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To be argued by
JONATHAN R. GOLDMAN, ESQ.
Time Requested: 15 minutes

Appellate Division – Second Department Case No. 2017-00496

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

RICHARD J. SASSI, II,

Plaintiff-Appellant,

–against–

MOBILE LIFE SUPPORT SERVICES, INC.,

Defendant-Respondent.

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APPELLANT'S BRIEF

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Dutchess County Clerk's Index No. 51918/2016

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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RICHARD J. SASSI, II.,

No. 2017-00496

Plaintiff-Appellant,

-against-

MOBILE LIFE SUPPORT SERVICES, INC.,

Defendant-Respondent.
-----X

STATEMENT PURSUANT TO CPLR 5531

1. The Index number of the case in the lower court is 51918/2016
2. The full names of the original parties are as stated in the above caption. There has been no change in the parties.
3. The proceeding was commenced in Dutchess County Supreme Court.
4. Plaintiff-Appellant commenced this proceeding on August 4, 2016 and served his Summons and Verified Complaint on Defendant-Respondents on August 5, 2016. On October 7, 2016, Defendant-Respondent timely filed and served its pre-answer motion to dismiss.
5. The nature and object of the proceeding are as follows: Appellant commenced this action, alleging that, after terminating his employment following his conviction of a misdemeanor offense, Respondent then refused to re-employ him on the ground of his conviction, thus violating his rights under Article 23-A of the New York State Correction Law and Section 296(15) of the New York State Executive Law (a/k/a New York State Human Rights Law). Supreme Court dismissed the complaint on the ground that the relevant statutory provisions did not apply to Appellants' circumstances. By this appeal, Appellant seeks to vacate Supreme Court's order and have the matter remanded to commence discovery.

6. This appeal is from the Decision and Order of New York State Supreme Court, County of Dutchess (Hon. James V. Brands, J.S.C.), dated and entered December 14, 2016, notice of entry of which was served on December 19, 2016.

7. The appeal is perfected on a full reproduced record.

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PRELIMINARY STATEMENT

When it comes to the issue of equal employment opportunity, our state has a strong public policy against discrimination on the basis of prior criminal conviction. That policy is embodied by statute in Article 23-A of the New York State Correction Law, which, subject to narrow exceptions not relevant to this appeal, makes it unlawful for an employer to deny or act adversely upon an application for employment or upon employment already held because of the applicant's or employee's prior criminal conviction(s), and Section 296(15) of the New York State Executive law, which makes a violation of Article 23-A an unlawful discriminatory practice under the New York State Human Rights Law ("NYSHRL").

Plaintiff-Appellant Richard J. Sassi, II alleged in his Verified Complaint that, following his conviction for a minor misdemeanor offense and sentence to a sixty-day jail sentence, his employer, Defendant-Respondent Mobile Life Support Services, Inc. ("MLSS") terminated him and that, after his release from jail, he sought reemployment and MLSS refused to rehire him based solely on his prior criminal conviction. He claims that MLSS's refusal to re-hire him violated Article 23-A and Section 296(15).

Sassi now respectfully appeals from the Decision and Order of Supreme Court, County of Dutchess, which dismissed his complaint on the ground that these statutes are inapplicable and do not protect him from discrimination because he was

convicted while already employed. Since the plain language of the statutes expressly prohibits employers from denying an application for employment because of a prior criminal conviction, and Sassi pleads that MLSS did just that, his Verified Complaint amply states his causes of action and Supreme Court's dismissal thereof should be vacated and the matter remanded.

QUESTION PRESENTED

- (1) Under Article 23-A of the New York State Corrections Law, it is unlawful for an employer to deny employment to an applicant because of that applicant's prior criminal conviction(s) and, under Section 296(15) of the New York State Executive Law, such a violation constitutes an unlawful discriminatory practice under the NYSHRL. Sassi alleges that, after MLSS terminated his employment, he re-applied and MLSS denied his application solely on the ground of his prior criminal conviction. Do these statutes apply to Sassi and provide him protection from unlawful discrimination?

NATURE OF THE CASE

A. Statement of facts.

Sassi resides in Dutchess County and first applied for employment with MLSS in or about June 2014 (R-13 ¶¶ 1, 4). At his first interview, Sassi advised MLSS's agents, John Miranda and Steven Longo, that he was facing a misdemeanor charge for having allegedly called in a false emergency to 911 when he worked as a police officer in August 2012 (Id. ¶¶ 5-6).

He then interviewed with Director of Human Resources, William Jeffries, and disclosed the pending misdemeanor charge to him as well (Id. ¶ 7). Jeffries viewed the legal matter as minor and compared it to a domestic squabble (Id. ¶ 8).

Thereafter, MLSS hired Sassi as a *per diem* communications specialist and, upon completing his required training, Sassi quickly promoted to a full time dispatcher position (Id. ¶ 9).

Sassi also trained as an EMT and, after passing the requisite courses, worked in that role as well (JA-14 ¶¶ 10-13). As he continued working for MLSS, Jeffries reiterated to Sassi that his legal matter should not impact his employment and noted that that he considered the issue “off limits” (Id. ¶ 5). He told Sassi to report to him any employee who gave him a hard time about it (Id.).

Sassi was scheduled to go to trial on his pending misdemeanor charge in early 2016 and, in the weeks before the scheduled start date of that trial, he apprised Jeffries, who, by then, was serving as MLSS’s Vice President and Chief Operating Officer, as well as Emily Smith, who replaced Jeffries as HR Director, of his legal status (Id. ¶ 15-16). In February 2016, Sassi was convicted of the charged offense and, prior to sentencing, the probation department completed a pre-sentence investigation (“PSI”) report, which recommend that Sassi not be incarcerated (Id. ¶¶ 17-19).

Before sentencing, Sassi spoke with Jeffries and Smith, who told him he was a good employee and that, in the unlikely event he be incarcerated, they would place him on leave, allow him to use accrued benefit time and re-instate him upon his release (Id. ¶ 22). On May 18, 2016, Sassi was sentenced to sixty-days’ incarceration

and, given his unavailability to provide notice, his wife advised Smith of the sentence (Id. ¶ 23-24). Smith reiterated to Mrs. Sassi what she and Jeffries had already advised her husband – that he would be placed on leave, allowed to use his accrued benefits, and then return to work upon his release (R-15 ¶ 25). But, contrary to its agents' representations to Sassi and his wife, after Sassi began his sentence, MLSS terminated his employment for “job abandonment” (Id. ¶ 26).

Upon completion of his jail term and his release from custody, Sassi contacted Longo, who advised that he wanted Sassi to return and that the supervisors were split on the issue, with some favoring his return and some opposing it (Id. ¶ 28-29). After being unable to regain employment through Longo, Sassi contacted Jeffries several times and finally was invited to meet with him and Smith (Id. ¶ 30). Jeffries told Sassi that MLSS had previously terminated other employees who had been incarcerated and, thus, had to be consistent, hence his termination (Id. ¶ 31).

Sassi told his former supervisors that it was unfair to hold against him the incident underlying his conviction, which had occurred nearly four years prior and had nothing to do with his job duties, particularly where he had kept them fully apprised of the situation throughout and they had agreed to allow him to return to work following his brief incarceration and he remained fully qualified to do so (Id. ¶¶ 33-34). Yet, despite his protestations, MLSS refused to rehire and re-employ

Sassi into his former position, the only reason underlying this determination being his prior conviction and brief incarceration (Id. ¶ 35).

B. Procedural History.

On August 4, 2016, Sassi commenced this action against MLSS, claiming that, by refusing to re-employ him in his former position based solely upon his prior conviction, MLSS violated Article 23-A of the New York State Correction Law and Section 296(15) of the New York State Executive Law (R-12-17). On October 7, 2016, MLSS filed a pre-answer motion to dismiss (R-18-31).

By Decision and Order dated December 14, 2016, Supreme Court (Hon. James V. Brands, J.S.C.) granted MLSS's motion and dismissed Sassi's complaint (R-8-10). MLSS served the Decision and Order with Notice of Entry on December 19, 2016 (R-7-11) and, thereafter, on January 11, 2017, Sassi timely filed and served his Notice of Appeal (R-1-6).

C. Decision Below.

In dismissing his complaint, Supreme Court held that neither Article 23-A nor Section 296(15) applied to Sassi's claims because his conviction did not pre-date his initial employment with MLSS (R-9). Specifically, the court stated:

Section 751 of Article 23-A of the Corrections Law specifically states that the statute "shall apply . . . to any . . . employment held by any person whose conviction of one or more criminal offenses *precedes* such employment" the statute continues stating that "no employment . . . held by an individual . . . shall be denied or accepted [sic] upon

adversely by reason of the individual's having been *previously* convicted of one or more criminal offenses.” Likewise, Section 296.15 of the Executive Law states that the statute only applies to convictions that occurred prior to employment, stating that “it shall be an unlawful discriminatory practice for any person . . . to deny . . . any . . . employment to any individual by reason of his or her *having been* convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of Article 23-A of the Correction Law.”

Based on the expressed language of the foregoing statutes, plaintiff's complaint is dismissed as a matter of law since the alleged statutory violation is belied by the facts as asserted in the verified complaint. The aforementioned statutes only apply to convictions that occur prior to one's employment, whereas plaintiff alleges he was first employed by defendant, after which he was convicted of a crime and incarcerated for 60-days, after which plaintiff sought to resume his employment with defendant.

(R-9 [emphases in original]).

STANDARD OF REVIEW

In reviewing a motion to dismiss for failure to state a cause of action, the court's “well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” See Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 318 (1995) (quotations & citations omitted). The complaint must be liberally construed. See CPLR § 3026. Plaintiffs must be afforded every favorable inference logically flowing from the facts alleged, see Dunn v. Gelardi, 59 A.D.3d 385, 386 (2d Dep't. 2009), and, therefore, “a complaint is deemed to allege whatever can be

imputed from its statements by fair and reasonable intendment.” Condon v. Associated Hospital Service of New York, 287 N.Y. 411, 414 (1942) (quotations & citations omitted).

Assessing the sufficiency of the Complaint, “the fundamental criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” Juric v. Bergstraesser, 44 A.D.1186, 1187 (3d Dep’t. 2007) (quotations and citations omitted); See also Bovino v. Village of Wappingers Falls, 215 A.D.2d 619, 620 (2d Dep’t. 1995) (quotations & citations omitted) (“[I]f from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion will fail regardless of whether the plaintiff will ultimately prevail on the merits.”). If the plaintiff is “entitled to relief on any reasonable view of the facts stated . . . [the court] must declare the complaint legally sufficient” and deny the motion to dismiss. Campaign for Fiscal Equity, 86 N.Y.2d at 318.

ARGUMENT

Point I

Sassi’s Verified Complaint amply alleges MLSS’s violation of Article 23-A and Section 296(15).

The sole ground upon which Supreme Court dismissed Sassi’s complaint (and, indeed, the sole ground upon which MLSS sought dismissal) is that the relevant statutes do not apply to Sassi because he was convicted during his initial

employment with MLSS (R-8-9; R-21-24). Respectfully, Supreme Court's decision is erroneous and should be vacated because, by dint of their plain language, the relevant statutes expressly apply to Sassi in the specific circumstances alleged in his Verified Complaint.

The operative provision of Article 23-A is Section 752, which provides, in pertinent part:

No *application* for *any* license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses

N.Y. Correction L. § 752 (emphasis added). And Section 751 sets forth the applicability of Article 23-A as follows:

The provisions of this article shall apply to *any application by any person* for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license

N.Y. Correction L. § 751 (emphasis added).

As he alleged in his complaint, MLSS terminated Sassi after he was convicted and sentenced to a sixty-day jail term (R-14-15 ¶¶ 17-26). After he served his sentence and was released from jail, Sassi then contacted MLSS and sought to be

rehired, but the company refused to rehire him because of his conviction (R-15 ¶¶ 28-36). Since the plain language of Section 751 renders Article 23-A applicable to “*any application by any person for . . . employment at any . . . private employer,*” N.Y. Corrections L. § 751 (emphasis added), and Sassi alleges he applied for employment with MLSS, a private employer, the provisions of Article 23-A apply and protect him against discrimination on the basis of his prior conviction.

In holding otherwise, Supreme Court erroneously viewed Sassi’s claim as one for wrongful termination of employment as opposed to one for wrongful failure to hire. Indeed, in quoting from Section 751, the court omitted that the statute applies to *applications* for employment and, instead, focused on the prong which makes it applicable to “any . . . employment held by any person whose conviction of one or more criminal offenses *precedes* such employment” (R-9 [quoting N.Y. Corrections L. § 751] [emphasis and ellipsis in original]).

Likewise, in quoting from the operative provision [Section 752], the court again omitted the language regarding *applications* for employment and, instead, focused on the proscription that “no employment . . . held by an individual . . . shall be denied or [acted] upon adversely by reason of the individual’s having been *previously* convicted of one or more criminal offenses” (Id. [quoting N.Y. Corrections L. § 752] [emphasis and ellipsis in original]).

But, again, read in the light most favorably to him, Sassi's Verified Complaint does not allege that MLSS unlawfully terminated him because of his conviction. Rather, it alleges that, after it already terminated him and he sought re-employment, MLSS denied his application and refused to rehire him. That he may have previously worked there is immaterial. The statute applies to "*any* application by *any* person." N.Y. Corrections L. § 751 (emphases added). Having already been terminated, Sassi's attempt to regain employment was plainly an "application" for employment as contemplated by the statute. Thus, its provisions apply and provide Sassi its protections as set forth therein.

For the same reason, Supreme Court's reliance upon the First Department's decision in Martino v. Consolidated Edison Co. of N.Y., Inc., 105 A.D.3d 575 (1st Dep't. 2013) is inapposite and does not support its holding (R-9). There, the plaintiff "allege[d] that his termination violated" Article 23-A and "contend[ed] that Correction Law § 752 protects current employees against adverse actions by employers based on convictions and arrests incurred while they are employed with the employers." Id. at 575. Again, by contrast, here Sassi does not challenge his termination, but rather his application to be rehired some sixty-days or so after he had already been terminated.

The same analysis applies with respect to Sassi's Section 296(15) claim. That section provides, in pertinent part:

It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association . . . to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of article twenty-three-A of the correction law.

N.Y. Exec. L. § 296(15).

By alleging that MLSS denied him employment – *i.e.*, denied his application for rehiring – in a manner that violated Article 23-A, Sassi amply alleges that MLSS denied him employment because he had been convicted of a criminal offense and, thus, amply pleads this claim.

In holding otherwise, Supreme court again focused on Sassi's prior employment and misconstrued his complaint as one challenging his termination rather than his re-application (R-9). And, to the extent the court, in quoting from Section 296(15), emphasized the words "having been" in reasoning that the past tense requires the conviction to have pre-dated the employment at issue, that reasoning fails to account for the fact that the proscription against denying employment to any person who has been convicted of a criminal offense includes a prohibition against denying an employment *application*, as such a denial plainly has the effect of denying someone employment. Thus, as in the case of Article 23-A, the provisions of which are expressly incorporated into Section 296(15) by

reference, in the case of an employment application, the criminal conviction need only predate the application, which it did here.

In short, New York's public policy is logical and clear – except in certain circumstances, a prior criminal conviction should not, in itself, preclude employment. See N.Y. Correction L. art. 23-A; N.Y. Exec. L. § 296(15); Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (1988); Marra v. White Plains, 96 A.D.2d 17, 22 (2d Dep't. 1983). And “it is the duty of courts to make sure that the Human Rights Law works and that the intent of the Legislature is not thwarted by a combination of strict construction of the statute and a battle with semantics.” City of Schenectady v. State Div. of Human Rights, 37 N.Y.2d 421, 428 (1975). Application of the relevant statutes to Sassi's circumstance as alleged in his Verified Complaint is not only consistent with – indeed, required by – their plain language, but also their underlying intent and policy goals.

CONCLUSION

Article 23-A of the New York State Correction Law applies, *inter alia*, to any application by any person for employment and, with narrow exceptions, prohibits employers from denying employment applications on the basis of the applicant's prior criminal conviction(s). Section 296(15) prohibits employers from denying employment to any person previously convicted of a crime where such denial also violates Article 23-A.

Here Sassi alleges in his Verified Complaint that, after MLSS had already terminated him and he completed his sixty-day sentence, he applied for re-employment with the company and was denied employment solely on the ground of his prior criminal conviction. These allegations fall squarely within the plain language of the relevant statutes and their underling policy goals. Accordingly, Supreme Court erred in holding that the statutes are inapplicable and, thus, its order should be reversed and vacated, Sassi's Verified Complaint reinstated and the matter remanded for further proceedings.

Dated: Goshen, New York
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Respectfully Submitted

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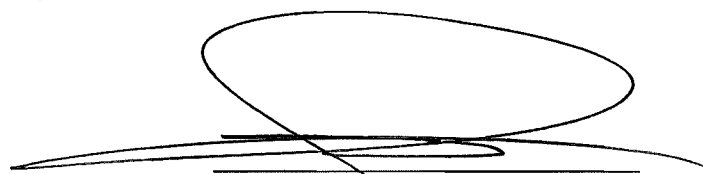
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Dated: Goshen, New York
July 10, 2017



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