

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

NEAL CUEVAS,

CASE NO.: 2018-011899-CA-01

Plaintiff,

v.

CITY OF NORTH MIAMI,

Defendant.

_____ /

**CITY’S RESPONSE TO PLAINTIFF’S MOTION TO RECONSIDER ORDER OF
DISMISSAL WITH PREJUDICE AND/OR FOR REHEARING**

Defendant, City of North Miami (the “City”), by and through undersigned counsel, hereby submits this Response in Opposition to Plaintiff’s Motion to Reconsider Order of Dismissal with Prejudice and/or for Rehearing (“Motion”), and in support thereof provides:

I. Introduction

The Court should deny the Motion without further hearing because it fails to raise any new matter that the Court overlooked or failed to consider when granting the City’s Motion to Dismiss Plaintiff’s Amended Complaint with prejudice.¹ To the contrary, the Plaintiff simply repeats—and even quotes—the same arguments already made in opposition to the City’s motion. In effect, the Plaintiff’s Motion just assumes the Court must have failed to hear him the first time. That is not a sufficient basis for rehearing or reconsideration.

In addition, Plaintiff overlooked the Court’s second ground for dismissal, which is a lack of causation between Plaintiff’s activities and an adverse employment action. Therefore, even if

¹ The Court’s Order is attached hereto as Exhibit 1.

the Court erred regarding the first ground (which it did not), the Court's order is still supported by the lack of factual allegations establishing the essential element of causation.

In sum, the Motion fails to satisfy the standard necessary to receive a rehearing or reconsideration. As a result, the Court should deny Plaintiff's Motion without further oral argument. *See Alberger v. Harvison*, 342 So. 2d 537, 539 (Fla. 3d DCA 1977) (aff'ing denial of Rule 1.530 motion without hearing, where no new matter was raised in motion that had not already been argued before trial judge); *Aubourg v. Erazo*, 922 So. 2d 1106, 1108 (Fla. 4th DCA 2006) (due process not entitled movant to hearing on Rule 1.530 motion); *Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 (Fla. 4th DCA 1994) (motion that attempted to re-litigate issues already covered was facially deficient, not entitled to hearing.); *Carnell v. Carnell*, 398 So. 2d 503, 507 (Fla. 5th DCA 1981) ("As to the motion for rehearing, we find that the Fla. R. Civ. P. do not specifically provide for a hearing.").

II. Plaintiff's Motion Does Not Raise Any New Matters For The Court to Consider.

The purpose of a motion for rehearing is to give the Court an opportunity to consider matters that it overlooked or failed to consider. *Balmoral Condominium Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013); *Francisco v. Victoria Marine Shipping, Inc.*, 486 So. 2d 1386, 1389 (Fla. 3d DCA 1986); *Pingree v. Quaintance*, 394 So. 2d 161, 162 (Fla. 1st DCA 1981) (citing *Diamond Cab Co. of Miami v. King*, 146 So. 2d 889 (Fla. 1962)).

Plaintiff's Motion does not raise any new matters. Plaintiff argues that the Court "ignored the factual allegations" of the Amended Complaint, apparently referring to Plaintiff's hyperbolic allegations of malfeasance on the part of the City. However, Plaintiff raised the issue of these allegations in his Response to the Motion to Dismiss and during argument on the Motion to Dismiss. Indeed, Plaintiff quotes from portions of the hearing transcript in which his counsel

specifically addressed this issue. *See* Motion, ¶ 11 and Exhibit B, pp. 10-11. The allegations in the Complaint are certainly not new matters supporting a motion for rehearing or reconsideration.

There is also nothing new about Plaintiff's argument concerning the requirements of the Florida Whistleblower's Act. § 112.3187, Fla. Stat. ("Whistleblower's Act"). Just as his counsel already argued, Plaintiff again asserts that the Court dismissed the claim because the Court has imposed an authorization requirement upon the Whistleblower's Act. Motion at ¶ 7. Plaintiff also raised this issue during the hearing on the Motion to Dismiss. Motion, Exhibit B at p. 11 ("It is not a determination on a motion to dismiss whether the employee was correct or incorrect about identifying perceived wrongs.").

Plaintiff's inclusion of an isolated quote from the Court, made during argument, does not reflect the basis for the Court's ruling. *See* Motion, ¶ 8 (quoting Ex. B at p. 14). The Court's observation that the allegedly protected disclosure was "an unauthorized memorandum at best" is not a finding made by the Court in support of its ruling. The Order granting the City's Motion to Dismiss states that "Plaintiff's Amended Complaint is dismissed with prejudice for the reasons stated in Defendant's Motion and stated on the record." The City's Motion to Dismiss never asserted that the unauthorized nature of Plaintiff's alleged disclosure was a basis for dismissal. Rather, the City pointed out that Plaintiff's attempt to place himself in an appellate role over decisions made by an independent panel is not a protected activity. As the Court stated:

The Court doesn't see this as whistleblower activity. It wasn't a whistleblower act, it was as far as the Court is concerned a comment on a disposition panel's report that he had no basis in his position to even comment on whatsoever. There was no adverse employment action that occurred as a result of this non-whistleblower memo.

Motion, Ex. B at p. 18.

It is clear from the record included with the Motion that Plaintiff is unable to point to any

matter the Court overlooked or failed to consider. The very arguments the Plaintiff makes now are the same ones he made previously. Plaintiff simply disagrees with the Court, which is a matter for an appellate court, not reconsideration or rehearing. Accordingly, Plaintiff's Motion should be denied.

III. Plaintiff Fails To Address Dismissal Of The Complaint Due To A Lack Of Causation.

Regardless of whether Plaintiff engaged in any protected activity, he cannot avoid dismissal due to the lack of causation. A causal connection between a protected activity and an adverse employment action is a fundamental element of any Whistleblower's Act claim.² Allegations supporting a causal connection are patently missing from Plaintiff's pleadings. Even if the Court's analysis of Plaintiff's activities was incorrect, which it is not, the Court nevertheless found that "[t]here was no adverse employment action that occurred as a result of this non-whistleblower memo." Therefore, dismissal with prejudice would still be required even if Plaintiff's Motion had identified something the Court overlooked regarding whether Plaintiff's activities were protected by the Whistleblower's Act. Nowhere in his Motion does Plaintiff claim that the Court erred in finding no factual support for causation. The Court's decision is sound for this reason as well and need not be revisited as Plaintiff urges.

WHEREFORE, the City of North Miami respectfully requests that this Court enter an Order denying Plaintiff's Motion to Reconsider Order of Dismissal with Prejudice and/or for Rehearing.

² To state a claim under the Whistleblower's Act, a plaintiff must allege that: "(1) she engaged in statutorily protected expression, (2) she suffered a materially adverse action of a type that would dissuade a reasonable employee from engaging in statutorily protected activity, and (3) there was some causal relation between the events." *Rutledge v. SunTrust Bank*, 262 Fed. Appx. 956, 958 (11th Cir. 2008) (citations omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Portal Service to Michael A. Pizzi, Esq., mpizzi@pizzilaw.com, Attorney For Plaintiff, Michael A. Pizzi, P.A., 6625 Miami Lakes Drive East, Suite 316, Miami Lakes, FL 33014, and Benedict P. Kuehne, Esq. ben.kuehne@kuehnelaw.com, mdavis@kuehnelaw.com, efiling@kuehnelaw.com, Co-Counsel for Plaintiff, Kuehne Davis Law, P.A., 100 SE 2nd St., Suite 3550, Miami, FL 33131, on January 2, 2019.

By: /s/ Michael S. Kantor

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CIVIL DIVISION

NEAL CUEVAS,

CASE NO.: 2018-011899-CA-01

Plaintiff,

v.

CITY OF NORTH MIAMI,
LARRY JURIGA, and
LARRY SPRING,

Defendants.

ORDER ON DEFENDANT CITY OF NORTH MIAMI'S MOTION TO DISMISS

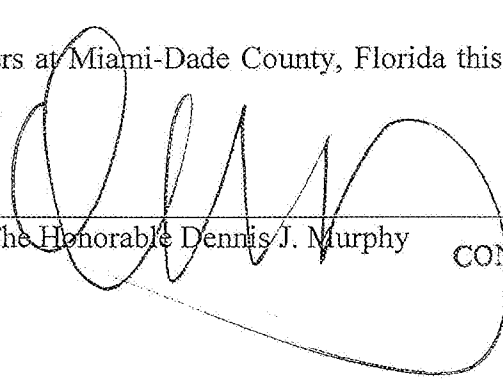
THIS CAUSE, having come before the Court upon the City of North Miami's Motion to Dismiss Plaintiff's Amended Complaint, and having heard the argument of counsel at a hearing November 15, 2018 on ~~October 19, 2018~~, it is hereby

ORDERED AND ADJUDGED as follows:

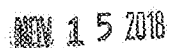
1. The City's Motion to Dismiss Plaintiff's Amended Complaint is granted.
Plaintiff's Amended Complaint is dismissed with prejudice for the reasons stated in Defendant's Motion and stated on the record.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 15 day of November, 2018.

cc: All counsel of record


The Honorable Dennis J. Murphy

CONFORMED COPY



DENNIS J. MURPHY
CIRCUIT COURT JUDGE