Thompson v Andy Warhol Found. for the Visual Arts
2015 NY Slip Op 31466(U)
August 3, 2015
Supreme Court, New York County
Docket Number: 450612/14
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ADDISON THOMPSON,
Plaintiff,

-against-

INDEX NO. 450612/14

MOTION SEQ. NO. 001

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS AND THE ANDY WARHOL ART AUTHENTICATION BOARD, INC.,
Defendants.

The following papers were read on this motion by the defendants to dismiss the complaint pursuant to CPLR 3211.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

In this action alleging causes of action for breach of contract and disability discrimination under Title III of the Americans with Disabilities Act (ADA), Addison Thompson (plaintiff), *pro se*, brings this lawsuit against defendants The Andy Warhol Foundation for the Visual Arts, Inc. and The Andy Warhol Art Authentication Board, Inc. (Warhol Authentication Board) (collectively, defendants). This case stems from a written opinion issued by the Warhol Authentication Board in which it concluded that a drawing (the drawing) submitted to it by the plaintiff is not an authentic original drawing by the artist Andy Warhol (Warhol).

Defendants move, pursuant to 3211, to dismiss plaintiff's amended complaint on the basis that his claims are barred by res judicata and that he fails to state a claim upon which relief can be granted. Additionally, defendants seek an Order imposing sanctions on the plaintiff and deeming plaintiff a vexatious litigant who should be enjoined from commencing

other lawsuits against the defendants without leave of the Court.

BACKGROUND

Plaintiff alleges that in 2007 he purchased a lot of drawings at an estate sale for $80.00, one of which, the drawing, he believed to be an original drawing created by Warhol. Plaintiff submitted the drawing to the Warhol Authentication Board, a now dissolved non-profit entity, on three separate occasions: January 25, 2008, October 9, 2008, and October 8, 2009 (*see* Defendants' Notice of Motion, exhibits B, C, D). Before plaintiff submitted the drawing to defendant, the parties entered into an agreement whereby plaintiff agreed to indemnify defendant and "covenanted not to sue" if plaintiff believed the opinion expressed by the Board was not correct (*id.*). On each occasion, defendant issued an opinion that Warhol did not create the drawing.

After the third evaluation of plaintiff's drawing, plaintiff filed two *pro se* complaints in the Southern District of New York (*see* Defendants' Notice of Motion, exhibit E). Plaintiff used the complaints of two antitrust actions pending against the same defendants as a template for his own federal action. However, plaintiff voluntarily dismissed his federal action after the two unrelated antitrust actions were dismissed with prejudice for lack of evidence to support the claims (*see* Defendants' Notice of Motion, exhibits F, G). In March 2011, plaintiff filed another action in the Southern District of New York which plaintiff also voluntarily dismissed after he was advised that his "copycat" complaints were not proper (*see* Defendants' Notice of Motion, exhibits I, J). Plaintiff filed his third lawsuit in April 2011 in New York County Supreme Court, which was dismissed with prejudice (*see Thompson v Andy Warhol Found. for the Visual Arts Inc.*, 33 Misc 3d 1221[A], 2011 NY Slip Op 52046[U] [Sup Ct, NY County 2011]). The First Department affirmed, and the Court of Appeals denied plaintiff's leave to appeal the First Department's decision (*see Thompson v Andy Warhol Found. for the Visual Arts*, 103 AD3d 528, 529 [1st Dept 2013] *lv denied*, 21 NY3d 861 [2013]).

Undeterred, Plaintiff then filed a complaint against defendants with the New York State Division of Human Rights, asserting that he suffers from Asperger's Syndrome, and that defendants discriminated against him in violation of Title III of the ADA (*see* Defendants' Notice of Motion, exhibit M). The Human Rights division denied plaintiff's complaint after determining that there was no probable cause to believe that defendants discriminated against plaintiff (*see* Defendants' Notice of Motion, exhibit N). In January 2014, plaintiff filed an Order to Show Cause (OSC) in the New York County Supreme Court to have his 2011 action revived to incorporate his discrimination claims (*see* Defendants' Notice of Motion, exhibit O). The Court determined that the matter had already been disposed and dismissed the OSC (*see* Defendants' Notice of Motion, exhibit P). In March 2014 plaintiff filed another action in the Southern District of New York, again alleging Title III disability discrimination (*see* Defendants' Notice of Motion, exhibit Q). The Southern District dismissed the complaint *sua sponte*, holding that the complaint was meritless, and that under 28 U.S.C. § 1915(a)(3) any appeal would not be taken in good faith (*see* Defendants' Notice of Motion, exhibit R). Plaintiff has filed the present action asserting breach of contract and Title III discrimination claims, with the continued intent that the court will compel defendant to "correct" their allegedly false opinion as to the authenticity of the drawing.

STANDARD

On a motion to dismiss pursuant to CPLR 3211(a)(5), *res judicata* bars certain claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). "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" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 [2008]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343,

347 [1999] ["Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action"]; *Serio v Town of Islip*, 87 AD3d 533, 534 [2d Dept 2011] ["although the plaintiff alleges in the instant action that the defendants engaged in fraud, this purported new claim or theory is grounded on the same transaction or series of transactions as the prior action"]). A "final conclusion" may be indicated by the court through the use of "on the merits" or "dismissal with prejudice" language, both interchangeably used to preclude further litigation on the matter (*Yonkers Contr. Co., Inc. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]). The party seeking dismissal on the grounds of *res judicata* must prove there was a prior judgment on the merits (*Miller Mfg. Co. v Zeiler*, 45 NY2d 956, 958 [1978]). "The doctrine [of res judicata] dictates, 'as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action'" (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 92 [1st Dept 2013], quoting *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473–474 [1st Dept 2011] [internal quotation marks omitted]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]. "[W]e look to the substance [of the pleading] rather than to the form" (*id.*).

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiff's statements can *sustain* a cause of action, not whether the plaintiff has "artfully

drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]). "In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

DISCUSSION

Res judicata bars certain claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). A complaint is "barred by res judicata when a previous complaint, almost identical to the present complaint, was dismissed without leave to replead for failure to state a cause of action" (*Papa v Burrows*, 186 AD2d 375, 375 [1st Dept 1992]).

Here, plaintiff's claims derive from the same transaction as, and are almost identical to, previous actions which were dismissed in State Supreme Court and the Southern District Court. Specifically, plaintiff's 2011 state action, in which he asserted a claim for breach of contract, was dismissed by the Supreme Court pursuant to CPLR 3211(a)(7) (*see Thompson*, 33 Misc 3d 1221[A]). The First Department affirmed the Supreme Court's dismissal of plaintiff's breach of contract claims with prejudice, holding that the covenants not to sue in the letter agreements that plaintiff signed "bar his claims for breach of contract" (*Thompson*, 103 AD3d at 529). Moreover, plaintiff's Title III claim was also dismissed by the Southern District of New York *sua sponte* (*see* Defendants' Notice of Motion, exhibit R).

Plaintiff has filed nine lawsuits against defendants in five distinct venues up to the New York Court of Appeals. Plaintiff's repetitive litigation is "precisely the type that the doctrine of claim preclusion is designed to avoid" (*Reilly v Reid*, 45 NY2d 24, 31 [1978]). "Considerations

of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation" (*id.* at 28; *Matter of Hunter,* 4 NY3d at 269). As such, plaintiff's claims are barred by *res judicata* pursuant to CPLR 3211(a)(5).

Even if *res judicata* did not apply, plaintiff's claims cannot survive a motion to dismiss pursuant to CPLR 3211(a)(7) because plaintiff has failed to plead the elements of legally cognizable causes of action. Even affording the plaintiff the benefit of every favorable inference, a review of all the allegations in the complaint and in light of the circumstances, plaintiff's allegations are insufficient to state a cause of action for Title III discrimination or breach of contract (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Title III of the ADA prohibits discrimination against individuals on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns or operates a place of public accommodation (*see* 42 U.S.C. § 12182[a]). The statute requires that a plaintiff establish that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA (*id.*).

First, the Warhol Authentication Board is a non-profit organization and thus is not a place of public accommodation as defined by the statute. Second, there is no causal connection between defendants' denial of plaintiff's application and plaintiff's disability. Plaintiff has failed to state a claim under Title III of the ADA, and plaintiff even concedes in his amended complaint that defendants "did not know that he was disabled" when he requested an in-person meeting to discuss his drawing, or when he submitted the work for evaluation on three separate occasions (*see* Complaint, page 4). Additionally, the New York State Division of Human Rights completed an investigation into plaintiff's complaint and found no probable cause that defendants discriminated against plaintiff on the basis that there was a lack of evidence, and

plaintiff failed to demonstrate how he was treated differently than others (*see* Defendants' Notice of Motion, exhibit N). Thus, plaintiff's claim for discrimination must be dismissed.

As to the breach of contract claim, plaintiff argues that defendants breached their contract because they "no longer exist to correct their false opinion" as to the authenticity of plaintiff's drawing (*see* Complaint, page 3). However, plaintiff fails to allege a sustainable breach of contract claim due to the plain language of the exculpatory clause in each agreement that the parties signed. The language stated that plaintiff agreed to "indemnify the Board and covenanted not to sue based upon any claim or liability asserted by (a) Owner ... including without limitation any claim that the opinion expressed therein is not correct ... " (*see* Defendants' Motion to Dismiss, exhibits B, C, D). Accordingly, plaintiff's claim for breach of contract must be dismissed as well.

The Court now turns to the portion of defendants' motion which seeks sanctions and an Order barring plaintiff from future filings against the defendants. 22 NYCR § 130-1.1 allows a court to exercise discretion to impose sanctions and costs on an errant party under circumstances such as the current instance (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]). Conduct is considered frivolous if it is: without legal merit; or is undertaken primarily to delay or prolong the litigation, or to harass or maliciously injure another; or asserts material factual statements that are false (*see* 22 NYCRR §130-1.1[c]; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Additionally, "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, should have been apparent, or was brought to the attention of counsel or the party" (*id.* at 524-525).

Proceeding *pro se* is not a license to pursue frivolous litigation, particularly where a litigant's extensive litigation history indicates that he is knowledgeable and familiar with court

orders and rules, including 22 NYCRR §130-1.1 (*see Cangro v Rosado*, 42 Misc 3d 1227[A], 2014 NY Slip Op 50207[U]*4 [Sup Ct, NY County 2014]). Proceeding *pro se* is also not a license to ignore court orders, engage in dilatory and obstructive conduct or malign officers of the court" (*id.* at 371). Furthermore, the courts are not obliged to indulge the excesses of a *pro se* litigant at the expense of decorum, judicial economy, and fairness to opposing parties (*see Couri v Siebert*, 48 AD3d 370, 371 [1st Dept 2008] [*pro se* plaintiff "engaged in frivolous, defamatory and prejudicial conduct that includes multiple actions ... and voluminous and unnecessary motion practice"]).

The Court finds that sanctions are warranted to address plaintiff's continuous pattern of conduct and to prevent frivolous future conduct (*Grayson v New York City Dept. of Parks and Recreation*, 99 AD3d 418, 419 [1st Dept 2012]), and at this time, exercises its discretion to impose sanctions and costs on the plaintiff for bringing this action (*see* 22 NYCRR § 130-1.1[a]). Every action that plaintiff has filed has been dismissed, and plaintiff has been forewarned of the consequences of filing a frivolous lawsuit in his prior litigation of this matter (*see* Defendants' Notice of Motion, exhibit J). Plaintiff has also admitted that he is litigating this matter in order to get his drawing authenticated (*id.* at 4, lines 17-19). This action is completely without merit, and as a policy, frivolous and baseless litigation will not be tolerated by this Court.

The Court also finds it appropriate to label plaintiff a vexatious litigator and enjoin him from filing any further litigation papers in connection with the herein action without prior Court approval (*see Dimery v Ulster Savings Bank*, 82 AD3d 1034 [2d Dept 2011]). Courts have held that barring a plaintiff from future litigation is appropriate where the plaintiff has an extraordinary history of frivolous, vexatious, and abusive litigation (*Cangro v Rosado*, 111 AD3d 422, 422 [1st Dept 2013]; *Melnitzsky v Apple Bank for Sav.*, 19 AD3d 252, 253 [1st Dept 2005]; *Dimery*, 82 AD3d at 1035; *Robert v O'Meara*, 28 AD3d 567, 568 [2d Dept 2006] ["although public policy generally mandates free access to the courts, courts have imposed injunctions barring parties

from commencing any further litigation where those parties have engaged in continuous and vexatious litigation"]). A "litigious plaintiff pressing a frivolous claim can be extremely costly to the defendant and can waste an inordinate amount of court time, time, time that the... courts can ill afford to lose" (*Sassower v Signorelli*, 99 AD2d 358, 359 [2d Dept 1984]). "Thus, when as here, a litigant is abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation" (*id.*). As the Court has already noted, plaintiff has filed nine lawsuits against defendants in five distinct venues up to the New York Court of Appeals, all of which have been dismissed. Moreover, this Court has found that sanctions are warranted as this matter lacks any merit in law. Accordingly, it is not improper to enjoin the plaintiff from commencing any further lawsuits against the defendants or their officers, directors, or employees without prior Court approval (*see Dimery*, 82 AD3d at 1035).

Accordingly, defendants' motion to dismiss the complaint, for sanctions, and to enjoin plaintiff from commencing further litigation is granted.

CONCLUSION

Accordingly, it is

ORDERED that the portion of the motion by the defendants seeking to dismiss the complaint, pursuant to CPLR 3211, is granted, and the complaint is hereby dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the portion of defendants' motion to award sanctions, pursuant to Section 130-1.1 of the Rules of the Chief Administrator, is granted, and plaintiff Addison Thompson is hereby sanctioned in the amount of $500.00.00; and it is further,

ORDERED that the portion of defendants' motion seeking to have plaintiff deemed a vexatious litigator and enjoining plaintiff from commencing any further litigations against defendants without first obtaining leave of the Court is granted; and it is further,

ORDERED that plaintiff is enjoined from filing and serving any litigation papers within the State of New York against the defendants or their officers, directors, or employees without prior Court approval; and it is further,

ORDERED that counsel for the defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court

Dated: 8/3/15

PAUL WOOTEN ***J.S.C.***

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**