2013 WL 1222720
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Harry M. STOKES, Plaintiff,

v.

CITY OF MOUNT VERNON, NEW YORK; J. Yuhanna Edwards, individually and in his official capacity; Nichelle A. Johnson, individually and in her official capacity; Maureen Walker, individually and in her official capacity; Karen Watts, individually and in her official capacity; Diane Munro–Morris; individually and in her official capacity; and Roberta Apuzzo, individually and in her official capacity, Defendants.

No. 11 CV 7675(VB).
|
March 25, 2013.

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** In a memorandum decision dated August 14, 2012, the Court granted in part and denied in part defendants' motions to dismiss plaintiff's complaint. (Doc. # 40). Subsequently, at a hearing held on December 17, 2012, the Court granted the individual defendants' motions for reconsideration, finding absolute legislative immunity barred all federal claims against them in their individual capacities. (Doc. # 64). At that hearing, the Court denied the City of Mount Vernon's motion for reconsideration, however, and adhered to its analysis in the memorandum decision. (*Id.*) As a result, plaintiff's only remaining federal claims are against Mount Vernon, for allegedly violating his procedural and substantive due process rights, under 42 U.S.C. § 1983.

In deciding the motions to dismiss and for reconsideration, the Court did not address plaintiff's state law claims alleging defendants violated his right to freedom of speech, under Article I, Section 8, of the New York State Constitution, and tortiously interfered with his employment contract. The Court therefore directed the parties to submit supplemental briefs addressing the viability of plaintiff's state claims. (Doc. # 64).

Upon review and consideration of those papers, for the following reasons, plaintiff's free speech and tortious interference claims are dismissed against all defendants.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

The Court presumes familiarity with the underlying facts of this case.

DISCUSSION

I. *Supplemental Jurisdiction*

Subject to certain inapplicable exceptions, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The court "may decline to exercise supplemental jurisdiction over a [state] claim" if 1) "the claim raises a novel or complex issue of State law"; 2) "the claim substantially predominates" over the federal claim; 3) the court has dismissed all other federal claims; or 4) there are exceptional circumstances. 28 U.S.C. § 1367(c). "In deciding whether to exercise jurisdiction over supplemental state-law claims, district courts should balance the values of judicial economy, convenience, fairness, and comity." *Klein & Co. Futures Inc. v. Bd. of Trade,* 464 F.3d 255, 262 (2d Cir.2006).

The Court has original jurisdiction over plaintiff's Section 1983 claims against the City and the individual defendants. The Court has dismissed the Section 1983 claims against the individual defendants (in both their individual and official capacities), but the Section 1983 claims against the City remain in the case. Those federal claims against the City arise from the same "common nucleus of operative fact" as the state claims against the individual defendants—namely, that defendants attempted to stifle plaintiff's speech and constructively terminated his employment. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). And plaintiff's claims do not appear to present novel questions of state law or exceptional circumstances. *See* 28 U.S.C. § 1367(c).

***2** As a result, the Court does not decline to exercise supplemental jurisdiction over plaintiff's state law claims. *Compare Gordon v. Katz,* 934 F.Supp. 79, 84–85 (S.D.N.Y.1995) (declining supplemental jurisdiction after dismissing all claims against individual defendants and city). The state law claims against all defendants are nonetheless dismissed for the reasons set forth below.

II. *Free Speech Under The New York Constitution*

Plaintiff's fifth cause of action is for a violation of his right to free speech, under Article I, Section 8, of the New York State Constitution. There is no implied private right of action under that provision if plaintiff has an alternative remedy to pursue his claims (i.e., a federal Section 1983 claim). *See, e.g., Singh v. City of N.Y.,* 418 F.Supp.2d 390, 405–07 (S.D.N.Y.2005) (explicating *Brown v. State,* 89 N.Y.2d 172 (1996) and its progeny). Plaintiff concedes as much, stating in his opposition papers that he is withdrawing the state constitutional claim against all defendants. Accordingly, that claim is dismissed.

III. *Tortious Interference*

Plaintiff's sixth cause of action alleges defendants tortiously interfered with his employment. Although not apparent from the face of the complaint, plaintiff's supplemental briefing indicates he brings this claim against defendant Maureen Walker only.

Assuming plaintiff has stated a tortious interference claim against Walker, that claim is barred by absolute legislative immunity.

Under New York law, absolute legislative immunity springs from the state Constitution's Speech or Debate Clause, which provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. Const, art III, § 11. "This spare phrasing has been interpreted as creating an immunity that is as broad as the immunity enjoyed by Congress under federal law." *Larabee v. Governor of State,* 65 A.D.3d 74, 88 (1st Dep't 2009) (citing *People v. Ohrenstein,* 77 N.Y.2d 38, 53–54 (1990)). This broad immunity attaches to the same conduct whether the suit arises under federal or state law. See *generally Bogan v. Scott–Harris,* 523 U.S. 44 (1998).

As the Court explained at the hearing on December 17, 2012, "the salary reduction was legislative in all contexts," including when defendants eliminated plaintiff's job, reduced his salary to $1 after he was reinstated, and ultimately reduced his salary to $35,000. (Hr'g Tr. at 9:24–12:17). Accordingly, the Court found Walker was immunized against plaintiff's Section 1983 suit arising from his constructive termination.

Plaintiff contends Walker's immunity does not extend to plaintiff's tortious interference claim because Walker hired two law firms to investigate plaintiff, held a press conference to call for his removal, and induced the City Council to terminate plaintiff's position and reduce his salary. Thus, plaintiff argues, Walker's actions were not entitled to immunity because they were statements made to the media and efforts directed to win legislative support for her proposals. *See, e.g., People v. Ohrenstein,* 77 N.Y.2d at 53–54 ("[Immunity] does not extend to acts which a legislator performs to secure support in the community or to insure reelection, such as giving speeches in the community, issuing newsletters and press releases."). But Walker's activity was directed at city legislators—not at securing support among the general populace—as part of her broader effort to have the City Council terminate plaintiff's employment. And Walker's use of the media did not *per se* forfeit her immunity. *See, e.g., Crowe Deegan, LLP v. Schmidt,* 38 A.D.3d 590, 591 (2d Dep't 2007) (finding legislative immunity covered legislator's statement to media).

***3** Plaintiff further contends Walker is not entitled to immunity because she was not a member of the City Council, did not vote on the resolutions abolishing plaintiff's position or reducing his salary, and targeted plaintiff. Yet, as the Court explained in its decision granting the individual defendants' motions for reconsideration, Second Circuit precedent teaches that absolute legislative immunity covers a non-legislative official attempting to influence legislative action applicable to more than a single person, even if that official acts with mal-intent. *See Almonte v.. City of Long Beach,* 478 F.3d 100, 107–08 (2d Cir.2007); *Harhay v. Town of Ellington Bd. of Educ.,* 323 F.3d 206, 210–11 (2d Cir.2003); *see also Olma v. Collins,* 2012 WL 4800455, at *1 (2d Cir. Oct. 10, 2012) (summary order) (citing *Bogan v. Scott–Harris,* 523 U.S. at 54–55). Here, Walker influenced the City Council to pass a budget applicable to the entire City government, which budget reduced plaintiff's salary.

Accordingly, plaintiff's tortious interference claims against all defendants are dismissed.

IV. *Plaintiff's Request for Reconsideration*

Plaintiff further argues the Court should reinstate the First Amendment claims against City Council members Edwards, Johnson, Watts, Munro–Morris, and Apuzzo in their official capacities because such suits are no longer duplicative of the First Amendment claim against the City. Because the Court's request for supplemental briefing was limited to four distinct issues unrelated to plaintiff's request, the Court deems plaintiff's request as a motion for reconsideration.

Plaintiff's motion, six months after the Court rendered its memorandum decision on August 14, 2012, is untimely. *See* Local Rule 6.3 (requiring motions for reconsideration be made within fourteen days of entry of decision). Even if the Court were to entertain such an untimely motion, it would be denied because plaintiff did not previously make this argument. See *Morse/Diesel, Inc. v. Fid. & Deposit Co. of Md.,* 768 F.Supp. 115, 116 (S.D.N.Y.1991) (noting the motion may not "advance new facts, issues or arguments not previously presented to the Court").

Accordingly, plaintiff's request for reconsideration is denied.

V. *City's Request for Reconsideration*

Instead of briefing the Court on the four questions discussed at the hearing on December 17, 2012, the City again asks the Court to dismiss plaintiff's Section 1983 claims for violations of his procedural and substantive due process rights, this time because of the Second Circuit's reversal of *Looney v. Town of Marlborough ("Looney I"),* 2011 WL 3290202 (D.Conn. July 30, 2011), *rev'd sub nom Looney v. Black ("Looney II"),* 702 F.3d 701 (2d Cir.2012). The Court deems this request as the City's second motion for reconsideration, which, although untimely, is appropriate based on "an intervening change of controlling law." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir.1992).

***4** In *Looney I,* the district court found a town official held a protected property interest in his appointed position, which, under relevant Connecticut statutes, he held for a four-year term and from which he could only be removed for cause subject to certain process. *Looney I,* 2011 WL 3290202, at *7–9. The court thus found plaintiff had stated a Section 1983 claim by alleging defendants had reduced his hours from full to part time during his term, without process, and had not reappointed him to a fifth term. *Id.* at *9–10.

Although *Looney I* is not binding, based in part on its persuasiveness, this Court found plaintiff held a protected property interest in his appointed position because the City charter stated he would hold his position until the expiration of his four-year term, or until the Mayor removed him for cause upon fourteen days written notice. (Doc. # 40, at 2, 16–17). The Court also denied the City's first motion for reconsideration on this point and adhered to its analysis in the memorandum decision. (Doc. # 64).

After the Court denied the City's first motion for reconsideration, the Second Circuit reversed *Looney I.* In *Looney II,* the Second Circuit held that a town official lacked a protected property interest in working full-time hours in his appointed position, because defendants had never promised that his position would be full time. *Looney II,* 702 F.3d at 708. The court noted that the relevant statute described the official's term of appointment and mechanism for removal, but was "silent as to any guarantee or procedural requirement for reducing [an official's] hours from full to part time." *Id.* at 709. As a result, *Looney II* does not support the proposition that a local official has no protected property interest in an unelected position. Rather, it held that a town official lacked a property interest in working full-time hours when the town did not promise him such employment.

Here, plaintiff has sufficiently alleged he was constructively discharged from his unelected position as a City official when defendants reduced his salary so severely (and without a commensurate reduction in hours) that he had no choice but to leave his position. In other words, he alleges he had a property interest in his position, not that he had a property interest in receiving his full salary or working full time. Therefore, plaintiff held a protected property interest in his position, in spite of the City charter not promising him a particular salary and stating the Board of Estimate would set his salary.

The Court adheres to its original decision holding plaintiff has stated Section 1983 claims against the City for allegedly violating his procedural and substantive due process rights. Thus, the City's second motion for reconsideration is denied.

CONCLUSION

Plaintiff's federal and state claims against all individual defendants are dismissed. Plaintiff's Section 1983 claims against the City for alleged violations of his rights to procedural and substantive due process remain.

***5** SO ORDERED:

2013 WL 1222720

All Citations

Not Reported in F.Supp.2d, 2013 WL 1222720

End of Document