

Cohler v St. Luke's - Roosevelt Hosp. Ctr.

2007 NY Slip Op 30331(U)

March 19, 2007

Supreme Court, Queens County

Docket Number: 0006856

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

	x	Index Number <u>6856</u> 2006
DOROTHY COHLER		Motion Date <u>October 10,</u> 2006
- against -		Motion Cal. Number <u>6</u>
ST. LUKE'S - ROOSEVELT HOSPITAL CENTER, et al.	x	

The following papers numbered 1 to 13 read on this motion by defendants pursuant to CPLR 3211 to dismiss the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10
Other	11-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff, alleging that she is a disabled person in that she is deaf and speech impaired, and further alleging that she was discriminated against on this basis by defendants, seeks damages and injunctive relief for causes of action sounding in negligence and violation of Title III of the Americans with Disabilities Act of 1999 (ADA) (42 USC § 12181 et seq.), section 504 of the Rehabilitation Act of 1973 (RA) (29 USC § 791 et seq.), The New York State Human Rights Law (Executive Law § 292 et seq.), the Hospital Code of the State of New York (10 NYCRR 2.1, 405.7), and the New York City Human Rights Law (Administrative Code of the City of New York §§ 8-107, 8-502). Plaintiff was a patient at defendants' hospital facility from March 22, 2004 until April 13, 2004. The discriminatory conduct alleged is defendants' failure to provide plaintiff with the services of a qualified sign language interpreter, and other auxiliary aids and services, until March 26, 2004, thus denying her the opportunity

to receive the full benefit of the hospital's health care services. Defendants move to dismiss the complaint based upon a lack of standing and for failure to state a cause of action. Although defendants identify CPLR 3211(a)(2) as a ground for dismissal in the notice of motion, the court's subject matter jurisdiction is not challenged in the supporting papers and the court will not further address this apparently erroneous reference.

On a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the court must liberally construe the pleadings, accept the factual allegations as true and afford plaintiff the benefit of every favorable inference. (See, Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]; McKenzie v Meridian Capital Group, 35 AD3d 676 [2006].) However, bare legal conclusions are not presumed to be true and plaintiff will not be accorded every possible inference therefrom. (See, McKenzie v Meridian Capital Group, supra.) As a further rule, evidentiary material submitted in support of a motion to dismiss will suffice to warrant granting the motion only where the evidence demonstrates that a material fact alleged by plaintiff to be true is not a fact at all and that no significant dispute exists regarding it. (See, Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004].)

In support of their motion, defendants have submitted a copy of a letter from the United States Department of Health and Human Services, Office for Civil Rights (OCR), explaining the results of an investigation by OCR of a complaint filed by plaintiff regarding the same events as complained of in this action. While not defining the legal basis for their position, defendants assert that the conclusion by OCR that defendants' hospital is in compliance with section 504 of the RA requires dismissal of this action. In reply papers, however, defendants admit that the OCR findings are not dispositive but urge the court to give significant weight to the findings and adopt the OCR decision. At this juncture, the fact that OCR's determination may be entitled to some weight in this action (see, Adams v Monroe County Dept. of Social Servs., 21 F Supp 2d 235, 241 [1998]) does not assist defendants' application. Since the letter is not in admissible form, the interviews conducted during OCR's investigation were not under oath, and OCR's findings are not binding on the court (see, Adams v Monroe County Dept. of Social Servs., supra), the evidence does not conclusively demonstrate that a material fact alleged by plaintiff is not true. (See, Guggenheimer v Ginzburg, supra; Allstate Ins. Co. v Raguzin, supra.) Furthermore, defendants have not claimed nor demonstrated that the OCR investigation's findings are entitled to preclusive effect under a theory of res judicata or collateral

estoppel. (See generally, Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999]; Ryan v New York Tel. Co., 62 NY2d 494 [1984]; Matter of Reilly v Reid, 45 NY2d 24 [1978].) In fact, OCR's letter contains a statement that OCR determinations do not affect the right of an aggrieved person to file a private civil action to remedy alleged discrimination.

In addition to its reliance on the OCR findings, defendants also argue that plaintiff's various causes of action are legally insufficient. In evaluating these claims, it is noted that state and city disability discrimination claims are governed by the same legal standards as federal disability claims. (See, Rodal v Anesthesia Group of Onondaga, 369 F3d 113, 117 n 1 [2004]; Mohamed v Marriott Intl., 905 F Supp 141, 156-157 [1995]; Pimentel v Citibank, N.A., 29 AD3d 141 [2006]; see also, Ferrante v American Lung Assn., 90 NY2d 623, 629 [1997].) To be entitled to injunctive relief pursuant to the various federal, state and city statutes based upon a past wrong, a plaintiff must show a real and immediate threat of repeated injury. (See, Freydel v New York Hosp., 242 F3d 365, reported in full at 2000 US App LEXIS 31862 [2000].) Plaintiff has not alleged facts which, if established, show that she is likely to have a future encounter with defendants. (See, Freydel v New York Hosp., supra.) The vague allegations that plaintiff is a resident of the City of New York where defendants' medical services are rendered and that plaintiff suffers from medical and physical conditions that require medical care from time to time do not support the conclusion that plaintiff is likely to have a need to use defendants' hospital in the future. (See, Freydel v New York Hosp., supra; Davis v Flexman, 109 F Supp 2d 776, 783-784, 790 [1999]; Proctor v Prince George's Hosp. Ctr., 32 F Supp 2d 820, 825 [1998]; Aikins v St. Helena Hosp., 843 F Supp 1329, 1333-1334 [1994].) Therefore, the eighth cause of action for injunctive relief is dismissed.

The second cause of action for money damages for defendants' alleged violation of Title III of the ADA (42 USC § 12101 et seq.) is also dismissed. Pursuant to the provision of Title III granting a private right of action to any person who is being subjected to discrimination on the basis of disability in violation of Title III, or who has reasonable grounds for believing that he or she is about to be subject to such discrimination, the remedies available to individuals bringing such an action are those set forth in 42 USC § 2000a-3(a), which allows only injunctive relief. (42 USC § 12188[a][1]; see, Newman v Piggie Park Enters., 390 US 400, 402 [1968]; Dudley v Hannaford Bros. Co., 333 F3d 299, 304 [2003]; see also, Lugo v St. Nicholas Assocs., 18 AD3d 341 [2005].) Plaintiff attempts to save her second cause of action by asserting that to the extent the ADA limits a private plaintiff to injunctive relief while

allowing money damages to be recovered in an action brought by the Attorney General, the ADA is unconstitutional as violative of equal protection. This argument is unavailing. The statute itself provides the "proper governmental objective" that plaintiff contends is necessary to validate legislative classifications of persons who are otherwise similarly situated. (See, Bolling v Sharpe, 347 US 497 [1954].) The ADA authorizes the Attorney General to bring suit where there is reasonable cause to believe that any person or group of persons has been discriminated against and such discrimination raises an issue of general public importance. (42 USC § 12188[b][1][B].) The action of Congress in providing one remedy when the discriminatory conduct occurred in the past and another remedy to correct ongoing or future conduct, and providing a different remedy when the discrimination is of general public importance, clearly bears a reasonable relation to a legitimate governmental purpose. (See, McGowan v Maryland, 366 US 420 [1961]; Bolling v Sharpe, supra.)

The part of the fifth cause of action that is premised upon 10 NYCRR 2.1 has been withdrawn. The remaining part of the fifth cause of action seeks to recover for a violation of a provision in the New York State Hospital Code (10 NYCRR 405.7) that imposes certain requirements on hospitals relating to the availability of interpreters for hearing impaired patients. The Hospital Code does not expressly authorize a private right of action for violation of this provision. Nor may a private right of action be fairly implied in this instance. (See, Uhr v East Greenbush Cent. School Dist., 94 NY2d 32, 38 [1999]; Catapano v Winthrop Univ. Hosp., 19 AD3d 355 [2005]; see also, Walters v New York City Health Hosp. Corp., 2005 US Dist LEXIS 1895 [2005].) A private right of action would not be consistent with the statutory scheme governing hospitals under which the subject regulation was promulgated. (Public Health Law, art 28; see, Uhr v East Greenbush Cent. School Dist., supra; Sheehy v Big Flats Community Day, 73 NY2d 629 [1989].) The Public Health Law has its own enforcement mechanisms in article 28, authorizing the Commissioner to institute proceedings to compel compliance with, and providing that the Supreme Court may enjoin violations of, provisions of the article and the rules and regulations thereunder, and allowing for the imposition of penalties for violations. (Public Health Law §§ 2801-c, 2803.) In addition, a private action by patients of residential health care facilities is expressly authorized by statute. (Public Health Law § 2801-d.) The legislature is entitled to select the methods to be used in effectuating its legislative goals. (See, Sheehy v Big Flats Community Day, supra, at 634-635.) Accordingly, the fifth cause of action is dismissed, but the allegations therein concerning the violation of 10 NYCRR 405.7 shall be incorporated in the seventh cause of action sounding in negligence. The

violation of a regulation is some evidence of negligence. (See, Bauer v Female Acad. of the Sacred Heart, 97 NY2d 445, 453 [2002]; Watral & Sons v OC Riverhead 58, 34 AD3d 560 [2006].)

In all other respects, the motion is denied. The seventh cause of action sufficiently states the elements of a cause of action for negligence to withstand dismissal. (See, Becker v Schwartz, 46 NY2d 401, 410 [1978].) Furthermore, while defendants correctly contend that where money damages are available for discrimination claims under federal statutes such as the RA, a plaintiff must demonstrate intentional discrimination to sustain the claim (see, Guardians Assn. v Civil Ser. Commn. of the City of New York, 463 US 582 [1983]; Freydel v New York Hosp., *supra*; Ferguson v City of Phoenix, 157 F3d 668, 674 [1998]; Constance v State Univ. of New York Health Science Ctr., 166 F Supp 2d 663 [2001]; Bravin v Mt. Sinai Med. Ctr., 58 F Supp 2d 269 [1999]), the allegations in the complaint, including the allegation that defendants did not have the necessary resources in place to supply interpreters in a timely manner, are sufficient, at this pleading stage, to set forth a claim that defendants intentionally discriminated against plaintiff. Intentional discrimination in this context does not require personal animosity or ill will, but may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights would result from the implementation of the challenged policy. (See, Freydel v New York Hosp., *supra*; Bartlett v New York State Board of Law Examiners, 156 F3d 321 [1998], vacated on other grounds by 527 US 1031 [1999]; Alvarez v New York City Health & Hosps. Corp., 2002 US Dist LEXIS 12986.) Thus, absent evidence from defendants demonstrating as a matter of law that the material facts alleged by plaintiff are not true, and liberally construing the complaint, the third, fourth and sixth causes of action sufficiently state claims for discrimination based upon statutory violations.

Accordingly, the motion is granted to the extent that the second, fifth and eighth causes of action are dismissed. The court notes that the paragraphs in the complaint under the heading of "first cause of action" merely set forth plaintiff's version of the factual history in this matter and summarize the claims presented in the second through eighth causes of action. Inasmuch as the parties do not separately discuss the viability of this cause of action, the court has not addressed it.

Dated: March 19, 2007

J.S.C.