

Miloscia v B.R. Guest Holdings LLC

2010 NY Slip Op 33884(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 116881/09

Judge: Doris Ling-Cohan

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

PRESENT: *Hon. Doris Ling-Cohan*

PART 36

Index Number : 116881/2009

MILOSCIA, MICHAEL ANTHONY

vs

B.R. GUEST HOLDINGS

Sequence Number : 002

DISS ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SET FOR _____

MOTION CAL NO. 13 2010

FILED

The following papers, numbered 1 to _____ were read on this motion

COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *to dismiss is decided*
in accordance with the attached memorandum
decision.

Dated: 7/13/10

[Signature]

JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 36

MICHAEL MILOSCIA,

Plaintiff,

- against -

B.R. GUEST HOLDINGS LLC, PAMELA
FRIEDL and JOHN/JANE DOE,

Defendants.

Index No.:116881/09

DECISION/ORDER

Motion Seq. No.: 002

FILED

JUL 13 2010

COUNTY CLERK'S OFFICE
NEW YORK

LING-COHAN, DORIS, J.:

In this action, plaintiff Michael Miloscia alleges that his employment with defendants was unlawfully terminated based on disability, and that he was denied benefits in breach of a contract or implied contract, among other claims. Defendants B.R. Guest Holdings LLC (BR Guest) and Pamela Friedl move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction. See CPLR 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002); *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss."

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EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005); see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005). Thus, "the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint." *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 (1st Dept 2002); see *Leon*, 84 NY2d at 88. Further, the court may consider a plaintiff's opposing affidavits to amplify the pleadings. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976). Such affidavits will similarly be "given their most favorable intendment." *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998) (internal quotation marks and citation omitted).

Where documentary evidence is considered, pursuant to CPLR 3211 (a) (1), the moving party must show that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); see *Leon*, 84 NY2d at 88. In addition, "a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009), quoting *Swierkiewicz v Sorema, N.A.*, 534 US 506, 514-515

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(2002); see also *Exxon Shipping Co. v New York State Div. of Human Rights*, 303 AD2d 241, 241 (1st Dept 2003) (plaintiff has de minimus burden of establishing prima facie case of discrimination); *Schwaller v Squire Sanders & Dempsey*, 249 AD2d 195, 196 (1st Dept 1998) (same).

The instant complaint alleges that plaintiff Michael Miloscia was employed by BR Guest as a restaurant manager commencing on April 28, 2009, and, pursuant to a written agreement, he became eligible for medical benefits three months later, on or about August 1, 2009. Complaint, ¶¶ 15-17. On July 16, 2009, plaintiff was hit by a bus and sustained severe injuries requiring hospitalization. *Id.*, ¶ 18. According to the complaint, on the date of the accident, plaintiff's mother notified defendants, on behalf of plaintiff, that plaintiff was unable to report to work because of his injuries. In several subsequent conversations, plaintiff's mother advised defendants' employees that plaintiff did not expect to be able to return to work for approximately six months. *Id.*, ¶¶ 19-20. Plaintiff alleges that no one employed by defendants notified him, between July 16 and August 3, 2009, that his employment was terminated. On August 4, 2009, plaintiff's mother called defendants' human resources director to discuss medical benefits for her son, and was advised that there were various packages available to plaintiff. *Id.*, ¶¶ 22-23. Later the same day, defendant Pamela

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Friedl, BR Guest's Corporate Recruiter, called plaintiff's mother and informed her that plaintiff's employment was terminated on July 16, 2009, and that plaintiff was ineligible for medical benefits. *Id.*, ¶ 25. By letter dated August 5, 2009, Ms. Friedl reiterated that plaintiff's employment with BR Guest was terminated effective July 16, 2009. *Id.*, ¶ 25; see Aug. 5, 2009 letter, Ex. H to Richmond Aff. in Support of Defendants' Motion to Dismiss. Plaintiff alleges that he was not terminated until August 4, 2009. The instant action was commenced in or around December 2009.

The complaint names "John/Jane Doe" as defendants, and alleges that they are "unknown individuals ... who took unlawful actions against Plaintiff." Complaint, ¶ 6. Defendants seek dismissal of the complaint against John/Jane Doe; they contend, and plaintiff does not dispute, that the unknown defendants have not been identified or served with the complaint. The complaint accordingly will be dismissed as against John/Jane Doe.

The complaint alleges five causes of action: The first and second causes of action allege that defendants discriminated against plaintiff based on disability, in violation of the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-101 *et seq.*) (NYCHRL) and the New York State Human Rights Law (Executive Law § § 290 *et seq.*) (NYSHRL), respectively, by failing to provide a reasonable accommodation or engage in an interactive process to determine whether plaintiff

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could be provided with a reasonable accommodation. The third cause of action alleges that defendants breached the covenant of good faith and fair dealing by "falsely backdating Plaintiff's termination date, in order to deprive him of the opportunity to enroll in medical benefits for which he was otherwise eligible." Complaint, ¶ 40. The fourth cause of action alleges that defendants breached a contract, or an implied contract, by failing to provide plaintiff with medical benefits after three months of employment, as set forth in defendants' letter offering employment to plaintiff. The fifth cause of action alleges that defendants falsified plaintiff's termination date for the express purpose of denying him medical benefits, knowing that he desperately needed medical benefits, and knowing that the failure to provide them would create severe emotional distress, thereby intentionally inflicting emotional distress.

Defendants move to dismiss the first and second causes of action, for employment discrimination, on the grounds that plaintiff fails to allege that he requested an accommodation, or that he was able to perform the essential functions of his job, with or without an accommodation. Defendants move to dismiss the breach of contract/breach of implied contract and breach of the covenant of good faith and fair dealing claims because plaintiff was an at-will employee; and further contend that plaintiff fails to allege facts sufficient to establish a claim for intentional

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infliction of emotional distress.

Addressing first the causes of action for employment discrimination, both the NYCHRL and the NYSHRL provide that it is an unlawful discriminatory practice for an employer to discharge an employee or otherwise discriminate in the terms, conditions and privileges of employment based on disability. See Admin. Code § 8-107 (1) (a); Executive Law § 296 (1) (a). To state a prima facie case of disability discrimination, a plaintiff must establish that he or she suffers from a disability and the disability caused the behavior for which he or she was terminated. *Matter of McEniry v Landi*, 84 NY2d 554, 558 (1994); see *Vig*, 67 AD3d at 146.

"Disability" is defined in the NYSHRL as

"(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment...."

Executive Law § 292 (21).

Under the NYSHRL, the term "disability" is limited to those "disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." Executive Law § 292 (21); see

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Staskowski v Nassau Community Coll., 53 AD3d 611, 611 (2d Dept 2008).

The NYSHRL defines "disability" more broadly than the Americans with Disabilities Act (42 USC § 12101 *et seq.*), the federal counterpart to the state and city laws providing protection against disability discrimination, and the NYCHRL defines disability more broadly still. See *Vig*, 67 AD3d at 145; see also *Phillips v City of New York*, 66 AD3d 170, 184 (1st Dept 2009) (neither statute, unlike ADA, requires any showing that the disability substantially limits any major life activity); *Reilly v Revlon Inc.*, 620 F Supp 2d 524 (SD NY 2009) (same). Under the NYCHRL, "disability" is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Admin. Code § 8-102 (16) (a). A "physical, medical, mental or psychological impairment" means

an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs ...; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system....

Admin. Code § 8-102 (16) (b) (1).

For purposes of the instant motion, defendants do not contest that plaintiff was disabled as a result of his accident on July 16, 2009, or that he was terminated when he was unable to

report to work as a consequence of his injuries. In support of their motion to dismiss, defendants argue, however, that plaintiff was not protected by either the NYSHRL or the NYCHRL because he was unable to work on July 16, 2009, and would be unable to work for approximately six months thereafter, with or without a reasonable accommodation. Defendants further argue that plaintiff was not covered by the statutes because he did not request an accommodation and, in any event, defendants fulfilled their obligation to participate in an interactive process by notifying plaintiff, in August 2009, that he had been terminated, and then notifying him, in November 2009, that he could seek reinstatement when he was able to work. Plaintiff contends, in opposition, that defendants failed to engage in an interactive process to determine whether his medical condition could be reasonably accommodated, and argues that it was not unreasonable, as a matter of law, to consider an extended leave.

Under both the NYSHRL and the NYCHRL, it is unlawful for an employer to refuse to provide a reasonable accommodation to the known disabilities of an employee. See Executive Law § 296 (3) (a); Admin. Code § 8-107 (15) (a); see generally *Vinokur v Sovereign Bank*, __ F Supp 2d __, 2010 WL 1223320, *14, 2010 US Dist LEXIS 26854, *40-42 (ED NY 2010). "Reasonable accommodation," as defined by the NYSHRL, means

actions taken which permit an employee ...
with a disability to perform in a reasonable

manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

Executive Law § 292 (21-e).

The NYCHRL again more broadly defines "reasonable accommodation" as "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." Admin. Code § 8-102 (18). This has been found to mean that "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation." *Phillips*, 66 AD3d at 182.

Notwithstanding the differences between the NYSHRL and the NYCHRL in the "conception and statutory architecture" of "reasonable accommodation" (*id.* at 180-181), under either law, "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." *Id.* at 176. Thus, for both the NYSHRL and the NYCHRL, engagement in an individualized interactive

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process is itself an accommodation, and the failure to so engage is a violation of the state and city statutes. See *id.*

While courts generally have held that, under the NYSHRL, an employer has a responsibility to investigate the feasibility of an accommodation only after an employee makes a specific request (see *Pimental v Citibank, N.A.*, 29 AD3d 141, 148 [1st Dept 2006]), it has also been held that an employer has an independent duty to reasonably accommodate an employee's disability if the employer knew or reasonably should have known that the employee was disabled, whether or not a specific request has been made. See *Brady v Wal-Mart Stores, Inc.*, 531 F3d 127, 135 (2d Cir 2008) (analyzing ADA requirement to engage in interactive process); *Roberts v AIG Global Investment Corp.*, 2008 WL 4444004, *6-7, 2008 US Dist LEXIS 76891, *23 (SD NY 2008) (same analysis applied also to NYSHRL and NYCHRL claims). As explained in *Brady*, "[t]his view is consistent with the statutory and regulatory language, which speaks of accommodating 'known' disabilities, not just disabilities for which accommodation has been requested." *Brady*, 531 F3d at 135.

Regulations implementing the NYSHRL, for example, expressly provide that an employer must consider a reasonable accommodation "where the disability and need for accommodation are known to the employer," as well as when an employee requests an accommodation. See 9 NYCRR § 466.11 (e) (1) and (2). Providing even more

12] support for the conclusion that an employer may have an obligation to engage in a process to determine whether an accommodation can be provided, even in the absence of a specific request, the NYCHRL affirmatively requires that an employer "shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of the job ... provided that the disability is known or should have been known by the [employer]." Admin. Code § 8-107 (15) (a); see *Nande v JP Morgan Chase & Co.*, 17 Misc 3d 1103[A], 2007 NY Slip Op 51819[U], *4 (Sup Ct, NY County 2007) (contrasting duties under NYSHRL and NYCHRL), *affd on other grounds* 57 AD3d 318 (1st Dept 2008).

Under either standard, however, the facts as alleged herein are sufficient to state a claim that defendants were notified of plaintiff's disability and need for an accommodation. The complaint alleges that, on the date that plaintiff was injured and hospitalized, his mother called defendants to inform them that, as a result of being injured, he would not be reporting for work; and in subsequent conversations with defendants, plaintiff's mother, on his behalf, notified defendants that he needed to recover for six months before he could return to work. Considering that "a request for accommodation need not take a specific form" (*Phillips*, 66 AD3d at 189), the pleadings, given a liberal construction, allow for an inference that a request for leave was made.

Defendants also fail to conclusively establish that they engaged in an interactive process to consider whether a reasonable accommodation was feasible. An employer "must make a clear, fact-specific inquiry about each individual's circumstance ... [and] is required to engage in a good faith interactive process whereby employer and employee clarify what are the individual needs of the employee and the business, and identify the appropriate reasonable accommodation." *Phillips*, 66 AD3d at 175. Here, documentary evidence submitted by defendants shows, at best, that defendants decided to terminate plaintiff, as of the same date that he became disabled, without any discussion or inquiry, and then, some months later, notified him that he could seek reinstatement after he had recovered. See Aug. 5, 2009 Letter, Ex. H to Richmond Aff. in Support; Nov. 2, 2009 Letter, Ex. I to Richmond Aff. in Support. This evidence belies defendants' assertion that there was any interactive process.

Nor does defendants' argument that plaintiff was unable to work with an accommodation, warrant dismissal, in view of defendants' failure to engage in any interactive process. Although an employer may not be required to hold an injured employee's position open indefinitely while the employee attempts to recover (see *Scott v Memorial Sloan-Kettering Cancer Ctr.*, 190 F Supp 2d 590, 597 [SD NY 2002]), the employer is required to consider the feasibility of all possible accommodations,

including the availability of an extended leave of absence. See *Phillips*, 66 AD3d at 179-180. Thus, at this stage of the proceedings, where plaintiff is entitled to every favorable inference, and in the absence of any factual record to show undue hardship, the motion to dismiss the first and second causes of action is denied.

Turning to the fourth cause of action, for breach of contract/breach of implied contract, plaintiff claims that defendants breached an agreement to provide him with medical benefits. Documentary evidence submitted by defendants confirms that, pursuant to the terms of defendants' letter offering employment to plaintiff, he would become eligible to participate in the company's benefit plans, including medical benefits, "effective the first of the month following 3 months of employment." See April 22, 2009 offer letter, Ex. F to Richmond Aff. in Support. Contrary to defendants' argument, plaintiff is not alleging that his termination was a breach of such agreement, but that defendants breached the agreement by denying him the opportunity to apply for medical benefits after three months of employment. To the extent that the promise to provide medical benefits is enforceable (see generally *Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 390 [1st Dept 1994] [implied contractual relationship may be established by conduct of the parties, as well as by express agreement]), plaintiff's eligibility for

benefits depends, at least in part, on a determination of his claim that he was unlawfully terminated. In view of the above findings with respect to the first and second causes of action, the fourth cause of action also survives the instant motion to dismiss.

As to the third cause of action, for breach of the covenant of good faith and fair dealing, that claim "cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 (1st Dept 1995); see *Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 (2d Dept 2008). As the claims for breach of the covenant of good faith and fair dealing and for breach of contract arise out of the same facts and seek the identical damages, the cause of action for breach of the covenant of good faith and fair dealing is dismissed as duplicative. See *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010); *Deer Park Enters., LLC*, 57 AD3d at 712.

With respect to the fifth cause of action, to state a claim for intentional infliction of emotional distress, plaintiff must allege that defendants' conduct was "so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

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in a civilized community." *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983) (internal quotation marks and citation omitted); see *Howell v New York Post Co.*, 81 NY2d 115, 122 (1993); *Freihofer v Hearst Corp.*, 65 NY2d 135, 143-144 (1985). Further, there must be intent to cause, or a disregard of a substantial probability of causing, severe emotional distress as well as the existence of severe emotional distress. See *Howell*, 81 NY2d at 121. "[T]he requirements of the rule are rigorous, and difficult to satisfy.'" *Id.* at 122 (citation omitted).

Plaintiff in this case alleges that defendants "falsified" the date of his termination of employment in order to deny him medical benefits, which they knew that he "desperately" needed. Even if true, the alleged conduct of defendants is not "so outrageous in character, and so extreme in degree" as to be "utterly intolerable in a civilized community." *Murphy*, 58 NY2d at 303; see *Burlew v American Mut. Ins. Co.*, 63 NY2d 412 (1984) (employer's insurance carrier's delay in authorizing surgery not so extreme and outrageous as to support intentional infliction of emotional distress claim); *Estate of Coppersmith v Blue Cross & Blue Shield of Greater N.Y.*, 177 AD2d 373 (1st Dept 1991) (refusal of insurer to pay medical benefits, allegedly contributing to death of decedent, not sufficiently extreme and outrageous to support claim of infliction of emotional distress); *Kirkup v American Intl. Adj. Co.*, 160 AD2d 676 (2d Dept

1990) (workers' compensation insurance carrier's denial of medical benefits insufficient to state claim for intentional infliction of emotional distress). Plaintiff's cause of action for intentional infliction of emotional distress, therefore, is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the third and fifth causes of action of the complaint; and it is further


ORDERED that the complaint as against John/Jane Doe is dismissed; and it is further

ORDERED that the motion to dismiss is otherwise denied and the remaining claims are severed and shall continue; and it is further

ORDERED that discovery shall be completed expeditiously, as a request for judicial intervention was filed December 28, 2009; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: July 7, 2010


DORIS LING-COHAN, J.S.C.

FILED

JUL 13 2010