Matter of Connolly v New York City Admin. for Children's Servs.

2024 NY Slip Op 33982(U)

October 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 512787/23

Judge: Heela D. Capell

At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of October, 2024.

PRESENT:

HON. HEELA D. CAPELL,

Justice.

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In the Matter of DELANO CONNOLLY,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-against-

Index No. 512787/23

NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES and CITY OF NEW YORK,

Respondents.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	25, 66, 83, 129-130
Opposing Affidavits (Affirmations)	68, 73, 89
Affidavits/ Affirmations in Reply	78
Other Papers: Affidavits/Affirmations in Support	23, 35, 27, 29,

Upon the foregoing papers in this CPLR article 78 proceeding, respondents New York City Administration for Children's Services (ACS) and the City of New York (City) move for an order, pursuant to CPLR 2004, 2005, and 3012 (d), extending the time for respondents to move, answer, or otherwise respond to the verified petition of petitioner Delano Conolly. Petitioner moves, by order to show cause in motion sequence number

(mot seq) 2, for an order granting a preliminary injunction enjoining respondents from terminating petitioner's employment or health benefits during the pendency of this proceeding. The Civil Service Bar Association (CSBA) moves, by order to show cause in mot seq 3, for an order granting CSBA leave to file an amicus curiae brief in support of petitioner. Respondents cross-move, in mot seq 5, for an order, pursuant to CPLR 3211 (a) (7) and 7804 (f), dismissing petitioner's amended verified petition.

Petitioner seeks judicial review, under Article 78 of the Civil Practice Law and Rules, of a determination by ACS which denied petitioner's request for reasonable accommodations in his employment on account of physical disability, which accommodations had been previously afforded to petitioner before being rescinded. Petitioner is employed as a Level III Agency Attorney in ACS's Family Court Legal Services Unit (FCLS). In or around January 2018, petitioner sustained injuries to his back, right shoulder, right and left knees, right and left elbows, and right hip after a slip and fall at the workplace. As a result of the injuries, petitioner applied for and was granted medical leave from in or around January 2018 through in or around December 2018. Prior to his scheduled return from leave, petitioner requested the following reasonable accommodations: (i) that ACS provide and permit him to use a standing desk; (ii) permission to attend periodic physical therapy appointments using accrued paid time off; and (iii) permission to take breaks to walk around the office periodically. In December 2018, ACS granted petitioner's request for these reasonable accommodations.

In or around February 2019, petitioner suffered a heart attack which required several surgeries, including insertion of stents into his arteries. In or around February 2021, as a

result of his impaired heart condition, petitioner requested that ACS provide him with additional reasonable accommodations including: (i) a caseload comprising of a mix of certain types of cases petitioner would litigate directly, as well as others on which he would mentor more junior Agency Attorneys; (ii) additional time to complete assignments and travel (if and when travel became necessary); and (iii) permission to work remotely. In or around April 2021, ACS granted petitioner the following reasonable accommodations: (i) a caseload of no more than 40 cases, starting with ten, then increasing gradually, comprising a mix of pre-fact finding abuse cases, pre-fact finding neglect cases, post-fact finding/disposition cases, post-disposition cases and permanency hearing cases; and (ii) additional time to complete assignments and travel (when necessary). ACS further granted petitioner permission to work remotely. Petitioner alleges that during the period of his employment following the granting of the reasonable accommodations, he excelled at his essential job functions and productivity, resolving his cases more quickly than ACS assigned them and reducing the average caseload for Agency Attorneys throughout FCLS.

Following a request by petitioner for medical leave in order to undergo an angiogram, ACS approved medical leave from August 22, 2022 through November 8, 2022, later extended through December 12, 2022. Prior to the expiration of the medical leave period, ACS notified petitioner that, because he stopped working on August 19, 2022, his employment would be terminated on August 18, 2023 unless he was able to return to work by said date with no restrictions.

In December 2022, petitioner was informed that his reasonable accommodations had been lifted and he was directed by ACS to resubmit a new request for the same

accommodations and provide updated medical documentation in support thereof. Petitioner thereafter provided doctors' notes stating, in sum and substance, that petitioner was able to return to work albeit with the previously granted accommodations.

By decision dated December 20, 2022, ACS denied petitioner's reasonable accommodation request. In its decision, ACS indicated that the requested accommodations would present an "Undue Hardship" and "Require Removal of an Essential Function of the Job" (NYSCEF Doc No 107). Upon being notified of the decision, petitioner unsuccessfully sought clarification with respect to the aforesaid grounds for denial. In an email to petitioner by ACS Human resources, ACS informed petitioner that he "will remain on a medical leave until either [his] Physician indicates that [petitioner] no longer require[s] restrictions or [petitioner's condition improves where [he is] able to return to work with no restrictions" (NYSCEF Doc No 101).

Petitioner subsequently appealed the December 20, 2022 determination. By email dated January 5, 2023, ACS confirmed to petitioner that he would be terminated if unable to return to work by August 18, 2023. Petitioner's appeal of the December 20, 2022 determination was denied by letter dated February 15, 2023.

On April 26, 2023, petitioner renewed his request for reinstatement of the previously approved accommodations. Shortly thereafter, the instant proceeding was commenced by petitioner by filing the original verified petition and notice of petition on April 28, 2023. ACS denied petitioner's renewal/reconsideration request by decision dated May 15, 2023, wherein the officer stated that "the circumstances surrounding the denial of the same request on December 20, 2022 have not changed. As such, granting your renewed request

would pose an undue hardship to agency operations and remove essential job functions" (NYSCEF Doc No 113).

On August 18, 2023, the date petitioner was to be terminated from employment if unable to return without restrictions, petitioner moved by order to show case for a preliminary injunction and temporary restraining order (TRO) enjoining respondents from terminating petitioner's employment or health benefits during the pendency of this proceeding. A TRO was signed by Justice Karen B. Rothenberg on August 23, 2023. Petitioner returned to work on August 28, 2023 without accommodations.

In September and October 2023, petitioner was examined by his physicians who recommended a hybrid schedule allowing petitioner to work from home two days per week. ACS denied petitioner's two-day work from home accommodation request by decision dated October 18, 2023 on grounds that the accommodation would require removal of essential job function(s) and cause undue hardship. Petitioner was thereafter permitted to work from home two days per week as part of ACS's Hybrid Work Pilot Program. Petitioner alleges that while he received his full salary from December 2022 through his return to work on August 28, 2023, he was only able to do so by using banked compensatory time, valued at approximately $5,600 per month, and would not have needed to expend this compensatory time had ACS permitted him to return to work with the same reasonable accommodations under which he had been working since December 2018 and April 2021, respectively.

Motion for Extension of Time

Respondents' motion for an extension of time to respond to the original verified petition was rendered moot by stipulation, dated February 16, 2024, whereby the parties agreed that a prior motion to dismiss the original verified petition (MS # 4) shall be withdrawn by respondents and a second motion to dismiss the amended verified petition shall be served on or before March 19, 2024. The new cross motion to dismiss the amended verified petition (mot seq 5) was filed by respondents on March 19, 2024.

Motion for Leave to File Amicus Curiae Brief

With respect to the motion of CSBA for leave to file an amicus curiae brief (MS # 3), respondents state in their opposing affirmation (NYSCEF Doc No 89) that while they contest the merits and relevance of the arguments CSBA seeks to raise in the brief and wish to file a response thereto, they do not oppose the motion to the extent it seeks leave to file the brief. As a result, CSBA's motion for leave to file an amicus curiae brief is granted, subject to a response by respondents.

Cross Motion for Dismissal

Respondents' cross motion to dismiss the amended verified petition is based on four general grounds that: (1) petitioner's verification of the amended verified petition is invalid; (2) petitioner's claims are moot since he was cleared to return to work, and did return, without accommodations; (3) the instant proceeding is untimely as it was commenced more than four months following respondents' final determination denying accommodations; and (4) alternatively, the proceeding was not ripe for adjudication when

commenced as petitioner had requested renewal of the determination two days prior thereto.

Initially, contrary to the argument of respondents, the amended verified petition is not subject to dismissal based on a defective verification, either due to the verification pre-dating the allegations in the pleading or to the verification being in improper form. Considering that the amended verified petition was dated and filed on February 6, 2024, the February 6, 2023 date of the jurat is an obvious typographical error which may be disregarded (CPLR 2001). With respect to form, a verification "is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true" (CPLR 3020 [a]). "The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true" (CPLR 3021). Petitioner's verification, which was sworn to before a notary, properly states:

> "[Petitioner] being duly sworn, herby deposes and says:
>
> > I am the Petitioner in the above-captioned action. I have read the foregoing Amended Petition and know the contents thereof. The same are true to my knowledge, except as to matters therein that are alleged upon information and belief and, as to those matters, I believe them to be true."

At any rate, the court finds respondents waived any objection to the verification of the amended verified petition. When verification of a pleading is required by statute, and it is either unverified or defectively verified, the pleading may be treated "as a nullity" provided the party gives notice with due diligence to the attorney of the adverse party that

he elects to do so (CPLR 3022). Due diligence has been held to mean "within twenty-four hours" (*O'Neil v Kasler*, 53 AD2d 310, 315 [4th Dept 1976]) and the Appellate Division, Second Department determined that the approximately eight-day period which elapsed between a plaintiff's receipt of the unverified answer and its rejection thereof was unreasonable under the circumstances (*Able Breaking Corp. v Consolidated Edison Co. of N.Y.*, 88 AD2d 649, 649 [2d Dept 1982]). Here, there is no allegation that respondents objected to the verification until the issue was raised in the instant cross motion to dismiss, filed over one month following the amended verified petition's filing.

Turning to the substance of the amended verified petition, "[o]n a motion pursuant to CPLR 3211 (a) (7) and 7804 (f), only the petition is considered, all of its allegations are deemed true, and the petitioner is accorded the benefit of every possible inference" (*Matter of Brown v Foster*, 73 AD3d 917, 918 [2d Dept 2010]; *see Matter of Johnson v County of Orange*, 138 AD3d 850, 850-851 [2d Dept 2016]). "In determining such a motion, the sole criterion is whether the petition sets forth allegations sufficient to make out a claim that the determination sought to be reviewed was 'made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" (*Matter of Kunik v New York City Dept. of Educ.*, 142 AD3d 616, 617 [2d Dept 2016], quoting CPLR 7803 [3]).

Respondents contend that on August 24, 2023, petitioner notified ACS, via email, that he was medically cleared by his physician to return to work without any accommodations and/or restrictions and, thereafter, on August 28, 2023, petitioner returned to work without accommodations. Respondents maintain that based on this change in

circumstances, petitioner's claims are now moot as he no longer requires accommodations to perform the essential functions of his job. Respondents further argue that petitioner's claims are moot as he was never terminated nor placed on leave without pay, meaning that he has no present right or interest that has been or would be affected by a ruling on the amended verified petition.

As the power of a court to issue legal declarations only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case, courts generally may not pass on academic, hypothetical, moot, or otherwise abstract questions (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *Funderburke v New York State Dept. of Civ. Serv.*, 49 AD3d 809, 810-811 [2d Dept 2008]). Thus, courts ordinarily may not consider questions that have become moot by passage of time or change in circumstances (*see Matter of Raven K. [Adam C.]*, 130 AD3d 622, 623 [2d Dept 2015]). When a determination would have no practical effect on the parties, the matter is moot and the court generally has no jurisdiction to decide the matter (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003]; *People ex rel. Crow v Warden, Anna M. Kross Detention Ctr.*, 76 AD3d 646 [2d Dept 2010]).

While respondents assert that petitioner has been cleared by his physicians to return to work without accommodations and continuously received his salary at all relevant times, petitioner alleges that his receipt of salary was only due to his being compelled to use banked compensatory time following respondents' "arbitrary and capricious" decision to rescind his reasonable accommodations. Petitioner alleges that he performed his essential job functions competently, even excelling in performance, during the time he was working

with the accommodations, which were withdrawn and later denied on bare grounds that the accommodations would "Require Removal of an Essential Function of the Job" and would create an "Undue Hardship." Affording the amended verified petition a liberal interpretation, as the court must on the instant motion pursuant to CPLR 3211 (a) (7), petitioner has sufficiently stated a claim under CPLR article 78 to reverse respondents' denial of reasonable accommodations on the ground that the denial was arbitrary and capricious or lacking a rational basis. Further, since petitioner maintains that, had the reasonable accommodations been granted, he would not have been forced to use compensatory time to receive income during the period of his medical leave, and because petitioner seeks damages in the form of reimbursement of his compensatory time for the allegedly arbitrary and capricious decision, a determination in this proceeding reversing the December 20, 2022 decision would have a practical effect on the parties. The amended verified petition is therefore not subject to dismissal on the ground of mootness.

The court finds respondents' remaining arguments for dismissal, to wit, statute of limitations and ripeness, unavailing. "A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes final and binding on the petitioner" (*Matter of Zherka v Ramos*, 173 AD3d 746, 747 [2d Dept 2019]; *see* CPLR 217 [1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *Matter of Rodas v RISC Program, Family Servs., Inc., of Dutchess County*, 163 AD3d 682, 683 [2d Dept 2018]). "There are two requirements for fixing the time when [the] agency action is deemed final and binding" (*Matter of Rodas*, 163 AD3d at 683). "'First, the agency must have reached a definitive

position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" (*id.*, quoting *Matter of Best Payphones, Inc.*, 5 NY3d at 34). A party seeking to assert the statute of limitations as a defense has the burden of establishing that the petitioner was notified of the determination more than four months before the proceeding was commenced (*see Matter of Rodas*, 163 AD3d at 683; *Matter of Romeo v Long Is. R.R. Co.*, 136 AD3d 926, 927 [2d Dept 2016]; *Matter of Bill's Towing Serv., Inc. v County of Nassau*, 83 AD3d 698, 699 [2d Dept 2011]).

While petitioner's reasonable accommodation request was denied by determination dated December 20, 2022, more than four months prior to the April 28, 2023 commencement of the instant Article 78 proceeding, the determination expressly provided petitioner the right to appeal within 30 days of receipt. Thus, the December 20, 2022 determination may not be deemed final and binding since the injury caused thereby may be "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." The final determination deciding petitioner's reasonable accommodations request was the denial of petitioner's appeal by letter dated February 15, 2023, less than 4 months from the commencement of the instant proceeding on April 28, 2023.

Finally, the fact that a request by petitioner for reconsideration of the December 20, 2022 determination was undecided and pending on the date this proceeding was commenced does not warrant dismissal of petitioner's claims on the ground of ripeness. "Generally, a request for reconsideration of an administrative determination does not

extend or toll the statute of limitations ***or render the otherwise final determination non-final*** unless the agency's rules mandate reconsideration" (*Matter of Piliero v Eastchester Fire Dist.*, 188 AD3d 694, 695 [2d Dept 2020] [emphasis added]). Respondents do not allege that reconsideration of a determination following its denial on appeal was mandated by agency rules.

Accordingly, respondents' motion to dismiss the amended verified petition is denied in all respects.

Motion for Preliminary Injunction

"'[P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant'" (*Saran v Chelsea GCA Realty Partnership, L.P.*, 148 AD3d 1197, 1199 [2d Dept 2017], quoting *Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 429-430 [2d Dept 2003]). "To establish the right to a preliminary injunction, the [movant] must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the [movant's] favor" (*Keneally, Lynch & Bak, LLP v Salvi*, 190 AD3d 961, 963 [2d Dept 2021]; *see* CPLR 6301). The movant must show that the irreparable harm is "'imminent, not remote or speculative'" (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010], quoting *Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]).

Loss of employment has been held in this judicial department and others to not constitute "irreparable harm" for purposes of injunctive relief (*see Abramo v HealthNow*

N.Y., 305 AD2d 1009, 1010 [4th Dept 2003] ["Loss of employment, although most likely to cause severe hardship, does not constitute irreparable damage" (citation omitted)]; *Suffolk County Assn. of Mun. Empls. v County of Suffolk*, 163 AD2d 469, 470-471 [2d Dept 1990]). While petitioner also seeks to enjoin respondents from terminating his health benefits, which he argues has been held by courts to constitute irreparable harm, petitioner has not shown that the loss of such benefits, let alone loss of his employment, is imminent. At the time the TRO was granted, petitioner was subject to termination on grounds of being on medical leave for more than one year. However, there is no showing that, following his return to work, petitioner's employment and health benefits were ever placed in jeopardy. Petitioner only alleges instances where superiors have pressured him to retire.

As a result, petitioner's motion for a preliminary injunction is denied.

Accordingly, it is hereby

ORDERED that respondents' motion to extend time is denied as moot; and it is further

ORDERED that petitioner's motion for a preliminary injunction (mot seq 2) is denied; and it is further

ORDERED that CSBA's motion for leave to file an amicus curiae brief (mot seq 3) is granted; and it is further

ORDERED that CSBA shall serve its amicus curiae brief on all parties within 30 days of the service of a copy of this order with notice of entry; and it is further

ORDERED that respondents shall serve a response to the amicus curiae brief within 30 days of the service of the amicus curiae brief; and it is further

ORDERED that respondents' cross-motion to dismiss the amended verified petition (mot seq 5) is denied; and it is further

ORDERED that respondents shall serve a verified answer to the amended verified petition within 30 days of the service of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. HEELA D. CAPELL, J.S.C.