

**Cogle v Bergstein**

2013 NY Slip Op 32955(U)

November 18, 2013

Supreme Court, New York County

Docket Number: 157562/12

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN
Justice

PART 52

Cogle

-v-

Bergstein

INDEX NO. 157562/12

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1

Answering Affidavits — Exhibits No(s) 2

Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/18/13

HON. MARGARET A. CHAN J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked) DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY, PART 52**

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**PAULETTE COGLE,**

*Plaintiff,*

*-against-*

**DAVID BERGSTEIN, KIM FITZPATRICK, ERIC  
LEIBERT, MADEL SURAVILA, NEW YORK CITY  
HEALTH AND HOSPITAL CORPORATION,  
BELLEVUE HOSPITAL CENTER, CITY OF NEW  
YORK,**

*Defendants.*

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**Index Number: 157562/2012**

**DECISION/ORDER**

**HON. MARGARET CHAN**

**Justice, Supreme Court**

Defendants jointly made the instant motion to dismiss the action pursuant to CPLR § 3211(a)(5) and (7). Plaintiff was a registered nurse employed by defendant New York City Health and Hospital Corporation (HHC) at Bellevue Hospital. Plaintiff alleged two causes of action: (1) defendants Bergstein, Fitzpatrick, Leibert, and Suravila defamed plaintiff; and (2) defendants The City of New York (the City) and HHC subjected plaintiff to discrimination in violation of New York City (“City HRL”) and State Human Rights Laws (“State HRL”). Defendants argued that the complaint failed to state a cause of action and that some defamation claims are time barred. The plaintiff submitted a memorandum in opposition with a request for leave to amend her complaint.

Plaintiff began her employment as a registered nurse with HHC at Bellevue Hospital in 2003. Plaintiff claimed she was the subject of a suspension based on defamatory statements made by defendants Bergstein and Fitzpatrick, who were both social workers for HHC. Plaintiff alleged that defendants Bergstein and Fitzpatrick informed HHC that plaintiff engaged in the use of profanity, threats, other abusive language to other staff members and patients. Plaintiff further alleged that defendants Leibert, a medical doctor, and Suravila, a nurse, also made defamatory statements to plaintiff’s supervisor and that plaintiff was disrespectful to patients. Plaintiff claimed the statements made by Leibert and Suravila resulted in plaintiff’s being transferred in May 2010 from her assigned floor to a less desirable location.

Plaintiff claimed that after her transfer she was granted a reasonable accommodation to work in a maternal unit because of a back problem and other medical problems known to her employer.<sup>1</sup> Plaintiff was transferred again in September 2012 to a patient rehabilitation unit where she had to lift items and stand for long periods. Working in the rehabilitation unit, plaintiff claimed, failed to reasonably accommodate her. Plaintiff was not able to find work elsewhere at HHC due to her prior suspension.

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<sup>1</sup> Plaintiff failed to specify those other medical problems or describe her back problems in her pleadings.

In considering a CPLR§3211 motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994] *citing Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). “In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards.” (*Vig v New York Hairspray Co.*, 67 AD3d 140, 145 [1<sup>st</sup> Dep’t 2009]). This is a more liberal standard where plaintiff is only required to provide fair notice of the nature of the claim and the underlying facts but not necessarily plead specific facts establishing a *prima facie* case of discrimination (*see id* at 145 *citing Swierkiewicz v. Sorema N.A.*, 534 US 506 [2002]<sup>2</sup>).

First discussing the defamation claims as to defendants Bergstein and Fitzpatrick, they are dismissed for failure to comply with the requirements of CPLR § 3016(a). Plaintiff failed to state the “particular words complained of” in the complaint (CPLR § 3016(a)). Further, plaintiff failed to “allege the time, place and manner of the false statement and to specify to whom it was made.” (*Dillon v City of New York*, 261 AD2d 34, 38 [1<sup>st</sup> Dept 1999]). Plaintiff’s reliance on *Rossignol v Silvernail*, 185 AD2d 497 (3<sup>rd</sup> Dep’t 1992) is misplaced and not controlling here. In *Rossignol*, defamatory statements proven at trial did not mirror the complaint’s specific quotation. That case does not relieve plaintiff from pleading the statements with particularity here pursuant to CPLR § 3016(a). Therefore, the defamation claims as to defendants Bergstein and Fitzpatrick are dismissed.

As to plaintiff’s claims of defamation as to defendants Leibert and Suravila, defendants asserted that they are time-barred. Plaintiff failed to address this argument in her opposition and thus that claim is abandoned (*see Gary v Flair Beverage Corp.*, 60 AD3d 413 [1<sup>st</sup> Dep’t 2009]). In any event, pursuant to CPLR § 215(3) there is a one year statute of limitations for defamation actions. Plaintiff asserted the defamatory statements were made by Leibert and Suravila in 2010, but this action was not brought until 2012. Therefore, the defamation claims as to defendants Leibert and Suravila are dismissed.

Turning to the discrimination claims, the matter is dismissed as against the City of New York as it is not a proper party here. Plaintiff argued that defendant City of New York funds, administers and is united in interest with HHC, thus they are a proper party. However, as Court of Appeals as held, HHC is a separate and independent public benefit corporation and therefore, its own distinct entity (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 665 (1976)). As discrimination was the only claim made against the City of New York, it is dismissed because it is not a proper party to this lawsuit.

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<sup>2</sup> In *Vig* the First Department recognized the liberal notice pleading requirements despite the holding of the stricter federal pleading standards set forth in *Ashcroft v Iqbal*, 556 US 662 (2009), which was decided prior to the *Vig* decision. This court is bound by the *Vig* holding permitting notice pleadings (*see Krause v Lancer & Loader Group, LLC*, 40 Misc3d 385 [Sup Ct, NY Cty 2013]; *Artis v Random House, Inc.*, 34 Misc3d 858 [Sup Ct, NY Cty 2011]).

As to the remainder of claims against HHC under both the State HRL and the City HRL, to state a *prima facie* case for an employer's failure to reasonably accommodate, plaintiff must show: (1) that her disability is within the meaning of the statutes; (2) the employer has notice of the disability; and 3) that the employer refused to fulfill the obligation to provide objectively reasonable accommodations (*see* Executive Law § 296; Administrative Code of the City of N.Y. § 8-107[1][a]; *Pimentel v Citibank, N.A.*, 29 AD3d 141 [1st Dept 2006]). “[A]n employer is obligated to engage a disabled employee in a ‘good faith interactive process’ to identify a reasonable accommodation that will permit the employee to continue in the position (*see Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449 [1<sup>st</sup> Dept 2012], *aff’d as modified* 22 NY3d 881 [2013], *quoting Phillips v City of New York*, 66 AD3d 170, 176 [1<sup>st</sup> Dept 2009]).

While plaintiff put forth that she was disabled by a back problem, asthma, and other medical problems, she does not provide sufficient information regarding her discrimination claims. On a CPLR 3211(a)(7) motion to dismiss, the court must construe the complaint liberally and find if the four corners of the pleadings assert sufficient facts to manifest a claim (*see* CPLR 3211). Even with this low burden, the complaint is vague and does meet the *prima facie* requirements. The only facts submitted here were in the attorney's affirmation<sup>3</sup>, which merely restated the facts in the complaint. Plaintiff made a conclusory allegation that defendants knew of her disability but failed to state how they knew of plaintiff's disability. Plaintiff claimed that working in maternal unit provided her an accommodation, but she failed to provide the “extent and limits of her restrictions” (*Pimentel v Citibank, N.A., supra* at 148). Plaintiff claimed that working in a rehabilitation unit required her to stand for longer periods and lift heavy objects, however it was not provided that those duties were not part of her responsibilities in the maternal unit or that her disability prevented her from doing those tasks. There was no assertion that defendants refused to fulfill the obligation to provide objectively reasonable accommodations or participate in an interactive process to identify a reasonable accommodation for the plaintiff. As such, the pleadings here are insufficient and defendant's motion to dismiss is granted.

Finally, plaintiff requested leave to amend her complaint pursuant to CPLR § 3025(b). Defendants countered that in addition to the request being improperly raised in a memorandum, it is meritless. While a formal defect itself will not defeat a motion to amend, failure to adequately support the merits of the amendment will result in denial (*see Mallory Factor, Inc. v Schwartz*, 146 AD2d 465, 467 [1<sup>st</sup> Dep't 1989] *citing Matter of Great E. Mall v Condon*, 36 NY2d 544 [1975]). Plaintiff sought to amend her complaint to add a claim for racial discrimination in violation of the Equal Protection provisions of the NY State Constitution. Plaintiff's attorney stated that plaintiff was denied “a promotion in favor of less qualified Filipino candidates [sic].” (Pltf's Memo in Opposition, p 21). This mention of the denial of a promotion was confusing as previously plaintiff's attorney only claimed that plaintiff was transferred and a Filipino employee took her position – there was no mention of a promotion or the job title plaintiff sought in the promotion. Plaintiff claimed that her Filipino supervisor sought to hire other Filipinos and discriminated against plaintiff by transferring plaintiff (*see id* at p 5). Plaintiff's submissions failed to specify if the failure to accommodate was the adverse employment action suffered by plaintiff, or if it was the failure

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<sup>3</sup> No plaintiff affidavit was submitted to cure the defects in the complaint.

to promote, or something else entirely – plaintiff merely indicated that she was transferred and replaced by a Filipino employee. Therefore, without that clarification the request to amend is denied.

Accordingly, defendants' motion is granted in its entirety and plaintiff's request for leave to amend her complaint is denied.

This constitutes the decision and order of the court.

**Dated: November 18, 2013**

A handwritten signature in black ink, appearing to read 'Margaret A. Chan', is written over a horizontal line.

**Margaret A. Chan , J.S.C.**