Specifically, the plaintiff contends that the defendants refused to assign him teaching responsibilities during the summer of 2010 and instead placed him on leave under the Family and Medical Leave Act ("FMLA") and then used their refusal to assign him classes as the reason to deny him the benefit of the ERI Program.

The defendants now move to dismiss the complaint on the grounds that the cause of action for a declaratory judgment is barred by the four-month statute of limitations applicable to CPLR article 78 proceedings; the plaintiff's ADA and Section 504 causes of action fail to state a cognizable claim against them, are time-barred, and are refuted by documentary evidence; and the plaintiff's Human Rights Law claims fail to state a cause of action.

III. Discussion

As an initial matter, there is no merit to the defendants' contention that this court lacks subject matter jurisdiction. See CPLR 3211(a)(2). Although the plaintiff's ADA and Section 504 claims may be brought in the Court of Claims, where, as here, the plaintiff seeks judicial review of a determination of a State agency, the Supreme Court does not lack subject matter jurisdiction as to those claims and dismissal pursuant to CPLR 3211(a)(2) is not warranted. See Helgason v New York State Div. of Hous. and Community Renewal, 66 AD3d 490 (1st Dept. 2009). As set forth below, the plaintiff's causes of action asserting violations of the ADA and Section 504 are dismissed along with the remaining causes of action.

The defendants correctly argue that the first cause of action seeking a declaratory judgment is subject to dismissal as time-barred. See CPLR 3211(a)(5); 217. Where, as here, a plaintiff seeks judicial review of a determination made by a State agency by seeking a declaratory judgment rather than commencing a proceeding under CPLR article 78, the four-month statute of limitations applicable to article 78 proceedings applies to the declaratory judgment cause of action. See CPLR 217; Gress v Brown, 20 NY3d 957 (2012); Solnick v Whalen, 49 NY2d 224 (1980); Blackman v New York City Hous. Auth., 280 AD2d 324 (1st Dept. 2001); Meyers v City of New York, 208 AD2d 258 (2nd Dept. 1995). The plaintiff was notified of the defendants' adverse determination on December 20, 2010. Exactly four months later, on April 20, 2011, the plaintiff sought relief through the EEOC. Even if the review by the EEOC and referral to the DOJ served to toll the statute of limitations, the review by the DOJ was concluded on August 4, 2014 and this action was not commenced until nearly two months later on October 30, 2014. The declaratory judgment cause of action is, therefore, barred by the applicable statute of limitations. See CPLR CPLR 3211(a)(5); 217; Blackman v New York City Hous. Auth., supra.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). Where evidentiary material is submitted in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must determine whether the plaintiff has a cause of action, rather than whether the plaintiff has stated one. See Leon v Martinez, 84 NY2d 83 (1994); Guggenheimer v Ginzburg, 43 NY2d 268 (1977); Rivietz v Wolohojian, 38 AD3d 301 (1st Dept. 2007). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530 (2nd Dept. 2007).

Applying these standards to the second through fifth causes of action alleging violations of the ADA and Section 504, the court finds that the defendants have not submitted documentary evidence which alone "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims." Fortis Financial Services, LLC v Fimat Futures USA, supra. However, the defendants correctly argue that the complaint fails to state a cognizable claim under the ADA and Section 504 because it does not sufficiently allege that the plaintiff was a "qualified individual" within the meaning of those statutes. See Bloomfield v Cannavo, 123 AD3d 603 (1st Dept. 2014); Rivera v New York City Hous. Auth., 60 AD3d 509 (1st Dept. 2009); see also Davis v New York City Dept. of Educ., 804 F3d 231 (2nd Cir. 2015); Scherman v New York State Banking Dept., 2010 WL 997378 (SDNY March 19, 2010) *aff'd* 443

Fed Appx 600 (2nd Cir. 2011). A "qualified individual" is one with a disability who meets essential eligibility requirements. See 42 USC § 12131(2); Rivera v New York City Hous. Auth., supra. Even accepting the facts alleged in the complaint as true (see Leon v Martinez, 84 NY2d 83 [1994]), the complaint fails to set forth that the plaintiff met the essential eligibility requirements for participation in the ERI Program. Indeed, the complaint, which details the periods of time the plaintiff was on unpaid leave after February 1, 2010, establishes that the plaintiff was ineligible for the ERI Program because he spent over 12 weeks on unpaid leave after that date, which exceeded the maximum permissible time for eligibility for the program. The defendant does not dispute that he was not teaching and did not receive pay from February 1, 2010 to April 5, 2010 and again during July and August 2010, a period in excess of the maximum allowable 12 weeks to qualify for the program. Even affording the complaint a liberal construction and accepting as true the facts alleged therein, and according the complaint the benefit of every reasonable inference, the facts, as alleged, do not fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, supra.

The defendants also established entitlement to dismissal of the plaintiff's cause of action for discrimination and retaliation based on the defendants' failure to assign him courses to teach in the summer of 2010. See Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530 (2nd Dept. 2007). The documents appended to the motion, including the exhibits attached to the affidavit of Debra Quashie, the Director of Instructional Staff of Brooklyn College, reflect that the plaintiff did not return to work until after the summer 2010 course schedules had been established and published to students. This proof shows that he was not given courses to teach during the summer of 2010 because the schedule had already been established, not due to his disability, as the complaint alleges. See Rivera v New York City Hous. Auth., supra.

Accordingly, the second and third causes of action for discrimination and retaliation under the ADA and the fourth and fifth causes of action for discrimination and retaliation under Section 504 are dismissed pursuant to CPLR 3211(a)(7).

The court further notes that, as claims under Section 504 of the Rehabilitation Act are governed by New York's three-year statute of limitations for personal injury claims (see Bates v Long Island R.R., 997 F2d 1028 [2nd Cir. 1993]; see also CPLR 214[5]) and this action was commenced nearly four years after the defendants' adverse determination, the Section 504 claims are time-barred. See CPLR 3211(a)(5).

For similar reasons, the plaintiff's sixth, seventh, and eighth causes of action alleging violations of the Human Rights Law must be dismissed pursuant to CPLR 3211(a)(7). As the complaint shows that the plaintiff was not eligible for the ERI Program because he spent over 12 weeks on unpaid leave, the sixth and eighth causes of action must be dismissed. See

Forrest v Jewish Guild for the Blind, 3 NY3d 295 (2004); Matter of Kirk v City of New York, 47 AD3d 406 (1st Dept. 2008). In addition, the plaintiff's seventh cause of action for refusal to provide reasonable accommodation under the Human Rights Law must be dismissed, as the complaint fails to allege all material elements of the cause of action. Indeed, the plaintiff fails to allege that, when he returned to work in April 2010, he proposed a reasonable accommodation for his disability which the defendant refused or even that he continued to suffer from a disability requiring accommodation, required to sustain a Human Rights Law claim based on reasonable accommodation. See Koester v New York Blood Ctr., 55 AD3d 447 (1st Dept. 2008); Pimentel v Citibank, N.A., 29 AD3d 141 (1st Dept. 2006).

IV. Conclusion

For these reasons, the defendant's motion is granted and the complaint is dismissed.

Accordingly, it is

ORDERED that the motion is granted in its entirety and the complaint is dismissed, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: January 22, 2016

NANCY M. BANNON, J.S.C.