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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 115483/2006
DAS, BOBBY
VS.
RIESE ORGANIZATION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 2/6/09
MOTION SEQ. NO.
MOTION CAL. NO.

on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to ... - Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed memorandum decision and order.

FILED
JUN 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/3/09

J.S.C.
JANE S. SOLOMON

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

BOBBY DAS,

Index No. 115483/06

Plaintiff,

DECISION AND ORDER

- against -

RIESE ORGANIZATION CORPORATION GROUP, NATIONAL RESTAURANT MANAGEMENT, INC. and 86 REALOPP CORP.,

Defendants.

----------X

JANE S. SOLOMON, J.:

Defendants Riese Organization Corporation Group (Riese), National Restaurant Management, Inc. (NRM), and 86 Realopp Corp. (86 Realopp), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Plaintiff Bobby Das (Das) commenced this action contending that his former "joint employer," defendants Riese, NRM, and 86 Realopp, wrongfully terminated his employment in violation of the Family and Medical Leave Act, 29 USC § 2601 *et seq.* (FMLA).

According to Das, he was hired in 1997 by Shuja Choudry, a supervisor of Riese's quick-serve restaurants, and he worked at various Riese locations, until his termination on September 16, 2006, at which time he was working as a manager at a Riese quick-serve restaurant ("Dunkin' Donuts"), located at 1276 Lexington Avenue, New York.

On that day, Das alleges, he telephoned his supervisor, Waheed Kahn, informing him that his wife was having chest pains and he needed to take her to the hospital for tests, and that he would be absent from work that day. Das alleges further that Kahn responded by stating:

"the same way you have to take care of your family I have to take care of my business, drop off your keys on Monday," and Das's employment was terminated.

Das contends that defendants' action was unlawful in that his absence was protected by the FMLA, because his wife suffered a "serious health condition," which thereby entitled him to up to 12 weeks of unpaid leave during any 12-month period, under the FMLA. The complaint's three causes of action allege violations of 29 USC §§ 2612, 2614, and 2615, by denying Das leave, by interfering with, restraining, and denying, his attempted exercise of his FMLA rights, and by terminating his employment based on absences protected by the FMLA.

Das's wife, Nancy Das (Ms. Das), testified at her deposition that she was experiencing chest pains for two days prior to September 16, 2006, on which day Das took her to the emergency room (of Maimonides Medical Center, Brooklyn, New York). Ms. Das stated that she was having trouble breathing, that she was asthmatic, and that she was in "[e]xcrutiating pain." Two days prior to going to the emergency room, Ms. Das had been experiencing similar pain," but to a lesser degree, and saw a certain Dr. Shupendra Wagley, who took an electrocardiogram, and she was sent home with Motrin. The doctor believed that the pain was caused by stress, that she should "take it easy," and if she felt worse, she should either come back to see him or go to the emergency room.

On September 16, 2006, Ms. Das again was having trouble breathing, and felt that she had to go to a hospital emergency room. She testified that she spent the night there, and was told that she had a nodule on her chest. She was instructed to take Motrin and get bed rest, to not do anything strenuous, and to follow-up with her regular physician, which she did two or three days later, and, again, a few times after that.

Defendants argue that they are entitled to summary judgment because Das cannot establish that his wife suffered a "serious health condition" and, as such, that he is not entitled to relief under the FMLA. Defendants contend that Das's wife did not suffer from a serious health condition because her "very brief visit" to the emergency room did not result in (1) admission to that facility, (2) any actual diagnosis of an underlying medical condition, and (3) a continuous course of treatment, such as proof that she followed-up and received treatment on a continuous basis by any health care provider. The only course of treatment that she received was an instruction to take Motrin, a readily available over the counter pain reliever.

In the alternative, defendants request that, as against Riese and NRM, the complaint should be dismissed, because neither employed Das, and NRM is a not a legal entity.

Discussion

Although defendants challenge Das's claimed entitlement to the FMLA, they assert that the motion for summary judgment rests solely on the issue of whether his wife experienced a "serious health condition," which is a necessary element of Das's FMLA causes of action. For the reasons discussed below, defendants have demonstrated entitlement to judgment in their favor, and, thus, the motion is granted.

New York has long recognized the rule that where an employment is for an indefinite term, as here, it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason, or for no reason at all (*Murphy v American Home Products Corp.*, 58 NY 2nd 293, 301 [1983]). This rule is subject to narrow exceptions, including a specific statutory prohibition. Das alleges that he was discharged in violation of a statutory prohibition set forth in the FMLA (*see*, 29 USC 2615[a]). If defendants can show that Das was

not subject to the FMLA's protection when fired, summary judgment must be granted.

The FMLA guarantees qualifying employees 12 weeks of unpaid leave in a one-year period following, among other events, a family member's serious illness (29 USC § 2612 [a] [1]; *Ragsdale v Wolverine World Wide, Inc.*, 535 US 81, 86 [2002]). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent position (29 USC 2614 (a) (1); *Ragsdale v Wolverine World Wide, Inc.*, 535 US at 86).

The FMLA uses the phrase "serious health condition," and defines it as "an illness, injury, impairment, or physical or mental condition, that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider" (29 USC § 2611 [11]; 29 CFR § 825.113). "Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113 (b) or any subsequent treatment in connection with such inpatient care" (29 CFR§ 825.114). A serious health condition includes, among other things, "incapacity and treatment" defined as:

> "(a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
>
> (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the

supervision of the health care provider"

(29 CFR § 825.115).

Although Ms. Das's condition (chest pain, shortness of breath, and stress), and her visit to the emergency room, appears to have provided the framework for a serious medical condition (*see e.g. Tambash v St. Bonaventure Univ.*, 2004 WL 2191566, *8 [WD NY 2004]), to qualify under the FMLA, a plaintiff must demonstrate that the family member underwent inpatient care or continuing treatment, neither of which has been established here.

Defendants met their initial burden of demonstrating entitlement to summary judgment by asserting (with supporting documentation) that Ms. Das's visit to the emergency room did not result in an inpatient admission to that facility, and there is no evidence of a continuous course of treatment, such as proof that Ms. Das followed-up and received treatment on a continuous basis by any health care provider. Thus, the burden shifted to Das to demonstrate the existence of a material issue of fact. Das did not meet his burden.

Das contends that his wife's visit to the emergency room constituted an "overnight stay and impatient care at Maimonedes Hospital," because she was admitted on September 16, 2006, and discharged on September 17, 2006. However, the hospital records reflect that she was seen at the emergency room somewhere between 10:00 PM and 11:00 PM on September 16, 2006, and discharged at 3:47 AM on September 17, 2006. Thus, her visit to the emergency room spanned from September 16 to September 17 only because she arrived in the late afternoon or early evening (based upon her deposition testimony), and was first examined at the very end of the day on September 16. Neither the hospital records, nor any other evidence in the record, establishes that Ms. Das had inpatient care, because her visit was limited to treatment

in the emergency room (*see Dombroski v Samaritan Hosp.*, 47 AD3d 80, 85 [3d Dept 2007] [the emergency room physician is not under a duty of continuing care after the patient's discharge from the emergency room and admittance as an inpatient, because that would be contrary to the limited purpose of an emergency room of providing temporary, short-term care]).

Neither Das nor his wife testified that she was incapacitated from her regular activities for a period of more than three consecutive days, nor did they submit any other evidence as to this component of a serious health condition under the regulations. Moreover, although Ms. Das was diagnosed with "atypical" chest pain, apparently "due to a problem in the chest wall," and was advised to "rest as much as possible" for two to three days, with the resumption of full activity "gradually as the pain improves," and she had a follow-up visit with her physician on September 18, 2006, the day after her discharge from the emergency room, the record is devoid of probative evidence that she had any further treatment by a health care provider after that visit on September 18, 2006. To be sure, deposition testimony submitted in opposition to a summary judgment motion constitutes evidence in admissible form by someone with personal knowledge of the facts (*Josephson v Crane Club, Inc.*, 264 AD2d 359 [1st Dept 1999]). Here, however, the testimony by Ms. Das, that her visit on September 18, 2006 to her regular physician was followed by subsequent visits to her health care provider, is conclusory, notwithstanding that treatment by health care providers can be easily documented. When asked:

> Q: After your follow-up visit with Dr. Wagli [sic] did you have any more visits with him concerning this particular incident?
>
> A: A couple of time, yes.
>
> Q: And when did these visits occur, do you recall?
>
> A: No.

> Q: What exactly happened on these visits?
>
> A: Well, basically, they always take my electrocardiogram first and check for my vitals. And that's about it. Most of the time they send me home with Motrin because they say there's not a whole lot they can do, so.

(Nancy Das Dep. Tr. at 21-22). Das cites Exhibit E to the affirmation of Eric A. Suffin, Esq., but that exhibit consists of only Dr. Wagley's report of September 18, 2006.

Furthermore, Das did not submit any competent evidence to establish that Ms. Das was unable to perform her usual duties during the period at issue (*Perez v Santiago*, 59 AD3d 692, 693 [2d Dept 2009]; *cf. Barr v New York City Transit Auth.*, 2002 WL 257823, *6 [ED NY 2002] [plaintiff put forth sufficient evidence in her sick forms, certifications from her physicians and medical exam reports to demonstrate that there exists a question of fact as to whether her condition qualifies as a serious medical condition under the FMLA]). In short, the testimony by Das and Ms. Das, without supporting medical evidence, is insufficient to defeat summary judgment (*see Dietrich v E. I. Du Pont de Nemours & Co.*, 2004 WL 2202656, *8 [WD NY 2004]). A party opposing summary judgment must produce evidence in admissible form sufficient to require a trial of material facts, but may be permitted to demonstrate acceptable excuse for failure to meet the strict requirements of tender in admissible form (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988], *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). No such explanation has been given here. Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and the Clerk is directed to enter judgment accordingly .

Dated: June 3, 2009

ENTER:

J.S.C.

JANE S. SOLOMON