Davis v Duane Reade, Inc.
2012 NY Slip Op 33867(U)
August 3, 2012
Supreme Court, Kings County
Docket Number: 445/2011
Judge: Bert A. Bunyan

At an I.A.S. Trial Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 3rd day of August, 2012.

PRESENT:
HON. BERT A. BUNYAN, J.S.C.

MICHAEL DAVIS, VICTOR SIMPSON, ALFRED WILLIAMS, RONNIE PETTIFORD, JAMES CHARITE, ALDO CHUMPITAZ, MARC ROBERTS, ISHMAEL BADDIE, RUPERTO SUAREZ, RAMEL FRIGGURES, STILTZ GOUDI, RANCHEEM HACRS, ACENOR RAPHAEL, RICKY FERGUSON, YUNILETH ESCOBAR, and JAMES RAPHAEL,

Plaintiffs,

DECISION AND ORDER

Index No.: 445/2011

- against -

DUANE READE, INC., WALGREEN COMPANY, SECURITY OFFICER GREEN (first name unknown), JOHN DOES 1-9 (names presently unknown), and ABC CORP. 1-9 (names presently unknown),

Defendants.

The following papers have been read on this motion:

		Papers Numbered
Notice of Motion		1
Petition/Cross Motion and Affidavits (Affirmations) Annexed		2 and exhibits
Opposing Affidavits (Affirmations)	Plaintiffs'	3 and exhibits
Reply Affidavits (Affirmations) (Affirmation)		
Other Papers	Memorandum in support	4
	Memorandum in opposition	5
	Reply Memorandum in opposition	6

Upon the foregoing papers, defendants Duane Reade, Inc. and Walgreen Company collectively move, pursuant to CPLR 3211, for an order dismissing the amended verified complaint of plaintiffs Michael Davis, et al. For the reasons set forth below, defendants' motion is granted to the extent that plaintiffs' first four causes of action are dismissed with prejudice, and denied as to plaintiffs' fifth cause of action.

BACKGROUND

The following material facts are alleged in plaintiffs' Amended Complaint and are accepted as true for purposes of defendants' motion. Plaintiffs Michael Davis, *et al.* ("Plaintiffs") were employed by Duane Reade at its warehouse facility located at 50-02 55th Avenue, Maspeth, New York, 11378[1] (Amen. Compl. ¶ 22). On or about January 7, 2008, plaintiffs discovered video recorders (with both visual and audio capability) placed in the air vents of the company bathrooms to monitor plaintiffs as they undressed (*Id.* ¶ 23). Plaintiffs allege that Security Officer Green ("Green"), an employee of Duane Reade, installed the cameras with the knowledge and consent of defendants Duane Reade and Walgreens (*Id.* at ¶ 24). Plaintiffs claim that upon discovery of the surveillance equipment, they immediately brought it to the defendants' attention and contacted the police, however, defendants turned the police away at the company security gate (*Id.* at ¶ 26-27). Plaintiffs allege that defendants threatened them with termination if they reported the use of the cameras, and then transferred Green to another facility (*Id.* at ¶ 27-30). In the amended verified complaint, plaintiffs seek compensatory and punitive damages.

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[1] The amended verified complaint constitutes an affidavit (*see* CPLR 104[u] ["A 'verified pleading' may be utilized whenever the latter is required."].

PROCEDURAL HISTORY

Plaintiffs filed a summons and verified complaint in this Court on January 6, 2011, alleging seven causes of action. Defendants removed the case to the U.S. District Court for the Eastern District of New York, which dismissed three of the original causes of action (intentional infliction of emotional distress, hostile work environment (under federal and state law), and violation of the U.S. Constitution Fourth Amendment), and remanded the case back to this Court by a stipulation and order dated November 16, 2011.

Plaintiffs filed an amended verified complaint on March 6, 2012 alleging negligent infliction of emotional distress; negligence; negligent hiring, training, and retention; violation of New York City Human Rights Law ("NYCHRL") Administrative Code Section 8-107; and a violation of statutory right to privacy under N.Y. Labor Law § 203-c. Defendants did not answer, and instead filed the instant motion to dismiss, on March 23, 2012. Oral argument was held on June 6, 2012, and the case was fully submitted.

THE PARTIES' CONTENTIONS

Defendants

In support of their motion to dismiss, defendants advance five main arguments. Defendants contend that New York Workers' Compensation Law §11 ("NYWCL") is the exclusive remedy for negligence actions against an employer, and thus precludes plaintiffs' first three causes of action (negligent infliction of emotional distress, negligence, and negligent hiring, training, and retention).

Defendants further assert that the waiver provision of N.Y. Labor Law §740(7) also bars

plaintiffs' first three causes of action, as well as the remaining two (alleged violations of NYCHRL, N.Y.C. Admin. Code. § 8-107 and N.Y. Labor Law § 203-c). While plaintiffs' dropped their originally pleaded § 740 claim from the Amended Complaint, defendants' maintain that the mere commencement of a § 740 action invokes the waiver provision, which cannot be nullified by amending the complaint.

In addition, defendants contend that both the NYCHRL and Labor Law § 203-c claims are barred by the statute of limitations, and that the NYCHRL claim fails to state a cause of action under the statute because it does not prohibit the behavior alleged in the Amended Complaint. Furthermore, defendants state that the doctrine of *res judicata* bars the NYCHRL cause of action. Finally, defendants argue that none of these purported causes of action states a claim against Walgreens because it did not own Duane Reade or employ Green at the time of the incident.

Plaintiffs

In opposition, plaintiffs argue that their first three causes of action are outside the realm of NYWCL because they do not involve physical injuries, and instead pertain to emotional damages resulting from the invasion of their right to privacy. Plaintiffs further assert that their claims are not barred by § 740, arguing that the waiver provision only applies to causes of action based on retaliation, not to underlying torts.

Plaintiffs note that they have yet to complete discovery, and should be afforded the opportunity, in the interest of justice, to fully investigate their claims before they are dismissed. As to the statute of limitations issues pertaining to the NYCHRL and Labor Law § 203-c claims,

plaintiffs argue that the "relation back" doctrine applies and allows for the inclusion of these two causes of action as these claims arose out of the same conduct, transaction, or occurrence set forth in the original pleading. Finally, plaintiffs contend that while Walgreens did not purchase Duane Reade until 2010, they assumed its assets and liabilities, which includes this lawsuit.

DISCUSSION

On a motion to dismiss made pursuant to CPLR 3211 (a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail"(*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *see also Gaidon v. Guardian Life Ins. Co. of America,* 94 NY2d 330 [1999]; *In re Loukoumi, Inc.,* 285 AD2d 595, 596 [2010]). Further, "[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer,* 43 NY2d at 275; *Doria v Masucci,* 230 AD2d 764 [1996]).

I. Plaintiffs' Negligence Claims Barred by Workers' Compensation Law § 11

Plaintiffs' first three causes of action for negligent infliction of emotional distress, negligence, and negligent hiring, training and retention, fail to state a claim against defendants because they are precluded by New York Workers' Compensation Law § 11. NYWCL provides the exclusive remedy for an employee seeking damages for unintentional injuries incurred while

on the job. *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2008]. "While an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege 'an intentional or deliberate act by the employer directed at causing harm to this particular employee'" (*Miller v Huntington Hosp.*, 15 AD3d 548, 549 [2005], *quoting Fucile v. Grand Union Co.*, 270 AD2d 227, 228 [2000]). Mere knowledge of a risk does not constitute an intent to cause injury, and allegations that an employer negligently exposed employees to a substantial risk of injury is insufficient to circumvent the exclusive remedy provision of the NYWCL (*Id.* at 550.)

Courts consistently hold that similarly situated plaintiffs cannot maintain a cause of action sounding in negligence (*see Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 859 [2008] (exclusivity provision of the NYWCL barred employee's claim for negligent infliction of emotional distress where she was videotaped without her knowledge while changing into her uniform), *Nacinovich v. Tullett & Tokoyo Forex, Inc.*, 1998 WL 1050971 [NY Sup 1998] (dismissing plaintiffs' claim for negligent hiring pursuant to the NYWCL), *Chrzanowski v Licthman*, 884 F Supp 751 [WD NY 1995] (holding that the NYWCL statute bars plaintiff's claims of negligent hiring and negligent infliction of emotional distress)). Thus, plaintiffs' first three causes of action must be dismissed.

II. Plaintiffs' Claim Pursuant to the NYC Human Rights Law is Barred by *Res Judicata*

Plaintiffs' fourth cause of action alleges a violation of the New York City Human Rights Law, NYC Administrative Code § 8-107. Plaintiffs merely assert that defendants violated § 8-107 by videotaping plaintiffs in the restroom (Amen. Compl. ¶ 50). While there is no specific

mention of illegal video taping within the code, the statute makes it unlawful for an employer to discriminate against its employees because of age, race, creed, color, sex, etc. (Admin. Code § 8-107). Under the law, sexual harassment constitutes a form of gender discrimination under which a person is subjected to a hostile work environment (*McIntyre v Manhattan Ford*, 175 Misc 2d 795, 802 [1997]; *see also*, *Meritor Savings Bank v Vinson*, 477 U.S. 57 [1986]). "New York courts rely on federal law when determining claims under the New York Human Rights Law" (*McIntyre*, 175 Misc 2d at 802; *see also*, *Miller Brewing Co. v State Div. of Human Rights*, 66 NY 2d 937 [1985]).

Pursuant to CPLR 3211 (a)(5), defendants correctly argue this claim is barred by the doctrine of *res judicata*. Plaintiffs' original complaint alleged in their fifth cause of action, a hostile work environment under the federal law as well as under § 8-107. Plaintiffs and defendants entered into a stipulation dismissing with prejudice this cause of action (Ex. 3). The Eastern District of New York approved the stipulation and entered it as an Order of the Court.

A stipulation discontinuing a claim with prejudice, is subject to the doctrine of *res judicata* (*see In the Matter of the State of NY v Seaport Manor*, 19 AD3d 609, 610 [2d Dept 2005]). "Under the transactional approach to *res judicata* issues, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Id. citing O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Plaintiffs willingly entered into a stipulation dismissing their § 8-107 claim with prejudice. Furthermore, the transactions and occurrences underlying the dismissed federal action are identical to the instant state action. Thus, plaintiffs' fourth cause of action must be dismissed.

III. Plaintiffs State a Claim Under N.Y. Labor Law § 203-c

Plaintiffs' fifth cause of action alleges a violation of N.Y. Labor Law §203-c, which states in relevant part "No employer may cause a video recording to be made of an employee in a restroom, locker room or room designated by an employer for employees to change their clothes, unless authorized by court order." Defendants argue that this claim is time barred because it was not brought within the three-year statute of limitations (CPLR 214(2)), and that the claim is further waived by the election of remedies provision of Labor Law §740(7).

Plaintiffs correctly assert that the "relation back doctrine" preserves their Labor Law §203-c claim. This doctrine, codified in CPLR 203(f), is invoked when a plaintiff seeks to add an additional claim against a defendant already a party in the action. An otherwise untimely claim in an amended pleading "is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR 203(f)). Plaintiffs' stated all known relevant facts pertaining to the discovery of the video recorder in the employee locker room in their original complaint. As such, defendants had adequate notice that a claim relating to the legality of the installation of the camera would likely be added.

"Labor Law § 740(4) creates a cause of action in favor of an employee who has been unlawfully discharged as a consequence of engaging in certain protected conduct" (*Pipia v Nassau County*, 34 AD3d 664, 665 [2d Dept 2006]). A cause of action based upon Labor Law § 740, known as the "whistleblower statute," is available "to an employee who discloses or threatens to disclose an employer activity or practice which (1) is in violation of a law, rule or

regulation, and (2) creates a substantial and specific danger to the public health" (*Id.* at 665 [citations and internal quotation marks omitted]). The election of remedies provision, Labor Law §740(7), states:

> Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation under the common law.

Plaintiffs argue that Labor Law §740 should no longer be considered because they removed it by amending their complaint as of right. Defendants correctly note that simply amending the complaint to withdraw a Labor Law §740 claim, as the plaintiffs have done, does not eliminate the effects of the waiver provision (*Bones v Prudential Fin., Inc.*, 54 AD3d 589 [1st Dept 2008], *Hayes v Staten Is. Univ. Hosp.*, 39 AD3d 593 [2d Dept 2007]). Defendants further contend that this cause of action should be dismissed because it arises out of the same alleged acts or conduct on which Plaintiffs' originally pleaded §740 claim was based.

Upon careful review, this Court finds that defendants assert an overly broad interpretation of the waiver provision, and that §740(7) is limited to causes of action relating to retaliatory discharge (*see Nicholls v Brookdale Univ. Hosp. Medical Ctr.*, 2004 WL 1533831 *6 [ED NY 2004], *Collette v St. Luke's Hosp.*, 132 F Supp 2d 256, 274 [SD NY 2001] (concluding that the Labor Law §740(7) provision applies only to rights and remedies concerning whistle blowing as defined in the Act)). The *Collette* Court, relying on the practice commentaries, determined that the intent of §740(7) is to avoid "overlapping claims and duplicate recovery that might arise from an employer's retaliation for whistleblowing, rather than to require that a whistleblower plaintiff

automatically waives rights to redress harms unrelated to whistleblowing" (*Id.* at 273.) As an example, the *Collette* Court, citing the practice commentary, provides:

> [I]f in retaliation for disclosing arguably unsafe as well as illegal crack sales by a welfare hotel management, an employee was shot, maimed and hence unable to work, and then denied health benefits, a § 740 claim for lost benefits should not operate to bar a suit for battery. The shooting would be independently illegal apart from its retaliatory character. The same reasoning can apply to less colorful situations where retaliation is not an element of the claim under a source of redress apart from § 740. (*Id.*)

The Second Department reached a similar conclusion in *Kraus v Bandsetter*, 185 AD2d 302 [2d Dept 1992]. The *Kraus* Court found that where plaintiff Kraus reported forgery of patients' medical records by her employer, and was later defamed and fired in retaliation, did not waive her tort claim by also alleging a § 740 cause of action (*Id.*) "[T]he waiver only applies to those causes of action relating to retaliatory discharge. In this case, the plaintiffs set forth causes of action sounding in tort which are separate and independent from the cause of action to recover damages for retaliatory termination of employment" (*Id.* at 303.)

Here, defendants attempt to distinguish *Kraus*, noting that the court relied on the four month gap between the defamatory publication made about Kraus and her actual termination as evidence that the tort claim was separate and independent from the § 740 cause of action. Defendants maintain that in the case at bar, plaintiffs allege that all facts underlying their now abandoned § 740 claim as well as their § 203-c claim occurred simultaneously, and thus must be viewed as the same course of conduct. However, the only date provided in the Amended Complaint is an approximate date of when the video cameras were placed in the vents of the locker room. Prior to the completion of discovery, this Court cannot ignore the possibility that a long period of time elapsed between when the surveillance cameras were installed and when they

were discovered by plaintiffs. Furthermore, even if the cameras were installed, discovered, and reported by plaintiffs within a brief period of time, they still consist of separate acts and harms.

Lastly, defendants argue that plaintiffs fail to state a cause of action against Walgreens Company, because its acquisition of Duane Reade, Inc. was not completed until April 9, 2010, more than two years after the discovery of the surveillance camera. Generally, a corporation which acquires the assets of another is not liable for the torts of its predecessor unless:

> (1) it is expressly or impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations. *Buja v KCI Konecranes International PLC*, 12 Misc 3d 859, 862, [2006] *citing, Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983].

Walgreens' Form 10-Q indicates that Walgreens completed the stock acquisition of Duane Reade Holdings, Inc., and Duane Reade Shareholders, LLC, consisting of 258 stores as well as the corporate office and two distribution centers (Ex. 4, Pg. 11). Because Walgreens successfully merged with Duane Reade, it cannot escape Duane Reade's prior liabilities. Defendants' motion to dismiss the fifth cause of action is denied

This constitutes the decision and order of this court.

ENTER.

J.S.C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT