Dillon v Silverman

2014 NY Slip Op 30934(U)

April 9, 2014

Supreme Court, New York County

Docket Number: 153549/2012

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DONNA M. DILLON,

Plaintiff,

- against -

HENRY R. SILVERMAN and KAREN SILVERMAN,

Defendants.

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INDEX No.: 153549/2012

Motion Sequence Numbers: 002 & 003

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of claims of plaintiff Donna M. Dillon ("plaintiff" or "Dillon") that she was subject to employment discrimination based on her alleged disability in violation of the New York City Human Rights Law ("NYCHRL"). Defendants Henry R. Silverman and Karen Silverman (collectively, "defendants" or "Silverman") move, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff's amended complaint. Defendants separately move, pursuant to CPLR § 3024(b) and 22 NYCRR § 130-1.1 striking certain alleged "improper" portions of plaintiff's amended complaint and imposing sanctions on plaintiff and her counsel. Plaintiff opposes the motions. Both motions are consolidated herein for disposition.

BACKGROUND

In or about September 2011, plaintiff began employment with defendants as a full-time "nanny" or domestic employee at defendants' residence in New York County earning a wage of approximately $40.00 per hour (Amended Complaint at ¶ 10). Defendants employed approximately 15 employees at their residence (*id.* at ¶ 9).

On March 6, 2012, defendants' chef served plaintiff fish for lunch (*id.* at ¶ 14). Later that day, plaintiff began to feel sick suffering from "crippling cramps, a terrible headache and severe

nausea" (*id.*). The following morning, on March 7, 2012, plaintiff went to her personal physician who diagnosed her with "Gastroenteritis" (*id.* at ¶ 15). On the same day, plaintiff gave defendants a doctor's note stating that:

> Patient [plaintiff] has food poisoning which will clear up within 3-5 days. Patient should have a bland diet for a few days to relieve her gastrointestinal tract. Patient should be hydrated and well rested.

(*Id.* at ¶ 17).

On March 10, 2012, plaintiff was feeling more sick and went to another doctor who confirmed she was still suffering from gastroenteritis. The doctor instructed plaintiff "to stay home until she was feeling better" (*id.* at ¶ 18). The next day, plaintiff went to the Montefiore Hospital emergency room for a "second opinion" because her symptoms "grew worse" (*id.* at ¶ 19). Plaintiff received the same diagnosis and instructions to "stay home and rest" (*id.*). On March 12, 2014, plaintiff went to see defendants' own doctor who also diagnosed her with gastroenteritis and instructed her not to return to work until she recovered (*id.* at ¶ 21).

Defendants gave plaintiff the weekend off and asked her to come back to work on Monday, March 19, 2012 (*id.* at ¶ 22). On March 19, 2012, plaintiff felt extremely sick, vomited and was taken to Lenox Hill Hospital, where she was admitted for "severe" gastroenteritis (*id.* at ¶¶ 23-24). On March 22, 2012, plaintiff was informed by her doctor that she still had "bacteria in her system" which required plaintiff to stay home and rest (*id.* at ¶ 25). On March 23, 2012, defendants terminated plaintiff's employment (*id.* at ¶ 27).

STANDARD OF REVIEW

In determining a motion to dismiss a pleading for failure to state a cause of action, 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 into any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 974 [1994]).

ARGUMENTS

Defendants argue that this action should be dismissed for two reasons. First, defendants argue that plaintiff as a private domestic employee is not covered under the NYCHRL based upon the unreported case of *Galonskly v Williams*, 1998 WL 1050969 (Sup. Ct., New York County, Miller, J.) ("it is likely that 'domestic' employment would also be considered outside the scope of the NYCHRL"). In addition, defendants cited several appellate cases that have excluded domestic employees from coverage under the New York State Human Rights Law ("NYSHRL") (*Matter of Thomas v Dosberg*, 249 AD2d 999 [4th Dept 1998]; *Annex Hotel v NY State Div. Of Human Rights*, 45 AD3d 360 [1st Dept 2007]). Second, defendants further argue that gastroenteritis is not a disability within the meaning of the NYCHRL because there has not been one reported case in which a court has recognized gastroenteritis as a disability under any anti-discrimination statute.

Plaintiff contends that defendants cannot rely upon various authority interpreting the NYSHRL and the Americans with Disabilities Act ("ADA") to limit the scope of the more liberal construction of the NYCHRL in light of the New York City Council's 2005 enactment of the Local Civil Rights Restoration Act ("Local Law 85" or "Restoration Act"). Plaintiff explains that *Galonsky* and the appellate authority interpreting the NYSHRL is no longer "good law" because the Restoration Act requires that the NYCHRL must be afforded a uniquely liberal and broad construction which is generally more favorable than New York State and Federal law. Thus, plaintiff

concludes that a domestic employee is included in the scope of NYCHRL and severe gastroenteritis qualifies as an impairment of the digestive system.

DISCUSSION

The NYCHRL Must be Construed in a Broad Manner

It is quite clear that in the aftermath of the Restoration Act, the provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). Indeed, courts now have to provide "an independent liberal construction analysis in all circumstances, even where state and federal civil rights have comparable language" (*Williams v. NYC Housing Auth.*, 61 AD3d 62, 66 [1st Dept 2009] *lv denied* 13 NY3d 702 [2009]). As such, similarly worded state or federal "provisions may be used in interpretation only to the extent that the counterpart provisions are viewed as a floor below which the City Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (*id.* at 66-67).

Courts May Look for Interpretive Guidance in Analyzing NYCHRL

There is fine distinction between analyzing the broad scope and definitions of the NYCHRL, and the "interpretive guidance" that the courts continue to employ to interpret the NYCHRL in light of the vast developed body of law under the NYSHRL and the federal law (*Vig v The New York Hairspray Co.*, 67 AD3d 140 [1st Dept 2009]). In other words, while courts independently analyze claims of NYCHRL under the broad and liberal construction described above, they may utilize textually similar provisions of state and federal law, if it is appropriate.

Temporary Conditions Do Not Qualify as a Disability under NYCHRL

With these guiding principles in mind, this Court will analyze the issues raised in this motion. This Court need not decide the more complex issue as to whether plaintiff is covered under NYCHRL as a domestic employee because the facts as plead in the amended complaint do not state a cause of action for a non-temporary disability as explained in more detail below.

It has been held under the NYSHRL and the ADA that temporary conditions do not qualify as a disability under the discrimination laws (*Guary v Upstate Natl. Bank*, 618 F Supp 2d 272, 275 [WDNY 2009] ["plaintiff's broken ankle, which resulted in a single, twelve-week disability leave with no alleged physical disability thereafter, is not a disability for purposes of the ADA or the parallel New York statute"]; *Jackson v Nor Loch Manor HCF*, 134 Fed Appx 477, 477 [2d Cir 2005] [a surgical procedure requiring a "temporary" absence from work did not qualify as a disability under the ADA]; *Zick v Waterfront Commn of New York Harbor*, 2012 WL 4785703 [SDNY 2012] [plaintiff's temporary eight to ten week absence due to two broken bones in her right leg which required a cast and rest at home was not a disability under the ADA]).

In this case, plaintiff merely alleges that she ate fish which seemed to have caused her food poisoning. The remedy for her ailment was a bland diet to relieve her gastrointestinal tract and rest. Plaintiff's symptoms got progressively worse or "severe"over the course of about two weeks requiring several visits to doctors and hospitals due to "bacteria" still in plaintiff's system requiring her to just "stay home and rest" to recover from her condition. The inescapable conclusion is that plaintiff is alleging a single, temporary, two-week illness with no subsequent long-lasting or permanent physical disability. Even under the most liberal and broad construction of the NYCHRL, such a temporary condition does not qualify as a disability. There is no indication that the City

Council ever contemplated that the NYCHRL would cover such temporary conditions because such an interpretation would ultimately mean that any illness of short duration and with little or no long-lasting or permanent physical manifestations would constitute a disability. In fact, under such a scenario, virtually any minor fleeting condition would qualify as a disability. The more rational or reasonable interpretation is that the City Council intended to broaden the scope and breadth of the NYCHRL to encompass disabling conditions that are of longer duration but not transitory conditions.

Perceived Disability

Plaintiff also alleges that defendants perceived her as being disabled and terminated her based on that perception. While the perception or the intent of the defendants is normally subject to a factual determination, plaintiff must allege as a matter of law that defendants perceived plaintiff "to be suffering from an impairment within the meaning of the statute, not just that the employer [defendants] believed the employee [plaintiff] to be somehow disabled" (*Francis v City of Meriden*, 129 F3d 281, 286 [2d Cir 1997]; *see also Massaro v Mercado*, 276 AD2d 445 [1st Dept 2000]). As stated above, plaintiff's allegations that she ate fish causing her food poisoning which became progressively worse over a two week period did not constitute a disability under the NYCHRL. Therefore, there cannot be a perception that plaintiff was impaired within the meaning of the NYCHRL, but only an unsupported and insufficient conclusion that defendants believed that plaintiff was somehow disabled (*Francis*, 129 F3d at 286).

Motion to Strike Portions of the Amended Compliant

Defendants separately moved to strike certain alleged "improper" portions of plaintiff's amended complaint. The first branch of the motion to strike the amended complaint is deemed moot for the reasons stated above.

Sanctions

Defendants also seek to impose sanctions on plaintiff and her counsel. Pursuant to 22 NYCRR § 130.1-1, a court, in its discretion, may also impose financial sanctions upon any party who engages in frivolous conduct. Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (22 NYCRR § 130.1-1[c][1-3]). In determining whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR § 130.1-1[c][3]).

Inasmuch as plaintiff had a basis in law to commence this action, this Court denies the remaining branch of the motion seeking to impose sanctions on plaintiff and her counsel.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR § 3211(a)(7) for an order dismissing plaintiff's amended complaint is granted; and it is further

ORDERED that defendants' motion pursuant to CPLR § 3024(b) and 22 NYCRR § 130.1-1 striking certain alleged "improper" portions of plaintiff's amended complaint and imposing sanctions on plaintiff and her counsel is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this Court. Copies of this decision and order have been sent to counsel for the parties.

ENTER:

Dated: April 9, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.