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TO BE ARGUED BY:
KEITH GUTSTEIN, ESQ.
TIME REQUESTED: 15 MINUTES

**Supreme Court of the State of New York
Appellate Division: Second Department**

RICHARD J. SASSI II,

Plaintiff-Appellant,

**Appellate
Division
Docket No.
2017-00496**

-against-

MOBILE LIFE SUPPORT SERVICES, INC.,

Defendant-Respondent.

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RESPONDENT'S BRIEF

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Supreme Court, Dutchess County, Index No. 51918/2016

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF THE QUESTION PRESENTED 2

STANDARD FOR DISMISSAL 3

LEGAL ARGUMENT

 PLAINTIFF-APPELLANT FAILED TO STATE A CLAIM PURSUANT TO ARTICLE 23-A OF THE CORRECTIONS LAW OF THE STATE OF NEW YORK AND SECTION 296.15 OF THE EXECUTIVE LAW OF THE STATE OF NEW YORK 4

 A. The Termination of Plaintiff-Appellant’s Employment With Defendant-Respondent is Not Protected By Article 23-A or Section 296.15 4

 B. Plaintiff-Appellant Failed to State Any Claim in His Verified Complaint Relating To An Alleged Application for Employment 6

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Bonacorsa v. Van Lindt,
71 N.Y.2d 605 (NY Ct. of Appeals 1988) 9

Leon v. Martinez,
84 N.Y.2d 83, 87-88 (N.Y. Ct. of Appeals 1994) (citations omitted) 4

Marra v. White Plains,
96 A.D.2d 17 (2nd Dept. 1983) 10

Martino v. Consolidated Edison Co. of N.Y., Inc.,
105 A.D.3d 575 (1st Dept. 2013) 10, 11

Martino v. Consolidated Edison Co. of N.Y., Inc.,
2012 NY Slip Op 30408(U) (N.Y. Sup. Ct. 2012) 10

Statutes

Article 23-A of the Corrections Law of the State of New York 1-11

Section 296.15 of the Executive Law of the State of New York 1-8, 11

CPLR 3211 (a)(7) 3, 12

PRELIMINARY STATEMENT

Defendant-Respondent Mobile Life Support Services, Inc. (“Defendant-Respondent” or “Mobile Life Support”) submits this Respondent’s Brief in opposition to the subject appeal and respectfully requests that Hon. James V. Brands’ Decision and Order, dated December 14, 2016, dismissing Plaintiff-Appellant Richard J. Sassi II’s (“Plaintiff-Appellant”) Verified Complaint (the “Decision and Order”) be affirmed in its entirety.

In the Decision and Order, Judge Brands correctly noted that in the Verified Complaint “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). Because Plaintiff-Appellant undisputedly alleges in his Verified Complaint that his employment at Mobile Life Support was terminated due to a conviction that occurred during his employment, Judge Brands properly held that Article 23-A of the Corrections Law of the State of New York (“Article 23-A”) and Section 296.15 of the Executive Law of the State of New York (“Section 296.15”) do not apply. This is because Article 23-A and Section 296.15 only apply to convictions that occurred prior to one’s employment.

In the instant appeal, Plaintiff-Appellant attempts to circumvent statutory authority by portraying himself as an applicant applying for new employment after

his conviction, rather than an employee terminated for his current conviction. Plaintiff-Appellant's argument is misleading and contradicts Plaintiff-Appellant's allegations in the Verified Complaint, which makes no reference whatsoever to an application for employment subsequent to his conviction. As a result, Plaintiff-Appellant's claims lack all legal foundation. Consequently, the Decision and Order dismissing Plaintiff-Appellant's Verified Complaint must be affirmed.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

In what can best be described as an effort to misguide the Court, Plaintiff-Appellant argues that he allegedly re-applied for employment and allegedly had his re-application denied by Defendant-Respondent. As such, he maintains that he is protected by Article 23-A and Section 296.15. However, Plaintiff-Appellant's Verified Complaint fails to allege, or even make reference to a post-conviction application by Plaintiff-Appellant. Moreover, it fails to address any denial of a post-conviction application by Defendant-Respondent.

Instead, Plaintiff-Appellant's Verified Complaint details his attempts to "return" to work upon his release from jail and a subsequent termination meeting that took place with William Jeffries, Defendant-Respondent's Chief Operating Officer. *See* R-15, ¶ 28-29, and 31. Specifically, paragraph 31 of Plaintiff-Appellant's Verified Complaint describes this termination meeting and states that "Jeffries told plaintiff that, as the company had previously terminated others who

had been incarcerated, they had to be consistent and terminate plaintiff.” *See* R-15, ¶ 31. This allegation clearly describes a termination meeting, not communications between a purported applicant and potential employer. Significantly, Plaintiff-Appellant’s Verified Complaint failed to allege that any communications took place with any employee or representative of Defendant-Respondent after this termination meeting.

As Judge Brands correctly determined in his Decision and Order, Plaintiff-Appellant’s Verified Complaint is abundantly clear that he was simply seeking to “resume” his employment with Defendant-Respondent. *See* R-9. Thus, the question presented to this Court, based on the actual allegations set forth in Plaintiff-Appellant’s Verified Complaint, is whether Article 23-A and Section 296.15 protect an employee, who was convicted during his employment, from termination. Because the aforementioned statutes only apply to convictions that occurred prior to one’s employment, they cannot and do not offer protection to Plaintiff-Appellant in this action. Accordingly, Judge Brands’ Decision and Order dismissing Plaintiff-Appellant’s Verified Complaint must be affirmed.

STANDARD FOR DISMISSAL

Pursuant to CPLR 3211(a)(7), “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR 3211,

the pleading is to be afforded a liberal construction” in which the Court “accept(s) the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. Ct. of Appeals 1994) (citations omitted).

As set forth herein, because Article 23-A and Section 296.15 do not apply to convictions that occurred during one’s employment, Plaintiff-Appellant has failed to assert any claim that fits within any cognizable legal theory. Accordingly, Judge Brands’ Decision and Order dismissing Plaintiff-Appellant’s Verified Complaint must be affirmed.

LEGAL ARGUMENT

PLAINTIFF-APPELLANT FAILED TO STATE A CLAIM PURSUANT TO ARTICLE 23-A OF THE CORRECTIONS LAW OF THE STATE OF NEW YORK AND SECTION 296.15 OF THE EXECUTIVE LAW OF THE STATE OF NEW YORK

A. The Termination of Plaintiff-Appellant’s Employment With Defendant-Respondent is Not Protected By Article 23-A or Section 296.15

Judge Brands correctly dismissed the subject Verified Complaint because Plaintiff-Appellant failed to state any cognizable claim under Article 23-A or Section 296.15. §751 of Article 23-A explicitly states that “the provisions of this article shall apply to any application by any person for...employment...who has previously been convicted of one or more criminal offenses...and to

any...employment held by any person whose conviction of one or more criminal offenses...preceded such employment.” (emphasis added). In addition, §752 of Article 23-A further confirms that “No application for any...employment, and 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.” (emphasis added). Section 296.15 echoes Article 23-A and specifically states 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 twenty-three-A of the correction law.” Accordingly, Article 23-A and Section 296.15 do not apply to convictions, that, like in the present action, took place during an employee’s employment.

Plaintiff-Appellant’s Verified Complaint clearly alleges that Plaintiff-Appellant was convicted during his employment with Defendant-Respondent, and was subsequently terminated. As a result, neither Article 23-A nor Section 296.15 prohibited Plaintiff’s termination. Thus, Plaintiff-Appellant, in his Appellant’s Brief, was left with no choice but to admit that he is not challenging the termination of his employment.

Because the subject Verified Complaint failed to allege that Plaintiff-Appellant applied for employment subsequent to his conviction, and also failed to

allege any denial of an application post-conviction, Plaintiff-Appellant's appeal may only be successful if Plaintiff-Appellant's Verified Complaint properly alleged that his employment was terminated because of a conviction that occurred prior to his employment with Defendant-Respondent. Plaintiff-Appellant's admission that he is not challenging the termination of his employment is fatal to Plaintiff-Appellant's claims and confirms that the lower Court properly dismissed Plaintiff-Appellant's Verified Complaint.

B. Plaintiff-Appellant Failed To State Any Claim In His Verified Complaint Relating To An Alleged Application For Employment

In an apparent attempt to salvage his otherwise doomed claims, Plaintiff-Appellant mischaracterizes his own allegations to the Appellate Division by attempting to reclassify himself as an applicant who was denied employment because of a prior conviction. This attempt cannot succeed.

Likewise, in his Appellant's Brief, Plaintiff-Appellant incorrectly alleges that Judge Brands erred in dismissing the Verified Complaint by failing to view Plaintiff-Appellant's claims as one for failure to hire, and thus failing to review Article 23-A and Section 296.15's protections against denying employment applications of persons with previous convictions. It is presumed that Judge Brands did not review Article 23-A and Section 296.15's protections regarding employment applications for a very simple reason, namely Plaintiff-Appellant's Verified Complaint fails to allege any post-conviction application for employment.

Simply stated, that is not what these claims are about. Instead, Judge Brands correctly viewed Plaintiff-Appellant's alleged communications with Defendant-Respondent after his release from jail as an attempt "to resume his employment with defendant." *See* R-9. Because Plaintiff-Appellant was convicted during his employment with Defendant-Respondent and did not make any subsequent application, Judge Brands correctly held that Article 23-A and Section 296.15 do not apply.

If Plaintiff-Appellant was permitted to simply portray himself as an applicant who was first applying for a job after a conviction, rather than an active employee who was terminated because of a conviction, it would directly undermine the legislative intent of Article 23-A, essentially rendering it a futile statute. In other words, any employee terminated because of a conviction that occurred during their employment would simply be able to attempt to immediately reapply for the very same job they just lost and then argue that the refusal to immediately rehire violated Article 23-A (and by reference Section 296.15).

At no point in the Verified Complaint does Plaintiff-Appellant make any allegation that he was applying for or interviewing for a position at Defendant-Respondent after his conviction. Instead, as discussed above, Plaintiff-Appellant's Verified Complaint contains specific allegations of a termination meeting with William Jeffries, Defendant-Respondent's Chief Operating Officer, that took place

subsequent to Plaintiff-Appellant's conviction and release from jail. Fatal to Plaintiff-Appellant's argument that he was somehow an applicant looking for new employment is the undisputable fact that Plaintiff-Appellant's Verified Complaint fails to allege any communication, let alone any application or interview, that took place after this termination meeting.

If Plaintiff-Appellant was to now be considered an applicant reapplying for a job simply because he was notified of his termination upon attempting to return to work following his incarceration, it would frustrate the purpose of Article 23-A and Section 296.15. If such a person, like Plaintiff-Appellant, was intended to be protected by these statutes, then Article 23-A (and by reference, Section 296.15) would not have included the explicit exception that it only applies to convictions preceding employment.

Not surprisingly, yet quite daring in its omission, is the fact that Plaintiff-Appellant was unable to cite to any case law or legal authority in his Appellant's Brief that supports his position that a protected application for employment exists when an employee, who was convicted during his employment, asks to return to work immediately upon his release from jail. Strangely, Plaintiff-Appellant instead relies upon two cases to establish that a prior criminal conviction should not, in itself, preclude employment. Defendant-Appellant does not deny that Article 23-A and Section 296.15 protect applicants with prior convictions, but this

principle has no bearing on the case at hand. Accordingly, said cases, seemingly relied upon by Plaintiff-Appellant, are neither analogous nor applicable to the present action because Plaintiff-Appellant's conviction admittedly occurred during his employment.

The first such case cited by Plaintiff-Appellant, *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605 (NY Ct. of Appeals 1988), is readily distinguishable from the present action. First, the petitioner in *Bonacorsa* was applying for a license, not employment. *Id.* Second, while the petitioner had previously held the license prior to his conviction, his new application for which his claim was based was made 8 years after serving his sentence. *Id.* at 610. By comparison, even if Plaintiff-Appellant in the case at bar was to be considered an applicant like in *Bonacorsa*, Plaintiff-Appellant allegedly contacted Defendant-Respondent immediately upon his release from jail. Ultimately, despite the significant gap of time, the New York Court of Appeals in *Bonacorsa* held that the denial of the license application at issue did not violate Article 23-A. *Id.* at 615. Consequently, in the instant matter, as there was no gap in time between Plaintiff-Appellant's release from jail and his notice of termination, applying the Court of Appeal's rationale from *Bonacorsa*, there would be no violation of Article 23-A in the case at bar.

The second such case cited by Plaintiff-Appellant, *Marra v. White Plains*, 96 A.D.2d 17 (2nd Dept. 1983), involves another petitioner who was applying for a

license, not employment. Similar to the *Bonacorsa* matter, the *Marra* case has no relevance whatsoever to the present action.

Contrary to the cases relied upon by Plaintiff-Appellant, a case relied upon by Judge Brands in his Decision and Order, *Martino v. Consolidated Edison Co. of N.Y., Inc.*, 105 A.D.3d 575 (1st Dept. 2013), presents highly similar facts to those alleged by Plaintiff-Appellant and provides the proper basis for Judge Brands' conclusion. The plaintiff in *Martino*, like Plaintiff-Appellant in the present action, was convicted during his employment. *See Martino v. Consolidated Edison Co. of N.Y., Inc.*, 2012 NY Slip Op 30408(U) (N.Y. Sup. Ct. 2012). Moreover, like Defendant-Respondent here, the defendant in *Martino* subsequently terminated the plaintiff as a result of his conviction. *Id.* at 2. As is the case here, the plaintiff in *Martino* challenged the termination by alleging that his former employer violated Article 23-A. *Id.* The defendant responded by filing a Motion to Dismiss which was granted by the Court. *Id.* at 8.

Significantly, the Appellate Division affirmed the lower Court decision granting a Motion to Dismiss in this nearly identical case. *See Martino v. Consolidated Edison Co. of N.Y., Inc.*, 105 A.D.3d 575 (1st Dept. 2013). As the Appellate Division made abundantly clear in *Martino*, "(b)ecause plaintiff's conviction, and an additional subsequent arrest, occurred when he was already employed by (defendant), they do not provide a basis for a claim under Correction

Law article 23-A.” *Id.* Accordingly, as Plaintiff-Appellant readily admits, he does not have a viable claim for challenging the termination of his employment under Article 23-A or Section 296.15. As a result, because Plaintiff-Appellant did not allege any post-conviction application of employment in his Verified Complaint and because Plaintiff-Appellant failed to state a claim under either Article 23-A or Section 296.15 regarding the termination of his employment, Judge Brands’ Decision and Order dismissing Plaintiff-Appellant’s Verified Complaint should not be disturbed, and should be affirmed.

CONCLUSION

Defendant-Respondent respectfully requests that the Appellate Division affirm Judge Brands' Decision and Order dismissing Plaintiff-Appellant's Verified Complaint, with prejudice, pursuant to CPLR 3211(a)(7).

Dated: Woodbury, New York
September 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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