

DeGregorio v Richmond Italian Pavilion, Inc.

2010 NY Slip Op 30743(U)

March 31, 2010

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. 102395/06
Motion No.:002**

**ILENE DEGREGORIO, Individually and on behalf of
other similarly situated,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

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

Defendant

The following items were considered in the review of the following motion for an award of attorneys fees.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	3
Replying Affidavits	4
Sur-Reply	5
Sur-Sur Reply	6
Memoranda of Law	2
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff, through her attorney, James E. Bahamonde, moves for an award of attorney's fees in conjunction with this court's decision and order dated August 28, 2009 pursuant to 42 USC 12205 and NYC Administrative Code § 8-502(f). The plaintiff's motion is denied in its entirety.

Facts

The plaintiff commenced this action alleging several causes of action against the defendant. The plaintiff alleged that the defendant was liable for violations of federal, state and

city civil rights laws. The plaintiff's counsel initially indicated that he was filing a class action stating at paragraph 1 of the complaint:

Plaintiff files this action for herself and as an action for those similarly situated, complaining of violations of New York City Admin. Code, New York State Civil Rights Law § 40-c and 40-d, New York State Human Rights Law, and Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182 (hereinafter "ADA")

However, the only statutes cited in the plaintiff's complaint specific to the use of the plaintiff's service animal was New York State Civil Rights Law § 47-b in the plaintiff's fourth course of action which states in pertinent part at paragraph 42 that:

Pursuant to New York State Civil Rights Law 47-b, an individual with a disability who is accompanied by a service animal, may keep the service animal in their immediate custody when entering a public accommodation.

Plaintiff's counsel failed to follow through with his attempt at a class action and was untimely in filing for summary judgment. After a bench trial, this court found that the plaintiff failed to prove compensatory or punitive damages under any statute cited by the plaintiff. It is important to note that Attorney Bahomonde did not offer any expert testimony to substantiate his client's claim that she suffered extreme emotional distress as a result of the defendant refusing to allow her service dog into his restaurant. Additionally, Attorney Bahamonde made no reference to any federal rules allegedly violated by the defendant in his complaint, except to cite 28 CFR § 36.104, the definition section, to define that a restaurant is a public accommodation under the first cause of action. It was not until filing his post trial memorandum of law that Attorney Bahamonde argued that Mr. Cukaj's establishment violated 28 CFR § 36.302(c)(1)., which states at section (c):

Service animals–

(1) General. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service

animal by an individual with a disability.

Nonetheless, this court found that the defendant violated the only statute pled by the plaintiff in connection with the plaintiff's use of a service animal and ordered the following relief:

ORDERED, that the defendant corporation, Richmond Italian Pavilion, 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 its restaurant. . .

Notwithstanding the fact that, Adem Cukaj, the owner of the Richmond Italian Pavilion, Inc., was ignorant of the law permitting service dogs into his restaurant, this court found that ignorance of the law is not an excuse. Mr. Cukaj's establishment had a clean record and did not have any prior violations of the statute cited by the plaintiff in her complaint.

Attorney Bahamonde makes the instant motion for attorney's fees, costs and disbursements alleging that as the attorney for the prevailing party he is entitled to a total of \$82,297.75. This number is based on his alleged customary hourly rate of \$425 per hour over 208.69 hours worked; as well as \$2,034.74 in litigation expenses such as travel, photocopies, court fees and the like. Additionally, Attorney Bahamonde annexed two subsequent bills one for \$7,225 representing 19 additional hours worked in preparing a reply to the defendant's opposition to this motion, and a bill for \$2,258.67 for an additional 4.1 hours worked on a sur-sur reply. Therefore, the grand total sought by Attorney Bahamonde, inclusive of his work on this motion before the court is \$91,781.42.

Discussion

After a one hour bench trial this court found that the defendant corporation violated New York Civil Rights Law § 47-b, which states in pertinent part that, “Persons with a disability accompanied by guide dogs, hearing dogs or service dogs shall be guaranteed the right to have such dogs in their immediate custody while exercising any of the rights and privileges set forth in this article.”¹ New York Civil Rights Law § 47-c states, “Any . . . legal entity violating any provision of this article shall be guilty of a violation.” Penal Law §80.05(4) establishes the penalty for a violation where it is not otherwise stated in the statute which states as follows:

Violation. A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred and fifty dollars.²

Therefore, the first violation of Civil Rights Law § 47-b imposes a maximum fine of \$250, which this court imposed upon the defendant. A subsequent violation within a two year period shall result in a fine of one thousand dollars.³ The Civil Rights Law § 47-c is silent as to whether attorney’s fees, costs and disbursements are obtainable. As such, this court is without authority to award attorney’s fees.

The plaintiff’s attorney James Bahamonde is seeking counsel fees not under New York State Law, but under the Americans with Disability Act and the New York City Administrative Code § 8-802(f), which permits an award for actions commenced pursuant to the New York City Administrative Code, specifically under § 8-107(4) and (15) which require access to public accommodations by persons with a disability. Attorney Bahamonde asserts that the court’s statement that the defendant comply with the laws of this state with respect to granting persons access to his establishment who are accompanied by guide dogs, hearing dogs or service dogs

¹ Civil Rights Law § 47-b(1).

² PL § 80.05(4).

³ Civil Rights Law § 47-c(2).

after finding a violation of New York Civil Rights Law § 47-b, is tantamount to injunctive relief pursuant to Title III of the Americans with Disabilities Act⁴ and the New York City Administrative Code. This position is misplaced.

This court's order that the defendant ". . . 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 its restaurant . . ." merely recites the statute that the defendant had violated New York Civil Rights Law § 47-b and no other statute. The court found that Mr. Cukaj's intent was not to discriminate against the plaintiff on the basis of her disability. The trial record reflects that the plaintiff was a patron of the defendant on several occasions while using a walker rather than her service dog to help her ambulate. This court found that Mr. Cukaj denied the plaintiff entry to his establishment while she was accompanied by her service dog. It was Mr. Cukaj's refusal to grant the plaintiff entry to his establishment while accompanied by her service dog that provided the basis for the fine issued by this court. As such, this court found that the defendant was "guilty" of a violation and assessed a \$250 fine. This court placed Mr. Cukaj on notice that he must grant access to guide, hearing and service dogs to his establishment. Notwithstanding the general prohibition by the New York City Health code which prohibits animals in restaurants.⁵ This court corrected Mr. Cukaj's mistaken belief that only blind individuals may be accompanied with a guide dog into public spaces.

This is not a case where a disabled person was denied access to a public accommodation, it was a case where a disabled person who was accompanied by her family was denied entry of her service dog. Therefore Civil Rights Law § 47-b was the appropriate statute that was pled which was found to be violated. A review of the history of Civil Rights Law § 47-b reveals that it was enacted in 1976 and amended to include service dogs in 1986 which is 4 years before the enactment of the ADA. Consequently, the ADA added no additional rights to disabled persons to

⁴ 42 USC § 12182.

⁵ 24 RCNY Hlth. Code § 81.25.

use a service dog that they did not already possess under New York Law. Now plaintiff's counsel wants to utilize the ADA legal fees provision to bootstrap a New York State Law that does not provide for legal fees.

It must be noted that prior to Attorney Bahamonde's representation in this case, the plaintiff had filed a complaint, based upon this incident, with the New York City Human Rights Commission that handles these matters free of charge to the complainant. Fines are routinely imposed upon individuals who violate sections of the Civil Rights Law in order to enforce compliance with the law. Somehow, Attorney Bahamonde, who is wheel chair bound and markets himself as a civil rights lawyer and champion for the disabled, convinced the plaintiff that he would bring a private cause of action to enforce the New York Civil Rights Laws so that they would recover a windfall in monetary damages by privately prosecuting a minor violation of the statute. In his pleadings Attorney Bahamonde cites the Americans with Disability Act ("ADA") on to this New York State statute explicitly to boot strap the ADA sections, which permit counsel fees. However, this court made no findings with reference to the ADA other than to advise the defendant to comply with the state and federal laws..

Ironically, on several occasions the defendant's attorney attempted to settle this matter amicably, but Attorney Bahamonde would not consent. Prior to the trial, which lasted one hour, Attorney Bahamonde demanded damages in the sum of \$30,000 and counsel fees of \$10,000. Now his fee request is an outrageous \$91,781.4, where he failed to obtain relief for his client other than to get a finding that the defendant was liable for a violation and was fined \$250, which was to be paid to New York State.

The basis for counsel fees is the attorney's time, standing in the legal community, effort and results. Here, Attorney Bahamonde took on a case which he could not lose and failed to demonstrate any damages other than a mere violation of a statute which has a maximum \$250 fine which this court imposed.

This entire action is nothing more than an attempt to extort large sums of money from an immigrant restaurateur for a minor violation. This court is outraged by the conduct of Attorney James Bahamonde in the inept manner in which he prosecuted this case turning into a “cause célèbre” and by his attempts to legally extort the defendant herein and by his audacious application for counsel fees.

The plaintiff’s complaint did not plead a violation of 28 CFR § 36.302(c)(1). Therefore this court did not find a violation of any federal statute, rule or regulation.

Even had this court found that there was statutory authority to award Attorney Bahamonde counsel fees, there are several discrepancies in Attorney Bahamonde’s affirmation in support for his application. Attorney Bahamonde states that, “I am the founding member of my law firm James E. Bahamonde, P.C. I have been practicing since 2001 with a primary focus on consumer rights and housing and disability discrimination. . . .From 2001 to 2002 I was an associate at the Law Offices of Agen & Stenz practicing in personal injury litigation. . . In 2003 I founded this Law Office focusing on consumer rights and housing and disability discrimination.” However, court records indicate that Attorney Bahamonde was admitted to practice law in the Appellate Division, Second Department sometime in 2002. Additionally, a mere four months prior to the trial in this matter the United States District Court for the Eastern District of New York rendered a decision in *Aslam v. Malen & Associates, P.C.* wherein the court found:

. . . Bahamonde proposes that \$425 per hour is a reasonable hourly rate for FDCPA work in the Eastern District of New York. The court disagrees. Although Bahamonde devotes a significant part of his practice to consumer protection cases, he has only been practicing in this area since 2003 when he founded his own firm. . .⁶

Even after a federal court discounted Attorney Bahamonde’s hourly fee, he asserted that his time was worth \$425 an hour. Assuming this court were to find that New York Civil Rights

⁶ *Aslam v. Malen & Associates, P.C.*, 669 F.Supp.2d 275, [ED NY 2009].

Law § 47-c permitted an award of attorneys fees; it still would not award Attorney Bahamonde a fee anywhere near the \$425 requested. Moreover, he achieved nothing for his client other than the satisfaction of knowing that she was correct in asserting her right to have her service dog in a restaurant.

Attorney Bahamonde was ill prepared for trial and failed to offer even a scintilla of evidence that demonstrated that would prove the plaintiff's allegation at paragraph 30 of her complaint that she “. . .has suffered and continues to suffer severe mental anguish and emotional distress, including but not limited to depression, humiliation, stress, embarrassment, anxiety, loss of self-esteem and self confidence, and emotional pain and suffering.”

Private causes of action for discrimination commenced in the Supreme Court must be reserved to those acts of discrimination that demonstrate a wanton indifference to federal, state and local civil rights laws. The plaintiff's own testimony demonstrates that this transgression on the part of the defendant was minor. The plaintiff's unsolicited testimony at trial with respect to the Mr. Cukaj's establishment was as follows:

The reason why I picked that restaurant is it's handicap accessible, it has good food, and the atmosphere is very nice there. We never had a problem until that day.⁷

The plaintiff's own testimony states that she had previously dined at the defendant establishment while using her wheelchair and walker. In fact, both the plaintiff and defendant acknowledged that a handicapped patron was in the dining room in her wheelchair on the evening in question. While Attorney Bahamonde attempted to file this lawsuit as a class action against the defendant it was never certified as such, nor were any witnesses produced to demonstrate a pattern of abuse against the handicapped at the hands of Mr. Cukaj at his establishment during the course of the one hour trial. The entire basis for this action was a single

⁷ Transcript at 33.

incident that lasted approximately 10 minutes, at an establishment that the plaintiff, admitted she never had a problem at previously.

This court in no way condones the action of Mr. Cukaj. However, the court must state that this matter would have been dealt with in a cost effective and expeditious manner by New York City Human Rights Commission had the plaintiff's complaint not been withdrawn to allow the commencement of this action.

Even if this court had found a violation of the federal ADA, or the New York City Administrative Code, this court would not award reasonable attorney's fees as their award is within the discretion of the court.⁸

Conclusion

Article 4-B of the New York Civil Rights Law does not provide for an award of attorney's fees in the event a court finds a violation of any provision contained in that article. Attorney Bahamonde has not presented any law that states otherwise. Instead, Attorney Bahamonde attempts to bootstrap this court's award finding a violation of New York Civil Rights Law § 47-b, as injunctive relief requiring the defendant to permit service dogs into his establishment in compliance with the Americans with Disabilities Act and New York City Administrative Code § 8-502(f). This court's prior order found a violation of New York Civil Rights Law § 47-b and not other federal, state or local statute.

Given the fact that New York Civil Rights Law § 47-c does not include language permitting an award for attorney's fees as a penalty for violations of New York Civil Rights Law § 47-b this court cannot expand the penalty provision beyond the statutory text to include attorney's fees for violation based solely on a violation of New York Civil Rights Law § 47-b,

⁸ NYC Code § 8-502(f), 42 USC 12205.

Accordingly, it is hereby:

ORDERED, that Jame E. Bahamonde's motion for an award of attorney's fees is denied in its entirety.

ENTER,

DATED: March 31, 2010

Joseph J. Maltese
Justice of the Supreme Court