

Franklin-Hood v 80th St., LLC
2015 NY Slip Op 30485(U)
March 30, 2015
Sup Ct, New York County
Docket Number: 152476/2013
Judge: Peter H. Moulton
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50 (formerly IAS PART 57)**

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ROBBIN FRANKLIN-HOOD,

Plaintiff,

-against-

Index No. 152476/2013

80TH STREET, LLC, WEBER FARHAT REALTY
MANAGEMENT INC. and JUAN CASTRO,

Defendants,

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PETER H. MOULTON, J.:

Defendant Weber Farhat Realty Management Inc. (“Weber”) seeks an Order, pursuant to CPLR § 3211, dismissing plaintiff’s complaint against it as a matter of law on the grounds that this court does not have subject matter jurisdiction over the claims asserted by plaintiff in this action insofar as plaintiff has effectively sought and received administrative relief for the same claims asserted here. Weber also argues that plaintiff’s suit is statutorily barred by Executive Law § 297[9]¹.

Defendant 80th Street, LLC (“80th Street”) opposes Weber’s motion, arguing that Executive Law § 297[9] does not preclude plaintiff from pursuing the present lawsuit. 80th Street also cross-moves, in the event that this court dismisses the complaint as against Weber, to convert its cross-

¹Executive Law § 297[9], often called an election of remedies provision, states, in relevant part: “No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section.”

claims against Weber into a third-party complaint.

Similarly, plaintiff asks this court to deny Weber's motion in its entirety based on plaintiff's assertion that the present lawsuit, which contains causes of action for negligence and intentional infliction of emotional distress, is separate and apart from a prior administrative proceeding in which plaintiff sought and was awarded relief based on the alleged discriminatory practices of Weber.

BACKGROUND

80th Street is the owner of a building in which plaintiff resides. Defendant Juan Castro ("Castro") was previously employed as a superintendent at that building. At the time, Weber was the managing agent of the building. Plaintiff alleges that she was sexually assaulted by Castro at the building in March of 2009. Castro was criminally charged for his alleged conduct. Plaintiff subsequently commenced a proceeding before the New York State Division of Human Rights ("SDHR") at which she alleged that she had been subjected to unlawful discriminatory practices related to her housing. Specifically, plaintiff alleged that she was discriminated against based on disability, race, and sex. Plaintiff further asserted that she was retaliated against after reporting Castro's behavior to Weber. After a full adjudication of plaintiff's claims before SDHR, a Final Opinion and Decision was issued on or about November 15, 2013 in favor of plaintiff which stated in relevant part, that "Respondent [Weber], effectively condoned the harassing conduct of Castro by failing to take action, and it is liable to Complainant for compensatory damages resulting from the hostile environment."

In this action, plaintiff seeks to recover from 80th Street and Weber for their alleged role in

failing to properly supervise Castro after being made aware of his harassment of and attack on plaintiff. In her cause of action for negligence, plaintiff alleges that 80th Street and Weber had a duty to use reasonable care in the ownership and operation of the building and in the management, supervision, and retention of employees. Plaintiff alleges that 80th Street and Weber breached that duty, and as a result of their actions, Castro was permitted to continue his employment and terrorize plaintiff. Plaintiff also alleges a cause of action for intentional infliction of emotional distress based on the aforementioned allegations.

ARGUMENTS

In the instant motion, Weber seeks to dismiss plaintiff's complaint as against it, arguing that Executive Law § 297[9] precludes this action against it because plaintiff elected to pursue a remedy through SDHR and was compensated in that proceeding, thereby preventing further recovery in a subsequent lawsuit.

In response, plaintiff argues that while Weber seeks dismissal based on her purported election of remedies, New York law does not preclude a plaintiff from seeking recovery for different causes of action in separate lawsuits. Indeed, plaintiff states that in her SDHR proceeding, she sought to recover for the alleged discriminatory practices of Weber – whereas in this action, she seeks to recover for alleged negligence in the management of the building, as exhibited by its retention and supervision of Castro. Plaintiff alleges that Weber breached a common law duty of care and as a result of that breach, plaintiff was injured.

DISCUSSION

New York courts have routinely held that the election of remedy contemplated by Executive

Law § 297[9] does not preclude a separate lawsuit alleging different causes of action after the adjudication of an SDHR proceeding. (*see, e.g., Gondola v. Center Moriches Union Free School Dist.*, 80 AD2d 600, 601 [2nd Dept. 1981]; *Matter of Baust v. New York State Div. of Human Rights*, 70 AD3d 1107, 1108-09 [3rd Dept. 2010]; *Goosley v Binghamton City School Dist. Bd. of Educ.*, 101 AD2d 942, 943 [3d Dept. 1984] [holding that where “a distinction can be made between the relief sought in a petition to [SDHR] and that claimed in court, the aggrieved individual is not necessarily viewed as having brought a single discriminatory grievance in two different forums so as to brand the first [action or] proceeding as a binding election of remedies”]).

In *Gondola*, the court held that Executive Law Section § 297[9] only prohibits an aggrieved individual from pursuing the same relief on a single discriminatory grievance alleging the same wrongs in two separate forums (*Gondola*, 80 AD2d at 601). Indeed, the court noted that “this statute cannot be employed to bar an aggrieved person from maintaining a proceeding before the State Division of Human Rights based upon a discrimination complaint, while contemporaneously maintaining an action in the courts based on the alleged breach of an employment contract” (*id. citing Matter of Richardson Employment Agency v. New York State Div. of Human Rights*, 40 AD2d 585 [4th Dept. 1972] [Grievance filed with SDHR for retaliation was not the same as grievance initiated before the Industrial Commissioner for excessive fees and discrimination against applicants for employment]).

Moreover, in *Matter of Baust*, plaintiffs sought recovery based on civil actions asserting claims that their employer failed to compensate them as provided in their employment agreements upon termination without cause (*see Matter of Baust*, 70 AD3d 1107, 1108-09). The court noted that although the plaintiffs also alleged that their termination was retaliatory, that allegation “was not

necessary to establish their breach of contract actions and it was added merely to underscore the lack of a valid cause for termination” (*id.* at 1108) As such, the court highlighted the fact that the plaintiffs did not seek reinstatement and sought only compensation as provided in their employment agreements in their civil actions (*id.* at 1108-09). In their subsequent discrimination complaints, however, plaintiffs alleged that they had made complaints to their employer regarding alleged discriminatory conduct and, in retaliation, were terminated, thus entitling them to relief under Executive Law § 297[4][c]. The court concluded that the discrimination complaints and the civil actions were separate and distinct, holding that “[i]nasmuch as petitioners’ discrimination complaints and their civil actions are not based upon the same grievances, there was no election of remedies” (*id.* citing *Gondola*, 80 AD2d at 601).

Here, plaintiff’s complaint before SDHR alleged discriminatory practices by Weber. The remedy that plaintiff subsequently was awarded was in the form of compensatory damages resulting from the hostile environment that Weber was found to have created. In the instant action, however, plaintiff seeks recovery for Weber’s alleged negligence in managing the building in which she resided, and in supervising and retaining Castro as an employee. While both complaints originated from circumstances that are alleged to have occurred around the same time, plaintiff’s present suit seeks recovery for separate and distinct conduct from that alleged in the SDHR complaint. Plaintiff does not seek to recover in this action against Weber for any discriminatory practice. Instead, plaintiff now separately charges 80th Street and Weber with negligence, carelessness and recklessness in the retention of Castro while equipped with constructive and actual notice of his alleged conduct towards plaintiff. As such, the mandates of Executive Law § 297[9] do not apply here. Consequently, Weber is not entitled to dismissal of the complaint as against it.

Weber's arguments in support of dismissal are unavailing. Indeed, the cases relied on by Weber are all predicated upon situations in which a plaintiff sought to pursue remedies for alleged discriminatory conduct before SDHR and in a separate lawsuit (*see, e.g. Matter of James v. Coughlin*, 124 AD2d 728 [2d Dept. 1986] ["the filing of a complaint with the Division precludes the commencement of an action in court based on...the same discriminatory grievance, and which seeks the same relief"]). That is not the case here, as plaintiff's complaint seeks recovery based on Weber's negligence rather than discriminatory conduct. Even if plaintiff's SDHR complaint had contained both discrimination and negligence claims, the court would have only dismissed the discrimination claims as identical to those litigated in a prior administrative proceeding, while retaining the claims of negligence that had not been previously litigated (*see Chiara v. Town of New Castle*, 61 AD3d 915 [2d Dept. 2009]).

Moreover, Weber's claim that the doctrines of collateral estoppel and res judicata bar the instant complaint is unpersuasive. To be sure, those doctrines generally apply where "a judgment in one action is conclusive in a later one, not only as to any matters litigated therein, but as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*see Siegel N.Y. Prac. (Fifth Edition)*, Collateral Estoppel, § 457:794). By Weber's own account in its moving papers, SDHR is an agency formed by the legislature with statutory authority to enforce the state's discrimination laws (*see NY CLS Exec §§ 293 - 295*). As Weber notes, pursuant to that authority, SDHR exclusively is responsible for investigating, prosecuting, and adjudicating complaints of discrimination. In the present action, plaintiff is not pursuing a claim of discrimination. Rather, plaintiff is pursuing claims of negligence as against Weber. Those common

law tort claims were not, nor could they have been, adjudicated by SDHR. Weber appears to realize that the claims asserted here could not have been brought before SDHR, thereby making the doctrines of collateral estoppel and res judicata inapplicable (*see Campbell Affirmation in Support of Motion* ¶¶ 32-33). Nonetheless, in ¶ 33 of the Campbell Affirmation in Support of Motion, Weber unconvincingly attempts to conflate those doctrines with the election of remedies provision contained in Executive Law § 297[9], by stating, “Plaintiff chose to seek relief for her discrimination claims before the Division instead of filing a state court action...which warrants preclusion of Plaintiff’s state court claims” (*id.* at ¶ 33). Weber’s arguments reiterate its opposition to plaintiff’s election of remedies rather than coherently advancing new arguments based on the doctrines of collateral estoppel and res judicata. Consequently, Weber’s arguments on account of those doctrines are misplaced.

The court need not consider the relief sought by 80th Street in its cross-motion, since the court has found plaintiff’s complaint as against Weber to be viable.

Accordingly, it is

ORDERED that Weber’s motion to dismiss the complaint is denied in its entirety; it is further

ORDERED that 80th Street’s cross-motion is moot on account of the denial of Weber’s motion to dismiss.

This constitutes the Decision and Order of the Court.

Dated: March 30, 2015

ENTER:



J.S.C.

HON. PETER H. MOULTON
J.S.C.