Boureima v NYC Human Resources Admin.
2014 NY Slip Op 30259(U)
January 28, 2014
Supreme Court, New York County
Docket Number: 402014/2009
Judge: Louis B. York

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C Justice PART 2

Index Number : 402014/2009
BOUREIMA, HAWA
vs.
THE NYC HUMAN RESOURCES
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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

FILED

JAN 30 2014

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/28/14

LOUIS B. YORK, J.S.C.

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
COUNTY OF NEW YORK

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HAWA BOUREIMA, MINKWON CENTER FOR COMMUNITY ACTION, MERCEDES CRUZ, XIAO DAN GUAN, MEKSHEN KWONG, REYITA RIVERA, TIDA KONTEH, HUAN NU LU, YAN YE, MARIA MA, QI HUA LI, YUE FU CHAN,

Plaintiffs, **Index No. 402014/2009**

– against –

THE NYC HUMAN RESOURCES ADMIN., and ROBERT DOAR as Commissioner of the NYC Human Resources Admin.,

Defendants.

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York, J.S.C.:

Motion Numbers 5 and 6 are consolidated for disposition and resolved as follows:

In this action, plaintiffs Hawa Boureima, Minkwon Center for Community Action ("Minkwon Center"), Mercedes Cruz, Xiao Dan Guan, Tida Konteh, Fei Jian Ye, Yue Fu Chan, and Antonio Cano claim that the New York City Human Resources Administration ("HRA") has failed to provide adequate assistance to the named individuals and to those clients of Minkwon Center who have limited English proficiency ("LEP"). The complaint states that as a result of lawsuits challenging HRA on grounds of national origin discrimination, which resulted in findings that HRA had not satisfied its obligation to provide assistance to LEP speakers, New York City enacted the Equal Access to Human Services Act ("the Equal Access Act") in 2003. In addition, several regulations were promulgated to effectuate the Equal Access Act. The complaint details the alleged problems the named individuals had in the course of applying for benefits through HRA – including missed appointments, the cancellation of benefits, and

delayed benefits. The complaint also indicates that on numerous occasions the named individuals had to seek outside help through neighborhood legal services centers, friends or family members, in order to understand letters they received in English and participate in the numerous meetings they attended at which there were no interpreters. The complaint also alleges that HRA is guilty of national origin discrimination. It alleges that HRA has violated the Equal Access Act, the New York City Human Rights Law, State Social Services regulations, and HRA's own policies and plans that allegedly implement the Equal Access Act. As relief, plaintiffs seek declaratory and injunctive relief, retroactive benefits the individuals did not receive because of the lack of language services, and a judgment including civil penalties and punitive damages due to the alleged Human Rights Law violations.

The parties have conducted extensive discovery, including the depositions of all plaintiffs and representatives of defendants. The Note of Issue has been filed. Currently the Court has before it two motions and two cross-motions, which the Court consolidates for the purpose of disposition. Plaintiffs and defendants have moved for summary judgment. There also are cross-motions by plaintiffs, to amend the caption and complaint, and by defendants, to strike the affidavit of Joseph Pereira.

First, the Court denies defendant's cross-motion to strike the affidavit of Joseph Pereira. The basis of defendants' objection to Mr. Pereira, upon whom plaintiffs rely as an expert, is that plaintiffs did not comply with paragraph 4 of this Court's compliance conference additional directive sheet. That provision mandates that plaintiffs serve their expert disclosure on or before the filing of the Note of Issue. Plaintiffs did not provide this disclosure until a few months after the filing of the Note of Issue. However, plaintiffs point to the Court's preliminary conference order and its additional directive that plaintiffs must serve expert disclosure by the filing of the

Note of Issue *if* defendants make a demand for expert disclosure. Here, plaintiffs state, defendants did not make a demand. Moreover, plaintiffs allege that defendants did not raise an objection to the disclosure when they initially provided it. It wasn't until the current motion practice that defendants objected. In light of the Court's own conflicting directives and of the facts that defendants neither sought nor requested the disclosure in question and did not object to the disclosure for several months, the Court shall consider the affidavit of Mr. Pereira. This decision is also in furtherance of the general policy of allowing motions for summary judgment to be decided on their merits.

Plaintiffs' cross-motion to amend the complaint and caption is only relevant if the Court denies defendants' motion for summary judgment. Therefore, the Court turns to both parties' summary judgment motions. Defendants argue that summary judgment is appropriate in their favor because: 1) the City of New York, rather than HRA, should be named as a defendant; 2) plaintiffs' claim under the Equal Access Law, N.Y.C. Admin. Code §§ 8-1001 *et seq,* must fail because it does not create a private right of action; 3) there also are no private rights of action based on plaintiffs' claims that defendants violated New York State Social Services Regulations, New York State Office of Temporary and Disability Assistance's ("OTDA") Administrative Directives or HRA's policy directives – instead, defendants claim that the individual plaintiffs should have proceeded as individuals, in the form of an Article 78 challenge; 4) plaintiffs have not adequately stated a cause of action for national origin discrimination under the City's Human Rights Law because a) the individual plaintiffs have not identified their nationalities, and b) plaintiffs have pointed to no evidence that the alleged discrimination was related to their national origins; 5) plaintiff Yan Ye is a minor and therefore should have appeared by a guardian, and MinKwon Center's allegation that it has spent significant resources trying to make up for HRA's

deficiencies is insufficient to establish injury in fact; 6) plaintiffs should have sought a declaratory judgment through an Article 78 proceeding, and the statute of limitations had expired for "nearly" all of the claims by the time plaintiffs commenced this action, Def. Brief at p. 17, Point III, Part A; 7) injunctive relief is not available as it relates to non-parties and as the government operations rule renders injunctive relief unnecessary; 8) punitive damages are not proper against defendants; 9) only the Commission or the City may seek civil penalties under the Human Rights Law; 10) plaintiffs cannot establish actual injury as they ultimately received their benefits. Plaintiffs oppose this motion.

Plaintiffs' motion for summary judgment is based on the following arguments: 1) defendants have not denied any of plaintiffs' factual assertions and produced only one witness familiar with only one of the individual plaintiffs' personal experiences with HRA, and therefore they have not raised any issues of fact; 2) plaintiffs have established beyond dispute that HRA routinely violates the Equal Access Act in numerous respects – failing to provide sufficient translation services in person or by its phone banks, sufficient copies of translated documents, not systematically apprising LEP individuals of their right to free language assistance services; not keeping records or analyzing data in accordance with the mandates of the law; failing to make reasonable efforts to hire and/or train and/or monitor the numbers of bilingual personnel and also failing to match the correct bilingual worker to its LEP clients; 3) HRA does not monitor its LEP programs despite a legal mandate to do so; 4) HRA does not have a complaint system for LEP applicants that is accessible and easily comprehensible; and 5) defendants are in violation of the City's Human Rights Law because defendants' failures have a disparate impact on those born outside the United States. Defendants oppose this motion. For the reasons below, the Court dismisses the action.

If the case were not dismissed, the Court would grant plaintiffs' cross-motion to amend for all the reasons plaintiffs describe in their cross-motion. Similarly, the Court would have allowed amendment to substitute the guardian of Yan Ye, a minor, for Yan Ye. In addition, it would have allowed the amendment to include the national origins of the individual plaintiffs. In particular, the Court notes, discrimination based on LEP status is considered discrimination based on national origin. As part of its stated intent and findings, the legislature noted that it was enacting the Equal Access Law to ensure that no individuals are denied social service benefits because of their race, color or national origin. Therefore, the Equal Access Law continues, individuals should not have difficulty in obtaining social services because they do not speak English. The legislature thus viewed obstacles based on the limited English proficiency of applicants for Human Resources benefits as encompassed by the prohibition against discrimination based on race, color or national origin – with no evident restriction on the individuals' national origin.[1]

However, the Court dismisses plaintiffs' causes of action for several reasons and the above issues are therefore moot. First, defendants acknowledge that a petitioner who receives a final decision denying benefits may challenge that decision through an Article 78 proceeding. However, they contend, a private right of action against HRA does not exist. Absent "some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce the statute or regulation." *Ferreira v. Cellco Partnership*, 111 A.D.3d 777, 976 N.Y.S.2d 488, 491 (2nd Dept. 2013)(citations and internal quotation marks omitted). A sufficient relationship exists where the

[1] It also appears that the MinKwon Center for community action may have institutional standing because of the financial impact these problems have had on the Center. *See Mixon v. Grinker*, 157 A.D.2d 423, 556 N.Y.S.2d 855 (1st Dept. 1990). However, as the issue is moot, the Court did not research it fully.

law in question authorizes a private right of action. *Id.* Moreover, this is true even if the intended plaintiffs are protected by the rules or laws in question. *Id.*

There is no provision in the Equal Access Act that explicitly establishes a private right of action. An implicit private right of action only exists if the law solely benefits the proposed plaintiffs, if recognition of the right promotes the legislative purpose, and if a private right of action is consistent with the overall legislative scheme. *Goddard v. Martino*, 40 Misc. 3d 1050, 1055, 970 N.Y.S.2d 382, 386 (Sup. Ct. Duchess County 2013). Legislative intent is the most critical factor. *See Mark G. v. Sabol*, 93 N.Y.2d 710, 720, 695 N.Y.S.2d 730, 734 (1999). Even where the plaintiff is a member of the class that benefits from the law and a private right of action arguably furthers the law's purpose, unless it furthers the legislative scheme and is consistent with the legislative purpose, no private right of action exists. *See Mark G. v. Sabol*, 247 A.D.2d 15, 28, 677 N.Y.S.2d 292, 299-300 (1st Dept. 1998)("*Mark G. I*"), *modified on other grounds*, 93 N.Y.2d 710, 695 N.Y.S.2d 730 (1999).

Here, as defendants point out, an earlier draft of the Equal Access law included a private right of action with a one-year limitations period. That provision was deleted from the final version, however. The City "[knows] how to include a private right of action when it [intends] to do so." *Flagstar Bank, FSB v. State*, – A.D.3d –, –, – N.Y.S.2d –, – (2nd Dept. Dec. 26, 2013)(avail at 2013 WL 6800914, at *6). By excising the language creating a private right of action from the Equal Access Law, on the other hand, it evinced a clear intent not to create one. *Id.* Accordingly, the Court dismisses the cause of action predicated on the Equal Access Law.

The City also has the authority to create a private cause of action for violations actionable under the Human Rights Law. In *Bracker v. Cohen*, 204 A.D.2d 115, 612 N.Y.S.2d 113 (1st Dept. 1994), therefore, the First Department agreed with the trial court that the City had the

power to enact Administrative Code § 8-502. *See also Phillips v. City of New York*, 66 A.D.3d 170, 186-87, 884 N.Y.S.2d 369, 381 (1st Dept. 2009)(relying on *Bracker).* Plaintiffs have not pointed to any laws creating a private cause of action based on the type of situation at hand. Moreover, because there is no private right of action under the Equal Access Act which applies to this situation, it is not likely that a private right of action based on the Equal Access Act would exist under another law. Also, one of the administrative guidelines upon which plaintiffs rely, a human rights law directive relating to LES individuals seeking assistance at Job Centers, Non Public Assistance Food Stamp Offices, and ancillary/related offices, provides for an administrative review process related to the denial of benefits or assistance. This type of hearing, as defendants note, are appropriate for an Article 78 petition rather than a civil action. Finally, the other rules and regulations upon which plaintiffs rely deal with employment discrimination and other situations which are not at issue here.[2] Therefore, plaintiffs have not shown that a private right of action exists.

Defendants are also correct that absent a showing of legislative intent, municipal entities are immune from claims for punitive damages. *Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.,* 70 N.Y.2d 382, 386-87, 521 N.Y.S.2d 653, 654-55 (1987). Plaintiffs have failed to make such a showing. Therefore, even if plaintiffs were to proceed under the Human Rights Law, they would not be able to obtain punitive damages against defendants. *See Krohn v. New York City Police Department*, 2 N.Y.3d 329, 778 N.Y.S.2d 746 (2004).

Plaintiffs' request for an order of mandamus cannot be granted. Mandamus exists to enforce ministerial rather than discretionary duties. *See Klein v. New York State Office of Temporary and Disability Assistance*, 84 A.D.3d 1378, 1380, 924 N.Y.S.2d 521, 524 (2nd Dept.

[2]The Court notes that, although it has not addressed every cited provision in this decision, it has considered all the parties' arguments concerning this issue and examined the rules upon which plaintiffs rely.

2011). Here, there are clear directives in place that compel defendants' duty to create the program that is in place and to assist LEP individuals applying for benefits. HRA has implemented the program so has not violated any explicit duty. As for plaintiffs' claim – that the program is not sufficiently effective – HRA has the discretion to determine how many information pamphlets should be available in what languages at what offices, how many translators – and for what languages – should be at each HRA office, and the like. This Court cannot compel HRA to add a specific number of Spanish language or other interpreters at HRA's sites or in other ways to direct HRA's implementation of the plan. *See id.*; *Temares v. County of Nassau,* 66 A.D.3d 1034, 1034-35, 888 N.Y.S.2d 129, 130 (2nd Dept. 2009).

The Court is troubled that there appears to be little or no means of enforcing the Equal Access Law. However, as defendants note, individual plaintiffs can proceed in Article 78 petitions when they do not receive benefits for which they are eligible, or retroactive benefits for which they are eligible, due to their LEP status or other pertinent problems. The parties dispute whether the claims are viable as the plaintiffs ultimately received their benefits. They also dispute whether the claims are timely; plaintiffs assert that they are timely because the problems are ongoing, but defendants state the four-month statute of limitations period commenced when the individuals were denied benefits or had benefits canceled. To the extent that these individuals raise timely and proper challenges to HRA decisions, plaintiffs may bring proceedings within 60 days of the date of entry of this order. This Court does not convert this action to a proceeding, as it is empowered to do, because the complaint as written does not set forth the Article 78 claims including the proper prerequisites – stating, for example, that the individuals applied for benefits on a set date and they were denied benefits or had benefits improperly canceled on a set date, and did not prevail after a final determination by HRA.[3]

[3]The parties have not discussed the question of whether plaintiffs, as petitioners,

The Court has considered the parties' other arguments and they do not alter its conclusions. For the reasons above, therefore, it is

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that this action is dismissed; and it is further

ORDERED that defendants' cross-motion to exclude the affidavit of plaintiffs' expert is denied and plaintiffs' cross-motion to amend is denied as moot.

ENTER:

Dated: 1/28/14

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

JAN 30 2014

NEW YORK
COUNTY CLERK'S OFFICE