APL-2020-00045

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

State of New York
Court of Appeals

RICHARD J. SASSI, II,
Plaintiff-Appellant,

-against-

MOBILE LIFE SUPPORT SERVICES, INC.,
Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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Appellate Division, Second Department Docket Number: 2017-00496
Supreme Court, Dutchess County, Index Number: 51918/2016

DISCLOSURE STATEMENT

Defendant-Respondent Mobile Life Support Services, Inc. does not have any parents or subsidiaries and it is affiliated with the following entities: (i) Nimue Realty, LLC; (ii) Cripple Creek Realty, LLC; and (iii) Pandemonium Realty, LLC.

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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 the Decision & Order dated October 9, 2019 issued by the Supreme Court of the State of New York, Appellate Division: Second Judicial Department (the "Second Department's Decision & Order") be affirmed in its entirety.

The Second Department's Decision & Order affirmed Hon. James V. Brands' Decision and Order, from the Supreme Court of the State of New York, County of Dutchess, dated December 14, 2016, which dismissed Plaintiff-Appellant Richard J. Sassi II's ("Plaintiff-Appellant") Verified Complaint ("Judge Brands' Decision and Order"). In Judge Brands' 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-12). 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 and the Second

Department correctly "agree[d] with the Supreme Court's determination to grant the defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint." (R-2-3). 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 conviction that took place during his employment. 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 Second Department's Decision & Order affirming Judge Brands' 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 maintains that the question presented herein is whether Article 23-A and Section 296.15 protect a person who is fired because of a conviction that occurred during his employment, who thereafter seeks reemployment with that employer and purportedly has his/her application denied as a result of the prior conviction.

Plaintiff-Appellant's Verified Complaint, however, 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. As such, Plaintiff-Appellant's question presented is simply inapplicable to the present action.

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-31, ¶ 28-31. 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-31, ¶ 31. This allegation clearly describes a meeting to confirm a termination, 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-12. 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, a fact which is undisputed by the parties, Article 23-A and Section 296.15 cannot and do not offer protection to Plaintiff-Appellant in this action. Accordingly, the Second Department's Decision & Order affirming 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, a fact even admitted by

Plaintiff-Appellant in the Preliminary Statement of his brief, Plaintiff-Appellant has failed to assert any claim in this action that fits within any cognizable legal theory. Accordingly, the Second Department's Decision & Order affirming 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

The Second Department correctly affirmed Judge Brands' Decision and Order dismissing 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. *See* R-30, ¶ 17 and R-31, ¶ 28-31. As a result, neither Article 23-A nor Section 296.15 prohibited Plaintiff-Appellant's termination and the Second Department was correct to affirm Judge Brands' Decision and Order dismissing 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 Court of Appeals by attempting to reclassify himself as an applicant who was denied employment because of a prior conviction. This attempt cannot succeed.

In his brief, Petitioner-Appellant alleges that Judge Brands erroneously viewed Plaintiff-Appellant's claims as alleging wrongful termination instead of

wrongful failure to hire, and thus failed 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-12. 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.

Plaintiff-Appellant bizarrely spends the bulk of his brief analyzing the legislative intent and statutory language of Article 23-A and Section 295(15) regarding applicants with prior convictions. Defendant-Respondent readily admits that Article 23-A and Section 295(15) protect against applicants with prior convictions, but such an analysis is completely irrelevant to the present matter as it has absolutely nothing whatsoever to do with Plaintiff-Appellant's allegations in his Verified Complaint.

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. *See* R-30, ¶ 17 and R-31, ¶ 28-31. 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. *See* R-31-32.

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. Contrary to Plaintiff-Appellant's assertion in his brief, this argument is not misplaced because if Plaintiff-Appellant was considered an applicant in such a situation, it would in effect prevent employers from being able to terminate an employee who was convicted during their employment without analyzing the Article 23-A factors since such an employee would be entitled to return to his employment immediately upon release from jail simply by making a phone

call and confirming the termination of his employment. If 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.

In his brief, Plaintiff-Appellant cites to *Kimmel v. State of New York*, 29 N.Y.3d 386, 396 (2017) to emphasize how statutes are to be "liberally construed to carry out the reforms intended…" The text of Article 23-A (and by reference, Section 295.15), however, clearly confirms that it was intended to protect applicants and employees with prior convictions; not those who were convicted during their employment. As such, if Plaintiff-Appellant, who fails to allege any communications taking place after a termination meeting immediately following his release from jail, 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. *See* R-31-32. 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). Such an application would render the exception that Article 23-A (and by reference Section 296.15) apply to

convictions preceding employment (and not to convictions occurring during employment) meaningless.

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 Brief that supports his position that a protected application for employment somehow exists when an employee, who was convicted during his employment, simply asks about returning to work immediately upon his release from jail. Strangely, Plaintiff-Appellant instead relies upon two cases which support the position that an applicant's prior criminal conviction should not, in itself, preclude employment. As discussed above, 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 and Plaintiff-Appellant failed to allege any subsequent application in the Verified Complaint. *See* R-29-32.

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 significant 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. *See* R-31, ¶ 28-31

Similarly, the second such case cited by Plaintiff-Appellant, *Matter of Acosta v. New York City Dep't. of Educ.*, 16 N.Y. 309 (NY Ct. of Appeals 2011), is unrelated to the present action. In *Matter of Acosta*, the petitioner was almost ten years removed from her release from prison (as opposed to Plaintiff-Appellant who had just been released from jail) and it dealt with her application for Department of Education security clearance and the Department of Education's failure to consider all of the Article 23-A factors asserted in New York Correction Law § 753. *See Matter of Acosta* at 315-318 and R-31, ¶ 28-31. Here, however, there was no alleged application after Plaintiff-Appellant's release from jail and there was no requirement by Defendant-Respondent to analyze such factors because, as discussed above, New

York Correction Law § 752 clearly confirms that Article 23-A only applies to an individual who has "been previously convicted of one or more criminal offenses." (emphasis added) *See* R-31-32. Here, by comparison, despite Plaintiff-Appellant's repeated attempts to allude to some form of application that neither existed nor is plead in the Verified Complaint, the only action alleged in the Verified Complaint to have been taken against Plaintiff-Appellant by Defendant-Respondent was the termination of his employment due to a conviction that occurred during his employment. *See* R-29, ¶ 9, R-30, ¶ 17, and R-31, ¶ 31. Thus, the Article 23-A factors discussed in *Matter of Acosta* are completely inapplicable to the present matter.

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, like what occurred here, 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.*

Similarly, earlier this year, the Appellate Division in *Matter of Hodge v. New York City Tr. Auth.*, 180 A.D.3d 490 (1st Dept. February 13, 2020) affirmed a lower Court decision dismissing a petitioner's Article 78 action involving an employee who plead guilty to a misdemeanor during his employment and who subsequently had his request for reinstatement denied. *See also Matter of Hodge v. New York City Tr. Auth.*, 2019 N.Y. Misc. LEXIS 946 (N.Y. Sup. Ct. 2019). In *Matter of Hodge*, an arbitrator issued a Preliminary Opinion and Award holding that the employer "had cause to terminate" the petitioner after the petitioner had plead guilty to a misdemeanor during his employment. *Id*. at 2. Only twenty two days later, the petitioner requested reinstatement and this request was denied by the employer. *Id*. at 3. As such, the petitioner in *Matter of Hodge* actually sought reinstatement after

receiving confirmation that his employment had been terminated, an additional step that Plaintiff-Appellant did not take as evidenced by Plaintiff-Appellant's failure to allege any communications after the termination meeting with Mr. Jeffries, but as discussed below, Article 23-A still did not apply.

In dismissing the proceeding, the lower Court held that the petitioner "entered into a plea deal for a misdemeanor during his employment with Respondent and not before. Petitioner fails to meet his burden of demonstrating that the Respondent's denial of Petitioner's request for reinstatement should be disturbed by the Court." *Id*. at 7. Moreover, in affirming the lower Court's decision, the Appellate Division held that "[i]t was not irrational for respondent to conclude that in seeking reinstatement, petitioner merely sought to relitigate issues presented approximately six weeks before his reinstatement request, and decided three weeks beforehand by a neutral arbitrator…which resulted in his termination." *Matter of Hodge v. New York City Tr. Auth.*, 180 A.D.3d 490, 491 (1st Dept. February 13, 2020).

Accordingly, 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, the Second Department's Decision & Order affirming Judge Brands' Decision and Order dismissing Plaintiff-Appellant's Verified Complaint should be affirmed. *See* R-30-32.

CONCLUSION

Defendant-Respondent respectfully requests that the Court of Appeals affirm the Second Department's Decision & Order affirming Judge Brands' Decision and Order dismissing Plaintiff-Appellant's Verified Complaint.

Dated: Woodbury, New York
July 29, 2020

Respectfully submitted,

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Affidavit of Service by Mail

RICHARD J. SASSI, II v. MOBILE LIFE SUPPORT SERVICES, INC.

Supreme Court, Dutchess County, Index Nos. 51918/2016 and 2017-00496

State of New York }
County of Kings }

Jonathan Didia being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed by Dick Bailey Service, Inc.

on Thursday, July 30, 2020 deponent served 1 copy(s) of the within

Brief[X] Record[ ] Appendix[ ] Notice[ ] Other [ ]_____

upon

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by mailing the paper to the person at the address designated by him or her for the purpose by depositing the same in a first class, postpaid, properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York pursuant to CPLR 2103 (b)(2).

Jonathan Didia

Sworn to before me
Thursday, July 30, 2020

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2022

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