

**Rubin v Napoli**

2016 NY Slip Op 30324(U)

February 25, 2016

Supreme Court, New York County

Docket Number: 160474/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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DENISE A. RUBIN,

Plaintiff,

-against-

Index No. 160474/15

**DECISION/ORDER**

PAUL J. NAPOLI,

Defendant.

-----X

**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Denise A. Rubin commenced the instant action alleging employment discrimination against defendant Paul J. Napoli, one of the managing partners of the law firm at which plaintiff was employed. Defendant Napoli now moves for an Order (1) pursuant to CPLR § 3211(a)(5) dismissing the complaint based on the doctrine of *res judicata* and/or collateral estoppel; (2) pursuant to CPLR § 3211(a)(7) dismissing the complaint for failure to state a claim pursuant to New York Partnership Law (“Partnership Law”) § 26(b), or, in the alternative, (3) consolidating this action with a related action pending before this court against several of Napoli’s law firms. Defendant’s motion is resolved as set forth below.

The relevant facts according to the complaint and the procedural history of this case are as follows. Between 2003 and 2014, plaintiff was, at various times, employed by several of Napoli’s law firms. Defendant Napoli was a senior partner at each of the law firms and

consistently exercised primary operational and administrative control over each of the law firms bearing his name. Plaintiff alleges that during her tenure at the law firms, Napoli discriminated against her by deciding to pay her far less than male attorneys with less experience and responsibility and by deciding to hire male attorneys with less experience and with far less responsibility as partners while plaintiff remained an associate attorney. Plaintiff further alleges that despite Napoli's promising on multiple occasions that plaintiff would receive bonuses, the bonuses were rarely paid while commensurate bonuses were paid to male attorneys. Plaintiff was terminated from Napoli's law firms in September 2014.

Plaintiff then commenced an action against Napoli and Napoli's law firms alleging employment discrimination and breach of contract (the "First Action"). Napoli then moved to dismiss the complaint as against him individually pursuant to Partnership Law § 26. Specifically, Partnership Law § 26 imposes joint and several liability upon all individual partners in a partnership for all obligations chargeable to the partnership under Partnership Law § 24 and § 25, which are referable to wrongful acts committed by one or more partners of the partnership acting in the ordinary course of partnership business. Partnership Law § 26(b), however, immunizes from individual liability, whether arising in tort, contract or otherwise, any partner in a partnership registered as a limited liability partnership who did not commit the underlying wrongful act. Thus, in a decision dated September 2, 2015, this court granted Napoli's motion and dismissed the complaint in the First Action as against him individually on the ground that "the Firms are all limited liability partnerships and plaintiff fails to allege that Napoli personally committed a discriminatory act against her to hold him personally liable." Specifically, this court explained that "[a]lthough plaintiff makes broad conclusory allegations regarding Napoli,

such that he made continued assurances regarding her compensation and advancement in the Firm, she fails to specifically allege that Napoli personally committed a discriminatory or wrongful act against plaintiff.”

Thereafter, plaintiff commenced the instant action under a separate index number against Napoli in his individual capacity asserting one cause of action for employment discrimination. Defendant Napoli now moves to dismiss the action in its entirety or, in the alternative, for an Order consolidating the instant action with the First Action.

The court first turns to defendant’s motion to dismiss the complaint on the basis of *res judicata*. The doctrine of *res judicata*, or claim preclusion, “provides that 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.” *Singleton Mgt. v. Compere*, 243 A.D.2d 213, 215 (1<sup>st</sup> Dept 1998). This doctrine is applied “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.” *Id.* Further, even if certain claims were not litigated in the prior action, claims brought later will be barred by *res judicata* if they “could have been asserted in the first action and [plaintiff] had a full and fair opportunity to litigate those claims in that action.” *Santiago v. New York Board of Health*, 8 A.D.3d 179, 181 (1<sup>st</sup> Dept 2004).

The Court of Appeals has held that a prior dismissal of a complaint is not a bar, based on *res judicata*, to a later action when the motion in the first action was directed at the pleading, attacking the sufficiency of the complaint as stating a cause of action. *See 175 E. 74<sup>th</sup> Corp. v. Hartford Acc. & Indem. Co.*, 51 N.Y.2d 585 (1980). Specifically, the Court of Appeals

explained that “[a] dismissal on such motion has preclusive effect only as to a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint.” *Id.* at 591. *See also Van Minos v. Merkley*, 48 A.D.2d 281, 284 (4<sup>th</sup> Dept 1975)(“when a complaint is dismissed for legal insufficiency or other defect in [the] pleading, it does not act as a bar to [the] commencement of a new action for the same relief unless the dismissal was expressly made on the merits or the new complaint fails to correct the defects or omissions fatal to the prior one.”)

In the instant action, defendant’s motion to dismiss the complaint on the basis of *res judicata* must be denied as this court finds that the complaint in this action sufficiently corrects the defects and omissions which were fatal to the complaint in the First Action. This court dismissed the complaint in the First Action because it found that the complaint merely made broad conclusory allegations regarding Napoli, such that he made continued assurances regarding plaintiff’s compensation and advancement, but that the complaint failed to specifically allege that Napoli personally committed a discriminatory or wrongful act against plaintiff, as required by Partnership Law § 26. However, the court finds that the complaint in the instant action corrects said deficiencies. Specifically, the complaint alleges that Napoli himself decided to pay plaintiff far less in base salary and bonuses than less qualified male attorneys and that although Napoli represented to plaintiff that he wanted to promote her to partner, Napoli did not promote plaintiff to partner but instead made the decision himself to promote and/or hire as partners several male attorneys who were less experienced, less skilled and who exercised less responsibility than plaintiff. Additionally, the complaint alleges that Napoli himself threatened and harassed plaintiff, eventually terminating her employment in an e-mail stating “I think it is

best that you look for another job.” Finally, the complaint alleges that “Napoli, . . . personally discriminated against Plaintiff in the terms, conditions and privileges of employment on account of her sex.” Based on said allegations, the court finds that the complaint in the instant action sufficiently corrects the defects and omissions which were fatal to plaintiff’s complaint in the First Action and thus, the instant action is not barred by *res judicata*.

The court next turns to defendant’s motion to dismiss the complaint on the ground that it fails to state a claim. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In the instant action, this court finds that defendant’s motion to dismiss the complaint on the ground that it fails to state a claim must be denied. Specifically, defendant asserts that the action against him is barred by Partnership Law § 26(b), which immunizes from individual liability, whether arising in tort, contract or otherwise, any partner in a partnership registered as a limited liability partnership who did not commit the underlying wrongful act. However, as this

court has already explained, the complaint in the instant action sufficiently alleges that Napoli himself committed the wrongful discriminatory acts alleged by plaintiff. Thus, the complaint may not be dismissed on that ground.

Finally, defendant's motion for an Order consolidating this action with the First Action is granted without opposition. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the action is denied in its entirety; and it is further

ORDERED that defendant's motion to consolidate this action with the First Action is granted; and it is further

ORDERED that the above-captioned action is consolidated in this court with *Rubin v. Napoli Bern Ripka Shkolnic, LLP, et al.*, Index No. 154060/2015, under Index No. 154060/2015, and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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DENISE A. RUBIN,

Index No. 154060/2015

Plaintiff,

-against-

NAPOLI BERN RIPKA SHKOLNIC, LLP,  
WORBY GRONER EDELMAN & NAPOI BERN, LLP,  
NAPOLI BERN & ASSOCIATES LLP and PAUL J.  
NAPOLI,

Defendants.

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And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk in the General Clerk's Office (Room 119), who is hereby directed to mark the court's records to reflect the consolidation. This constitutes the decision and order of the court.

Dated: 2/25/16

Enter: CR  
J.S.C.  
**CYNTHIA S. KERN**  
J.S.C.