

<b>Kamate v M.J. Cahn Co.</b>
2016 NY Slip Op 33100(U)
May 5, 2016
Supreme Court, Bronx County
Docket Number: 22512-15E
Judge: Fernando Tapia
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**SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY: Part 13**

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**MAIMOUNA KAMATE**

**Plaintiff,**

**v.**

**Index No. 22512-15E**

**M.J. CAHN CO., DANIEL CAHN, and FRANCIS  
THOMAS LEAHY,**

**Defendants.**

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**DECISION**

This is an employment discrimination lawsuit in which the most recent act of discrimination occurred on October 31, 2014, which marked the last day of employment for Plaintiff, Ms. Maimouna Kamate. She sustained back injuries from a work-related accident as a sampler at M.J. Cahn Co.

While pro se, Ms. Kamate filed a Complaint with the New York State Division of Human Rights [NYS DHR]. She then filed a Complaint in this Court, through counsel.

Defendants move to dismiss the Complaint under CPLR 3211(9)(a)(2) and (a)(7), asserting that Ms. Kamate is barred by the election of remedies provision of the New York State and New York City Human Rights Laws [a/k/a N.Y. Executive Law § 297(9)], as well as for failure to state a cause of action.

After careful review of the motion papers and a settlement conference held on April 15, 2016, this Court hereby **GRANTS TO THE EXTENT** Defendants' motion to dismiss, with respect to dismissing Counts IV [workers' compensation] and V [Labor Law] of Ms. Kamate's Complaint. This Court notes that there is an appeal pending which was filed by New York State Division of Human Rights [SDHR] of the Article 78 decision rendered by the Hon. Manuel Mendez on January 11, 2016.<sup>1</sup>

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<sup>1</sup> Under Index No. 158607-15, J. Manuel J. Mendez granted M.J. Cahn Co.'s Article 78 petition, which sought to vacate SDHR's dismissal of Ms. Kamate's administrative complaint [ACD]. J. Mendez's decision therefore reinstated and remanded Ms. Kamate's administrative complaint back to SDHR based on her election of remedy to initially have her claim adjudicated before SDHR. SDHR has appealed J. Mendez's Order.

Was SDHR's dismissal of Ms. Kamate's administrative Complaint proper, and therefore not arbitrary, given the timing of the annulment of her election of remedies? This is the issue presented.

### **Factual Background**

On or about April 29, 2014, Ms. Kamate hurt her lower back while in the course of her employment. See Complaint at ¶ 8. After some delay and alleged struggle with Defendants, she was awarded workers' compensation benefits. See Cahn Aff. at Exh. 1. Based on Defendants' adverse actions towards Ms. Kamate post-injury, she claims that they violated New York Workers' Compensation Law Section 120, as well as sections of the New York City Human Rights Law.<sup>2</sup> Her last day of work was on October 31, 2014. She worked for Defendants for almost eighteen [18] years.

On May 6, 2014, Ms. Kamate filed an "Employee Claim" with the New York State Workers' Compensation Board [WCB]. See Leahy Aff. at Exh. 1. On July 18, 2014, Ms. Kamate had her first of many WCB hearings [during and after employment] in which she was awarded due compensation for her injuries. Id. On February 25, 2015, SDHR received Ms. Kamate's Complaint, asserting discrimination by Defendants based on disability and race. See Bonnaig Aff. at Exh. B. Upon information and belief, Ms. Kamate filed this administrative Complaint pro se.

On or about May 6, 2015, Ms. Kamate, through counsel, filed a Complaint with Bronx Supreme Court. In response to the Complaint, Defendants moved to dismiss Ms. Kamate's action with this Court on or about June 5, 2015. They rely on the election of remedies provision. See NYS Administrative Code § 8-502 ["Civil action by persons aggrieved by unlawful discriminatory practices"].<sup>3</sup>

On July 17, 2015, SDHR rendered its Annulment Determination, dismissing Ms. Kamate's administrative complaint for administrative convenience [ACD], under N.Y. Executive Law § 297(9)

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<sup>2</sup> Ms. Kamate's Fifth Cause of Action was violation of New York Labor Law 195(1), which this Court dismisses, because Defendants gave the requisite written proof about Ms. Kamate's pay. Furthermore, the July 23, 2014 WCB Decision ordered Defendants to produce payroll records by September 18, 2014. See Leahy Aff. at Exh. 1.

<sup>3</sup> Under NYC Administrative Code § 8-502, once the plaintiff brings the case to SDHR, she can appeal only via an Article 78 proceeding, and not via a plenary action. See N.Y. Executive Law § 298; *York v. Assn of the Bar of the City of NY*, 286 F3d 122,127 (2d Cir 2002).

["Procedure"]. In other words, Ms. Kamate's administrative complaint was dismissed on the ground that her election of an administrative remedy has been annulled. See SDHR Decision, Case No. 10173873.

On or about August 18, 2015, M.J. Cahn Co. filed its Article 78 petition in New York Supreme Court, seeking vacatur of SDHR's July 17, 2015 Decision and remanding Ms. Kamate's case to SDHR for adjudication. Justice Manuel J. Mendez granted M.J. Cahn Co.'s petition, which NYSDHR noticed its appeal on or about March 24, 2016. See March 29, 2016 Azrin Letter.<sup>4</sup>

Ms. Kamate currently lives in Bronx, New York.

### **The Parties' Stances**

Ms. Kamate asserts that she has been aggrieved by her former employers because they discriminated against her on the basis of her disability, having injured her lower back while in the course of employment as a sampler, which requires heavy lifting and handling of rolls of fabric. See Cahn Aff. at Exh. 1. She also pleads that Defendants were retaliatory towards her when she filed for workers' compensation benefits, thus directly resulting in her being terminated. See Azrin Opp. at p. 3.

Defendants argue that Ms. Kamate failed to state a cause of action and that her Complaint must therefore be dismissed, especially since she first elected her administrative remedy with NYSDHR, based on the election of remedies provisions under the NYS Human Rights Law and NYC Human Rights Law. See Defs.' Memorandum of Law at p. 3. In addition, Defendants point out that Ms. Kamate, through counsel, requested an administrative dismissal from NYSDHR only after Defendants moved to dismiss in this Court. See Defs.' Reply Memorandum of Law at p. 2.

### **Complete Dismissal Is Denied Because There Is A Cause Of Action Based On Discrimination**

The court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint. *Frank v. DaimlerChrysler Corp.*, 292 AD2d 118, 121 (App Div, 1st Dept 2002). The standard on a motion to dismiss a pleading for failure to state a cause of action is whether deeming the pleading to

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<sup>4</sup> According to SDHR's Pre-Argument Statement, J. Mendez misapprehended SDHR's power to annul a complainant's election of remedies. See Pre-Argument Statement at p 8.

allege whatever can be reasonably implied from its statements, a cause of action can be sustained.

*Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46, 48 (App Div, 1st Dept 1990). The pleadings must therefore be liberally construed. See CPLR 3026; *Leon v. Martínez*, 84 NY2d 83, 87-88 (App Ct 1994).

Lastly, the court must accept the facts in the complaint as true, give plaintiffs the benefit of every possible favorable inference, and determine only whether the facts fit into any cognizable theory. *Vig v. New York Hairspray Co., L.P.*, 67 AD3d 140, 144-45 (App Div, 1st Dept 2009); *Nonnon v. City of NY*, 9 NY3d 825, 827 (App Ct 2007).

Here, Ms. Kamate posits that she has a valid cause of action: Defendants displayed unlawful discriminatory practices towards her at work, based on her disability, post-accident. She injured her lower back as a sample maker and orally represented during settlement conference that no one helped her bring rolls down and up, post-injury. Employment discrimination cases are generally reviewed under notice pleading standards. *Vig v. New York Hairspray Co., L.P.*, 67 AD3d at 145.

Furthermore, allegations of employment discrimination need not plead a prima facie case of discrimination, but need only to give "fair notice" of the nature of the claim and its grounds. *Id.*; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514-15 (2002). And this is exactly what Ms. Kamate did: she filed her Complaint before this Court, thus signaling her former employers about her grievances, based on employment discrimination. During settlement conference, Ms. Mahima Joishy, on behalf of Defendants, argued that both Mssrs. Cahn and Leahy were very accommodating to Ms. Kamate during her almost 18-year employment with them, and that after the accident, it was Ms. Kamate who refused to cut fabric. Ms. Joishy also stated that Ms. Kamate continues to receive workers' compensation benefits and that Mr. Cahn has not only shown proof that Ms. Kamate was fully paid, but that he also issued W-2s to her, thus dispelling her argument that Defendants failed to comply with NY Labor Law § 195 and dispelling Ms. Kamate's contention that she was being dissuaded from filing for workers' compensation benefits. See Cahn Aff. at Exh. 3 & 4; see also Azrin Opp. at p. 3.

Based on the above, there is a baseline level of contention between the parties that sustains the filing of Ms. Kamate's non-frivolous Complaint. Accordingly, this Court finds that the Complaint is sufficiently pled, which survives a complete dismissal.

**Complete Dismissal Is Also Unwarranted Because SDHR Dismissed the Complaint**

Under N.Y. Executive Law § 297(9),

"[A]t any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled."<sup>5</sup>

Here, Defendants contend that the timing of SDHR's dismissal of Ms. Kamate's administrative Complaint is contrary to the purpose and applicability of N.Y. Executive Law § 297(9) because SDHR can only dismiss an administrative complaint if there are no other competing complaints that have been previously filed. Below is a "snapshot" of the procedural history:

- February 25, 2015: Ms. Kamate, pro se, filed her administrative Complaint with SDHR<sup>6</sup>
- May 6, 2015: Ms. Kamate, through counsel, filed her Complaint before this Court
- June 5, 2015: Defendants move for dismissal under CPLR 3211
- July 17, 2015: SDHR dismissed the Complaint, thus annulling election of remedies

Although Defendants vigorously argue that it was improper for SDHR to annul Ms. Kamate's election of remedies **after** she filed her state court Complaint because the timing of the administrative dismissal obstructed the purpose and function of the election of remedies provisions of Executive Law § 297(9),<sup>7</sup> no administrative hearings were held before a hearing officer at SDHR.

As such, there is no prejudice whatsoever to Defendants to have this claim adjudicated in state court because even if it remained with SDHR and Ms. Kamate does not prevail, state court will still be

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<sup>5</sup> Under this Section, once an administrative complaint is annulled by NYSDHR, the plaintiff's rights to file suit before state or federal court shall be limited by the statute of limitations in effect at the time the complaint was initially filed with SDHR.

<sup>6</sup> During settlement conference, Ms. Joishy contends that Ms. Kamate may or may not have had legal assistance with filing her SDHR Complaint.

<sup>7</sup> See Defs.' Reply Memorandum of Law at p. 3.

involved by way of an Article 78 proceeding. It was therefore prudent for Ms. Kamate to have her administrative Complaint annulled so that state court can adjudicate it, in the interest of justice.

Defendants heavily rely on *Legg v. Eastman Kodak Co.*, 248 AD2d 936, 937 (App Div, 4th Dept 1998) to magnify its contention that if a plaintiff files an administrative complaint first, and subsequently files a second complaint in state court [thus having duplicate complaints], then the state court, upon motion, can properly dismiss the state complaint because commencing a state court action before a dismissal for administrative convenience [ACD] is issued, contradicts the election of remedies provisions under N.Y. Executive Law § 297(9), thus making the administrative dismissal purely arbitrary. See Defs.' Memorandum of Law at p. 10.

While this Court agrees with Defendants that *Legg* is on point here, the distinguishable feature in Ms. Kamate's case versus the complainant in *Legg* is that Ms. Kamate, through counsel, did not let an inordinate amount of time pass by until she requested SDHR to administratively dismiss her Complaint. Although this request was directly prompted by Defendants' motion to dismiss, SDHR has been recognized to have a public interest in conserving its scarce resources and in alleviating its overwhelming caseload, especially when the complainant has an alternative forum. *Acosta v. Loews Corp.*, 276 AD2d 214, 220 (App Div, 1st Dept 2000). Such is the case with Ms. Kamate, who sought to withdraw her SDHR Complaint so that it can be properly adjudicated in this Court.

The *Acosta* court acknowledged that an ACD must serve agency convenience rather than the convenience of the complainant. *Id.* In *Legg*, fifteen [15] months had passed from the time the plaintiff filed her SDHR complaint to the time SDHR dismissed her complaint for administrative convenience. Here, over four [4] months had passed, thus serving convenience to SDHR because it was therefore spared from expending resources to hold a hearing, which requires administrative support that this Court can otherwise provide.

Moreover, under Executive Law § 297, an ACD is an exercise of its unreviewable discretion which meets the state legislature's goal of streamlining administration of SDHR's affairs. *Id.* at 219. Here, Ms. Kamate, through counsel, sought to have her discrimination claim heard in state court, without any

intention to thwart or delay dismissal of her Complaint under CPLR 3211 in this Court. As *Acosta* succinctly put it, the purpose of the 1997 amendment to Executive Law § 297 was to allow SDHR to dismiss an administrative complaint for the purpose of allowing the complainant to annul her election of remedies and pursue an action in state court. And this is exactly what Ms. Kamate did.

In sum, Defendants' motion to dismiss is **GRANTED TO THE EXTENT** that Counts IV and V are dismissed with prejudice. SDHR has properly dismissed Ms. Kamate's Complaint for administrative convenience, based on the fact that it issued its dismissal and annulment within a four-month span, thus avoiding prejudice to any of the parties. There was nothing arbitrary with its administrative dismissal. It is therefore in the interest of justice to continue Ms. Kamate's matter in this Court.

This constitutes the Decision of this Court.

Dated: May 5, 2016  
Bronx, NY



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**Hon. Fernando Tapia, J.S.C.**