Vassenelli v City of Syracuse
2015 NY Slip Op 32834(U)
February 25, 2015
Supreme Court, Onondaga County
Docket Number: 2014EF97
Judge: Hugh A. Gilbert
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At a Term of Supreme Court held in
and for the County of Onondaga,
in the City of Watertown, New York.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NICHOLAS L. VASSENELLI,

Plaintiff,

MEMORANDUM DECISION AND ORDER

Index No. 2014EF97
RJI No. 33-14-0960

-vs-

THE CITY OF SYRACUSE, STEPHANIE A. MINER, in her individual and official capacity as Mayor of The City of Syracuse, FRANK L. FOWLER, in his individual and official capacity as Chief of Police for The City of Syracuse, JUDY CULETON, in her individual capacity as former Director of the Human Resources Division of the Syracuse Police Department, MATTHEW DRISCOLL, in his individual capacity as former Mayor of The City of Syracuse, GARY MIGUEL, in his individual capacity as former Chief of Police for The City of Syracuse, SERGEANT RICHARD PERRIN, in his individual and official capacity, POMCO GROUP a/k/a POMCO, INC., individually and as an agent for The City of Syracuse, SHARON MILLER, in her individual capacity as a former agent of the City of Syracuse and SHARON ERIKSSON, in her individual capacity as a former agent of the City of Syracuse, DAVID BARRETTE, in his individual and official capacity as a Deputy Chief of the City of Syracuse Police Department, SERGEANT MICHAEL MOUREY, in his individual and official capacity as the employee in charge of the Medical Section of the City of Syracuse Police Department; PMA MANAGEMENT CORP.; CAROL WAHL; and JOHN DOE(S) and JANE DOE(S),

Defendants.

Plaintiff Nicholas Vassenelli was formerly employed as a police officer by the Defendant City of Syracuse. He suffered a work related injury on October 2003 and, since that time, has been receiving benefits pursuant to General Municipal Law §207-c. That section requires the City to pay all necessary medical expenses relating to an on-the-job injury suffered by a police officer.

Plaintiff commenced a lawsuit in United States District Court for the Northern District of New York on November 24, 2010 naming all of the parties listed in this caption except Sergeant Michael Mourey, PMA Management Corp. and Carol Wahl. On August 18, 2011, Plaintiff requested a temporary restraining order relating, in part, to a claim that the Defendants were threatening to remove him from his home and/or cease providing medical care and assistance in the home. The request was denied and the motion for a preliminary injunction was referred to Magistrate Judge David E. Peebles.

Judge Peebles conducted a three day evidentiary hearing in December 2011. On January 30, 2012, Judge Peebles issued an extensive Report-Recommendation recommending that the motion for a preliminary injunction be denied. By Order dated March 5, 2012, United States District Judge David N. Hurd accepted the Report-Recommendation in its entirety and denied the Plaintiff's motion for a preliminary injunction.

After the parties completed extensive discovery, the Defendants filed motions for summary judgment dismissing the Plaintiff's Amended Complaint. By Memorandum-Decision Order dated August 5, 2013, Judge Hurd dismissed all of the Federal claims and the New York State constitutional claims on the merits with prejudice. The Court declined jurisdiction over the pendent State law claims and dismissed them without prejudice. Plaintiff filed a Notice of Appeal on September 10, 2013. Oral argument was conducted on October 21, 2014 and no decision had been rendered as of the return date of this motion.

Plaintiff commenced this action by the filing of a Summons with Notice on January 27, 2014. The Complaint was filed on February 24, 2014. We concur with Defendants that Plaintiff was required to serve the Defendants within six months of the dismissal of the Federal action [CPLR §205(a)]. The Memorandum-Decision Order was filed on August 5, 2013, and the final date for service was February 5, 2014.

We note that Defendants City of Syracuse, Stephanie A. Miner, Frank L. Fowler, Judy Culeton, Matthew Driscoll, Gary Miguel, Sergeant Richard Perrin and David Barrette ("City Defendants"), Defendants Pomco Group a/k/a Pomco Inc., and Sharon Miller ("Pomco and Miller") and Defendant Sharon Eriksson ("Eriksson") previously moved to dismiss the Complaint. On August 18, 2014, the

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eve of the scheduled oral argument before Justice Donald Greenwood, Plaintiff filed an Amended Complaint, rendering the motions moot. There are four current motions, including one filed by newly named Defendants PMA Management Corp. and Carol Wahl ("PMA MC and Wahl") and including newly named Michael Mourey as a City Defendant all of which seek dismissal of the Amended Complaint. We shall address the motion made by Sharon Eriksson in detail herein and then continue discussion separately of each of the other motions.

There are twelve causes of action in the Amended Complaint: First, Promissory and/or Equitable Estoppel; Second, Breach of Contract; Third, Negligence; Fourth, Gross Negligence; Fifth, Fraud; Sixth, New York Business Law §§ 349 and 350; Seventh, Intentional/Reckless, Negligent Infliction of Emotional Distress; Eighth, Retaliation Under Americans with Disabilities Act; Ninth, Retaliation under Rehabilitation Act; Tenth, Retaliation under 42 USC §1983; Eleventh, Violation of Americans with Disabilities Act; and Twelfth, Violation of Rehabilitation Act. This Defendant Eriksson asserts that all the causes therein applicable to her are barred by the statute of limitations, res judicata and/or collateral estoppel because of the August 5, 2013 dismissal of the Federal District Court action against her or because they fail to state a cause of action against her.

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In the Amended Complaint Plaintiff alleges that Sharon Eriksson is among a group of Defendants who are or were agents and employees of the City of Syracuse charged with upholding the law and insuring that City Police Officers injured in the line of duty are provided all medical care and treatment as required under the law and contracts with the Syracuse Police Department; was a case manager overseeing Plaintiff's treatment and care. Plaintiff asserts that he is a permanently retired police officer for the City of Syracuse who is partially paralyzed and wheelchair bound.

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We do not disagree with Defendant that the doctrine of res judicata bars future litigation between the same parties on the same cause of action where there is a final judgment. ***Hodes vs. Axelrod,*** 70 NY2d 364 (1987). Here, however, the Federal Court declined to exercise jurisdiction over the State law claims and dismissed them without prejudice. Since the Federal Court did not make determination as to the merits of Plaintiff's pendent State Law causes of action, they are not barred by the doctrine of res judicata and may be asserted in this action. ***Van Hof vs. Town of Warwick,*** 249 AD2d 382 (1998); ***Stylianou vs. Incorporated Village of Old Field,*** 23 AD3d 454 (2005). "When it is made clear that the Federal dismissal does not include the State Court cause of action, res judicata does not apply." ***Travelers Indemnity vs. Sarkisian,*** 139 AD2d 27, 30 (1988) (citation omitted).

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The first cause of action sounds in promissory and/or equitable estoppel in that Defendant acting within the scope of her authority made a promise and/or affirmative representation to disabled police officers, and more particularly Plaintiff, that their necessary medical providers, medical care, services, and treatment resulting from their injuries would be paid in full. He further asserts that he reasonably relied upon these promises and/or affirmative representatives in seeking, obtaining and receiving treatment, care, services and prescriptions and visiting with and/or contracting with their providers for such care, services and prescriptions. Plaintiff cites General Municipal Law §207-c entitled "Payment of Salary, Wages, Medical and Hospital Expenses of Policemen with Injuries or Illness Incurred in the Performance of Duties". Section 207-c(1), however, refers to payment by and liability of the municipality by which the injured officer is employed "for all medical treatment and hospital care necessitated by reason of such injury or illness". This Defendant is a self-employed licensed practical nurse and registered nurse who was retained by the City of Syracuse to provide case management services. Therefore, the first cause of action would not appear viable as to her, and is thereby dismissed.

The second cause of action alleges that Defendants breached a contract by diminishing or compromising contractual obligations owed to Plaintiff.

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This Court cannot find that this Defendant was a party to any contract with Plaintiff and dismisses this cause of action.

The third cause of action and fourth cause of action allege negligence and gross negligence, by disregarding Plaintiff's rights, needs, medical treatment and privacy. Again, this Defendant is a nurse case manager who coordinated care and made recommendations regarding treatment where assigned but was under no obligation to go where she is not assigned, or retained, or to make the ultimate decisions regarding care. This is not a medical malpractice case where her standard of care was questioned. These causes of action are dismissed.

The fifth cause of action is for fraud. It is axiomatic that an alleged cause of action based upon fraud must include factual allegations which support the claim. ***Lotz vs. Lotz,*** 135 AD2d 1007, 1008 (1987). The Court cannot find any allegations in paragraphs 69 through 74 against this Defendant. This cause of action is dismissed.

The sixth cause of action asserts violations of General Business Law §§349 and 350. General Business Law §349, entitled "Deceptive Acts and Practices Unlawful", involves the right of the Attorney General to bring an action in the name and on behalf of the People of the State of New York to enjoin such

unlawful acts or practices and to obtain restitution. That statute is not applicable in this civil lawsuit by a private citizen. Generally, claims under General Business Law §349 are available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising. ***Small vs. Lorillard Tobacco Co.,*** 94 NY2d 43, 55 (1999). Plaintiff does not plead his status as a consumer of Defendant advertising any product he purchased. Parties claiming the benefit of this Section must, at the threshold, allege conduct that is consumer oriented. The conduct need not be repetitive or recurring but Defendant's acts or practices must have a broad impact on consumers at large; private contracts are not adequate. ***New York University vs. Continental Insurance Co.,*** 87 NY2d 308, 320 (1995). The Court further cannot perceive the applicability of General Business Law §350. This cause of action is dismissed.

The seventh cause of action sounds in the tort of intentional affliction of emotional distress, which must rise to a level of extreme and outrageous conduct which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society. ***Doe vs. American Broadcasting Cos.,*** 152 AD2d 482, 483 (1989). Accepting Plaintiff's pleadings this Court cannot find that any such conduct is outrageous, extreme, beyond all possible bounds of decency, atrocious and utterly intolerable in a civilized society by this Defendant. ***Oakley vs. St. Joseph's Hospital,*** 116 AD2d 911, 913 (1986). This cause of action is dismissed.

The eighth cause of action is for retaliation pursuant to the Americans with Disabilities Act, the ADA. Plaintiff asserts that Defendants have subjected Plaintiff to retaliation for instituting and litigating a November 2010 action under the ADA with the United States District Court. Plaintiff does not set forward any administrative authority or responsibility vested in this nurse case manager that would allow her to accomplish any of the acts outlined in Paragraph 85 in this cause of action. This same observation would apply to the ninth cause of action pursuant the Rehabilitation Act for retaliation, and also to the tenth cause of action pursuant to 42 USC §1983 for Retaliation, and also to the eleventh cause of action pursuant to the Americans with Disabilities Act, and to the twelfth cause of action pursuant to the Rehabilitation Act. These remaining causes of action are each dismissed.

THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the motion by Defendant Sharon Eriksson to dismiss the Plaintiff's Amended Complaint is granted as set forth herein.

Dated: February 25, 2015
at Watertown, New York

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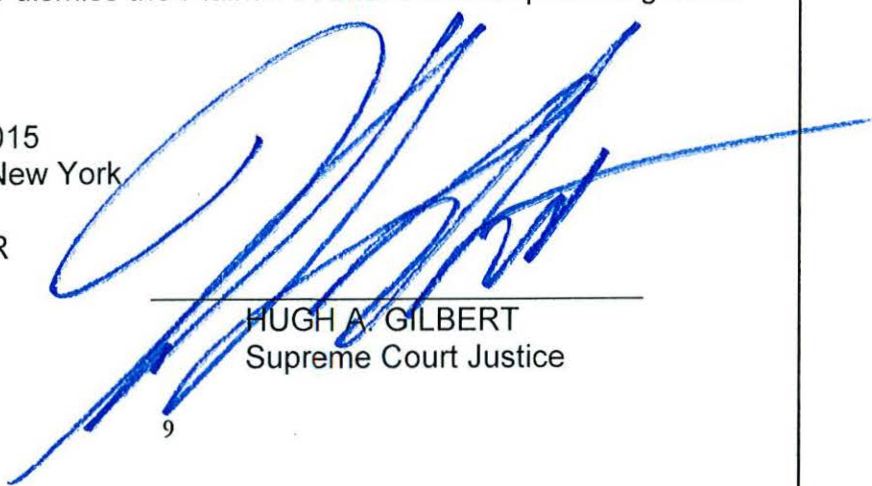

HUGH A. GILBERT
Supreme Court Justice