Degregorio v Richmond Italian Pavillion Inc.
2009 NY Slip Op 31957(U)
August 28, 2009
Supreme Court, Richmond County
Docket Number: 102395/06
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102395/06

ILENE DEGREGORIO, Individually and on behalf of all others similarly situated,

Plaintiff

against

RICHMOND ITALIAN PAVILLION INC. d/b/a BELLA VITA, II,

Defendants

DECISION & ORDER
HON. JOSEPH J. MALTESE

At a bench trial this court finds and decides as follows:

Facts

The plaintiff, Ilene Degregorio, claims to be an individual with a disability as defined by the Americans with Disabilities Act,[1] who is also protected by the New York State Human Rights Law,[2] and the New York Civil Rights Law.[3] Ms. Degregorio states that she has had ten hernia operations, knee and hip replacements, misalignments of her L5-S1 discs and has been diagnosed with a nervous disorder (unrelated to this action). As a result, Ms. Degregorio claims to trip when she is walking, cannot kneel or bend, spontaneously loses her hand grasp, has a drop foot and experiences loss of balance.

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[1] 42 U.S.C. § 12101 et seq.; *See Schroeder v. Suffolk County Community College*, 2009 U.S. Dist. LEXIS 52533 (E.D.N.Y. June 22, 2009) quoting 29 C.F.R. § 1630.2(I) (Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

[2] NY Executive Law § 296(14).

[3] NY Civil Rights Law §47-b.

In May 2005, Ms. Degregorio was given a service dog[4] to assist her in becoming more independent by Canine Companion for Independence. The service dog, which was present in court, wears a harness so that Ms. Degregorio could hold and lean on the dog for support and would support her when she stood and walked. The dog was trained to understand the commands of Ms. Degregorio and is capable of retrieving items, holding packages and opening doors. If Ms. Degregorio fell, the service dog could assist her to stand. As a result of the use of the service dog, Ms. Degregorio claims that she has substantially regained the independence she lost in 1991.

On July 26, 2006, Ms. Degregorio claims she made reservations for six people and a service dog to go to defendant's Bella Vita II Restaurant for her birthday celebration. However, the reservation book presented by Adem Cukaj, the owner of the defendant restaurant, Richmond Italian Pavilion, Inc., doing business as Bella Vita II, discloses only that a reservation was made for six people and no mention of a dog. The reservation was not taken by Mr. Cukaj; it was taken by one of his employees. Nonetheless, Ms. Degregorio came to the restaurant, accompanied by her husband, two children, father-in-law, mother and her service dog. Upon arriving at the restaurant, everyone but Ms. Degregorio and her service dog entered the restaurant because she decided to first toilet the dog. After approximately five minutes, Ms. Degregorio entered the restaurant where she was confronted by Adem Cukaj, who told her that she could not enter the restaurant with a dog. In response, Ms. Degregorio informed Mr. Cukaj that she is disabled and the dog is a service working dog, which is permitted to enter the restaurant. Ms. Degregorio asserts that she was wearing the New York City Service Dog licensed on a necklace around her neck and that in addition, the service dog was wearing a vest with bold large lettering of "Service Dog," "Canine Companion for

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[4] "Service dog" means any dog that has been trained to do work or perform tasks for the benefit of an individual with a disability. *See* 28 C.F.R. 36.104. The federal regulation requires that a particular service animal be trained to work for a disabled individual, however, there is no requirement specifying the amount or type of training that an animal must receive to qualify as a service animal. *Vaughn v. Rent-A-Center, Inc*., 2009 U.S. Dist. LEXIS 20747, 29-30 (S.D. Ohio Mar. 16, 2009). Similarly, there is no requirement regarding the type or amount of work a service animal must provide for the disabled person. *Access Now, Inc. v. Town of Jasper, Tenn*., 268 F.Supp.2d 973, 980 (E.D. Tenn. 2003). Instead, the relevant question is whether the animal helps the disabled person perform tasks to ameliorate the ADA disability. *Id.*

Independence," and "Please don't pet, I am working." These facts are not disputed by the defendant and both the license and the signs on the dog were demonstrated in open court.

Mr. Cukaj told Ms. Degregorio not to proceed any further and wait while he made a phone call to inquire about her right to be accompanied by the dog into the restaurant. Mr. Cukaj claims that he could not reach the Department of Health or his lawyer at 6:00 p.m. that evening because they were both closed. Upon returning to Ms. Degregorio, he told her that she did not appear to be blind and therefore he did not have to allow the dog in the restaurant and that perhaps she could leave the dog in her vehicle, since she had others present to assist her in walking to the table.

In response, Ms. Degregorio showed Mr. Cukaj her service dog license which had been issued by the New York City Department of Health, Canine Companions for Independence identification, and a pamphlet titled "Legal Rights of Guide Dogs, Hearings Dogs and Service Dogs" stating that service animals are allowed in restaurants and other places of public accommodation. Mr. Cukaj briefly looked at the items, but told Ms. Degregorio that he cannot allow her with the dog into the restaurant because she was not blind. After some other words with Mr. Cukaj and her husband, Ms. Degregorio signaled her family, who had been previously seated and were served bread and water awaiting her arrival, to get up and leave the restaurant. Ms. Degregorio claims that Mr. Cukaj told her and her husband that it was his restaurant and he will do what he likes in it. Mr. Cukaj disagrees with that characterization of the events and asserts that he had decided to seat Ms. Degregorio with her dog, but that she and her family just left. However, when Mr. Cukaj was asked if he asserted himself to tell them not to leave, he claims he never tried to persuade them to stay.

During trial, Mr. Cukaj did not dispute that Ms. Degregorio has a disability, nor did he contest her use and need of her service dog, or that his restaurant is a public accommodation as defined under federal, state and local laws. Further, Mr. Cukaj does not dispute that Ms. Degregorio demonstrated to him a service dog license, which he claims "I didn't even look, because she didn't look blind." Mr. Cukaj did not dispute that the service dog was wearing a vest clearly identifying itself as a service working dog. Mr. Cukaj claimed that he was ignorant of the law stating "I didn't

know if the Health Department allows me." Mr. Cukaj advised the court that he allows disabled people into his restaurant regularly; in fact, on the evening in question another female patron was seated in a wheelchair in the restaurant when the Degregorio party was present. Moreover, Ms. Degregorio admits that she has eaten at the restaurant on prior occasions utilizing a wheelchair and a walker without her dog and the she was treated courteously by the restaurant personnel. Mr. Cukaj claims he was aware that blind persons are allowed to have a dog assist them in a restaurant, but he was not aware that persons with other disabilities were also allowed to have a service dog in a restaurant.

Discussion

It is unlawful to discriminate against a person with a disability in the full and equal enjoyment of the services and goods offered by a public.[5] A public accommodation[6] must make "reasonable modifications" to their practices and policies when modifications are necessary to afford an individual with disabilities, goods and services. The Code of Federal Regulations,[7] and the New York Executive Law (Human Rights Law) § 296.2(a) obligates a proprietor of a public accommodation to provide evenhanded treatment of all customers, directly or indirectly, and to not withhold from or deny plaintiff the accommodations, advantages, facilities or privileges of their public accommodation; and it shall be unlawful to demonstrate that the patronage is not welcomed or is objectionable or not acceptable, desired or solicited.

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[5] *See* Title III of the Americans with Disabilities Act 42 USC § 12101 et seq.; 42 USC §12101(a)(5) (summarizes the legislative intent of the ADA to combat intentional exclusion, the discriminatory effects of overprotective rules and policies, failure to make modifications to existing practices, segregation and regulation to unequal treatment); 42 USC §12182 (a); 28 C.F.R. 36.201; 28 C.F.R. 36.202(a); 28 C.F.R. §36.302(c)(1); NYC Admin. Code (Human Rights) §8-102(4) and (18), and §8-107.4 and §8-107.15.

[6] A place of public accommodation includes "restaurants." *See* 28 C.F.R. 36.104; *see also* NY Executive Law § 292(9); *see* e.g., NYC Administrative Code § 8-102(9). During the trial, Defendant did not contest that it is a public accommodation as defined by the foregoing federal, state and local laws.

[7] 28 C.F.R. §36.302(a).

The New York Civil Rights Law § 40-c states, in part, that "no person shall, because of disability, be subjected to any discrimination in his or her civil rights, or to any harassment, in the exercise thereof."

Title III of the Americans with Disabilities Act (ADA) defines discrimination as a "failure to make reasonable modifications and policies, practices, procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities,"[8] an outright intentional exclusion, the discriminatory effects of overprotective rules and policies, failure to make modifications to existing facilities and practice and regulation to lesser services and opportunities,[9] denying a disabled individual "the opportunity to participate in or benefit from the goods and services offered by a public accommodation."[10]

Discriminatory practices also includes a public accommodation's "refusal to make reasonable modifications and policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless such person can demonstrate that making such modifications would fundamentally alter the nature fo such facilities, privileges, advantages or accommodations."[11] Under federal, state and local laws, Ms. Degregorio has the right to be accompanied by a service dog despite the fact that she is not blind.[12]

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[8] 42 USC § 12182(b)(2)(A)(ii); *see, Tennessee v. Lane*, 541 U.S. 509, 537 (U.S. 2004).

[9] 42 USC § 12101(a)(5).

[10] 42 USC § 12182(b)(1)(A)(l); *See, Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. Cal. 2004); NY Executive Law § 292(19) ("discrimination" shall also include segregation and separation."); *see* NY Executive Law § 292(4) (unlawful discriminatory practice includes those practices specified in NY Executive Law §296 and 296(a); NY Civil Rights Law § 40-c; NYC Administrative Code § 8-102(4) (unlawful discrimination include those practices specified in sections 8-107). The NYC Administrative Code § 8-107(4) and § 8-107(15) is substantively and textually similar to its federal and state counterparts.

[11] NY Executive Law § 296(2)(c).

[12] *See* 42 USC § 12182(a); 28 C.F.R. §36.201; 28 C.F.R. §36.202(a); 28 C.F.R. §36.302(c)(1); NYC Admin. Code (Human Rights) § 8-102(4) and (18), and § 8-107.4 and § 8-107.15 NY Civil Rights Law § 47; NY Executive (Human Rights) Law § 296(14); *see also* 24

The defendant's argument, that he was ignorant of the law and regulations, has no force in law when determining liability. Courts have consistently held that "ignorance of the law excuses no one; not because courts assume everyone knows the law, but because this excuse is one all will plead and no one can refute."[13] While ignorance of the law is not a defense to potential liability, it is a fact to consider in determining civil penalties.[14] The New York Court of Appeals has stated that a party "is bound by his action even though he would have acted otherwise had he not been ignorant of the law."[15] The Court of Appeals in *Municipal Metallic Bed Mfg. Corp. v. Dobbs* stated it well, "If ignorance of the law did not in fact exist, we would not have lawyers to advise and courts to decide what the law is."[16]

The ADA combats intentional and the discriminatory effect of benign actions. Congress expressly recognized that persons with disabilities suffer not just intentional discrimination, but "the discriminatory effects of ...overprotective rules and policies, failure to make modifications to existing...practices."[17] The ADA covers not only intentional discrimination, but also the discriminatory effects of 'benign neglect, apathy, and indifference."[18] The Congressional findings at 42 U.S.C. § 12101(a)(5) reflect a Congressional intent "to address the discriminatory effects of

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RCNY Health Code Reg. § 81.25 (Department of Health and Mental Hygiene; Health Code of the City of New York - Food Preparation and Food Establishments) ("No live animal shall be...permitted to enter into or remain in any food service establishment...[t]his section shall not apply to...service dogs accompanying and assisting disabled persons.").

[13] *Dezaio v. Port Authority*, 205 F.3d 62, 64 (2d Cir. 2000).

[14] *See Morgan v. Secretary of Housing and Urban Dev.,* 985 F.2d 1451, 1461 (10th Cir. 1993).

[15] *Freitas v. Geddes S&L Ass'n*, 63 NY2d 254, 268 (1984).

[16] 253 NY 313, 317 (1930).

[17] 42 USC § 12101(a)(5); *see also Parr v. L & L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1084 (D. Hawaii 2000).

[18] *U.S. v. Morvant*, 898 F. Supp. 1157, 1166 (E.D.LA 1995); *Mayberry v. Von Valtier*, 843 F.Supp. 1160, 1166 (E.D. Mich. 1994).

benign actions or inaction, as well as intentional discrimination." Discriminatory impact is sufficient to determine liability.[19]

The New York Human Rights Law applicable to this case this is contained in the Executive Law § 296(14), which states "it shall be an unlawful discriminatory practice for any person...to discriminate against...a person with a disability on the basis of her use of a guide dog, hearing dog or service dog." Hence, refusal to admit the service dog in these circumstances is tantamount to refusing to admit the person who is in need of the dog. Moreover, a public accommodation may not require the person with the disability to be separated from the service dog once inside the facility.[20]

A person with a disability accompanied by a service dog is "guaranteed the right to have the dog in their immediate custody."[21] The New York Civil Rights Law § 47(1) states: "No person shall be denied admittance to and/or the equal use of and enjoyment of any public facility solely because said person is a person with a disability and is accompanied by a guide dog, hearing dog or service dog." The Civil Rights Law further states..."the term 'public facility' shall include...all places where food is offered for sale..."[22]

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[19] *See* 42 USC § 12182(b)(1)(D)(1); *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 1353, 1361 (S.D. Fla. 2001) (and cases cited); *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp.2d 1159, 1169 (D. Or. 1998) ("Title III of the ADA outlaws not just intentional discrimination but also certain practices that have a disparate impact upon persons with disabilities even in the absence of any conscious intent to discriminate.").

[20] *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1061 (5th Cir. Tex. 1997) quoting H.R. REP. No. 485(II), 101st Cong., 2d Sess. 106 (1990), reprinted in 1990 U.S.C.C.A.N. 303,389.

[21] "The term 'service dog' means any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose." NY Executive Law § 292(33); *see also* NY Civil Rights Law § 47-b(4) (the term "service dog" means a dog which is properly harnessed and has been or is being trained by a qualified person, to aid and guide a person with a disability).

[22] NY Civil Rights Law § 47(2).

Penalties

The New York Human Rights Law and the Civil Rights Law are generally enforced by the New York State Division of Human Rights or the New York City Commission of Human Rights, neither of which is party to this action. The plaintiff brings on a civil action initially seeking a class action for other persons similarly situated. But the plaintiff never complied with requirements of CPLR § 901 and 902 to establish a class. The plaintiff also sought punitive damages, but the New York Court of Appeals has previously ruled in *Thorson v. Penthouse International, Ltd.*, that punitive damages are not permissible in a court action for Human Rights Law violations.[23] Nevertheless, the plaintiff has not even come close to establishing the requisite wanton and reckless or malicious conduct on the part of the defendant by a preponderance of the evidence, let alone by the clear and convincing standard followed by the courts of the Second Judicial Department.[24] Moreover, the plaintiff has not established any compensatory damages. Therefore, the claims for punitive damages must fail as well as the class action.

The penalty for violating Civil Rights Law § 47 is that "any person, entity, public or private, violating any provision...shall be guilty of a violation."[25] The fine for a violation is "a sentence to pay an amount, fixed by the court, not to exceed two hundred fifty dollars. In the case of a violation defined outside this chapter (Penal Law), if the amount of the fine is expressly specified in the law or ordinance, the amount of the fine shall be fixed in accordance with that law or ordinance."[26] New York Civil Rights Law section 47-c provides for a one thousand dollar fine where there is a violation of the statute two or more times within a two year period. Here, there is only this sole violation for which the statute does not prescribe a fine amount. However, Penal Law section 80.10(1)(d) states "A sentence to pay a fine, when imposed on a corporation for an offense defined in this chapter or for an offense defined outside this chapter for which no special corporate fine is specified, shall be

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[23] 80 NY2d 490 (1992).

[24] *Randi A.J. v. Long Island Surgi-Center*, 46 AD3d 74 (2007); *Orange and Rockland Utilities v. Muggs Pub. Inc*. 292 AD2d 580 (2002).

[25] NY Civil Rights Law § 47-c.

[26] NY Penal Law § 80.05(4).

a sentence to pay an amount, fixed by the court, not exceeding: five hundred dollars when the conviction if of a violation."

The New York Human Rights Law § 299 provides that a person who wilfully resists, prevents or impedes or interferes with the Division (NYS Division of Human Rights) or Commission of Human Rights shall be guilty of a misdemeanor. But no such prosecution has taken place by either of those entities.

While Mr. Cukaj, as the owner of the defendant corporation, was aware that he was to allow a guide dog to accompany a blind person into his restaurant, he apparently was not aware of the statutes that extended the right to have a service dog assist persons with other disabilities such as the plaintiff. As it has often been said, ignorance of the law is not a recognized defense, but may be considered when assessing a penalty for a violation. Accordingly, the defendant corporation is liable for the violation of the New York Human Rights Law for refusing to allow Ms. Degregorio into the restaurant with the guide dog. Since the state legislature enacted the Civil Rights Law § 47-b and the Human Rights Law § 296(14), it was anticipated that such violations of those statutes would be enforced by either the New York State Division of Human Rights or the New York City Commission on Human Rights. Here, the plaintiff notified those agencies and the Attorney General, and none of them has appeared in this matter. The plaintiff is therefore prosecuting this violation individually. The plaintiff seeks compensatory and punitive damages as well as counsel fees, but gives no statutory justification for an award of compensatory damages. Nonetheless, the plaintiff has not shown any compensatory damages to this court. While this court can sympathize with her claim of humiliation, no damages have been shown as a result of that humiliation. The purpose of imposing a violation of statute is to penalize the violator and deter others from such conduct. That is exactly what this court is imposing here, as well as injunctive relief to comply with the New York Civil Rights Law, Human Rights Law and the Americans with Disabilities Act.

The statutes relied on by the plaintiff anticipate corporate violations that would not exceed $500 on a first offense and up to $1,000 for subsequent violations. Violations are paid to the State of New York and not individuals absent a statute authorizing some other disposition of the fine. Since this is a case where the defendant did not knowingly violate the statute, this court will assess a fine of two hundred and fifty dollars ($250) against the defendant corporation to be paid to the State of New York.

Prior to the opening of the trial, this court inquired of plaintiff's counsel whether he was presenting any expert testimony to prove his claim of extreme emotional distress as a result of the alleged violation, to which plaintiff's counsel responded that he would not be offering any expert testimony.

The plaintiff's attorney seeks tens of thousands of dollars in damages and a like sum in counsel fees. However, after trial the plaintiff has not demonstrated compensatory or punitive damages that may be applicable under the statutes. This court reserves decision on the applicability of counsel fees.

Accordingly, it is hereby:

ORDERED, that the defendant corporation, Richmond Italian Pavillion, Inc. d/b/a Bella Vita II, is liable for a violation of the New York Civil Rights Law § 47-b and this court imposes a fine of two hundred fifty dollars ($250) to be paid to the state of New York; and it is further

ORDERED, that the defendant shall comply with the laws of this state in allowing persons with a disability to be accompanied by a guide dog, hearing dog or service dog into the its restaurant; and it is further

ORDERED, that the plaintiff's counsel may submit an affidavit justifying an attorney's fee by outlining the authorizing statute(s) and sections. Counsel shall also affirm to the amount of necessary work performed by him, together with his counsel fee application to be served on notice to counsel for the defendant by September 18, 2009, and answering affidavits must be served upon plaintiff's counsel and this court by September 30, 2009.

ENTER,

DATED: August 28, 2009

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Joseph J. Maltese
Justice of the Supreme Court