State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 5, 2026 CV-25-1354

SUSAN ROSENTHAL,
Appellant,
v OPINION AND ORDER

STATE OF NEW YORK,
Respondent.

Calendar Date: September 16, 2026

Before: Reynolds Fitzgerald, J.P., McShan, Mackey and Corcoran, JJ.

Storch Byrne LLP, New York City (*Edward Dolido* of counsel), for appellant.

Letitia James, Attorney General, New York City (*Raymond D. Moss* of counsel), for respondent.

Mackey, J.

Appeal from an order of the Court of Claims (Zainab Chaudhry, J.), entered March 27, 2025, which, among other things, granted defendant's motion to dismiss the amended claim.

Claimant formerly served as the President and CEO of the Roosevelt Island Operating Corporation (hereinafter RIOC). According to claimant, during her tenure she repeatedly raised concerns regarding what she understood to be potential safety issues related to certain steam tunnels, but no action was taken to address those concerns. In June 2020, she was terminated and, shortly thereafter, a senior advisor to then-Governor Andrew M. Cuomo informed the New York Post that claimant's termination had followed

a complaint and related investigation finding that she had used "racially and sexually offensive" language.

Claimant thereafter unsuccessfully pursued various claims stemming from her termination against RIOC and defendant, among others, via a CPLR article 78 proceeding and a separate plenary action.[1] Ultimately, in February 2023, claimant commenced the instant action against defendant,[2] alleging retaliatory termination under New York's whistleblower statute (*see* Labor Law § 740; *see also* Civil Service Law § 75-b) stemming from her disclosure of concerns pertaining to steam-tunnel safety, as well as common-law defamation and a violation of 42 USC § 1983 based upon defendant's public comments regarding claimant's termination. Claimant later filed an amended claim, replacing the section 1983 claim with one alleging violation of her due process rights under NY Constitution, article I, § 6, asserting that defendant's public statements against her, combined with the failure to afford her a name-clearing hearing, constituted a "stigma plus" injury. The Court of Claims granted defendant's subsequent motion to dismiss the amended claim, finding that it lacked jurisdiction relative to the retaliation

[1] In October 2020, claimant filed a CPLR article 78 petition against RIOC and defendant, among others, alleging various violations of state and federal law and seeking, among other things, back pay and reinstatement. While that matter was pending, in April 2021, claimant commenced a plenary action against the same defendants asserting, among other things, retaliation pursuant to Labor Law § 740, a violation of 42 USC § 1983, and common-law defamation. The CPLR article 78 proceeding was dismissed in July 2021, after Supreme Court (Engoron, J.) concluded that the "determination to terminate [claimant] clearly was not irrational" (*Matter of Rosenthal v Roosevelt Is. Operating Corp.*, 2021 WL 2891517, *2 [Sup Ct, NY County, July 6, 2021], *affd* 209 AD3d 598 [1st Dept 2022]). The plenary action was also dismissed in its entirety; however, the Labor Law § 740, 42 USC § 1983 and common-law defamation claims were dismissed "without prejudice as they were improperly brought in Supreme Court, instead of before the Court of Claims" (*see Rosenthal v Roosevelt Is. Operating Corp.*, 221 AD3d 551, 551-552 [1st Dept 2023]).

[2] Although both the claim and the amended claim named three individual defendants, upon claimant's concession, the Court of Claims sua sponte amended the caption to reflect the State of New York as the only named defendant.

claim, that claimant had adequate alternative remedies in lieu of a constitutional tort, and that claimant's defamation claim was untimely.[3] Claimant's appeal to this Court ensued.

We turn first to claimant's challenge to the dismissal of her due process claim predicated upon a violation of the NY Constitution. "While a private cause of action to recover monetary damages for state constitutional violations is permissible in certain limited situations, this narrow remedy does not apply where an adequate remedy is available to the claimant in an alternate forum" (*Alsaifullah v State of New York*, 166 AD3d 1426, 1426 [3d Dept 2018] [citations omitted]; *see Gomez v State of New York*, 249 AD3d 1286, 1287 [3d Dept 2026]). Remedies are deemed "available" irrespective of whether a claimant has elected to pursue them (*see generally Waxter v State of New York*, 33 AD3d 1180, 1182 [3d Dept 2006]; *Bullard v State of New York*, 307 AD2d 676, 679 [3d Dept 2003]).

The claim here was predicated upon claimant's assertion that defendant's "dissemination of . . . false accusations" to a news reporter in connection with her termination from employment, together with the failure to afford her a hearing to dispute the allegations against her, inflicted a "stigma plus" injury. In view of these allegations, and contrary to claimant's arguments, we find that she had several adequate alternative remedies in which to raise her constitutional due process claim, including a name-clearing hearing pursuant to CPLR article 78 (*see Wilcox v Newark Val. Cent. Sch. Dist.*, 107 AD3d 1127, 1133 [3d Dept 2013]), a common-law tort claim (*see Waxter v State of New York*, 33 AD3d at 1181; *Augat v State of New York*, 244 AD2d 835, 837 [3d Dept 1997], *lv denied* 91 NY2d 814 [1998]), and a federal civil rights lawsuit pursuant to 42

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[3] In the meantime, in November 2023, claimant commenced a separate action in federal court against RIOC and others, asserting a stigma-plus due process claim under the US Constitution. The District Court granted the defendants' motions to dismiss based upon res judicata, finding that claimant could have, but failed, to assert a due process claim against the named defendants in her CPLR article 78 proceeding or her plenary action (*Rosenthal v Roosevelt Is. Operating Corp.*, 2025 WL 1518240, 2025 US Dist LEXIS 101221 [SD NY, May 28, 2025, No. 23 Civ 9660 (DEH)], *vacated by* 185 F4th 48 [2d Cir 2026]). On appeal to the Second Circuit, and while the instant appeal before this Court remained pending, the federal appeals court vacated the District Court's judgment and remanded for further proceedings, finding that claimant's 42 USC § 1983 claim was never adjudicated on the merits inasmuch as the prior dismissal of same in state court had been without prejudice (*Rosenthal v Roosevelt Is. Operating Corp.*, 185 F4th 48 [2d Cir 2026]).

USC § 1983 (*see Alsaifullah v State of New York*, 166 AD3d at 1426-1427). We are unpersuaded by claimant's contention that her due process claim is distinct from her cause of action for defamation, inasmuch as both are based upon the same underlying facts and seek identical damages (*see generally Batista v City of Yonkers*, 243 AD3d 863, 865 [2d Dept 2025]; *NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc*., 167 AD3d 1305, 1309 [3d Dept 2018]). Accordingly, the Court of Claims properly dismissed that part of the claim (*see Jones v State of New York*, 171 AD3d 1362, 1363-1364 [3d Dept 2019], *appeal dismissed* 33 NY3d 1056 [2019]; *Alsaifullah v State of New York*, 166 AD3d at 1426-1427; *Lyles v State of New York*, 2 AD3d 694, 695-696 [2d Dept 2003], *affd* 3 NY3d 396 [2004]).

We similarly find that claimant's cause of action for defamation was properly dismissed as untimely. Pursuant to Court of Claims Act § 11 (b), the State's waiver of sovereign immunity is conditioned upon, among other requirements, service of a timely notice of intention to file a claim specifying "the time when and place where such claim arose[and] the nature of same." "[A]lthough absolute exactness is not necessary, a claimant must provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" (*Viscuso v State of New York*, 238 AD3d 1402, 1404 [3d Dept 2025] [internal quotation marks and citations omitted]; *see Berg v State of New York,* 228 AD3d 1077, 1077 [3d Dept 2024]). As to timeliness, "[a] claim to recover damages for injuries to property or for personal injuries caused by the intentional tort of an officer or employee of the state . . . shall be filed and served upon the attorney general within [90] days after the accrual of such claim, unless the claimant shall within such time serve upon the attorney general a written notice of intention to file a claim therefor, in which event the claim shall be filed and served upon the attorney general within one year after the accrual of such claim" (Court of Claims Act § 10 [3-b]; *see Ross v State of New York,* 217 AD3d 1225, 1225 [3d Dept 2023]). "Because the timeliness requirements imposed by the Court of Claims Act have jurisdictional implications, they must be strictly construed" (*Ross v State of New York,* 217 AD3d at 1225 [internal quotation marks and citations omitted]).

Claimant's lengthy pursuit of her various claims against defendant, and others, arising from her termination and defendant's subsequent remarks to the press have spanned multiple actions and forums. Succinctly, and as claimant and defendant agree, whether claimant's cause of action for defamation is timely hinges upon whether her earlier CPLR article 78 petition can be construed as a notice of intention to file a claim under Court of Claims Act § 11. In this regard, claimant concedes that her earlier petition does not expressly set forth a defamation claim. She nevertheless contends that her

petition relied upon the same underlying facts as the instant defamation claim such that it met the requisite notice of intention requirements. As the Court of Claims noted, however, nothing in claimant's petition asserted that she had suffered reputational damages as a result of defendant's reported allegations to the press, she did not seek the same relief as she does in the instant matter, nor did she apprise defendant that monetary damages would also be sought. Accordingly, we agree that claimant's CPLR article 78 petition failed to adequately apprise defendant of the possibility that an action for defamation would be brought so as to meet the requirements for a notice of intention to file a claim for purposes of Court of Claims Act § 11 (*see* Court of Claims Act § 11 [b]; *Czynski v State of New York*, 53 AD3d 881, 883 [3d Dept 2008], *lv denied* 11 NY3d 715 [2009]). Claimant's defamation claim was thus properly dismissed as untimely (*see* Court of Claims Act § 10 [3-b]).

We agree with claimant, however, that her whistleblower claim should not have been dismissed. Initially, the Court of Claims dismissed this claim upon finding that it lacked jurisdiction over RIOC, which the court had deemed to be claimant's employer. Significantly, however, defendant concedes, and we agree, that there exists a question of fact as to whether defendant was claimant's de facto employer such that this issue should not have been resolved on a motion to dismiss (*see generally Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; *Cain v North Country Community Coll.*, 249 AD3d 1430, 1432-1433 [3d Dept 2026]). Notwithstanding that, defendant contends that dismissal was proper for failure to state a claim, arguing that the underlying factual allegations were insufficient to support a whistleblower-based retaliation claim.

"On a motion to dismiss a claim, we afford the pleading a liberal construction and accept the facts alleged as true, according the claimant the benefit of every possible favorable inference" (*A.J. v State of New York*, 231 AD3d 237, 238-239 [3d Dept 2024] [citations omitted]). This Court's "role is not to assess the ultimate merits of the claim, but rather to determine whether the pleading states a cause of action" (*Draina v Town of Ballston*, 250 AD3d 1429, 1430 [3d Dept 2026]; *see A.J. v State of New York*, 231 AD3d at 239). At issue here, pursuant to Civil Service Law § 75-b (2) (a), "[a] public employer shall not dismiss . . . a public employee . . . because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably

believes constitutes an improper governmental action" (*see Matter of Hardy v Kraham*, 224 AD3d 946, 949-950 [3d Dept 2024]).[4]

In support of her whistleblower claim, claimant alleged that her employment was terminated in retaliation for raising safety concerns regarding the condition of certain abandoned steam tunnels. According to claimant, engineering studies from 2012 and 2017 revealed that the tunnels were in disrepair and that there could be "catastrophic results" in the event of a significant weather event. Thereafter, between 2017 and June 2020 claimant repeatedly attempted to inform defendant of her concerns and to devise a plan to mitigate the potential risk posed by the steam tunnels, but her efforts were dismissed. In addition to drafting a memorandum, claimant avers that she continued to raise her concerns with the then-deputy secretary for economic development "every other week" over the course of "many months," but that no action was taken. Claimant alleged that she was terminated in retaliation for her persistent efforts to call attention to, as she believed, this public safety issue. In turn, she argues that defendant's failure to take action in response to the safety issue alleged amounted to criminal nuisance in the second degree, arguing that defendant knowingly and recklessly maintained a dangerous condition (*see* Penal Law § 240.45 [1]).

Initially, contrary to defendant's assertion, we find that claimant's allegations concerning defendant's *inaction* with respect to the steam tunnels are sufficient to support a retaliation claim under Civil Service Law § 75-b. It is axiomatic that government inaction may have as profound adverse effects to public safety and health as that of an active response. Indeed, whether to respond actively or passively to a safety concern is an affirmative choice taken. By way of example, we can scarcely conceive of a scenario in which whistleblower protections would be denied, as a matter of law, to an employee who discloses a governmental failure to investigate a credible threat to the life or safety of a public figure. To be sure, in an analogous case concerning the application of Labor Law § 740, which provides whistleblower protections for retaliation by private

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[4] Claimant's whistleblower-based retaliation claim was premised upon protections afforded under Labor Law § 740, which concerns private employers. Nevertheless, "[i]t is clear from a reading of Civil Service Law § 75-b (1) (b) that plaintiff was a 'public employee' as defined by that statute and therefore entitled to its protection" and "[t]he fact that plaintiff commenced her action in the form prescribed by Labor Law § 740 makes no difference" (*Hanley v New York State Exec. Dept., Div. for Youth*, 182 AD2d 317, 320, 321 [3d Dept 1992]; *see* Civil Service Law § 75-b [3] [c]; *see generally Frank v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 187 [3d Dept 2011]).

employers, the First Department has previously found that a defendant's discouragement of reporting suspected child abuse was sufficient misconduct to state a claim under that statute, as such "alleged inaction might result in further abuse or maltreatment" of children (*Villarin v Rabbi Haskel Lookstein Sch.*, 96 AD3d 1, 8 [1st Dept 2012]). Accordingly, we now hold that government action, whether passive inaction or an affirmative step taken, may support a Civil Service Law § 75-b claim. To hold the contrary would undermine the salutary purpose of this state's whistleblower protections designed to "encourag[e] employees to report violations of health and safety laws and regulations" (*Bordell v General Elec. Co.*, 208 AD2d 219, 221 [3d Dept 1995], *affd* 88 NY2d 869 [1996]; *see DaCosta v New York City Dept. of Bldgs.*, 203 AD3d 571, 572-573 [1st Dept 2022]).

Accordingly, accepting the facts alleged in the claim as true, and granting claimant the benefit of every possible favorable inference, we conclude that claimant sufficiently alleged a cause of action for a whistleblower retaliation claim pursuant to Civil Service Law § 75-b (2) (a). Specifically, she sufficiently alleged that defendant's inaction in response to claimant's disclosure of a potential safety risk constituted a violation of law, resulting in a substantial and specific danger to public health or safety, and that her persistent disclosure of her concerns in this regard resulted in her termination (*see* Civil Service Law § 75-b [2] [a]). Claimant's retaliation claim under Civil Service Law § 75-b was thus improperly dismissed. Defendant's remaining contentions, to the extent not expressly addressed herein, have been examined and found to be unpersuasive.

Reynolds Fitzgerald, J.P., McShan and Corcoran, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendant's motion to dismiss claimant's cause of action for retaliation; motion denied to that extent; and, as so modified, affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court