Reid v Macy's N.E. at Herald Sq., N.Y. 10001 Under Federated Corp.

2013 NY Slip Op 30829(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 102458/12

Judge: Louis B. York

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SCANNED ON 4/24/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK J.S.C.

PRESENT: ______________________ Justice   PART 2

Index Number : 102458/2012
REID, RHONDA D.
vs.
MACY'S
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
APR 24 2013
NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/17/13   ______________________, J.S.C.

LOUIS B. YORK

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 2

RHONDA D. REID,

Plaintiff,

- against -

MACY'S N.E. AT HERALD SQ., N.Y. 10001 UNDER FEDERATED CORP.,

Defendant.

Index No.: 102458/12

DECISION/ORDER

FILED

APR 24 2013

NEW YORK COUNTY CLERK'S OFFICE

YORK, LOUIS, J.:

In this action, plaintiff Rhonda D. Reid (Reid), proceeding pro se, sues to recover damages for alleged disability-based employment discrimination, among other claims, arising out of the termination of her employment by defendant Macy's N.E. at Herald Sq., N.Y. 10001 under Federated Corp. (Macy's). Macy's moved to dismiss the Amended Complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, or, alternatively, to compel a more definite statement, pursuant to CPLR 3024 (a). In response, plaintiff submitted a Second Amended Complaint. Although not so denominated, plaintiff's opposition to defendant's motion is deemed a cross motion for leave to amend the complaint. In opposition to plaintiff's cross motion and in further support of its motion to dismiss, defendant argues that leave to amend should be denied, and seeks dismissal of the Second Amended Complaint on the merits.

At the outset, it is well settled that leave to amend a

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pleading "shall be freely given" by the court in the absence of prejudice or surprise. *See* CPLR 3025(b); *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983); *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012). "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Murray v City of New York*, 43 NY2d 400, 404-405 [1977]), and a court may grant leave to amend pleadings "at any time." CPLR 3025 (b). "'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side ....'" *Edenwald Contr. Co.*, 60 NY2d at 959 (citation omitted). "Nevertheless, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 (1st Dept 2009); *see Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 209 (1991). "Where a proposed [pleading] plainly lacks merit ... amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied." *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 (1989).

Here, defendant does not claim surprise or prejudice resulting from any delay in seeking to further amend the complaint, but defendant argues that the Second Amended Complaint

lacks merit and should be dismissed pursuant to CPLR 3211 (a) (7).

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction (*see* CPLR 3026; *Leon* v *Martinez*, 84 NY2d 83, 87 [1994]), particularly where, as here, the plaintiff is proceeding pro se. *See Pezhman v City of New York*, 29 AD3d 164, 168 (1st Dept 2006); *Rosen* v *Raum*, 164 AD2d 809, 811 (1st Dept 1990). 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*, 84 NY2d at 87-88; *see 511 W. 232nd Owners Corp.* v *Jennifer Realty Co.*, 98 NY2d 144 (2002); *Sokoloff* v *Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001). "Stated another way, 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 Guggenheimer* v *Ginzburg*, 43 NY2d 268, 275 (1977); *Bernstein* v *Kelso & Co.*, 231 AD2d 314, 318 (1st Dept 1997). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc.* v *Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see Roni LLC* v *Arfa*, 18 NY3d 846, 848 (2011); *AG Capital*

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Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 (2005). "A court is further obligated to 'sustain the pleading when a cause of action may be discerned, even if inartfully stated.'" *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 99-100 (1st Dept 2004), quoting *Fischbach & Moore v E.W. Howell Co.*, 240 AD2d 157, 157 (1st Dept 1997]). However, while the pleading standard is a liberal one, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts." *Vanscoy v Namic USA Corp.*, 234 AD2d 680, 681-682 (3d Dept 1996) (internal quotation marks and citation omitted); *see Shariff v Murray*, 33 AD3d 688, 690 (2nd Dept 2006); *Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2nd Dept 2005); *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003).

The proposed Second Amended Complaint asserts seven causes of action. The first, second and third causes of action allege that defendant discriminated against plaintiff based on disability, in violation of the New York State Human Rights Law (Executive Law § § 290 *et seq.*) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-101 *et seq.*) (NYCHRL), by terminating plaintiff's employment, while she was on medical leave, and by failing to provide a reasonable accommodation or engage in an interactive process to determine whether plaintiff could be

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provided with a reasonable accommodation. The Second Amended Complaint also asserts causes of action for: unlawful retaliation, under the NYSHRL and the NYCHRL (fourth); wrongful termination (fifth); fraud and material misrepresentation (sixth); and negligent and intentional infliction of emotional distress (seventh).

Employment Discrimination

As to the first, second, and third causes of action, defendant originally contended that those claims were barred by the statute of limitations, but has now withdrawn the branch of its motion seeking to dismiss the discrimination claims as untimely. Plaintiff has submitted evidence to show that her employment ended on April 17, 2009, and her complaint, therefore, filed on April 17, 2012, is timely. Defendant does not otherwise oppose amendment of the complaint to add the causes of action for disability discrimination.

Plaintiff's allegations are, in any event, sufficient to state causes of action for violations of the NYSHRL and the NYCHRL. Under both statutes, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's disability. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). It also is unlawful for an employer to refuse to provide a reasonable

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accommodation to the known disabilities of an employee. Executive Law § 296 (3) (a); Administrative Code § 8-107 (15) (a); *see generally Phillips v City of New York*, 66 AD3d 170 (1st Dept 2009); *Vinokur v Sovereign Bank*, 701 F Supp 2d 276 (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, ... 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 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." Administrative 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. Moreover, 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; *see Miloscia v B.R. Guest Holdings, LLC*, 94 AD3d 563, 564 (1st Dept 2012). Engagement in an individualized interactive process is itself an accommodation, and the failure to so engage is a violation of the state and city statutes. *See Phillips*, 66 AD3d at 176.

Here, the facts alleged are sufficient to state a claim that defendants were notified of plaintiff's disability and need for an accommodation. Considering that "a request for accommodation need not take a specific form" (*id.* at 189), the pleadings, given a liberal construction, allow for an inference that a request for leave was made.

Retaliation

Generally, to establish a claim of unlawful retaliation under the NYSHRL (Executive Law § 296 [1] [e]), a plaintiff must show that she participated in a protected activity known to defendants, an adverse employment action was taken against her, and a causal connection existed between the adverse action and the protected activity. *See Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 (2004); *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 (1st Dept 2012); *Bendeck v NYU Hosps.*, 77 AD3d 552, 553 (1st Dept 2010); *Hernandez v Bankers Trust Co.*, 5 AD3d 146, 148 (1st Dept 2004). Under the more protective NYCHRL, a

plaintiff need not show that termination or another materially adverse action resulted, but, rather, that she was deterred from engaging in protected activity. *See* Administrative Code § 8-107 (7); *Fletcher*, 99 AD3d at 51; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 70-71 (1st Dept 2009).

"Protected activity" refers to action taken to oppose or complain about any discriminatory practices prohibited by the state and city human rights statutes. *See Forrest*, 3 NY3d at 313 n 11; *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010); *Sharpe v MCI Communications Servs., Inc.*, 684 F Supp 2d 394, 406 (SD NY 2010). "[C]omplaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the State and City Human Rights Laws." *Pezhman*, 47 AD3d at 494; *see Ciullo v Yellow Book, USA, Inc.*, 2012 WL 2676080, *13, 2012 US Dist LEXIS 93912, *39 (ED NY 2012) ("general complaints ... that did not relate to allegations of discrimination do not trigger retaliation protections"). "[A]mbiguous complaints that do not make the employer aware of alleged discriminatory conduct" (*International Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345, 357 [SD NY 2007]) and complaints "'merely of unfair treatment generally'" also do not constitute protected activity. *Aspilaire v Wyeth Pharms., Inc.*, 612 F Supp 2d 289, 308-309 (SD NY 2009).

In this case, there are no allegations that plaintiff

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complained about any discriminatory conduct or actions, as opposed to unfair treatment generally. Absent such allegations, the retaliation claim cannot stand.

Wrongful Termination

"New York does not recognize the tort of wrongful discharge." *Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316 (2001). "An at-will employment relationship may be 'freely terminated by either party at any time for any reason or even for no reason' with limited exceptions." *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 367 (1998), quoting *Murphy v American Home Products Corp.*, 58 NY2d 293, 301 (1983); *see Sullivan v Harnisch*, 19 NY3d 259, 261 (2012). "[T]here is no exception for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities" (*Lobosco*, 96 NY2d at 316), although an exception may be found "when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment." *Id.*

Plaintiff's wrongful termination claim does not allege a violation of a written agreement, but, rather, asserts that termination of her employment violated public policy and New York's state and local human rights laws. This claim is duplicative of plaintiff's causes of action for violations of the

NYSHRL and the NYCHRL, and is, therefore, dismissed. *See Kamen v Berkeley Coop. Towers Sec. II Corp.*, 98 AD3d 1086, 1086 (2nd Dept 2012).

Fraud

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 (1958). Fraud claims are subject to the heightened pleading requirements of CPLR 3016 (b), which provides that "the circumstances constituting the wrong shall be stated in detail." *See Mandarin Trading Ltd.*, 16 NY3d at 178; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 (2nd Dept 2010). CPLR 3016 (b) thus "'imposes a more stringent standard of pleading than the generally applicable "notice of the transaction" rule of CPLR 3013, and complaints based on fraud ... which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed.'" *Megaris Furs, Inc.*, 172 AD2d at 209-210 (citations omitted).

Plaintiff's fraud claim rests solely on her allegation that, on the day she was scheduled to return to work from a medical leave, she was told by one of defendant's employees to stay home, due to a storm, and the next day she was told by another employee that she had received incorrect information about staying home and her employment would be terminated. Second Amended Complaint, ¶¶ 8-9. This allegation, without more, is insufficient to satisfy the pleading requirements for a fraud claim.

Negligent and Intentional Infliction of Emotional Distress

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege conduct "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 in a civilized community." *Murphy*, 58 NY2d at 303 (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). Courts also have applied that standard to claims of negligent infliction of emotional distress. *See Hernandez v Central Parking Sys. of N.Y., Inc.*, 63 AD3d 411, 411 (1st Dept 2009); *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 (1st Dept 2005); *Sheila C. v Povich*, 11 AD3d 120, 130-131 (1st Dept 2004); *Dillon v City of New York*, 261 AD2d 34, 41 (1st Dept 1999). "[T]he 'requirements

of the rule are rigorous, and difficult to satisfy.'" *Howell,* 81 NY2d at 122 (citation omitted). Generally, the claims that have been upheld by the courts "were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v Bayer,* 272 AD2d 263, 264-265 (1st Dept 2000); *see Nader v General Motors Corp.,* 25 NY2d 560, 569 (1970).

Plaintiff's cause of action for intentional infliction of emotional distress is barred by the one-year statute of limitations. *See* CPLR 215 (3); *Bridgers v Wagner,* 80 AD3d 528, 528 (1st Dept 2011). Moreover, plaintiff's allegations that defendant terminated her employment and denied her benefits in a discriminatory, malicious and deliberate manner, even if true, do not meet the standard of "extreme and outrageous" conduct necessary to state a cause of action for intentional or negligent infliction of emotional distress. In addition, "intentional infliction of emotional distress is a theory of recovery that is to be invoked only as a last resort." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.,* 256 AD2d 269, 270 (1st Dept 1998); *see Conde v Yeshiva Univ.,* 16 AD3d 185, 187 (1st Dept 2005). Where, as here, another avenue of recovery of emotional distress damages is available under the NYSHRL and NYCHRL, "there is no reason to apply the theory." *McIntyre,* 256 AD2d at 270.

With respect to plaintiff's claim for punitive damages,

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defendant correctly contends that punitive damages are not available for employment discrimination claims brought under the NYSHRL. *See Thoreson v Penthouse Intl., Ltd.*, 80 NY2d 490, 499 (1992); *McIntyre*, 256 AD2d at 271. A claim for punitive damages under the NYCHRL is not thereby precluded, however. *Id.*; *see* Administrative Code § 8-502 (a); *Bracker v Cohen*, 204 AD2d 115, 115-116 (1st Dept 1994).

Accordingly, it is

ORDERED that plaintiff's cross motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the complaint to add the first, second and third causes of action, and to this extent the Second Amended Complaint in the form annexed to plaintiff's opposition papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed fourth, fifth, sixth and seventh causes of action; and it is further

ORDERED that defendant's motion to dismiss is granted only as to the fourth, fifth, sixth and seventh causes of action of the Second Amended Complaint, and those causes of action are stricken; and it is further

ORDERED that defendant shall answer the Second Amended Complaint or otherwise respond thereto within 20 days from the

date of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 2, Room 205, 71 Thomas St., New York, N.Y., on May 1, 2013, at 9:30 AM/PM.

Dated: 4/17/13

FILED

APR 24 2013

NEW YORK COUNTY CLERK'S OFFICE

HON. LOUIS YORK, J.S.C.