

**Wong v City of N.Y. & Parks & Recreation**

2024 NY Slip Op 34031(U)

November 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 503651/2024

Judge: Gina Abadi

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This opinion is uncorrected and not selected for official publication.

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 8<sup>th</sup> day of November, 2024.

PRESENT:

HON. GINA ABADI,  
J.S.C.

RAYMOND WONG,

Plaintiff,

Index No.: 503651/2024

-against-

Motion Seq: 1

CITY OF NEW YORK AND PARKS AND RECREATION, AND THE CITY OF NEW YORK,

DECISION, ORDER, AND JUDGMENT

Defendants.

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

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed .....	8 – 11
Opposing Affidavits (Affirmations) .....	16 – 18
Reply Affidavits (Affirmations) .....	19 – 20
Other .....	

Upon the foregoing cited papers and after oral argument, defendants City of New York and Parks and Recreation (DPR), and the City of New York (City and, collectively with DPR, defendants), jointly move, pre-answer, for an order, pursuant to CPLR §§ 3211(a) (5) and (7), dismissing the entirety of the verified complaint (Verified Complaint or VC) of plaintiff Raymond Wong (plaintiff).

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### Background

Immediately before the onset of the COVID-19 pandemic, plaintiff was working as a resident engineer with the DPR (VC, ¶¶ 1-2).<sup>1</sup> As the result of the COVID-19 pandemic, on October 21, 2021, the City implemented an “Expanded Vaccine Policy (10/21/21)” mandating (in relevant part) that “[a]ll [DPR] employees must provide proof of vaccination, at least 1 dose, by 5 pm on October 29<sup>th</sup>, 2021” (the vaccine mandate) (NYSCEF Doc No. 3). The vaccine mandate (in FAQ, §§ 2-3 thereof) permitted employees to apply (by no later than October 27, 2021) for a reasonable accommodation to be exempt from vaccination.

Plaintiff, a practicing Buddhist, applied on October 27, 2021 for a religious accommodation to be exempt from the vaccine mandate (VC, ¶¶ 3 and 11). From November 1, 2021 and until February 4, 2022, plaintiff was allowed to work at the DPR without vaccination, “as long as he submitted a PCR test weekly.” (VC, ¶¶ 15 and 75). One week later on February 11, 2022, however, plaintiff was terminated from his employment with the DPR for failure to get vaccinated (VC, ¶¶ 16, 23, 36, and 81).

On February 5, 2024, plaintiff commenced this action against the DPR and City asserting four causes of action under the New York City Human Rights Law (Administrative Code § 8-107, et seq.) (the City HRL): (1) religious discrimination; (2) failure to accommodate plaintiff’s religious needs; (3) an award of punitive damages; and (4) an award of attorney’s fees (the first through fourth causes of action, respectively).

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<sup>1</sup> See also NYC Parks Reasonable Accommodation Form, dated October 27, 2021, Section A (NYSCEF Doc No. 4).

In lieu of an answer, defendants served the aforementioned motion to dismiss. The Court heard oral argument on August 14, 2024 and reserved decision. The well-established standard of review on a pre-answer motion to dismiss has been omitted from this Decision, Order, and Judgment in the interest of brevity.

### Discussion

Plaintiff's claims as against the DPR must be dismissed because the DPR, as an agency of the City, is not amenable to being sued under the New York City Charter. *See* NYC Charter, Ch. 17, § 396; *Matter of Carpenter v New York City Hous. Auth.*, 146 AD3d 674 (1st Dept 2017), *lv denied* 29 NY3d 911 (2017); *Johnson v Department of Parks & Recreation*, 68 Misc 3d 127(A), 2020 NY Slip Op 50850(U), \*1 (App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020).

Plaintiff's claims as against the City should have been brought as a CPLR article 78 proceeding, insofar as he is challenging the continued denial of his reasonable accommodation request, and as such, his claims against the City are now time-barred. "It is well established that determinations which are made within the jurisdiction of the [administrative] official or body concerned, stand unless they are avoided by a direct attack where the infirmity is alleged to be that the action has been arbitrary or capricious." *Matter of Foy v Schechter*, 1 NY2d 604, 612 (1956). Such "direct attack" takes the form of a CPLR article 78 proceeding which is to be commenced within four months of the challenged act, pursuant to CPLR § 217. *See e.g. Matter of Metropolitan Museum Historic*

*Dist. Coalition v De Montebello*, 20 AD3d 28, 36 (1st Dept 2005). See also *Matter of Rysiejko v City of NY*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 05503 (1st Dept 2024).

It is undisputed that plaintiff failed to commence a CPLR article 78 proceeding in connection with the DPR's ultimate denial of his religious exemption/accommodation request. Although plaintiff frames this action as a religious discrimination lawsuit under the City HRL, the crux of his Verified Complaint is a challenge to the ultimate administrative denial of his request for a religious exemption/accommodation from the COVID-19 vaccination. See *Campagna v New York City Police Dept.*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 05046, \*1 (1st Dept 2024). As the true nature of the Verified Complaint, stripped of all artifice, squarely fits the parameters of a CPLR article 78 proceeding, plaintiff was required to commence it "within four months of the act giving rise to the litigation." *Town of Southampton v County of Suffolk*, 98 AD3d 1033, 1034 (2d Dept 2012); *Nieves v New York City Police Dept.*, 2024 NY Slip Op 33476(U) (Sup Ct, Kings County 2024); *Goolsby v City of NY*, 83 Misc 3d 445, 453-455 (Sup Ct, NY County 2024); *Hunold v City of NY*, 2024 NY Slip Op 51241(U) (Sup Ct, NY County 2024); *Almodovar v City of NY*, 82 Misc 3d 1235(A), 2024 NY Slip Op 50475(U) (Sup Ct, NY County 2024), amended on rearg 83 Misc 3d 1271(A), 2024 NY Slip Op 51074(U) (Sup Ct, NY County 2024); *Farah v City of NY*, 83 Misc 3d 1252(A), 2024 NY Slip Op 50961(U) (Sup Ct, Kings County 2024); *Sekulski v City of NY*, 79 Misc 3d 1240(A), 2023 NY Slip Op 50839(U) (Sup Ct, Kings County 2023).<sup>2</sup>

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<sup>2</sup> Plaintiff's reliance on *Chinchilla v New York City Police Dept.*, 2024 WL 3400526 (SD NY 2024), is unavailing (footnote continued)

Because plaintiff first became aware of the ultimate denial of his religious exemption/accommodation request on or before February 11, 2022, he should have commenced this action by no later than June 13, 2022. Inasmuch as he commenced this action much later on February 5, 2024, his Verified Complaint must be dismissed in its entirety as untimely. *See* CPLR §§ 217(1) and 3211(a)(5); *see also Sloninski v City of NY*, 173 AD3d 801, 802 (2d Dept 2019); *Dolce-Richard v New York City Health & Hosps. Corp.*, 149 AD3d 903, 905 (2d Dept 2017); *Town of Southampton*, 98 AD3d at 1035.

In any event, each of plaintiff's four causes of action is subject to dismissal for failure to state a claim, pursuant to CPLR § 3211(a)(7). Plaintiff's first and second causes of action for religious discrimination, as grounded on the failure to accommodate theory, are inadequately pleaded. In particular, he failed to plead that the City could, in fact, accommodate him, a resident engineer, without suffering an undue hardship in light of his work duties, particularly where (as was the instance at the time) the vaccine mandate was a condition of his continued employment.<sup>3</sup> *See Hunold*, 2024 NY Slip Op 51241(U); *Almodovar*, 82 Misc 3d 1235(A), 2024 NY Slip Op 50475(U); *Nieves*, 2024 NY Slip Op 33476(U), *Farah*, 83 Misc 3d 1252(A), 2024 NY Slip Op 50961(U); *Benoit v City of NY*, 2024 NY Slip Op 31724(U) (Sup Ct, Kings County 2024); *Chun v City of NY*, 2024 NY

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because it is not binding on this Court. *See Cox v Microsoft Corp.*, 290 AD2d 206, 207 (1st Dept 2002) ("Federal case law is at best persuasive in the absence of State authority. . . ."), *lv dismissed* 98 NY2d 728 (2002).

<sup>3</sup> The DPR's letter terminating plaintiff's employment stated, in relevant part, that:

"You [plaintiff] have previously received notice regarding your failure to comply with the New York City Health Commissioner's Order requiring vaccination of all City of New York employees. *Compliance with that Order is a condition of employment.* Since you have not complied with the Order, despite notice and an opportunity to do so, your employment with [the DPR] is terminated effective February 11, 2022."

(NYSCEF Doc No. 5) (emphasis added)

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).<sup>4</sup>

Plaintiff's third and fourth causes of action for punitive damages and attorney's fees, respectively, may not be maintained as separate causes of action. *See Pergament v Government Empl. Ins. Co.*, 225 AD3d 799, 801 (2d Dept 2024); *La Porta v Alacra, Inc.*, 142 AD3d 851, 853 (1st Dept 2016).

The Court has considered plaintiff's remaining contentions and found them either unavailing or moot in light of its determination.

### Conclusion

Accordingly, it is

**ORDERED** that defendants' pre-answer motion for an order, pursuant to CPLR §§ 3211 (a) (7) and (5), dismissing the Verified Complaint is *granted*, and the Verified Complaint is dismissed in its entirety with prejudice and without costs or disbursements; and it is further

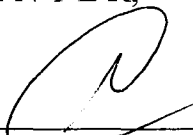
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<sup>4</sup> See also *We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 294 (2d Cir 2021), *clarified* 17 F4th 368 (2d Cir 2021), *stay pending appeal denied* 142 S Ct 734 (2021); *Beickert v New York City Dept of Educ.*, 2023 WL 6214236, \*4 (ED NY 2023), *appeal filed* (2d Cir 2023); *Marte v Montefiore Med. Ctr.*, 2022 WL 7059182, \*5 (SD NY 2022); *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* 144 S Ct 286 (2023); *Garland v New York City Fire Dept.*, 574 F Supp 3d 120, 129 (ED NY 2021); *Matter of Police Benevolent Assn. of City of NY, Inc. v City of NY*, 215 AD3d 463 (1st Dept 2023), *lv denied* 40 NY3d 906 (2023); *Matter of Police Benevolent Assn. of City of NY, Inc. v De Blasio*, Index No. 85229/21, Decision & Order, dated February 16, 2022 (Sup Ct, Richmond County, Colon, J.), *appeals withdrawn* Docket Nos. 2022-02225 and 2022-02238 (2d Dept, Nov. 23, 2022). See further *O'Reilly v Board of Educ.*, \_\_\_ NY3d \_\_\_, 2024 NY Slip Op 05130, \*1 (2024) ("This Court has long distinguished between disciplinary proceedings and employment conditions for employees entitled to statutory civil service protections, and has held that statutory hearings are not warranted when employment eligibility conditions [such as the requirement to provide proof of vaccination] are enforced.").

**ORDERED** that the Corporation Counsel is directed to electronically serve a copy of this Decision, Order, and Judgment on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

ENTER,



HON. GINA ABADI  
J. S. C.

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J.S.C.

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